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Jurisdictional remedies for corporate rights in Ukraine: Sub-standard remedies in corporate disputes

Anatoliy V. Kostruba

Full Doctor in Law, Professor at the Department of Civil Law, Vasyl Stefanyk Precarpathian National University, Ivano-Frankivsk, Ukraine. He is an author of dissertations "Bill of lading as a security", "Legal facts in the mechanism of termination of civil property relations". Scientific interests: civil law and procedure, international and European law.

Abstract: In the context of the European integration processes taking place in Ukraine, there is a convergence of the national legal system with the legal principles and provisions of the European Union, including in the field of corporate legal relations. The main purpose of this study was an independent study of problematic issues that arise upon the implementation of sub-standard remedies in corporate disputes to develop author's conclusions and recommendations to ensure sustainable and effective law enforcement practices. The methodological framework of this study included the principles of cognition of social phenomena in their historical development, interrelation, and interdependence, a dialectical approach to the study of theory and practice, the history and current state of law. The leading methods were historical, comparative legal, and dialectical. Based on the results of the investigation, the study covered the leading issues of the state of modern legal regulation of sub-standard remedies in corporate disputes in Ukraine; analysed the main issues of theoretical certainty regarding sub-standard remedies in corporate disputes and suggested new vectors of reforms concerning further improvement of law enforcement practice. The author's conclusion on the need to ensure the unity of law enforcement practice by introducing changes to the legislation of Ukraine towards detailed regulation of sub-standard remedies in corporate disputes, which also correlates with the reformation vectors of development of Ukraine in the context of European integration, will become a stable basis for further scientific research and legislative transformations in the field under study.

Keywords: Remedies for corporate rights; derivative claim; derivative action; weak party; corporate legal relations

1 Introduction

The improvement of international economic integration aims to create regulatory prerequisites based on the harmonisation of corporate law in Ukraine in terms of compliance with the requirements of the European Union legislation. The signed Association Agreement between the European Union and the European

Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part, can be considered a serious step on this path.[1] An important factor of effective cooperation in this aspect is the creation of conditions for remedying participants in corporate legal disputes, which are achieved by testing of effective European legal structures in the Ukrainian legal field.[2] The above, according to A. V. Kostruba[3] also concerns the choice of effective legal means of ensuring not only the rights, but also the interests of participants in corporate legal relations. These include derivative property and non-property claims favouring the corporation among other persons, tort claims of the corporation or claims from other persons to its management body, as well as liability of the participant (founder) of the corporation for obligations to third parties.

Upon interaction of corporate governance bodies with other subjects of corporate relations to ensure their organisational and economic activities, there may be situations when the parties to such interaction pursue multifaceted or mutually exclusive goals, which is conditioned by the polar pursuit of corporate interests. Such idea, according to Professor Yu. M. Zhornokuy,[4] serves as the basis for the emergence of a corporate conflict. The researcher noted that in the conditions of non-transparency of most Ukrainian joint-stock companies, their main advantages are realised through current management and decision-making mainly due to shadow schemes. In such circumstances, it is easy to underestimate profits and not pay dividends or not perform other obligations. Therefore, for a shareholder who has acquired the corresponding corporate rights, but does not have a real opportunity to influence management decisions, investing is a risky business. Pointing out the civil liability of a legal entity, isolating its property from its participants (founders), as well as taking part in civil turnover on its own behalf and interests excludes the possibility of external influence on the adoption of corporate governance acts by a legal entity. This, in fact, creates conditions for possible abuse of the rights of a legal entity by the governing bodies and, as a result, violation of this entity's interests.

In this context, the remedies in corporate disputes and their methods acquire a new dimension of implementation. Thus, the theory of civil procedure uses numerical criteria to classify claims. Each of them has a particular focus and plays its role in ensuring effective legal remedy for the rights and interests of participants in the judicial process. In particular, classification according to the subjective criterion of derivative effect, along with direct effect, allows determining the subject composition of the dispute, its jurisdiction, the matter of the subject

1 The Association Agreement ..., 2014.
2 KATERYNIUK, 2021, p. 54-55.
3 KOSTRUBA, 2019, p. 120-123.
4 ZHORNOKUY, 2015.

of proof, the ownership and admissibility of evidence, the amount of court fees, the form of procedural means of defence, that is, the such classification has not only theoretical, but also practical significance. V. A. Zhurbin[5] believes that the right to file a derivative claim stems from the ownership of shares. The derivative action is applied because a party to corporate relations has the right to a share in the corporation's property. Consequently, their right to file a claim stems from a person's right to defend their interests and the associated right to joint access.

