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THE LIABILITY OF CORPORATE GOVERNANCE BODIES AS A PHILOSOPHICAL-LEGAL CATEGORY

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Abstract: In the light of philosophy of law given scientific research is devoted to the disclosure of the essence and content of corporate liability, the identification of the features of the liability of corporate management bodies and the presentation of proposals for solving emerging problems. The article examines the issues of corporate liability, proposes its definition, and analyzes the features inherent in corporate liability in venture joint-stock companies.

The scope of research embraces concepts, such as fiduciary duties (duty of care, duty of loyalty, the requirement for awareness and not allowing conflict of interests), business judgment rule, as well as the adverse effects of corporate offenses, corporate liability measures and specifics of liability applicable to venture joint stock companies.

As a result, the concept of corporate liability was given, as well as the features characterizing such liability in venture joint stock companies were highlighted

Keywords: corporation, corporate liability, obligation to act in good faith and reasonably, venture joint stock company.

Introduction

In order to ensure the effective and normal functioning of corporations, there is a need to monitor their activity and to take measures to prevent the possible illegal behavior of the participants of the corporate legal relationship.

In civil legal relations in general and corporate law relations in particular, the issues of the nature and type of liability, on which there are dissenting approaches, are discussed.

I. Shitkina (2018) believes that it is inappropriate to distinguish "multi-branch" corporate liability in the doctrine, which combines different types of liability, and it is correct to speak not of corporate liability, but of proprietary liability in the field of corporate legal relations (p. 698).

According to O. Gutnikov, the existence of relative corporate rights and obligations allows to separate another type of civil liability, the corporate liability, which is imposed for the violation of relative corporate rights and obligations defined by corporate legislation, constituent and other internal documents and/or corporate transaction.

According to him, there are also cases of legal liability before creditors that are not related to illegal behavior (e.g., voluntary obligation, pecu-

liarities of the organizational-legal type of a legal entity and subsidiary liability of governing persons).

These cases are not considered corporate liability, but since they are stipulated by norms of corporate law and are connected with management of a legal entity, the author has called it "quasi-corporate" liability (Gutnikov, 2018, pp. 140, 143-145; Loos, 2016).

In EU member states, particularly in civil law jurisdictions, a direct legal relationship between directors, shareholders, and other constituencies may arise from an application of general principles of law, particularly tort law. The general tort law clauses that can be found in a number of jurisdictions may open that possibility as they provide for liability for any damage caused by intentional or negligent conduct.

In jurisdictions where legal tradition is usually characterized by narrower provisions these cannot be relied on as complements of the company law duties capturing general directorial misconduct, but they afford additional protection to shareholders and some other constituencies in particularly severe cases of wrongdoing like criminal offences.

Finally, a third group of civil law jurisdictions distinguish laws between internal liability of the director to the company and external liability to shareholders or third parties. External liability usually requires conduct that goes beyond mere mismanagement or conflicts of interest and is triggered by a breach of specific legal requirements of the legislation or the articles of association, conduct that affects exclusively the rights of the shareholders, or the drawing up of misleading accounts (Gerner-Beuerle et al., 2013, p. 11).

According to US law, the breaches of director's duties (duty of care, duty of loyalty, etc) may raise the issue of the latter's corporate liability. Delaware law permits a corporation to include a provision in its certificate of incorporation eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty, provided that the provision cannot eliminate or limit the liability of a director for cases set forth in law (Forrester et al., 2016, pp. 34-35).

In our opinion, corporate liability is a separate, independent type of civil liability, taking into account its features listed below.

The main criteria for separating corporate liability as a special type of civil liability are:

1) arises in corporate relationships related to the management or participation of legal entities,
2) the basis of corporate offenses is the violation of subjective civil rights and corporate responsibilities established under legislation and/or the corporate contract, with respect to the management of legal entities (Gutnikov, 2018, p. 146),
3) the sources are corporate legislation, the founding and internal documents of the corporation, the corporate transactions,
4) is manifested in violation of integrity, reasonableness and/or obligation to act in favor of the company (fiduciary duties),
5) features of guilt and its proof,
6) the uniqueness of adverse consequences and sanctions.

