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RESPONSIBILITY IN CORPORATE RELATIONS

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As a general rule, liability in corporate relations means the responsibility applicable to the corporation itself, members of the corporation, as well as members of corporate governance bodies.

Over the past few years, discussions have been ongoing in the legal literature regarding the independence of the institution of corporate responsibility.

The concept of corporate responsibility is just beginning to be used in legal science. To date, corporate responsibility issues have not been developed.

Corporate responsibility is responsibility for violation of corporate law. The main subjects of such responsibility are corporations, their bodies, as well as participants in corporations. By their nature, corporate responsibility can be civil, administrative and criminal.

Corporate responsibility as an independent type of legal responsibility was studied in detail by O.V. Gutnikov. The author understands corporate responsibility as a special type of civil liability that differs from tort or contractual responsibility. The basis of corporate responsibility O.V. Gutnikov calls “not a violation of the contract and not a civil tort (causing harm), but the violation that resulted in the violation of the numerous and specific corporate obligations of members of the bodies of the legal entity established by law and the constituent document of the legal entity, the most important of which is the obligation to act in good faith and reasonably in the interests of the legal entity . The content of these duties goes far beyond the obligation to simply not cause harm, the violation of which is the basis for the onset of tort liability [1].

In addition, in contrast to tort liability, where the presumption of the guilty party of the harm prevails, corporate responsibility, on the contrary, the presumption of innocence of persons who violate corporate obligations to act in good faith and reasonably is valid. The burden of proof of guilt lies with the victims, ”writes O.V. Gutnikov. The author shares corporate responsibility on the responsibility of managers and other persons to a legal entity and its participants for causing losses; liability of a legal entity and other persons to its creditors for the obligations of a legal entity; responsibility of participants of a legal entity to a legal entity and other participants [2].

The subjects of corporate responsibility are not only subjects of corporate law, but also persons who are members of a legal entity - founders (property owners), participants, members of legal entity bodies, managers, employees. Sources establishing corporate responsibility include the law, contract, charter, and internal documents of the corporation. The key goal of the institution of corporate responsibility is not so much to punish the guilty person as to protect the rights and legitimate interests of participants in corporate relations by eliminating or minimizing their property losses as a result of actions (inaction) of other persons.

Thus, the main function of corporate responsibility can be called recovery (compensation).

The foundations and compositions of specific tort are often found in special corporate law.

For corporations, not all measures of corporate responsibility provided by various branches of law are applied. This feature is associated with the specifics of some branches of law. First of all, it is a question of criminal law, so the Criminal Code of the Republic of Kazakhstan (hereinafter - the Criminal Code of the Republic of Kazakhstan) does not consider legal entities as a subject of criminal liability. Therefore, only individuals are held liable for committing crimes [3].

The possibility of criminalizing legal entities is provided for by the United Nations Convention against Corruption, adopted in New York on October 31, 2003 by resolution 58/4 at the 51st plenary meeting of the 58th session of the UN General Assembly [4].

Corporate responsibility consists in the application of sanctions provided by various branches of law, including legislative acts regulating exclusively corporate legal relations. So, civil law provides for the liability of a person authorized to act on behalf of a legal entity, members of the collegial bodies of a legal entity and persons determining the actions of a legal entity. The Law of the Republic of Kazakhstan “On Joint-Stock Companies” provides for liability of officials of a joint-stock company. So, company officials are liable, established by the laws of the Republic of Kazakhstan, to the company and shareholders for damage caused by their actions and (or) inaction,

and for losses incurred by the joint-stock company, including, but not limited to losses incurred as a result of:

- 1) the provision of misleading information or knowingly false information;
- 2) violation of the procedure for the provision of information established by the Law of the Republic of Kazakhstan "On Joint-Stock Companies";
- 3) proposals for the conclusion and (or) decision-making on the conclusion of major transactions and (or) related party transactions that entailed losses to the company as a result of their dishonest actions and (or) inaction, including for the purpose of obtaining either their affiliates profit (income) resulting from the conclusion of such transactions with a joint stock company [5].

