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РЕСПУБЛИКАЛЫҚ ҚҰҚЫҚТЫҚ,
ҒЫЛЫМИ-ПРАКТИКАЛЫҚ ЖУРНАЛ



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Responsibility of body and officer of a legal entity

**Ответственность в области
гражданского права**

**Азаматтық құқық саласында
жауапкершілік**

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Summary

The article deals with the responsibility and authority of the official legal entity, the term "governing body" and "official" legal entity. Attention is drawn to the lack of uniformity in the definition of "official" in the various fields of law. However, the ratio is particularly highlighted the concepts of "official" and "executive officials". The features of the responsibility of officials of the limited liability and company officers.

Keywords: civil liability, the legal entity, the official person performing managerial responsibilities, executives, corporation, limited Liability Company

Резюме

В статье рассматриваются вопросы ответственности органа и должностного лица, понятие «органа» и «должностного лица» юридического лица. Обращается внимание на отсутствие единообразия в определении понятия «должностного лица» в различных отраслях права. Вместе с тем особенно выделено соотношение понятий «должностное лицо» и «руководящие работники». Рассмотрены особенности ответственности должностных лиц товарищества с ограниченной ответственностью и должностных лиц акционерного общества.

Ключевые слова: гражданско-правовая ответственность, должностное лицо, орган юридического лица, руководящие работники, товарищество с ограниченной ответственностью, акционерное общество

Түйін

Мақалада орган мен лауазымды тұлғаның жауапкершілігі, заңды тұлғаның «органы» және «ресми тұлға» түсінігі қарастырылады. Құқықтың әртүрлі салаларында «ресми тұлға» ұғымның анықтамасында біркелкілік болмауына назар аударылады. Сонымен бірге, «ресми тұлға» және «атқарушы қызметкерлер» ұғымдарының өзара байланысы ерекше атап өтіледі. Жауапкершілігі шектеулі серіктестіктің және акционерлік қоғамның лауазымды тұлғаларының жауапкершілігінің ерекшеліктері қарастырылады.

Түйінді сөздер: азаматтық-құқықтық жауапкершілік, лауазымды тұлға, заңды тұлғаның органы, жетекші қызметкерлері, жауапкершілігі шектеулі серіктестік, акционерлік қоғам.

The matters of civil liability are quite complex however their solution is very important for civil law science and regulation of civil law relations.

According to the article 37 of the Civil Code of the Republic of Kazakhstan a legal entity shall acquire rights and shall undertake obligations only through its bodies acting pursuant to the legislative acts and statutory instruments. Actions of such bodies shall be acknowledged as actions of the legal entity and thus the legal entity shall be liable for their consequences. Presence of one or another body shall depend on the legal form of the legal entity and will of its members. A legal entity shall realise its legal capacity and capability through its bodies, where such bodies may be divided into managing ones and other. The managing bodies shall include those which may create rights and obligations for the legal entity. Other bodies shall, for instance, include regulatory bodies - review committee having no managerial functions.

The civil legislation specifies the following types of legal entity bodies for different legal forms:

supreme managing body - general meeting;
supervisory board or board of directors for

joint-stock companies (the "JSC"); executive body - collegial (Board, Directorate) or one-man (director, general director, president); regulatory body - collegial (review committee) or one-man (inspector).

The science has no uniform understanding of a legal entity body. In general, one may divide them into few groups, the first of which has a human medium as scientists acknowledge and try to underline by any ways. Other authors understand a body as one or few persons (individuals) following the legal entity's will [1, p. 91]. Thus, according to Basin Yu.G., bodies include officers and collective squads of the legal entity "authorised by the legislation or statutory instruments to solve the matters defining the status of the legal entity as well as to take floor on behalf of the legal entity before other subjects and governmental bodies" [2, p. 107].

We follow the opinion of S.I. Klimkin who assumes that a legal entity body is "a perfect, non-existing in real life term just like the legal entity itself" [3, p. 37-38]. We think that a body is however a structural unit of the legal entity, the epitome of which are individuals.

Performing any actions by a legal entity body shall be deemed as actions of the legal entity. However, according to the legislation each body has its own competence. Then what is going on when a body goes beyond its powers? We suppose that no liability in the civil law course for legal entity body going beyond its competence may be envisaged, otherwise it turns out that such legal entity shall punish itself. In this case liability may be expressed in application of measures for disciplinary or financial liability with regard to certain persons for breach of official or employment duties, unless, of course, they are shareholders (founders). This is now the scope of labour law that's why such relations may be called as "borderline" as they are closely related to the civil law relations. The civil law and labour relations do entwine in this context.

