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ҚАЗАҚСТАН РЕСПУБЛИКАСЫ
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ВЕСТНИК

НАЦИОНАЛЬНОЙ АКАДЕМИИ НАУК
РЕСПУБЛИКИ КАЗАХСТАН

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CIVIL LEGAL NATURE OF RELATIONS BETWEEN LEGAL ENTITY AND ITS FOUNDERS

Abstract. The article analyzes using the normative and systematic methods, as well as analysis and synthesis, the content of the statements of Civil Code of the Kyrgyz Republic, the Law of the Kyrgyz Republic "On economic partnerships and companies" and the Law of the Kyrgyz Republic "On state registration of legal entities, branches (representative offices)" and the works of Kyrgyz and Russian legal scholars.

Within the framework of this article, the features of civil-legal nature of relations between legal entity and its founders are considered on the example of such legal entity as Limited Liability Company.

The result of the authors' research is the statement – legal address of organization is determined in the decision to create legal entity, and is also established in all of its constituent documents. The legislation only stipulates when legal address changes, legal entity must notify state authorities about it. The authors come to the conclusion such lacuna in the legislation of the Kyrgyz Republic contributes to violation of rights of creditors of legal entity, since if it fails to fulfill obligations, it is rather difficult to find location of legal entity or location of its property.

According to the authors, it is necessary to provide for minimum amount of authorized capital of legal entity in the norms of legislation and establish this capital should be placed in special bank account. Such decision will allow, firstly, to guarantee availability of any compensation to creditors for obligations of legal entity, and secondly, it will somewhat reduce number of registered such entities.

Keywords: civil law, legal entity, founders, society, state, capital, charter.

Introduction. According to generally accepted practice, the main subjects of civil relations are legal entities. This position of legal entities is due to the fact they produce most of the goods, services, tax payments. As Russian researchers note, the transition to market methods of management is accompanied by the intensive introduction of new organizational and legal forms of enterprises, which are fundamentally incompatible with the previously existing structures (S. Zinchenko, V. Lapach, B. Gazaryan, 1995, p. 73). In context of developing market economy in the Kyrgyz Republic, there is an annual increase in registered legal entities. Overwhelming majority of legal entities registered in the Kyrgyz Republic operate in form of business partnerships and companies, among which limited liability companies continue to be the leading ones.

The popularity of such organizational and legal form is explained by simplicity in organizing and creating such legal entity, convenient tax regimes, wide range of economic activities that limited liability company can carry out activities without obtaining special permit (license), legal requirements for minimum amount of authorized capital. In this regard, this form is especially popular with small businesses.

For clear and effective functioning of legal entities, detailed legislative framework for their activities is required. The current legislation does not always reflect the objective needs of developing social relations. It should be noted despite the fairly detailed legal regulation of all stages of creation, registration and registration of termination of activity of legal entity, a number of problems of relations between them

and their founders remain unresolved. Anticipating their identification and formulation of certain areas to overcome them, we consider it necessary to investigate the features of legal regulation of activity of legal persons in the Kyrgyz Republic.

Methods. The article analyzes using the normative and systematic methods, as well as analysis and synthesis, the content of the statements of Civil Code of the Kyrgyz Republic, the Law of the Kyrgyz Republic "On economic partnerships and companies" and the Law of the Kyrgyz Republic "On state registration of legal entities, branches (representative offices)" and the works of Kyrgyz and Russian legal scholars.

Discussion. In accordance with paragraph 1 of Art. 83 of the Civil Code of the Kyrgyz Republic of May 8, 1996 No. 15, legal entity is an organization that owns, economically or operatively manages isolated property and is liable for its obligations with this property, can acquire and exercise property and personal non-property rights on its own behalf and responsibilities, and be a plaintiff and a defendant in court. Legal entities must have their own balance sheet or estimate.

The civil law clearly establishes moment of creation of a legal entity – in accordance with paragraph 2 of Art. 86 of the Civil Code of the Kyrgyz Republic law person is considered created from moment of its state registration. However, even before state registration of legal entity, its founder (founders) performs a number of legally significant actions aimed at creating new subject of law.

