

# МАТЕРІАЛИ ДЛЯ САМОСТІЙНОЇ РОБОТИ

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## *LECTURE COURSE OF CORPORATE LAW*

### **LECTURE 2. SUBJECTS OF CORPORATE RELATIONS. CONCEPTS AND TYPES OF CORPORATE RIGHTS AND LIABILITIES**

Among the topics most studied by scholars and being popular in the legal doctrine, an important aspect is the participation of persons in corporate legal relations, including their acquiring of corporate rights, features of their implementation etc. The problem is the lack of legislative settlement of the corporate relations, the lack of legislative interpretation of special terminology, the obsolescence of certain normative acts. Social relations in the field of corporate law are characterized by a fast development, but there is a lack of legal provisions for their settlement. Consequently, the legal doctrine is full of controversial provisions, and generalization of judicial practice and recommendations of the Presidium of the Supreme Economic Court which should be based on special legislation, increasingly act as a single regulator of the relations in the field of corporate law.

In particular, the law science has no clearly defined notion of a member (subject) of corporate relations, but there are many approaches to determine the corporate relations themselves, which in various researches have different meaning, which respectively makes different the composition of their members.

Definition of subject composition of corporate relations has a practical value, as it is the basis to enable certain subjects to protect their violated rights arising from such relations, including in court.

Thus, we consider it necessary to define the concept of corporate relations, to establish the range of the subjects which can be regarded as the members and to establish the nature of participation of subjects in these relations.

In view of parts 1, 3 of Art. 167 of the Economic Code of Ukraine (hereinafter – the ECU) the corporate relations are the relations governing by the law which arise, change and terminate as

to the corporate rights of the person whose part is determined in the statutory capital (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 law science has several approaches to improve the above definition. In particular, the corporate relations, according to V.S. Kononov, include relations between economic entities, cooperatives and their members.

N.S. Kuznetsova believes that “there are two general approaches to corporate relations in the doctrine: wide and narrow. In a broader sense, corporate relations include all legal relations where one of the members is a corporation as a legal form of legal entity which conducts business activity. In the narrow (strict) sense these are liability relations between the corporation (its bodies) and the members as to the management of business, providing information etc.

A.B. Babayev’s differentiation of corporate relations into internal and external corporate relations according to the criterion of primary and secondary subject composition of such relations is particularly expedient.

At the same time, it is difficult to accept the fact that members of internal corporate relations, according to the author, are only the bodies of the legal person, and the members of external corporate relations are only the subjects of civil law.

Thus, the main members are, in particular: the state, as an owner of corporate rights (represented by competent authorities, institutions) and all legal and natural persons who were or are, at their own

will, members of the relations which arise, change and terminate as to corporate rights, and have a property interest as a result of such relations.

As to the notion of additional member of corporate relations, we adhere to the opinion that such members, in particular, are: the state, as an owner of corporate rights (represented by competent authorities, institutions) and all legal and natural persons who are not owners of corporate rights and economic organizations the property which has a share of other person, which, however, were or are members of the relations which arise, change and terminate as to corporate rights by virtue of government's acts and powers which they acquired under the law; at that they do not have any property interest in the results of the corporate relations.

Keeping the said differentiation, these are members of corporate relations: 1) legal entities; 2) individuals; 3) the state. Thus, each of these groups has members both of internal corporate (main members) and external corporate (additional members) relations.

In a group of legal entities, we suggest attribute to the main members: 1) economic entities (their associations) as owners of corporate rights; 2) economic organizations in the property which there is a share of other persons; 3) other legal entities, the corporate rights of which have been violated, challenged or not recognized.

Additional members of the group of legal entities shall include: 1) Commissioner of state corporate rights management being a legal person; 2) State Commission for Securities and Stock Market; 3) Registrars of rights of securities holders; 4) Economic courts of all instances.

In the group of individuals being members of corporate relations, following should be attributed to the basic members: 1) members of economic organizations being individuals (founders, shareholders, investors), including those who withdrew; 2) other individuals whose corporate rights have been violated, challenged or not recognized, and to the additional members are: Commissioner of state corporate rights management being an individual.

Therefore, we suggest considering the peculiarities of the legal status of some members of corporate relations (besides those already considered by us above), as well as the grounds of non-attributing of certain categories of persons (bodies) to the latter.

In this context a special attention should be paid to the country's status as a party in the corporate relations, represented by its special statutory bodies and institutions. At that, we can not agree with those

authors who attribute the state to the category of legal entities. Thus, the state can act simultaneously as a basic member when considering it as an owner of corporate rights, as well as as an additional member, represented by competent authorities and institutions which, in accordance with the law, are statutory to perform several functions as to the owners of corporate rights and do not have any property interest in the corporate relations arising between the basic members.

Economic entities are classical subjects in relation to which the corporate rights exist.

However, not all legal entities are economic entities, only a separate group of them. Economic entities, in particular, include: joint-stock companies, limited liability companies, companies with additional liability, full and commandite companies. The last three types are not "popular", as a considerable part of "corporate affairs" refers to joint stock companies and limited liability companies (Art. 116 of the Civil Code of Ukraine, Art. 88 of the Economic Code of Ukraine, Art. 10 of the law of Ukraine *On Economic Entities*), which will be described in detail below.

Legal entities, as any organizations, do not appear all of a sudden. The basis for their creation is always the will of people. The right to create a legal entity is a lawful ability to take actions foreseen by law which will result in creation of a legal entity, i.e. the right to choose the name of the organization, its location, to choose the legal form, to form a legal entity, to register the organization with a state registrar, and in case of denial, to appeal this denial.

