Legal Aspects of Corporate Management in the Context of International Law Rules Harmonization of civil law View project Succession View project

Anatoliy V Kostruba, Yurii S Shemshuchenko

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Contents:

1	Legal Aspects of Harmonization of Labor Legislation of Kazakhstan and the Eurasian Economic Union Countries (EAEU) by Samal K. Alimkhanova	... 1080
2	World Trade Organization and the Renewable Energy Sources Cases: How to Achieve the SDG7? by R.D. Akshalova, A.M. Solntsev, B.Zh. Abdraiym, Sh.V. Tlepina, and Zh.T. Iskakova	... 1087
3	The Mechanism of International Legal Support of Effective Management of Indigenous Peoples in the Northern Territories by Vadim Avdeevich Avdeev, Stanislav Vasilyevich Rozenko, Igor Nikolaevich Fedulov, Igor Mikhailovich Ospichev, Elena Vyacheslavovna Frolova, and Elena Evgenievna Stepanova	...1095
4	Performance Audit of the Use of Budget Funds Aimed at the Development of the Agricultural Sector of Kazakhstan by Lyazzat Z. Beisenova, Saule B. Spatayeva, and Aliya Ye. Shakharova	...1102
5	Integration of Company Development Management Practices Based on Project Management byTalgat Bolatzhanuly, Gaukhar M. Rakhimzhanova, Azhar K. Beisenbayeva, Ainur U. Abdimoldayeva, and Omirzhan K. Shaimanov	... 1109
6	Access to Justice: Ukraine and Europe by Tetiana M. Brezina, Nadiia P. Bortnyk, and Iryna Yu. Khomyshyn	... 1122
7	Implementation of Good Faith Principle as an Efforts to Prevent the Business Disputes by Elisabeth Nurhaini Butarbutar	... 1131
8	Relevant Issues of Property Rights Protection in Ukraine by iubov M. Dolgopolova, Marina V. Us, and Sergiy O. Glotov	... 1137
9	Legal Science Methodology through the Lens of Legal Thinking Innovations by Taras Z. Garasymiv, Nadiya P. Pavliv-Samoyil, and Andrii I. Hodiak	... 1145

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Legal Aspects of Corporate Management in the Context of International Law Rules

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Abstract:

This study sets the task of studying the legal aspects of corporate governance in the context of existing international law. Consideration of issues related to the legal aspects of corporate governance is of great importance for the development of common criteria for evaluating their activities from the point of view of existing legal norms. The development of ever new forms of public organizations and the need to develop legislative norms to regulate their activities only emphasizes the importance of the issue under study. The relevance of this problem is of particular importance in light of the fact that to date, the laws of most countries have not yet developed clear criteria governing the corporate activity. This fact leads to difficulties in studying this issue and the high probability of misunderstanding in matters of corporate activity and corporate governance features, not to mention giving this activity a proper assessment from the standpoint of the norms of current legislation. This study sets the task of studying the fundamental legal rules regulating the corporate governance of Ukraine and foreign countries with the identification of the similarities and differences of existing legal standards. The method of comparative analysis of works of domestic and foreign researchers in the framework of the subject under consideration was selected. The applied value of this material is to identify the main criteria for the compliance of the current aspects of corporate governance with international law with a view to the subsequent application of the results in practice. The research prospects in this direction from a legal point of view consist in comparing the current legislative acts regulating international law with regard to corporate governance issues, which opens up great opportunities for analysis of all the provisions of corporate governance and bringing them into line with the norms of existing international law.

Keywords: normative legal act; civil law; managerial culture; business companies; corporate rights.

JEL Classification: K15; K20; K33.

Introduction

Recently, corporate governance issues have become particularly important in light of the emergence and activities of organizations with a wide range of ownership forms, the activities of which have a significant impact on economic development in the CIS countries and abroad. The term 'corporate governance' itself owes its appearance to the theoretical developments of economists, who researching management problems. Relations arising within business entities only fuel interest in the issue under consideration, due to the need to study their legal nature (Morozova 2005). Moreover, a unified, holistic concept of studying the nature and mechanism of implementing corporate rights and their legislative protection has not yet been developed. Until recently, corporate rights and various aspects of

corporate governance were not singled out independently in the structure of existing civil rights. This is partly due to the fact that to this day in the legal literature there are discussions about the nature of corporate relations and whether to consider them mandatory or material.