A joint-stock company (hereinafter - JSC) on the basis of a decision of the general meeting of shareholders or a shareholder (shareholders) owning (owning in aggregate) 5 or more percent of the voting shares of the JSC, on its own behalf, has the right to appeal to the court with an official for compensation for the damage to the JSC or losses incurred by the joint-stock company, as well as on the return of the joint-stock company by the official and (or) its affiliates, the profit (income) received as a result of decisions on the conclusion (proposal to conclude) major transactions and (or) transactions in which there is a guarantee that resulted in a loss to the JSC, in case the officer acted in bad faith and (or) inactive. A joint stock company on the basis of a decision of the general meeting of shareholders or a shareholder (shareholders) owning (owning in aggregate) 5 or more percent of the voting shares of the joint-stock company, on its own behalf, has the right to apply to the court with a lawsuit against the official of the joint-stock company and (or) a third party for compensation of the joint-stock company losses incurred by the joint-stock company as a result of the joint-stock company's transaction with this third party, if at the conclusion and (or) implementation of such a transaction this company official, on the basis of an agreement with such a third party, acted in violation of the requirements of the law VA RK, the charter and internal documents of the joint-stock company or its employment contract. In this case, the aforementioned third party and the official of the joint-stock company act as joint debtors of the joint-stock company when such losses are reimbursed to the company. AO officials recognized by the court as guilty of crimes against property, in the field of economic activity or against the interests of service in commercial or other organizations, as well as exempted from criminal liability for the commission of these crimes, cannot within 5 years from the date of repayment or withdrawal of the procedure established by law of a criminal record or exemption from criminal liability to fulfill the duties of officers of joint-stock companies, as well as a representative of shareholders at a general meeting ii shareholders. If the financial statements of the company distort the financial position of the joint-stock company, the company's officials who have signed these financial statements of the company are liable to third parties who have suffered material damage as a result of this [6].

The Law of the Republic of Kazakhstan "On limited and additional liability partnerships" establishes the liability of members of the board of directors (supervisory board) of the company, the sole executive body of the company, members of the collegial executive body of the company and the manager for losses caused to the company by their guilty actions (inaction) [7].

The possibility of bringing entities of corporate legal relations to liability of various types (property, disciplinary material, administrative and criminal liability) determines one more specific feature of corporate liability - for the same violation of corporate duties, the guilty person can be subjected to punitive measures provided for by various branches of law . Moreover, a feature of corporate responsibility is the ability to simultaneously apply several types of responsibility to the offender for the same act. V.A. Zakharov explains this property of corporate responsibility by the fact that the liability provided for by the norms of public branches of law, which has a punitive and penal function, allows the use of civil liability (property) liability that performs a compensation-restoration function for one offense. The considered feature of corporate responsibility can be demonstrated by the example of the responsibility of the head of a joint stock company or limited liability company who is guilty of violating the requirements of the law on the procedure for preparing and holding general meetings of shareholders or company participants. The action (inaction) of the head of a corporate legal entity cited as an example violates the rights of its

participants and constitutes an administrative and civil offense. In this case, the corporation official may be held administratively liable in the form of a fine). If the same action (inaction) of a person authorized to act on behalf of the company caused losses to this company, then, subject to the proof of dishonesty and unreasonableness of such actions, it is obliged to compensate for the losses [8].

Another example of the simultaneous application of various types of responsibility in the framework of corporate relations is the case of violations of the requirements of the legislation on the disclosure or provision of information on securities. Thus, the head of a corporate legal entity can be held either administratively liable, or in case of malicious evasion of disclosure or provision of information specified by the legislation of the Republic of Kazakhstan on securities, or the provision of deliberately incomplete or false information if these acts caused major damage to citizens, organizations or to the state, to criminal liability. At the same time, such a manager may be held liable in the form of a recovery of losses incurred by a legal entity.

The following prospects for improving the institution of responsibility in the field of corporate relations in the Republic of Kazakhstan can be noted.

