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CIVIL LIABILITY OF MEMBERS OF ADMINISTRATIVE BODIES OF BUSINESS ENTITIES: TENDENCIES IN THE RUSSIAN LEGISLATION DEVELOPMENT AND EXPERIENCE OF FOREIGN COUNTRIES

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Introduction: *the research considers the peculiarities of the liability of a person exercising powers of the individual executive body of a business entity. It also shows the specific aspects of the liability of collegiate bodies' members. The experience of foreign countries is used to evaluate the correctness of borrowing a number of rules that were introduced into the Russian legislation, and to determine the guidelines for further reception of the normative provisions that proved to be efficient.* ***Purpose:*** *to reveal the gaps and contradictions in the legislation and judicial interpretation that preclude efficient implementation of the directors' liability rules and balance among the interests of the corporation, its sharers and the directors themselves.* ***Methods:*** *general scientific methods: comparison, description, system analysis, interpretation; specific scientific methods: juridical dogmatic method, method of interpreting legal norms, method of analysis and generalization of the legislation and its application practice.* ***Results:*** *the study has revealed the inconsistency of criteria of the director's unlawful behavior, and as a result – their inferiority in the form they currently exist. An attempt to partially borrow categories that characterize the duties of the manager from the Anglo-American law is not successful due to the artificiality of the criteria distinguishing between the*

bad faith and irrationality given in the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of July 30, 2013, No. 62 "On Some Issues of Compensation for Losses by Members of a Legal Person's Administrative Bodies". The problem of the actual absorption of the director's guilt by the unlawfulness of his behavior is not solved, which invalidates the normative principle of fault-based liability. The rules establishing the grounds for imposing liability on collegiate bodies' members are not sufficiently developed. ***Conclusions:*** *we deem it necessary to conceptually review the criteria of the director's bad faith behavior and director's irrational behavior. It is proposed to define the director's key duties through applying the criteria of caring attitude to business. It is essential to introduce certainty into the content of such a bad faith criterion as the presence of conflict of interest, to determine the correlation of this criterion with the criterion of the initial unprofitableness of the deal for the company. It is also necessary to develop criteria of guiltlessness in case of breach of the duty to act in the interests of the company in reason and in good faith.*

Keywords: civil liability; business entity; administrative bodies; director; good faith; interest; rationality; illegality; guilt

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ГРАЖДАНСКО-ПРАВОВАЯ ОТВЕТСТВЕННОСТЬ ЧЛЕНОВ ОРГАНОВ УПРАВЛЕНИЯ ХОЗЯЙСТВЕННЫХ ОБЩЕСТВ: ТЕНДЕНЦИИ РАЗВИТИЯ РОССИЙСКОГО ЗАКОНОДАТЕЛЬСТВА И ОПЫТ ЗАРУБЕЖНЫХ СТРАН

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Введение: *в настоящем исследовании рассматриваются особенности института ответственности лица, осуществляющего полномочия единоличного исполнительного органа хозяйственного общества, обозначена специфика ответственности членов коллегиальных органов. Используется опыт правового регулирования в зарубежных странах для оценки корректности заимствования ряда применяемых в российском законодатель-*

стве правил, а также выявления ориентиров для дальнейшей возможной рецепции доказавших свою эффективность нормативных установок. ***Цель:*** *выявить пробелы и противоречия законодательства и судебного толкования, которые не позволяют эффективно применять правила об ответственности директоров, гарантировать баланс интересов корпорации, ее участников и самих директоров.* ***Методы:*** *общенаучные: сравнение, описание, системный анализ, интерпретация; частнонаучные: юридико-догматический, метод толкования правовых норм, метод анализа и обобщения законодательства и практики его применения.* ***Результаты:*** *выявляется несогласованность критериев установлению противоправности поведения директора и, как следствие, их недостаточность в существующем виде. Попытка частичного заимствования категорий, характеризующих обязанности руководителя, из англо-американского права, не является успешной ввиду искусственности критериев разграничения недобросовестности и неразумности в тексте постановления Пленума ВАС РФ от 30 июля 2013 г. № 62 «О некоторых вопросах возмещения убытков лицами, входящими в состав органов юридического лица». Не решена проблема фактического поглощения вины директора противоправностью его поведения, что нивелирует нормативный принцип виновной ответственности. Требуют развития правила, закрепляющие основания по возложению ответственности на членов коллегиальных органов.* ***Выводы:*** *представляется необходимым концептуальный пересмотр критерия недобросовестного и неразумного поведения директора. Предлагается раскрывать ключевые обязанности директора посредством применения критерия заботливого отношения к делам. Требуется уточнить содержание такого критерия недобросовестности, как наличие конфликта интересов, определить соотношение данного критерия с критерием изначальной невыгодности сделки для общества. Необходима разработка критериев невиновности при нарушении обязанности действовать в интересах общества разумно и добросовестно.*

Ключевые слова: гражданско-правовая ответственность; хозяйственное общество; органы управления; директор; добросовестность; интерес; разумность; противоправность; вина

Introduction

The active development of the institution of civil liability of members of business entities' administrative bodies started not long ago; for an extended period of time, the legislative norms covering liabilities of managers, contained both in the Russian and foreign corporate legislation, did not undergo any significant changes and included extremely laconic wordings describing the duties of the persons who administer business entities and the grounds for their liability. A stimulus for reopening the extensive discussion about the essence of the directors' duties was in adopting the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of July 30, 2013 No. 62 "On Some Issues of Compensation for Losses by Members of a Legal Person's Administrative Bodies" (hereinafter referred to as the Resolution of the SAC Plenum No. 62)[1]; then a certain contribution to the development of the scientific discussion on this issue was made as part of the consequent reform of civil legislation in 2014. The mentioned Resolution fully established the burden of evidence adequate for the complainant, the negative criteria of good faith and reasonableness, the circumstances that relieve the director of responsibility. In spite of the detailed regulation of the civil liability issues, the proposed tools of protecting the property interests of a corporation (a business entity) and its participants do not always demonstrate efficiency. The key problem is in the fact that the principal attention is focused on developing practical recommendations necessary for setting the basic guidelines for the courts during case hearings, but at the same time the theoretical background gets weak, and in particular – its foundation represented by evaluative notions, i. e. "good faith", "guilt', "care and discretion", "reasonable entrepreneurial risk" and so on. It is impossible to develop sound criteria of violating the duties by a director without good understanding of the content of these categories.

[1] Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 62 "On Some Issues of Compensation for Losses by Members of a Legal Person's Administrative Bodies" of July 30, 2013. Access from legal reference system ConsultantPlus (accessed 17.01.2018).

Fundamentals of the Russian Legal Regulation of a Business Entity's Director Liability

The problems of civil liability of persons managing business entities are covered in multiple scientific works due to a wide range of disputable questions about the grounds for liability for losses incurred by a corporation as a result of the improper fulfillment of the obligations by the members of its administrative bodies in respect of the corporation. These ground definitely result from the scope of the legal duties of the manager (director) in relation to the company, because if a duty is not officially established, it is not possible to violate it.

As it is reasonably noted in literature, the scope of a manager's duties in the most general terms consist of performing managerial functions inside the company through day-to-day administering its activities, carrying out its business, effecting deals and other transactions in the interests of the company and on behalf of it, cooperating with the third parties on behalf of the company [14, p. 53]. The specific duties of the manager are settled at the legislation level and at the level of the company (they can be agreed in the internal documents of the business entity). With this, the law does not oblige business entities to regulate the duties and the authority limits of the company manager, and so the latter correspondingly has some freedom of discretion when taking and executing decisions on day-to-day issues associated with the business entity activities. Surely, the legislation runs that an individual executive body is accountable to the general meeting and the board of directors (Item 1 of Article 69 of Federal Law "On Joint Stock Companies[1]"), however this body has a broad independence and its behavior, both passive and active, can seriously influence the "faith" of the corporation.

Managing a corporation is one of the activities performed not in the interests of the manager [3, p. 93], and so there should be definite obligations settled for persons carrying out managerial activities. The obligations are to provide a full compliance of the managerial activities with the interests of the business entity being managed. According to the rule that has existed for a long period of time and was originally established by the previous revision of Article 53 of the Russian Federation Civil Code, "a person who by virtue of a law or another legal act or the constitutive document of the legal entity is empowered to act in its name shall act in the interests of the legal entity he represents in a bona fide and reasonable manner. The person who by virtue of a law or another legal act or the constitutive document of a legal person is empowered to act in its name shall compensate on a demand of the legal person or its founders (participants) for the losses caused through his fault to the legal person, unless provided otherwise by law or a contract". Similarly, the obligation of compensating for losses is imposed on the respective individual in the recently adopted new revision of the RF Civil Code, Article 53.1, which runs that "the person who by virtue of a law or another legal act or the Charter of the legal person is empowered to act in its name (Item 3 of Article 53) shall compensate on a demand of the legal person or its founders (participants) acting in the interests of the legal person for the losses caused through his fault to the legal person. The person who by virtue of a law or another legal act or the constitutive document of the legal person is empowered to act in its name shall bear liability, if it is proven that while exercising his rights and executing his duties he acted in a non-bona fide or unreasonable manner, for instance if his actions (omissions) did not correspond to the ordinary civil circulation terms or the ordinary entrepreneurial risk[2]". Besides everything mentioned above, this RF CC Article contains a rule of extending the liability to the members of the collegiate authority of a legal person, except for those of them who voted against the decision that led to losses incurred by the legal person, or did not participate in the voting when acting in good faith. According to Item 4 of the mentioned article, in the event of joint infliction of losses, the losses shall be compensated jointly and severally.

