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TÍTULO: Abuso de derechos en las relaciones jurídicas corporativas: el concepto y características, temas y formas.

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RESUMEN: El objetivo de la investigación es determinar el abuso de los derechos en las relaciones jurídicas corporativas. Se utilizaron los aspectos teóricos, metodológicos, conceptuales e institucionales del abuso del derecho por parte de los accionistas en las relaciones con una sociedad anónima. Los resultados mostraron que el abuso de los derechos por parte de los accionistas se entiende como una violación por parte de los accionistas de las reglas básicas de comportamiento corporativo según las cuales un accionista está obligado a ejercer sus derechos e intereses legítimos al tiempo que respeta los derechos de otros accionistas, así como el de toda la sociedad anónima.

PALABRAS CLAVES: Abuso de derechos, relaciones legales corporativas, Greenmail, emprendimiento injusto.

TITLE: Abuse of Rights in Corporate Legal Relations: The concept and characteristics, subjects and forms.

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ABSTRACT: The purpose of the research is to determine the Abuse of Rights in Corporate Legal Relations; the theoretical, methodological, conceptual and institutional aspects of abuse of the right by shareholders in relations with a joint-stock company were used. Results showed that Abuse of Rights by shareholders is understood as a violation by shareholders of the basic rules of corporate behavior according to which a shareholder is obliged to exercise his/her rights and legitimate interests while respecting the rights of other shareholders, as well as the entire joint-stock company.

KEY WORDS: Abuse of Rights, Corporate Legal Relations, Greenmail, Unfair Entrepreneurship.

INTRODUCTION.

The concept of "abuse of right" has become increasingly common in the domestic legal literature, and has become widely used in the Russian context, which is caused by several factors and conditions. It should be emphasized the following among those conditions and characteristics: the incompleteness of reforms in the sphere of economy, its financial-speculative and capitalist nature; features of the national legal conscience which critically evaluates, on the one hand, socio-economic inequality, and on the other hand, has a long experience of evading the law, the

experience of impunity for "fraud" in the era of perestroika; hastiness of civil law reforms, mistakes and miscalculations in legislative activities.

Abuse of rights is mentioned quite often in domestic legislation. In the Civil Code of the Russian Federation, there is a ban on taking advantage because of somebody's behavior of an unfair nature and an illegal nature. Thus, the Civil Code in Article 10 obliges a person to the conscientious behaviour. The law provides for certain sanctions in connection with these abuses.

The Concept for the Development of the Civil Legislation of the Russian Federation notes the need for constant control over the observance of the good faith principle when assessing the rights and obligations of the parties. Therefore, civil law is the closest than all branches of law in the creation of legal mechanisms to combat abuses of rights. Civil law provided for various mechanisms to counter abuse of the right.

Company law issues, i.e. legal rules governing relations within commercial corporations, attract special attention of researchers of private law, in particular, corporate law. A large number of internal contradictions play a negative role in the economic and business activities of joint-stock companies. This fact affects the growth in the number of scientific publications on the issues of shareholder relations between their participants in terms of compliance with the civil law prohibition of abuse of the right. It also has an impact on judicial practice: more and more often, the courts use the term "abuse of the rights" to analyze existing conflicts in corporate law.

DEVELOPMENT.

Literature review.

The concept of "abuse of right" has been actively studied in recent years in connection with the development of market relations. However, this problem is known for domestic law from the earliest times. For the first time, the use of the term close in meaning to the "malicious use of subjective right" can be found in Roman legal texts. This was indicated by Pokrovsky I.A. in his

classic famous work "The History of Roman Law." In pre-revolutionary Russia, the limits of exercising civil rights have become a problem discussed in the writings of civil law theorists, among whom were G.F. Shershenevich, I.A. Pokrovsky, V.P. Domanzho, Yu.S. Gambarov, A.N. Gulyaev, N.M. Korkunov, and others.

Problems of abuse of rights in Soviet civil law were considered by M.M. Agarkov and V.P. Gribanov. Recently, the works have appeared devoted exclusively to this problem. From a scientific and practical point of view, the works of T.S. Yatsenko "Shikana as a legal category in civil law" (M., 2003) and A.V. Yudin “Abuse of procedural rights in civil proceedings” (St. Petersburg, 2005) deserve special treatment. The issues of the structure concerning abuse of the right, its consequences and the mechanisms of counteraction are examined in the studies of V.A. Kodolov and O.N. Barmin.

