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МУНДАРИЖА | СОДЕРЖАНИЕ | CONTENT

PROBLEMS OF THE FIDUCIARY DUTY OF MAJORITY SHAREHOLDERS IN UZBEKISTAN

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Abstract The relevance of this topic is determined by the fact that majority shareholders play a decisive role in corporate governance. In this regard, the establishment of fiduciary duties for majority shareholders could strengthen the investment attractiveness and efficiency of joint-stock companies. The scientific problem lies in the fact that the duty of a majority shareholder is formally established, but its detailed content has not been fully disclosed, including the boundaries of personal benefit, the evidentiary aspects of proving actual knowledge of harm, and other related issues. The purpose of this article is to examine the issues of the fiduciary duty of majority shareholders in Uzbekistan. The research is based on a combination of formal legal, systemic-structural, comparative legal, doctrinal, and analytical methods. The result of this study is that the duties of a majority shareholder contain fiduciary elements and may be qualified as a limited duty of loyalty towards the company and other shareholders.

Keywords: Fiduciary duty; Majority shareholders; Minority shareholder protection; Corporate governance; Shareholder rights; Corporate law; Abuse of control; Conflict of interest; Joint-stock companies; Uzbekistan.

O‘ZBEKISTONDAGI MAJORITAR AKSIYADORLARNING FIDUTSIAR MAJBURIYATINING MUAMMOLARI

Habibullayev Asliddin Ataullo o‘g‘li, Toshkent davlat yuridik universiteti tayanch doktoranti (PhD).

Annotatsiya. Mazkur mavzuning dolzarbligi majoritar aksiyadorlarning korporativ boshqaruvda hal qiluvchi rol o‘ynashi bilan belgilanadi. Shu munosabat bilan majoritar aksiyadorlar uchun fidutsiar majburiyatlarning belgilanishi aksiyadorlik jamiyatlarining investitsiyaviy jozibadorligi va samaradorligini oshirishga xizmat qilgan bo‘lardi. Ilmiy muammo shundan iboratki, majoritar aksiyadorning majburiyati rasmiy jihatdan mustahkamlangan bo‘lsa-da, uning batafsil mazmuni, jumladan shaxsiy manfaat chegaralari, zarar yetkazilishini oldindan bilganlikni isbotlash masalalari va boshqa jihatlar to‘liq ochib berilmagan. Ushbu maqolaning maqsadi O‘zbekistonda majoritar aksiyadorlarning fidutsiar majburiyati masalalarini tadqiq etishdan iborat. Tadqiqotda formal-yuridik, tizimli-tuzilmaviy, qiyosiy-huquqiy, doktrinal va tahliliy metodlar majmuasidan foydalanildi. Tadqiqot natijasida majoritar aksiyador majburiyatlarida fidutsiar elementlar mavjudligi va ularni jamiyat hamda boshqa aksiyadorlarga nisbatan cheklangan sodiqlik majburiyati sifatida kvalifikatsiya qilish mumkinligi asoslantirildi.

Kalit so‘zlar: Fidutsiar majburiyat; Majoritar aksiyadorlar; Minoritar aksiyadorlarni himoya qilish; Korporativ boshqaruv; Aksiyadorlar huquqlari; Korporativ huquq; Nazoratdan suiiste’mol qilish; Manfaatlar to‘qnashuvi; Aksiyadorlik jamiyatlari; O‘zbekiston.

ПРОБЛЕМЫ ФИДУЦИАРНОЙ ОБЯЗАННОСТИ МАЖОРИТАРНЫХ АКЦИОНЕРОВ В УЗБЕКИСТАНЕ

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Аннотации. Актуальность данной темы обусловлено тем, мажоритарные акционеры играют решающую роль при корпоративном управлении. В связи с этим, установление фидуциарных обязательств для мажоритарных акционеров усилило бы инвестиционную привлекательность и эффективность акционерных обществ. Научной проблемой является то, что обязанность мажоритарного акционера формально закреплено, но не раскрыто их детальное содержание, включая определение границ личной выгоды, аспектов доказывания заведомого знания нанесения ущерба и т.д. Целью настоящей статьи является исследование вопросов фидуциарной обязанности мажоритарных акционеров в Узбекистане. Для исследования был использован комплекс формально-юридического, системно-структурного, сравнительно-правового, доктринального и аналитических методов. Результатом данного исследования является то, что в обязанностях мажоритарного акционера имеются фидуциарные элементы и её можно квалифицировать как ограниченную лояльность в отношении общества и других акционеров.
Ключевые слова: Фидуциарная обязанность; Мажоритарные акционеры; Защита миноритарных акционеров; Корпоративное управление; Права акционеров; Корпоративное право; Злоупотребление контролем; Конфликт интересов; Акционерные общества; Узбекистан.