To complement the norms of the RF Civil Code, Article 71 of Federal Law "On Joint-Stock Companies" establishes the range of potentially liable persons: "...the members of the board of directors (or supervisory board), one-person executive body (director, general director), an interim sole executive body, members of the collegial executive

[1] Federal Law No. 208-FZ "On Joint-Stock Companies" of December 26, 1995 (as amended on 31.12.2017). *Collection of Legislative Acts of the Russian Federation*. 1996. No. 1. Art. 1.

[2] Federal Law No. 99-FZ "On Introduction of Amendments to Chapter 4 of Part I of the Civil Code of the Russian Federation and on Abolishment of Certain Provisions of Legal Acts of the Russian Federation" of May 5, 2014. *Collection of Legislative Acts of the Russian Federation*. 2014. No. 19. Art. 2304.

body (management board, directorate), and likewise the management organization or the manager must, when exercising their rights and performing duties, operate in the interests of the company and exercise their rights and perform duties with respect to the company reasonably and in good faith. The members of the board of directors (or supervisory board), one-person executive body (director, general director), an interim sole executive body, members of the collegial executive body (management board, directorate), and likewise the management organization or the manager shall bear responsibility to the company for losses caused to the company due to their actions (or failure to act), unless other grounds and extent of responsibility have been established by federal laws". Similar norms are also contained in Article 44 of Federal Law "On Limited Liability Companies". It should be noted that the opportunities for bringing the company's director to civil liability are not limited to restrictions set by the above-mentioned norms. Besides general liability for the losses incurred by the legal person, the joint responsibility can be pursued on the manager in case of the insolvency (bankruptcy) of the business entity.

A solid step towards the development of the general rules of bringing to liability both the director and other persons managing the company with the grounds for such liability was the adoption on July 30, 2013 of the foregoing Resolution No. 62 of the Plenum of the RF Supreme Arbitration Court. The Resolution was aimed at clarifying a number of issues which were not properly regulated in legislation. However, it is important to note that a significant number of the rules included into the above Resolution are also the subject of numerous discussions due to varying interpretations.

In this study we will try to go into the most complicated questions of applying the norms concerning civil liability of directors, for the purpose of identifying the possible ways to optimize the Russian corporate legislation. The analysis performed demonstrates under-regulated aspects associated with establishing the grounds for bringing the director to civil liability, with the diversification of norms covering the mentioned liability in accordance with the corresponding categories of managing persons, with providing the balance of the legal opportunities for all the parties in the dispute about the losses to be compensated by the director.

Requirements for Managers: Experience of Foreign Countries

First of all, let us have a look at how the directors' duties are stated in foreign legal orders with well-developed corporate law system. As for the regulations of the English legal doctrine, it can be said that all directors of a corporation (company) are imposed with special fiduciary obligations which are identical to the obligations of the managing trustee. Actions performed by the corporation (company) director are viewed as the actions performed by the legal person itself. The question about the corporation property falls within the jurisdiction of the director, and while the managing trustee is focused on ensuring the full protection of the property, the main task of the director is to maintain the company's entrepreneurial activities considered risky [26, pp. 83, 84; 27, p. 89].

Articles 171–177 of the Companies Act (Companies Act 2006)[1] establishes the following director's duties:

1) a duty to only exercise powers for the purposes which they are conferred for, i. e. to act in accordance with the company's charter and exercise powers only for achieving the objectives set for the company's directors;

2) a duty to promote the success of the company, i. e. when taking decisions, to have regard to the interests of the company's managers and employees, suppliers and customers, to have regard to the probable consequences of any decision in the long term, their impact onto environment and the local community, and to maintain a reputation for high standards of business conduct [23, p. 28];

3) a duty to exercise "independent judgment", meaning the activity of the director in expressing his own opinion on the questions discussed, and no situations when his opinion is influenced by the third parties;

4) a duty to exercise reasonable care, skill and diligence – according to these principles, a director must act as a reasonably diligent person with general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director of the company;

5) a duty to avoid conflict of interests, i. e. the situations in which he has, or can have, a direct

[1] Companies Act, 2006. Available at: http://ec.europa.eu/internal_market/auditing/docs/dir/transpo/uk17.pdf (accessed 17.01. 2018).

or indirect interest that conflicts, or possibly may conflict, with the interests of the company;

6) a duty not to accept benefits and bonuses from third parties conferred by reason of his being a director, his doing (or not doing) anything as director;

7) a duty to declare interest in a proposed transaction or arrangement. The required declaration must be made before the company enters into the transaction or arrangement.

The above duties of a director are the principal ones. Directors of all the companies are imposed with many other special duties in accordance with legislation on the health service and security, employees' rights, bribery act, director's criminal negligence act, insolvency legislation, and also in compliance with the listing rules, AIM and DTR rules, Act of 2006 and others [30].

The standard USA models of the director's actions in the company's interests are mainly revealed through the Duty of Good Faith, the Duty of Loyalty and the Duty of Care. These duties are better developed in Delaware.

Directors as trustees must perform their duties in relation to their corporation and its sharers exceptionally in the interests of the corporation and regulate the corporation matters with due care (discretion) of a person managing his own business entity [31, p. 37].

The *duty of loyalty* means that the actions of directors should be aimed exceptionally at securing the interests of the company. The day-to-day business turnover is full of situations when directors adhere to the loyalty principle and at the same time evade approving the decisions of the board. For this reason, there increases a risk of the conflict of interests, which will sooner or later affect this director, and so the director is to make sure if he has a personal interest or dependence on the decision, to determine the availability of aspects which raise the court's doubts in the director's neutrality. In case he does have the interest or dependence, the director is to inform the board about the conflict of interests and view the opportunity not to participate in the discussion on the specific decision of the board.

The *duty to act in good faith* is being actively developed by the legislation of state Delaware. It is understood that intentional disregarding of duties contradicts the duty to act in good faith [31, p. 38]. What is interesting, in other countries of the Anglo-American law, the concept of good faith is not thoroughly developed, either. For example, in Canada the courts define the violation of the duty to act in good faith as taking decisions by directors for their personal advantage. The English courts understand bad faith as willful intention to disregard the director's duty to act for the best interests of the company.

The *duty to adhere to the interests of the corporation* suggests using the same degree of attention by the director as he would use for carrying out his own business with due care and diligence. This duty cannot be practically viewed in the framework of a single scenario. Nevertheless, it rests on such aspects as finding by the director a proper amount of time needed, depending on the importance of the decision for the company; having the documented proof of studying the available information and possessing the necessary amount of time for evaluating and choosing the most suitable decision; the board's detailed analysis of the contribution made by the invited advisers or experts, to see the alternative variants. The data collected from the advisers and the managers of the company, and also from invited advisers and experts (should the directors distrust the given recommendations) directly influence the decisions taken by the directors. Nevertheless, the directors should not "blindly" accept the received data – a discussion is necessary with those who presented the information, with the questions asked and applicable conclusions made.

The case (precedent) law have created a special mechanism to secure directors from unreasonable claims. The USA courts are guided by global rule according to which they disclaim the liability of the director for taking corporate decisions, except when the decisions are totally unreasonable. The mentioned court non-interference got known under the name of the "business judgement rule", which runs that the directors act on the basis of exhaustive information, in good faith and in the company's interests unless the contrary is proved. The Russian law category of the reasonable entrepreneurial risk is the analogue of the "business judgement rule".

Originally, the RF SAC Resolution No. 62 indicated that the director "can be relieved from liability" if he acted within the limits of the standard entrepreneurial risk, i. e. the courts are not obliged to check the economic practicability should there be no signs of bad faith and unreasonableness of the director's actions. With this, the Russian court practice did not account for the experience of the USA and Germany, which demonstrates that "the business judgement rule" can only work in the sphere of the so called "reasonableness". The protection of decisions which are potentially bad faith decisions is a priori impossible. The bad faith of a decision is evidenced by the absence of the reasonable economic purpose or by taking the decision through misusing the authority or through swindling [24, p. 333].

In accordance with the court practice of the state of Delaware, the business judgement rule can only be used by independent directors whose behavior satisfy the "business judgement rule" in the rest of the parameters. If we view it from the position of an interest, it turns out that directors have never taken the side of either party to the deal and do not intend to take specific personal advantages of the official position. The same cannot be said about ordinary advantages enjoyed by the corporation or the shareholders.

In German corporate law, managers of companies should adhere to the basic principles of proper behavior: good faith, competent following the path of duty, diligence in carrying out activities. Within corporate law, good faith is understood as the corresponding attitude of a GmbH manager to work (a GmbH is the analogue of the individual executive body of the limited liability company in the RF); with the above attitude fitting the company, the creditors, the German society in general and the direct manager. The legal relations of the GmbH participants, creditors and other interested parties rest on the faith in the proper behavior of the manager, whose legal consciousness does not allow him to act in contradiction with the expectations of the third parties and destructively influence the adopted legal order [6, p. 74].