The current Civil Code of the Russian Federation (1994) provides a legal definition of an obligation, allows to conclude that the legal status of a creditor in a relative, mandatory relationship is of the same nature as the legal status of an owner. At first glance, the binding nature of corporate relations and related issues of corporate governance and its regulation in terms of existing international legal norms is evident. However, a more careful study of this issue suggests that it is impossible to unconditionally attribute corporate relations to mandatory legal relations. For example, the right to consolidate the dividend is legislatively reflected in Article No. 42 of the 'Law on Joint Stock Companies'. Based on the meaning of this regulatory document, a company can pay dividends only after the relevant decision on payment has been made (Federal Law 2001).

A literal understanding of the provisions of this article makes it possible on the right of the company to pay dividends, but not on obligations. This means that until the decision on payments is made between a company and a shareholder, there are no mutual obligations. In this case, talking about mandatory legal relations between them is not necessary. Until recently, there was no allocation of corporate rights as an independent type in the structure of civil rights (Gataulina 2016). The legal framework in Russia does not stand still and is actively developing. In 2014, the country underwent a reform of civil law, which affected corporate law. Now in theory, along with generally accepted property, obligation, and exclusive rights, membership (corporate rights) are considered and studied. The term 'corporate rights' itself is not specified at the level of current legislation and is purely theoretical. Therefore, before proceeding to the consideration of corporate rights and the study of their legal nature, one should determine the concept of a corporation.

There is still no clear interpretation of the term 'corporation' in the legislation. Doctrinally, this concept is interpreted very ambiguously. On this issue, diametrically opposed points of view are expressed. Some researchers believe that all commercial organizations should be considered corporations, while others express the view that only business companies and partnerships should be called that. There is a point of view according to which corporations should be considered exclusively joint-stock companies. According to another opinion, corporations are business entities created by several legal entities (Gushchin *et al.* 2006).

It should be remembered that at the beginning of the 90s, in Russia, a large number of joint-stock companies appeared, created specifically at the privatization stage. If corporations are only joint-stock companies and limited liability companies, then this approach will narrow and limit the perception of the essence of a corporate organization to a certain extent. An opinion has been established in Russian and Ukrainian legal literature according to which it is customary for a corporation to mean 'a commercial organization, a commercial organization that has received the status of a legal entity as a result of state registration; an organization based primarily on pooled capital (voluntary contributions) to conduct certain socially useful activities in which property is separated from management' (Melkumyants 2007). The reform of civil law has led to the perception of corporations as legal entities, the participants of which are vested with membership rights in these organizations and form their highest management body. By law, a fairly wide range of legal entities belongs to the category of corporations. The legal aspects of managing these organizations require further reflection and study as part of research in this area.

1. Literature Review

Studying the works of researchers in the analysis of the legal aspects of corporate governance in the context of international legal norms reveals a wide variety of scholars' views on this issue. Among research scientists, there is no consensus on the assessment of corporate governance issues as part of the regulation of such by existing legal norms. In this aspect, the definition of the essence of the concept of a corporation is of paramount importance. In particular, Loginova (2016), notes that 'the existing domestic civil doctrine contains a developed position, according to which the corporation is a legal entity based on membership'. The works of the classics of civil law affirm a similar definition. A vast field in works of researchers is devoted to the study of corporate relations. This is due to the specifics of relations that arise within business entities, as well as the need to identify their legal nature. It seems possible to highlight such points of view in the framework of this issue.

Bratus and Gendzekhadze treat corporate relations as personal, non-property relations (Bratus 1963). In turn, Erdelevsky (1997) interprets corporate relations as non-personal and non-property. Moreover, this researcher rightly draws attention to the fact that personal non-property rights should be associated with the personality of an entity who bears them. Therefore, it is not possible to alienate and transfer them, while the moral rights of participants in the corporation can be transferred by one person to another. Lomakin (2008) notes that: 'The analysis of the nature of the legal relations of participation in the activities of the corporation does not make it

possible to attribute them to either real or mandatory legal relations. This is a special kind of civil legal relations that exist along with mandatory and material ones'. Morozova (2005) concludes that 'at the first consideration, corporate rights are clear, binding in nature, there are specific, expressed parties to the legal relationship, involving the presence of shareholders and participants. However, upon closer examination, it turns out that corporate relations cannot be attributed unconditionally to mandatory legal relations'.

Pakhomova (2004) believes that 'a reasonable, objective legislative solution to the issue of corporate governance in the legal context may consist in expanding the powers of a corporation member with an attribution authority capable of objectively reflecting the existing economic possibilities of appropriation in various forms, including legal forms of corporate relations involving a legal entity'. An analysis of the work of researchers in the study direction shows that the issues of the legal aspects of corporate governance from the point of view of international legal science cause numerous discussions.