A specific managerial decision may be unsuccessful, but imposing liability on the manager for any negative result in the company's activities would result in the avoidance of the participation of responsible and proactive persons in the work of management bodies of legal entities (Bernam, 2006, p. 920).

The basis of corporate liability is the violation of subjective civil rights and corporate responsibilities set under the legislation with regard to management of legal entities, and the source is the norms of corporate legislation, corporate acts (founding documents and other internal documents of the legal entity), corporate contract (Gutnikov, 2018, pp. 145-146).

According to Article 90 (1) of the RA Law on Joint-Stock Companies (hereinafter referred to as "JSC Law"), the members of the board, the director (general director) of the company, the members of the management board, as well as the managing company and manager must act in the course of their duties based on the interests of the company, exercise their rights and perform their duties in good faith and in reasonable way, avoid real and possible conflicts between the personal and company's interests (fiduciary duty).

The mentioned provision stems from the complex of the corporate governance bodies' responsibilities to the company, the violation of which leads to the liability of the members of those bodies.

The duty of loyalty is based on a combination of subjective and objective criteria. Objective criteria describe the direction of the behavior of a member of the corporation's management body to the achievement of the interests of the company and suggests that when performing this or that actions, the latter must take all possible measures and take all possible risks to ensure the achievement of a more favorable result conditioned by the interests of the company.

And the subjective standard implies the subjective perception of the company's interests by defining the nature and content of the adverse consequences assumed for the company, the probability of their occurrence, the ability of organizing the neutralization of consequences in case of achieving them, the ratio of all costs compared to the advantages received (Pleshkov, 2011, pp. 71-78; Fedoseev, 2012, p. 137).

The content of duty of care is revealed through acting within the scope of his/her powers, exercising independent judgment, exercising reasonable prudence, and through demonstrating professionalism. In other words, the member of the management body of the corporation must demonstrate care and prudence in exercising his or her powers (while performing his/her duties), which in the same circumstances could be expected from a reasonable person (Gerner-Beuerle et al., 2013, pp. 74-126; Forrester et al., 2016, pp. 17-30; Fedoseev, 2012, pp. 139-140; Pleshkov, 2011, pp. 78-79).

It should also be added that the requirement for awareness (possessing the information necessary to make decisions and examining it) is included in the content of care, and the obligation to avoid conflicts of interest (competition or conflict of interests of the organization or its interests) is embodied in the obligation of loyalty (Karnakov, 2009, pp. 71-72).

Analysis of the RA Civil Code and the judicial practice in this regard shows that the debtor's misconduct, damage, causal link between the debtor's illegal conduct and damage and the debtor's fault are mandatory conditions for compensation. Moreover, in the absence of any of the mentioned conditions, the damage shall not be subject to compensation, except for cases prescribed under law (The decision of the RA Cassation Court No. EKD/2128/02/13, 2015; No. EKD/2600/02/10, 2013; No. HQD3/0016/02/08, 2009).

In case of corporate liability, the above-mentioned mandatory conditions have certain features, which must be taken into account in each particular case when resolving the issue of liability.

It is important to clarify the question which particular acts should be taken into consideration under the illegal behavior of a member of the governing body of the corporation, but, in other words, its activity should be evaluated from the moment of appointment to the moment of termination of its powers or the specific administrative decision (Pleshkov, 2011, p. 71).

Our view is that the assessment of illegal behavior within the scope of corporate liability should be carried out taking into consideration the peculiarities of a particular case. Namely, if there is a certain decision or action (inaction) of a member of the governing body of the corporation, which caused damages for the corporation, then the legality of that specific decision or action (inaction) should be discussed.

In addition to the above said, it is possible that the damages caused to the corporation are not caused by one specific decision or action (inaction), but are the result of a certain period of activity, in which conditions the legality of such activity should be assessed (for example, the director of the corporation allowed minor violations for several months or years, but in combination they have caused damages for the corporation).