It should also provide legislative definition of the concept of founder of legal entity. In accordance with paragraph 2 of Art. 87 of the Civil Code of the Kyrgyz Republic, founders of legal entity may be property owners or their authorized bodies or persons, and in cases specifically provided for by legislation, other organizations or citizens. At the same time, legal entities that own property on basis of right of economic or operational management may be founders of other legal entities with consent of owner or his authorized body. In Kyrgyz Republic founders of legal entity in the form of Limited Liability Company may be domestic and foreign law persons and individuals. At the same time, the combination of one or several individuals and (or) legal entities among founders of legal entity is quite acceptable. Most scientists agree that the legal regime of Limited Liability Company is close to the mode of private corporations and in this case is permissible to draw direct analogy between them (Moll, 2005, p. 917; Pinto, 2014, p. 362). Referring to foreign experience, it should be noted the principle of limited liability of participants was enshrined in the Law of England in 1855, but participants of unlimited company were ubiquitous. The High Court of New York in 1822, in its interpretation of the General Industrial Corporation Act of 1811, clearly defined the course of limited liability as the basis for the state's general corporate policy to stimulate economic growth (Presser, 1992, p. 155). Nevertheless, in the United States, this feature was recognized only by the end of the 19th century. (Henn, Alexander, 1983, p. 130). One of the most important principles of modern civil law is the rule of limiting liability of participants for obligations of corporation. Its use can reduce transaction costs and reduce the uncertainty of the future, ensuring economic development (Easterbroo, Fischel, 1985, p. 89), respectively, abandoning it will lead to collapse of the modern economy.

To create legal entity in the form of the Limited Liability Company founder(s) decides on the establishment of legal entities and defines its name; registered address and legal form; approved Charter on the basis of which law person acts; appoints executive body of legal entity, as in the case of several founders; they also conclude Memorandum of Association, form authorized capital and distribute shares in it according to contributions of founders (participants), etc.

It should be noted until moment of state registration of legal entity, there is already a mutual agreement between its founders aimed at achieving the main joint aim – creation of legal entity, and at this stage there is mutual independent responsibility between founders in case of violation of agreement's terms. At the same time, since legal entity has not actually been created yet, founders are responsible for their obligations to third persons as individuals.

Historically, in the doctrine of civil law, the point of view has developed that from moment of signing constituent documents of legal entity and until moment of state registration of such person, founders are united and act as a simple partnership. Such union acts as a temporary form, as it operates for a rather short time. In accordance with Part 1 of Art. 8 of the Law of the Kyrgyz Republic "On State Registration of Legal Entities, Branches (Representative Offices)" dated February 20, 2009 No. 57 state registration (re-registration) of legal entity, branch (representative office) is carried out within 3 working days from date of submission to registering authority of necessary list of documents. However, if mistakes

committed to and inaccuracies, and not provided with all documents necessary for registration of legal entities, as well as upon occurrence of other reasons, listed in Part. 2, Art. 21 of same law, registering authority makes reasoned decision to refuse registration of legal entity with mandatory reference to legal norm. In this case, relationship of founders, as participants in conditional simple partnership, is prolonged due to the need to eliminate defects in documents submitted for registration of legal entity, conclude contracts with professional lawyers and pay for their services for procedure of state registration of legal entity, development of constituent documents, notarization of powers of attorney representatives, decision on state registration of legal persons, as well as distribution and coverage of such costs between founders. Moreover, if one of founders acts in interests of future legal entity on behalf of other founders, his powers must be confirmed by duly issued power of attorney.

Outstanding Russian scientist and jurist G.F. Shershenevich wrote claim of eye are founders of legal entity yet. When legal entity appears, there are no founders anymore, since they turn into its participants (shareholders, comrades) (Shershenevich, 2003, p. 406). Similar norms are contained in the civil legislation of the Kyrgyz Republic. So, according to Part 11 of Art. 4 of the Law of our country "On Business Partnerships and Companies" dated November 15, 1996 No 60 after state registration of economic partnership and community members are participants of partnership and of society. Thus, taking into account foregoing, we believe in the relationship between founders of legal entity and itself when it has not passed state registration procedure, there is, as N.V. Kozlova notes, special case of conducting other people's affairs without an order, and not only in interests of future legal entity, but also in the interests of its founders themselves, acting with due diligence and discretion required by circumstances of case, based on obvious benefit or benefit of these actions. If a transaction made by founder in interests of not yet registered legal entity is approved by state authority of this law person after its state registration, rights and obligations under such transaction are transferred to legal entity in whose interests transaction was made (Kozlova, 2004).

It should be noted at considered stage of relations between founders and legal entity that has not yet passed state registration procedure, a number of problems arise that can have a negative impact on activities of legal entity after passing state registration procedure. So, in the legislation of the Kyrgyz Republic, regulating registration procedures, legal status and activities of legal entities, to date, no procedure has been formed for mandatory verification of legal address of law persons, or the provision of relevant documents on valid ownership of such an address. In accordance with paragraph 2 of Art. 89 of the Civil Code of the Kyrgyz Republic location of law persons determined by place of its state registration, unless otherwise specified in constituent documents of legal entity in accordance with the law. At the same time, when submitting application for state registration of law person, applicants (founder, trustee) can indicate as legal address: the place of residence of its founders, location of rented office, or any address in general. At the same time, legal address is fixed in decision to create law person, and is also indicated in all of its constituent documents. The legislation provides only when legal address changes, law person is obliged to notify by state authorities. In our opinion, such lacuna in domestic legislation contributes to violation of creditors' rights of law person, since if legal entity fails to fulfill its obligations, it is rather difficult to find location of law person or its property.

