



HAL
open science

Derivative Claim in the System of Remedies for Corporate Legal Relations

Anatoliy Kostruba

► **To cite this version:**

Anatoliy Kostruba. Derivative Claim in the System of Remedies for Corporate Legal Relations. *Revista Jurídica Portucalense*, 2023, 35, pp.6-23. 10.34625/issn.2183-2705(34)2023.ic-01 . hal-04476279

HAL Id: hal-04476279

<https://hal.science/hal-04476279v1>

Submitted on 24 Feb 2024

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Anatoliy KOSTRUBA

*Derivative Claim in the Ukrainian System of Remedies for Corporate Legal
Relations*

DOI: [https://doi.org/10.34625/issn.2183-2705\(34\)2023.ic-01](https://doi.org/10.34625/issn.2183-2705(34)2023.ic-01)

Secção I

Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

Derivative Claim in the Ukrainian System of Remedies for Corporate Legal Relations

Ação derivada no sistema ucraniano de recursos para relações jurídicas empresariais

Anatoliy V. KOSTRUBA¹

ABSTRACT: Corporate law contains many gaps and deficiencies in legal doctrine to date. Therefore, it is important to identify these shortcomings and propose solutions to eliminate them. This paper examines the derivative claim, which ensures the restoration of rights and interests of any person participating in corporate legal relations. The study utilizes dialectical, historical, and comparative methods to analyze the establishment, development, and operation of economic entities. The analysis identifies key trends in corporate rights redress, as well as the advantages, disadvantages, and efficiency of applying derivative claims in the system of remedies for subjects of corporate legal relations. The study concludes that a derivative claim is an essential instrument for corporate governance and conflict resolution. However, further research is needed to develop practical recommendations for addressing issues in Ukrainian corporate law.

KEYWORDS: legal interest, economic activity, derivative claim, legal entity, conflict resolution.

RESUMO: O direito das sociedades contém muitas lacunas e deficiências na doutrina jurídica até à data. Por isso, é importante identificar essas lacunas e propor soluções para as eliminar. O presente trabalho analisa a ação derivada, que assegura a restauração de direitos e interesses de qualquer pessoa que participe das relações jurídicas societárias. O estudo utiliza métodos dialécticos, históricos e comparativos para analisar a criação, o desenvolvimento e o funcionamento das entidades económicas. A análise identifica as principais tendências na reparação dos direitos das empresas, bem como as vantagens, desvantagens e eficácia da aplicação das acções derivadas no sistema de reparação dos sujeitos das relações jurídicas empresariais. O estudo conclui que a ação derivada é um instrumento essencial para a governação empresarial e a resolução de conflitos. No entanto, é necessária mais investigação para desenvolver recomendações práticas para a resolução de problemas no direito das sociedades na Ucrânia.

PALAVRAS-CHAVE: interesse jurídico, atividade económica, ação derivada, entidade jurídica, resolução de conflitos.

Introduction

The actions of a corporation's management body, aimed at realizing the outcomes of entrepreneurial activities and serving the interests of legal entities and their participants, establish the legal identity of the corporation's founders. However, in some instances, conflicting or mutually incompatible goals may be pursued by various parties during the corporation's management body

interactions with other stakeholders in corporate legal relations concerning the organization and economic activities. This issue directly pertains to the effectiveness of remedies for corporate legal relations and the selection of appropriate legal means to protect not only the rights but also the interests of the participants^{1,2}. These include derivative property and non-property claims favouring the corporation pressed by other persons (in particular, for recovery and/or recognition of transactions as invalid), tort claims of the corporation or from other persons to its management body, as well as the liability of the participant (founder) of the corporation for obligations to third parties (piercing the corporate veil). These are the so-called bonum requirements (*bonum* – from Latin “goods, benefit”), the main purpose of which is to provide preferences for the corporation to prevent possible losses from the activities of dishonest persons associated with it^{3,4}. Along with that, it is crucial to concentrate on a derivative claim, which assures the restoration of a person's participation in corporate legal contacts by redressing their rights and interests in a different manner. A person whose secondary claim is mediated by an objectified interest is the subject of a derivative claim. This entails the selection of legal interest remedies that are equivalent to those for person rights⁵.

The problems related to remedies for corporate rights have been studied by many researchers. In the article Yu. M. Zhornokuy⁶ focuses on the civil law aspects of corporate conflicts in joint stock companies. The article explores the legal framework and principles that govern corporate conflicts in joint stock

¹ Department of Civil Law, Vasyl Stefanyk Precarpathian National University, 76000, 57 Shevchenko Str., Ivano-Frankivsk, Ukraine.

¹ ZHORNOKUY, Yu. M. Corporate conflicts in joint stock companies: Civil law aspect. Kharkiv: Pravo, 2015.

² ZHORNOKUY, Yu. M. Squeezeout and voluntary share repurchase: law enforcement issues. In: Civil law of Ukraine: new challenges and prospects for development: Proceedings of the XVIII International scientific-practical conference dedicated to the 98th anniversary of the birth of dr., prof. V.P. Maslov (pp. 148-157). Kharkiv: Pravo, 2020.