As for the director's qualifications, note that the corporate practice of Germany sets strict requirements for his competency and professional suitability: to the position of a GmbH manager, a person is appointed who has the necessary professional qualification in a specific sphere of the company's activities, is capable of autonomous exercising the manager's rights and duties and managing the company activities. This will ensure undertaking and fulfilment of the GmbH contractual obligations and the GmbH public legal duties by him [25, pp. 47–148].

It seems reasonable to assume that specific qualification requirements to directors of business entities need to be established in the Russian legislation, because the liability for choosing a true professional lies with the company sharers. With this, it is typical of Russian business that managerial positions are occupied by the corporation sharers, which makes it difficult to adopt the rule about appropriate qualifications of the managers. At the moment, the RF legislation requires only to have the individual proprietor or the commercial company status for an association where the same persons act as the sharers and the managers.

Persons in Whose Interests the Duties of Directors are Established: Normative and Actual Composition of Persons Concerned

One of the key functions of civil liability of administrative bodies' members is the protection of the legally meaningful interests of the company, and eventually – of its shareholders (sharers), which is primarily manifested in the successful commercial activity and avoidance of losses. The losses in their turn can potentially result in bankruptcy, thus the protected interests of the corporation shall include the interest in financial stability, i. e. the interest in the absence of the financial problems that can pose risks to the corporation's further functioning.

Resolution No. 62 of the RF Supreme Arbitration Court Plenum prescribes that when determining the interests of a legal person, one should take into account that "the main activity of a commercial company is making profit" (Paragraph 4 of Item 2). "It is also necessary to account for the corresponding provisions of the founding documents and the decisions of the legal person's bodies (for example, about prioritizing the activity areas, about approval of strategies and business plans and so on). The director cannot be recognized as acting in the

interests of the legal person in case he acts in the interests of one or more of its sharers but to the disadvantage of the legal person itself".

Despite these clarifications, such an evaluation category as the legal person's interest is still a stumbling block for the courts. Of note is the insufficient development of the Russian legislation in terms of the adequate accounting for the interests of other persons besides the company owners. It is known that in continental law for securing a long-term commercial success of a company, there should be covered the interests of the parties concerned (employees, contractors, state and etc.), and this tendency has also penetrated to the Anglo-American legal system.

An important argument against including the provisions about the influence of the persons concerned into the corporate law is that the legislation is already liberal enough (giving wide powers to directors) to care for the stakeholders' interests. With this, Sheldon Leader thinks that if a company is viewed as an autonomous legal person separated from its members and other concerned groups, there is a good chance that the legal concept of the company coincides with that of the concerned groups [20, pp. 85, 86]. A company (a corporation) has its own interests that do not depend on any particular group of people connected with it, including the shareholders. Thus, the role of managers and directors is in regulating the constantly changing layout of interests.

Following the Australian corporate law study, Shelly D. Marshall and Ian Ramsay note that in spite of the fact that this issue was not discussed in detail neither in the courts' decisions nor in scientific works associated with the directors' duties, the views on how directors should take into account the interests of the parties concerned have changed [28, p. 9]. It is stated that directors should consider such aspects as public interests, environmental issues, social support of the population and charity only in case these aspects are to the benefit of the shareholders [26, pp. 164, 187].

This being the case, the researchers emphasize three important questions. First, are there any circumstances when directors can have regard to the interests of the stakeholders not being shareholders, with no profit obtained by shareholders? Second, can there be any circumstances when directors are obliged to have regard to the interests of stakeholders who are not shareholders? Third, can there be any circumstances when the interests of stakeholders not being shareholders have priority over the shareholders' interests? These questions are directly associated with the directors' duty to act in the interests of the company. There can be other legislatively implied circumstances requiring the directors to consider the interest of a particular concerned party.

First of all, let us take as a general statement that the actions performed in the interests of the company usually mean actions performed in the interests of the shareholders (sharers) as a whole. Directors can, but not obliged to, take into account the interests of the stakeholders who are not shareholders, but if they do consider their interests, they also must take the shareholders' benefit into account. However, it is a known fact that in the situation of a business entity bankruptcy, the creditors' interests must initially be taken into account by directors. More than that, the only situation when the court clearly stated that directors can put the stakeholders / non-shareholders' interests over the shareholders' interests is when the company is insolvent or is close to insolvency, or when some planned transaction endangers the company's solvency [28, p. 11].

Article 181 of the Australian Corporations Act 2001[1] obliges directors and other managers to exercise their powers and fulfill their duties "in good faith and in the best interests of the company", and for "good purposes". Besides acting in good faith, directors must comply with the requirement of "acting in the best interests of the company". Specifying this requirement, the courts believe that defining the best interests is a part of the directors' duties.

Mitchell, O'Donnell and Ramsay prove that even if we agree that the company's interests mostly coincide with the shareholders' interests, the directors' duties are not clearly defined, which gives them enough freedom for considering the interests of the employees and other groups concerned. These authors adhere to the following views on the directors' duties: "It appears probable that if the directors have regard to the long-term welfare of the shareholders, it serves for the interest of the latter because both their current and future needs are taken into account. In the same way, although the benefit of the shareholders as *the purpose* is very important, the directors must

[1] Corporations Act 2001. Available at: http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/ca2001172/ (accessed 17.01.2018).

carefully choose *the means* to reach it. This implies that a long-term maximization of the benefit should not be achieved at the expense of the short-term profit if this leads to the displeasure of the suppliers, to antagonism of the employees and to public fury. Vice-versa, the profit planned for the shareholders may require some generosity in respect of other concerned groups. And finally, the duty to protect the interests of the shareholders is largely dependent on the director's motivation and his opinion about what is "company's best interests", and does not involve solely the earned profit evaluation. This gives a sufficient amount of freedom of actions to directors, as the courts seldom interfere with the process of taking decisions by the board of directors or seldom find a sound evidence that the director, when taking the decision, did not think it to be serving for the company's best interests" [22, p. 417].

As a rule, the court practice of Germany does not define the notion of the company interest, but also refers to the director's obligation to consider the interests of the shareholders, employees and other parties concerned [18, p. 159].

Therefore, modern trends in the rulemaking push to look at the legal person's interest from a different, new perspective, revealing the "scenario" which rests on the selected pillars of corporate governance, when directors are mostly focused on the interests of the company (corporation) but also consider similar interests of the shareholders and other parties that have a direct relation to the success of the company's activities. The latter are the stakeholders including the population in society, suppliers of different products, supervising organizations that analyze the areas which fall under the influence of a particular company, government officials, the state and others. The company that shares the interests of the above stakeholders and shareholders is at advantage, as every element of the construction representing the whole company gets the necessary attention and does not demonstrate opposition attitude that negatively influences the overall activity. With reference to the above mentioned, it is necessary to broaden the scope of directors' duties, and probably the companies should enroll representatives of the concerned parties as members of the administrative bodies.

Thus, the experience of foreign countries reveals the potential need for having regard to the complex group of persons interested in the successful and stable operation of the corporation, although it needs to be recognized that the development of the current Russian legislation with respect to increasing the number of people whose interests must be followed by the director is at the moment extremely difficult if not impossible. Establishment of an actually indefinite range of persons with juridically meaningful interests mandatory for considering by the manager, would indeed mean blurring the limits of his liability. At least following principle "it is not possible to please everyone", the director one way or another will not be able to meet somebody's interest, and should he have that as an obligation, the failure to meet it would mean violating the duty. For this reason, a clear absolute and exceptional priority of the legal person's interests is established; satisfying the interests of all the others is possible to the extent they comply with the interests of the legal person. Otherwise such an interest will be recognized as the one contradicting the company's interests and the managers actions will be viewed as actions against the interests of the company.

The instruction to respect the interests of the creditors in contemplation of the company's bankruptcy is probably the only case when the managers of the company are required to do more than just to adhere to the interests of the legal person itself. It should be noted that this duty was established for the first time only in 2017: Article 30 of the Federal Law "On Insolvency (Bankruptcy)[1]", covering the measures on the pre-court preventing of bankruptcy, was modified with an amendment[2] that changed Paragraph 2 of Item 1 to the following wording: "the head and other bodies of the debtor, as well as the founders (stakeholders) of the debtor being a unitary enterprise, and other persons controlling the debtor, from the date on which they became aware or should have become aware of the mentioned circumstances, shall act with due account for the creditors' interests, and in particular – to prevent actions (of failure to act) that can knowingly result in worsening the debtor's financial position". In this way the legislator agrees that worsening the financial position of the

[1] Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" of October 26, 2002 (as amended on 29.12.2017). *Collection of Legislative Acts of the Russian Federation*. 2002. Issue 43. Art. 4190.

[2] Federal Law No. 266-FZ "On the Amendments to the Federal Law Insolvency (Bankruptcy) and the Code of the Russian Federation on Administrative Offenses" of July 29, 2017. *Collection of Legislative Acts of the Russian Federation*. 2017. No. 31 (Part I). Art. 4815.

legal person also violates the interests of the creditors. The creditors are actually the "central" party whose interests are given priority in case the bankruptcy proceedings are initiated. This duty was not previously formalized. However, the norms covering the reasons for bringing to subsidiary liability (earlier – Article 10 of Federal Law "On Insolvency / Bankruptcy", which lost effect with introducing Chapter III.2 which covers the entire liability), as well as provisions covering contesting business deals made in the pre-bankruptcy period, one way or another demonstrate that for observing the interests of the creditors in the process of bankrupting, much attention should be given to actions performed by the administrative bodies of the debtor in the pre-bankruptcy period. In other words, administrative legal liability measures can be taken toward the manager for disrespecting the interests of the creditors by worsening the financial position of the debtor. It goes without saying that in fact this refers to the initial infringement of the debtor's interests (reduction of its property), however, this measures are taken for the benefit of the creditors.

