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XIII Халықаралық ғылыми конференциясы

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«SCIENCE AND EDUCATION - 2018»

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FOREIGN EXPERIENCE OF CORPORATE LEGAL RELATIONS

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According to the statistics made by the Ministry of National Economy of the Republic of Kazakhstan in March 2018, the number of legal entities was accounted for 417,774, and the number of legal entities with a foreign form of government was 12,684. Undoubtedly, international and foreign organizations have difficulties in implementing any legal actions in the territory of our country, because corporate relations are not well developed. I believe that for the further development of our country and for entering the international market, the legislation of the Republic of Kazakhstan must adopt the experience of foreign countries in the field of corporate law, and single out a separate branch of law regulating corporate legal relations.

The peculiarity of corporate legal relations, as noted above, is that they arise, change and terminate within organizations based on the principles of participation (membership), called corporations, and mediate the participation of persons who are members of the corporation members (members) in its activities .

Potentially, corporate legal relations can arise primarily with the participation of the corporation itself, as well as between its members (members), but only insofar as this relates to participation in the activities of the corporation. It is also possible corporate legal relations with the participation of third parties that are not participants (members) of the corporation. Such legal relationships can also be due to participation in the activities of the corporation, even if not actual, but potential.

Obviously, what has been said does not mean that all legal relations to which the corporation is a party can be called corporate, since a corporation can act as a subject of the most diverse in its subject matter and the nature of social relations. Corporate legal relations are legal relations arising within the corporation. It is the internal structure of the corporation that determines the sphere of existence of such legal relationships that can be conditionally called internal, or intra-organizational, legal relationships in the sense that they arise, change and terminate due to participation in the activities of the corporation of persons belonging to its internal structure and called participants (members).

At the same time, at present there is no clear understanding in the Kazakh legal community and the scientific community, as well as in the business environment and at the governmental level, of what constitutes a field of corporate relations subject to legal regulation. Also, there is no universally recognized notion of the corporation and the content of the concept of corporate law. Such uncertainty causes imperfection of the corporate legislation of Kazakhstan, creates appreciable obstacles in its perfection and modernization.

At the same time, there is no doubt that historically (as long as the state did not actively use corporate forms to implement state entrepreneurship), corporate relations existed and were regulated exclusively within the framework of the civil legal institute of legal entities. The very concept of a corporation is a concept of a civil legal institution of a legal entity and a more extensive institution (teaching) about individuals historically being one of the central institutions of civil law [16].

It seems that at the current stage corporate relations by their nature remain civil-law, namely, property relations. They are formed about the creation and activities of private-law corporations, established on the basis of combining property contributions (and sometimes - and efforts) by their members and functioning, primarily, as a source of property income of these members. Attempts to

single out any "organizational" or other (non-property) legal relations in their composition do not appear to be particularly promising, since even the interaction of the corporation and its members within the framework of the functions of the bodies and officials of the corporation, as well as its members (acting separately or in the form of a general meeting) has, at its core and at the same time, its object, a relationship regarding the use of the property of the corporation and the distribution of income or losses arising from its activities.

As a future lawyer I observed law systems of the most developed countries in a field of corporate law. I marked three of them: England, Germany and USA.

English law is one of the most developed legal systems in general, including systems of corporate law, its study is very interesting both from a scientific and practical point of view.In theory, it will allow for a better understanding of the development and development of the corporate phenomenon.At the legislative level, the study of foreign experience helps to develop new ways of right regulation.In practice, modern lawyers and entrepreneurs are not often directly faced with the rules of English law on companies.

In England, the Law "On Companies" even established standard examples of acts regulating corporate legal relations, a special place among which is the charter. Moreover, the sample of the corporation's charter does not have a recommendatory, but a normative character. In the legal literature, it was noted that slight departures from statutory samples are allowed, but only if case law confirms the acceptability of improved forms. The law refrains from any description of the powers of directors, leaving them at the discretion of the participants (the powers of directors and any bodies of the company are described in the charter). The law also does not introduce such concepts as "executive body" or "general director", usual for continental-European legal systems. Thus, the "director" of a British company can be both an executive director and a member of the supervisory body. The law also knows the concept of a "shadow director," that is, a person whose instructions are "usually followed" (Article 251). Such a shadow director is subject to certain duties of directors, for example, he must declare an interest in the company's transactions (Article 187).