Problems of abuse of the right are also considered in studies of company law. Problems of abuse of the right by minority shareholders, issues of the so-called greenmail bringing great harm to the legitimate interests of joint-stock companies and their shareholders were discussed in articles and publications by T.V. Kolosovskaya and O.A. Zharkaya. Studies by A.Yu. Fyodorov are devoted to the analysis of greenmail, patterns of their distribution, forms and methods of implementation. The definition of this concept, the description of its features and forms were also the subject of a separate study by G. Adamovich. Greenmail is considered by A.V. Gabov and A.E. Molotnikov as a special legal phenomenon. Qualifying characteristics of greenmail are given in the work of V.P. Kashepov. He thoroughly and in details studied the problems of abuse of the right to know by the shareholders of M.S.Krokhin.

In the monographic study by S.D. Radchenko “Abuse of rights in the civil law of Russia”, the various types and forms of abuse of the right are examined in great detail. The author gives an extensive analysis of the abuse of corporate rights which he understands as rights arising from

participants in joint-stock companies and other business organizations, the occurrence of which are the facts of acquiring stocks or shares in the company's authorized capital.

In the studies by D.V. Gololobov, various types of conflicts within joint-stock companies were considered. Of particular interest are his analyses of greenmail, by which he understands a certain sequence of actions that are formally legal, but essentially unlawful.

A.Yu. Fedorov devoted his research to greenmail also, noting that its foundations lie in the achievement of benefits through the abuse of right. Other authors have also devoted their studies to the study of greenmail, including V.A. Gureev, V.I. Dobrovolsky, M.G. Iontsev, I. Oskina and A. Lupu, M. Krotkov and E. Kirshenman.

Methods and materials.

The analysis of the abuse of civil law in joint-stock companies was chosen as the main methodological area. To this end, the theoretical, methodological, conceptual and institutional aspects of abuse of the right by shareholders in relations with a joint-stock company were used.

The main approach was based on the formation of conceptual and theoretical ideas, and the development of legal principles to counter the abuse of the right in shareholder relations. In accordance with the stated purpose, the following methodological tasks are set in our thesis research: to consider the definition of the notion “abuse of the right” in legal science; determine the place and importance of abuse of the right in civil law, to identify its manifestations and the institutional structure; explore the theoretical and methodological aspects of abuse of the right in joint-stock companies; to analyze the behavior of subjects of abuse of the right in corporate legal relations; to analyze the most common forms of abuse of the right by shareholders.

The theoretical and methodological basis of the study consists in the use of structural-functional and conceptual methods of cognition of civil law, and the methodological provisions of the theory of abuse of rights. The methodological basis was also made by the methods of dialectic, formal-logical

and system-structural analysis, and special methods of legal research (comparative-legal, historical-legal, formal-dogmatic, etc.).

Results and discussions.

Joint-stock issues, i.e., legal norms governing relations within commercial corporations attract special attention of researchers of private law, corporate law in particular (Radchenko S.D., p. 212). A large number of internal corporate contradictions play a negative role in the economic and business activities of joint-stock companies.

This fact affects the growth in the number of scientific publications on the issues of shareholder relations between their participants in terms of compliance with the civil law prohibition of abuse of the right. It also has an impact on judicial practice: more and more often, the courts use the term "abuse of rights" to analyze existing conflicts in corporate law; for example, a judicial authority identified raiding with abuse of the right: "It follows from the case materials that a corporate conflict arose in connection with an attempt to unfriendly seize the enterprise. This is evidenced by the parallel existence of two registers of shareholders and two systems of governing bodies, the change of the legal address from the Moscow region to the Republic of Kalmykia, the alienation of property, and the liquidation of the legal entity.

The contested decisions of the meeting are aimed at preventing the seizure of the enterprise, and the requirements to invalidate these decisions are aimed at creations of conditions for the seizure. Unfriendly capture is a form of abuse of the right and is not subject to judicial protection under Article 10, the Civil Code of the Russian Federation. Since the claim on recognizing the decisions of the meeting dated March 14, 2003, as invalid is one of the constituent elements of the unfriendly takeover, it is not subject to satisfaction" (Resolution of the Federal Antimonopoly Service of the North Caucasus District dated October 10, 2006).