Unlawful Behavior of Director in Respect of the Company: Problem of Developing the Criteria

One of the most topical questions associated with bringing the company's administrative bodies members to civil liability for inflicting losses, is the question of qualifying their action (failure to act) in respect of the company as unlawful. When taking the decision about the managers' liability for the losses, the first task to solve is differentiating between the situations when the losses were incurred through no unlawful actions (failure to act) of the manager and the situations when the losses were incurred through his unlawful behavior.

Developing the adequate criteria which allow for treating the manager's behavior as unlawful is a complicated task, and it is not as if there is some stability and clearness about the content of the criteria at the current stage of development of the Russian legislation that regulates directors' liability. One of the reasons why it is difficult to develop such a system of criteria is the evaluativity of every notion that characterizes the director's behavior as unlawful. For the same reasons, the unlawful nature of the behavior is often mixed up with guilt. This means that the theoretical concept of the grounds for the manager's liability is not developed enough in the Russian science. For the same reasons, the unlawful nature of behavior is often mixed up with guilt, and this testifies to the insufficient state of knowledge of the managers' liability grounds in the Russian science.

As known, unlawful behavior is the behavior that violates the imperative norms of law or the law-authorized agreement terms, including those which are not directly provided for by the law but do not contradict the general principles and the sense of civil legislation [12, pp. 440–441]. The researchers are right saying that unlawful behavior of the director can be manifested both in actions and in failure to act: "the actions of managers can be rather different and can include voting as a member of the board of directors on issues of the agenda of the board of directors' meeting, or taking decisions as the general director of the joint-stock company. The unlawful behavior of persons administering a joint stock company can also be manifested by way of failure to act. With this, the failure to act is viewed as unlawful only in case the person is imposed with a legal obligation to act in a specific situation" [11, p. 81].

In the popular sense, the positive duties are considered to be violated when it comes to compensating losses to the business entity, inflicted by persons who administer the business entity, as a consequence of effecting a deal or taking a decision that subsequently negatively influenced the financial position of the company. As it was repeatedly emphasized in literature [13, p. 80], the unlawful nature of the manager's behavior within the limits of corporate relations means violating the manager's duty to act reasonably and in good faith in the interests of the business entity. As A. A. Makovskaya notes, both the RF Civil Code and the Federal Law "On Joint-Stock Companies" use the notions of "acting reasonably and in good faith" and "acting in the interest of a legal person" for describing the meaning of the proper fulfilment of the obligations by the manager of the legal person in regard of this legal person [9, p. 11].

In turn, in case these components are missing, effecting a deal would be a legitimate juridical action

if there are no other formal violations of law. Should there be other formal violations of law detected, the actions of the manager do not need any additional qualification as being unlawful, unreasonable or performed against the interests of the company. When the reasonableness or good faith are recognized as being associated with any unlawful act, the very usage of these notions loses its point. Moreover, the actions which are objectively unlawful (for example, the transfer of monetary means of a legal person with no reason, taking decisions at one's sole discretion while exceeding the authority) do not need evaluation in respect of the good will and reasonableness at all. This evaluation is only required for actions which are formally ("visually") lawful: making a deal on behalf of the company, taking financially important decisions within the manager's competence.

As we have already demonstrated, the legislator just gives the principal characteristics of the manager's lawful behavior but does not reveal their contents, while the very categories of "reasonableness" and "good faith" are of the evaluative nature and are subject to subjective interpretation by courts that settle specific disputes on compensating the losses to a company. As for the provisions set by Resolution No. 62 of the RF Supreme Arbitration Court Plenum, the positive criteria of good faith and reasonable behavior of the managers are not actually established: the system of criteria for these duties violation is proposed (Items 2, 3 of the Resolution), but the criteria for their fulfilment are not. Nevertheless, Item 4 of the mentioned Resolution gives the general wording of the so-called "positive" definition of reasonableness and good faith, which are manifested in "*his taking the necessary and sufficient measures* for reaching the tasks of the activity for which the company was founded, including proper performing of the public legal duties imposed on the legal person by the current legislation". Thus, the key descriptive component in this definition is taking all the necessary and sufficient measures and focusing on reaching the tasks of the organization. The criteria for defining the level of necessity and sufficiency of the measures are still not clear at the moment: in our opinion, there is a probability of different opinions of courts about whether the minimum sufficient measures or the maximum possible efforts are meant, in particular when making a deal profitable for the company. For example, can the valuation of property, which is a subject matter of the transaction, be viewed as a sufficient measure? The Russian legislation specifies cases when the valuation is mandatory. But is the formal obligatoriness equivalent to necessity? It must be admitted that it is rather difficult to develop a common rule in respect of both the sufficiency criteria and the necessity criteria, and so these criteria are still disputable.

Further on, for each of the components – both the good faith and reasonableness – there are individual negative criteria: i. e., what shall be considered *un*reasonable or *bad* faith behavior. These criteria are more detailed. For example, the criteria of bad faith include:

– actions taken with hidden conflict of interests;

– hiding or mispresentation of the information about the transaction;

– making deal without approval of the legal person's bodies, required by the legislation or the legal person Charter;

– evasion from handing over documents related to the circumstances that led to unfavorable consequences for the legal person, after termination of the director's authorities;

– advance knowledge (or failure to know when obliged to know) about the deal non-compliance with the interests of the legal person (in particular – making a transaction under knowingly unfavorable terms or with a person knowingly incapable of following the obligation).

According to the wording of Resolution No. 62 of the RF Supreme Arbitration Court Plenum, the criteria of unreasonableness include:

– taking a decision without regard to the necessary information;

– failure to take measures to acquire information, in case it was reasonable to postpone taking the decision until such information is received;

– making deal in disregard of the company's internal procedure usually required or adopted for making such deals (for example, getting approvals from legal department, accounting department and so on).

It should be noted that when analyzing the above criteria, we deem it difficult to make a conclusion about the availability of the clear grounds for differentiating the criteria from each other. For example, the criterion of having the necessary information is expressly designated as one of the few criteria of unreasonableness. With this, differentiating between reasonableness

and good faith does not seem evident on the basis of this criterion – the criterion of imposing obligation of taking decisions based on the full information. If the director fails in his duty to collect and analyze information, does not give enough time to studying the relevant information, is not it possible to view his behavior as the bad faith behavior? We consider this question to be researched insufficiently, as the proposed criteria not just characterize the director's actions as short-sighted and impulsive; with the same degree of confidence, his actions can be characterized as negligence, uninterested attitude to his duties, i. e. – lack of diligence, minimum efforts made, this meaning bad faith. In a number of situations, the director can be excused for his behavior, whether good faith or bad faith, should the profitability of the deal depend on the speed it is made with and should there be no time for analyzing all the possible alternative variants: in this case, this refers to risk which is inevitably accepted by the director because of the commercial company status. But even if the manager acts in good faith aiming to add value to the profit of the corporation via a deal with a portion of risk, this will not have a legal meaning in case the unreasonableness is traced (the impulsiveness, overestimating of one's own abilities, relying on incomplete data), because even one type of unreasonableness is enough for bringing to liability.

Of course, the completeness of information for taking a decision by the director is rather a nominal parameter. Moreover, in the majority of cases it is subjective. That is why one should evaluate not the completeness of the available information, but the efforts made by the director to obtain it. In accordance with the wording of Subitem 2 of Item 3 of Resolution No. 62 of the RF Supreme Arbitration Court Plenum, there should be actions taken aimed at getting the information which is necessary and sufficient for taking the decision, the actions "that are usual for common business practice at similar conditions, in particular – in case it is proved that under circumstances in place, a reasonable director would postpone taking the decision until additional information is received." Comparing the behavior of a specific manager with the actions of some abstract good faith / reasonable director is common for foreign legal systems. For example, German researchers of the director's legal duties in the company mention that the level of the director's informative preparedness in a specific situation will be viewed in comparison with the actions of a standard manager of a company with a similar type of activities and economic status [21, p. 18].

The notion of "the diligence of a prudent businessman" is a kind of reference standard used for measuring the efforts made by a specific director[1]. In accordance with the requirements set for the adequate management in Germany, the director is to have the necessary knowledge and experience, and if his own knowledge and experience is not enough for taking an important decision, he is to obtain a competent opinion of the outside expert. In case the director's special knowledge is sufficient, he is to make full use of it during the whole period of managing the company [17, p. 10]. Moreover, claiming director's special knowledge "raises the bar" and the standard of the obligation to demonstrate the duty of care [29, pp. 119, 122].

