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LEGAL ASPECTS OF THE CORPORATE GOVERNANCE

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ПРОБЛЕМИ

ЦИВІЛЬНОГО ПРАВА ТА ПРОЦЕСУ

Тези доповідей учасників
науково-практичної конференції,
присвяченої 95-й річниці від дня народження
Олександра Анатолійовича Пушкіна

22 травня 2020 р.

Харків
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2020

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П 78

Друкується згідно з рішенням організаційного комітету
відповідно до доручення Харківського національного університету
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П 78

Проблеми цивільного права та процесу : тези доп. учасників
наук.-практ. конф., присвяч. 95-й річниці від дня народження
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Право на інформацію про діяльність корпорації в контексті корпоративних відносин є складовою частиною суб'єктивного цивільного права участі в корпоративній структурі. Безумовно інформація є самостійним об'єктом цивільних правовідносин. Але в корпоративних відносинах вона не виокремлюється як самостійний об'єкт прав та обов'язків, а є елементом правомочностей володільця корпоративних прав. Корпоративні права є оборотоздатними. Разом з корпоративним правом як об'єктом правовідносин може передаватися суб'єктивне право на інформацію про діяльність корпоративної структури.

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2. Жорнокуй Ю.М. Цивільно-правова природа корпоративних конфліктів в акціонерних товариствах: автореф. дис. ... докт. юрид. наук: 12.00.03. Харків, 2016. 44 с.

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LEGAL ASPECTS OF THE CORPORATE GOVERNANCE

The «corporate governance» term has different variations. One of such notions of the corporate governance as a system under which business corporations are managed and controlled. This term describes procedures, customs, policies, laws and institutions that govern the corporation.

§

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We are convinced that *the corporate governance is a form of organization of activity of a corporation through the orderly influence of the subjects of such governance, its interactions at microeconomic processes, which ensure its optimal socio-economic existence in the macroeconomic environment.*

The concept of the term «corporate governance» indicates the necessity to define it by categories not only of legal science.

The legal aspect of an issue of corporate governance is caused by two factors:

1. *Ensuring the judicial personality of the corporation, which provides the implementation of its proper management;*

The legal capacity of the corporation is realized by the activities of certain natural persons, associated to such corporation by a certain legal connection. The activity of responsible persons is mediated by an authority of corporation management with a certain volume of powers through the variability of the directions of such an implementation.

2. *The prudence of corporate conflict among corporate affiliates.*

The corporate governance is not limited to the category of legal capacity of a legal entity. Except for the institutional aspect as a method of legal entity's implementation of its legal personality, the corporate governance has a meaningful content, which foresees the creation of such a model of interaction between all the corporation's stakeholders, including the participants of corporation relations, which is able to ensure the existence of the corporation in civil circulation according to the goal of its creation and activity. The activity management of the corporation inevitably gives rise to conflict of interests of a specified circle of persons.

The corporate governance exercising is achieved by the activity of the *corporation management entities*, which ensure a correspondent organizational influence. Despite the polyvariety of entities, who are involved in the activity of the corporation and somehow influence on its management, *the corporation management entity is one who has direct influence on management governance decision-making and its realization.* Therefore, the category of corporate governance personality is revealed through a feature of connectivity in decision-making of the corporation's activity. *Such an entity is a responsible authority of corporate governance.* Due to a vivid activity of these entities, the functioning of the legal entity is ensured, as a participant of civil relations, its legal personality.

We may see from the above that the *formula of corporate governance consists in the fact that the entity of the corporate governance is a person who ensures its legal personality.*

Consequently, in the aspect of the mentioned above, we offer to divide a legal status of the participant of corporate relationship and the entity of corporate governance. This way, the participant (founder) of the corporation doesn't realize direct management and that's why he/she cannot be a correspondent management entity. He/she exercises an appropriate right to management by the participation in formation and activity of an appropriate authority of corporate governance body, which is the General meeting. Any decision of the participant (founder) of the corporation on the aspects of corporate governance doesn't have an independent sense. Such a decision should be of a consistent nature with respect of all stakeholders (participants of the corporation) on a correspondent management issue. Agreement and adoption of such a decision causes the creation and activity of a management body, that is empowered to express public position on behalf of the participants (founders) of the corporation through the adoption of a relative act of corporate governance (act of corporate rulemaking). As a participant of corporate legal relations, the participant (founder) of the corporation exercises exclusively his/her corporate capacity.