The judicial authorities are actively applying Article 10 of the Civil Code of the Russian Federation to resolve corporate conflicts, and that requires a separate analysis. However, first of all, we should decide on the concept of corporate rights, the abuse of which constitutes an abuse of the right by shareholders. These are the rights that arise for participants in joint-stock companies and other business organizations, the reason for the appearance of which are the facts of acquiring stocks or shares in the authorized capital of a joint-stock company.

In accordance with Article 67 of the Civil Code of the Russian Federation, participants in a joint-stock company have the following rights: to take part in managing the affairs of the partnership or company; to have access to information on the functioning of the partnership or company, have the right to familiarize themselves with the documents of a managerial nature, to study its accounting books, and other documents in the appropriate order with regard to constituent documents; participate in the distribution of profits; have the right to receive a part of the property remaining after settlements with creditors, or its value, in situations of liquidation of a partnership or company.

Another regulatory act providing for shareholders' rights is the Federal Law “On Joint-Stock Companies” where it is indicated in paragraph 2 of Art. 31 that shareholders which are owners of ordinary shares of the company have the right to participate in the general meeting of shareholders and have the right to vote in connection with any field of activity and its competence, the right to receive dividends and the right to receive part of the company's property as a result of its liquidation.

One more normative act of the corporate law is Federal Law dated February 8, 1998, № 14-FZ “On Limited Liability Companies”; it indicates in the first paragraph of Article 8 that shareholders have the right to take an active part in the management affairs of the company; to have access to information files on joint-stock company activities, to review, and receive accounting documents for review, distribute the company's profits, along with other shareholders, to alienate, through

purchase and sale agreements, its own share in the company's authorized capital or part of it to one or several participants of this company. Under the specified regulatory act, shareholders have the right to leave the company at a convenient time for them without the consent of other members of the company. If a joint-stock company is liquidated, a shareholder has the right to a part of the property remaining as a result of settlements with shareholders, as well as its value (Radchenko S.D., P.23).

In the process of abuse of his/her right, the shareholder harms the interests of other shareholders and managers, using the stocks belonging to him/her. A limit or a boundary, which is a marker of the legitimate use of his/her right, and not its abuse, is a public danger caused to the management structures of a joint-stock company: the amount of harm from the abuse of the right must reach this level. In the course of abuse of rights, a shareholder violates principles that are common to participants in their corporate behavior, the main purpose of which is to enable a shareholder to exercise his rights, taking into account the legitimate rights and interests of shareholders and managing structures of a joint-stock company (D.V. Gololobov, pp.23-26).

In legal literature, there are various approaches to understanding the essence of such a phenomenon as "greenmail". D.V. Gololobov believes that greenmail "is a certain sequence of actions that are formally legal in nature (such as, for example, sending certain requests to a joint-stock company), but are essentially nothing more than a systemic and pre-planned abuse of a certain person or a group of persons their shareholder rights" (Gololobov D.V., pp.23-26). However, there are narrower approaches to greenmail. Within the framework of these approaches, greenmail is viewed as a set of activities aimed at raising the price of shares. V.V. Gorbov defines greenmail as "a set of activities carried out by one or several minority shareholders aimed at endangering the stable development of a joint-stock company in order to force it to buy out the block of shares owned by such shareholders at a price that exceeds its market value" (V. Gorbov, p. 45).

Another researcher, A.Yu. Fedorov notes that greenmail is the influence of third parties on the functioning of a joint-stock company due to its voting shares. It is aimed at creating obstacles in the implementation by the company of normal economic activity to force the latter to buy back shares owned by third parties at a price substantially higher than the market price" (A.Yu. Fedorov, p.23). A similar position is taken by other authors.

We are deeply convinced that the essence of greenmail is the abuse of corporate rights on the part of a shareholder with a stake, but not in the amount that would have a significant impact on the management process of a joint-stock company (management decisions), which seriously complicated the work of the joint-stock company.

Some scholars define actions by principal shareholders, or majority shareholders (Melnik A.), which exercise their rights in their subjective interests violating the interests of minority shareholders as the abuse of the right. For a general example, the author gives a situation where, in the course of implementing the principle of "one share - one vote", shareholders owning less than ten percent of shares have no influence on the company's activity, which gives the majority shareholders the opportunity to influence the functioning of a joint-stock company. This case is considered as abuse of the right, because a large shareholder abuses the right when he/she/it does not act in the interests of the company and its shareholders, following the balance of interests.

