10.19192/wsfip.sj1.2016.7

Tomasz JABŁOŃSKI *

LEGAL RISKS IN SALE TRANSACTIONS OF SHARES OF A LIMITED LIABILITY COMPANY CONDUCTED OUTSIDE THE TERRITORY OF THE REPUBLIC OF POLAND

Summary
Sale transactions of shares of a limited liability company may involve numerous risks, the negative effects of which the transaction parties are exposed to. In this paper only those risks have been discussed, which may occur in case of transactions conducted outside the territory of the Republic of Poland. Those risks are connected to the law applicable to the said transaction, a form of legal action subject to the law applicable to the said transaction, and depending on the particular transaction – also the acquisition of a share covered with a non-cash contribution in the share capital and the recognition of the said shares as foreign securities. Although there is no possibility of a precise measurement and evaluation of the probability of negative effects concerning risks related to the use of percentage rates or similar, they may be classified as risks: low, medium and high. The aim of this paper is to submit the classified risks to the future parties of such transactions, which may occur when conducting the title legal action, and their possible, negative consequences, so that the parties may exercise due diligence.

Key words*: audit, legal risks, property rights of shareholders, limited liability company, sale*

Introduction

A share in a limited liability company is a property right of a shareholder and its sale is a legal action considered as a disposal of shares. The disposal of shares may constitute various acts of the shareholder's property right disposal, e.g. a sale, exchange or grant of the share, contribution in kind to the company or transfer of the share to

* Doctoral student at the Faculty of Law and Administration at the University of Silesia in Katowice – the Department of Public Economic Law, a lawyer in a law office Marek Płonka & Partners, A limited partnership.

another person resulting from the prior agreement concerning the share transfer, or the clause, unjust enrichment or any other event[1]. The subject of disposal – in particular cases – may also be a fraction of the share.

The sale of shares of a Polish limited liability company, which are covered by cash or/and non-cash contributions being the basis of the company's economic activity – is generally free. This concerns any forms of trading between the living people and in case of death, which means the legal actions (e.g. sales agreement), and those resulting from a particular event, the legal effect of which is defined by the act as universal or singular succession[2]. Having focused on the free trading between the living people, it results first and foremost from the general principle of civil law defined in the Article 57, Section 1 of the act of 23 April 1964 of the Civil Code[3], according to which the right of transfer, encumbrance, change or abolition of law cannot be excluded or limited by a legal action if the law is transferable under the act, and secondly, from the company's structure, which is based on the capital domination[4]. The limitations, which the sale of shares of a limited liability company may involve result from the regulations of the Article 181 and the Article 182 of the act of 15 September 2000 of the Commercial Companies Code[5] [6].The issue limited in the first place is a partial disposal of shares, which is permissible only in a specific structure of the share capital and if the provisions of association of the company do not provide otherwise**.** However, the partial disposal of shares is permissible only if the articles of association of the company do not provide otherwise. The limitations stated above aim to protect the company's interests, because they

[1] See A. Szajkowski, M. Tarska, *Comment on Article 180 of the Commercial Companies Code*, [in:] *Kodeks spółek handlowych. Spółka z ograniczoną odpowiedzialnością*. [*The Commercial Companies Code. A Limited Liability Company*] Comments on Articles 151-300. Volume II, (ed.) S. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, C.H. Beck 2014, Legalis, Nb 5.

[2] See: the sentence of the Supreme Court of 5 March 1996, II CRN 25/96, Prokuratura i Prawo [Prosecution and Law] No 7/1996, item 38.

[3] Journal of Laws No 16, item 93 with further amendments.

[4] See: the sentence of the Supreme Court of 5 March 1996, II CRN 25/96, Prokuratura i Prawo…

[5] See: I Zielińska-Barłożek, J. Grygiel, M. Szewczyk, [in:] *Ryzyka prawne w transakcjach fuzji i przejęć*, (ed.) P. Ciećwierz, I. Zielińska-Barłożek, edition 1, LexisNexis, 2013, p. 41.

[6] Consolidated text of the Journal of Laws of 2008 No 25, item 150 with further amendments.

counteract the uncontrolled changes of the company's shareholders[7]. All the parties concerned (the seller and the buyer) are obliged to inform the company of the sale of a share (or its part or fractional part), providing a proof of purchase. The transfer of shares or its part or fractional part is effective in respect to the company from the moment when the company receives a notification on this fact from one of the parties concerned, with the proof of transfer.

Legal risk may be understood as a probability of a certain circumstance, which raises, directly or indirectly, adverse legal effects for the buyer[8]. Due to the lack of a uniform statutory definition of legal risk, in order to complete this definition, as a way of comparison it may be stated that in the light of the Article 3, Section 32c of the act of 27 April 20, the environmental law[9] the risk is understood as a probability of a certain effect in a definite time or definite situation. According to the Article 4, Section 4 of the act of 27 June 1997 on the labour medical services[10] the risk is the "possibility of adverse (…) events resulting in losses" [11]. Legal risks may be considered in three dimensions, i.e. first of all, from the viewpoint of the dangers (risks), then from the viewpoint of the effects, which may be caused by those dangers, and also within the context of a probability of their materialisation[12]. The adverse consequences of risk and its materialisation take the form of material or non-material for the buyer.