At present, there is a need to strengthen the protection of relevant persons who have independently deprived themselves of such an opportunity by transferring their trust rights to the management body of a corporate entity. Such an action, albeit corresponding to the legal nature of the corporation (theory of interests), substantially weakens the legal status of a person who grants part of their legal personality (legal status and legal capacity) to an artificially created subject of civil law (legal entity).[6] The problem of the need to expand the boundaries and methods of legal remedies of corporate legal relations also has practical nature. Judicial practice in the consideration of corporate disputes has made it possible to identify substantial shortcomings in the legal regulation of corporate relations in Ukraine, which require their urgent solution.

Proceeding from the above, it is quite relevant to consider the main issues related to sub-standard remedies in corporate disputes. To achieve this purpose, the tasks were defined as follows:

1) to consider the main points of the state of modern legal regulation of sub-standard remedies for corporate relations in Ukraine;
2) to analyse issues of theoretical certainty regarding sub-standard remedies in corporate disputes and further improving the practice of law enforcement.

2 Literature Review

In modern civilistics, certain issues of the application of an indirect claim, problems of a material and procedural nature that arise with such application, become, although infrequently, the subject of discussion on the pages of scientific and educational literature, periodicals of legal journals. At the current stage of development of legal science, the nature of corporate rights, its place in the legislative and law enforcement activities of the state, some issues of remedies for corporate relations in the entrepreneurial activity were investigated in the studies of such representatives of the corresponding branches of legal science as A. V.

[5] ZHURBIN, 2012.
[6] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.

Kostruba,[7] Yu. M. Zhornokuy,[8] V. A. Zhurbin,[9] M. Bekker,[10] O. V. Bihnyak,[11] M. I. Brahinskyy and V. V. Vytryanskyy,[12] S. N. Bratus,[13] L. A. Burtseva,[14] O. O. Volos,[15] V. Volyanskyy and V. Pavlenko,[16] K. Leonov,[17] N. S. Kuznyetsova,[18] I. Lavrinenko,[19] O. S. Listarova,[20] V. V Luts and R. A. Maydanyk,[21] P. Malyshev,[22] H. K. Matveev and K. P. Nykolaev,[23] H. L. Osokina,[24] L. M. Rakitina,[25] N. V. Semenenko,[26] V. V. Yarkov.[27]

Therewith, in the civil legislation of Ukraine, the issues outlined above are investigated fragmentarily and require a more in-depth study. Notably, there are no comprehensive studies of indirect claims as a remedy for business entities, as well as problems arising in connection with its practical application. However, the coverage of the essence of law enforcement, the forms of its implementation in the civil law doctrine can increase the axiological nature of the law, outline its new possibilities, and give an answer to unresolved issues of law enforcement today, namely the effectiveness of law enforcement mechanisms in the legal regulation of corporate relations.

3 Materials and Methods

The methodological framework of this study included the principles of cognition of social phenomena in their historical development, interrelation, and interdependence, a dialectical approach to the study of theory and practice, the history and current state of law. Of great significance in the development of the study subject was the idea of a state governed by the rule of law, wherein an essential place is given to the legal remedies for a person, namely the forms, means, and methods of remedying, which in modern realities of mainstreaming

7 KOSTRUBA, 2019, p. 120-123.
8 ZHORNOKUY, 2015.
9 ZHURBIN, 2012.
10 BECKER, 1997.
11 BIHNYAK, 2018.
12 BRAGINSKY; VITRYANSKY, 2000.
13 BRATUS, 1976.
14 BURTSEVA, 2011.
15 VOLOS, 2016.
16 PAVLENKO; VOLYANSKY, 2015.
17 LEONOV, 2021.
18 KUZNYETSOVA, 2011.
19 LAVRINENKO, 2016.
20 LISTAROVA, 2010, p. 69-75.
21 KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
22 MALYSHEV, 1996, p. 95-112.
23 MATVEEV; NIKOLAEV, 1955.
24 OSOKINA, 1999, p. 18-19.
25 RAKITINA, 2009, p. 49-57.
26 SEMENENKO, 2007, p. 210-215.
27 YARKOV, 2000.

corporate disputes becomes of paramount importance for the essence of a person's existence in society.[28] In addition, this study involved a system of general scientific and private scientific research methods, including analysis, synthesis, induction, deduction, historical method, comparative legal, and formal legal methods.

The dialectical method was used to investigate the doctrinal and legislative sources in the field of corporate rights as an objective social reality, which is inextricably linked with other social phenomena of a political, economic, socio-cultural, and other nature, and constantly and gradually evolves under the influence of various factors in the context of globalisation and transformation of corporate structures.