Not giving a list of powers of directors, the Law contains a detailed list of their duties. This list is essentially a codification of the principles previously formulated in judicial decisions, and it is in the light of these decisions that the provisions of the Law should be interpreted (Article 170).Directors are required to act within their authority; contribute to the success of the company; exercise reasonable care, skill and diligence; avoid conflict of interest; do not take benefits from third parties; declare their interest in the company's transactions (Articles 171-177). Despite the seeming vagueness of the wording, the meaning of each of them is quite clearly defined by many years of judicial practice.

The greatest controversy during the discussion of the bill was caused by the obligation "to contribute to the success of the company". Traditionally, the "success of the company" was understood as the economic interest of its participants, that is, the company's maximum profit and, accordingly, an increase in the value of its shares or the distribution of the greatest dividends. However, the new law, following the trends of the time, formulated in court decisions, offers to consider a number of other factors, including interests of employees, relations with suppliers and customers, environmental impact, etc. (Article 172). In the event of non-fulfillment of his duties, the director bears material responsibility both to the company itself and to its participants who are entitled to a "derivative claim" against the director (Article 260).

The duties of the company secretary include the maintenance of various kinds of corporate documentation. The novelty is that a private company (unlike a public company) does not have to have a secretary: its functions can be performed by the director or any appointed person (Article 270).

Thus, the most important actors in the British company are the company's shareholders (shareholders), its director and secretary. British corporate law is very flexible: it allows the company's members to determine the specific powers of the directors themselves. Under the new law in a private company, the secretary can be taken over by the director (or entrusted to another person).

Currently, the Kazakhstani legislator provides subjects of corporate legal relations with unjustifiably wide opportunities for independent choice of behavior within the framework of these legal relations, which is facilitated by the corporation's right to independently approve the necessary constituent documents for this provision. Thus, at present, corporate legal relations are not sufficiently regulated by the legislator, which does not meet the interests of the "weak" participants (members) of the corporation and its creditors. What this can lead to is well known from the history of development of the joint-stock enterprise, which is characterized by numerous abuses by founders and major shareholders. Options to fill gaps in the legal regulation of corporate legal relations currently exist only for joint-stock companies, mainly open joint-stock companies. They consist in the adoption by such corporations of codes of corporate conduct. In the legal literature, it was already suggested that such an approach would not solve the existing problems related to the mechanism of legal regulation of corporate legal relations.

This approach is especially characteristic of the foreign legislator for business corporations. The desire to maximize the regulation of corporate legal relations is aimed at protecting the rights and legally protected interests of those participants in the corporation who, due to their insignificant share of participation in the charter (share) capital of the business corporation, are not capable of exerting any significant influence on the corporation itself.

The US Model Law on Enterprise Corporations provides a clear indication of ultra vires: the reality of actions taken by the corporation can not be challenged on the grounds that the corporation did not or does not have the authority to do so (§ 3.04). However, for the shareholders to control the activities of the joint stock company, the American legislator, in particular, provided for three cases where the unrestricted right of the corporation can be challenged:

- A shareholder may file a claim against the corporation to prohibit the commission of certain actions that go beyond the powers granted to the corporation, if the contracts concluded with the excess of the powers have not yet been executed, and the decisions have been implemented;
- a corporation or a person acting on its behalf and in its interests may file a claim against the corporation's managers on compensation of damages incurred as a result of the actions of these officials committed with abuse of authority;
- The Attorney General (prosecutor) can file a claim for liquidation of the corporation in cases where the corporation was created fraudulently or if the corporation constantly exceeded the powers granted to it by law or abused them (see: § 3.04 of the Model Law on Enterprise Corporations).