Moving on to the analysis of the title issue to indicate the legal risks in sale transactions of shares of a limited liability company conducted outside the territory of the Republic of Poland, first of all there should be stated the laws whose provisions shall or may be applied to the following actions, i.e.:

- the act of 15 September 2000, the Commercial Companies Code (the consolidated text of the Journal of Laws 2013.1030 of 6 September 2013);

[7] See I Zielińska-Barłożek, J. Grygiel, M. Szewczyk [in:] *Ryzyka prawne*… p. 41.
[8] Ibid p. 40.
[9]Consolidated text of the Journal of Laws of 2008 No 25, item 150 with further amendments.
[10]Consolidated text of the Journal of Laws of 2008 No 125, item 1317 with further amendments.
[11]See I. Zielińska-Barłożek, J. Grygiel, M. Szewczyk [in:] *Ryzyka prawne*… p. 41.
[12]Ibid p. 40.

- the act of 23 April 1964, the Civil Code[13] (the consolidated text of the Journal of Laws 2014.121 of 23 January 2014);
- the act of 4 February 2011, Private International Law[14] (the consolidated text of the Journal of Laws 2015.1792 of 4 November 2015);
- the act of 14 February 1991, the Polish Notary Public Act (the consolidated text of the Journal of Laws 2014.164 of 4 February 2014);
- the act of 27 July 2002, the Foreign Exchange Law (the consolidated text of the Journal of Laws 2012.826 of 19 July 2012);
- the act of 29 July 2005 on Trading in Financial Instruments (the consolidated text of the Journal of Laws 2014.94 of 21 January 2014);
- the act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (the consolidated text of the Journal of Laws 2014.1380 of 13 October 2014);
- the act of 25 June 2015, the Consular Law (the consolidated text of the Journal of Law 2015.1274 of 31 August 2015);

Legal risks in sale transactions of shares of a limited liability company outside the territory of the Republic of Poland may arise particularly while constituting the law applicable to the said transaction, then while determining the form of a legal action governed by the law applicable to the sale of a share, its part or fractional part, subsequently – depending on the particular transaction – when the shares are paid up by contribution in kind in form of a property located in Poland, and also when the shares are foreign securities.

1. Applicable law

The provision of Article 25 Section 1 of the private international law includes a general rule which says that the form of a legal action is governed by the law applicable to the action itself. Alongside the general rule there are also two subsidiary rules of constituting the law applicable to the given legal action. According to the first one it is sufficient to keep the form provided by the law of the country, where the action is conducted, and in the light of the other rule, if at the moment of making the statement of will the persons are on the territories of different

[13]Further: The Civil Code.
[14] Further: The Private International Law.

countries, it is sufficient to keep the form provided for this action by the law of one of those countries. According to Section 2 of the article mentioned above the subsidiary rules are not applicable to the legal actions, involving creation, merger, split, conversion or cessation of a legal entity, or also a legal entity without corporate status. Taking into consideration the fact that in Article 25 Section 2 of the private international law there is no record on such a legal action as a disposal of shares, the above rules should be considered inapplicable in case of a share disposal, or its part, or its fractional part, since the phrases listed in this provision have their precise legal significance. In the light of Article 17 of the private international law the attainment and loss of a shareholder status or membership, and rights and duties attached to them remain under the country, where a legal entity (a limited liability company) is based or, if the law of the country where the legal entity is based provides for the applicability of the law of the country, under which the legal entity was incorporated, then the law of this country is applicable. The above provision of Article 17 of the private international law includes factors, which determine the personal status of the legal entity. It seems rational to acknowledge that with regard to the form of the sale of property rights of the shareholders of a Polish limited liability company outside the territory of the Republic of Poland the stipulations of the personal status of the legal entity, whom the legal actions refer to, should be applied, because the form of a legal action in the aspect concerned depends on the law applicable to the action itself (*legi causae*). The law constitutes the personal status of a Polish limited liability company[15].