Due to the differentiated nature of the corporate governance, the multidimensional nature of the corporation's realization directions of the legal personality, its governance is concentrated within the polyvariative limits. Because of the disbalance of the law enforcement and the level of general competence, the concentration of management leverages of governance within the limits of one subject inevitably influences the efficiency of taking and realization of management decisions.

Thus the subject's activity of the corporate governance has a variable nature and competence component, which is the differentiation of the subjects of governance in relation to the area of its competence. This way the relevant bodies realize the legal personality of the corporation. Their systematization requires the construction of the coordination model between them.

The first (basic) level of the construction is the governing body, which is formed by a participant (founder) of the corporation and is a legal means of self-organization of collective interest. Thus it is a source in the governance system of the corporate governance as it unites key participants of corporative legal relations in it and exercises corporative

rulemaking. Such a body defines the model of the governance system of the corporation in general. Its formation from the side of the participant (founder) of the corporation gives him/her exclusive powers of definition of the fate of the corporation, directions of its activity. In addition, such an authority forms other authorities of the corporate governance in the base of the process, of which subject-functional aspect of their competence, organization of their activity.

In order to ensure a constant coordination between the participants (shareholders) of the corporation in the period between their meetings, which has as a goal an increase of efficiency of the superior body of the corporate governance, a special presidium is created from the number of the minority and majority participants (founders) of the corporation. Its formation occurs by a proportion of an equal, from the total quantity of participants, of the representation of minority and majority founders of the corporation and doesn't depend on a size of their share in the authorized capital of the corporation. In such a way the balance of interests of the minority and majority participants (founders) of the corporation is ensured, when taking certain management decisions.

The second level is the creation and functioning of the authority of implementation of the decisions of the corporate governance, taken by the superior body. Thus level has different forms of its manifestation (board, supervisory board, directorate, director). In such a way, the overall competence Superior body of the corporate governance is diversified in special (executive) powers that are delegated to separate governance bodies. The idea of such a separation consists, from one side, of the increase of efficiency of the corporate management, and from another side, and of avoidance of interest conflict in the competence of such bodies. The executive body is formed of persons who are not connected neither with correspondent superior body of the corporate governance, persons who are the part of it, nor with the corporation as a whole (external independent directors).

The quota principle of formation of the executive body of the corporate governance (board, directorate) ensures equal representation of interests of main stakeholders of the corporation (employees, participants (founders) of the corporation).

If the first level of the corporate governance is a static form of self-organization of the participants (founders) of the corporation, then the second one has a dynamic structure of its construction. Such a

dynamics is conditioned by many factors (the organizational and legal corporation form, the quantitative composition of its participants (founders), the character and types of its activity etc). It determined the polyvariety of the structure of the second level of management.

A combinatorial set of elements of second level of the corporate governance, definition of the configuration of its relations according to the superior corporate governance body, creates a relevant model of the corporate governance. This model is an explication of the practical form of the corporate governance.

According to the Agency theory, the corporate governance is performed by a management, which is hired by a principal. The balance of interests between them is ensured by the outcome of such governance.

According to this theory, the corporate governance is characterized by the weakness of self-organization and activity of the superior body of the corporate governance (due to the number of the participants (founders) of the corporation, their minority), a significant strengthening of the role of the executive body of management. In this case institutional investors make autonomous decisions regarding the evaluation of the performance of the executive management body through the use of their corporative rights with the mediation of stock market instruments. The available contradictions between the management body of the corporation and its participants (shareholders) are the characteristic feature for the English-American management model. The investment activity of the participant (founder) of the corporation is more labile than the changing process of the corporation management in such economic conditions.

