

GCPMED 2020
**Global Challenges and Prospects of the Modern Economic
Development**

**NOTARIAL ACTIONS IN THE FIELD OF CORPORATE
GOVERNANCE**

O. S. Skachkova (a)*
*Corresponding author

(a) Samara State University of Economics, Soviet Army Str., 141, Samara, Russia, yarmoluik@mail.ru

Abstract

The article examines issues on the participation of a notary in corporate legal relations, in order to determine the objectives, significance and legal consequences of such participation. The problem of the interpretation of legal rules by the highest courts is also discussed, the solution of which is reflected more directly in the practice of law enforcement agencies of commercial organizations. The study of Russian and international practical experience, the identification of difficulties in the practice of notarial actions by commercial organizations allows to justify the need to include a notarial element in the activities of companies. Moreover, it is important to outline the trends to improve the participation of notaries in legal relationships of companies in modern conditions: the transition to the Internet in the entrepreneurial sphere, which proved particular importance during the COVID-19 pandemic; required improvement of the legislation relating to the participation of a notary in remote proceedings on corporate governance (meetings of shareholders and members of companies on digital platforms). There has been a trend in the development of electronic notaries and as of December 2020 it is possible to certify transactions without direct meeting of the counterparties in Russia and pandemic conditions show that the remote format could be used to certify the minutes of the decisions of a meeting of participating companies and other decisions of entities.

2357-1330 © 2021 Published by European Publisher.

Keywords: Alienation of shares in equity, corporate legal relations, notarial certification, notary, rights of participants in corporations



1. Introduction

Notary institution is one of the instruments used to exercise functions in the field of human rights by performing notarial acts on behalf of the state. Unfortunately, we have to say that for quite a long time legal potential of the notary institution was ignored by the Russian state. There was also a negative tendency to reduce the share of its participation in solving a large number of problems, by transferring only a small circle of powers to it. However, the development trends of the economy and the gradual expansion of the content of social relations led to the emergence of a certain need for changes in the rules of law reflecting the transformations underway. One of the novelties was the expansion of the powers of a notary in the area of guaranteeing the rights and legitimate interests of citizens and organizations in the legal relations of companies. The strengthening of the notarial control of the respect of the rights of the participants in the companies during the realization of actions of alienation or grafting of shares of the authorized capital, as well as during the general meetings is essential in this area. It is becoming evident that the new modern format of economic relations requires a similar format of guarantees for the stability of civil turnover. The notarial attribution of the authenticity of deeds is one of the necessary conditions to protect the civil rights of both people and entities, preventing the emergence of controversial situations in commercial practice.

2. Problem Statement

The subject of study is the participation of a notary in the field of corporate governance. information technology in the system of notarial activity in Russia. Here it is necessary to define not only the role and meaning of notarial certification in the context of business relations. But also to analyze the procedural mechanisms of notarial participation in the development of the digital economy. And also to take into account the needs of the commercial community, made worse by the pandemic situation, in the use of remote notarial participation methods by the notary. It is important to outline the trends to improve the participation of notaries in legal relationships of companies in modern conditions. The transition to the Internet in the entrepreneurial sphere, which proved particular importance during the COVID-19 pandemic; required improvement of the legislation relating to the participation of a notary in remote proceedings on corporate governance (meetings of shareholders and members of companies on digital platforms).

3. Research Questions

The following issues are compliant with the subject of this research and are covered in this study:

1. Justification of the need for the participation of notaries in the field of corporate legal relations, analysis of the current changes in Russian legislation in this regard.
2. Analysis of the usefulness and effectiveness of notarial deeds in the commercial practice of economic entities on the basis of foreign and Russian practice, both in the field of trade and in the context of the institute of notaries.
3. Investigation of the role of higher courts in the practice of law enforcement through the interpretation of legal rules.

4. Studying the problem of regulating the procedures for carrying out notarial deeds using information technologies: assessing the risks and possibilities of holding shareholders meetings on digital platforms with the participation of a notary.