In practice, taking into account the risk and unpredictable nature of business, sometimes there arise difficulties when proving the cause-and-effect relation between losses and illegal actions, which have arisen the need to introduce standard evidentiary presumptions of the existence of such a connection in corporate law when committing this or that corporate offense.

Contrary to contractual and delict liability, where the presumption of guilt acts, the obligation to prove the guilt of the person causing the damage in the event of a corporate liability lies on the plaintiff. It is related to the fact that the violation of the duty to act in good faith, reasonably and in the interest of the corporation means not only illegality, but also, according to the general rule, indicates the guilt of the relevant person (Gutnikov, 2018, p. 149, 153).

In this case, the plaintiff shall bear the obligation to prove the fact of causing damages to the

company, its size, the lawfulness of actions, causal link between the respondent's action (inaction) and the adverse consequences that have arisen, which stems from the presumption of legality of the actions of the members of the corporations' management bodies. We also agree with this point of view.

Nevertheless, the issue of the presumption of innocence/guilt (integrity and reasonability) and the allocation of the burden of proof of the members of the corporations' governing bodies in the professional literature is disputable: some scientists believe that the presumption of guilt works (Tikhomirova, 2002, p. 349; Yakovleva, 2009, p. 126), according to others, it is necessary to proceed from the presumption of innocence (good faith and reasonableness) (Sadikov, 1995, p. 29; Abova et al., 1996, p. 28; Molotnikov, 2006, p. 240).

Corporate relations are also characterized by a special notion of guilt when violating the obligation to operate in the interests of corporations, in a fair and reasonable way, which, in fact, identifies with a violation of the obligation to act honestly and reasonably (Gutnikov, 2018, p. 149). At the same time, it is necessary to take into account the business risks.

Therefore, the "business judgement rule" is also applied, according to which the person subjected to liability has the right to make not deliberate unprofitable decisions for a company in conditions of ordinary entrepreneurial and other economic risk. Despite the unprofitability of the decision and even the existence of damages related to that decision, the person subjected to liability is recognized innocent (not violating the obligation to act honestly and reasonable), if he manifested the level of care and veracity, which, due to the nature of turnover, is required from him under the conditions of ordinary entrepreneurial risk (Forrester et al., 2016, pp. 13-16; Klyuchareva, 2015, pp. 132-141; Tsepov, 2015, pp. 159-178; Fedoseev, 2012, p. 174).

The negative consequences for a legal entity itself do not reflect the director's actions (inaction) to be unfair and/or unreasonable, as such consequences may arise due to the risk of entrepreneurial and/or other economic activity. Consequently, the business judgement rule serves as a unique protection method for subjecting the company's managers to corporate liability (*Resolution of the Plenum of the Supreme Court of the Russian Federation dated 23.06.2015 No. 25*, 2015).

Moreover, the Constitutional Court of the Russian Federation noted that it is designed to ensure the protection of the rights and freedoms of shareholders, instead of checking the expediency of the decisions of the board and the general meeting of shareholders, which are endowed with autonomy and wide discretion when making decisions in the business sector (*Resolution of the Constitutional Court of the Russian Federation No. 3-P dated 24.02.2004*, 2004; *Resolution of the Constitutional Court of the Russian Federation dated 12/16/2008 No. 1072-O-O*, 2008).

By the way, a number of typical situations are established in russian judicial practice, in the conditions of which the manager is considered as acted dishonest or unreasonable. At the same time, despite the existence of such circumstances, the manager is not deprived of the opportunity to prove his innocence (*Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated See 30.07.2013. No. 62*, 2013).

The peculiarities of corporate liability are also expressed in adverse effects of corporate offenses and the means of corporate liability (sanctions) corresponding to them. Moreover, it is noteworthy that they have not only proprietary but also non- proprietary nature.

