

Management of Russian business entities: the peculiarities of legal regulation

Georgi Leonidovich Rubeko

Kalmyk State University Pushkin Street, 11, 358000, Elista City, Republic Kalmykia, Russia

Abstract. The paper investigates the problems of a legal regulation of the Russian business entities' management. A brief comparative analysis of Russian business companies and their counterparts in foreign countries is given. The legal nature of business entities is investigated. In particular, the definition of business entities is offered. The bodies that are formed in business entities are defined as well. Various models of business entities' management are analyzed. The shortcomings of the Russian legislation are revealed, which regulate the management of business entities. In this regard, it is offered to amend the Russian legislation in changing the ratio of the management bodies of business entities.

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Introduction

Business companies are the dominant organizational-legal forms of commercial organizations in the Russian economy, both in number and in size of the ownership capital. More over the very category of "business companie" is a generalizing one and includes three types of business organizations – joint stock company, limited liability company and additional liability. Approximately the same system of trading partnerships has been developed in countries, which belong to the continental law system (Germany, France, Switzerland, etc.) [1; 2].

In Russia, in contrast to a number of European continental states, the so-called joint-stock commandite is not recognized; that is a form that combines elements of a commandite partnership and joint stock company. At the same time, Russia is one of the few states where an additional liability was provided. In connection with the fixing of this form in the Russian civil legislation, it makes sense to draw some parallels with the English law. It provides such a kind of a company as a company with a liability, limited by guarantee (Article 4 of the UK Companies Act 2006) [3]. The essence of a company is that within its liquidation, their participants make a commitment to pay the designated amount for the company debts payment [4]. Thus, we should agree with those experts who note that not only German, but also Anglo-American law influences the Russian corporate law [5].

Currently, the Russian Federation civil legislation is reformed, as well as a corporate law. Thus, © 4 of the part 1 of the Civil Code of the Russian Federation and the acknowledgement of the fact that certain legislative provisions' acts of the Russian Federation became inoperative" was accepted [6]. In accordance with this law the norms, governing the activities of juridical companies were changed

significantly. In particular, the new classification criteria of juridical companies division were established, by which the business companies are supposed to be referred to the so-called corporate juridical companies. The additional liability companies are excluded from the list of juridical bodies as well. The public joint stock company is provided.

The main part.

One of the most urgent and challenging questions, both in theoretical and practical terms, are the questions of the business companies' management.

In particular, such issues may be referred to the problem of the legal nature of business companies. Scientists' opinions are presented by two main viewpoints. Some of them think that the juridical entity bodies are its part. And this opinion can be considered as dominant among the scientists-civilists of the Soviet era. Similar views on the nature of the legal entity are largely connected with the active researches of the nature of the juridical entity. But we need to emphasize that in 1950-70-s of the last century the major Soviet juridical entity theory (the theory of the collective, the theory of a director, theory of reality, etc.) appeared. Among the scientists of that era, who believed that bodies of a juridical entity are its part, may be called O.A. Krasavchikova, B.B. Cherepakhina, O.S. Joffe, rightly considered as outstanding scientists of that period. However, this point of view is shared by many modern researchers such as S.D. Mogilevskiy, D.V. Lomakin, etc.

Another group of scientists considers bodies as representatives of juridical entity. This point of view was taken by a number of pre-revolutionary Russian scientists (E.N. Trubetskoy, G.F. Shershenevich [7; 8]). In Soviet times, many scientists-processualists considered bodies as legal representatives of a juridical entity [9; 10]. However,

this opinion has been subjected to a well-founded criticism in literature [11].

This position is popular among modern researches. Moreover, in many ways it is the result of a critical attitude to the Soviet era prevailing theories of the juridical entity and, vice versa, return of interest to the theories of the juridical entity nature, which are peculiar for European science of the 19th century civil right (in particular, for the theory of fiction, special-purpose property, etc.) [12]. It must be emphasized that in the Anglo-American law, directors are considered as agents of companies [13]. This is generally a consequence of the peculiarities of legislative system in these countries, where, as a rule, cases of speech on behalf of another person are considered as agency. As for the Russian realities, the analysis of the legislation, special literature and judicial practice, allows speaking about the scientists' arguments' reasonableness, who believe the juridical entity to be a part of it.

In our opinion, the determination of the legal nature of the juridical entity, we should consider the following. The body of the legal entity is an individual or a group of individuals, as without a human constituent, organized somehow, a juridical entity can not exist and operate. The process of formation and expression of the will of the juridical entity mainly depends on the legal form of organization of a juridical and a structure and its organs. Russian legislation provides the most complex system of organs for business companies (especially for stocks). There will-forming and volition organs are distinguished respectively. For juridical companies, mainly the actions of volition organs create rights and duties within the relationship with third parties.