Most of all, the founders of legal entities are individuals. Foreign citizens and stateless individuals also have the right to create a legal person.

Regardless of the type of legal entity, whether it is a company or institution, legal relations arise between it and its founders.

The corporate law is complex and includes the following elements:

1) organizational – the right to participate in administration, the right to vote, the right to obtain information on the activities of legal entities. Along with the rights, there are organizational liabilities: to carry out the decisions of the authorities; not to interfere with their actions in achieving the company's objectives; not to disclose trade secrets and confidential information.

2) property-related – the right to receive a part of profits from the activities of legal persons, the right to receive a part of assets in case of liquidation. Property liabilities being elements of corporate law are: liability to pay one's contribution; to be responsible for the company's liabilities with one's property, if foreseen by the law; to make additional contributions.

The above property and organizational elements constitute the corporate law only in the aggregate. In other words, the corporate is an aggregate of all rights and liabilities which a person has as to certain legal entity. Specific content of the corporate law, its correlation of property and organizational elements are determined by the legal form of legal entity.

An analysis of relevant legislative acts allows distinguishing such powers of the members of economic entities:

A) to participate in the management of corporate affairs in the manner prescribed by the Articles, except as provided by law;

B) to participate in the distribution of profits of the company and to receive its share (dividends);

C) to withdraw his membership in the prescribed order;

D) to obtain information about the company in the manner prescribed by the constituent documents;

E) to alienate shares in the statutory (share) capital of the company, of securities certifying the membership in the company in the manner prescribed by law.

The range of property rights of the company's members depends, as a rule, on the form of the company.

One of them is the right to receive a share of profits (dividends) of the company in proportion to their share in statutory (shared) capital.

The income is the defining property interest for which the member of the company invests his assets in the statutory fund.

Not all the members have the right to obtain a share of profits of the company, but only those who are its members as of the beginning of the term of payment of the dividends.

The procedure of exercising this right is referred by the legislators to the local regulation.

Constituent documents or an agreement between its members may provide various options for distribution of profit, which are different from the legally defined principle, but the law forbids depriving members of this right under the constituent documents.

The following right set forth by law for members of all economic entities is the right to alienate shares in the company's statutory capital, securities certifying the membership in the company in the manner prescribed by law.

The scholars list the main derivative ways of acquiring corporate rights: cession of a share, sale of shares, inheritance.

Members of all forms of economic entities have another property right: the right to receive a part of the assets in case of its liquidation. It results from

the general rule established by Art. 111 of the Civil Code, under which the property of an economic entity that remains after the satisfaction of the creditors' demands, shall be transferred to the members, unless otherwise provided by the constituent documents of the legal entity or by law.

The second group of legally fixed property-related corporate rights includes those caused by participation in certain form of economic entity. First of all, we mean the preemptive rights.

Members of all economic entities, except for shareholders and general partners, have the preemptive right before third parties in purchasing shares in the statutory (shared) capital.

In addition to the lawful property-related powers of general and special nature, members of economic entities may also have rights established by constituent or other local documents of the company.

Legislators define the corporate law as a combination of two groups of rights – property and non-property.

An analysis of legislative acts defining the rights of members of economic entities allows separating the last group with the following basic powers:

A) to participate in the management of the company in the manner prescribed by the Articles, except as provided by law;

B) to participate in the distribution of income;

C) to withdraw his membership in the prescribed order;

D) to obtain information about the company in the manner prescribed by the constituent documents;

As for the property rights, a list of non-property corporate rights is not exhaustive, as members of economic entities may have other rights established by the constituent documents and the law.

The content of corporate relations is a complex two-element structure covering subjective rights and liabilities of these relations and is built on a 'right-liability' principle.

Like every legal liability, the subjective liability of a member of corporate relations is a kind and extent of his proper behavior which may include the need to take active or passive actions.

Active actions encourage the bound member to act in the interests of other members of the corporate relations, as they are provided by the sanction for failure of liability.

Passive actions are due to a prohibition, inappropriateness of certain acts because their carrying out would be contrary to the rights and lawful interests of other members of the corporate relations.

Certain legal norms have no direct indication to prohibiting the members to make certain actions; however, it derives from its contents.

An analysis of legislation as to the liabilities of the economic entities allows distinguishing three groups of positive and negative corporate liabilities:

- general - inherent to the members of all types of economic entities;
- special - caused by participation in some form of economic entity;
- local - provided by the constituent and other local documents.

The general liabilities include the liability of the members of all economic entities to comply with the requirements of the constituent documents, to carry out the decisions of the general meeting and other management bodies as adopted within their competence. Vesting by the legislator of this duty in the members of economic entities is due to the need to achieve the objectives of the company.

Next set of general liabilities make the members of economic entities to fulfill their liabilities towards the company, including those associated with property membership, as well as to make contributions (pay the shares) in an amount, order and by the means provided by the constituent documents.

Next liability of the members of economic entities: not to disclose trade secrets and confidential information about the company's activity. According to Art. 36 of the Economic Code, a trade secret is data associated with manufacturing, technology, management, financial and other activities of an entity which is not a state secret and disclosure of which may damage its interests.

In addition to general liabilities, the members of companies may have other liabilities that are caused by certain type of economic entities.

For example, the liability of the members of a limited liability company is to inform the company on their withdrawal three months prior to it.

A special shareholders' liability is to pay for the shares in the amount, order and by the means provided by the company's articles.

In addition to the lawful liabilities of general and special nature, the members of economic entities may also have local liabilities. Thus, the company's articles may provide an ability to conclude an agreement between the shareholders according to which additional liabilities are vested in the shareholders, including the liability to participate in the general meeting, and responsibility for non-compliance is foreseen.