In Germany shareholders have a list of the specific rights allocated to them by the Aktiengesetz , although this is circumscribed by the general principle in AktG §119 (2) that matters concerning 'business management' can only be determined by the executive directors. The voting rights of shareholders are heavily influenced by the banks. Banks proper.

There is no right to control political donations (cf AktG §58).

Directors' duties

German speakers have similar duties to most jurisdictions, primarily a duty of loyalty, and a duty to exercise competent judgment. First, the duty of loyalty, or Treuepflicht, derives from the good faith provision in the civil code.

Second, there is a particular prohibition on taking corporate opportunities and a duty of secrecy, AktG §93 (1).

Third, there is a specific prohibition on competing with the company, AktG §88.

Fourth, recently introduced was a 'business judgment rule'. A new provision, AktG §93 (1) says, 'executive members have to exercise the care of an ordinary and conscientious business leader'.

The attempts to apply the German experience to solve complex issues of joint-stock law are fundamentally erroneous. German, French and Italian joint-stock laws are not a model of joint-stock law in the world, and today they themselves adopt norms and principles of Anglo-American joint-stock law. The company's business affairs, in accordance with the general ideology of British corporate law, are conducted by the directors of the company, considered as a single body (the board of directors). A public company must have at least two directors, one director is sufficient for

a private company (Article 154). Directors can be legal entities; However, according to the new law, at least one director of the company must be an individual (Article 155). The minimum age of the director for the new Law is 16 years (Article 157). Directors can delegate their authority to committees of directors, the executive director, etc.

The application of joint-stock legislation in the former Soviet republics has long been revealing a lot of complex and often unresolved issues. This happened and happens only for one main reason: due to incorrect, sometimes truncated, adaptation of the world experience of joint-stock law by former Soviet countries, as well as to the lack of properly trained experts, judges, and staff of state authorized bodies in this field.

In one of the speeches of a president of Republic of Kazakhstan Nursultan Nazarbayev said that the economy of our country is in hands of businessmen, and we should do everything to make all the conditions for their comfortable work and existence.

Список использованной литературы:

1. Основные особенности развития корпоративного права в Республике Казахстан, Ф.С. Карагусов
2. Корпоративные правоотношения: общая теория и практика ее применения в хозяйственных обществах, Ломакин Д.В.

УДК 347.4

НЕКОТОРЫЕ ВОПРОСЫ ПРАВОВОГО РЕГУЛИРОВАНИЯ ДОГОВОРА ПОСТАВКИ ЭНЕРГИИ В РЕСПУБЛИКЕ КАЗАХСТАН

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Результативность регулирования законодательством снабжения энергии зависит от правильности выделения определенных черт правоотношения, содержащихся в правовых нормах. Комплекс договоров обосновывается наукой для выявления особенностей договорных правоотношений и разработки норм права, регулирующих указанные правоотношения.

В соответствии с п. 1 ст. 492 ГК РК положения гражданского законодательства о снабжении энергией может применяться к отношениям, по подаче тепловой энергии посредством присоединенных линий, если другое не предусмотрено законами либо нормативными актами. Согласно п. 2 ст. 492 ГК РК также к правоотношениям по поставке энергии посредством присоединенных линий газа, нефти, нефтепродуктов, воды и иных ресурсов, положения пятого параграфа 25 главы ГК РК о соглашении по снабжению энергией могут применяться, если другое не определено законодательством, другими нормативными актами либо не исходит из самой сути обязательства.

Вероятность передачи и использования энергии лишь посредством присоединенных линий считается одним из ключевых индивидуальностей контракта энергоснабжения. Она разрешает различать его от смежных обязательств, к примеру, договора поставки. Так, соглашение, в силу которого природный сжиженный газ продается в баллонах, будет не договором энергоснабжения, а считается как договор поставки либо купли-продажи. В случае, если газ поставляется абоненту посредством присоединенных линий, то это конечно будет соглашением по снабжению энергией, который является подвидом договора купли-продажи и регулируется нормами гражданского законодательства. Также данное соглашение