Federal State Educational State-Financed Organization for Higher Education
Russian Presidential Academy of National Economy and Public Administration under the President of the Russian Federation

Shikin Sergey Alekseevich

BASES OF CIVIL LIABILITY OF CHIEF EXECUTIVE OFFICER IN RUSSIAN AND ANGLO-AMERICAN COMPANIES

Qualifications: 12.00.07 – corporate law; competition law; energy law

ABSTRACT OF ACADEMIC RESEARCH

Submitted for the Russian degree of Candidate of Juridical Science

Krylov Vadim Grigorievich
Academic Advisor
Candidate of Juridical Science, Associate Professor of the
Russian Academy of National Economy and Public Administration

Moscow – 2019

Concept description of the thesis work. The topic of civil liability of directors in companies is one of the most debated and is important in punditry and also in practice because of contradictory and mixed bases of court decisions subjected to directors' liability.

Russian legislation since 2013 was the benchmark for strengthened practice as far as increasing cases of reimbursement of directors is concerned.

Civil liability of the chief executive officer in a company overlaps fiduciary duties of the directors. The author's topic of research is based on comparative analysis in Australia, Canada, New-Zealand, the UK and in the USA.

Maneuverability of Russian legislation comes partly with diversification and pitfalls in legislation together with incorrect construction of provision of law by judges which uses body of law to impose liability on the directors.

Russian legislation ever since it entered into force the resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation which dates back to 30.07.2013 «On matters relating to recovery of damages from company directors» up to this day there is wide practice testifying about the unelaborated doctrine.

Anglo-American corporate and common law in general have quite a detailed body of law in terms of fiduciary duties of company directors such as Model Business Corporation Act which regulates practice and bases following liability.

In Anglo-American law doctrine, academic specialists have been discussing matters of reviewing the bases of liability embodied in economic argumentation from point of view of foreseeability associated with equity doctrine. This consists of legal nature of pure economic loss which is in contrast with branches of law.

When it comes to indemnification of company directors in Russian legislation, the biggest question arises from problematic non-exhaustive and undeveloped case law. It relates not only to construction of fiduciary duties but also some diversified state of law under the branches of law in applied legislation doctrines such as Bona Fide, Equity for Buena principles with inconsistencies in the Plenums. As a result, we look at trends in strengthening of liability level.

It should be noted, along with fiduciary duties that when looking into Anglo-American law doctrines such as Corporate opportunity, Waste doctrine, duties oversight, cost-benefit internalization doctrine and bundle of rights it is beyond all doubt a necessity for correct qualification in every case.

Notwithstanding all rules provided in the nature of Russian legislation which regulate particularities that come with directors' liability particularly in construction. Under Article 90, Russian criminal procedure code issued by direct construction and litigation practice creates barriers for applying rules related to prejudicial effect.

In Russian tax law under the law qualification of directors' liability, judges incorrectly apply «prevails nature versus form» doctrine as was in Ahmadeeva case.

The same with criminal law when criminal investigation offices impose liability on innocent directors ignoring business risk as a base principle of civil law. That's why it's important to take into account the loopholes of legislation and make up for the gaps in law in order to put ground on freedom business turnover and directors' activity in international transactions including burden of risks in Russian laws. It seems evident, that there is a need to amend the legislation to incorporate the lifting of the corporate veil. This mechanism is known in foreign law.

The research lights up more objectively on the approach of the institute of liability's point of view considering not only public law but also private law including comparative analysis combined with some jurisdictions of Common law.

As for the degree of elaboration on this specific topic, we could say that such a comparative legal analysis of all the peculiarities of the liability of CEOs in Russia and Anglo-American Law has not yet been studied thoroughly in legal doctrines.

Moreover, taking into consideration the current and planned reforms of the civil legislation, this topic becomes even more interesting as it will become the method and mechanism for future scientific studies that are described in my thesis. The topic concerning the liability of the CEO has not been studied sufficiently due to the constant amendments being made to the Russian civil legislation.

One of the prior directions of my thesis is the research on the legislation of the States of Common Law and the study of the possibility of adoption of this legislation and it's effective implementation in Russian legal system.

We should note the stirring last trends of liability doctrine and this determined my choice of topic of academic research.

