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THE DEFENCE OF CORPORATE RIGHTS

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The aim of right is to protect interests, here defence makes inalienable part of right and examined by research workers in different aspects: as a measure of the settled conduct; as a system of the legal adjusting; as a guarantee of rights; as the forced method of realization of the broken right with the purpose of its renewal; as a complex of the concerted organizational measures; as an aggregate of measures of law-enforcement character; as activity. One conceptions are concentrated on the materially legal aspect of category of defence, others on a judicial aspect, and some interpret defence too widely in quality of legal norms.

However, every field of both financial and judicial law contains the institute of defence, but none of them determines this category. The scientific studies are mostly concentrated on the analysis of forms and methods of defence, without division of them and leaving out of eyeshot intercommunication with other legal categories, the features of defence that are conditioned by disagreements of the subject of the legal adjusting.

Nowadays for science of civil law the research of the integral system of defence of corporate rights is actual for the improvement of current legislation, for acceptance of new normatively legal acts, for legal adjusting activity, and also for the legal defensive institutes of other fields of law.

The purpose of the article is to determine the concept of defence of corporate rights and the analysis of characteristic signs, to analyse the forms and methods of defence.

The research of practical and theoretical questions of defence of corporate rights were done by as I.V. Spasibo-Fateeva, Yu.F. Bespalov, L.M. Zvyagintseva, Z. V. Romovska, N. A. Chechina, Yu. D. Pritika, I. G. Pobirchenko, O. P. Vershinin etc.

The right for defence is an independent subjective right which has a materially legal nature and is a pre-condition of origin of judicial relations. Thus, an equitable right on defence consists of possibility of realization of own positive actions by a competent person; possibilities of requirement of the proper conduct from the obliged person; the use of the state forced measures in relation to persons, who violated a legal duty. The corporate rights, as well as other rights of the participants of civil appeal are equitable rights and the right for defence is the inalienable guarantee of realization of corporate rights and interests, that go out from the statements of article 15 of the Civil code of Ukraine. A requirement in defence of corporate rights arises up in the case of violation or abuse of such rights, in the case of origin of dispute in relation to such rights.

The defence is the constituent of rights for his transmitter, that is used for renewal or ceasing of the violated rights, which is realized in certain forms.

In the encyclopaedic meaning defence is understand go as complex system of measures which are used for providing of free and proper realization of equitable rights, including judicial defence, legislative, economic, organizational technical and other facilities and measures, and also self-defence of civil laws [1, p. 169].

I. V. Spasibo-Fateeva examines defence as measure of the settled conduct of a competent person which is expressed in possibility independently or by jurisdiction organs to apply to the obliged person the measures of the state forced character with the purpose of removal of obstacles in realization of equitable right or proceeding it in the previous state or punishment for violation [2, p. 234].

Yu. D. Pritika determines defence of rights as a legal activity directed on the removal of obstacles on the way of realization of the rights and ceasing of offence, renewal of the statement which existed before the violation [3, p. 16].

Being a doubtful of the expounded positions, it should be noted that defence includes in itself the elements of both financial and judicial order, they are associated and complement each other, and the accent on activity (determination only of judicial legal aspect) narrows the article of research of this phenomenon. Moreover the defence of right is not the measure of the settled conduct, rather than it touches the forms and facilities of defence, which are examined as possible actions fastened by the protective norm of law or agreement directed on warning, ceasing of violation of rights and also on their renewal. The defence can not be examined only

as activity the given determination is characteristic for the forms of defence, which are mediated by activity which we divide into judicial activity and procedural activity directed on the disputes desicion. The conception of I. G. Pobirchenko is that the forms of legal defense in relation between socialistic organizations have principle differences from the form of legal defense with participation of citizens [4, p. 19] on which judicial or procedural activity of participants will depend.

Along side it follows to take into account that defence can be shown not only in the form of activity of the proper organs the defence of rights can be expressed within the framework of protective financial legal relationship (a shareholder, a founder an economic society).