³ KOSTRUBA, A. V., MAYDANYK, R. A., LUTS, V. V. Bonum requirements of the beneficiary in the corporate rights protection system in Ukraine: Implementing best practices. *Asia Life Sciences*, 2020, vol. 1, pp. 189-207.

⁴ YAROSHENKO, O. M., VAPNYARCHUK, N. M., BURNYAGINA, Y. M., KOZACHOK-TRUSH, N. V., MOHILEVSKYI, L. V. Professional development of employees as the way to innovative country integration. *Journal of Advanced Research in Law and Economics*, 2020, vol. 11, no. 2, pp. 683-695.

⁵ CENOLLI, S., OSMONOVA, A., ASKAROVA, C., MILLER, A. The role of personnel management in increasing productivity at agricultural enterprises in Mongolia. *Scientific Horizons*, 2023, vol. 26, no. 6, pp. 146-155.

⁶ ZHORNOKUY, 2015.

companies in Ukraine, as well as the various types of conflicts that can arise and the potential legal consequences for parties involved. It also analyzes relevant court cases and provides recommendations for best practices in managing and resolving corporate conflicts. In another research⁷, the author explores the legal framework and procedures for squeeze outs and voluntary share repurchases in Ukraine, as well as the potential law enforcement issues that can arise in the implementation of these mechanisms. According to R. A. Maidanyk⁸, the imperfect theoretical reasoning of the derivative claim model in the procedural law of Ukraine raises doubts regarding the adequacy of protecting a minority of shareholders, specifically due to the lack of standards for proving illegal or dishonest behavior of officials. V. O. Kucher⁹ discusses the key features of the civil procedure system in Ukraine, such as the rules and procedures governing civil lawsuits, the role of the courts and judges, and the rights and obligations of parties involved in civil proceedings.

The article aims to provide an analysis of the challenges and opportunities for improving the corporate rights protection system in Ukraine, and to offer recommendations for implementing best practices that can enhance the effectiveness and fairness of the system.

Materials and Methods

The study employed a variety of linked, complementary research techniques in achieving the goals of the scientific research. Dialectical, historical, and comparative methods were used to analyze the creation, growth, and operation of economic entities and provide the theoretical and methodological foundation. Analysis of the Civil Code of Ukraine's provisions, which control the rights of business organizations, was done, also the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine relating to Investors' Rights Protection"¹⁰ and The Economic Procedural Code of Ukraine¹¹ were analyzed.

⁷ ZHORNOKUY, 2020.

⁸ MAIDANYK, R. A. Development of private law of Ukraine. Kyiv: Alert, 2016.

⁹ KUCHER, V. O. Civil procedure of Ukraine. Lviv: Lviv State University of Internal Affairs, 2016.

¹⁰ Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine relating to Investors' Rights Protection" No. 289-VIII, 2015.

¹¹ Economic Code of Ukraine, 2003.

This study placed significant emphasis on theoretical generalization and classification techniques. These methods were employed to explore fundamental concepts in legal entity responsibility, individual rights and responsibilities, the nature of business disputes, and more. Through these techniques, we were able to establish the procedural role of a derivative claim in remedying subjective rights or interests.

Using analytical methods, we delved into key concepts central to our research, such as "derivative claim," "weak party," "strong party" (in corporate law), "presumption of innocence," and others. Additionally, we analyzed the role of shareholders (the "weak party") in corporate law and identified deficiencies in the regulation of shareholder rights through synthesis.

Employing a formal legal approach, we characterized corporate law itself, studying its primary functions, subjects, and objects. We provided an overview of Ukrainian corporate law within this framework and characterized civil legislation, which encompasses corporate law.

The hermeneutic method facilitated an examination of current civil and economic laws in Ukraine, along with the global system of corporate rights remedies. With this method, we outlined procedures for enforcing shareholder rights remedies in Ukraine, aligned with a broader context of economic Europeanization and the establishment of a rule of law-based civil society. These procedures are grounded in legal concepts, including the statutory definition of a corporate governance body's fiduciary obligation and the principles of reasonableness, justice, and good faith found in Ukrainian civil law.

Results and Discussion

The concept of a derivative (indirect) claim finds its origins in the practice of English trusts, where individuals manage property in trust on behalf of others. Similarly, directors of corporations bear responsibilities stemming from their role as managers of the assets and finances on behalf of the organization's owners, known as participants or founders. Trust managers are entrusted with the management of someone else's property, obliging them to act in the best interests of the corporation and take their responsibilities seriously.

One of the earliest judgments on a derivative claim rendered by American courts dates back to the early 19th century¹². The procedural motivation of the plaintiff in these legal strategies can be summarized as "statutory remedy through remedy for interests." It revolves around protecting personal interests by addressing corporate rights because, to some extent, participant (founder) rights only serve as an expression of legal interests.