How well explored is the subject? In our country previous researches related to these problems arose in Czarist-era and in the period of new economic policy. In the late 20th century in the territory of the Soviet-Union a few researches were done by academic specialists focusing on the topic of nature of liability. In this period there were quite a few scientists who wrote about corporate liability with a need to elaborate corporate law as a subject in legal entities. Base issues of liability in corporate relations were analyzed by unique authors such as: S.N. Bratus, V.A. Belov, E. Godeme, O.S. Ioffe, O.A. Krasavchikov, D.V. Lomakin, G.K. Matveev, S.D. Mogilevsky, I.B. Novitsky, E.A. Sukhanov, E.A. Fleyshitz, B.B. Cherepakhin, G.F. Shershenevich, I.S. Shitkina as well as foreign authors Bernard Black, J.H. Choper, Schmidt K, R.Ch. Clark, J.C. Coffee, A.F. Conard, A.J. Dignam, P.J. Dalley, M.P. Dooley, R.J. Gilson, R.W. Hamilton and many others. A number of these academic researches were elaborated and presented in the dissertation.

However, nowdays none of these researches include much of global comparative analysis based on comparison between Russian legislation and Anglo-American jurisdictions.

Research object. The academic research eludes that social relations arise from bases of directors' liability in Russian and common law in the legal framework.

Subject of research. The academic research looks into laws and legislation in Russia and Anglo-American law (in terms of the UK, the USA, Canada, New-Zealand and Australia). It regulates social and legal relations of liability of CEO in Russian companies as compared to directors of the companies in common law.

Methodology of the research. The methodology elaborated on methods such as general scientific (analysis, synthesis, structural, functional, factorial) and specific scientific methods: system-structural, historical, formal-logical and others.

Taking into account the particularities of object, subject of the research and aims with tasks, methods of analysis play a role in rather-legal analysis of public relations and legal rules with principles in accordance with doctrinal conclusions.

By using rather-legal analysis to help understand how to solve problems in legal system of common law that arise in Russian corporate law, comparative analysis determines a level of applicability and practicality of discovered approaches concerning national system of justice.

In addition, applying the method of teleologic construction assists in recognizing real sense from legal rules, legal enforcement and in researches of corporate law. Among other things, using the method assists in deep case law analysis which relates to director's liability in Russia and Anglo-American law jurisdictions. Using the teleologic construction's method, simplifies fundamentals for understanding tasks and sense of legislator's will. Moreover, it's of importance on a theoretical level for determination of functioning mechanisms of applying concepts in black letter law that have contrast to unique character in common law.

The process of writing the research uses the method of diachronic analysis to make the text structure more general. Stem from the fact that this style of writing was passed from one thesis to the other and skipped some unverifiable scholastic-relativistic vision statements. This approach corresponds with methodology's principal of rational economy.

Given the fact that this research used quite a wide approach to analyze (such methods as: induction, legal simulation etc.). That's why the title of the research includes the word «bases». It certainly essential in order to emphasize the scope of sources from point of view of a number of methodology approaches to search loopholes in legislation, trends, law of natures of liability doctrine through the lens of comparison to other branches of law with an eye to analyze the problem more objectively.

Theoretical bases of the research includes the following fundamental explorers written by Russian academics such as: M.M. Agarkov, G.E. Avilov, S.S. Alekseev, V.K. Andreev, V.A. Belov, M.I. Braginsky, V.V. Vitriansky, Y.D.

Zhukova, G.K. Matveev, S.D. Mogilevsky, O.N. Sadikov, D.I. Stepanov, E.A. Sukhanov, Y.K. Tolstoy, O.N. Fomina, B.B. Cherepakhin, I.S. Shitkina and another. Among other international law scholars are: J.E. Antunes, T. Baker, Bernard Black, J.H. Choper, Schmidt K., R. Ch. Clark, J.C. Coffee, A.F. Conard, A.J. Dignam, P.J. Dalley, M.P. Dooley, R.J. Gilson, R.W. Hamilton, S. Griffith, H. Merkt, Karen Vandekerckhove etc.

Aim of the research is to thoroughly analyse the bases of civil liability of chief executive officer of a corporation in Russian and Anglo-American law jurisdictions.