The acknowledgment as invalid of any transactions performed by the legal entity body with breaching the certain competence, shall relate to remedies but not to the liability.

We would like to draw your attention to the correlation of terms "body" and "officer". These terms coincide only in part. E.g., general meeting of shareholders is the supreme managing body of a joint-stock company but all shareholders may not be expressly considered as officers. However board of directors, board and review committee of the joint-stock company shall consist of officers. At the same time some authors understand a very wide set of people as officers, for example, directors (managers) and other persons which

may not comply with the term "body". Thus, T.V. Kashanina supposes that "The managers include not only members of board but also those persons managing the structural units, monitoring certain work clusters, responsible for certain range of issues having dealings with people, however the number of members of board does not include... Besides the above category of workers corporations have a certain workforce of non-management employees working directly under guidance of the managers and performing only executive duties which are however not related to the expenses on the physical labour" [4, p. 281-283].

Upon results of performed analysis we may conclude that in contrast to a body an officer always means an individual.

But we are more interested in civil legislation and practice in its application. According to the point 16, article 1 of Law "On Joint-Stock Companies" of the Republic of Kazakhstan an officer shall be a member of the board of directors of the joint-stock company, its executive body or a person, who solely performs functions of an executive body of the legal entity [5].

The principles of activity for a company's officers are determined in article 62 of Law "On Joint-Stock Companies" of the Republic of Kazakhstan.

It is worth noting that in banking legislation the content of term "officer" is much wider and comprises other bank employees. Thus in accordance with point 3, article 40 "On banks and banking activities" of the Republic of Kazakhstan, the following persons shall be deemed as persons related to the bank and having special relations:

a) any officer or manager, first head and chief accountant of the branch of this bank as well as their spouses and next of kin;

b) individual or legal entity being a large member of this bank, or officer of a large member of the bank (italics made by us – A. Omarova, A. Kussainova), as well as their spouses and next of kin;

c) a legal entity in which persons shown in subpoint a) and b) hereof are large members or officers;

d) a legal entity in relation of which this bank is a large member, officers of this legal entity (italics made by us - A. Omarova, A. Kussainova), as well as their spouses and next of kin;

e) bank affiliates [6].

It is worth noting that in the point 22, article 1 of the Law "On rehabilitation and bankruptcy" of the Republic of Kazakhstan the term "officer" is determined as follows: - this is a member of board of directors of the joint-stock company, head (deputy head) of the legal entity-insolvent,

as well as other persons not included in the collegial executive board of the legal entity having permanent or temporary powers for management of the legal entity, chief accountant (deputy chief accountant) of the legal entity-insolvent as well as a person temporary acting as such [7].

As distinct from the norms of the Law "On banks and banking activities" of the Republic of Kazakhstan, the Law "On rehabilitation and bankruptcy" or the Republic of Kazakhstan shall include chief accountant (deputy chief accountant) of the legal entity to the meaning of an officer.

Notwithstanding of who is legally an officer - founder (member) or a hired employee - the Laws "On limited and additional liability partnerships" and "On joint-stock companies" also pay attention to the officers with regard to the matter of liability before the legal entity where they are employed. As a rule these are the persons taking part in direct management of the legal entity and carrying out day-to-day management of its activities.

Pursuant to the point 3, article 52 of the Law "On limited and additional liability partnerships" members of partnership's executive body may be brought to liability by request of any of the partnership's members in order to reimburse damages inflicted by them to the partnership. Whereupon they shall be solidary liable for any losses caused by joint performance of improper management of the partnership. Whom shall the losses be reimbursed - to the partnership or certain members? We think that to the partnership as the damage was inflicted to partnership but how it may be realised in civil proceedings remains a question. During civil proceedings only the head (manager, director) may act on behalf of the legal entity without a power of attorney, who is empowered to issue powers of attorney to represent the partnership (point 2, article 53 of the Law "On limited and additional liability partnership" of the Republic of Kazakhstan).

Pursuant to the point 4, article 61 of the Civil Procedure Code of the Republic of Kazakhstan dated 31 October 2015 a power of attorney on behalf of a legal entity shall be issued by the head of the respective legal entity or other authorised person [8]. It is clear that the head may not certify the power of attorney for other employees in order to file a claim against himself. Other authorised person is not envisaged in the legislation. Nevertheless there is a possibility to indicate it in the charter of the Company.

Basing on the performed analysis of the current legislation we suggest adding the following wording: "Powers of the legal entity's representative may be confirmed by the resolution of the supreme managing body" to the point

4, article 61 of the Civil Procedure Code of the Republic of Kazakhstan. Thus, a member shall have to obtain a resolution of the general meeting of members which may empower him as a representative to file a claim to the benefit of the legal entity.