In particular, Dolinskaya (2005) defines corporate relations as joint, dividing them into two varieties:

- (1) internal joint-stock relations related to the organization of activities of joint-stock companies (internal joint-stock relations);
- (2) relations related to the regulation of joint-stock companies (external joint-stock relations).

Thus, the author has to admit the lack of unity of views and understanding of the essence of corporate governance issues and assessment of it from the standpoint of existing norms of international law in the work of researchers. The current situation implies the necessity for further study of the issue in question to search for and determine objective criteria for its assessment.

2. Methodology

The study aims to determine the main aspects of corporate governance in the context of existing international law. The questions of the concept of corporate governance and its main aspects, the study of intra-corporate relations in the context of corporate governance and the compliance of managerial standards with applicable international law are considered. The existing civil law standards that define various aspects of the activities of corporations and their management are analyzed. The research methodology in this work is based on the principle of a comparative analysis of existing legislative acts in the field of corporate governance in order to identify the main features in this legal area, as well as a quantitative analysis of the work of scientists from the former CIS countries and abroad available within the framework of the issue under study.

A significant amount of data was taken from various sources: book and magazine publications, online publications, dissertation research relating to the consideration of various aspects of corporate governance, in relation to existing civil law standards. Foreign publications within the framework of the issue under study were translated into Russian with the aim of facilitating their perception and gaining the possibility of a more objective and in-depth analysis of the issue being studied. The performed analysis of the works of domestic and foreign authors within the framework of the subject under consideration allowed to identify and analyze the similarities and differences in their views on the issue under consideration, to identify the main criteria for evaluating the activities of the corporation as a social and public institution, to identify the main areas of activity related to corporate governance, and to evaluate within the framework of the studied problem, various aspects of corporate legal relations.

This approach to the study of the problem seems to be optimal in view of the current isolation of today's theoretical and industry studies of the nature of legal entities in general and corporate legal relations in particular. There is a lack of the possibility of a clear definition of the nature and essence of the corporation in the context of the current legislation of countries that were formerly members of the USSR, on the one hand, and a certain degree of isolation of research assessments in relation to the issue submitted for research on the other hand. As a result, the main, significant part of researchers within the framework of this topic indicates the lack of the ability to clearly identify the main legal criteria for assessing corporate governance from the standpoint of existing international legal norms, which significantly complicates the research task.

In this regard, the implementation of a quantitative analysis of the information available on this issue seems to be the most rational for determining both the essence of corporate governance and designating the main parameters of regulation of this issue by the framework of existing international law. Comparison of differences in approaches to determining the legal aspects of corporate governance in the context of existing international legal norms allowed to develop a unified position in assessing the essence of the concept of a corporation, assessing existing approaches to corporate governance issues and determining criteria for classifying corporate governance standards as defined in international law. Corporate legal relations are an integral part of civil legal relations and the development of a concept for the development of criteria for the compliance of aspects of corporate governance

with regulatory acts of civil and international law depends on their proper assessment from the standpoint of existing legal acts. Based on the foregoing, conclusions were drawn regarding the possibilities of regulating corporate relations by existing civil law international standards.

3. Results and Discussion

Today, the corporation acts as a significant institution in the modern system of economic relations. At the same time, there was a paradoxical situation in which both the concept of the corporation and the issues of corporate governance do not find any meaningful reflection in the existing regulatory legal acts of Russia, Ukraine, other countries that were formerly part of the USSR and foreign countries. Opinions of researchers conducting scientific developments within the framework of this issue also differ. Some define the concept of corporations and their management, guided by the definition of the status of a corporation as a legal entity, others believe that it is necessary to consider internal corporate relations, and, therefore, issues of corporate governance from the standpoint of existing civil law.

In Ukraine today there is no clear, legislative definition of the concept of a corporation within the framework of the current civil law, nor the regulation of the essence of corporate governance issues. The concept of corporation is present exclusively in the economic legislation of the country. The Economic Code of Ukraine (2003) interprets the concept of a corporation as follows: 'A corporation is a contractual association created on the basis of combining the production, scientific and commercial interests of combined enterprises, with the delegation of separate powers of centralized regulation of each of the participants to the corporate governance bodies'. Based on this definition, it is the governing bodies of the corporation that take responsibility for the centralized regulation of the activities of participants of a corporation, based on the unification of the interests of enterprises belonging to a particular corporation. British law refers to the definition of a corporation as the activity of any legal entity. At the same time, there is a clear legislative regulation of this structure as such, which sets itself the task of making a profit, and according to the legal regulations in force in this country, this aspect is the key one in corporate governance issues (Shitkina 1997; Lipton 2017; Kosyakova 1998; Daugareilh 2019).