Aim of research is achieved by realization of the following **tasks**:

1. In paragraph №1.1 identifying common characteristics of a status and legal activity regulations of a chief executive officer in Russia and in states of Anglo-American law.
2. In paragraph №1.2 determining procedure of incorporating a company and competence of a chief executive officer in Russian companies in contrast to jurisdictions of Anglo-American law.
3. In paragraph №1.3 analyzing activity of management company in Russia and states of Anglo-American law.
4. In paragraph №2.1 analyzing common characteristics of types of liability in Russia and Anglo-American law.
5. In paragraph №2.2 analyzing bases, terms and components of civil liability in Russian and Anglo-American law legal systems.
6. In paragraph №2.3 defining common principles of corporate director's responsibility in Russian corporations and states of Anglo-American law.
7. In paragraph №3.1 determining bases for restrictions of directors' civil liability in corporations.
8. In paragraph №3.2 showing particularities of legal regulations of insurance directors' liability in Russia and jurisdictions of common law.
9. The outcomes are part of the «conclusion». To come up with general findings which are embodied in the research.

Scientific novelty of the academic research consists of a problem statement, argumentation author's position and formulation of answers to questions which serve as a basis for the dissertation. Furthermore, it's good for complex comparative analysis in narrow legal aspects which are subject to liability of directors when comparing Russian and some modern legal systems of common law.

In the course of theoretical-legal analysis some new legal patterns were identified, trends for developing legal relations, loopholes in legislation and instruments for filling the gaps. In addition, some mechanisms for implementation and modernization of corporate legislation include construction of legal rules with conclusions that are expressed in an established practice in applying the law.

Element of novelty characterized in this research includes not only particularities of regulation researched relations in the United States and in the United Kingdom of Great Britain but some researched aspects which also arise from director's liability in jurisdictions such as in New-Zealand, Canada and Australia.

In accordance with the foregoing**, points of defense in the research include the following provisions**:

1. Formulated dogmatic concept as «covert profit of director». Following on the concept, we offered to take any profitable and any foreseeable benefits that the director might get in accordance to some circumstances (for instance, in cases of market fraud and a director can use dominant position on the trade market with a view to derive any profit chasing only his own opportunistic interest ignoring interest of other shareholders in the group of companies). Among other things getting nonmandatory benefits may prohibit interests of the company or increase occurrence of damages. However, the director had foreseen opportunities and consequences. He intentionally, directly and indirectly promoted realization of these consequences for his own interest.

2. Approved that an essential element for imposing of liability on director is his factual membership in a company's activity. Suppose the director was involved in the company's activity (as a worker) then presumed he had made an offence along with the company ipso facto he is holding a position in. It's independent of his

opportunities for realization of instructions to the company or his legal status. The mere fact of holding position of director makes sense for cases like «umbrella» when other persons strategically govern in the company as ex post. This conclusion is based on the postulate meaning that any director acceding to employment has to know work features and foresee any consequences that could arise.

3. Justified that the legal nature of chief executive officer's liability has particular mixed hallmarks insofar as it consists of public and private legal relations (in particular that arise from criminal law). This conclusion is based on theoretical analysis and established practice in applying the law. In this dissertation examples are given to intercondition legal relations in Civil, Criminal law and systematical legal binding concerning bases of CEO' liability. Inter alia, it's an approved case law which has shown that cases of corporate law don't prevail over arbitral procedure in the courts following cases that arise from imposing liability on directors. In practice, cases from arbitral proceedings don't have prejudicial effect of fault versus criminal proceedings because of direct construction of the article on prejudicial but also adopts rulings of the constitutional court. Summing up, there are circumstances that acknowledge that the bases of corporate and criminal liability can't be considered separately so they have an interdependent character. Moreover, this idea follows a general concept of liability's doctrine in Anglo-American law.

4. With a view to clarify a concept and understand the concept of directors liability as one of the fiduciary duties offered follows the formulation in a doctrine which is «do business in the interest of the legal entity» by interpretation as a characteristic which supports the unique business aim of shareholders. Not only are there complex unique interests for stakeholders and shareholders in the holding structure but also for some separated beneficial owners of the corporate structure.