V. P. Gribanov marks that the material legal maintenance of defence includes in itself: first, the possibility of the authorized person to utillize the facilities of the own forced influence settled by the law on an offender, to protect a due right him by the own actions of actual order (self-defence of civil laws); secondly, the possibility of application of legal measures of operative influence directly by the authorized person on an offender; thirdly, possibility of the authorized person to appeal to the competent public or state organs with the requirement of forcing a person to the certain conduct [5, p. 107].

Taking into account the features of corporate relations it should be noted that the stages of defence of rights and interests formulated by the scientists-legislators are not [6, p. 6-8], characteristic of them namely: the origin of conflict (the availability of loss, the violation of rights and interests); documentary fixing of conflict (including establishing of a causal connection); operative defence of rights (the refusal in of paying accounts etc.); claim work; forced defence (lawsuit); implementation of court decision. In corporate attitudes toward the stages of the defence of rights we refer: avaliability of conflict – extra-judicial defence is judicial defence, and attributing to the stage of defence of rights implementation of court decision – is in general debatable.

Along side with the absence in the legislation of the determination of «defence of right», the ambiguousness of doctrine approaches, the national legislation does not contain the concept «form of defence», does not even operate such term, interpreting or using terms «order of defence», «methods of defence». However, «facilities» and the «forms» of defence are not identical concepts, all of them are included in the system of defence, but the mean its different constituents.

V. V. Butnev determines the form of defence as a complex of the concerted organizational measures on defence of equitable rights which are realised within the framework of the unique legal mode [7, p. 17].

V. V. Dunaev determines the form of defence of civil laws as actions, based on the norm of right or agreement, that is realised within the framework of legal procedure or without it, directed on warning, ceasing of violations of rights and their renewal, carried out by the special jurisdiction organ, or by the legal owner himself [8]. Other research workers determine the form of defence as a «certain order of the defence of rights and iterests, realised by this or that by a judicial organ depending on its nature» [9, p. 6; 10, p. 12-14; 11, p. 7].

Taking into account the work in relation to the kinds of forms of defence of civil laws, it should be noted that the subject competent to carry out the defence of equitable rights, is the most general classificative basis of forms of defence of corporate rights. The grounded claims of G. A. Sverdlika and E. L. Strauninga [12, p. 37] prove that the form of defence specifies the subject who carries out the measures of defence, thus, determining him in quality basic, characterizing the signs of one form in relation to the other.

Consequently, without the detailed analysis of the existent theories in relation to the classification of the types of forms of defence it should be noted that the participants of corporate relations can use the both jurisdiction and unjurisdiction form of defence. If with the jurisdiction form of defence of corporate rights all is clear, and a legislator defined clearly the jurisdiction of corporate disputes to economic courts, it should be noted that not all of types of unjurisdiction form of defence can be used the participants of corporate relations.

Thus to the unjurisdiction form of defence we refer the arbitrary form of defence; making peace procedures; meditation; extra-judicial order; self-defence. Along side in the case of defence of corporate rights the participants of corporate relations can use practically all of types of unjurisdiction form of defence, except for the arbitrary form of defence. Such conclusion is done on the basis that the corporate disputes are exceptional jurisdiction of economic court and accordingly the participants of corporate relations, rights and the duties of which are regulated by the corporate legislation and constituent documents, can not by arrangement change the jurisdiction of corporate disputes, independently to carry out the choice of right which under goes application to maintenance of their legal relationships, even in the case of availability of a foreign element in the corporate relations.

I.10 p. 1 article 6 of the Law of Ukraine «About the arbitrary courts» from 11.05.2004 № 1701-IV, item 2 article 12 the Economic code of practice of Ukraine testifies the impossibility of electing of arbitrary for of defence of corporate rights it is marked in them, that matters, which arise out of corporate relations in disputes between the economic society and its participant (by a founder, shareholder), including a participant which has been removed, and also between the participants (by the founders, the shareholders) of economic societies, which are associated with the creation, activity, management and ceasing of activity of this society, except for labour disputes that can not be passed by the sides for the decision of the court arbitrary.