The logical method, which includes analysis, synthesis, induction and deduction, allowed conducting a meaningful analysis of the legal structures of provisions wherein corporate rights found their consolidation at the international and national levels, and contributed to identifying problems in implementing the remedies in corporate disputes.

The system method, as one of the main methods of streamlining legislation, allowed identifying the issues of statutory regulation of sub-standard remedies for corporate legal disputes in modern conditions and offering scientifically sound ways to solve them.

The system-structural method was used in the classification of subjects of corporate legal relations, corporate interests, classification of claims within the framework of the implementation of the judicial remedy, classification of forms and methods of remedying subjective corporate rights and interests. Using the Aristotelian method, the author established the content of terms in the area under study, namely the term of corporate legal relations, remedies for subjective corporate right and interest, sub-standard remedies, etc.

The forecasting method was used to identify shortcomings in corporate legislation and determine ways to improve it. Using the comparative legal method, the experience of foreign countries and positive developments of representatives of the civil doctrine of other states were studied. The formal legal method was used in the interpretation of legal provisions governing the material and procedural aspects of the implementation of substandard remedies for the rights and interests of subjects of corporate legal relations

The use of these methods allowed performing a comprehensive study of the declared issues and led to a reliable author's scientific result. The empirical basis of this study included the analysed materials of judicial practice, including those relating to the application of the legislative provisions of Ukraine concerning

[28] KOPCHA, 2021.

corporate legal relations, analytical materials on the issues under study. The main methodological principles of the study included the principles of objectivity and historicism, scientific ascent from the abstract to the concrete, organic unity of theory and practice, the principles of synergetics, namely polyvariety, nonlinearity, constructiveness, etc.

4 Results

The weaker party in corporate legal relations is a shareholder who has a smaller set of legal tools to implement the purpose of their right – to profit and take part in the management of the corporation due to fiduciary trust in his or her confidence in the exercise of such a right by the management body of the legal entity. In other words, fiduciary relations are those where the trust of one party in the other or the mutual trust of both forms the basis for the emergence, amendment, or termination of the relations. The motive of trust in such relations becomes their auxiliary element, emphasising its essence in them. This element underlies certain norms of legal regulation of trust relations, primarily concerning the conditions of liability of the parties. Thus, the trusting nature of the relations between the participant (founder) and the body of a legal entity, despite the mutual respect of these persons, at the same time puts the founder in a difficult position, creating an objective possibility of abuse of such fiduciary trust. In this case, exemption from liability is possible only if corporate damage is caused in a procedural form as a result of economically unforeseen risks of entrepreneurial activity (force majeure, compliance with the boundaries of normal economic risk). Therefore, it is the founder who must provide great legal opportunities to remedy their rights and interests, namely by strengthening the responsibility of their counterparty.

One of the most effective ways to resolve corporate conflicts is to appeal to a beneficiary who has a legitimate interest in the proper exercise of corporate rights, demanding the protection of violated rights.[29] The way to resolve the corresponding corporate conflict is to file a claim to remedy the subjective civil rights of the corporation, thereby remedying the interests of the corporation member (founder). According to the procedural doctrine of the Anglo-American legal system, such a procedural form of corporate legal remedy was embodied in the filing of a “derivative” or “indirect” claim. This claim originated in the countries of the Anglo-Saxon legal family in the middle of the 19th century and is called a derivative suit. The establishment of the institution of derivative suits is associated with the search for a solution to the problem of abuse on the part of management

[29] WÓJTOWIC, 2020.

and majority participants in the context of the dispersion of shares among a considerable number of shareholders, as well as with the need to protect the rights of minority shareholders. Describing the institution of indirect action in US case law, P. Malyshev[30] noted that indirect actions were introduced in US case law to resolve disputes arising from conflicts of interest between corporate owners and their managers. They are filed by shareholders on behalf of the corporation to protect interests that the corporation itself refused to remedy for whatever reason, in other words, when the interests of shareholders were damaged not directly, but indirectly, that is, usually due to a decrease in the value of shares; hence the name of the statement of claim – "derivative". Its emergence is an achievement of US judicial practice and a distinctive feature of the common law legal system. At the same time, the legal geography of the distribution of this construction in the legal system of many countries of the world is quite extensive and today is not an absolute monopoly of the Anglo-Saxon legal system (China, Congo, Singapore, Chile, USA, Italy, Germany, Australia, New Zealand).[31]

