негативних наслідків для власника і добросовісного набувача з метою досягнення балансу інтересів. Оптимізація та узгодження інтересів власника та добросовісного набувача може бути здійснена комплексно за допомогою інших способів захисту цивільних прав або за допомогою закріплення у чинному законодавстві додаткових допоміжних механізмів та засобів, якими можна попередити або хоча б зменшити випадки виникнення ситуацій протиправного вибуття майна з володіння власника.

1. *Маслов В.Ф.* Осуществление и защита права личной собственности в СССР. – М., 1961. – С. 182-186. **2.** *Генкин Д.М.* Право собственности в СССР. – М., 1961. – С. 180-182. **3.** *Венедиктов А.В.* Гражданско-правовая охрана социалистической собственности в СССР. – М., 1954. – С. 106-107; *Толстой Ю.К.* Содержание и гражданско-правовая защита права собственности в СССР. – Л., 1955. – С. 100. **4.** *Звод* законів Російської імперії [Електронний ресурс]. – Режим дрступу: http://www.runivers.ru/bookreader/book388202/#page/1/mode/1up.; *Саатчанин А.Л.* Гражданское уложение. Проект Редакционной комиссии по составлению Гражданского уложения: С объяснениями, извлечениями из трудов Редакционной комиссии / Под ред. М.И. Тютрюмова, Книга 3, Издательство: Волтерс Клувер. – М., 2008, 1018 с. – С. 574. **5.** *Еремеев Д.Ф.* Право личной собственности в СССР. – М.: Госюриздат. – С. 74; **6**. *Генкин Д.М.* Право собственности как абсолютное субъективное право // Советское государство и право. – 1958. – № 6. – С. 20. **7.** *Ровный В.В.* Конкуренция исков в российском гражданском праве: теоретические проблемы защиты гражданских прав. – Иркутск, 1997. – С. 22. **8**. *Черепахин Б.Б.* Виндикационные иски в советском праве. – М.,1965. – С. 36. **9.** *Приобретение* движимостей в собственность от лиц, не имеющих права на отчуждение / Трепицын И.Н. – Варшава: Тип. Варш. учеб. окр., 1907. – 604 с. – Репринтная копия РИО. – С. 12. **10.** *Лыкошин А.И.* Об отыскание недвижимых имений из чужого владения // Гражданское и уголовное право. – СПб., 1888. – №4 . – С. 27. **11**. *Шершеневич Г.Ф.* Учебник русского гражданского права. М., 1995, С. 163. **12**. *Халфина Р.О.* Право личной собственности граждан СССР. – М., 1955. С.172. **13**. *Волков А.В.* Злоупотребление гражданскими правами. Проблемы теории и практики Волтерс Клувер. – М., 2009. – С. 341. **14.** *Гулова А.Г., Машевська О.П.* Вибуття майна з володіння власника поза його волею: окремий погляд на проблему // Вісник господарського судочинства. – 2006. – № 2. – С.29-37.

УДК 347

Е. А. СУШКО

ЗАХИСТ ПРАВ МІНОРИТАРНИХ АКЦІОНЕРІВ У НІМЕЧЧИНІ, КИТАЇ, УКРАЇНІ: ПОРІВНЯЛЬНИЙ АНАЛІЗ

Досліджується захист прав міноритарних акціонерів шляхом аналізу похідного позову як інструменту акціонерів щодо захисту своїх прав. Проведено порівняльне дослідження механізму похідних позовів у Німеччині, Китаї, Україні.

Ключові слова: *акціонерне товариство, міноритарні акціонери, похідний позов, наглядова рада, директор.*

Сушко Е. А. **Защита прав миноритарных акционеров в Германии, Китае, Укра-**

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ине: сравнительный анализ

Исследуется защита прав миноритарных акционеров путем анализа производного иска как инструмента акционеров по защите своих прав. Проведено сравнительное исследование механизма производных исков в Германии, Китае, Украине.

Ключевые слова: *акционерное общество, миноритарные акционеры, производный иск, наблюдательный совет, директор.*

Sushko Yelyzaveta. **Protection of minority shareholders' rights in Germany, China, Ukraine: a comparative analysis**

The article investigates protection of minority shareholders' rights through analyzing of derivative claim as an instrument for shareholders to defend their rights. The comparative research of derivative claims mechanisms in Germany, China, Ukraine was applied.