The Economic courts, deciding the disputes between the shareholders in questions of corporate management, should the agreements about the submission of questions of corporate management to the foreign right violates a public order made between shareholders – foreign legal or physical entities and according to the article 228 CC of Ukraine is useless. The participants of economic societies regardless of the subject membership of the shareholders have no right to subordinate consideration of corporate disputes connected with activity of economic societies which are incorporated in Ukraine, in particular, such which go out from a corporate management, the international commercial arbitration courts [13].

Coming out from positions of the Economic code of practice of Ukraine, corporate disputes, jurisdicted to an economic court, can be devided into two categories as to their subject composition:

Firstly, disputes between the economic society and its participant, besides the former one (who has left) out;

Secondly, disputes between the participants (by the founders, the shareholders) of the economic societies, which are connected with creation, the activity, management and ceasing of the activity of this society, except for labour disputes.

While finding out the possibility of relation of dispute to the corporate one you should refer to Recommendations of the Higher Economic court «About the practice of application of legislation in consideration of businesses, which arise out of corporate relations» dated from December, 28th in 2007 № 04-5/14, and also the Decisions of Plenum of the Supreme Court of Ukraine «About the practice of consideration of corporate disputes by the courts» dated from 24.10.2008 №13, where the categories of disputes which are not corporate are determined.

Special attention should be paid to differentiating of corporate and labour disputes. In corporate relations it has an important value, as a participant of the society to which the corporate rights belong can also be with society in labour relations. Thus liberation of participant of society, for example from position which he occupied in accordance with a labour agreement contract (the contract) with the society does not bring automatically to its deprivation of corporate rights. In practice different approaches as to determination of nature of dispute and referring it to labour or corporate appear sufficiently often between the sides of dispute. In this connection proper attention should be paid to analysis of judicial practice, and also to the recommendations, given by the Higher Economic court.

As an example, an ambiguous approach at consideration of businesses in relation to the removal of members of executive branch of society from implementation of the duties can be given, in particular attributing them to labour or corporate. As there has been marked in the Decision of the Constitutional Court of Ukraine from 12.01.2010 № 1/2010 the removal of the members of the executive branch of society from implementation of duties (part third of the article 99 of the Civil code) or removal of the chairman of the executive branch of society from the implementation of plenary powers (the passage of the first part of the second article 61 of the Law of Ukraine «About the joint-stock companies») as to their legal nature, the article of adjusting of the legal relationships and law consequences differs from the removal of a worker from work on the basis of the article 46 of the Labour Code. For this reason the possibility of the authorized organ of society to remove the member of the executive branch from the implementation by him the duties is contained not in the orders of the Labour Code, but in the article 99 of the Civil Code, that is not being the article of adjusting of the labour right norms. The realization by the participants of society their corporate rights on participating in its management by taking by the competent organ the decisions about electing (setting), removal, recall of the members of the executive branch of this association refers also giving or deprivation them of their authorities for society management. Such decisions of the authorized body must be examined not within the limits of labour, but corporate legal relationships, which arise up between the society persons whom the plenary powers of its management are trusted. In this connection the «removal» in accordance with the part of the third article 99 of the Civil Code is the action of the authorized organ of society, directed on doing impossible the process to fulfil the plenary powers in the field of administrative activity by the member of its executive branch within the limits of

corporate relationships with society. The necessity of such norm is predefined by the specific status of the member of the executive branch which received from the authorized organ of society the on right management. By nature of corporate relations the participants of society must be given the possibility at any time to react operatively on the actions of the person who carries out the representative functions with harm for interests of society, by deprivation of it of the proper plenary powers. Thus, the maintenance of the positions of the third part of article 99 of the Civil Code needs to be understood as the right of the competent authorized organ of society to remove the member of the executive branch from the implementation of duties which have been by it defined him, at any time, at ones own discretion, from any grounds, but on conditions that, if the grounds of the removal have not been marked in the constituent documents of the society. Such form of defence is the specific action of the transmitters of corporate rights in relationships with a person to whom they trusted to carry out the management of society, and can not be examined in scope of the labour right, in particular in the aspect of the article 46 of the Labour Code.