In the Black's Law Dictionary,[32] there are several definitions of the concept of "derivative action", but it is not always considered as a type of corporate action. In particular, the nature of the claim in derivative suit demonstrates that this is an action by the beneficiary's trustee aimed at enforcing the right belonging to the trustee (fiduciary); an action brought by a corporation shareholder to remedy the corporation's rights against third parties (usually employees of the corporation), since the corporation itself did not file a corresponding action against third parties; an action arising from claims for damages caused to another person. In Ukrainian sources, the term "derivative" is interpreted as "formed, derived, etc. from something similar (about size, shape, category, etc.). The term "indirect" in the same dictionary is interpreted as not immediately related to something, not related to the essence; not at once. Something that is done not directly, but with intermediate periods, stages. The difference in interpretation of this term explains the difference in the nature of the remedies for subjective civil rights and legitimate interests of a person. The purpose of filing a derivative suit is to protect the derivative right from another fundamental right associated with it. That is, the remedying of corporate rights is provided through the remedying of the rights of a participant in corporate legal disputes, since this is conditioned by the effective remedying of the rights of creation. In turn, the functional division of claims into two types is as follows: derivative action and indirect action make provision for the determination of the subject of the claim in each of them. In the first case,

[30] MALYSHEV, 1996.
[31] GIAMPIERO, 2020.
[32] BLACK, 1968.

these are the requirements that the founder justifies a possible reduction in the capitalisation of his or her assets. His or her satisfaction is ensured by such remedies for rights and interests as invalidation of the transaction, termination of the action that violates the right, enforcement of in-kind obligations, termination of legal relations, etc., and the defendant is a third party, actions affect the property status of the corporation and the corporation itself as a party to the disputed relations.

Otherwise, the protection of the rights and interests of participants in corporate legal relations is ensured in the absence of property damage directly from the founder by restoring situations that existed prior to the violation, terminating the action that violates the right, etc. The occurrence of a derivative (indirect) action is inextricably linked with the activities of companies and, above all, with the joint-stock form of business organisation, when abuse of behaviour by the company's management leads to the need for a comprehensive settlement of liability issues in the joint-stock company. The concept of derivative (indirect) action came from the English practice of trust, that is, trust management of someone else's property. In turn, the duties of corporation directors come from the principle of its activity – management of someone else's property, funds of its owners – participants (founders) of the corporation. Since the trust relationship manager manages someone else's property, he or she undertakes responsibility – he or she must act most effectively in the interests of the corporation and take the undertaken responsibility seriously.[33] Therefore, an indirect or derivative claim is a legal instrument that purposefully works contrary to shareholder democracy, since it can appeal against a decision taken by members of management bodies even unanimously.[34]

Such a legal construction as a derivative action is not limited to the scope of tort of the governing body of a corporate entity. This is a procedural form of remedying real and binding rights in the structure of corporate legal relations, which allows achieving the legitimate interest of a business entity participant. Consequently, a violation of the subjective right of a legal entity leads to a violation of the subjective right of a participant (founder) of a legal entity through close property and other relations between them. If a legal entity does not exercise its right to judicial remedy, the participant acquires the right to claim damages and submits a substantive claim to the court for the judicial remedying of the subjective right of the legal entity, since only in this sequence is it possible to protect its subjective right.[35]

[33] BURTSEVA, 2011.
[34] BIHNYAK, 2018.
[35] GULAC; SHCHERBAK, 2021.

The following main features are inherent in a derivative claim:[36] the plaintiff is a shareholder without a special authority of the joint-stock company, by direct instruction of the law; the plaintiff is obliged to be a shareholder of the joint-stock company in the interests of which the claim is filed, at the time of both the appeal to the court and the court decision; the plaintiff may be only one shareholder because the current economic and procedural legislation does not make provision for the institution of plurality for the plaintiff; the shareholder acts to protect primarily the general corporate interest, which indirectly violates the individual corporate interest of the shareholder, but from a procedural standpoint, the shareholder acts in the interests of the company, as the award in this category of cases favours the legal entity and not its participant; the shareholder files a claim on their own behalf, but in the interests of the joint-stock company; the subject of an indirect claim is a demand for invalidation of an agreement concluded by a joint-stock company with another counterparty and compensation for damages to the interests of the joint-stock company caused by such agreement; the right to an indirect claim is exercised by a shareholder, if the bodies of the joint-stock company authorised by law and (or) the charter have not exercised the right to remedy the rights and relevant interests of the joint-stock company; defendants in this category of cases are officials of the joint-stock company who performed activities on behalf of the joint-stock company upon the conclusion of an agreement, and (or) actual counterparties under the agreement; upon legalising this institution in the current joint-stock to avoid abuse of minority rights by their corporate rights, it is necessary to make provision for the possibility of filing a lawsuit by a shareholder who owns over 10% of ordinary shares of the company.