For example, Chinese corporate law does not explicitly address the issue of derivative claims. Nevertheless, Chinese courts have entertained corresponding claims from shareholders. In this context, it is imperative that the Chinese legislature establishes clear procedural rules. Notably, the current Chinese legislation is lacking in this regard, creating a gap in the legal procedure.

In contrast to the development of derivative claims in the United States, which was driven by practical necessity and recent judicial law-making in response to contentious corporate law issues, the evolution of this institution took a different path in Ukraine. It transitioned from being a topic discussed in academic papers and legal discussions to becoming the subject of legislative consolidation, with alternative standards for such claims being established. However, despite extensive preparation, practical legal research has not accorded this legal instrument for resolving business conflicts the proper recognition it deserves, in contrast to the existing historical and theoretical conditions.

Article 133 of the Labor Code of Ukraine¹³ establishes that the heads of enterprises, institutions, organisations and their deputies, as well as the heads of structural divisions at enterprises, institutions, organisations and their deputies bear limited material liability – in the amount of damage caused through their fault, but not more than their average monthly earnings, if the damage to the enterprise, institution, organisation is caused by excessive monetary payments, incorrect accounting and storage of material, monetary or cultural values, failure to take necessary measures to prevent downtime, production of substandard products, theft, destruction and damage to material, monetary, or cultural values. In general, according to the provisions of the current legislation of Ukraine, employees cannot be held liable neither for damage that belongs to the category

¹² Robinson v. Smith, 1832.

¹³ Labor Code of Ukraine, 1971.

of normal production and economic risk, nor for profits not received by an enterprise, institution, organisation, and for damage caused by an employee who was in a state of extreme necessity. Therefore, not only are regulatory requirements for modifying the scope of duty of the corporation's management body unavailable, but theological conditions are also missing¹⁴.

Civil liability is based on civil legislation, which establishes rules and norms regulating relations between individuals and legal entities. In accordance with civil legislation, each subject of civil law is responsible for their actions if they cause harm to another subject¹⁵. Civil liability can arise from breaches of contractual obligations, unlawful damage to property or health of another person, unlawful actions of officials, and other similar circumstances. The objective elements of a civil offense are the external signs of an action (or inaction) that lead to a violation of the law. Examples of this include causing damage to property, breaching contractual obligations, illegally using someone else's intellectual property, etc.¹⁶ The objective elements determine what was done and how it conflicts with the law. The subjective elements of a civil offense are intent or negligence in actions, meaning the intention to cause harm or insufficient attention, resulting in damage. The subjective elements help in determining whether the violation was committed knowingly and intentionally or was simply a result of accidental non-compliance with the rules¹⁷. To establish a civil offense, both objective and subjective elements are required, meaning a wrongful act committed with intent or negligence.

Proponents of the notion of causing as the foundation of civil culpability acknowledge the reality of harm being caused. The subjective causes of such damage, however, are irrelevant to the legal standing of the responsible party's acts. The most important point is that there must be a connection between a

¹⁴ TOMASHEVSKI, K., YAROSHENKO, O. Problems of labour legislation codification in belarus and ukraine: History, current situation and prospects. *Transition Studies Review*, 2020, vol. 27, no. 2, pp. 41-49.

¹⁵ YAROSHENKO, O. M., SLIUSAR, A. M., SEREDA, O. H., ZAKRYNYTSKA, V. O. Legal relation: The issues of delineation (on the basis of the civil law of Ukraine). *Asia Life Sciences*, 2019, no. 2, pp. 719-734.

¹⁶ LUTSENKO, O. Bringing civil servants to liability for disciplinary misconduct in judicial practice of Ukraine, Poland, Bulgaria and Czech Republic. *Journal of Advanced Research in Law and Economics*, 2017, vol. 8, no. 1, pp. 103-112.

¹⁷ PETERSONE, M., KRASTINS, A. V., KETNERS, K. In-service training system organization improvement at customs administrations. *Eurasian Studies in Business and Economics*, 2016, pp. 201-216.

person's actions and the actuality of injury. The Civil Code of Ukraine (hereafter referred to as "CCU")¹⁸ states that further examination of the circumstances that caused the harm is not necessary in this situation (paragraph 2, article 612; paragraph 1, article 614; and article 618). Therefore, regardless of objective or subjective factors whose existence affects or may impact the incorrect execution of responsibilities under such an agreement, the risk of non-performance of the terms and conditions of the agreement is carried by the party to it. According to this formula, the grounds for tort responsibility were also created in line with Ukrainian civil law (Articles 1170, 1173-1177, and 1187 of the CCU)¹⁹.

It is noteworthy that the theory of civil law regulates in detail the problem of substantiating presumption of innocence in tort relations, in particular, ensuring compensation for harm caused by a source of increased danger. The presumption of innocence is a legal principle that states that every person is considered innocent until proven guilty in a court of law. This means that the accused is not required to prove their innocence, and the burden of proof lies with the accuser to prove guilt. The presumption of innocence is a fundamental guarantee of a fair trial and protection of citizens' rights. It also requires that any judicial process must be based on the presumption of innocence and strictly adhere to the principles of legality, objectivity, and independence of the judiciary²⁰.