Based on the aforesaid, we think that the notion of the duty of care, put in place by foreign legal systems and included in some way into the requirements of good faith and reasonableness set by the Russian legislator, *does not* fully comply both with the notion of reasonableness and the notion of good faith, which is evident from the example of the obligation to possess sufficient information. The criteria of "due diligence" is by its nature associated with a good faith behavior, while the foreign law distinguishes between the *duty of care* and *duty of good faith*. Using the category of reasonableness, it is more logical to characterize the manner of the director's actions (their quality and result) rather than his attitude and approach to exercising the managerial authority. If the Russian legislator wishes to base himself upon the foreign standard of *duty of care* for formulating the directors' duties, then not only the law but the criteria

[1] Aktiengesetz. 06.09.1965. § 93(1). Available at: http://www.gesetze-im-internet.de/aktg/ (accessed 17.01. 2018).

defined by the court practice need to be improved. Otherwise the *care* component is lost between the characteristics of reasonableness and good faith, which is indirectly evidenced by the above mentioned "positive" definition of both "good faith and reasonableness" as "taking necessary and sufficient measures" in accordance with Item 4 of Resolution No. 62 of the Plenum. Our opinion is that the requirement for care should be formulated and revealed separately, with no artificial dividing of its features into manifestations of unreasonableness or bad faith.

Conflict of Interest as a Bad Faith Criterion

Other criteria of bad faith given in Resolution No. 62 are also of a certain concern, an in particular – Subitem 1 of Item 2, which runs that the bad faith of the director is considered to be proved in case "he acted in the presence of the conflict between his personal interests (his affiliated persons' interests) and the interests of the company, including cases when the director is actually interested in effecting the deal by the company, except for cases when the information about the conflict of interests was disclosed in advance and the actions of the director were approved in the procedure stipulated by law." The question about the influence of the director's conflict of interests on qualifying his actions as bad faith actions is rather controversial, if we take into account the uncertainty of both the legislation and the explanations of the court in this sphere.

Thus, the current Russian legislation sets the manager's duty to act reasonably and in good faith *in the interests of the company*. Very often a question is raised in literature about whether the actions which are performed *not* in the interests of the company can be recognized as good faith actions [1, p. 3]. We think that this question can be answered in the affirmative, as the above actions that fall within the category of unreasonable actions (irrational, impulsive, ill-considered) can be performed in compliance with the good faith requirement (with no conflict of interests or hiding the details of concluding the deal, with no violation of the relevant approval requirement, for the purpose of making maximum profit for the company) and can be aimed at a positive result; however, because of the omission of the necessary aspects which are to be evaluated before the deal is concluded, the deal turns to be lossmaking, and so *the result* is that the director's actions do not comply with the interests of the company. So a question arises about what in particular is included into the notion "actions in the interests of the company" – the focus of the activities or their actual result?

Surely, one needs to understand that the contradiction in actions taken in the interests of the company is not similar to "actions taken in the conflict of interests" because the conflict of interests is just a pre-condition for the possible negative progression of events (when the director pursues his own or somebody else's interests that do not comply with the interests of the company). The formal criteria of being in the conflict of interests are not officially established for a situation of bringing the director to liability, and probably it is proposed to be guided by the criteria of having interest in affecting the deal. These criteria are set by relevant laws (Article 81 of the Federal Law "On Joint-Stock Companies", Article 45 of Federal Law "On Limited Liability Companies"). By their nature, these criteria are reduced to having managerial, relative or property relations. It is obvious that the fact of having these relations cannot fully and directly prove the bad faith of the director. However, Item 2 of the Resolution No. 62 of the Supreme Arbitration Court Plenum runs that in such a situation, the bad faith is considered definitely *proved*.

The experience of the English court system demonstrated that it is possible to intentionally avoid giving the detailed definition of the "conflict of interests", so that this term could be interpreted differently, making it more complicated for dishonest directors to get around the law when planning a deal. Judicial precedents can be used for guidance when uncovering deals with a conflict of interests, as the conflict of interests can be proved by any aspect (more often – by a financial one) that stimulates the director or another official to act in his own interests and for his own benefit at the company's expense. For example, in case *Aberdeen Railway Co v Blaikie Brothers*, there was an idea presented that people having fiduciary obligations should be prohibited to make deals with implied personal interest if this interest can result in conflict or directly contradicts with the interests of the defendant. The rules of the transaction approval are often complimented with the requirements of the companies' charters [18, p. 303].

As for the Russian circumstances, one can hardly speak about the developed ground for implementing the specific prohibition to make deals with a potential conflict of interests. The current Russian legislation requires the managers to inform the company, among other things, about the concluded or planned transactions where the managers can be recognized as interested persons (Item 1 of Article 82 of Federal Law "On Joint-Stock Companies"). It is clear that failure to inform the company about the director's being interested in effecting this or that deal is misconduct of the director. However, does this fact mean an expressed disregarding of the requirement to act in the interests of the company when effecting the deal? It seems that is does not, however, the wording of the rule contained in the Supreme Arbitration Court Plenum Resolution No. 62 suggests that such circumstances as the actual adherence to the company's interests by the director at the time of effecting the deal, and the initial profitability of the deal (let us assume that the deal became unprofitable already in the process of its effecting, when the contractor did not follow his obligations to pay) will have no legal meaning for establishing the fact of misbehavior. With this, there is a significant difference between the presumption of bad faith in view of a definite fact discovery, and the *proof* of the bad faith.

The text of the Supreme Arbitration Plenum Resolution No. 62 officially establishes one of the main principles of the director's liability, in particular the impermissibility to bring him to liability because of the losses in case they are incurred during the period when the director performed his functions, as the losses on their own do not imply bad faith and (or) unreasonableness of the actions (failure to act), since the opportunity for such consequences occurrence accompanies the risky entrepreneurial operations (Item 1). Correspondingly, the question that has to be answered is – can the losses be justified by the risky character of the entrepreneurial activities if the director acted in the interests of the company (even in the conditions of the unrevealed conflict of interests) and did not go beyond the usual entrepreneurial risk limits?

As a reminder, the *duty of loyalty*, tentatively borrowed from the Anglo-American law, suggests focusing on serving the interests of the company, which is not identical to avoiding the conflict of interests.

The correlation between the bad faith criterion included into Item 2 of the SAC Resolution No. 62 and that of Subitem 5 is also disputable: the latter settles the known in advance disadvantages of the deal as the indicator of the manager's bad faith; so does this condition turn to be not mandatory in the first instance (unrevealed conflict of interests)? All the more so as, in spite of the conflict of interests, the deal can comply with the provisions of the company's founding documents and decisions (on defining the priority areas of activities, on approving the strategies and business-plans and so on) which are mentioned in the above Resolution when defining the interests of the legal person. In our opinion, it would be more logical to use these criteria in complex – it is the known disadvantage of the deal that should determine the bad faith; the criteria of being in the conflict of interests cannot be self-sufficient.

In fact, being liable for solely being in the conflict of interests supposes the formally established duty of the director to avoid the conflict of interests, as it is required by the Company's Act of Great Britain. If the positive legislation only requires to inform about the potential or actual conflict of interests, it is not logical to consider the director's bad faith proved just on the basis of the unrevealed conflict of interests: such a fact can create the presumption of bad faith but cannot be the clear proof of it.

Some of the scientists who analyze the similarities and differences between the Russian and foreign regulation of the managers' legal liability issues, emphasize the following. In contrast to the American approach, where in the presence of the conflict of interests, the director can prove his "absolute honesty" and profitability of the deal terms for the company, a Russian manager shall bear liability in case of the formal (unrevealed) conflict of interests with no personal profit obtained, should the deal be effected with full information available and under market conditions but results in losses [2, p. 126]. At present, the above foreign approach seems to be more advantageous

and ensuring the balance of interests of the director himself and the corporation managed by him, because acting in the conflict of interests and acting against the company's interests are two different things. This needs to be considered when defining the criteria of the director's bad faith.

Differentiating Between Unlawfulness and Guilt in an Offense Committed by the Director: Legal Meaning of the Director's Subjective Intention

Inclusion of the subjective characteristics into the director's (bad) good faith contents is one of the reasons for difficulties in singling out unlawfulness and guilt as separate elements of the offense which the director was held liable for. No doubt violating the reasonableness and good faith requirements is the act of unlawful behavior, i. e. the bad faith of the manager is a characteristic of his unlawful behavior. At the same time, when analyzing the offense of inflicting losses to the company through violating the duty to act reasonably and in good faith in the interests of the company, it is necessary to have regard to the principle of the *guilt-based* liability set by Article 53.1 of the RF Civil Code, Article 71 of the Joint-Stock Companies Law, Article 44 of Federal Law "On Limited Liability Companies". Members of managerial bodies of business entities are not covered by the rule about the liability which is independent of the guilt, however the liability becomes guilt-based if the guilt, being a constitutive element of the offense, "is lost", merging with unlawfulness.