Shareholder claims serve as a management control tool.[37] The main distinguishing feature of a derivative suit is that the applicant of a derivative suit does not have the right, if satisfied, to demand an award of the amount that the business company will have. For minority shareholders, the effect of indirect benefits occurs in this situation, which lies in cessation of harmful influences of the company's governing bodies and management, which, in most cases, are of a long-term nature. Moreover, the recurrence of such actions is clearly prevented by members of the governing bodies. O. V. Bihnyak[38] noted that this may affect both the dynamics of the company's securities exchange rate and the amount of dividends in the future. Individual shareholders may take legal action either through a derivative right on behalf of the corporation (derivative suit) or in their own rights, if their rights are directly violated (direct claim). Class action lawsuits should also be mentioned,

[36] KUZNYETSOVA, 2011.
[37] BECKER, 1997.
[38] BIHNYAK, 2018.

when an individual shareholder files a claim acting on behalf of a group of persons whose rights have been violated. The derivative suit, in particular, is associated with several details that reinforce the claim. Firstly, the shareholder must contact the board of directors to file a claim. According to the business judgment rule, a claim is usually settled if the board does not approve the decision. Therefore, the business judgment rule restricts the use of derivative suits. If the rights of shareholders are violated, the shareholder has the right to file an application for judicial remedy.

On May 1, 2016, the Law of Ukraine No. 289-VIII "On Amendments to Certain Legislative Acts of Ukraine Concerning the Protection of Investors' Rights" dated April 7, 2015 has entered into force.[39] This regulation amended several articles of the Economic Procedural Code of Ukraine, as well as corporate and labour legislation of Ukraine, according to which the mechanism of "derivative suit" is introduced into Ukrainian legislation. This law also established the responsibility of directors of business entities in case of company losses caused by their illegal actions. Starting from this date, the Ukrainian procedural legislation de jure introduces a remedy for the rights of minority shareholders. The adoption of such an amendment substantially affected the approach of Ukrainian legislation to meeting the requirements of the Association Agreement with the EU.

Despite the lack of legislative regulation of this institution in Ukraine before its introduction based on the law, derivative suits factually took place in the judicial practice of Ukraine. The right of a company member to appeal to the court was justified by the Decision of the Constitutional Court of Ukraine No. 18-RP/2004 of December 1, 2004[40] (the case on legally protected interests), wherein the court stated that the provisions of Part 1, Article 4 of the Civil Procedural Code of Ukraine[41] should be interpreted in such a way that "a shareholder can remedy their rights and legally protected interests by applying to the court in case of their violation, challenge, or non-recognition by the joint-stock company of which they are a member, bodies, or other shareholders of this company". At the same time, in 2008, the Supreme Court of Ukraine attempted to terminate the practice of applying derivative suits. Thus, in the resolution of the Plenum of October 24, 2008 No. 13 "On the Practice of Consideration of Corporate Disputes by Courts",[42] the Court stated that "the law does not make provision for the right of a shareholder (participant) of a business company to apply to the court for remedying the rights of a shareholder (participant) of the company outside agency". However, it was

[39] Law of Ukraine No. 289-VIII ..., 2015.
[40] Decision of the Constitutional Court of Ukraine ..., 2004.
[41] Civil Procedure Code of Ukraine, 2004.
[42] Resolution of the Plenum of the Supreme Court of Ukraine ..., 2008.

not possible to finally ensure the unity of judicial practice in the application of derivative suits. Rather, on the contrary, in some cases, the courts still consider claims of shareholders that are not related to corporate rights, referring to the "legally protected interest" (Decision of the Economic Court of the city of Kyiv in the case No. 910/3845/15-g of March 25, 2015),[43] and in others – refuse to accept or satisfy them, referring to the decision of the Plenum of the Supreme Court of Ukraine No. 13 of October 24, 2008 (Resolution of the Supreme Economic Court of Ukraine of May 22, 2013 in case No. 5010/1465/2012-18/60).[44] At the same time, notwithstanding Article 17 of the Law of Ukraine "On Enforcement of Decisions and Application of the Practice of the European Court of Human Rights", according to which courts use the Convention and practice of the European Court of Human Rights as a source of law upon considering cases, the highest instance ignored the decision in the cases No.33202/96 "Beyeler v. Italy" of January 5, 2000 and No. 42527/98 "Prince Hans-Adam Ii of Liechtenstein v. Germany" of July 12, 2001, which emphasised that the right of ownership under court decisions is not limited to the right of ownership of physical things and provides that the right of claim, legitimate interest, and legitimate expectation of a person, which include, for example, interests conditioned by the corporate rights of a shareholder, must also be effectively remedied.[45] Currently, judicial practice in Ukraine is gradually moving beyond the narrow regulatory understanding of the essence of a derivative suit, stipulated by the Law of Ukraine "On the Protection of Investors' Rights". Thus, the Supreme Court of Ukraine in its Decision on Case No. 3-327gs15 of 01.07.2015[46] recognised the right of a company participant to file a claim to the court for invalidation of agreements concluded between this company and the counterparty, having satisfied the claims in full.