Key words: *joint stock company, minority shareholders, derivative suit, supervisory board, director.*

The subject of the article is to define the nature and essence of derivative claims as an instrument for minority shareholders to defend their rights in Germany, China and Ukraine. The research is made with application of the comparative method to identify essence of derivative claims in the abovementioned countries. Legal literature and legal sources of Germany, China and Ukraine were investigated.

Countries with sufficiently developed stock markets recognize derivative lawsuits, regardless of legal family to which the country belongs[1]. A derivative lawsuit is a corporate claim, merely initiated by one or more shareholders to get around the structural block presented by those who control corporation and are unwilling to bring suit[2].

This mechanism enables minority and outside shareholders to put a last resort check on the incumbent management which only in very exceptional cases enforces the corporation's claims against themselves or their peers[3].

First the concept (or rule) of derivative actions was introduced in the common law system. Under the *Foss* v. *Harbottle* rule in English law, the proper person to bring action is the company itself[4]. However, this rule is given to bring historical impact about development of the issue on derivative actions. Our article is devoted to investigation of derivative actions in Germany, China, Ukraine.

Germany. The German Stock Corporation Act of 1965 was amended in 2005 to allow a derivative action to be brought by a shareholder directly[5]. The German legislature implemented mechanisms that were designed to prevent the abuse of the derivative action[6].

The quantitative approach of the determining a minority of shareholders means that the percentage of the capital owned by shareholder decides how many votes the concerned shareholder has and with this right majority shareholders can direct the company[7]. Nowadays rights and obligations became much more complex[8]. In Germany minority of shareholders should constitute at least 5% of corporate subscribed capital for convening of shareholders' general meeting[9]. In accordance with § 147 of the German Stock Corporation Act a minority which holds at least 10 % of the share capital can pursue a claim for damages for the corporation in their right. § 148 made it possible that under certain circumstances a minority of 1% of share capital may gain the right to sue the management[10]. The shareholders can appeal against resolutions passed at the general meeting in case of some breaches[11].

The substantive limitation on derivative suits excludes most cases of breaches of fiduciary duties by members of the management or supervisory board of joint stock company from being actionable in a derivative action[12].

Das Gesetz zur Unternehmensintegrität *und Modernisierung des Anfechtungsrechts*

provides reformation of minority shareholders‘ right. In accordance with this document, for example, the Court should review the resolution challenged by the minority shareholders and weigh, which interests prevail: shareholders’ or company’s interests; Chairman of the shareholders’ meeting acquires right to limit time for speech during the meeting to conduct meeting more efficiently; joint stock corporation provides forum for minority shareholders that wish to file a derivative claim in the German Electronic Federal Gazette.

Thus, the derivative claim is a young mechanism in Germany. *Das* Gesetz zur Unternehmensintegrität *und Modernisierung des Anfechtungsrechts* provides reformation of minority shareholders‘ rights and makes modernization of the mechanism of the minority shareholders‘ suits.

China. Protecting minority shareholders from expropriation of management or controlling shareholders is always a critical principle of corporate governance, but protection of minority shareholders was not the chief concern of the Company Law of 1994[13] in China.

The main aim of the Company Law of 1994 was transforming State Owned Enterprises (hereinafter – SOE) into stock companies, establishing a legislative authority for this transformation, and preventing possible losses of state-owned assets in the transformation. In China the Company Law, which is considered to be a basic statute for the common business enterprises, was drafted as a law for converting SOEs into stock companies[14].

Many corporate entities in the People’s Republic of China are dominated by insiders who have – or present – significant political power that exceeds their formal economic or management power[15]. The interests of the dominant shareholder were invariably seen as taking priority over those of minority shareholders[16]. Any legal mechanism that empowers minority shareholders to attack the misdeeds of insiders empowers weak political economic actors to constrain penalize vastly superior forces in Chinese society[17].

Derivative lawsuit was included in the 2006 Company Law of China[18] in order to give minority of shareholders in companies limited by shares (hereinafter – CLS) a way to hold insiders and controlling shareholders accountable at law for rampant malfeasance[19].

