The American Journal of Political Science Law and Criminology
(ISSN – 2693-0803)
Published: December 22, 2021 | **Pages:** 63-67
Doi: https://doi.org/10.37547/tajpslc/Volume03Issue12-10

IMPACT FACTOR
2021: 5. 952

Journal Website: https://theamericanjournals.com/index.php/tajpslc

The Concept Of Control In Uzbek Corporate Law

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ABSTRACT

This article discusses the concept of control and its implications for the distribution of corporate risks. The analysis of the meaning and state of the concept of control in Uzbek law is given. Also, the problems of establishing control in subsidiaries in the constituent documents and subordination agreements are considered. The question was raised: what amount of participation in the company gives the right to control and how control is determined if there is no formal reflection (in the constituent documents or agreements)? The responsibility of the controlling person is recognized as the main goal of the concept, because control determines the actual relationship between the society and the controlling person and explains the responsibility of the decision-maker.

KEYWORDS

Uzbekistan, Uzbek Law, Concept Of Control, Subsidiary, Joint And Several Liability, Creditor, Piercing Corporate Veil, Limited Liability Company, Investment.

INTRODUCTION

Control in a corporation is a fundamental concept in the management of a corporation and in defining the scope of responsibility of controllers in legal systems. After all, a fundamental feature of a corporation is its independent legal personality, and excessive control actually deprives it of its own will, as a result, the right can ignore the legal personality of the corporation. In American law, control is considered a very important legal fact in determining the responsibility of majority shareholders and directors. Mr. Justice

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Brandeis called it "the main instrument of the American economy," and he based his opinion on the growing importance of control in the economic and social reality of the corporation. [1] In addition, the institution of control is important in ensuring the rights and legitimate interests of creditors and minority shareholders (participants). And in German law, control is considered a decisive factor in determining responsibility in corporate groups (concerns).

Corporations are essentially controlled by its controlling persons: shareholders, directors. They are not just managers, but they essentially determine all the actions of the corporation. And this in itself means that control is in fact a very important phenomenon in determining the essence of a corporation's actions.

The concept of control appeared at the beginning of the 20th century to identify the participation of enemy structures in the most important sectors of the economy. Today, the concept has found a normative reflection in the developed legal order to determine economic dependence and is the basis for the use of the doctrine of the removal of corporate cover (to hold participants accountable for the obligations of the corporation).

Control concept in Uzbek private law

In national corporate law, the concept of control is reflected in the relationship of dependence and subsidiaries of business entities (Art. 67-68 of the Civil Code).[2] This definition of economic control is also the basis for the parent company to have subsidiary and joint liability for the obligations of the subsidiary. Also, Article 48 of the Civil Code links control with the subsidiary liability of the controlling participant (or owner) in the presence of certain conditions..

However, as follows from the content of Part 4 of Art. 48 of the Civil Code, the control of the founder is determined not with the ownership of a share or shares, but with the right to give mandatory instructions to a controlled legal entity, which clearly demonstrates the inconsistency of the legislator in the application of the concept of control over the responsibility of controlling persons.

Also, the concept of control in Uzbek tax law is used for tax control of related companies. The Tax Code of the Republic of Uzbekistan defines the controlling persons of a foreign company as a subject of taxation.[3] But the Tax Code, intervening in private law issues, established the procedure for imposing tax obligations of a controlled entity on the controlling.

Relationship "parent company-subsidiary company"

This institution was borrowed from German law by a group of companies (Konzernrecht), which is intended primarily to protect the rights of minority shareholders and adjust the scope of responsibility of the controlled subsidiary.

According to the legislation, a subsidiary is a company in cases where another legal entity (main) has the ability to determine its decisions on the basis of a prevailing participation in the authorized capital or an agreement concluded between them.

However, this definition raises a large number of controversial questions about the limits of prevailing participation: what percentage of

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participation is called dominant? This issue remains at the discretion of the court, without explaining the scope criteria. However, the legislator defines another criterion of control - to give mandatory instructions to the controlled company.