In corporate relationships, the "weak party" is usually considered to be the shareholders or participants of the company that does not hold a sufficient number of shares or stakes to influence the decisions made at the general meetings of shareholders or participants. Such shareholders or participants may find themselves in a somewhat uncomfortable position if the company's management makes decisions that do not correspond to their interests. The "strong side" in corporate relationships, accordingly, is the shareholders or participants who hold a controlling stake in the company and, therefore, have the ability to influence the decisions made. In addition, the "strong side" can also

¹⁸ The Civil Code of Ukraine, 2003.

¹⁹ GALANIS, M. Corporate law versus social autonomy: Law as social hazard. *Law and Critique*, 2021, vol. 32, no. 1, pp. 1-32.

²⁰ BORYSOVA, V. I., IVANOVA, K. Y., IUREVYCH, I. V., OVCHARENKO, O. M. Judicial protection of civil rights in Ukraine: National experience through the prism of European standards. *Journal of Advanced Research in Law and Economics*, 2019, vol. 10, no. 1, pp. 66-84.

include the company's management and its key employees who have significant experience and resources to protect the company's interests in various situations²¹.

In Ukrainian corporate law, the principle of protection of the weaker party is implemented through various means. For example, shareholders who do not hold a controlling stake have the right to protect their interests by appealing to the court or forming a coalition with other shareholders. Additionally, Ukrainian corporate law establishes mandatory requirements for providing shareholders or participants with information about the company's activities, reporting, profit distribution, and other important matters. This allows the "weaker party" to more consciously and effectively protect their rights and interests. Another mechanism for protecting the weaker party in Ukrainian corporate law is the use of special procedures such as arbitration and judicial proceedings, which allow disputes between shareholders and participants of the company, as well as with the company itself, to be resolved. In case of violation of the rights of the "weaker party", the court can make decisions aimed at protecting their interests, including the suspension of transactions or decisions made by the company. It is true that in this situation, the primary function of civil law is to provide an equal playing field for all parties to a legal relationship by granting one of them particular rights. This is accomplished by either imposing greater duties of a stronger party or by recognizing additional rights for a weaker party²².

Derivative claims are one of the forms of protection of the weak party in corporate legal relations. A derivative claim is a means of protecting the rights and interests not only of participants in corporate relationships, but also of the company itself, in whose interests such an action is brought. A derivative action allows shareholders or participants of a company to protect the rights of the company if they have been violated by the company's management or its employees. For example, such an action may be brought when the company's management fails to take action to recover damages caused to the company by third parties. Thus, a derivative action allows for the protection of the interests of

²¹ BILIAVSKA, Y., MYKYTENKO, N., ROMAT, Y., BILIAVSKYI, V. Category management: Industry vs trade. *Scientific Horizons*, 2023, vol. 26, no. 1, pp. 129-150.

²² BODNAR, T. V., DZERA, O. V., KUZNETSOVA, N. S. Contract law of Ukraine. The general part. Kyiv: Yurinkom Inter, 2008.

the company and its participants, the prevention of violations of legislation and activities harmful to the company. It is an important tool of corporate law aimed at protecting the rights and interests of all parties involved in the company's operations. A derivative claim is one of the varieties of a corporate claim.

By categorizing claims based on substantive reasons, corporate claims may therefore be distinguished. In light of the nature of the protected interest and the identity of the beneficiary, derivative claims are thereafter classified in a fundamentally different manner. The corporation itself is the beneficiary of an indirect claim, the researcher claims, as it is in its favour when the awarded sum is paid out. Since they personally gain nothing, the advantage to the stockholders is indirect²³. Notably, the theory of civil process employs a variety of classification criteria for claims. Each of them has a particular direction and function in ensuring the rights, and interests of participants in procedural legal relations are effectively protected by the law. The subject matter of the dispute, the court's jurisdiction, the issue of the admissibility and ownership of the evidence, the amount of the filing fee, the nature of procedural remedies, etc. can all be determined, in particular, by classifying the claims in accordance with the subject criteria of both direct and derivative claims. In other words, it has substantial practical relevance beyond merely a theoretical one.

Ukrainian law schools emphasize that in order to file such claims, a shareholder must first make an official appeal to the executive body, detailing their demands and the procedures they must follow to do so^{24,25}. Derivative claims are evidently only viewed as a procedural remedy for parties to corporate legal relations under the prevalent philosophy of civil law. This remedy may only be applied in situations covered by corporation law. Only a corporate shareholder's claim in the corporation's interests is referred to as a derivative claim. In order to protect the interests of minority shareholders against abuse by the management body, a derivative claim is a viable remedy. In particular, the growth of the market economy has consolidated and given rise to a wide range

²³ ATAMANCHUK, I. V. The right to judicial protection of civil rights and interests in the light of European standards. In: Civil law of Ukraine: new challenges and prospects for development: Proceedings of the XVIII International scientific-practical conference dedicated to the 98th anniversary of the birth of dr., prof. V.P. Maslov (pp. 75-78). Kharkiv: Pravo, 2020.