Article 152 of this Law enshrines that a controlling shareholder who violates the rights and interests of a Chinese company, causing losses to the company, may be subject to a derivative lawsuit. Any individual shareholders in CLS must hold alone or jointly more than 1% of the company’s shares for at least 180 consecutive days for derivative claim initiative. There is no shareholding threshold, no length of shareholding requirements, nor any requirement with respect to the timing of share acquisition.

Where minority shareholders are interested in corporate governance issues, they realize that they do not have much power to influence company corporate governance practices[20]. Minority shareholders cannot take listed companies to court, due to limitations in the civil law, and a lack of punishment spectrum in the current securities laws. Courts do not accept cases to widely-held CLSs[21].

The controlling shareholders may be governmental bodies of some kind, or tied to Party organizational structures[22]. Therefore, pressure may be brought to bear courts to protect such actors from claims against them. Local political power – formally, the local People’s Congress, and in reality, the local Communist party organization – controls courts both informally and formally through the power of appointment and power over

budgets[23]. When confronted with interference, disturbance and influence exerted by various external forces, the judiciary has to surrender itself to the external pressure and cater for the needs of local interests[24].

Communist Party committees can and do issue instructions to courts telling them how to handle particular cases. Some areas have a specific rule providing that where a party from outside the jurisdiction sues a local enterprise. Derivative suits involving CLSs, listed or unlisted, are striking by their virtually complete absence[25].

There is a persistent sense in the Chinese discourse that the required minimum is tied to the notion that a derivative lawsuit is in fact a representative lawsuit, and therefore requires a minimum number of shareholders to represent the interests of all or most of other shareholders[26].

Scientist Qiao Liu considers that 'the protection of minority shareholders is poor' in China[27].

Thus, Chinese Company Law enshrines provision on derivative actions. However, there is an influence of insider political individuals, that creates obstacles for minority shareholders to exercise their rights.

Ukraine. Before February 3, 2011, Article 72 of the Joint Stock Company Act of Ukraine made an effort to enshrine provision on the derivative claim. However, the content of the article was unsuccessful, so that provisions on derivative claims was excluded by new Law of Ukraine № 2994-VI, dated February 3, 2011.

Current Ukrainian legislation does not have derivative claims provisions[28]. In our opinion, absence of derivative claim provisions deprives minority shareholders of efficient instrument to defend their rights; it is a step in corporate relations. So, derivative claims provisions in the Joint Corporation Act of Ukraine[29] would be important to give basis for protection of the interests of minority shareholders.

Nature and essence of derivative suits were investigated by many Ukrainian researchers, in particular, Vynnik O.M.[30]; Zhurbin B. A.[31]; Popov Y. O.[32]; Ostrovskaya L. A.[33] and others.

An important legal act is the decision of the Constitutional Court of Ukraine № 18-rp/2004, December 1, 2004. It is enshrined that a shareholder can protect their violated rights and legitimate interests by suing in court against the joint stock company. At the same time it is enshrined that the order of judicial proceedings is determined by law[34].

The Supreme Court of Ukraine in its Decree "On practice of corporate disputes proceedings", October, 24, 2008, holds an opinion that the law does not provide for the right of the shareholder to sue for the protection of violated rights. The Supreme Court of Ukraine recommends the commercial courts to deny shareholders' claims[35].

Thereby, derivative claims are not clearly enshrined in the corporate legislation of Ukraine. In our opinion, Joint Stock Company Act of Ukraine could add the provision about right of a shareholder to file a derivative claim in the court. The limit of such right could be a minimum of 10 %, so that shareholder who holds at least 10 % of the share capital could file a derivative claim.

Thus, the derivative claim is a young mechanism in Germany (since 2005). *Das* Gesetz zur Unternehmensintegrität *und Modernisierung des Anfechtungsrechts* provides reformation of minority shareholders' rights and makes modernization of the mechanism of the minority shareholders' suits. In China the protection of minority shareholders is not efficient due to absence of possibilities for minority shareholders to protect their rights. In China controlling shareholders in many cases are tied to Party organizational structures and can influence the court. In Ukraine derivative claims are

not clearly enshrined in the corporate legislation of Ukraine (was abolished in 2011). In our opinion, the Joint Corporation Act of Ukraine could add the provision about right of a shareholder who holds at least 10 % of the share capital to file a derivative claim in the court.