It is also important to make it clear that to date, the question of exclusion of the subjective components (i. e. the characteristics related to the manager's attitude to his actions / failure to act) has not been explicitly answered, which is proved primarily by the content of Subitem 5 of Item 2 of the RF SAC Resolution No. 62, which runs that one of the indicators of bad faith is the advance knowledge or the obligation to know that the deal does not comply with the interests of the legal person. Surely, this criterion does not mean the strict necessity to investigate the director's motives and intentions at the time of effecting the deal, especially in view of the fact that advance knowledge is just one of the possible indicators of the bad faith. Moreover, the mentioned criterion is largely objectified as it implies not so much the understanding of the deal unprofitability, let alone the intention to cause losses, as the presence of the facts objectively available at the moment of effecting the deal which demonstrate the deal's unprofitability and must not be ignored by the manager. Nevertheless, the modern court practice encounters positions, not great in number, which rest on the necessity of assigning the legal meaning to the intentions of the manager brought to liability and to his attitude towards his actions in respect of the company. For example, in Resolution by the Arbitration Court of the Volga-Vyatka Region of May 16, 2016, No. F01-1597/2016, on case No. A11-1792/2015, the court found that OOO HK "MRG-Invest", providing management to OOO "Vladimirteplogaz", concluded additional agreements to the contracts on the lease of the heat-supply objects; the additional agreements were concluded for increasing the lease fee, and this "did not contradict the permitted statutory activities of the company and the reasonableness / goof faith requirements set by law"[1]. So, the actions of the defendant did not go beyond the usual (entrepreneurial) risks. In its turn, the court explained that the complainants' reference to defendant's affiliation with contractor OOO "EnergoServis" does not imply any bad faith of OOO HK "MRG-Invest" during exercising its authority on managing the company, "*should there be no proof that OOO HK "MRG-Invest" acted deliberately for causing losses to the Company*".

The court's conclusions are illustratory in terms of two aspects. First of all, it should not go unnoticed that such circumstance as affiliation was not considered separately, because affiliation can possibly involve a conflict of interests when there are no other circumstances indicative of the director's bad faith. In turn, the importance is denied of the fact of affiliation in this dispute, specifically for the reason that the general director's *intentions* to cause losses are not proved.

In Resolution of the Arbitration Court of the Moscow Circuit of November 17, 2017, No. F05-15759/2015FB on case A40-186370/2013, the stated claims of the shareholder to the members of the

[1] Resolution of the Arbitration Court of the Volga-Vyatka Region No. F01-1597/2016 on case No. A11-1792/2015 of May 16, 2016. Access from legal reference system ConsultantPlus.

managerial bodies of "Olympic Complex Luzhniki" Joint Stock Company (to the company's general director and the board of directors' members) were motivated by the fact that approval and execution of the contract of gift, according to which the city of Moscow was presented with the Grand Sports Arena, was the violation of the duty to act in the interests of the company in reason and in good faith[1]. According to the complainant's opinion, "a deal involving a gift is loss-making by its definition, as it has no counter compensation, and as a result of the execution of the objected deal the company lost its right for large piece of property, which led to reducing the balance cost of the assets by 31,19 % minimum[2]". With this, to prove the unreasonableness, the complainant states that the mentioned persons did not take actions to get the information about possibilities to sell the piece of property at balance cost, and they also did not take into account the fact that a part of the property's premises was for lease.

The courts came to the conclusion that "the evidences presented by the complainant do not alone mean *that the actions of the board of directors and the general director were aimed at inflicting losses to the joint stock company*". To prove the lawfulness of the managerial bodies' actions, the appeal court stated that "the actions of the defendants while approving and executing the contract of gift comply with the requirements of Federal Law of June 7, 2013, No. 108-FZ "On Preparation and Holding of the 2018 FIFA World Championship, 2018 FIFA Confederation Cup, and Introducing Changes into Individual Legislative Acts of the Russian Federation" and the RF Government Resolution of June 20, 2013, No. 518 "On the Program of Preparation and Holding of the World Football Championship", which runs that the grand sports arena "Luzhniki" was included into the list of objects planned for reconstruction for the purpose of holding the Championship and according to which the grand sports arena needs to be reconstructed through financing from the state budget"[3]. In its turn, the court noticed that there were presented no evidences of negative consequences, including that in the form of impossibility to perform statutory activities by "Olympic Complex Luzhniki" JSC.

It should not go unmentioned that neither by virtue of law nor by virtue of the RF SAC Resolution No. 62, the impossibility to carry out activities by a business entity is the circumstance that, when not proved, expressly bears evidences of absence of losses and prevents from bringing the director to liability for actions unreasonable or in bad faith. In all probability, if the deal involving the compensation-free alienation of property had not related to achieving above-mentioned specific purposes, the arguments about the possibility for the company to continue the activities and about failure to prove that the actions were directly aimed at causing losses, could hardly be sufficient for justifying the good faith and reasonableness of the actions of the business entity's director. Even with consideration of the above purposes, it has to be noted that the complex of facts presented to the complainant as not proven, objectively raises doubts from in terms of real possibility to prove them.

In support of that, the above position is reflected in the court decisions on similar cases. Let us take Resolution of Moscow Circuit Arbitration Court of October 15, 2015, No. F05-13936/2015 on case A41-4048/2015[4] as an example. In this case, the question was raised on bringing the director of "2463 TsBPR" JSC to liability, for the reason of alienating a company's vehicle at an understated price. To justify the unreasonable underpricing, the complainant made references to data about the average market cost of similar vehicles taken from online advertisements; the references were also made to the professional opinion of the company that buys and sells vehicles. Besides, it was highlighted that the defendant was interested in effecting the deal, as he was holding the position of the individual executive body simultaneously in "2463 TsBPR" JSC and "Spetsremont" JSC,

[1] Resolution of the Moscow Circuit Arbitration Court of November 17, 2015, No. F05-15759/2015 on case No. A40-186370/2013. Access from legal reference system ConsultantPlus.

[2] Resolution of the 9th Arbitration Appeal Court of July 20, 2015, No. 09AP-27070/2015 on case No. A40-186370/13. Access from legal reference system ConsultantPlus.

[3] Ibid.

[4] Resolution of the Moscow Circuit Arbitration Court of October 15, 2015 No. F05-13936/2015 on case No. A41-4048/2015. Access from legal reference system ConsultantPlus.

which is an affiliated person to the contractor under the agreement.

The claim was rejected proceeding from the conclusion that "the evidences presented by the complainant do not solely prove that the actions of the former manager of "2463 TsBPR" JSC were aimed at causing losses to the joint stock company". Moreover, the court of cassation stated that "the materials in the case do not contain evidence which could invalidate the contract as per reasons given in Federal Law "On Joint Stock Companies", or other evidence that could demonstrate bad faith and (or) unreasonableness of the actions (failure to act) of the former manager of "2463 TsBPR" JSC that led to adverse consequences for the legal person". Surely, attention should be given to the fact that the appeal court pointed out the lack of evidence that prove the deal underpricing[1], however the focus on the lack of evidence to prove the manager's unlawful intentions together with the deal's validity (which do not prove the deal profitability for the company) inevitably indicates the situation when this position originally involves the requirement for the complainant to give evidence not only with regard to the manager's actions but also with regard to his purposes, and actually – to his subjective intentions.

Resolution of the Volga-Vyatka Region Arbitration Court of April 2, 2015, No. F01-766/2015 on case No. A43-10377/2014 contains a direct conclusion of the court that "there is no data presented by the complainant proving that the director acted willfully for the purpose of causing losses"[2]. So, there is a problem of assigning a critical importance to the subjective intentions of the person brought to liability, with putting the burden of proof on those claiming for the compensation of losses. Surely, this approach seems to be inadmissible, because in the majority of cases it is not possible to prove the facts directly associated with the personal intentions of another individual.

It is most likely that the origins of this problem are to be sought in the historically acquired duality of understanding the good faith – either as excusable lack of knowledge of any fact, or as a positive characteristic of conduct complying with definite standards.

It goes without saying that it is important to differentiate between the advance knowledge about the unprofitability of the effected deal and the *intention* to cause losses to the company. Paying no regard to the factors objectively available for consideration or their undervaluation is enough for qualifying the manager's conduct as unlawful. Thus, placing the obligation onto the complainant (shareholder or company) to present the evidence of the unlawful purpose, intention, will to cause losses is in any case the manifestation of extremely broad discretion and going beyond the limits of the circumstances subject to justification by the complainant.

Let us note that legislation of a number of European countries provides for the necessity to consider the negative character of the manager's intentions when taking decisions about the possibility of bringing him to liability. For example, Para 31a of Section 2 "Legal Persons" of the German Civil Code runs that the members of the board who work for free or receive salary not exceeding 720 euro a year, bear liability to the company only in case of the criminal intent or gross negligence[3]. In accordance with Article 754 of the Swiss executory law, the members of the administrative council and persons exercising control bear liability in case they intentionally or through negligence fail in duties[4].

The question of correlation between the norms of law of obligation and corporate law, when establishing the essential elements of the offense in the form of bad faith behavior during exercising authority in respect of the company, is not properly regulated at the current phase of the legal regulation in the Russian Federation. Scientists often emphasize the theoretical crudity of the bad faith and guilt notions and shifting the responsibility for specifying

[1] Resolution of the 10th Arbitration Appeal Court of June 25, 2015, No. 10AP-4775/2015 on case No. A41-4048/15. Access from legal reference system ConsultantPlus.

[2] Resolution of the Arbitration Court of the Volga-Vyatka Region of April 2, 2015, No. F01-766/2015 on case No. A43-10377/2014. Access from legal reference system ConsultantPlus.

[3] Burgerliches Gesetzbuch of 18.08.1896. Available at: http://www.gesetze-im-internet.de/bgb/ (accessed 17.01. 2018).