Introduction

The relevance of this topic is determined by the fact that the investment attractiveness and efficiency of a joint-stock company depend not only on its governing bodies, but also on the decisions, actions, or omissions of majority shareholders. This is because majority shareholders play a decisive and key role in almost all matters of the company. By introducing Article 28^1 into the Law of the Republic of Uzbekistan “On Joint-Stock Companies and Protection of Shareholders’ Rights”, the legislation of Uzbekistan has taken an important step towards regulating the duties and liability of majority shareholders.

The scientific and practical problem is that, although the duty of majority shareholders has been formally established, the full content of this duty and liability has not been fully described. In particular, the legislation does not clearly determine whether this duty is fiduciary in nature, where the boundaries of personal benefit lie, or how the fact of actual knowledge of harm should be determined and proven.

Considerable attention is usually paid to the duties and liability of governing bodies, such as the supervisory board and the executive body. However, the duties of majority shareholders remain insufficiently studied, even though they have a direct and effective influence on the corporate governance of the company.

The purpose of this article is to examine the issues of the fiduciary duty of majority shareholders in Uzbekistan.

The objectives of this study are: to examine whether the duties of majority shareholders are fiduciary in nature and, if so, to determine their scope and limits; to identify gaps and limitations in the legislation in this area; to distinguish between the abuse of majority voting rights and the lawful exercise of such rights by majority shareholders; to study and compare the experience of foreign jurisdictions; and to develop proposals for improving the legislation in this area.

The hypothesis of this article is that the protection of shareholders' rights cannot be improved solely by granting more rights to minority shareholders. It is also necessary to define the duties of majority shareholders. At the same time, it is important to maintain a proper corporate balance.

Method

A combination of formal legal, systemic-structural, comparative legal, doctrinal, and analytical methods was used to examine the topic of this article. The formal legal method was applied to analyze the legislation of Uzbekistan. The systemic-structural method was used to examine the duties of the majority shareholder in connection with the duties and rights of other subjects of corporate law. The comparative legal method was applied to compare the legislation of foreign jurisdictions with the legislation of Uzbekistan. The doctrinal method was used to study the theoretical aspects of the obligations of the majority shareholder. The analytical method was applied to identify gaps and shortcomings in the legislation of Uzbekistan.

Results

Under the legislation of Uzbekistan, the concept of a majority shareholder is defined in such a way that a majority shareholder is not only a shareholder holding 50 percent or more of participation in a joint-stock company, but also a shareholder whose participation exceeds that of each other shareholder and who may have a decisive influence on voting. A similar concept of a majority shareholder is used in contemporary legal literature. Therefore, the legislative definition corresponds to the doctrinal understanding of this concept. Moreover, legal literature indicates that one of the problems within agency theory is the conflict of interests between majority shareholders and minority shareholders[1].

The legislation of Uzbekistan does not expressly state that the obligations of a majority shareholder are fiduciary in nature. However, based on the duties established by law — namely, the duty not to adopt decisions where the majority shareholder is aware that such decisions will cause harm to the interests of the company and other shareholders, as well as the duty not to include such matters in the agenda — it may be concluded that the duty of a majority shareholder has a fiduciary character. In our view, this duty should more appropriately be qualified not as a duty of care, as in the case of a director, but as a duty of loyalty towards the company and other shareholders. Some American legal scholarship also notes that, in certain circumstances, the duty of a majority shareholder may be similar to that of a director, particularly where a conflict of interest or control over corporate decisions is involved[2].

The majority shareholder is liable both to the company and to other shareholders. This is expressly provided for under the legislation of Uzbekistan. Accordingly, the object of protection is dual in nature: on the one hand, the interests of the company are protected, while on the other hand, the interests of other shareholders are also protected. A similar approach can be found in the German model of corporate law, under which, if a person intentionally uses their influence to cause the company or other shareholders to act to their detriment, that person is obliged to compensate the losses suffered by both the company and the other shareholders[3].