1. *Островська Л.А.* Непрямі (похідні) позови: міжнародний досвід та законодавство України: Дис... канд. юр. наук: 12.00.03. – Одеса, 2008. – 187с. **2.** *Tang X.* Protecting Shareholders in China: a Task for both Legislation and Enforcement / in Hideki Kanda, Kon-sil Kim, and Curtis Milhaupt (eds.) / Transforming Corporate Governance in East Asia / New York: Routledge, 2008. – pp. 141 – 167; *Zhang Z.* Making Shareholder Derivative Actions Happen in China: How Should Lawsuits be Funded? / Hong Kong Law Journal. – № 38, 2008. – pp. 549 – 550. **3**. *Reisberg A.* Derivative Actions and Corporate Governance / Theory and Operation, 2007. – № 5. – p. 1; *Grotheer M.* Aussenhaftung von Aufsichtsratsmitgliedern / Wertpapier-Mitteilungen (WM), 2005. – ss. 2070 –2074. **4.** *Foss* v. *Harbottle* [1843] 2 Hare 461. **5.** *Begründung* des Regierungsentwurfs eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) (Explanatory statement of the governement for the bill introducing the derivative action into the German law of corporations), Bundes-tags-Drucksache (Legislative Materials of the German Parliament). – № 15/5092. – ss. 1, 10, 20. **6.** Ibid. ss. 10, 20 Ibid; *Spindler G.* Haftung und Aktionärsklage nach dem neuen UMAG / Neue Zeitschrift für Gesellschaftsrecht (NZG), 2005. – ss. 865 – 866; *Seibert U.* Berufsopponenten – Anfechtungsklage – Freigabeverfahren – Haftungsklage: Das UMAG, eine Rechtsfolgenanalyse / Neue Zeitschrift für Gesellschaftsrecht (NZG), 2007. – s. 841. **7.** *Pana Cr.* Protection of the minority shareholders of a subsidiary toward the parent company – comparison between Germany, United Kingdom, France and Romania / CEU Legal Studies IBL L.L.M short thesis, Central Euroepan University, 2001. – p.7. **8.** *Szentkuti D.* Minority Shareholder Protection rules in Germany, France and in the United Kingdom. A Comparative Review / VDM Verlag, 2008. – 64 p. **9.** §122 (1) Aktiengesetz GmbH-Gesetz: mit Umwandlungsgesetz, Wertpapiererwerbs- und Übernahmegesetz, Mitbestimmungsgesetzen und Deutschem Corporate Governance ... Governance Kodex, Rechtsstand von Heribert Hirte von Deutscher Taschenbuch Verlag // Beck Juristischer Verlag (1 Januar 2012). – 464 Seiten. **10.** § 148 Ibid. **11.** § 243 Ibid. **12.** *Kling M.* Die Innenhaftung des Aufsichtsratsmitglieds in der Aktiengesellschaft / Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (DZWIR), 2005. – ss. 45 – 55. **13.** *Tang X.* Protecting Shareholders in China: a Task for both Legislation and Enforcement / in Hideki Kanda, Kon-sil Kim, and Curtis Milhaupt (eds.)/ Transforming Corporate Governance in East Asia / New York: Routledge, 2008. – pp. 141 – 167; *Zhang Z.* Making Shareholder Derivative Actions Happen in China: How Should Lawsuits be Funded? / Hong Kong Law Journal. – № 38, 2008. – pp. 549 – 550. **14.** *Howson N. C.* China's Company Law: One Step Forward, Two Steps Back? A Modest Complaint / Columbia Journal of Asian Law, 1997. – № 11. – pp. 127-73. **15.** *Clarke D. C.* Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China / D. C. Clarke, co-author. In The Derivative Action in Asia: A Comparative and Functional Approach, edited by D. Puchniak, H. Baum, and M. Ewing-Chow / International Corporate Law and Financial Market Regulation. – Cambridge University Press, 2012. – pp. 243–295. **16.** Ibid. **17.** Ibid. **18.** *Companies* Law of the People's Republic of China [Електронний ресурс] / The Shanghai Stock Exchange (SSE) official Internet Source: data base contains information on stocks, list-ing, listed companies, market information in China – English, Chinese, 2006. – 47 p. Режим доступу: http://www.sse.com.cn/sseportal/en/pages/p1075/p1075_content/Companies%20Law%20of%20the%20People%27s%20Republic%20of%20China.pdf Last watch on 18.12.12. **19.** Ibid. **20.** *Tomasic R.* Minority Shareholder Protection in China's Top 100 Listed Companies' / Roman Tomasic, Neil Andrews / Australian Journal of Asian Law, 2007. – № 9(1). – pp. 88-119. **21.** Supra note 15. **22.** Ibid. **23.** Ibid. **24.** *Liu Z.* Zhongguo sifa defang baohu zhuyi i zhi pipan – jianlun 'sifaquan guojiahua' de sifa gaige silu [Critique of Judicial Local Protectionism on 'Nationalization of Judicial Power' as