[4] Federal Act on the Amendment of the Swiss Civil Code of 30.03.1911. Available at: https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf (accessed 17.01. 2018).

these notions onto the courts. RF SAC Resolution No. 62 does not contain any reference to the director's fault-based liability at all, in spite of the fact that this principle is included into the law. The many years of practice show the actually adopted rule of non-distinguishing between the bad faith and the guilt. And this does not seem surprising with regard to the extremely blurred character of both notions and unsystematic inclusion of the subjective features into each of them.

At the same time, the problem of determining the features of guilt and their correlation with the characteristics of the manager's bad faith and unreasonableness is one of the key issues when bringing him to liability, and it certainly requires solutions. A guilt is the most important element, which when not found excludes bringing to liability. Moreover, the confusion of the guilt and unlawfulness inevitably influences the burden of proving the elements of offense, considering the unbreakable rule which states that in civil law the absence of guilt shall be proved by the person who violated the duty, while the violation itself shall be proved by the adversely affected person.

As known, the guilt in civil law is revealed through two opposite concepts, each of them resting on the objective or the subjective approach. The "behavioral" concept of guilt, which is used in civil relations, unlike the general legal "subjectivistic" one [10, p. 178; 5, p. 128], suggests refusing to use psychological criteria when revealing the notion of guilt, or limiting this criterion to intentional guilt only. For example, in the opinion of E. A. Sukhanov, "guilt in civil law is viewed not as a subjective, psychic attitude of the person to his behavior but as his failure to take the objectively possible measures to eliminate or avoid the negative results of his activities, in compliance with the circumstances of the specific situation. In other words, here the guilt is transferred from the field of difficult-to-prove subjective psychic perceptions of the specific person to the field of the objectively possible behavior of the participants of the property relations, where their real behavior is checked against a definite template of proper behavior. With this, it is not a question of some abstractly understood "careful owner" or "good faith businessman", whose theoretically imagined behavior is compared with the behavior of a specific person in a specific situation (as it is required, for example, in civil law). By implication of our law, the behavior of a specific person should be checked against the particular circumstances of the case, including the character of the duties imposed on him, the conditions of the turnover and the resulting requirements of care and diligence, which should be in any case followed by any good faith participant of the turnover [12, p. 222]".

For comparison, let us provide an example of how this interpretation is settled in foreign legislation. For instance, in accordance with corporate legislation of Australia (Article 180 of the Corporation Act), when administering a company, directors must exercise their powers and discharge their duties with the degree of care and diligence that *a reasonable person* would exercise in similar circumstances.

Thus, the RF Civil Code establishes the concept of guiltlessness, which should be used for formulating the definition of guilt as an element of a civil offense. In accordance with Item 1 of Article 401 of the RF CC, "the person shall be recognized as not guilty if, taking into account the extent of the care and caution which were expected from him in the face of the nature and the terms of the circulation, he has taken all the necessary measures for properly discharging the obligation". The difficulty of differentiating between the concepts "reasonableness and good faith" and "care and caution" is not surprising, which is often emphasized by researchers who analyze the problem [9, p. 14]. The tendency of defining the notions of reasonableness and good faith through the characteristics of guiltlessness was introduced by the RF Supreme Arbitration Court. RF Supreme Arbitration Court Resolution of May 22, 2007, No. 871/07 contains the following conclusion: "bringing an individual executive body to liability depends on the fact of whether he acted reasonably and in good faith while exercising his powers, i. e. whether he proceeded with care and caution and took all the necessary measures for properly discharging his obligations. An individual executive body of the company cannot be adjudged *guilty* for causing losses to the company if he acted within the limits of the reasonable entrepreneurial risk[1]". Later,

[1] Resolution of the RF Supreme Arbitration Court No. 871/07 of May 22, 2007. Access from legal reference system ConsultantPlus.

this wording started to be actively used by arbitration courts[1].

Violation of the duty to act reasonably and in good faith in the interests of the legal person inevitably serves as the characteristic of unlawfulness, because when this duty is followed, effecting a deal or taking any other decision with regard to the company will be a lawful action. However, if these circumstances are established, it appears that there is no space for the guilt as a separate element. As the scientists note, at the current phase of studying this issue, "as to the members of managerial bodies, the reasonableness and good faith during fulfilling duties imposed on them consist in taking all necessary and sufficient measures for achieving the purpose of activities the company was created for. Determining unreasonableness, actions in bad faith (failure to act) of the management team member and his actions against the interests of the company, the courts establish the degree of guilt in his behavior [13, p. 83]". This point of view is supported by the majority of researchers: the legal doctrine insistently reveals the signs of tendency to merge the guilt and unlawfulness into a single element of the civil offense committed by a person who manages the company [8, p. 204; 4, pp. 91–92; 7, p. 279]. Reviewing any other violation committed by the manager (for example, failure to comply with the requirement to have the deal approved, disclosure of confidential information and so on), it is possible to single unlawfulness out as a separate element and so to distinguish it from guilt. However, in a situation when unlawfulness is limited to unreasonableness and bad faith in effecting the deal, such separation because of the above reason may seem artificial.

We think that because of the specific character of the offense consisting in the manager's deviation from the good faith and reasonableness requirements, the direct application of the guiltlessness criteria contained in the liability law norms does not seem appropriate for the above reason. Separating the unlawfulness from the guilt is necessary first of all for practical reasons, to equalize the legal opportunities of both the manager and the company (its shareholders / participants), and also to provide the balance of interests of both parties and improve the mechanism of their protection.

Guiltlessness in violating a duty invariably differs in its content from guiltlessness in violating a duty to act reasonably and in good faith in the interests of the company, because the latter rests of the evaluation categories, has a lasting character, and qualification of its violation is not as "linear" as qualification of violation of the duty by an obligator. Failure to fulfill an obligation under a contract (for example, a delay in payment or delivery) does not itself need additional qualification as an unlawful act: failure to fulfill or improper fulfillment is technically unlawful by virtue of the provisions of Article 309 of the RF CC, which runs that the obligations shall be discharged in the proper way. In its turn, the concept of guiltlessness accounts for: circumstances of failure to fulfill, due degree of the obligator's diligence, demonstrating caring attitude expressed in objective actions. (Proving the absence of negative intentions as guiltlessness is not important for the company that incurred losses, because in this situation it does not matter to the company and the creditor in obligation whether the causer of losses wanted to cause them or not). Speaking about the duties of the manager as part of corporate relations, we see that the listed factors are mostly important for evaluating the fact of executing the obligation by the manager.

Let us remind that in their positive sense, the director's reasonableness and good faith mean "his *taking necessary and sufficient measures* for reaching the purposes of the activities for which the legal person was created, including his proper execution of public legal obligations imposed on the legal person by the legislation in force" (Item 4 of the RF Supreme Arbitration Court Resolution No. 62). It seems apparent that for performing an obligation, the meaning of "taking necessary and sufficient measures" should approximately align with the just mentioned appropriate degree of care and caution. With this, "taking necessary and sufficient

[1] Resolution of the Federal Arbitration Court of the East Siberian District on case No. A74-2820/2011 of September 14, 2012; Resolution of the Federal Arbitration Court of the Moscow District on case No. A40-48273/10-45-373 of July 21, 2011; Resolution of the Federal Arbitration Court of the Volga District on case No. A12-13018/2011 of April 2, 2012. Access from legal reference system ConsultantPlus.

measures" does not exactly mean "making one's best efforts" for fulfillment of the duty imposed. In other words, the component of diligence, eagerness is not included into the contents of the duty itself. It is possible that the manager made all possible efforts and did his utmost but did not achieve a result in the form of taking necessary and sufficient measures for providing the welfare of the legal person? In our opinion, this question needs careful consideration, because at the moment there is no clearness about whether the character of managers' actions is evaluated or their final result. The capability of the manager to influence this result can perfectly characterize his guilt or guiltlessness.

In its turn, the guilt, or at least a degree of it, can be established considering the degree of the actual participation in taking the decision: if an individual executive body is, in fact, only implementing the decision that was taken with no regard to his / her opinion by a collegiate authority, it makes sense to put a question of whether he could act differently, taking into account the accountability of the individual executive body to the general assembly and the board of directors (with this accountability imperatively prescribed by law). For resolving this situation, the current regulation provides for the joint liability of all the members of the board of directors involved into taking and executing the decision (Item 7 of Resolution No. 62). However it goes without saying that in reality, in the overwhelming majority of cases, it is the individual executive body that turns to be "the whipping boy", and the proposed opportunity of the joint liability does not relieve him from the negative consequences of taking and executing this body's decision. In turn, non-execution of such decision will also have negative consequences for the general director, but these consequences will be of dissimilar nature.

In view of the above, we think that the question of the conditions of imposing the civil liability on the managerial bodies of business entities in this situation is not fully regulated at the moment. It would be more than reasonable to have legislative provisions that could account for the whole possible variety of the corporate "scenery" variants in a specific corporation by way of a rule, so that this rule could make the guilt of an individual executive body dependent on his role in taking the decision that resulted in losses.