²⁴ ZHORNOKUY, 2015.

²⁵ Robinson v. Smith, 1832.

of new ideas, including “corporate law”, “corporate conflicts”, and, therefore, the means of redressing the rights of members of diverse associations, including indirect claims²⁶.

The problems of the implementation of corporate law and the role of shareholders in it have long caused discussions among researchers in the field of jurisprudence. For example, T. Ucaryilmaz Deibel²⁷ explores the legal framework surrounding global value chains and how it affects corporate social responsibility (CSR) practices. The author argues that companies operating in global value chains have a responsibility to ensure that their activities do not contribute to human rights violations, environmental damage, or other social harms. This responsibility is reinforced by a range of international legal frameworks, including the United Nations Guiding Principles on Business and Human Rights and the International Labour Organization’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The author highlights the importance of responsible corporate behavior in the context of global value chains and the need for companies to take a proactive approach to addressing social and environmental risks.

The article by M. Galanis²⁸ critically examines the role of corporate law in shaping social autonomy and argues that corporate law can be a social hazard. One should agree that the narrow focus on shareholder value in corporate law has contributed to a range of social harms, including income inequality, environmental degradation, and exploitation of workers. It can be suggested that corporate law should be reformed to promote greater social autonomy and to address these social harms²⁹.

The idea expressed in the study by C. Mayer³⁰ that the current legal framework is insufficient to address the social and environmental challenges facing modern corporations should also be seconded. The potential role of the law of purpose, which would require companies to articulate a clear and

²⁶ ATAMANCHUK, 2020.

²⁷ UCARYILMAZ DEIBEL, T. Corporate social responsibility in the legal framework of global value chains. *Law and Development Review*, 2022, vol. 15, no. 2, pp. 329-356.

²⁸ GALANIS, 2021.

²⁹ CHEREVKO, N. Features and legal regulation of the procedure for granting employee consent to work in new working conditions. *Law Journal of the National Academy of Internal Affairs*, 2022, vol. 12 no. 2, pp. 57-63.

³⁰ MAYER, C. What is wrong with corporate law? the purpose of law and the law of purpose. *Annual Review of Law and Social Science*, 2022, vol. 18, pp. 283-296.

comprehensive purpose that considers all stakeholders' interests is also examined. This would provide a framework for corporate decision-making that is aligned with broader social objectives.

Some articles have examined specific corporate law litigation in detail. For example, in the article by N. Safari and M. Gelter³¹ critically analyze the collapse of British Home Stores (BHS) and explore the potential for employees to bring a derivative claim against the company's directors for breaches of their fiduciary duties. The article argues that employees, as a key stakeholder in the company, should also be able to initiate derivative claims under certain circumstances, and this would provide an avenue for employees to hold directors accountable for any breaches of their fiduciary duties that have a direct impact on employees, such as underfunding pension schemes. In addition, the article discusses the potential benefits and challenges associated with allowing employees to bring derivative claims, such as improved transparency and accountability, as well as the potential for legal complexities and conflicts of interest. In conclusion, the article provides a thorough analysis of the potential for employee derivative claims against directors and underscores the need for greater corporate governance accountability.

The works of D. Gibbs-Kneller and C. Ogbonnaya³², Gibbs-Kneller and D. Gindis³³ are dedicated to the derivative claim and the problems associated with it. The ideas expressed in the aforementioned study are reasonable in the aspect that there is a significant gap between the legal framework surrounding the derivative claim and its actual application in practice. The difference is that the present study examined the problem within the framework of Ukrainian legislation, while the authors of the analyzed research studied the problem within the framework of British legislation. The study³⁴ suggests that there is a need for greater awareness and understanding of the derivative claim among shareholders and the wider business community. The authors also suggest that

³¹ SAFARI, N., GELTER, M. British home stores collapse: The case for an employee derivative claim. *Journal of Corporate Law Studies*, 2019, vol. 19, no. 1, pp. 43-68.

³² GIBBS-KNELLER, D., OGBONNAYA, C. Empirical analysis of the statutory derivative claim: De facto application and the sine quibus non. *Journal of Corporate Law Studies*, 2019, vol. 19, no. 2, pp. 303-332.

³³ GIBBS-KNELLER, D., GINDIS, D. De jure convergence, de facto divergence: A comparison of factual implementation of shareholder derivative suit enforcement in the United States and the United Kingdom. *European Business Law Review*, 2019, vol. 30, no. 6, pp. 909-930.

³⁴ GIBBS-KNELLER and OGBONNAYA, 2019.

there may be a need for reforms to the legal framework to address some of the challenges associated with the derivative claim, such as the sine qua non requirement. Another study³⁵ highlights a need for greater awareness and understanding of the implementation of shareholder derivative suits among stakeholders in both countries. It is also suggested that there may be a need for reforms to the legal frameworks to address some of the challenges associated with shareholder derivative suits, such as the potential for abuse.