Actions that may be regarded as an abuse by a majority shareholder of their influence may include: adopting decisions in their personal interests; imposing certain actions on the company's governing bodies, including the conclusion of transactions; diluting the shares of minority shareholders; avoiding the payment of dividends; artificially reducing the amount of net profit in order to avoid dividend payments; concealing information from other shareholders; and other similar actions.

The legislation of Uzbekistan already provides for the following mechanisms for protecting the rights of minority shareholders: the establishment of a minority shareholders' committee; the possibility of challenging related-party transactions; the right of a shareholder holding 5 percent or more of the voting shares to engage an audit organization to examine the company's activities; the right to demand the buyback of shares in certain cases; and other mechanisms.

Although the liability of majority shareholders is formally established by law, at this stage there are still gaps in both substantive and procedural aspects. In particular, it has not been clarified what constitutes actual knowledge, where the boundaries of personal interests lie, which matters should be considered inconsistent with the interests of the company and shareholders, whether harm must necessarily be caused to both the company and other shareholders, or whether harm caused to one shareholder is sufficient, and so on. Therefore, these aspects should be clarified.

It is also important to take into account foreign models for regulating the duties of majority shareholders. Under the American model, fiduciary duties are recognized not only in relation to a person who holds a controlling block of shares, but also in relation to a person who has actual influence over corporate decision-making[4]. The German model may be used as a basis for introducing a direct rule on the liability of a person who uses their influence to the detriment of the company and its shareholders, including influence exercised through dependent companies[5]. The English model of corporate law provides broader and more comprehensive mechanisms for protecting the rights of minority shareholders.

However, the liability of a majority shareholder should not be equated with the liability of a director. A majority shareholder should be held liable not merely on the basis of share ownership, but on the basis of the use of their influence to the detriment of the company and other shareholders. This approach would allow majority shareholders to implement their investment plans while, at the same time, preventing harm to other shareholders.

Scholars argue that corporate governance should maintain a balance between the entrepreneurial and investment needs of the majority shareholder and the full exercise of the rights of minority shareholders[6]. In this regard, Uzbekistan should not impose a duty of care on majority shareholders. Instead, it should establish a limited duty of loyalty towards the company and other shareholders, including a prohibition on the use of influence for personal benefit to the detriment of the company and other shareholders.

However, it should be taken into account that not every decision of a majority shareholder constitutes abuse or bad faith. If a majority shareholder exercises their majority voting rights to allocate net profit for economically justified expenses of the company, this should not be regarded as a violation of the rights of minority shareholders, even if the latter wished to allocate such net profit for the payment of dividends.

At the same time, there may be cases of bad-faith use of majority voting rights. For example, this may occur where the company sells an asset to another company on terms worse than market conditions, especially where there are direct or indirect indications of affiliation. The same may apply where the company leases property, transfers it into temporary management, or enters into similar arrangements on terms that are clearly worse than market conditions. In such cases, harm is caused to the company and minority shareholders, while the majority shareholder obtains a personal benefit. There may also be more aggressive and more evident signs of bad faith on the part of the majority shareholder.

Discussion

Based on the analysis conducted, it may be concluded that a violation of the fiduciary duties of a majority shareholder cannot be established merely on the basis of ownership of a majority of shares or the adoption of a particular decision. In addition, several elements must be present in combination: the adoption of a decision, the receipt of a personal benefit, actual knowledge that the decision would cause harm to the company and other shareholders, and the existence of such harm itself. An example may be the adoption of a decision that does not contribute to the development of the company.

The fiduciary duties of a majority shareholder and those of a director have different legal natures. A director occupies the position of the head of the executive body and is required to take care of the company on a daily basis. By contrast, a shareholder is the owner of shares and an investor. Therefore, a shareholder should not be responsible for the company to the same extent as a director. A majority shareholder may only be subject to a limited duty of loyalty towards the company and other shareholders. Such loyalty should be expressed in the duty not to adopt decisions that are knowingly harmful to the company and other shareholders. However, this does not mean that a majority shareholder should be held liable for an unsuccessful decision if that decision was justified and made in good faith. Foreign legal sources also note that the duties of a director and those of a majority shareholder are different[7].

It is also necessary to distinguish between an abuse of majority voting rights and the adoption of an economically justified decision. Not every decision of a majority shareholder can be considered to have been made in bad faith. A shareholder is fully entitled to adopt decisions where they believe that such decisions are economically reasonable. Minority shareholders may be dissatisfied with such decisions, but their dissatisfaction alone does not constitute a violation of their rights.