If the juridical entity has several bodies, each of them acts within its authority, established by law, other legal acts, as well as the constituent documents of the society. Mainly through the actions that may be related to the authorities of the body, it is possible to draw a line between the actions of individuals, as independent juridical companies, and activities of the same people who will be regarded as acts of a juridical entity. The latter will include the actions of those individuals, who carried them within the authority granted to them. That is why it can be argued that in this aspect, we are talking about bodies as a part of a juridical entity and not a separate subject of law.

Thus, we can determine a **body of a legal person** as follows: *it is a part of a legal person, which consists of one individual or group of individuals, acting within their competence, stated by law, and other legal acts of the constituent documents, which form and express outwardly the will of a legal person.*

Another relevant issue is the characterization of the system of business companies bodies' management.

Modern law (Civil Code of the Russian Federation and the Law of the Russian Federation of December the 26th, 1996 #208-FL "About Joint Stock Companies" (hereinafter the JSC Law), the Law of the Russian Federation of February the 8th, 1998 #14-FL "On Limited Liability Companies" (hereinafter the LLC Law)) solves the issue of the business companies' management structure flexibly. The presence of these or those management organs in a joint stock company depends largely on the number of shareholders – owners of voting shares. In limited liability companies and in companies with an additional liability, a decision about an organs' system is taken by the participants. At the same time, the legislation establishes certain requirements for the mandatory of creation of some business companies bodies.

The supreme governing body, according to the JSC Law and the Law on the LLC is the general meeting of shareholders (participants). This is also presented in all business companies except those that consist of a single shareholder (participant). The board of directors (supervisory board) is compulsorily created in joint stock companies with a number of shareholders – owners of voting shares of more than fifty (p. 2, the article 103 CC, p. 1, the article 64 of the JSC Law). In limited liability companies a similar body is created at the discretion of the participants.

The Russian legislation allows the creation of executive bodies, conducting a current company management. Moreover a generalized name of "executive bodies" is peculiar to countries, formed after the breakup of the Soviet Union. In all other countries the specific (board of directors) is used and not a generalized name the corresponding bodies. The roots, in this case, seem to be found in the Soviet tradition of naming administrative-regulatory bodies as executive ones. The Russian legislation allows two types of executive bodies – the individual and collegial ones. Moreover, the Russian legislation clearly distinguishes the individual and collegial executive bodies. In foreign countries, there is no such distinction. For example, in Germany, the board may consist of one or more persons (paragraph 2 §76 of the JSC of 1965 in Germany). In the UK, the number of directors depends on the type of the company. In a private company there may be one director; in the public one – at least two directors (Article 154 of the UK Companies Act of 2006 of Great Britain). Moreover, in the UK and in number of other common law countries, it is provided the possibility of the existence of shadow directors [14].

As for the combination of the executive bodies of the joint stock company in particular, there

is a contradiction between the Civil Code of the RF and the JSC Law and LLC. According to the CC, there are basically three possibilities: in a society can be created either sole authority or collective, or both simultaneously individual and collective one (paragraph 1, p. 2, the article 91, p. 3, art. 103). The JSC Law provides that a company can be created either sole or sole and collegial executive body (p. 1 of the article 69). What is the way out of this situation? According to the Civil Code provisions of federal laws, containing norms of civil law must comply with the Civil Code. Therefore, in this case it is necessary to apply the norms of the Civil Code. However, the situation is complicated by the fact that in the case of creating only a collegial body is quite difficult to solve the question of who will act without a power of attorney on behalf of a company. That is why, in practice, mainly the provisions of the JSC Law and the LLC Law are used. In the future, in our view, the paragraph 2, p. 1, the article 91 and p. 3 the article 103 of the Civil Code, should be amended accordingly, having foreseen a creation of the individual or the individual and collegial executive body in business companies.

Speaking about the business companies' management, in literature the term "joint-stock company management model" is used. In our view, by the joint-stock company management model should be understood a set of management organs, which is provided by a code of a particular company, in accordance with a legislation, which depends on various kinds of economic and other factors.

S.D. Mogilevskiy points out four management models that can be used in business companies.

The first model is implemented in a company with a general meeting of shareholders, board of directors (supervisory board), as well as individual and collective executive bodies.

The second model provides a presence of a general meeting of shareholders (participants), a board of directors (supervisory board) and the sole executive body.

In the third model within a presence of a general meeting of shareholders (participants) there is no board of directors (supervisory board), but in addition to the sole body, a collegial executive body is created as well.

The fourth management model has no a board of directors, and a collegial executive body [15].