On the basis of part five of Article 8 of the Law of the Republic of Uzbekistan "On Joint Stock Companies and Protection of Shareholders' Rights", the parent (controlling) company, which has the "right to give mandatory instructions to a subsidiary business company", is jointly and severally liable. Thus, the right to issue binding instructions is being introduced into the concept of control at the legislative level. And the law establishes the right of the parent company to give a mandatory instruction: this right arises if it is provided for in an agreement with a subsidiary and parent company or in the charter of a subsidiary company (part five of Article 8 of the Law "On Joint Stock Companies and Protection of Shareholders' Rights").

The right to give binding instructions

In national law, the "right to give binding instructions" is considered a key element of control. However, neither the legislator, nor judicial practice, nor legal science have yet revealed the nature of such a right and provided the grounds for the obligatory nature of such instructions. They also did not explain how such a right to give mandatory instructions differs from the right of a participant to participate in the management of a business company, whose decision precisely determines the will of the company.

Control based on the contract arises when the powers of the sole executive body are transferred to the trustee (part two of Article 79 of the Law of the Republic of Uzbekistan "On Joint Stock Companies and Protection of Shareholders' Rights").

In scientific and legal sources there are many different approaches to the problem under study. E.A. Sukhanov believes that the factor-forming agreement may be an agreement with a management company.[4] According to I.S. Shitkin, holding relations do not arise when the functions of the company's executive body are delegated to a third legal entity, since in this case there is no economic subordination between the two persons.[5] S.S. Gulyamov argues that the relationship between the parent company and the subsidiary between the managing organization and the joint-stock company does not arise when the powers of the executive body of the company are transferred on the basis of an agreement. [6] But let us consider the situation when part of the shares of a subsidiary belongs to the parent company, which at the same time, under the agreement, transfers the powers of its executive body to the subsidiary. On the issue under consideration, in our opinion, each specific case depends on the right of the parent company to give instructions binding on the subsidiary. The specified right of the parent company is absent in cases when the decision is made by the board of directors of the company or the general meeting of shareholders.

But a relationship of dependency between a corporation can arise from ordinary civil contracts that establish the right to give binding instructions to a subsidiary.

But it is obvious that there are many shortcomings of this concept of control: the

scope and criteria of control, grounds for liability in the event of control, and the possibility of direct claims by creditors against controlling persons.

The legislator initially builds constructions of responsibility of the founder (participant / shareholder) for the obligations of a legal entity based on the logic of tort - responsibility arises from the unlawful acts of the participant. But he himself violates it by mixing completely different constructions of obligation that are incompatible with it: he conditions the emergence of responsibility by establishing the right to give instructions by an agreement or a constituent document. After all, here the responsibility should come from the illegal actions of the participant. It is known that obligations arise: from transactions (constituent document), from illegal acts and legal fact. And the legislator wanted to build responsibility out of the unlawful acts of the participant. But in this case it all mixes up.

Apparently, the legislator intended to establish a control criterion - the decisive participation of a participant in the decision-making process. In all developed legal systems, the liability of a participant for the debts of a corporation arises if the first has substantial control: rightly, the one who made the decision is responsible. For example, in the United States, excessive control is the most important reason for “piercing corporate veil”. [7]

In fact, the prevailing participation of a participant (shareholder) in the company (if he owns a controlling block of shares / shares, or is an executive body, etc.) fully makes it possible to decisively influence decision-making - to control it. Accordingly, this in itself means that such a controlling person has the ability to harm others by abuse of the right, committing illegal actions, in a word, abuse the corporate form (privilege of limited liability) as a "tool", "pocket", "facade", "shell " etc.

This means that it is impossible to attract the founder (shareholder) even in cases of abuse of his controlling participation right to liability (for example, subsidiary), if the right to give mandatory instructions is not expressly provided for in the charter. Again, the same logic: the responsibility is borne by another enterprise only if its right to give instructions to the controlled enterprise is established in the company's charter. Apparently, the legislator proceeds from the understanding of a tort - failure to fulfill an obligation that exists between the one causing harm and the victim. [8]

This understanding of the logic of subsidiary liability fits well with the concept of general tort, which was formed in French law, with the participation of the outstanding French scientist Jean Domat.

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