It is also important to account for a possibility of having several individual executive bodies by one corporation, which would function independently. And there can also be a situation when the authority of the individual executive body is delegated to several persons acting together (Item 3 of Article 65.3, Item 1 of Article 53 of the RF CC). Surely, such variations of the individual executive body can lead to certain problems in practice. If a model is used when each individual executive body acts independently of the other, there appears a problem of distributing competences between them to define the liabilities of each. When the variant is followed of having several persons acting together in one individual executive body, all of them should put their signatures for effecting a deal. But what shall be done if, for example, one of the body's members refuses to sign? Can he be brought to liability for inaction? Or did the legislator mean by this wording first of all that when acting together, the directors are to coordinate efforts to avoid conflicting deals, thus leading to a number of duties for the members of the individual executive body to the company? Let us note that joint conducting of business is also known to foreign systems of law. For example, in accordance with Para 77 of German Company Law, the general rule is that the managing board consisting of several persons carries out business jointly only. With this, it is mentioned that in case of disagreement between the board members, there can be no rule of taking a decision by one or several members of the board against the will of the majority.

Let us note one more nuance associated with the above construction. The likelihood of false representation for pursuing illegal purposes also influences establishing the degree of guilt of the person who can find himself in circumstances of simulated disinformation. In the situation when a person having the full authority of the individual executive body and access to any information about the company, practices abuse and intentionally takes illegal steps which make the deal concluded by the other authorized person unprofitable for this company, our opinion is that the degree of guilt of each should be taken into account.

With this, as a matter of clarification: if unlawfulness is universal in terms of the external

characteristics of violating a duty (including the duty to act reasonably and in good faith in the interests of the legal person) and does not depend on who the subject / the bearer of the duty is, then the legal status of this person is meaningful for establishing the guilt. According to the current norms of the civil legislation, a legal person can also act as an individual executive body (Item 2 of Article 65.3 of the RF CC). Correspondingly, we think that the approach to the content of the concept of guilt of the individual executive body cannot be universal, and the criteria should be developed separately for both categories of managers. With this, a list of possible excusing circumstances should be given as explanations in the resolutions of the supreme court bodies if not as a law. Unless this legal deficiency is properly corrected, it is impossible to speak about the real construction of the managers' liability based on the principle of guilt.

Liability of the Collegiate Authority Members: Specific Features of Qualifying the Unlawful Behavior

Of exceptional interest are the specific features of liability of members of collegiate authorities of the company, and first of all – concretization of the grounds for their liability.

The court practice of bringing the board members to liability is not developed in the Russian Federation. This is due to a number of reasons, for example, low efficiency of adopting the symbiotic Anglo-American and German law norms, the mixed status of the board of directors comprising both the control functions and the managing functions, and lack of proper normative regulation of the question of grounds for liability of a particular director who is a member of the board but does not independently take decisions on behalf of the company. As for the above question about the correlation between the powers of directors representing an individual executive body, there is possible either individual or joint exercising the powers. But as for the board of directors, the approach is completely different: all the decisions are taken only by a majority vote, there are no individual powers for a particular director outside the board.

Scientists are right to say that one of the key reasons for limited court practice on compensating the losses by the managers of the company is "the absence of precise and personified duties [16, p. 25]" for these persons (although it is worth noting that the Russian legal doctrine makes attempts to develop specific rights and duties of the board members [15, pp. 11–13]). The normative regulations on the obligation of both collegiate bodies and individual executive body to act reasonable and in good faith with regard to the company, and on liability in case of a wrongful violation of this requirement have been of unified character during the whole period of their existence. The Russian legislation has never contained separate criteria characterizing the requirements for the behavior of the person acting as the individual executive body (manager) of the legal person or members of collegiate bodies, neither the legislation contained the diversified reasons for bringing them to liability. Possibly, this is one of the reasons why there is no practice of bringing the collegiate bodies' members to liability.

Notwithstanding the fact that they have been mentioned as the subjects of liability alongside with and equal to the individual executive body during the whole period of existence of Article 71 of Federal law "On Joint-Stock Companies" and Article 44 of Federal Law "On Limited Liability Companies", it is rather difficult to bring a separate member of a collegiate body to liability. First of all, it is obvious that a person holding a position in, specifically, the board of directors, does not act on behalf of the company in the business turnover, and according to the general rule – he does not have a representative authority with respect to the company and cannot, for example, conclude an agreement on behalf of it. Thus, the relation of any actions of such a person to the losses of the legal person will hardly be obvious. With this, the members of the board of directors, which is a strategic will-determining body of the corporation, as a rule have impressive possibilities in influencing the financial status of the company and the decisions that are formally taken among others by the individual executive body.

As D. I. Tekutyev notes, the unlawfulness in the behavior of the managing collegiate bodies' members "is manifested by way of a specific type

of activities – voting on the issues on the agenda of the meeting [13, p. 80]". The author mentions that bringing a separate board member to liability for failure to act (for example, failure to deliver the necessary information) "seems to be possible only in theory, because in fact, it is impossible to prove that the board member held particular information but did not share it with the others [13, p. 80]". Developing the author's idea, we would like to mention that if we allow for such an opportunity in theory, then the violation of the board member could be manifested in not just withholding the information important for taking the decision but in intentional mispresentation of the information on the meaningful circumstances to the rest of the board members. It should be noted that the author believes that a situation is possible when the board of directors takes a decision judging from insufficient information, as a result of mispresentation of the information by the executive bodies, and proposes to treat this circumstance as the grounds for relieving from liability in case "acting with due diligence and caution, they could not identify the fact of false data presence in the information presented to them [13, p. 80]". However, this false-informer (-informers) can be one or several members of the board of directors itself.

Thus, the unlawful behavior resulting in losses for the company can be manifested not only through voting as a member of the body. Moreover, there can be a separate influence on, for example, the general director of the company, encouraging him to carry out activities for his own deceptive purposes at the expense of the company interests. The range of the director's unlawful behavior manifestations is too wide, and for this reason it seems that it is impossible to confidently narrow down the grounds for liability of a collegiate body member. The development of these grounds and the mechanisms of proving them is the next step to take, but the difficulty of establishing a fact can in no way be the ground for denying a possibility of the fact itself and its legal implications at the legislative level.

Returning to the question of liability for voting at the board of directors meeting, let us remind that according to Para 3 of Item 2 of Article 71 of Federal Law "On Joint-Stock Companies", the members of collegiate bodies who voted against the decisions that caused losses to the company or did not take part in the voting, cannot be brought to liability. Item 7 of RF SAC Plenum Resolution No. 62 reproduces this provision with one clarification: the director did not take part in voting *while acting in good faith*. So, that is an attempt to avoid relieving a collegiate body member from liability by reason of evading the direct participation in taking the decision (taking into account that in this case the director could actively promote taking the decision and support the decision behind the scene). However, the rule of non-participating in voting while acting in good faith will remain declarative until this concept is properly defined. In our opinion, the negative experience of having the evaluative concepts undefined and the impossibility to use them for this reason is already extensive, and so the importance of this clarification is insufficient with no definition of the circumstances that prove the good faith of the director who missed voting.

Moreover, with the so-called "personification" of the liability of each collegiate body member, there can be the following questions raised: is it possible to relieve a collegiate body member from liability if he voted against the decision that finally caused losses, but later actively worked towards its implementation? Or, vice versa, having voted in support of the decision, he could do his best to reduce losses or to low them down to a negligible level.

We think that the role of a particular board member brought to liability should be defined through the whole process. Only having evaluated correctly the degree of each person's influence onto taking and executing the decision, one can speak about the correct identifying of liable persons.

Thus, the institution of civil liability of the collegiate bodies' members needs progressive development. Individual aspects of the legal regulation of each body's activities should not be underevaluated, as well as the limits of the legal and actual opportunities of each collegiate body member. For this reason, we deem it practicable to prepare a separate chapter covering particularly the duties and details of liability of members of the collegiate body of the business entity, as events have proved

the inefficiency of the standardized rules for both individual executive bodies and members of the board of directors.

Conclusions

The performed study revealed the following problematic issues which need to be fixed: insufficient development of the "company's interest" concept, artificial separation of the bad faith and reasonableness characteristics, together with the absence of contextual "positive" details of the good faith and reasonableness notions, mixing up the unlawfulness and the guilt, absence of the definitized duties of the managerial bodies' members, absence of details of bringing the individual executive body and collegiate bodies' members to liability, absence of qualifying requirements to the managerial bodies' members.

As it has been discovered, when defining the interests of the company, it is difficult to account for the interests of all the concerned groups, even if that would provide for the long-term success of the corporation. The reason for confusing the unlawfulness and the guilt is in subjective and objective characteristics of each category. Originally, the search for intent or negligence is enshrined in the category of guilt, which is proved by the foreign legislation. The problem of defining the contents of unlawfulness appears due to the artificial separation of good will from reasonableness. With this, the implied duty of care / diligence is blurred between these two notions, while the duty to act in the interests of the company has not got proper regulation at all, and is mentioned only in a declarative manner. It also has been discovered that even after the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 62 was adopted, the subjective aspects are still used when bringing to liability, which creates a false impression that a complainant has to prove the director's intent to cause losses. The lack of understanding of the above factors results in difficulty of distributing the burden of evidence between the complainant and the defendant. Unreasonable requirements on proving the managers' motives that are raised by courts can be avoided only through establishing clear positive rules.

The above problems can be partially solved by strict regulation of the duties of managerial bodies (at least, at the level of the business entity's charter and internal documentation). There is a critical importance of the local rule-making in this sphere, because only the local level allows for the complete accounting for the real interests of business entities, corporate "conditions" and relations between the managerial bodies and the sharers. Nevertheless, a true solution of the problem is only possible by way of law and explanations given by courts.

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