It should be considered that the third and fourth management model may be used only in those joint-stock companies, where the number of shareholders, owners of voting shares, is less than fifty.

As we see, in this case, business companies, consisting of a single shareholder (participant) are not

taken into account. In them, general meeting of shareholders (participants) is not formed and the decision on matters within its competence is made by the sole shareholder (participant) alone (p. 3 the article 47 of the JSC Law; art. 39 of the LLC Law).

As a matter of principle, in this case you can use all the same model as well, but in a modified form (there is no general meeting). This is explained by the fact that the law does not require that members of a board of directors and the collegial executive body is necessarily shareholders. However, the most optimal is a variant, in which in similar companies there will be created only one sole executive body. It is at such cases some provisions of the JSC Law and the LLC Law are calculated for (respectively p. 7, the article 79, paragraph 2, p. 2, article 81 and p. 9 of the article 46).

It should be noted that the choice of a management model is an important step in the creation of a business entity. In a particular entity there can be realized only one model. At the same time, business companies have the right to change a management model in an established order. The presence of these or those control bodies in a particular entity depends on a kind (type) of a company, the number of shareholders (participants), on size of share package (shares) of individual shareholders (participants), the goals, which are within a creation of a company, and other factors. Also, it is necessary to take into account that in joint stock companies, a right to control is distinguished from property rights. The control function is taken by professional managers [16; 17]. And, of course, in this case the effectiveness of an entity control largely depends on the right choice of a management model. Different management models, offered by the legislation for companies, allow some flexibility in a management and control [18].

I would like to draw an attention to the shortcomings of the Russian corporate law in a part of management.

Peculiarities of the development and adoption of the JSC Law contributed to that fact that in Russia the terms "board of directors" and "supervisory board" are used as equal. Although the functions assigned to these bodies are different in those countries, where their creation is provided (respectively, mainly the countries of Anglo-American law and civil law countries). If a board of directors may, as a matter of principle, be attributed to executive bodies, the supervisory board is only a supervisory body. In the Russian JSC and LLC Laws it is provided that a board of directors (supervisory board) is the governing body. Therefore, this authentication can not be considered as successful. In connection with the possibility of creating a business entity both a board of directors and a management board simultaneously, the management structure of business companies is rather cumbersome.

And the more clearly it manifests itself in limited liability companies, in which the participants decide to form a board of directors. Previously, we offered a solution of this problem [19]. In particular, it was offered to assign a board of directors to executive bodies. In this case, this organ would serve the functions of a collegial executive body or, as another variant, a refuse to use the term "board of directors" could be considered or to use it as an alternative for a government term. In this formulation, the structure of management organs can be represented as follows: the general meeting of shareholders (participants), the board of directors (or the management board, which is created mandatory in companies with a number of shareholders – owners of voting shares over fifty) and chief executive officer. A supervisory board creation is possible as an overseeing body, which controls a board of directors' activities (a management board). By the way, mainly these functions are assigned to a supervisory board of a production cooperative according to p. 1 the article 16 of the Law of the Russian Federation of May the 8th, 1996 "About production cooperatives." Moreover, a supervisory board creation in limited liability companies does not seem appropriate. Unlike a supervisory board, the other controlling body – the audit commission – controls the operations of the company. It should be noted that the Law of Russian Federation of May the 5th, 2014 #99-FL "About an amending of the chapter 4 of the part 1 of the Civil Code of the Russian Federation and the acknowledgement of the fact that certain legislative provisions' acts of the Russian Federation became inoperative" presents the article 97 of the Civil Code in the new edition, which is dedicated to public companies. The paragraph 3 of this article in the new edition provides a creation of a collegiate management body (supervisory council or otherwise) within a public entity, whose members can not be less than five. This body is designed to monitor the activities of the corporation executive bodies. As you can see, the development of appropriate changes, a legislator gave up the idea of identifying a board of directors and the supervisory board which should be considered correct with the listed above. Further, within the development of amendments of the legislation, which governs the management bodies activities, management models should established that simplifies the system of business companies' bodies.

Conclusions.

All of the aforesaid makes it possible to ascertain the existence of certain problems of legal regulation of the bodies' activities' management of business companies, which requires a legal solutions.

To solve these problems, a definition of a legal entity is suggested in the article. We should proceed from the fact that according to the Russian law, an authority is part of a legal entity, rather than its legal representative. An optimization of the management model of business companies was offered in the article. In particular, we are talking about changing the ratio between a board of directors and collegial executive bodies.

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Corresponding Author:

Dr. Rubeko Georgi Leonidovich

Kalmyk State University

Pushkin Street, 11, 358000, Elista City, Republic Kalmykia, Russia

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