In the Civil Code of the Republic of Kazakhstan (hereinafter - the Civil Code of the Republic of Kazakhstan) it is necessary to introduce universal rules on the property liability of officials of all corporations. So, as a result of legislative changes (the Law "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Mortgage Lending and Protection of the Rights of Consumers of Financial Services and Investors" dated February 10, 2011 No. 406-IV), a certain block of flaws was eliminated regulation of liability of officials of joint-stock companies, however, certain aspects of such responsibility remained outside the attention of the legislator. In addition, new problems were added in the interpretation and application of certain rules on the responsibility of officials, including as a result of the adoption of the Law of the Republic of Kazakhstan dated February 27, 2017 No. 49-VI "On Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on the Improvement of Civil , banking legislation and improving the business environment. " For example, the UK Companies Act (2006) contains a detailed list of responsibilities of corporate directors and their responsibilities. These requirements, in essence, are a codification of the principles previously formulated in court decisions, and it is in the light of these decisions that the provisions of the Law should be interpreted. Directors are required to act within their authority; contribute to the success of the company; exercise reasonable prudence, skill and diligence; avoid conflict of interest; not accept benefits from third parties; declare your interest in company transactions. Despite the apparent vagueness of the wording, the meaning of each of them is quite clearly defined by many years of judicial practice. In the event of failure to fulfill his duties, the director bears material liability both to the company itself and to its participants, who are entitled to a "derivative claim" against the director. The most important actors in a British company are the participants (shareholders) of the company, its directors and secretary. British corporate law is very flexible: it provides company members with the opportunity to determine the specific powers of directors themselves. In a private company, the functions of a secretary can be taken over by the director (or delegated to another person) [9].

The central issue of the responsibility of corporate officials in Kazakhstan is the determination of industry standards for such responsibility and the distinction between the rules established by civil law and labor regulation. In addition, the current norms of the Laws "On Joint-Stock Companies" and "On Partnerships with Limited and Additional Liability" (and legislative acts on other membership-based organizations) on the liability of officials are not agreed upon among themselves, while they should be unified. The property liability of corporate officials should be based on common principles for both companies and partnerships and, by their legal nature, is an internal corporate relationship rather than an employment relationship, which should be reflected in the Civil Code of the Republic of Kazakhstan. In other words, the relevant rules should be based on uniform common approaches, but at the same time take into account the specifics stipulated by the use of the appropriate legal form of the company (JSC, LLP or other business partnership).

It is also necessary to carefully study the provisions in the Civil Code of the Republic of Kazakhstan regarding the forms of responsibility of corporate officials and their relationship to each other. The question of the conditions for such responsibility, and, in particular, whether responsibility of officials is possible regardless of the fault of the latter, should be legally resolved. Currently, a clear answer to this question from the provisions of Art. 63 of the Law of the Republic of Kazakhstan "On Joint Stock Companies" does not follow.

In addition, as exceptions to the General rule of article 44 of the civil code of the Republic of Kazakhstan, the civil legislation of the Republic of Kazakhstan should further develop the rules on personal liability of founders and managers of a legal entity for its debts in cases exhaustively defined by Law. We are talking about the "penetrating of responsibility" in the corporate law of England. In Western European literature, it is called "penetration behind the corporate foundations" (Durchgrif hinter den gesellschaftsrechtlichen Schleier), in American law – "piercing the corporate veil". This is sometimes called "removing the corporate veil" [10].

As an example of the expansion of the responsibility of the founders and officers of a legal entity, we can take the reform of the civil legislation of the Russian Federation in the field of regulation of the activities of legal entities.

Thus, the Federal Law of May 5, 2014 No. 99-Φ3 in the Civil Code of the Russian Federation was included art. 53, fixing the responsibility of a person authorized to act on behalf of a legal entity, and members of the collegial bodies of a legal entity [11].

Responsibility arises if it is proved that in exercising his rights and fulfilling his duties, a person acted in bad faith or unreasonable, including if his actions (inaction) did not meet the usual conditions of civil turnover or the usual entrepreneurial risk.

In addition, in paragraph 3 of Art. 53 of the Civil Code of the Russian Federation, a provision was formulated that a person who is able to determine the actions of a legal entity (including giving instructions to persons authorized to act on behalf of a legal entity and members of collegial bodies of a legal entity) is obliged to act reasonably and in the interests of the legal entity in good faith and is liable for losses incurred through his fault to a legal entity [12].

The latter position is mainly focused on the founders (participants) of the corporation, especially in the "one man company", where the founder plays the dominant role. However, for liability to occur, at least the following conditions are required:

- 1) a person has the ability to determine the actions of a legal entity;
- 2) violation of the obligation to act reasonably and in good faith;
- 3) the presence of losses caused to the legal entity;
- 4) the fault of the person in causing these losses.

Thus, the need to introduce amendments to civil law requires further study and study of the institution of responsibility in the field of corporate relations in the Republic of Kazakhstan.

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