The most important principle in the process of exercising a right is to recognize such exercise of corporate shareholder rights when all shareholders can benefit or should have suffered damage resulting from such exercise of the right proportionally to the number of their shares and only depending on the content of their right. In the opinion of scientists, the use by shareholders of their subjective rights in violation of this principle to obtain unjustified advantages over other shareholders is one of the criteria for the abuse of the right (G. Adamovich, p.45).

Because the abuse of rights is determined by the significance of the realization of a subjective right, when analyzing this question, one should answer the question of what content characterizes the will and interest of the company as a whole organism. Buying a share of stocks in a limited liability company, a subject of shareholder relations is showing its interest in making a profit. Since the subject is not one, but the legal entity is single, it is important to harmonize strong-willed interests so that the participants have a common will. The goal of shareholders in agreeing on their will is to determine the use of the legal entity created by them in the format of the most effective realization of their interests. "The participants of the corporation achieve the realization of a property interest by participating in the management and in conducting the affairs of the corporation. The value of participation in the management and in conducting business by the corporation for a corporate participant consists of the possibility to receive a portion of its profit in future" (M.A. Rozhkova, p. 142).

A concerted will and common interest emerge at the moment, when the full combination and harmony of individual wills and interests of all shareholders is achieved. Some researchers even turn to the well-known writings of J.-J. Rousseau, whose social contract includes "concerted will" and "will of all" (J.-J. Rousseau, p.23). The difference between the "concerted will" and "the will of all" is as follows: the concerted will "is invariably directed straight to one goal and always seeks the benefit of society, the realization of common interests; the will of all is a private interest and represents only the sum of the will of private individuals".

The most important principle for achieving the agreement of the interests of the participants in society is their difference from each other, since "the agreement of all interests arises due to the opposition of their interests to everyone. If interests were not different, one could hardly understand what a common interest is, which then would not meet with any opposition; everything would go by

itself... "The relationship between interests forms exactly what they have in common, “and if there were no such point in which all interests agree, no society could exist” (D. Gololobov, p. 216).

In Russian legal science, the Rousseau’s approach was used in the analysis of the “concerted will” (Gololobov D.V., p.46). The will of all should be considered simply as the sum of the individual wills of shareholders aimed in different directions at the realization of the interest belonging to each of them. Concerted will arises during the synthesis of wills, as a result of which a qualitatively new will of the joint-stock company appears, and its focus is determined by the achievement of a completely new, collective interest. It is this concerted will that makes it possible to achieve and realize the interest of a legal entity.

Thus, the votes compiled at the general meeting of shareholders represent the “will of all”. The result of the vote represents the will of all. "The purpose of the right to manage society is to form the will of society as a legal entity" (V. Belov, E. Pestereva, 45). If we take into account that a legal entity is a fiction that cannot have any needs, then, therefore, it excludes any personal interest and own will (Suvorov N.S., 48). According to B. B. Cherepakhin, the rights of a legal entity are established for the sake of people and are intended to serve their interests and not the interests of the legal entity. At the same time, the main task of the institution of a legal entity is to create a subject of rights and obligations existing and acting independently of the change (partial or even complete) of its human substrate (Cherepakhin B. B., p.45).

Some researchers believe that rights are often abused by majority shareholders, but minority shareholders also abuse rights. According to S.D. Radchenko, there can be no abuse in the case when “a majority shareholder decides at a general meeting which is not at all beneficial by its consequences to minority shareholders.

Decision-making by the collegial management bodies of legal entities (the general meeting of shareholders (participants), the board of directors, and the management board) is made according to the majority principle: a decision on a specific issue can be either made or not, there is no third. The decision cannot be made in part, in proportion to the number of votes cast for and against. Approval of a major transaction; for example, cannot but be recognized as the result of the majority's will and evil about using minority rights at the same time.

Corporate law does not involve the principle of equality of shareholders since "each ordinary share of a company gives a shareholder being its owner the same amount of rights as each other" (clause 1, article 31 of the Federal Law "On JSC"). As a result, it should be taken into account that a majority shareholder, having a large stake, independently determines the will of the company. This act should not be defined as an abuse of the right. A shareholder who has a controlling stake does not have to worry about the interest of other shareholders who are not related to the purchase of his/her shares. Following paragraph 3, Article 308 of the Civil Code of the Russian Federation, the majority shareholder has no legal obligation to coordinate his/her actions with the interests of other shareholders.