It can be concluded that the scope of application, as well as the procedural features of this institution, have special features in each country, but in the general sense, derivative (indirect) suits imply the claim of a participant (shareholder) of the company (sometimes even a creditor), filed on behalf of and in the interests of the company itself to the management of the enterprise for damages or recognition of the transaction as invalid. That is, in fact, a person who owns a share of the enterprise, the minimum size of which is usually regulated, gets the right to appear in court and defend not their own interests as the owner, but the interests of the enterprise directly outside the agency. Thus, the list of measures to protect corporate rights has been expanded by law, but, considering the specific features,

[43] OSOKINA, 1999.
[44] Resolution of the Supreme Commercial Court of Ukraine ..., 2015.
[45] PAVLENKO; VOLYANSKY, 2015.
[46] Resolution of the Supreme Commercial Court ..., 2015.

the mechanism of the right to a derivative claim is still limited to the scope of applicants – shareholders (participants) of companies to an official of the company who caused the company the corresponding losses.

5 Discussion

The author's conclusions formulated based on the results of the study necessitate the reference to the controversial positions of researchers expressed on this matter. Thus, O. S. Listarova[47] considers indirect action as "a claim of a corporation participant to protect the interests of other members of the corporation and the corporation in general, proposed for compensation for damage caused to a legal entity in the event of illegal actions of its managers, officials, and bodies". According to Yu. M. Zhornokuy,[48] the derivative nature of this claim makes provision for the satisfaction of such a claim in favour of the joint-stock company, and not the shareholder, that is, the company acts as a direct beneficiary. Respecting the interests of a company also means ensuring the interests of its members.

The construction of the derivative suit is described by H. L. Osokina. In her opinion, "...an indirect (derivative) suit is an abstract, purely speculative construction that does not have a solid theoretical basis and does not go into the field of practical law enforcement. In this regard, it represents a dead end in the development concerning the theory of the claim form of remedying the rights and legitimate interests...".[49] Criticising the existence of this form of requirements, the author simultaneously classifies derivative suits as a form of corporate requirements. V. V. Yarkov[50] does not agree with this position, considering that corporate requirements are distinguished upon classifying requirements by essential features. At the same time, derivative suits are defined within a fundamentally different classification – depending on the nature of the protected interest, as well as on the identity of the beneficiary. Thus, according to the researcher, in an indirect form, the beneficiary is the company itself, in favour of which the bonus is awarded. The benefit of the shareholders themselves is indirect, since personally they receive nothing.

The effectiveness of the remedies for the rights of participants in corporate legal relations is achieved by theoretical definition and legislative consolidation of the basics of civil liability of a corporate governance body. Civil liability is based on a set of its mandatory elements (features). Today, it is doctrinally defined that such a set of elements forms the composition of a civil offence. At the same time,

47 LISTAROVA, 2010.
48 ZHORNOKUY, 2015.
49 OSOKINA, 1999.
50 YARKOV, 2000, p. 6-12.

from the standpoint of A. V. Kostruba, R. A. Maydanyk and V. V. Luts,[51] conclusion of H. K. Matveev and K. P. Nykolev[52] that the common basis of civil liability is the unity of subjective and objective elements of a civil offence is doubtful. For the most part, it is appropriate to argue the primacy of objective elements of a set of offences, pertinence to which has a subjective meaning. Therewith, it is advisable to pay attention to their dialectical relations.

Proponents of the theory of causation recognise the fact of causing harm as the basis of civil liability. However, the subjective grounds for such damage do not matter for the legal qualification of the responsible person's actions. The main thing is that there should be a causality between a person's behaviour and the fact of harm. Exceptions to the principle of presumption of guilt in the civil legislation of Ukraine have socio-economic conditions. Each of them, as noted by H. K. Matveev and K. P. Nykolaev,[53] should be considered as a sanction against the debtor, which establishes an increased amount of liability for violation of obligations. The attempt to justify the existence of "innocent responsibility" and extend its boundaries to corporate relations has a clear legal tradition. Its application in legal regulation of corporate relations, as well as in the civil legislation of Ukraine in general, as mentioned by S. N. Bratus,[54] only increases the requirements for due diligence to the mandatory party in corporate legal relations. These requirements are also related to the weakness of a business entity participant in relation to a corporate governance body as a result of trust in its activities. These requirements include the ability to maintain secrecy of information about the subject of management of the corporation's body; limiting the scope of remedies for the interests of a business entity participant, which makes the relevant mechanism for its implementation flawed, and the presence of a lower status opportunity relating to the counterparty.