5. With the purpose of legal certainty of view and form of chief executive officer's liability in the civil turnover a formulation is offered in a doctrine called «possession risk» which should be taken as a business risk and is related to both material and immaterial risk that causes damages and arised loss of assets in the legal entity.

6. Justified that one of the effective approaches and guarantee for stability of a company is a principle which would prohibit transferring of powers from chief executive officer to management company which has proved to be a fact since it relates to casing damages and abuse of director's authority in a company.

7. Argued the thesis that the legal nature of contract restrictions of a chief executive officer (director) for unreasonable acts has an explanation which is based on a principle of legal capacity as a restriction of subjective legal right. Similarly, there is limitation of director's liability insofar as this person is restricted to realizing the legal rights and as a result uncapable of having these rights and duties too. Since a chief executive officer is a separated part of the legal body then it's guessed that limitation of director's liability (Paragraph 5 of Article 53.1 Russian Civil Code) is exactly that case which is unnamed in law directly and when it would give a conclusion on restriction rights of the legal body (Paragraph 2 of Article 49 Russian Civil Code). Consequently, restriction of director's subjective legal rights corresponds with restriction of liability for results of his business decision. Accordingly, the aim of contract restriction of liability in the corporate framework is not imposing liability on someone for business mistakes which don't overlap legal rules that arise from legal public relations.

Summary.

Summarizing the results of research, therein were marked most important aspects. In view of recent trends, Russian case law is increasing level of secondary liability of chief executive officer and strengthening the problem of inter-branch prejudice when legal rules arising from public law liability overlap the area of private law. The conclusions are based on theoretical analysis of legislation and legal practice. In this research, interdependent legal aspects between criminal and civil law are analyzed using the lens of inextricable link of liability's general principles. There are points confirming current trends in case law. It's been proved that bases of civil director's liability don't prevail versus the bases of criminal liability that are being considered in courts of ordinary jurisdiction. Accordingly, court decisions for a case that had been held in arbitral courts wouldn't have

prevailed if it was held in ordinary jurisdiction. Thus, category of cases that were considered in arbitral courts wouldn't have prevailed versus in courts of ordinary jurisdiction as far as massive evidence with elements of guiltiness and faultlessness are concerned.

That is to say, the bases of corporate director's liability mightn't be considered differently in as much as there are complementary elements in accordance with public law.

In Russia increasing the level category of cases from pure economic loss might be causing damage to director's liability without fault.

Extensiveness of legislation in Australia, Canada, New-Zealand, the UK and the USA has different approaches and characteristics regarding particularities of jurisdictional institutes (including court's activity). Different litigation practices on settlement of disputes arise from breach of fiduciary duties of CEOs in the companies.

In England the most inherent principle of legal certainty follows qualification of breach of director's duties and absence of a clear bona fide in legal doctrine.

Nevertheless, English legal practice relies upon the common principle of equity following each case and formulating each decision post factum like ad hoc. Moreover, from time to time English judges rely on a conception called identification of will of entity to will of company members. Conceptual English approach for the piercing of corporate veil doctrine is based on criterias such as «possession», «control», «unfairness». Note that for English corporate law uncharacteristically applying of piercing of corporate veil's doctrine is more likely to be excluded from common rules. Some authoritative English lawyers who are discussing it today are opinioned to completely abolish piercing of corporate veil.

U.S. law is characterized by enormous wide legal practice of applying the piercing of corporate veil doctrine and quite dispositive regulations regarding rights and obligations of members' corporation, elaborated legal practice and formulated models of corporate governance. It should be pointed out that each state in the USA

differs in point of view of law depending on specificity of territory and legal performance.

Features of the Australian legal system conform to the concept of «Derivative private liability» (DPL) which is broadly discussed in punditry. In the legal framework of this doctrine, it has been proven that the most important thing is the director's position in the company which means that director's present position is in fact not only the real involvement in the company's activities. This doctrine justified usefulness of legal mechanism for director's secondary liability.

In Anglo-American law, theory of agency law is widely debated in punditry in particular some points regarding principal's liability (in a company) for agent's obligations. In doing so, it is generally used as the bases of a principle called «foreseeability of consequences».