The adverse effects of corporate offenses include not only causing damage but also special consequences such as loss of corporate control, loss of right to the share, the impossibility or significant difficulty of the legal entity to carry out its activity, the impossibility of achieving the goals of the legal entity's activity, the failure to receive profit (dividend), the impossibility of selling shares at a fair price, the impossibility or difficulty of exercising corporate rights, the deprivation or limitation of individual corporate powers.

Corporate liability measures, in addition to damages and penalties, include compensation, removal from a legal entity, deprivation or restriction of the part of corporate rights (prohibition of voting, suspension of membership or participation), early termination of the powers of governing bodies, recognition of the invalidity of transactions on a corporate basis, as well as acts of governing bodies (abolition of corporate of-

fense), imposition of additional obligations (obligation to pay dividends, investment in the property of a legal entity), deprivation of special rights (restriction of legal capacity), liquidation of a legal entity.

Taking into consideration that compensation for damages in civil law is considered as a primary means of liability, a question arises whether any violation of corporate rights and obligations leads to compensation for damages and the application of other means of liability or whether in the corporate law there should be differentiation of sources, subjects, grounds and sanctions.

The professional literature notes that corporate law does not directly envisage the general grounds and conditions of the obligation to compensate for damages caused by violations of corporate rights.

These grounds and conditions are *expressis verbis* provided under law in each specific case, in relation to relevant corporate offenses and, accordingly, the corporate legislation, based on the *numerus clausus* principle, defines the exhaustive list of corporate offenses, for which participants in corporate relations can present each other's requirements. The corporate law relates to civil law as *lex specialis* and *lex generalis* (Gutnikov, 2018, pp. 155-156, 158-162).

In general, we agree that the issues of corporate liability *mutatis mutandis* (to the extent not regulated under corporate law) may be regulated under civil law, provided that they do not contradict the essence and peculiarities of corporate relations.

Referring to subjects of corporate liability, it should be noted that, according to O. Gutnikov**,** such people are considered to be anyone who participates in corporate relations (actually or legally participates in governance), and by virtue of this, they have the opportunity to influence the management processes of a legal person in any way (participants, members of the governing bodies, leading persons, legal entities, creditors, investors, entities, bearing fiduciary duties) (Gutnikov, 2018, pp. 174-175).

While D. Pleshkov (2011) thinks that such subjects are members of the board, the sole executive body, the temporary executive body, members of the collegial executive body, the managing company, the manager, members of the supervising, calculating and liquidation committee, emphasizing the impossibility of wide interpretation of this list (p. 59).

The scientific community also discussed the issue of considering the corporation's management bodies as a subject of corporate liability. The mentioned approach has been considered unjustified, as the governing bodies, as such, are not considered a subject of civil law, a participant in civil-legal relations based on equality, autonomy of will and property independence (Sukhanov, 2011, pp. 191-192; Rubeko, 2007, p. 16; Lomakin, 2008, p. 285; Mogilevskiy, 2001, pp. 102-107).

We believe that corporate governance bodies are not subject to corporate liability, but their members are, these bodies are not subjects of civil law, and the proper exercise of the rights and interests of the corporation depends on the actions (inaction) of their members and the decisions taken by them.

Although the question of the liability of the executive bodies of corporations (director, general director, president) is mainly raised, it is necessary to highlight the characteristics of the liability of the board members and the participants (members) of the corporation.

The liability of the board members is characterized and distinguished by the fact that the board is a collegial body responsible for the general management of the corporation, therefore the issues under its jurisdiction are resolved and the decisions are adopted at the sessions of the board by the collegial order (by voting).

It follows from the above that in practice there are no cases when the personal liability of the board member is reached, because the decisions are taken collegially, so the liability of several members of the collegial body will be joint, and Article 90 (3) of the JSC Law defines that if several persons are liable for the damage caused to the company, they are subject to solidary liability to the company.