Consequently, the presence of certain amount of forms of defence of rights puts before the subject of corporate relations a question in relation to efficiency and expedience of the use of this or that form of defence. Thus, the participants of corporate relations in connection with the specific nature related to the subjects and maintenance of corporate relations can not use all the existent types of forms of defence. Taking into account the subject composition of corporate relations, imperativeness of adjusting of them only by the national legislation the address to such kind of unjurisdiction form of defence as arbitrary institutions it is impossible.

The specific nature of connections which arise up in corporate relations between his participants foresees the use at defence of corporate rights the administrative form of defence. O. R. Kibenko marked «the shareholders nights can be protected in a number of different ways: 1) internal (corporate) self-defence; 2) the administrative, extra-judicial order); 3) in a judicial order» [14, p. 248]. The administrative form of defence is characterized by the fact that a dispute is decided by an organ which is not the participant of the debatable legal relationship, but related to one or a few participants of the debatable legal relationship by the proper legal organizational relations. Such organ is the National commission on securities and fund market, on which in accordance with the Decree of the President of Ukraine «About the National commission on securities and fund market» dated from 23.11.2011 there has been a task put in relation to defence of rights of investors by realization of measures on prevention and ceasing of legislation violations at the market of equities and legislation as to joint-stock companies, the implementation of sanction for violation of legislation within the limits of the plenary powers [15].

Along with the administrative defence, the defence of corporate rights is carried out by means of the whole system of alternative procedures (consensus procedures): mediation, reconciliations in basis of which lies the collaboration of sides and which are directed on achievement of acceptable agreements for the sides of conflict. So the vexed questions of corporate character become the article of consideration of the management organs of societies (general collections, observant advice, checkup committee); extra-judicial settlement of disputes with bringing in the specialists which assist in reconciliation mediation.

For complete research of the concept of «defence of rights», besides the «form of defence» it is necessary also to consider a concept the «methods of defence» and the « defence of facilities» and to define their correlation.

It is impossible to agree with the position of Yu. F. Bespalov, who under the judicial methods of defence examines the measures of state compulsion foreseen by the legislation and applied by the court directed on the forced realization of rights and interests of person [16, p. 126]. Such understanding of judicial methods of defence, narrows their legal nature, besides at defence of corporate rights, a person has a right to choose the method of defence independently which is foreseen by the legislation and to take advantage of administrative form of defence, in accordance with which the authorized organs will apply the measures of compulsion, which will be directed on effective defence and realization of corporate rights.

To the methods of defence of corporate rights they refer: renewals of violated and confessions the questioned equitable rights, confession of the proper decision invalid of the general meetings of shareholders (participants) of society or observing society putting on the shareholder the rights and duties of buyer of actions in connection with the presence of overwhelming right on acquisition of actions, which are sold to other shareholders of society, removal of threat of violation of equitable rights, operating on a person, guilty in violation of equitable rights, etc. Thus, the use of methods of defence of corporate rights can be carried out within the framework of the articles 16 CC of Ukraine and 20 CC of Ukraine.

The methods of defence of the civil laws having been transferred in p. 2 items 16 CC of Ukraine and have the name «the defence of civil laws and interests by the courts», in connection with what can be made the impressions that the methods marked in p. 2 items 16 CC can be used only by the court. Actual by the fact for defence of the person carries out at own discretion (p. 1 item 20 CC of Ukraine). And as the defence of corporate rights can be carried out in different forms, the choice of method of defence from the list of methods, determined in part 2 items 16 CC of Ukraine, depends not on the form of defence, but on the specific nature of right which is detended, for character of violation and takes place taking into account the limits of realization of equitable right set by the law.