American lawyers are discussing a theory of cost-benefit internalization along with legal reforms in the restatement legislation.

It should be noted that a director bears duty of loyalty to entity and he mustn't abuse power and demand unequal (overestimated) prices for his services.

Some American scholars hold a position that the matter of tort liability is incorporated partly to the theory of cost-benefit internalization meaning concepts such as «price risks», «foreseeability» in accordance with causation and damages are essential elements to both tort law and agency law. This point follows a common concept called «respondeat superior» and it is a type of enterprise liability. Ultimately, academicians are still debating on the idea of indoctrination and implementation of one or other elements which are derived from other branches of law in order to adopt the doctrine of cost-benefit internalization.

In the USA legal rules are elaborated and described more extensively versus in some other states which regulate the bases of director's liability in corporations.

In this regard, the U.S describes in detail other rules such as Business judgment rule, duty of care, duty of loyalty and some others which provide not only determination of criteria of fault but also other interests of stakeholders.

The specific hallmark of legal regulation for Anglo-American law is to give high level punishment to directors in the framework of civil and criminal liability.

Features of many jurisdictions of common law are to give insurance for director's business risks following adoption of the D&O policy. Under the nature of this policy, it's effective mechanism for efficiency in corporation's relations from business point of view follows strategic decision-making which is approved by directors for a number of important contracts.

A distinctive feature of Canadian law is that of settlement of disputes as far as directors' duties are concerned. Canadian courts use «factual-based» content for every case of breach of fiduciary duties even if other approaches are established in law. In this sense, judges in cases of legal construction use approaches of principle of basis of prudence and substance over form. However, Canadian judges take into account case law for determining of degree of director's fault.

It's important to note that the U.S law called Securities Act of 1933 was enacted with a view to defends interests of shareholders after a crisis of stock market which is dated from 1922 to 1923. This bill in detail regulates bases for imposing liability on directors.

Russia for a number of historical reasons is dominated by Pandect's system of legislation and it's difficult to put evidence in accordance with the formalistic approach used by judges in criminal cases which establishes a problem with prejudicial effect. In the case of a director realizing his authority in due manner then such a director defends under the Business judgment rule. This rule is important for cases when CEO must make responsible choices as far as business risk is concerned.

Importance of theory and practice in the research.

Conclusions and suggests of this research might be used to improve Russian legislation particularly in light of the upcoming reforms of corporate law and formulation of legal enforcement practice in the legal framework of guidelines for development of Russian legislation with relevant aspects of directors' liability.

The academic research conclusions might put ground for elaborating the theory of corporate, civil and other branches of law while improving study

guidelines and practical materials for scientific training and preparing highly qualified university graduate professionals.

The results of research.

This academic research was prepared, discussed and approved at the Institute of Law and National Security in the Department of Business, Labor and Corporate Law at Russian Presidential Academy of National Economy and Public Administration. In addition, the base results of the research were discussed in the framework of the pedagogic practice. The author shared with students the general problems which arise in legal practice both to directors' liability and to other practicability-oriented approaches to avoid some risks in legal drafting.

The general results of the research were published as articles in law magazines and in other collections of scientific articles.

Some of the points of defense were discussed and recommended for publication in legal academic articles presented at the legal conference called «Implementation of foreign legal mechanisms of corporate law in Russian legislation» in memory of Anatoliy Grigoryevich Bykov. It took place at the academic council hall at the law faculty, at Moscow State University on 28.02.2019.

Structure of the research to determine aims and tasks including methodology of base principles such as abstract system-structure, rational-economy and teleologic construction together with diachronic-comparative legal analysis.

This research consists of introduction, three chapters which have eight paragraphs then conclusion and bibliography.

List of basic copyright' academic articles.

During the research the author published the following academic articles:

1. «Legal regulation of CEO of a company» in «Юрист» journal 2016 №11;
2. «Liability bases of management company» in «Юрист» journal 2016 №15;
3. «Bases of liability of CEO in U.S companies» in «Юрист» journal 2017 №3;
4. «Insurance of CEO's liability in Russia versus Anglo-American Law» 2017
5. «Fiduciary duties of directors in Anglo-American Law» in «Гражданское право» 2018 №4