The Stakeholder theory of the corporate governance, unlike the previous one, focuses on keeping the balance of interests of the corporation's stakeholders. Despite the fact that in this case, the sense of the corporate governance is significantly narrowed by the framework of the interest of a certain group of persons, nevertheless it emphasizes the role of governance more clearly in ensuring the functioning of the corporation. The main principal of such a model becomes the concentration of the capital in the hands of a narrow circle of persons and establishment of a severe control over it.

In its turn, the stakeholders are not only the participants (founders) of the corporation, but also the management of the corporation, staff, contractors, state etc, which, according to scientists,

should be classified as substantive or contextual stakeholders, presenting social system, in which the corporation, contract stakeholders function.

Nowadays such legal traditions, accepted in the French corporate legislation, which provides that a joint-stock company is rules by the Administrative Board, composed of not less than three persons, a maximum quantity of which may not exceed 18 (Article L. 225–27 Code de commerce). The institute of participation of the employees in the management of the corporation is a form of ensuring of labor rights of an employee.

The variability of factors which influence the formation of the corporate governance model, being under the impact of numerous theories, each of which has its weak and strong sides, leads to a set of combinations of their components. This process has a non-linear nature. Thus, none of the above-mentioned theories, in its “pure form”, can be implemented.

In order to describe the corporate governance, one needs to use additional combinations of classical ideas, developed by the mentioned above theories of the corporate governance, the complex of which can give a thorough information about the essence of the corporate governance as an integral phenomenon.

The involvement of the society in the corporate governance has positive leverages of influence in context of securing the interests of the employees. Thus thesis of the social contract is absorbed by the *integrative theory of the corporate governance*.

Supporting the thesis of critical perception of the society’s primary importance in the activity of the corporation and shaping its inner policy, it is worth mentioning on the relevant position of extending the limits of legal responsibility of the corporation by persons’ involvement, who have the influence on taking management decisions in the corporation. The relevant principles are taken into account by the provisions of the integrative theory of the corporate governance, presented by the author of the study.

The formula of efficiency of the corporate governance is precisely in the unity of the diversity of interests of persons. The clear identification of interest of a separate group of persons and its representation in the process of governance of the corporation is a form of prevention of abusive use of the construction of a legal entity in the interests of another group of persons who have relation to the management of a legal entity. A social compromise is achieved

throughout the mentioned way and due to a mutual balance of interests. At the microsocial level its realization is ensured by the functioning of management bodies of the corporation, formation of the structure of such bodies, interaction of the subjects of the corporate governance between each other.

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ОБНОВЛЕННЯ КНИГИ ДРУГОЇ ЦК УКРАЇНИ З УРАХУВАННЯМ ДОСВІДУ РЕГУЛЮВАННЯ ОСОБИСТИХ (НЕМАЙНОВИХ) ПРАВ У ЦИВІЛЬНОМУ КОДЕКСІ КВЕБЕКА

Процес оновлення Книги другої ЦК України потребує аналізу найбільш сучасних кодифікацій світу для того, щоб не втратити можливість врахувати досягнення наукової і законотворчої думки колег з інших країн. Цивільний кодекс Квебека, який був прийнятий Національними Зборами канадської провінції Квебек 4 червня 1991 року у якості гл. 64 Зібрання законів Квебека являє у цьому контексті неабиякий інтерес, в тому числі тим, що він набув чинності 1 січня 1994 р. у відповідності з Декретом 712-93 від 19 травня 1993 р., тобто ще до прийняття чинного ЦК України. Для його підготовки було задіяно, починаючи з 1966 року не лише урядові органи, але майже 150 юристів, нотаріусів, суддів, професорів, державних службовців, консультантів і дослідників, об'єднаних у тридцять комітетів, які на протязі дванадцяти років надали близько п'ятидесяти детальних доповідей з усіх питань, які стосуються традиційних предметів цивільного права, ще дванадцять років знадобилося для того, щоб уряд прийняв новий кодекс [1, с. 9]. Отже системний перегляд цивільного законодавства канадської провінції Квебек (не лише кодексу) зайняв чимало часу і складав колосальну кількість матеріалів, які у повному обсязі, включаючи самий кодекс,

Наукове видання

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