The disadvantages of legal regulation of the process of establishing legal entity in the form of Limited Liability Company in the modern realities of the Kyrgyz Republic also should mention the fact that the stipulated requirements of the law to determination of minimum authorized capital of legal entity. As a general rule, the minimum size of authorized capital cannot be less than one calculated indicator approved by the Government of the Kyrgyz Republic. At present, the size of one calculated indicator is set at the amount equivalent to 1.2 US dollars. In accordance with paragraph 3 of Art. 91 of the Civil Code of the Kyrgyz Republic, trustee (participant) of legal entity or the owner of its property is not liable for the obligations of law person, and it is not responsible for obligations of founder (participant) or owner, with exception of cases provided for by the Civil Code of the Kyrgyz Republic, by law or by constituent and documents of legal entity. The legislator details the provisions of this civil legal norm in Art. 36 of the Law of the Kyrgyz Republic "On Business Partnerships and Companies", according to which participants of Limited Liability Company are not liable for its obligations and bear risk of losses associated with activities of the company, within value their contributions.

In accordance with the same act, private owners of Limited Liability Company who have not fully made contributions to authorized capital bear joint and several property liability for company's obligations

within value of unpaid part of contribution of each participants. Thus, situation arises when, in absence of legislative fixation of size of authorized capital of legal entity, it can conclude transactions and conduct economic activities in amounts are many times greater than size of authorized capital, and will be responsible for its obligations only within these limits. Moreover, at present, legal entities have the opportunity to keep their authorized capital at the company's cash desk, actual existence of which can not be verified. In our opinion, the legislation should provide for a minimum amount of authorized capital of legal entity and establish authorized capital of law person must be placed in special bank account. This decision will allow, firstly, to ensure the availability of some compensate creditors for obligations of law person, and secondly, some will reduce the number of registered legal entities. Currently, there are a huge number of legal entities, including in the form of the Companies and Limited Liability Company, which, since its state registration has not begun to engage in economic activities and the only kind of their activity is in delivery of so-called "zero" reporting.

These problems, which arise even at initial stage of creating legal entity, can significantly reduce further economic efficiency of law person, and require more scientific understanding and implementation in practice and legal regulation.

From the moment of state registration of legal entity legal nature of relationship between founders changes. Most decisions aimed at creating law person are made before state registration procedure. After passing this mandatory procedure, founder must pay for the state registration, obtain certificate of state registration from registration authorities, make seal and (or) stamps, and proceed with the implementation of immediate purpose of created legal entity.

It should be noted direct management of law person is carried out by specially created its bodies. For example, in accordance with paragraph 1 of Art. 131 of the Civil Code of the Kyrgyz Republic in the highest body of Limited Liability Company is general meeting of its participants, in event company is created by one person, he is the supreme body of company.

In Limited Liability Company, executive body (collegial or sole) is created that carries out current management of its activities and is accountable to general meeting of its participants. The sole management body of company may be elected not from among its members.

According to the Civil Code of the Kyrgyz Republic, establishment of company may provide for formation of Directors' Board. Powers of legal entity's bodies are quite diverse and are regulated in detail by the norms of the current legislation. Without dwelling on their detailed consideration, we consider it necessary to note responsibility for all actions and obligations of law person of considered organizational and legal form rests with its executive body. There is a certain logical collision here, since formation of the executive body (in practice, it occurs through appointment of director of Limited Liability Company during state registration or subsequent notification of change of executive body to the registration authorities), all significant economic aspects of life of legal entity (approval of annual reports and the company's balance sheets and distribution of its profits and losses, etc.), making decisions and re-registering, registering termination of activities, electing audit commission and much more belongs to exclusive competence of general meeting of company's participants.

Management of company's current activities is carried out by sole executive body of Limited Liability Company or its sole (collegial) executive body. Executive bodies manage current activities of legal entity and are accountable to general meeting and board of directors. At the same time, entire responsibility for decisions made lies precisely with executive body.