In the light of the above, if a company was incorporated and is based on the territory of the Republic of Poland, searching for the personal status of the company should be considered effortless, because the law applicable to the form of a legal action of the sale of shares conducted abroad shall be the Polish law. A problem with the determination of the personal status of a Polish limited liability company may arise if the company was incorporated according to the foreign law and then it was relocated to the territory of the Republic of Poland. Both the Polish private international law and the law of the majority of the European countries stand for the seat theory, according to which the company is

[15]See: J. Pazdan, [in:] *System Prawa Prywatnego*, Volume 20A, *Prawo Prywatne Międzynarodowe,* (ed.) M. Pazdan, C.H. Beck, 2014, edition 1, p. 773.

under the law of the country, where it is based. Nevertheless, the Polish legislator did not directly regulated the way of recognizing the companies on the territory of the Republic of Poland. According to Article 19 Section 1 the second sentence of the private international law: the legal personality obtained in the country of the existing residence is maintained if the law of each country concerned provides so, therefore in particular cases it should be determined if the law of the country where the company was incorporated stands for the seat theory or incorporation theory. It brings the conclusion that in case of moving the company from the country which stands for the seat theory to the territory of the Republic of Poland the company is no longer under the existing law, and in case of moving the company from the country which stands for the incorporation theory on the territory of the Republic of Poland the company is sent back under the law of the country of incorporation, which means the country of the previous real seat[16]. Such a standard results in the Polish legislation not being applied as a personal status of a foreign company, because it generates the conclusion that in the context of the Polish legislation of the private international law it does not constitute a legal entity[17]. In the above situation a form applicable to the sale of shares of a "Polish" (de facto foreign) limited liability company will be the law of the country of its incorporation.

For example, if a company is currently based on the territory of the Republic of Poland and was incorporated in Switzerland, then according to Article 154 Section 1 of the act of 18 December 1887 Bundesgesetz über das Internationale Privatrecht the company shall be under the law of the country, according to the rules of which they are structured, provided they comply with the requirements foreseen referring to disclosure or registration, or if there are no such requirements, provided they are structured according to the law of this country[18]. The Swiss law stands for the incorporation theory, therefore the legal form foreseen for the

[16]See: A. Wowerka, *Wskazanie statutu personalnego spółek w kontekście unijnej swobody przedsiębiorczości. Jednolity „unijny" łącznik w zakresie krajowego międzynarodowego prawa spółek*?, [in:] *Współczesne wyzwania prawa prywatnego międzynarodowego*, (ed.) J. Poczobut, LEX, 2013, Lex no 174194.
[17]See: A. W. Wiśniewski, *Uznanie zagranicznej osoby prawnej w cieniu art. 17 nowego prawa prywatnego międzynarodowego*, [in:] *Współczesne wyzwania prawa prywatnego międzynarodowego*, (ed.) J. Poczobut, LEX, 2013, Lex no 174194.
[18]See: A. Wowerka, *Wskazanie statutu personalnego spółek*…

action of the sale of shares of a limited liability company shall be as required in the Swiss law.

Similarly, the private international law of Lichtenstein stands for the incorporation theory, because pursuant to Article 233 Section 1 of the Act of 20 January 1926 Personen- und Gesellschaftsrecht ....depending on the fact that the legal entity is structured according to the national or foreign law, i.e. the law applicable to its status is the national or foreign law or it meets the foreign or national conditions defined in the rules referring to the disclosure or registration, or if there are none, it was structured according to the foreign or national law, with reference to the private law it is considered as a foreign or national legal entity and a proper foreign or national law is applicable to it[19]. In this situation the required form of the sale of the material rights of a shareholder shall be the one provided by the law of Lichtenstein.

Moreover, in the light of Article 25 of the Italian Act of 31 May 1995 number 218 di diritto internationale privato the company is under the law of the country where the procedure of the company's incorporation was conducted, and also if the head office or the principal place of business is based in Italy, the Italian law is applicable[20]. The sale of shares of a company incorporated in Italy, and based on the territory of the Republic of Poland, will require the maintenance of the form established in the Italian law.

The above examples indicate clearly, which law determines the personal status of a legal entity, nevertheless it must be admitted that sometimes defining if the country where the company was incorporated and then moved its seat to the territory of the Republic of Poland stands for the seat or incorporation theory – may be in practice difficult. However, it will be essential to stipulate the proper legal form of an action, which is the sale of shares of a limited liability company.

2. Legal risk referring to an appropriate legal form, and the consequences of its non-compliance

Assuming that the appropriate law is the Polish law, then the legal form of a legal action determined by the Polish legislation, which is a sale of shares of a Polish limited liability company was defined in Article 180 of the Commercial Companies Code. According to the above

[19] Ibid.
[20] Ibid.

article a disposal of a share, its part or fractional part should be conducted in writing with signatures certified by a notary. The provision defines the required form of the sale of shares (or its part), under pain of nullity. According to Article 73 Section 2 of the Civil Code in conjunction with Article 2 of the Commercial Companies Code, if the act reserves a different particular form of a legal action, then the action conducted without this form is void. Therefore, disregarding the written form with signatures certified by a notary shall result in invalidity of a legal action[21]. The requirement of the written form with signatures certified by a notary will be maintained in case of applying a notarial deed[22]. Moreover, the written form with signatures certified by a notary is in force both when the signature was placed in the presence of a notary while signing the agreement and also when the signature was not placed in the presence of a notary, but the person signing the document acknowledged the authenticity of the signature in the presence of a notary. If the acknowledgement of the authenticity of the signature was conducted later than the date of signing the agreement of the share transfer, the date of agreement is the date of the notarial legalisation of the signature23.