It does not make sense to dispute the major transactions carried out by the company for minority shareholders. They will most likely be denied with their the claim, since one of the reasons for the refusal of such a claim is that the court established that their opinion could not affect the voting results (paragraph 4, Item 6, Art. 79 of the Federal Law dated December 26, 1995 No. 208-FZ "On Joint-Stock Companies") taking into account their small stake.

By D.V. Gololobov, abuse of the right occurs when there is damage arising from the abuse of the right by shareholders or managers of a company. It is concluded that the exercise of the rights by a shareholder (participant) in violation of the rights of other shareholders (participants) does not occur because there is no relationship between them.

The main sign of abuse of the right should be recognized the exercise of rights in a way that contradicts or the results of which contradict the interests of the company. This conclusion requires adjustment and clarification. Features of the abuse of corporate rights that this abuse violates not only the interests of shareholders but also the interest of the entire corporate community, a common interest.

A joint-stock company is only a means to achieve the goal. This goal can be receiving a profit, material benefits, so the general will is a common means of achieving this profit.

Another important sign of abuse of the right by shareholders is that rights can be abused only when the subject of abuse possesses those rights. In the absence of the right to any actions committed by the shareholders, these actions cannot be considered abuse.

An example is a case when the court saw the abuse of the right in the following activities of a shareholder: his shares were pledged, and he participated in the voting. His mortgagee did not agree on these actions, although the mortgage agreement enshrined the obligation of the mortgagors-shareholders not to use the mortgagee's right to participate in the management of the company without the prior written consent of the mortgagee (Resolution of the FAS of the North Caucasus District dated October 11, 2005).

In another case, a judicial authority recorded the decision by the board of directors of the joint-stock company to establish the redemption price of shares in an amount below their market value (Resolution of the FAS of the North Caucasus District of April 9, 1997) as an abuse of the right. Meanwhile, the board of directors does not have the right to determine the redemption value of shares in the amount that it needs, as specified in paragraph 3, article 75 of the Federal Law “On the Joint-Stock Company”.

In another case, the court saw the abuse of the right in the actions of the management body of the joint-stock company. The latter set an obligation to allocate 2% of the profits for the maintenance of the management by the shareholders (Resolution of the Federal Anti-Monopoly Service of the North Caucasus region dated July 23, 1997). However, the law does not establish such an obligation to pay payments to the joint-stock company on the part of the shareholders, if these payments are not related to the payment of the value of the shares, as specified in paragraph 1, Article 2, and paragraph 3, Article 11 of the Federal Law "On Joint Stock Company". Based on this determination, the joint-stock company has no right to oblige shareholders to make any payments in their favour. Therefore, the abuse of these rights is impossible.

CONCLUSIONS.

There are some conclusions like:

1. Abuse of rights by shareholders is understood as a violation by shareholders of the basic rules of corporate behaviour according to which a shareholder is obliged to exercise his/her rights and legitimate interests while respecting the rights of other shareholders, as well as the entire joint-stock company. The criteria of abuse of the right in the process of exercising their rights by shareholders are the following: a) the rights and freedoms of others in the process of exercising their right are violated; b) the use of rights occurs in violation of the purpose for the achievement of which they were taken; c) the infliction of various damage, harm, loss to other shareholders or the company as a whole in the course of the exercise of their rights; d) the achievement of unlawful interests or intent to cause harm; e) violation of the principle of good faith in the exercise of their rights.

2. Greenmail is the impact of certain individuals owning a small stake, most often up to 10%, which is formally legal and aimed at the occurrence of negative consequences for the joint-stock company to influence the value of the shares. The essence of greenmail is the abuse of corporate rights by a shareholder who has a stake but not to the extent that would have a significant impact on the

management process of the joint-stock company (management decisions), which seriously complicates the work of the joint-stock company. It is required to involve criminal law protection methods to combat greenmail.

3. Greenmail is expressed in unfounded or poorly grounded appeals and shareholder applications to judicial authorities; in the constant demands for holding extraordinary general meetings of shareholders; in appeals to various control authorities, the tax inspectorate, the antimonopoly service, the purpose of which is to check the company's activities, disrupting the natural course of work due to the large number of requests from regulatory agencies and responding to these requests, preparing documents, accounting reports, etc.; making efforts to create a negative informational context regarding the activities of the company or its major shareholders; unreasonable request of a large amount of information about the activities of the company.

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