the Guideline for Judicial Reform] / Faxue Yanjiu [Legal Studies]. – № 1, 2003. – pp. 83–98. **25.** Supra note 15. **26.** *Jin J.* Gudong paisheng susong zhidu yanjiu [A Study of the Shareholders' Derivative Lawsuit System] / Wang Baoshu, Zhu Ciyun, Shi Tiantao, and Tang Xin (eds.). Shijianzhongde gongsifa [Company Law in Practice] / Beijing: Shehui kexue wenxian chubanshe [Social Sciences Academic Press (China)], 2008. – p. 412–428. **27.** *Qiao* Liu Corporate governance and earnings management in the Chinese listed companies: A tunneling perspective / Qiao Liu, Zhou (Joe) Lu / Journal of Corporate Finance, 2007. – № 13. – pp. 881–906. **28**. Supra note 1. **29.** *Закон* України «Про акціонерні товариства» // ВВР України. – 2008. – № 50-51. – Ст. 384. **30.** *Вінник О.М.* Публічні та приватні інтереси в господарських товариствах: проблеми правового забезпечення. – К.: Атіка, 2003. – 352 с. **31.** *Журбин Б.А.* Групповые и производные иски в судебно-арбитражной практике. – Система Гарант, 2009. – 168 с. **32.** *Попов Ю.Ю.* Толкование «косвенных» исков // Юридическая практика. – 2002. – № 50 (260). – С. 7. **33.** Supra note 1. **34.** *Рішення* Конституційного Суду України № 18-рп/2004 від 01.12.2004 року щодо офіційного тлумачення окремих положень частини першої статті 4 Цивільного процесуального кодексу України (справа про охоронюваний законом інтерес) // Офіційний вісник України. – 2004.– № 50.– Ст. 3288. **35.** *Постанова* Пленуму Верховного Суду України «Про практику розгляду судами корпоративних спорів» №13 від 24.10.2008 року // Вісник Верховного Суду України. – №11. – 2008.

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Д. С. МИХАЙЛОВА

ПРОБЛЕМИ ОБМЕЖЕННЯ ЦИВІЛЬНОЇ ДІЄЗДАТНОСТІ ФІЗИЧНОЇ ОСОБИ В УКРАЇНІ

Здійснено порівняння підстав обмеження цивільної дієздатності в законодавстві України та зарубіжних держав. Розглянуто проблему дієздатності в нотаріаті. Проаналізовано правотворчий досвід юристів Стародавнього Риму, його роль у розробці норм Цивільного кодексу України щодо обмеження дієздатності. Обґрунтовано необхідність приділення додаткової уваги цьому питанню. Встановлено доцільність розширення кола підстав, за яких особа може бути визнана обмежено дієздатною.

Ключові слова: *фізична особа, дієздатність, римське право, нотаріат.*

Михайлова Д. С. **Проблемы ограничения гражданской дееспособности физического лица в Украине**

Осуществлено сравнение оснований ограничения гражданской дееспособности в законодательстве Украины и зарубежных государств. Рассмотрена проблема дееспособности в нотариате. Проанализированы правотворческий опыт юристов Древнего Рима, его роль при разработке норм Гражданского кодекса Украины об ограничении дееспособности. Обоснована необходимость уделения дополнительного внимания этому вопросу. Установлена целесообразность расширения круга оснований, при которых лицо может быть признано ограниченно дееспособным.

Ключевые слова: *физическое лицо, дееспособность, римское право, нотариат.*

Mykhailova Daria S. **The problems of restriction of legal capacity of individual in Ukraine**

The author compared restriction of civil capacity in the legislation of Ukraine and foreign

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