The requirement of a qualified form when transferring shares of a limited liability company on the territory of the Republic of Poland may seem a restriction of the freedom to dispose of property rights of a limited liability company with regard to formalism. Nevertheless, for comparison the regulation of the German law may be a good example, because in the light of it in order to dispose of the shares of a limited liability company by the shareholders a form of a notarial deed is required, and it is also essential for the agreement, in which a shareholder commits themselves to dispose of the share[24].

The reservation by the Polish legislator of the discussed legal form of the sale of shares aims at preventing the abuses connected with a disposal of shares of a limited liability company issued retrospectively, particularly in case of levying a compulsory execution or insolvency

[21]See*:* M. Stanik, Comment on Article 180*,* [in:] *Kodeks spółek handlowych*, (ed.) Z. Jara, C.H. Beck, 2014, edition 6, No 17.
[22] Ibid. No 22.
[23]See: the sentence of the Administrative Court in Wrocław of 30 October 2007, I SA/Wr 744/07, Legalis.
[24]See: A. Szajkowski, M. Tarska, *Comment on Article 180 of the Commercial Companies Code…*

proceedings, and also preventing the unfilled fields in the agreements regarding the date of the disposal transactions of shares, so that they can be filled by the buyer anytime they decide[25].

The parties conducting the disposal transactions of shares outside the territory of the Republic of Poland should decide to arrive in the country and in the presence of a notary certify the signatures on the territory of the Republic of Poland. If a party or parties taking part in the notarial proceedings do not know the Polish language and there is no translation attached into any language spoken by the parties, according to Article 87 Section 1 Subsection 1 of the Polish Notary Public Act, a notary should translate the act or other document (the sales agreement) in person or with a translator. The exception is the situation when the parties conducting the sales transaction of shares of a limited liability company outside the territory of the Republic of Poland and also residing there, for various reasons cannot or do not want to arrive in Poland to make the proceedings in the presence of a notary. Then the parties may do it in the presence of a consul, because according to Article 28 of the act on the consular right the consul makes the notarial proceedings, and particularly certifies the signatures and initials on the documents. In this case the only risk is a time lag, because the possibility of making the proceedings in the presence of a consul will take more time than in the presence of a notary.

Significant legal risks arise when the applicable law is a foreign law. Therefore, assuming that the applicable law is a foreign law and the parties of a sales transaction of shares shall in good faith apply a legal form foreseen by the Polish law, there will be a conversion. The conversion of a form of a legal action occurs in situations when the persons conducting the legal action by concluding an agreement, in fact conduct a void legal action, without being aware of this fact. In such cases there appear two legal actions – a void main action and a substitute action that the main action turns into as a result of the conversion[26].

---

[25] See: A. Szajkowski, M. Tarska, *Comment on Article 180 of the Commercial Companies Code*…, see: J. Strzępka, E. Zielińska, *Comment on Article 180 of the Commercial Companies Code* [in:] *Commercial Companies Code. Comment*, (ed.) J. Strzępka, C.H. Beck, 2013, edition 6, Legalis; see: A. Kidyba, *Updated comment on Article 180 of Commercial Companies Code* [in:] A. Kidyba, *Updated comment on Article 1-300 of the act of 15 September 2000 of the Commercial Companies Code* (Journal of Laws 00.94.1037), LEX/el, 2015, Lex no 414797, item. 4 and the literature cited).

[26] See: J. Pazdan*, [in:] System Prawa Prywatnego*… p. 779 and the literature cited.

It is considered justified to assume that if the parties concluding the agreement of the share sales realized the fact that the legal action is void, they would make the proper choice. Therefore, in particular cases if the private international law which is applicable allows conversion, then applying the form required by the Polish law to the title legal action will not result in invalidity[27].

3. Legal risks resulting from the limitations imposed by the act on the Foreign Exchange Law

First of all, the possible limitations imposed by the provisions of the act on the Foreign Exchange Law should be indicated, because in order to manage the foreign currency there is a foreign exchange authorisation required, general or individual. According to Article 2 Section 1 Subsection 12 paraphrased on the basis of Article 2 Section 1 Subsection 14 of the Act mentioned above the foreign currency are equity securities, particularly shares, pre-emptive rights to new shares and debt securities, particularly bonds issued according to the legislation of the country where the issuer has its registered office or where the issuance was conducted. At this point it should be considered if shares in a Polish limited liability company are securities.

Securities do not have a legal definition, nevertheless for the purposes of interpretation according to Article 3 Subsection 1 of the Act on Trading in Financial Instruments, whenever securities are mentioned in this act the meaning is as follows:

- shares, pre-emptive rights to new shares within the meaning of the provisions of the act of 15 September 2000 – the Commercial Companies Code[28], rights to shares, warrants, depositary receipts, bonds, mortgage bonds, investment certificates and other transferable securities, including incorporating property rights corresponding to the rights resulting from the shares or incurring a debt, issued under the relevant provisions of the Polish or foreign law;
- other transferable proprietary rights, which arise as a result of issuance, incorporating the right to acquire the securities referred to in point a), or made by a cash settlement (derivative rights).