Abuse may be found where there are such indicators as personal benefit, the economic unjustifiability of the decision, related-party transactions, transactions concluded at below-market value, restrictions on access to information for other shareholders, artificial reduction of profit, dilution of other shareholders' interests, withdrawal of financial assets, and other similar circumstances. Thus, it may be concluded that abuse is more likely to arise where majority voting rights are used to redistribute assets in favour of the majority shareholder.

It is also necessary to establish certain criteria for determining what should be regarded as the adoption of a decision in the personal interests of a majority shareholder. This expression should not be interpreted too broadly. Every shareholder, whether majority or minority, has a reasonable economic, financial, and investment interest in their participation in the company. This is a legitimate and expected interest. In our view, the personal interest of a majority shareholder should be understood as the receipt of a benefit by that shareholder or by persons affiliated with them, where such benefit is not provided to other shareholders on equal terms.

Furthermore, it is appropriate to define the evidentiary boundaries for proving actual knowledge of harm to the interests of the company and other shareholders. In practice, it is rarely possible to find direct evidence proving actual knowledge of harm. In this regard, actual knowledge should be proven not only by direct evidence, but also by a combination of circumstantial evidence. Such evidence may include affiliation between the parties to transactions, transaction prices below market value, artificial restrictions on obtaining or providing information, the absence of an economic justification for the decision, repeated similar transactions, and other relevant circumstances.

The law of Uzbekistan provides that, for the liability of a majority shareholder to arise, harm must be caused to the interests of both the company and shareholders. This means that if harm is caused to only one of these subjects, the majority shareholder may not be held liable. In some cases, however, harm may be caused only to an individual shareholder. Therefore, the wording of the provision should be expanded and given a more flexible interpretation, under which a majority shareholder may be held liable both where harm is caused to an individual subject of corporate law and where harm is caused to all such subjects.

On the other hand, the duties and liability of a majority shareholder should not restrict their right to make risky entrepreneurial decisions. A shareholder should not be afraid to adopt such decisions. Otherwise, this may reduce the investment attractiveness of joint-stock companies. Therefore, courts should clearly distinguish between situations where there is an abuse of rights and situations where there is no such abuse.

Conclusion

The main scientific conclusion of this study is that a majority shareholder is not only a holder of corporate rights, but also a bearer of corporate duties towards the company and other shareholders. These duties should have the nature of a limited duty of loyalty and should not be equated with the corporate duties of a director.

The main gap in the legislation lies in the absence of clear criteria for such concepts as personal benefit and actual knowledge of harm, as well as in the lack of procedural rules for proving them. In addition, there are limitations concerning the subjects to whom harm may be caused. In other words, the majority shareholder has a duty not to cause harm jointly to both the company and other shareholders. However, if harm is caused to individual subjects separately, the current wording of the law does not fully cover such situations. Another issue is that liability arises only where harm exists. In practice, however, it is often difficult to prove a causal link between such harm and the interests of shareholders or the company, since the consequences of corporate decisions may be indirect and may not occur immediately.

The protection of the rights of minority shareholders and the company should not turn into an excessive restriction of the rights of majority shareholders. Majority shareholders should have the right to adopt economically justified decisions, including decisions involving a high level of entrepreneurial risk. However, this right should not be transformed into a mechanism for transferring assets from the company to majority shareholders or to persons affiliated with them.

Abuse of rights by majority shareholders may be established not only through direct proof of intent, but also through a combination of actions aimed at obtaining a benefit received only by the majority shareholder or persons affiliated with them. Such circumstances may include artificial restrictions on access to information, artificial understatement of net profit, insufficient economic justification for decisions, and withdrawal of assets from the company through transactions concluded at undervalued prices, and other similar actions.

In conclusion, certain proposals may be made for improving the legislation in this area. In particular, it is necessary to establish non-exhaustive criteria for determining personal benefit, to define non-exhaustive criteria for establishing actual knowledge of harm, to clarify that the emergence of an obligation should take into account the possibility of harm being caused to subjects of corporate law separately rather than only jointly, and to provide that indirect harm caused to the company or to a shareholder may also serve as a basis for liability. In our view, the introduction of these mechanisms would make it possible to achieve a proper balance between the corporate rights of majority and minority shareholders.

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