An interesting question is what is the nature of the liability (collegial or personal) in the event that the company's charter provides for the right to a decisive vote for the chairperson of the board in case of equal votes, and, accordingly, having the opportunity to block the adoption of this or that decision, cast his vote in favor of the decision, which later caused losses for the company (Pavlova, 2013, p. 182).

We think that in the aforementioned case it is necessary to find out whether there are grounds and conditions for corporate liability, in particular, whether there are violations, damages, the causal link between them, as well as the fault of the chairperson of the board (members of the board) and accordingly, to subject or exempt from liability.

Referring to the issue of the liability of the participants (members) of the corporations, it should be noted that it also has certain peculiarities.

According to A. Savikov (2003), for the participants of the company's meeting, who can be called the members of the company's management body, the law does not provide for the liability, however, that is provided for the members of other collegial bodies of the company's management (board, collegial executive body) (p. 19).

In O. Gutnikov's (2018) opinion, a wide range of persons is subject to corporate liability. In particular, it is possible to hold liable not only the director but also the participants of the legal entity, if the director acted on their instructions or in accordance with the decision of the participants. Moreover, it is emphasized that all persons who are related to the adoption of a decision that is unprofitable for the company are liable (p. 207).

In this regard, Article 90 (1) of the JSC Law stipulates that a person who has the opportunity to participate in the company's charter capital or to significantly influence decisions due to other circumstances should not prompt board members, the director (general director), members of the board and the management board, as well as the management company and the manager to make decisions that contradict the company's interests or the legitimate interests of shareholders that cannot have a significant impact on the company's decisions.

Consequently, unlike the other members of the corporate governance, the major participants (members) of the corporation, do not bear the fiduciary liability (for the benefit of the corporation, acting in good faith and reasonable manner), but have the obligation not to make decisions that contradict the interests of the companyor small shareholders.

Summing up and combining the abovementioned, we suggest the following definition of corporate liability: *corporate liability is a separate, special type of civil liability, which is applied in the corporate relations (mutiatis mutandis in parallel with civil law by applying the rule lex specialis derogat legi generali) and is distinguished by its grounds, conditions, sources, offenses, means of liability and other peculiarities.*

While referring to the application of corporate liability in the case of venture joint-stock companies (hereinafter "VJSC") (Meliksetyan, 2022), it should be noted that the above-mentioned mutatis mutandis is also related to them, but, nevertheless, it is also necessary to define the peculiarities of their nature:

1. In VJSCs, shareholders (founders) bear fiduciary duties not only towards VJSC, but also to venture investor shareholders, while the fiduciary duties and liability of venture investors may be limited, taking into account economic and control components,
2. In addition to fiduciary obligations to venture investors, the shareholders have additional obligations as well as other responsibilities according to investment agreements concluded with venture investors, the violation of which may also lead to the application of corporate liability,
3. In VJSCs, in case of corporate breaches, including the breaches of investment agreements, may result in the liability of the company's shareholders without fault on the grounds, conditions and peculiarities defined under the investment agreements,
4. In the case of VJSCs, the corporate offenses, the adverse effects and the applied sanctions are differentiated, special measures of liability can be applied to venture investors that are not applied to other shareholders, and vice versa, i.e. restriction or deprivation of special rights, privileges and/or benefits, e.g. pay-to-play, vesting, antidilution, etc.

Conclusion

Based on research one can conclude that *corporate liability is a separate, special type of civil liability, which is applied in the corporate relations (mutiatis mutandis in parallel with civil law by applying the rule lex specialis derogat legi generali) and is distinguished by its grounds, conditions, sources, offenses, means of liability*

and other peculiarities.

Meantime, *the corporate liability in VJSCs is characterized by the above-mentioned peculiarities and the investment agreements allow to thoroughly and comprehensively regulate the issues of liability of venture investors and other shareholders.*

Therefore, *we suggest that in the case of VJSCs, the general rules of corporate liability are applied, taking into account the specifics provided under the applicable VJSC legislation. At the same time, it is proposed to provide a special measure of liability for venture investors, i.e. restriction or deprivation of their special rights, privileges and/or benefits.*

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