[27] Ibid., p. 779-780 and the literature cited.

[28] Journal of Laws No 94, item 1037, with further amendments.

In the light of the Act on Trading in Financial Instruments the criterion of recognizing a certain instrument as a security may involve defining it with this term or indicating the features, relatively the functions, which decide such a nature[29].

Before the Act on Trading in Financial Instruments came into force, the act of 22 March 1991 on Public Trading and Trust Funds had been binding[30], which defined securities in general terms. According to Article 2 of the expired act above, a security was relevant to a document which should have confirmed or confirmed the existence of a specific proprietary right, adopted in the wording and such a manner that it may constitute a stand-alone subject publicly traded. In the light of the above definition a security may have been both a document confirming the existence of a specific proprietary right and also a document which would confirm this[31].

Moreover, for the purposes of interpretation, there should also be indicated a provision from Article 921(6) of the Civil Code, according to which: if an obligation results from an issued security, the debtor is obliged to abide by the return of the document or making it available to the debtor in order to deprive it of its legal status as is customary. The provision mentioned above is of general nature for other provisions regarding the securities law32. In the light of the above provision a security should be considered as a qualified document, confirming specific proprietary rights, because between the document and the rights included there is a link which determines the fact that having the document constitutes an essential premise of attributing the right to the

[29] See: K. Zaradkiewicz, M. Wierzbowski, P. Wajda, Comment on Article 3 of the Act on Trading in Financial Instruments, [in:] the Act on Trading in Financial Instruments. Comment, (ed.) M. Wierzbowski, L. Sobolewski, P. Wajda, C.H. Beck, 2014, edition 2, No 85 and the literature cited.

[30] Journal of Laws No 35, item 155 with further amendments; the act was repealed by Article 191 of the act of 21 August 1997 – the Polish Securities Act (Journal of Laws 97.118.754) of 4 January 1998, excluding Article 2 Subsection 7 and 8, Article 5 Section 5, Article 16 Section 1 Subsection 2, Section 8, Article 120.

[31]See: A. Janiak, *Comment on Article 921(6) of the Civil Code*, [in:] Civil Code. Comment. Volume III. Obligations – Specific Part, edition II, (ed.) A. Kidyba, LEX, 2014, LexPrestige, item 9 and the literature cited.

[32] E.g. the act of 15 January 2015 on bonds (Journal of Laws 2015.238 of 2015.02.20), the act of 29 August 1997 on mortgage bonds and banks (Journal of Laws 2015.1588 of 2015.10.12), the act of 28 April 1936 on the bills of exchange law (Journal of Laws 2016.160 of 2016.02.09) or/and the act of 28 April 1936 on the cheque law (Journal of Laws 1936.37.283 of 1936.05.11).

person formally empowered under the document, and also a premise of realising this right by this person. In other words, a security in terms of the Civil code is a document, which incorporates a specific right, and thereby is a „medium" of this right and also economic value, which this document features[33].

Taking the above into consideration, to answer the question if shares in a Polish limited liability company are securities, first of all the following five questions must be answered:

- Is a share a transferable proprietary right?
- Does a share result from an issuance?
- Does a share incorporate a right to acquire securities, which are mentioned in Article 3 Subsection 1 point a) of the Act on Trading in
- Financial Instruments?
- Does a share constitute a right exercised by cash settlement?
- Does the Polish law include the rule *numerus clausus* regarding the securities?

Giving the answer to the first question, it is obvious that a share of a limited liability company is a transferable proprietary right, which was discussed in the introduction of this article, and which also results from the requirement of keeping the qualified form when disposing of shares.

About the second question – it should be indicated that the Polish legislator also does not define the term 'issuance'. This word appears in the text of the provisions of the Commercial Companies Code, regulating the increase of the company's share capital. Therefore, the term 'issuance' may have various meanings. It refers to the issuance of the document (a security), the issuance of the document to the buyer, and all activities aiming at obtaining the effect of the issuance of the document to the buyer[34] (e.g. adopting a resolution by the Board of a listed company regarding the issuance of the bond series or defining the terms of conducting the public offering of the bond series). According to Article 257 Section 2 of the Commercial Companies Code increasing the share capital of a limited liability company takes place by increasing the nominal value of the existing shares or establishing the new ones. On the

[33] See: A. Janiak*, Comment on Article 921(6) of the Civil Code…*, Subsection 11 and the literature cited; See: P. Nazaruk, *Comment on Article 921(6) of the Civil Co*de, [in:] *Civil Code. Comment*, edition II, (ed.) J. Ciszewski, LexisNexis, 2014, Subsection 2.

[34] See: K. Zaradkiewicz, M. Wierzbowski, P. Wajda, *Comment on Article 3*..., No 117 and the literature cited.

basis of this provision it may be concluded that the term "issuance" also refers to creating (issuing) shares by a limited liability company in its share capital.