In the research by M. Miao et al.³⁶ the relationship between corporate law, government intervention, and corporate ownership structure is examined. The authors argue that the legal framework of corporate law can have a significant impact on the ownership structure of corporations. The article also explores the role of government intervention in shaping corporate ownership structures. The authors suggest that government intervention can be an important factor in promoting a more diverse ownership structure, as it can create incentives for companies to adopt more diversified ownership structures.

It is established by the present study that a better understanding of these claims is required in order to ascertain the legal status of a derivative claim. First off, it is contended that additional substantive ties, in addition to corporate ones, should be taken into account when protecting the subjective civil rights and interests of participants (founders) in a business through a derivative claim³⁷. And Ukrainian civil law has used this strategy before. The protection of copyright and related rights of their subjects is thus carried out in accordance with Article 47 of the Law of Ukraine "On Copyright and Related Rights"³⁸, which also grants non-exclusive rights to use the objects of copyright and (or) related rights to any person who enters into agreements with collective management organizations. Such claims may be used in areas other than corporation law according to American legal traditions.

The derivative claim, as an essential tool in corporate governance and conflict resolution, finds its roots and nuances diverging across different

³⁵ GIBBS-KNELLER and GINDIS, 2019.

³⁶ MIAO, M., LIU, A., SHI, J. Corporate law, government intervention and corporate ownership structure. *Asian Journal of Law and Economics*, 2019, vol. 10, no. 3, 0023.

³⁷ VOVK, M., YURKEVYCH, Y. Legal status of the business entities in Ukraine in the context of changes in current legislation. *Law Journal of the National Academy of Internal Affairs*, 2022, vol. 12, no. 2, pp. 9-15.

³⁸ Law of Ukraine "On Copyright and Related Rights" No. 3792-XII, 1993.

jurisdictions. A comparative analysis of the treatment of derivative claims in various countries can lend insights into the potential evolution and application of such claims in the Ukrainian corporate legal framework.

In the UK, the significance of derivative claims has been profoundly discussed. Reisberg³⁹ offers an extensive discourse on the use of derivative actions in corporate governance. This aligns with Hamadziripi's⁴⁰ exploration of the leave of court requirement, highlighting the jurisprudential developments of the past decade. The UK's approach underscores the checks and balances in place, ensuring that such claims aren't misused but remain accessible to those who seek to redress corporate wrongs. However, UK law has imposed barriers like the "proper plaintiff" rule that limit derivative actions⁴¹.

The changing corporate landscape in Zimbabwe sees an essential evolution in the application of the derivative remedy. Hamadziripi and Osode⁴² critically assess the standing or locus standi features of the derivative remedy under Zimbabwe's new corporate legislative framework. Their study suggests a dynamic interplay between historical precedence and the changing needs of modern corporate entities.

The derivative action, as elucidated by Baum and Puchniak⁴³, traces its journey through an economic, historical, and practice-oriented lens across various Asian countries. This perspective can be instrumental for Ukraine, given the economic and corporate similarities shared among some Asian and Eastern European nations.

Sealy's⁴⁴ exposition on *Foss v. Harbottle* underscores the marathon nature of derivative claims, with resolutions often appearing elusive. While this historical case from the UK might not directly correspond to the Ukrainian context, the

³⁹ REISBERG, A. 2009. *Derivative Actions and Corporate Governance*. Oxford University Press.

⁴⁰ HAMADZIRIPI, F. 2021. The leave of court requirement for instituting derivative actions in the UK: A ten-year jurisprudential excursion. *Potchefstroom Electronic Law Journal*, 24, 1-25.

⁴¹ RILEY, C. A. 2014. Derivative claims and ratification: Time to ditch some baggage. *Legal Studies*, 34(4), 582-608.

⁴² HAMADZIRIPI, F., OSODE, P.C. 2022. A Critical Assessment of Pertinent Locus Standi Features of the Derivative Remedy under Zimbabwe's New Companies and Other Business Entities Act. *Journal of African Law*, 66(2), 315-338.

⁴³ SEALY, L. S. (1981) *Foss v. Harbottle — a marathon where nobody wins*. *The Cambridge Law Journal*, 40(1), pp. 29-33.

⁴⁴ BAUM, H., PUCHNIAK, D.W. 2012. The derivative action: An economic, historical and practice-oriented approach. In *The Derivative Action in Asia: A Comparative and Functional Approach*, pp. 1-89.

challenges it poses are universal, highlighting the complexities associated with derivative claims.

Macey⁴⁵ and Thai⁴⁶ both delve into the overarching theme of corporate governance, focusing on its promises and the role of derivative actions. Their works underscore the necessity of maintaining a balance between corporate governance objectives and the utility of derivative claims as tools of accountability.

The work of Gibbs-Kneller and Ogbonnaya⁴⁷ stands apart in its empirical evaluation of the statutory derivative claim, focusing on its de facto application. Such empirical approaches provide a robust foundation to assess the real-world implications and efficiency of derivative claims.