In support of the legal position regarding the establishment of the presumption of guilt of the corporation's governing body in the event of negative consequences, the adoption and implementation of corresponding management decisions is advisable, as suggested by A. V. Kostruba, R. A. Maydanyk and V. V. Luts,[55] to determine the criteria of the "weak party" in corporate legal relations. Thus, the essence of weakness in corporate relations is determined by establishing the signs of the latter. The corresponding classification was provided by O. O. Volos[56] in the dissertation research "Principles of the Law of Obligations". The author noted that the weaker party is a participant with a smaller economic base, which has status

[51] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
[52] MATVEEV, NIKOLAEV, 1955.
[53] MATVEEV; NIKOLAEV, 1955.
[54] BRATUS, 1976.
[55] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
[56] VOLOS, 2016.

opportunities compared to the counterparty. Furthermore, the obligated weaker party is a person who has a subjective civil right, but the forms and methods of its implementation are imperfect, while regulations establish a mechanism for exercising such a right in particular legal relations.[57] The opinion of M. I. Brahinskyy and V. V. Vytryanskyy[58] is that the main objective of civil legislation is to equalise the rights of participants in legal relations by establishing special rights for one of them. The above is achieved either by recognising additional rights for the weaker party, or by establishing additional obligations for the stronger party. N. V. Semenenko[59] noted that "the development of a market economy has led to the consolidation and emergence of numerous new concepts, such as "corporate law", "corporate disputes" and, accordingly, the remedies for the rights of participants in various associations, including indirect actions. As noted by L. M. Rakitina,[60] "... during the improvement of the civil legislation on business entities in the science of civil procedural law, attempts are being made to distinguish claims relating to the activities of such organisations. Such claims are proposed to be called indirect, derivative, or corporate...".

Derivative suit, as noted by A. V. Kostruba, R. A. Maydanyk and V. V. Luts[61] is not only a form of remedying the rights and interests of participants in corporate legal relations, through which the participant's claims to the corporation's governing body for compensation of losses caused by management decisions are represented and satisfied. Using this procedural model of law, the interests of any person are protected in another way that guarantees their restoration as a participant in corporate legal relations. In the opinion of lawyers, to determine the legal nature of a derivative suit, the understanding of these requirements should be clarified. Remedying subjective civil rights and interests of participants (founders) of a corporation by means of a derivative suit should be considered in the context of not only corporate, but also other substantive relations.[62] And this approach is not new for the civil legislation of Ukraine. Thus, for example, in accordance with Article 47 of the Law of Ukraine "On Copyright and Related Rights",[63] the copyright and related rights of their subjects are protected by collective management organisations, which also grant non-exclusive rights to use copyright objects to any persons by entering into agreements with them on the use of copyright objects and/or related rights. In other words, the subject of a derivative suit is

[57] BIELOV, 2020.
[58] BRAGINSKY; VITRYANSKY, 2000.
[59] SEMENENKO, 2007, p. 210-215.
[60] RAKITINA, 2009, p. 49-57.
[61] KOSTRUBA; MAYDANYK; LUTS, 2020, p. 1-19.
[62] BONDARENKO; PUSTOVA, 2021.
[63] Law of Ukraine ..., 1993.

a secondary claim of a person who has an indirect interest in it. This involves choosing remedies for legitimate interests identical to the remedies for a person's rights. Thus, legal experts conclude that the derivative suit is applied when in the presence of an interrelation and interdependence of one substantive relations with other substantive relations, when the rights and interests of one person cannot be remedied without remedying the rights of another person. When filing a derivative suit for remedying the rights of another person, the purpose of filing a derivative suit is achieved – to remedy the rights and interests of the participant (founder) of the enterprise. The above gives grounds for researchers to conclude on the streamlining of legal procedural terminology. Thus, the above considerations indicate the use of the terms "derivative" and "indirect" action in the academia as a procedural form of jurisdictional remedy for participants in corporate relations. In this regard, O. V. Bihnyak[64] noted that the term "derivative" means that the person filing the claim has only corporate rights to the company, whose rights are violated by illegal behaviour on the part of the management bodies. As for the use of the term "indirect", this refers to the fact that the participant (shareholder) who initiated the legal process does not act as a direct beneficiary in the dispute, such a person is the company itself. In this case, the legitimate interests of the participant are remedied by remedying the interests of the company itself. Therewith, in the vast majority of cases, these terms are identical.[65]

Based on the results of the discussion, it can be concluded that the doctrine of civil law is dominated by the understanding of derivative suits exclusively as a procedural remedy for participants in corporate relations. The use of this remedy is limited to the sphere of corporate law. Derivative actions are performed exclusively as a request of the founder (shareholder) in the interests of a corporate entity. Thus, a derivative action is considered as an effective remedy for the interests of minority shareholders.