To the question if a share in a Polish limited liability company incorporates a right to acquire the securities, defined in Article 3 Subsection 1 point a) of the Act on Trading in Financial Instruments, the answer should be negative regarding the rule included in the provision of Article 174 Section 6 of the Commercial Companies Code, i.e. the rule of scriptuality, according to which a share in a company concerned cannot be incorporated into the documents (both 'materialised' and 'dematerialised') which have a status of a security[35]. Thereby, a share in a limited liability company in the light of the above provision is deprived of a basic feature of a security, defined in Article 921(6) of the Civil Code.

The next question is whether a share constitutes a right by cash settlement and it is disputable. Giving a positive answer may be explained that the sale of shares can be settled in a physical form (in cash) and also by charging the bank account of the buyer (non-cash settlement). In this case the literal interpretation of Article 3 Subsection 1 point b) should be considered, especially the conjunction 'or' included in the text, because giving a negative answer to the above question - that a share in a Polish limited liability company does not incorporate a right to acquire the securities, it may be stated that alternatively securities are the shares of a limited liability company as other proprietary rights executed by cash settlement. However, in my opinion the answer to the fourth question should be negative due to the fact that the shares in a limited liability company would have to be sovereign bonds, the basic instrument of which are securities, which means the value of the shares would have to be dependent on the value of the basic instrument[36]. In practice, sovereign bonds are derivative rights, i.e. warrants, forward agreements, options and so called index participation units, which have the nature of debt securities[37], and such a nature cannot be assigned to the shares of limited liability company.

---

[35]See: Individual tax ruling of the Director of the Fiscal Chamber in Bydgoszcz of 25 October 2011, ITPB2/436-114/11/MK.

[36]See: A. Chłopecki, [in:] *Prawo rynku kapitałowego*, (ed.) A. Chłopecki, M. Dyl, C.H. Beck, 2012, p. 246.

[37]See: K. Zaradkiewicz, M. Wierzbowski, P. Wajda, *Comment on Article 3 of the Act on Trading in*… No 169.

Answering the fifth question, both in literature and in practice rather the majority of the authors stand for the rule *numerus clausus* of the securities in the Polish law[38]. The acts include no word in that regard. Therefore, due to the lack of a provision allowing or excluding the creation of securities unidentified in the acts it is difficult to draw unambiguous conclusions for a possible decision and "will" of the legislator[39]. Standing for the exhaustive list of securities, in the light of the above consideration, a share of a Polish limited liability company should not be recognised as a security regarding safety and certainty of the transactions seen through a necessity of the protection of both public and private market from a surrogate for money or/and avoiding the tax obligation. At this point it is worth mentioning that in Article 7 Section 2 point 2) of the Act of 27 May 2004 on investment funds[40], the legislator made a distinction by indicating that to the investment fund there may be contributed: securities admitted to official listing or securities not admitted to official listing or shares in limited liabilities companies – which makes it clear that the Polish legislator does not consider the shares of a limited liability company as securities. Nevertheless, standing for the exhaustive list of securities, which would also speak for considering a share of a Polish limited liability company as a security, the binding rule may be disputed. If there is a rule *numerus clausus* of securities on the territory of the Republic of Poland, and the Polish legislator has foreseen that the securities are also those documents, which were issued on the basis of appropriate regulations of a foreign law (foreign securities) and thereby the legislator releases them for a free circulation on the Polish regulated market. It must be considered if in the country where the foreign securities were issued, provided their nature corresponds with the shares of a Polish limited liability company, do they constitute foreign currency? For example, while dealing with a sale of proprietary rights of a shareholder of a company of the nature corresponding to a Polish limited liability company, and those rights are foreign securities, and the sale of those rights refers to a company

[38]Ibid, No 84, 87 and the literature cited; see individual tax ruling of the Director of the Fiscal Chamber in Bydgoszcz of 25 October 2011, ITPB2/436-114/11/MK, see: individual tax ruling of the Director of the Fiscal Chamber in Katowice of 17 September 2014, IBPBII/2/415-591/14/MM.

[39]See: K. Zaradkiewicz, M. Wierzbowski, P. Wajda, *Comment on Article 3 of the Act on Trading in…* No 86.

[40]Journal of Laws 2014.157, consolidated text.

moving from the country which stands for the incorporation theory on the territory of the Republic of Poland, which results in sending back under the law of the country of incorporation, i.e. the country of the previous real seat – then in such a situation there must be considered a risk of limitations imposed by the Foreign Exchange Law.

Taking the above into consideration, it must be stated that the legal action which is a sale of a share, its part or fractional part, of a Polish limited liability company usually does not involve a legal risk regarding limitations as a result of the Foreign Exchange Law, because in most cases to such transactions the Polish law will be applicable, for which it is impossible to acknowledge the shares concerned as foreign currency (a security in terms of the provisions of the Civil Code and the Act on Trading in Financial Instruments).