Drawing from these insights, it is evident that while the mechanics and application of derivative claims differ across jurisdictions, their intent remains consistent - safeguarding corporate interests and ensuring accountability. The Ukrainian system, in evolving its derivative claims framework, can draw from these varied perspectives, seeking a balance that resonates with its unique socio-economic and legal environment.

Conclusions

This study concludes that legal entities, mainly corporations where commercial firms dominate, are the primary actors in economic activity in Ukraine. Protecting participants' rights is critical since such entities own property contributed by participants, whose rights depend on their share ownership. Therefore, if rights are infringed, a member first seeks restitution. If unfeasible, remedies compensating property losses apply. The fiduciary motif in these relationships emphasizes the importance of trust, governing liability terms. Despite respect, the trusting relationship between a shareholder and corporate management leaves the shareholder vulnerable to fiduciary abuse, evidenced in court practice.

⁴⁵ MACEY, J.R. 2008. *Corporate Governance: Promises Kept, Promises Broken*.

⁴⁶ THAI, L. 2023. *Corporate Governance and Statutory Derivative Actions: Comparative Approach to Shareholder Litigation*. London: Routledge.

⁴⁷ GIBBS-KNELLER, D., OGBONNAYA, C. 2019. Empirical analysis of the statutory derivative claim: de facto application and the sine quibus non. *Journal of Corporate Law Studies*, 19(2), 303-332.

Presuming management's culpability for corporate harm reasonably balances shareholder protection and management competence. Competence relates to the objective alignment of management decisions with business standards. Competence should enable anticipating negative impacts, exempting liability only for unforeseeable business risks.

Further research should define practical recommendations to address problems in Ukrainian corporate law. Key issues include codifying management's scope of duty and evidentiary thresholds for shareholder derivative claims. Additionally, awareness and proper implementation of derivative claims need strengthening among stakeholders. Overall, this study demonstrates derivative claims are essential but require refinement to effectively remedy parties' rights in corporate relations.

REFERENCES

- Atamanchuk, I. V. 2020. The right to judicial protection of civil rights and interests in the light of European standards. In: *Civil law of Ukraine: new challenges and prospects for development: Proceedings of the XVIII International scientific-practical conference dedicated to the 98th anniversary of the birth of dr., prof. V.P. Maslov* (pp. 75-78). Kharkiv: Pravo.
- Baum, H., Puchniak, D.W. 2012. The derivative action: An economic, historical and practice-oriented approach. In H. Baum, & D. W. Puchniak (Eds.), *The Derivative Action in Asia: A Comparative and Functional Approach* (pp. 1-89). Cambridge: Cambridge University Press.
- Biliavska, Y., Mykytenko, N., Romat, Y., Biliavskyi, V. 2023. Category management: Industry vs trade. *Scientific Horizons*, 26(1), 129-150. doi:10.48077/scihor.26(1).2023.129-150.
- Bodnar, T. V., Dzera, O. V., Kuznetsova, N. S. 2008. *Contract law of Ukraine. The general part*. Kyiv: Yurinkom Inter.
- Borysova, V. I., Ivanova, K. Y., Iurevych, I. V., Ovcharenko, O. M. 2019. Judicial protection of civil rights in Ukraine: National experience through the prism of European standards. *Journal of Advanced Research in Law and Economics*, 10(1), 66-84.
- Cenolli, S., Osmonova, A., Askarova, C., Miller, A. 2023. The role of personnel management in increasing productivity at agricultural enterprises in Mongolia. *Scientific Horizons*, 26(6), 146-155. doi:10.48077/scihor6.2023.146.
- Cherevko, N. 2022. Features and legal regulation of the procedure for granting employee consent to work in new working conditions. *Law Journal of the National Academy of Internal Affairs*, 12(2), 57-63. doi:10.56215/04221202.57.

Economic Code of Ukraine. 2003. Available from <https://zakon.rada.gov.ua/laws/show/436-15#Text>.

Galanis, M. 2021. Corporate law versus social autonomy: Law as social hazard. *Law and Critique*, 32(1), 1-32. doi:10.1007/s10978-020-09267-7.

Gibbs-Kneller, D., Gindis, D. 2019. De jure convergence, de facto divergence: A comparison of factual implementation of shareholder derivative suit enforcement in the United States and the United Kingdom. *European Business Law Review*, 30(6), 909-930.

Gibbs-Kneller, D., Ogonnaya, C. 2019. Empirical analysis of the statutory derivative claim: De facto application and the sine quibus non. *Journal of Corporate Law Studies*, 19(2), 303-332. doi:10.1080/14735970.2018.1527651.

Gibbs-Kneller, D., Ogonnaya, C. 2019. Empirical analysis of the statutory derivative claim: de facto application and the sine quibus non. *Journal of Corporate Law Studies*, 19(2), 303-332.

Hamadziripi, F. 2021. The leave of court requirement for instituting derivative actions in the UK: A ten-year jurisprudential excursion. *Potchefstroom Electronic Law Journal*, 24, 1-25.