Russian law classifies corporate relations as a structure of civil law. This provision allows to classify issues of corporate governance in Russia in the field of civil law. However, this does not mean that such a legislative definition is absolutely indisputable from the position of the civil law doctrine existing in the country. In Russian civil law, classical ideas have emerged regarding the nature of corporate relations and related issues of internal corporate governance. Prior to the final entry into force of amendments to the Civil Code in Russian economic and legal science, disputes were widely spread as to which legal sector covers corporate governance as a subject of regulation. US law defines corporate governance issues based on the concept of defining a corporation as a legal entity. It should be noted that a very wide circle of structures, with completely different managerial principles, which often contradict each other, falls under this definition. The question is that publicly recognized religious organizations, as well as non-profit structures and setting themselves the development of their own entrepreneurial activity, united by the general principle of activity on the basis of the approved legal form of ownership, meet the legislatively fixed concept of a corporation in the USA. Such a definition significantly complicates the assessment of the legal aspects of managing the activities of these organizations from the standpoint of universally recognized international legal regulations.

The American corporate governance model has successfully taken root in the countries of Central Asia. In this region, the legal aspects of the management of corporations are based on the principles of managing the shares of existing and newly created corporations. The current state legal norms in the context of corporate governance require the state to control the activities of corporations at the initial stage of their existence. As Central Asian corporations develop and form, all issues of their management gradually become the sphere of competence of shareholders, and this concept is reflected in existing legal and legislative acts (Rudenko 2015). The joint-stock corporate governance model was first reflected in the laws of the countries of the continental part of Europe, starting from the second half of the 19th century. The explanation for this lies in the 'emergence of large-scale production and the growing need for capital for the construction of large infrastructure projects, including railways, telegraph, mining and others' (Magnier 2019). This largely explains the perception by the legislation of a number of European countries (Austria, Belgium, Sweden, Norway, the Netherlands) of the concept of a corporation as a circle of material assets and entities organized in a certain way, pursuing the task of carrying out any kind of socially useful activity and endowed with the status of a legal entity.

Corporate relations have historically been formed as private law, while due to their own specifics they also have a public-law nature. This is explained by the involvement of a significant number of participants in corporate governance issues, which, of course, is reflected in the public interest. A proper definition of the nature of corporate

governance and its assessment from the standpoint of existing norms of international law is of great practical and theoretical importance from the perspective of the ratio of civil and civil law principles in international law. Corporate governance issues are issues of a civil managerial nature in view of the fact that corporate law is not a separate legal industry. For their settlement, there are specific regulations of a civil law nature. It should be noted that the civil legal relationship is based on the autonomy of the will, organizational and property isolation of entities involved in corporate governance issues.

The norms of international law are designed to regulate corporate governance issues in the context of existing intra-corporate relations. In practice, there is a significant difference in the researchers' understanding of the essence of corporate legal relations. Some scientists believe that they should be regarded as property relations, while others have a diametrically opposite view on this issue. At the same time, the bulk of it agrees that corporate relations are civil-law relations with all the characteristics arising from this definition. It seems possible that the nature of corporate governance issues and its legal aspects has not yet been fully explored in relation to existing international law. Differences in legislative definitions of different countries of the legal aspects of corporate governance significantly complicate the task and necessitate the development of new regulatory documents in this area and the continuation of scientific research in the context of this issue.

The question of assessing the legal aspects of corporate governance from the standpoint of existing international law is still debatable. Despite the numerous studies conducted within the framework of this issue, there was no consensus among scientists regarding the assessment of corporate governance from the standpoint of international law. First of all, this is explained by the unclear nature of corporate rights and internal corporate relations, which leads to uncertainty in assessing various aspects of corporate governance from the point of view of civil law. In the studies of foreign authors, where there were stable legal views on corporate governance issues, such as those associated with equity investments of financial resources in the development of these structures, corporate governance assessments prevailed in terms of the efficient use of invested funds. So, Lipton (2017) note: 'A company that invests in the long term will invest more in future productivity, whether it is the development of vital medicine; creation or purchase of newer, more efficient equipment; or tuition fees for their workforce. All these investments are immediately recognized as expenses and reduce profits in the current quarter, but increase the company's future productivity. Management should pay more attention to investing issues' (Magnier 2017; González-Masip *et al.* 2019; Martín-de Castro *et al.* 2017; Martín-de Castro *et al.* 2019; Martín-de Castro *et al.* 2020; Martín-de Castro 2020). According to Magnier (2017; 2019), 'it is the increase in the well-being of the shareholders of the corporation that is the primary task of its management: 'a corporation, called a 'company', is formed from a number of private contracts whose main purpose is to maximize the well-being of shareholders'.