Pursuant to the point 4, article 52 of the Law "On limited and additional liability partnerships" members of executive body of the limited liability subsidiary with the partnership before third persons for any losses which such persons incurred due to insolvency (bankruptcy) of the partnership caused by improper management of the partnership by the members of executive body. Such liability shall be additional, i.e. levy of execution upon debtor's personal assets is possible in case of insufficiency of legal entity's assets at its liquidation.

The point 3, article 44 of the Civil Code of the Republic of Kazakhstan specifies additional liability of the founder (member) or owner of its property if the bankruptcy is caused by their actions.

It is worth noting that the above guidelines miss any references to the guilt as a necessary condition of civil liability. As a rule the executive bodies consist of the very founders however other persons may be accepted thereto under a separate employment agreement. This brings up the question: norms of which branch of law must be used - civil or labour? The presence of a separate employment agreement shall expressly give evidence of no civil law obligations but of execution of labour and official duties. Here we also have to follow the principle of guilt and guidelines of labour legislation.

Thus we may conclude that the wording of point 4, article 52 of Law "On limited and additional liability partnerships" of the Republic of Kazakhstan one should add with an indication on guilty manner of action of the executive body members. In such case if founder and executive body officer is one and the same person a collision of norms of article 44 of the Civil Code of the Republic of Kazakhstan and article 52 of Law "On limited and additional liability partnerships" of the Republic of Kazakhstan takes place. This issue may be quite easily solved as by virtue of article 2 of the Civil Code of the Republic of Kazakhstan the Civil Code shall prevail.

We should note that courts rarely accept provisions of laws on liability of founders, members of executive or other bodies.

Article 55 of the Law "On limited and additional liability partnerships" of the Republic of Kazakhstan stipulates conflict of interests of members of executive body and limited liability partnership.

The members of executive body of the limited liability partnership shall not be allowed:

1) without consent of the general meeting to conclude with partnership any transactions oriented to gaining any benefit therefrom (including any agreements on gift, pledge, free use, purchase and sale, etc.);

2) to receive a commission fee either from the very partnership or from third persons for any transactions concluded by the partnership with third persons;

3) to act on behalf or in interests of third persons with regard to their relationships with the partnership;

4) to perform business activities competing with the business of the partnership.

The charter of the partnership may also provide other bans for members of its executive body.

The point 3, article 55 of this Law is of interest. According to this point any member of the limited liability partnership shall be entitled to require in court a collection of all expenses in favour of partnership from members of executive body inflicted to the partnership by them or their relatives, stated in point 2 hereof, bans specified by point 1 hereof or by points 1)-3) hereof respectively.

Firstly, any transactions performed with infringement of requirements of legislation shall be deemed as null and void (point 1, article 157 Civil Code of the Republic of Kazakhstan). Secondly, the liability of executive body members for infringement of above bans shall be characterised as several, as its character is not indicated in the very article.

We do not deny that actions of executive body members breach the interests of the legal entity members but they infringe the interests of the very legal entity, that's why all losses shall be reimbursed to the partnership but not to a certain member. In order to file a claim in court against

officers of the partnership, and in this case the member shall be needed a resolution of the general meeting which may authorise him/her for such actions. We suppose that those members - executive body members, against whom the claim is filed, must not participate in the voting.

Upon results of the performed analysis we have come to the conclusion that the wording of point 3, article 55 of the Law "On limited and additional liability partnerships" of the Republic of Kazakhstan does not reflect the actual state of things, that's why we suggest to make amendments and additions to this article after stipulation therein of powers provided to the member from the partnership in general.

In this context law "On joint-stock companies" of the Republic of Kazakhstan is more developed; its article 63 provides liability of officers of the company in particular for wrongful acts and filing of a claim to an officer on reimbursement of losses incurred by the company under the resolution of the general meeting of shareholders.

Basing on the performed analysis of the current legislation it is important to understand the scope of application of the term "officer" in civil law relations as well as which legal consequences it leads to. The highlighting of such persons shall be first of all necessary for protection of interests of the legal entity and its members from abuse of powers by such persons, deriving of profit for themselves, their relatives, other legal entities in prejudice of the organisation they are working in as officers. It means that they are able to express the will or the legal entity outside, to take decisions on management of the legal entity property and performance of transactions, and to affect the taking of such decisions. This is possible in case the individual is a member of a collegial body of the legal entity or represents a sole executive review body. An officer may be either one of the legal entity's members or a hired employee.

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