4. Legal risks resulting from the limitations imposed by the act on the acquisition of real estate by foreigners

Another risk that a sales transaction of shares of a Polish limited liability company may involve results from the provisions of the act of 24 March 1920 on the acquisition of real estate by foreigners. Such a situation may appear when disposed shares will be covered in the share capital with a non-cash contribution in the form of real estate property, and the buyer of the shares will be a foreigner.

A foreigner in terms of the above act is a physical person without a Polish citizenship, a legal person having a registered office abroad, a company without a legal personality with its registered office abroad, incorporated according to the legislation of the foreign countries or/and a legal person and a commercial company without a legal personality with its registered office on the territory of the Republic of Poland, controlled directly or indirectly by the persons or companies mentioned above.

According to Article 1 Section 1 of the act mentioned above the acquisition of a real estate property by a foreigner requires a permission. The permission is issued on an administrative decision, by the Minister of Interior, if the Minister of National Defence does not object, and in case of agricultural real estate, if the Minister in charge of rural development does not object[41]. Moreover, according to Article 3e Section 1 of the Act, the acquisition by a foreigner of the shares or bonds of

[41] See: Article 1 Section 1 of the Act.

a commercial company based on the territory of the Republic of Poland, and also any other legal action connected with the shares or bonds requires a permission by the Minister of Interior, if the result is that the company being the owner or the perpetual usufructuary of the real estate on the territory of the Republic of Poland becomes a company controlled. A company controlled is the company where a foreigner or foreigners hold directly over 50% of the voting rights in the shareholders' assembly or general meeting of shareholders, also as a pledger, user or on the basis of agreements with other parties, or have a dominant position within the meaning of Article 4 Section 1 Subsection 4 point b), c) or e) of the act of 15 September 2000 of the Commercial Companies Code[42]. The dominant position of a foreigner or foreigners in case of the title acquisition of shares is considered as a foreigner or foreigners who are entitled to appoint or remove a majority of the members holding managerial positions in a limited liability company whose shares they acquired (a subsidiary), and they are entitled to these actions under agreements with other persons.

Nevertheless, not every case of a share disposal of a Polish limited liability company covered with non-cash contribution in the form of real estate properties requires a permission. Exemptions from permissions were indicated in Article 8 Section 1 of the act on the acquisition of real estate by foreigners. Moreover, since the Polish accession to the EU a provision has been applied, according to which a permission is not necessary for the foreigners being the citizens or entrepreneurs of the countries which are the parties of the Agreement on the European Economic Area and nationals of the Swiss Confederation. At this point it should be emphasized that an absolute permission to acquire real estate is required if a buyer of the shares of a Polish limited liability company is a foreigner and the shares concerned in the share capital are covered with a contribution in the form of a real estate property located in the frontier zone or an agricultural land up to an overall farm size limit of 1 hectare.

The above limitations resulting from the act on the acquisition of real estate by foreigners are to prevent from obtaining by foreigners real estate properties in Poland as a result of acquiring the shares or bonds of the companies based on the territory of the Republic of Poland. Currently the existing law does not impose on the companies controlled by foreigners an obligation of submitting information on the land owned.

[42]Journal of Laws 2013.1030 consolidated text.

Despite the fact that an acquisition of shares or bonds of the companies has to be registered in the National Court Register, the companies controlled by foreign capital are not obliged to submit information on the land owned to the court registers. In the result, the Ministry of Interior does not have data on the land acquired by foreigners in Poland.

Importantly, an acquisition of a real estate property by a foreigner against the law (e.g. without a permission) according to Article 6 of the act mentioned above is void. In case of acquiring a real estate property against the provisions of the act (directly or indirectly by acquiring e.g. shares of a limited liability company) the court shall order it to be void.

To summarize, in case of acquiring shares of a limited liability company by a foreigner there is a risk of this transaction being void.

Conclusions

Sale transactions of shares of a limited liability company may involve numerous risks. In this article only those were discussed which may arise in such transactions conducted outside the territory of the Republic of Poland. As a result of the consideration in this article there is no possibility of a precise measurement and assessment of a probability of occurrence of negative effects with the use of percentage rates or others, which is caused by the lack of objective evidence and criteria. The most important is – as it seems – noticing the risk when concluding an agreement, the possible effects of the risk and their probability. To sum up, the highest risk of negative effects in sale transactions of shares of a limited liability company is invalidity of the whole transaction, which may arise in case of incorrect determination of the law applicable to conduct a legal action, and lack of a proper form, or/and the previously obtained permission, defined in the act on the acquisition of real estate by foreigners. For a low legal risks it may be taken the risk of excessive time needed to realise the whole procedure in the presence of a consul and the risk resulting from the Foreign Exchange Law. Summarizing the above risks (high and low), they are not easy to notice, therefore for safety reasons in every transaction of this kind due diligence will be required when investigating potential legal risks and defining a probability of occurrence of negative effects, taking into consideration all the specific circumstances.