H. Hagen (2019) points out the close relationship between the legal nature of corporate governance and the promotion of their interests: 'The nature of law and legal institutions is that they diminish the ability of human nature to encourage people to act against common interests. The same applies to corporate governance'. According to a researcher, the problems that arise when managing a corporation and related to the application of legal norms to them should not be a sufficient basis for rejecting the very idea of following the law. In other words, following the rules of law when managing a corporation is mandatory. Daugareilh (2016) notes, that in modern conditions 'The situation is complicated by profound socio-psychological changes caused by the necessary reorientation of personnel in the new conditions. The progressive individualization of people, the already begun urbanization, and its phenomena of mass and social distance continue through exponential multiplication of opportunities. Effective management of the activities of corporations in such conditions is possible only if the accepted legal norms are observed'. Domestic researchers hold a different point of view. In particular, Ebzeev (2001) indicates that the shareholders of the corporation realize the general will to manage, exercising their rights. The researcher writes that 'giving corporation's shareholders a different, secondary role in managing is unjustified'.

According to Rudenko (2015), a corporation is managed by its bodies, and not just shareholders. In this case, decisions come solely from the governing bodies of the corporation, and not from individual entities. This explains the possibility for shareholders to manage the corporation within the framework of those bodies of which they are members. For its part, Kosyakova (1998) notes that she cannot agree with Shitkina (1997) regarding the aspects under consideration of this issue. She draws attention to the fact that the laws on commercial organizations in most countries presuppose the presence of a quorum for the meeting of all participants when deciding on the activities of an organization. It follows from this that in the case of the denial of direct participation in the management of a commercial organization, the participants have no legislative basis (Loginova 2016). Morozova (2005) indicates that 'participants can exercise their corporate rights as their own actions, which expresses the resemblance to absolute rights. In particular, when voting at a general meeting, he exercises his rights to participate in the management of a corporation. Moreover, the actions taken are not absolute, because they must be supported

by active actions on the part of a corporation itself'. The researcher directly points to the fact that when a specific entity taking part in the management of a corporation takes certain managerial actions, they require the approval of such decisions by a corporation to take legal force.

Lomakin (2008) interprets corporate relations as capable of arising, mutating and terminating due to the acquisition, exercise and transfer of corporate rights and related obligations. 'Corporate legal relations also arise in the protection of corporate rights when special corporate methods of protecting rights are applied for these purposes, which will be discussed later. In this regard, corporate relations can be called participation or membership relations. The terms 'participation' and 'membership' characterize the legal relationship that mediates a relationship of an entity to an internal structure of a corporation'. From the above examples, it follows that among domestic researchers on issues of corporate governance and their assessment from the point of view of existing international legal norms, there is also no unity regarding the criteria for assessing various managerial aspects in the context of existing legal norms. This state of affairs only emphasizes the necessity for further research in the framework of this issue in order to search and determine criteria for assessing the legal aspects of corporate governance in the context of international law.

Conclusions

A study of the legal aspects of corporate governance in the context of the current international law has led to such results. Firstly, the very clear definition of the concept of a corporation today is not in its pure form in the legislative acts of most countries, which in itself complicates the consideration of this issue from a legal perspective. Legislative documents in different countries interpret the concepts of legal culture and corporate relations differently, and in some countries, there is no clear link between these forms of relations and civil law. Secondly, in the legislative acts of Ukraine, Russia, the USA, the countries of Europe and Asia there are no clear legal documents regulating the legal nature of corporate governance and various legal aspects arising in this regard. The administrative aspects of corporate activity are either not covered by the current legislative norms, or are related to the sphere of civil law relations without clearly regulating the dependence of the actions of the entities participating in them on existing legal norms. Thirdly, in works of foreign and domestic researchers on corporate governance topics and linking it to the current legal standards, there are significant differences in the assessment of this issue. There is no unity among researchers in assessing the very term of a corporation, the nature of corporate relations, or regulating corporate governance with existing civil and international law. The very essence of corporate relations, as a rule, is treated differently by various researchers on this issue. Fourth, despite extensive research on the issue under consideration, fundamental criteria for assessing the legal aspects of corporate governance, as applied to existing international law, have not yet been developed. Based on the foregoing, it follows that the legal aspects of corporate governance in the context of existing international law require further research, which seeks to identify and state the main criteria for regulating these relations from the standpoint of international legal norms.

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