

МАТЕРІАЛ ДЛЯ САМОСТІЙНОЇ РОБОТИ

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LECTURE COURSE OF CORPORATE LAW

LECTURE 1. GENERAL TERMS OF CORPORATE LAW. SOURCES OF CORPORATE LEGISLATION

The modern world is developing towards a global economy. This process gives a powerful development impulse to the integration of economic activity of businesses, while a growing level of international competition makes businesses look for ways to consolidate potentials in their struggle for survival and market cooperation. Corporate integrated structures are the foundation of modern economics.

Considering the concept of corporate law, it should be noted that there is one single definition of it, as there are various opinions and views to this issue, including identification of corporate law with company law, attributing to corporate relations the issues of regulation of internal rules of certain organization, which is based on membership and pooling of capital.

First of all in order to study these issues it is necessary to analyze the history of origination of corporate law and corporate relations.

It should be noted that the United Kingdom is the pioneer of modern corporate law, whose legal institutions formed the basis of modern corporate law in most countries. Ukraine is not an exception.

The prototype of modern legal entities was so-called “companies”, which later became known as “corporations”; to obtain a legal status, such corporation was subject to registration.

Corporations were based on the norms governing relations of companies’ founding, their activities, reorganization order, classification of companies, legal standing, legislation concerning company’s securities, insolvency and bankruptcy of companies.

The corporate movement in Ukraine started mainly in the form of joint stock companies. There were and still are many obstacles in the development of joint stock companies; the biggest one being actual legal inconsistency of relations between subjects of corporate rights.

Until recently the concept of corporate law was absent in the Ukrainian legislation and was only met in law books. The Economic Code currently in force gives the official concept of corporate relations as relations which arise, change and stop.

It should be noted that the existing legislation is quite controversial, as most of the legal rules governing the corporate law in Ukraine were borrowed from certain foreign laws which do not always match the realities of the economic development of Ukraine.

First of all, the Ukrainian process of formation of a mature national economy foresees an efficient management, so the attention of legislators to the corporate relations has increased recently.

The appearance of corporate relations in Ukraine is related to economic reforms, consolidation of human rights and freedoms in the basic regulatory acts, including the right to create a legal person and the right to conduct business activity by creating legal entities of various kinds. The corporate law is a set of interrelated legal norms fixing and regulating a special sector of social relations which constitute its subject. Pursuit to combine these social relations into one independent kind which requires a separate legal governing, leads to an inevitable separation of corporate law from other branches of law.

Part 1 of Article 167 of the Economic Code of Ukraine, which came into force on January 1, 2004, defines the concept of corporate law, namely:

“Corporate law is the right of the person whose part is determined in the statutory fund (property) of an economic organization, including legal capacity of this person to participate in the management of the economic organization, to receive certain part of the profits (dividends) of this organization and its assets in case of liquidation of the latter in accordance with the law, and other powers foreseen by the law and the statutory documents”.

The Civil Code of Ukraine does not use the term “corporate law”, but such concepts as “right to participate in a company”, “a share in the statutory capital”. However, there is no article that would disclose the meaning of “corporate law” as in the Economic Code of Ukraine.

Corporate rights originate as a result of creation of a company, member’s admission to the company, purchase of shares in the statutory capital.

A change of corporate rights occurs due to an increase or decrease of the amount or the nominal value of a share in the statutory capital; due to a reorganization of a company.

Termination of corporate rights occurs due to a withdrawal of one’s membership in a company, alienation of a share in the statutory capital, upon liquidation of a company, a death of a member being individual.

According to Part 3, Art 167 of the Economic Code of Ukraine, by corporate relations we mean relations that arise, change and cease in relation to corporate rights.

Nowadays there is no common understanding of the concept of corporate relations. There are several points of view.

Some believe that corporate relations are organizational relations. The concept of organizational relations was introduced by O.A. Krasavchikov. Distinguishing organizational relations, he believed that they were instrumental in relation to the basic property relations and that they had a specific function: regulation of property relations. Others think that corporate relations as property relations are fixed by specific forms of alienation of a share of property values, which is characterized by a multiplicity of subject composition. However, property relations can not be exercised without organizational relations. Therefore, we should understand corporate relations as complex relations: property relations and related non-property (organizational) relations. Others believe that corporate relations are mixed property-and-organizational relations.

All existing opinions for understanding corporate relations have a right to exist, as in every definition of corporate relations one or another criterion (object, content, etc.) is taken as basis, and corporate relations themselves are divided by these criteria into different types.

Corporate relations, due to their heterogeneity, should be considered as a mixed category.

Corporate relations as a subject of corporate law are civil law relations formed in the course of creation of corporations – among corporations’ founders and other persons; after the state registration of

corporations – among them and their members, as well as between their members.

As it was already mentioned, the emergence of corporate law is due to the creation and recognition of legal entities as equal legal subjects. The characteristics of this group of civil relations can be studied by analyzing the elements of corporate legal relations, namely: subjects, object of management and the legal fact by virtue of which corporate legal relations appear.

The subjects of corporate relations are natural and legal persons within the scope in which they have the right to be founders (members) of organization. The subject of management is a group of civil relations arising in connection with exercising the subjective right to create a legal entity. The legal fact in virtue of which it occurs is also an element of any legal relations. Registration of a legal entity is the moment of origination of corporate relations.