Legal acts, case-law, interpretation and reports

[1]. Individual tax ruling of the Director of the Fiscal Chamber in Bydgoszcz of 25 October 2011, ITPB2/436-114/11/MK.

[2]. Individual tax ruling of the Director of the Fiscal Chamber in Katowice of 17 September 2014, IBPBII/2/415-591/14/MM.

[3]. The report by the Polish Supreme Chamber of Control of 14 January 2014, signature LSZ-4101-05-00/2014, P/13/195.

[4]. The act on Public Trading and Trust Funds of 22 March 1991 (Journal of Laws 1991.35.155 of 25 April 1991).

[5]. The Notary Public Act of 14 February 1991 (Journal of Laws 2014.164 of 4 February 2014).

[6]. The Act on Bonds of 15 January 2015 (Journal of Laws 2015.238 of 20 February 2015).

[7]. The Act of 15 September 2000, the Commercial Companies Code (Journal of Laws 2013.1030 of 6 September 2013).

[8]. The act of 23 April 1964, the Civil Code (Journal of Laws 2014.121 of 23 January 2014).

[9]. The Act of 24 March 1920 on the acquisition of real estate by foreigners (Journal of Laws 2014.1380 of 13 October 2014).

[10]. The Act of 25 June 2015 on the consular right (Journal of Laws 2015.1274 of 31 August 2015).

[11]. The Act of 27 April 2001 on the environmental law (Journal of Laws 2008.25.150 of 15 February 2008).

[12]. The Foreign Exchange Act of 27 July 2002 (Journal of Laws 2012.826 of 19 July 2012).

[13]. The Act of 27 May 2004 on investment funds (Journal of Laws 2004 No 146, item 1546).

[14]. The Act of 28 April 1936 on the cheque law (Journal of Laws 1936.37.283 of 11 May 1936).

[15]. The Act of 28 April 1936 on the Bill of Exchange Law (Journal of Laws 2016.160 of 9 February 2016).

[16]. The Act on Trading in the Financial Instruments of 29 July 2005 (Journal of Laws 2014.94 of 21 January 2014).

[17]. The Act of 29 August 1997 on mortgage bonds and banks (Journal of Laws 2015.1588 of 12 October 2015).

[18]. The Act of 4 February 2011 on the Private International Law (Journal of Laws 2015.1792 of 4 November 2015).

[19]. The Act of 27 June 1997 on labour medical services (Journal of Laws 2004 .125. 1317 of June 2004).

[20]. The sentence of the Supreme Court of 29 August 2013, I CSK 713/12, Lex 1391108.

[21]. The sentence of the Supreme Court of 5 March 1996, II CRN 25/96, „Prokuratura i Prawo" No 7/1996, item 38.

[22]. The sentence of the Administrative Court in Wrocław of 30 October 2007, I SA/Wr 744/07, Legalis.

Literature

[1]. Chłopecki A., [in:] *Prawo rynku kapitałowego*, (ed.) Chłopecki A., Dyl M., C.H. Beck, 2012.

[2]. Dalecka A., *Nabywanie nieruchomości przez cudzoziemców*. *Komentarz,* LexisNexis, 2013.

[3]. Kawecka-Pysz J., *Nabywanie nieruchomości przez cudzoziemców*, Zakamycze, 2004.

[4]. Kidyba A., *Updated comment on Articles 1-300 of the act of 15 September 2000 of the Commercial Companies Code* (Journal of Laws 00.94.1037), LEX/el, 2015, Lex no 414797.

[5]. *The Civil Code. Comment, edition II*, (ed.) Ciszewski J., LexisNexis, 2014.

[6]. *The Civil Code. Comment. Volume III. Obligations – Specific Part, edition II*, (ed.) Kidyba A., LEX, 2014.

[7]. *The Commercial Companies Code*, (ed.) Jara Z., C.H. Beck, 2014, edition 6.

[8]. *The Commercial Companies Code. Comment*, (ed.) Strzępka J., C.H. Beck, 2013, edition 6.

[9]. *The Commercial Companies Code. A Limited Liability Company. Comments on Articles 151-300*. Volume II, (ed.) Sołtysiński S., Szajkowski A., Szumański A., Szwaja J., C.H. Beck, 2014.

[10]. *Ryzyka prawne w transakcjach fuzji i przejęć*, (ed.) Ciećwierz P., Zielińska-Barłożek I., edition 1, LexisNexis, 2013.

[11]. *System Prawa Prywatnego, Volume* 20A, Prawo Prywatne Międzynarodowe, (ed.) Pazdan M., C.H. Beck, 2014, Edition 1.

[12]. *The Act on Trading in Financial Instruments. Comment.*, (ed.) Wierzbowski M., Sobolewski L., Wajda P., C.H. Beck, 2014, edition 2.

[13]. *Współczesne wyzwania prawa prywatnego międzynarodowego*, (ed.) Poczobut J., LEX, 2013, Lex no 174194.