Thus, taking into account the existent methods of defence of corporate rights they can be grouped on the methods of prophylactic character and methods of the forced realization of rights and implementation of duties which aqvired direct legislative fixing, which can not be dependent upon the form of defence, but which depend on maintenance of corporate rights and authorized organs of management economic society defence.

The application of methods of of corporate rights is provided by the in a number of ways which in legal science are named of defence the facilities. The defence of facilities in this aspect are possible to subdivide into a few groups:

- facilities, common at the judicial form of defence (point of claim, statement, complaint, judicial acts, orders etc.);
- facilities, common at the administrative form of defence (a statement, complaint, suggestion, executive inscription of notary, decision of public and organs of local self-government authorities, accepted by the appeal of citizens, and etc.);
- – facilities, common at a self-defence (holding up the property, the statement as to the refuse of implementation of a duty etc.).
- Consequently, both the choice of method of defence and the choice of mean of defence, depend on maintenance of legal relationships and the will of a person who comes running to defence. However, if the methods of defence are determined by the norms of financial right, the forms and facilities of defence are regulated not only by the of norms judicial but also by the norms of financial right. Besides, if «the methods of defence» and «form of defence» are independent categories which between there exit interrelation the «form of defence» and «defence the facilities» are correlated between themselves as general and partial.
- During the research of the concept of defence of rights, the analysis of the correlations of concepts of «the form of defence», «the methods of defence», «the defence facilities » we came to the next conclusions.
- It is possible to refer to the specific features of defence of corporate rights:
- arises up in the case of violation or creation of the real threat of violation of rights and interests;
- is the right of any person whose rights and are violated or considered violated;
- contains a financial and judicial constituent;
- the purpose is cleasing of violation, proceeding of the right or prevention of offence;
- stipulated by realization of the proper methods;
- has the proper form which is an objective necessity;
- facilities

In a general sense the defence of corporate rights is a complex system of measures of financial and judicial order, which includes it itself the forms, methods, facilities which are independently elected by a person, whose rights and interests of which are violated, and used for providing such rights.

The component elements of defence of corporate rights are forms, facilities and methods. It should be noted that in social legal sense they are independent phenomena although closely connected, here the forms of defence and facilities of defence are correlated between themselves as general and partial.

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АНОТАЦІЯ

Бігняк А.В. **Захист корпоративних прав.** – Стаття.

У статті досліджується поняття захисту корпоративних прав, проведено аналіз характерних ознак, визначено зміст корпоративних прав, досліджено форми та способи захисту корпоративних прав, наведено види захисту корпоративних прав, відображено співвідношення понять «захисту прав», «форма захисту», «способи захисту», «засоби захисту»

Ключові слова: захист прав, корпоративні права, форма захисту, спосіб захисту, засіб захисту, юрисдикційна захист, неюрисдикційний захист, адміністративний захист, корпоративні правовідносини, організаційні правовідносини.

АННОТАЦИЯ

Бигняк А.В. **Защита корпоративных прав.** – Статья.

В статье исследуется понятие защиты корпоративных прав, проведено анализ характерных признаков, определено содержание корпоративных прав, исследовано формы и способы защиты корпоративных прав, приведены виды защиты корпоративных прав, отражено соотношение понятий «защиты прав», «форма защиты», «способы защиты», «средства защиты».

Ключевые слова: защита прав, корпоративные права, форма защиты, способ защиты, средство защиты, юрисдикционная защита, неюрисдикционная защита, административная защита, корпоративные правоотношения, организационные правоотношения.

SUMMARY

Bignyak O.V. **The defence of corporate rights.** – Article.

In the article there has been given the determination of concept of «corporate rights» and the analysis of characteristic signs has been conducted: there has been determined the maintenance of corporate rights, forms and methods of defence have been analysed,the types of defence of corporate rights have been defined the correlation of the concepts of «the defence of rights», «the form of defence»,has been highlighted «the methods of defence», «facilities of defence».

Keywords: defence of rights, corporate rights, form of defence, method of defence, mean of defence, jurisdiction defence, unjurisdiction defence, administrative defence, corporate legal relationships, organizational legal relationships.