Hamadziripi, F., Osode, P.C. 2022. A Critical Assessment of Pertinent Locus Standi Features of the Derivative Remedy under Zimbabwe's New Companies and Other Business Entities Act. *Journal of African Law*, 66(2), 315-338.

Kostruba, A. V., Maydanyk, R. A., Luts, V. V. 2020. Bonum requirements of the beneficiary in the corporate rights protection system in Ukraine: Implementing best practices. *Asia Life Sciences*, 1, 189-207.

Kucher, V. O. 2016. *Civil procedure of Ukraine*. Lviv: Lviv State University of Internal Affairs.

Labor Code of Ukraine. 1971. Available from <https://zakon.rada.gov.ua/laws/show/322-08#Text>.

Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine relating to Investors' Rights Protection" No. 289-VIII. 2015. Available from <https://zakon.rada.gov.ua/laws/show/289-19#Text>.

Law of Ukraine "On Copyright and Related Rights" No. 3792-XII. 1993. Available <https://zakon.rada.gov.ua/laws/show/3792-12#Text>.

Lutsenko, O. 2017. Bringing civil servants to liability for disciplinary misconduct in judicial practice of Ukraine, Poland, Bulgaria and Czech Republic. *Journal of Advanced Research in Law and Economics*, 8(1), 103-112.

Macey, J.R. 2008. *Corporate Governance: Promises Kept, Promises Broken*. Princeton University Press.

Maidanyk, R. A. 2016. *Development of private law of Ukraine*. Kyiv: Alert.

Mayer, C. 2022. What is wrong with corporate law? the purpose of law and the law of purpose. *Annual Review of Law and Social Science*, 18, 283-296. doi:10.1146/annurev-lawsocsci-050520-102251.

Miao, M., Liu, A., Shi, J. 2019. Corporate law, government intervention and corporate ownership structure. *Asian Journal of Law and Economics*, 10(3), 0023. doi:10.1515/ajle-2019-0023.

Petersone, M., Krastins, A. V., Ketners, K. 2016. In-service training system organization improvement at customs administrations. *Eurasian Studies in Business and Economics*, 201-216. doi:10.1007/978-3-319-27570-3_17.

Reisberg, A. 2009. *Derivative Actions and Corporate Governance*. Oxford University Press.

Riley, C. A. 2014. Derivative claims and ratification: Time to ditch some baggage. *Legal Studies*, 34(4), 582-608.

Robinson v. Smith. 1832. Available from <https://casetext.com/case/robinson-v-smith-30>.

Safari, N., Gelter, M. 2019. British home stores collapse: The case for an employee derivative claim. *Journal of Corporate Law Studies*, 19(1), 43-68. doi:10.1080/14735970.2018.1496780.

Sealy, L. S. 1981. Foss v. Harbottle — a marathon where nobody wins. *The Cambridge Law Journal*, 40(1), pp. 29-33.

Thai, L. 2023. *Corporate Governance and Statutory Derivative Actions: Comparative Approach to Shareholder Litigation*. London: Routledge.

The Civil Code of Ukraine. 2003. Available from <https://zakon.rada.gov.ua/laws/show/435-15#Text>.

Tomashevski, K., Yaroshenko, O. 2020. Problems of labour legislation codification in belarus and ukraine: History, current situation and prospects. *Transition Studies Review*, 27(2), 41-49.

Ucaryilmaz Deibel, T. 2022. Corporate social responsibility in the legal framework of global value chains. *Law and Development Review*, 15(2), 329-356. doi:10.1515/ldr-2021-0098.

Vovk, M., Yurkevych, Y. 2022. Legal status of the business entities in Ukraine in the context of changes in current legislation. *Law Journal of the National Academy of Internal Affairs*, 12(2), 9-15. doi:10.56215/04221202.09.

Yaroshenko, O. M., Sliusar, A. M., Sereda, O. H., Zakrynytska, V. O. 2019. Legal relation: The issues of delineation (on the basis of the civil law of Ukraine). *Asia Life Sciences*, (2), 719-734.

Yaroshenko, O. M., Vapnyarchuk, N. M., Burnyagina, Y. M., Kozachok-Trush, N. V., Mohilevskiy, L. V. 2020. Professional development of employees as the way

to innovative country integration. *Journal of Advanced Research in Law and Economics*, 11(2), 683-695.

Zhornokuy, Yu. M. 2015. *Corporate conflicts in joint stock companies: Civil law aspect*. Kharkiv: Pravo.

Zhornokuy, Yu. M. 2020. Squeezeout and voluntary share repurchase: law enforcement issues. In: *Civil law of Ukraine: new challenges and prospects for development: Proceedings of the XVIII International scientific-practical conference dedicated to the 98th anniversary of the birth of dr., prof. V.P. Maslov* (pp. 148-157). Kharkiv: Pravo.

Data de submissão do artigo: 05/04/2023

Data de aprovação do artigo: 12/05/2023

Edição e propriedade:

Universidade Portucalense Cooperativa de Ensino Superior, CRL

Rua Dr. António Bernardino de Almeida, 541 - 4200-072 Porto

Email: upt@upt.pt