Corporate law, like any other law, has its own forms of expression. Source of corporate law is a system of its forms containing corporate norms. First of all, these are legislative acts which, in aggregate, constitute the corporate legislation.

Sources of corporate law can be arranged on different bases.

By the nature of acceptance of the source of corporate law, these are divided into the ones accepted by public authorities (laws, decrees, resolutions, etc.) and the ones accepted by the members of the economic entity (the Articles, Corporate Behavior Code etc.).

Depending on the legal effect, it is necessary to differentiate the Constitution of Ukraine, laws, bylaws, acts of local authorities and local governments, local regulations.

Depending on the degree of generalization, it is necessary to distinguish codified, current and comprehensive sources of corporate law.

Codified sources of corporate law are the Civil Code of Ukraine (CCU), the Economic Code of Ukraine (ECU).

As the economic entity is a legal person, it is subject to the provisions of the CCU concerning legal entities. The ECU regulates the legal status of economic entities, in particular, it provides the concepts of enterprise, economic entity, it defines organizational and legal forms of economic entities, statutory capital of an economic entity, rights and liabilities of members of economic entities etc.

The Laws of Ukraine On Joint Stock Companies, On Economic Entities are the civil acts currently in force.

Comprehensive normative acts include the Laws of Ukraine On Banks and Banking Activity, On privatization papers etc.

By the nature of corporate relations, the sources of corporate law should be divided into the sources of internal company and corporate law, the norms that regulate relations connected to creation, activity and liquidation of economic entities.

Internal company sources of corporate law include the corporate contract – a standard contract which includes provisions of corporate law, defines the universalization of rights and liabilities of the parties of corporate relations, gives them a long-term, stable nature (i.e., founding treaty of a legal entity).

Among the internal company sources of corporate law, an essential role belongs to local legal acts (i.e., the Articles, internal regulations etc.) which are valid only within a particular company, institution or organization.

A corporate (local) legal instrument is a document of a corporation body which contains corporate standards and regulates various fields of company's activity: management of the company, financial issues, securities of the company.

Corporate practices take up a special place among the sources of corporate law. Corporate practice is a rule, a result of continuous and uniform application of rules (i.e., stopping the work at certain hour, notifying the management on the facts violating the company's internal regulations).

Corporate precedents are corporate solutions used as a model for solving similar cases in the corporation.

Depending on specific areas of business, we should distinguish general and special sources of corporate law.

Application of general laws is explained by the fact the economic entities are considered by the national law as subjects of economic (business) activity and thus they are subject to the standard norms of economic (business) activity.

Normative acts that govern the procedure of carrying out economic (business) activity Ukraine should be attributed to the general sources: the Civil Code of Ukraine, the Economic Code of Ukraine, the Tax Code of Ukraine; the Law of Ukraine On Economic Entities, the Law Ukraine On Joint Stock Companies, the Law of Ukraine On Licensing Certain Types of Economic Activities, the Law of Ukraine On State Registration of Legal Entities and Individuals Being Entrepreneurs, the Law of Ukraine On Renewing of Debtor's Solvency or Declaring it Bankrupt etc.

Not only the legislation on economic activity, but legislation on securities and stock market apply to

joint stock companies, including: the Law of Ukraine On Securities and Stock Market, the Law of Ukraine On State Regulation of Securities Market in Ukraine, the Law of Ukraine On National Depository System and Peculiarities of Electronic Turnover of Securities in Ukraine etc.

The legal status of economic entities created in the field of common investment, banking, insurance and depository activities, on securities market and in some other fields of business have significant characteristics. The legal status of these economic entities is defined by specific investment, banking, insurance, stock exchange legislation, the legislation defining the legal status of professional members of the stock market.

Thus, the specific sources of corporate law are: normative acts in the field of privatization, stock market regulation, investment activities etc.

The foregoing allows coming to the conclusion that the sources of corporate law constitute a single, integrated system the elements (components) of which are in relative and hierarchic subordination in accordance with the logic of legal regulation of corporate relations.

Besides the domestic legislative acts and corporation's local acts, the sources of the corporate law are international acts and agreements involving Ukraine, business practice and agreements concluded for the implementation of corporate rights.

Necessary conditions for the successful development of corporate law in Ukraine should be a comprehensive regulation and a strategic approach. Nowadays many institutions of the national corporate law require a total rethinking to determine the practicability of their existence. At that we should not only aspire to protect the interests of the members and creditors of a economic entity, social and state interests, but also think about how the domestic corporate law serves the interests of the economic entity, whether it creates a favorable and efficient form of business organization and operation and whether it contains any "extra" non-working standards that are not performing any positive function, but only create obstacles to the efficient conducting of business and are a source of additional costs for the company and its shareholders.

We should exclude from the corporate law of Ukraine all provisions and legal structures which have proven to be ineffective (i.e. not reaching the goal of regulation, not having any positive effect) or inoperativeness (being artificial and unable to regulate the relations occurring in real life). Legal behavior patterns introduced by modern corporate law of Ukraine sometimes are very far from the relations which really exist in practice, but the