6 Conclusions

Apart from the form of doctrinal proof of the validity of expanding the limits of liability of the governing body of the corporation for causing harm to the latter, the principle of protecting the weak party in corporate relations determines the possibility of ensuring not only the subjective civil right of the participant (shareholder), but also its legitimate interest. The above makes provision for expanding the range of jurisdictional remedies for the subjective civil rights and interests of a corporation participant (founder) and other persons for resolving corporate disputes by also using

[64] BIHNYAK, 2018.
[65] LAVRINENKO, 2016.

a derivative procedural form. At present, there are not only doctrinal prerequisites for changing the extent of liability of the corporation's governing body, but also clear rules concerning the legal grounds and procedure for applying a derivative action. In modern realities, it is important to provide participants of corporate entities in Ukraine with a real and effective opportunity to apply to the court under a derivative suit. Thus, the alternative sub-standard remedies for resolving corporate disputes were presented. An alternative to a reasonable balance in ensuring the interests of company participants and exercising the professional competence of the management body of a business entity can be the principle of presumption, when the management body is responsible for causing harm to a corporate entity, and, moreover, is obliged to prove that its decisions comply with the business standard of a "smart" manager.

According to the principle of "innocent (objective) liability" of the corporation's governing body for damage caused upon the adoption and implementation of management decisions, the corporate rights of a shareholder (participant) are filled with real content. In turn, the principle of protecting the weak party in corporate law of Ukraine lies in the general idea of providing remedies for a party to legal relations, which is limited by the appropriate possibility due to self-regulated and purposeful legal actions (creation of a legal entity) as a form of compensation for the same level of legal capacity of participants in civil law relations.

The debatable scientific opinions allowed establishing that the doctrine of civil law of Ukraine is dominated by the understanding of derivative actions exclusively as a procedural remedy for participants in corporate disputes. The use of this remedy is limited to the sphere of corporate law. At the same time, the author's conclusion on the necessity of ensuring the unity of law enforcement practice by introducing changes to Ukrainian legislation towards detailed regulation of sub-standard remedies for corporate legal relations is quite reasonable and urgent, which also correlates with the reformation vectors of Ukraine's development in the context of European integration.

Remédios abaixo do padrão para relações corporativas

Resumo: No contexto dos processos de integração europeia em curso na Ucrânia, verifica-se uma convergência do ordenamento jurídico nacional com os princípios e disposições jurídicos da União Europeia, inclusive no domínio das relações jurídicas societárias. A dinâmica das mudanças legislativas na Ucrânia indica a transformação da regulamentação jurídica das relações corporativas e as características específicas de sua reparação. A aspiração para a integração europeia da Ucrânia, por um lado, é economicamente determinada pelas necessidades atuais do empreendedorismo ucraniano, por outro lado, eles são os componentes através dos quais novos remédios abaixo do padrão para direitos e interesses corporativos são implementados no estrutura da Ucrânia, que actualizou o tema escolhido para este estudo. O objetivo principal deste estudo foi um estudo independente de questões problemáticas que surgem na implementação de remédios abaixo do padrão para relações

corporativas para desenvolver conclusões e recomendações do autor para garantir práticas de aplicação da lei sustentáveis e eficazes. O referencial metodológico deste estudo incluiu os princípios de cognição dos fenômenos sociais em seu desenvolvimento histórico, inter-relação e interdependência, uma abordagem dialética do estudo da teoria e da prática, da história e do estado atual do direito. Os métodos principais eram históricos, jurídicos comparativos e dialéticos. Com base nos resultados da investigação, o estudo cobriu as principais questões do estado da regulamentação legal moderna de remédios abaixo do padrão para relações corporativas na Ucrânia; analisou as principais questões de certeza teórica sobre remédios abaixo do padrão para relações corporativas e sugeriu novos vetores de reformas para melhorar ainda mais a prática de aplicação da lei. A conclusão do autor sobre a necessidade de garantir a unidade da prática de aplicação da lei, introduzindo mudanças na legislação da Ucrânia para uma regulamentação detalhada de remédios abaixo do padrão para relações jurídicas corporativas, que também se correlaciona com os vetores de reforma do desenvolvimento da Ucrânia no contexto da integração europeia, tornar-se-á uma base estável para mais investigação científica e transformações legislativas no domínio em estudo.

Palavras-chave: Recursos de direito empresarial; pretensão derivada; ação derivativa; parte fraca; relações jurídicas societárias

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