Results. Because under applicable law person is considered to be formed only from date of its registration, corporate relationship between legal entity, its founders and managers can not occur before new law person is created. Legal entity as artificial entity arising on basis of civil transactions made by founders and administrative act of authorized state body (act of state registration) becomes an independent, legally able and capable subject of law, having its own will, not reducible to will of its individual founders (participants, members), as well as to will of other persons performing functions of its bodies, however, in accordance with the law, constituent documents and agreements, all participants in corporate relations must obey will of legal entity, just as law person must obey will of founders (participants, members) and others persons performing functions of its organs.

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ЗАҢДЫ ТҰЛҒА МЕН ОНЫҢ ҚҰРЫЛТЫШЫЛАРЫ АРАСЫНДАҒЫ ҚАРАЖАТТАРДЫҢ АЗАМАТТЫҚ ҚҰҚЫҚТЫҚ МӘНІ

Аннотация. Мақалада нормативтік және жүйелік әдістерді, сондай-ақ талдау және синтездеу, ережелерінің мазмұнын қолдану арқылы талдау жасалады. Қырғыз Республикасының Азаматтық кодексінің ережелері, «заңды тұлғаларды, филиалдарды (өкілдіктерді) мемлекеттік тіркеу туралы» және «шаруашылық серіктестіктер мен қоғамдар туралы» Қырғыз Республикасының заңдары, сонымен қатар заңгер ғалымдардың еңбектерінің ережелерін зерттеді.

Осы баптың шеңберінде заңды тұлға мен оның құрылтайшылары арасындағы қатынастардың азаматтық-құқықтық сипатының ерекшеліктері жауапкершілігі шектеулі серіктестік сияқты заңды тұлға мысалында қарастырылады. Авторлық зерттеудің нәтижесі ұйымның заңды мекен-жайы заңды тұлғаны құру туралы шешімде анықталады және оның барлық құрылтай құжаттарында белгіленеді деген қорытынды болды. Заңнамада заңды мекен-жайы өзгерген кезде заңды тұлға әділет органдарына бұл туралы хабарлауға міндетті екендігі ғана айтылған. Авторлардың пікірінше, Қырғызстан Республикасының заңнамасындағы мұндай олқылық заңды тұлғаның кредиторларының құқықтарының бұзылуына ықпал етеді, егер заңды тұлға өз міндеттемелерін орындамаса, заңды тұлғаның орналасқан жерін немесе оның мүлкінің орналасқан жерін табу өте қиын.

Авторлар заңнама нормаларында заңды тұлғаның жарғылық капиталының минималды мөлшерін қамтамасыз ету және заңды тұлғаның жарғылық капиталын арнайы банктік шотқа орналастыру керек деп санайды. Мұндай шешім, біріншіден, несие берушілерге заңды тұлғаның міндеттемелері бойынша қандай-да бір өтемақы алуға кепілдік беруге мүмкіндік береді, екіншіден, тіркелген заңды тұлғалардың санын біршама азайтады.

Түйін сөздер: азаматтық құқық, заңды тұлға, құрылтайшылар, қоғам, мемлекет, капитал, жарғы.

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ГРАЖДАНСКО-ПРАВОВАЯ ПРИРОДА ОТНОШЕНИЙ МЕЖДУ ЮРИДИЧЕСКИМ ЛИЦОМ И ЕГО УЧРЕДИТЕЛЯМИ

Аннотация. В статье проанализированы с применением нормативного и системного методов, а также анализа и синтеза, содержание положений Гражданского кодекса Кыргызской Республики, Законов Кыргызской Республики «О государственной регистрации юридических лиц, филиалов (представительств)» и «О хозяйственных товариществах и обществах», а также трудов ученых-юристов.

В рамках настоящей статьи рассматриваются особенности гражданско-правовой природы отношений между юридическим лицом и его учредителями на примере такого юридического лица, как Общество с ограниченной ответственностью. Результатом авторского исследования стал вывод о том, что юридический адрес организации определяется в решении о создании юридического лица и устанавливается во всех его учредительных документах. В законодательстве предусмотрено только то, что при перемене юридического адреса юридическое лицо обязано уведомить об этом органы юстиции. По мнению авторов, такой пробел в законодательстве Кыргызской Республики способствует нарушению прав кредиторов юридического лица, так как при неисполнении юридическим лицом своих обязательств найти местоположение юридического лица или местонахождение его имущества достаточно сложно.

Авторы полагают, что в нормах законодательства необходимо предусмотреть минимальный размер уставного капитала юридического лица и установить, что уставный капитал юридического лица должен быть помещен на специальный банковский счет. Такое решение позволит, во-первых, гарантировать наличие какой-либо компенсации кредиторам по обязательствам юридического лица, во-вторых, несколько снизит число регистрируемых юридических лиц.

Ключевые слова: гражданское право, юридическое лицо, учредители, общество, государство, капитал, устав.

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