4. Purpose of the Study

The purpose of the study in accordance with the research questions posed within the framework of this article is to build the concept of the electronic notary of Russia as a legal institution that guarantees the reliability of actions, transactions, acts of subjects of economic relations. Determining the need for the participation of a notary in the legal relations of companies, identifying the difficulties of the process of electronic and corporate governance and of the notarial system allows us to identify a trend towards improving the legal regulation of notarial activities. To identify the advantages and disadvantages of notarial participation in corporate relations. Investigation of the role of higher courts in the practice of law enforcement through the interpretation of legal rules. Consequently, the purpose of the study within the framework of this article is to analyze changes in the legal regulation of notarial activities.

5. Research Methods

The research methodology consists of using both general theoretical methods of cognition and special methods. We used such general theoretical methods as dialectics of cognition, the method of analogy. The systemic method makes it possible to represent the “notarial system” as a set of certain elements. Comparative legal and logical methods are indispensable in the analysis of legislation and practical material of the activities of commercial organizations. As well as in the judicial and notarial practice of law enforcement agencies. And they were necessary in the study of the systems of notaries of foreign states. For example, sociological and statistical methods were used as special methods. Sociology of law makes it possible to assess the degree of state-legal impact on the life of society, in this case, on the commercial sphere of activity. Statistical data were investigated when assessing the use of participation of a notary in business relations.

6. Findings

1. Recent legislative changes on Russian notary indicate a gradual expansion of the functional powers of a notary in the field of corporate legal relations and that contributes not only to ensuring the stability of civil turnover and the stability of the economic situation of business societies, but also allows to reduce the burden on arbitration courts.

Many foreign authors study the importance of the institution of the notary in economic relations both in generally (Gultom et al., 2020; Pavic et al., 2019); and more precisely as studying guarantees of the legality of decision-making procedures in Croatian companies (Gargo et al., 2018). Moreover, the importance of ensuring the legality of procedures in commercial practice is linked to the development of electronic commerce not only within countries, but at the level of international relations. In December of 2014 Estonia became the first country to open its digital borders, so that anyone, anywhere in the world, could apply for electronic resident status, and that guarantees the development of relations between

business, which allows residents to enter into business relationships with private and public companies (Sullivan & Burger, 2017).

The Russian Federation is no exception and, together with the global community, we recognize the need to develop tools that help ensure the security of trade relations. This is evidenced by a series of important legislative changes concerning the role of notarial participation in legal relations of companies. Strengthening of the notarial control on the respect of the rights of the participants during the alienation or grafting of shares of the authorized capital, as well as during the general meetings is essential. These changes in the legal framework for in-company notarial activity began in 2009: the entire main volume of transactions carried out with the shares of a public limited company began to be the subject of a mandatory notarial deed. Subsequently, the provisions governing the role of the notary were extended and implemented. The main purpose of these innovations is to prevent and reduce the risks of committing the so-called “hostile takeover”, which damage the economic stability of the state.

Federal law № 99-FZ “On the amendment of chapter 4 of the first part of the Civil Code of the Russian Federation and on the recognition as invalid of certain provisions of legislative acts of the Russian Federation” introduced a standard on the possibility of authentication of decisions of entities’ boards and lists of board meeting participants. There is also a provision on the compulsory presence of a notary at general meetings of participants of a company in cases where it is decided to increase the amount of share capital. In 2017, the notary obtained the right to keep a register of the list of entities boards.

2. The expansion of the participation of the notary in business relations happens in Russia with a considerable delay compared to many European countries, such as Germany, Italy, Austria, where notaries have long been an integral part of corporate life. In Germany, Austria, all actions concerning the structural changes of companies require mandatory certification by a notary, which guarantees the stability, security of the economic situation of the country, and increases the attractiveness of investments. Thus, in Germany, a fairly active model of notarial participation in the life of commercial enterprises has been built, it can also be said that the services provided are mostly comprehensive and represent legal support for the activities of the organization. All of this transfers the notary from the function of “notarial attestation of legal facts” to an entity that provides direct legal assistance and resolves, within its competence, corporate legal issues.

Nowadays, the Russian notary has tools to help businesses, the potential of which has not yet been fully revealed. For example, the Unified Notarial Information System provides for the possibility of maintaining and filing lists of participants of companies. The transfer of this document under the responsibility of the Federal Chamber of Notaries allows us to guarantee its security and allows access to all members of the company, regardless of the relationship with the CEO, a conflict with which, or his absence often lead to the loss or intentional concealment of this list. It is crucial to account the possibility of introducing a remote form of company board meetings, to analyze the experience of European countries, so that it can be considered acceptable to hold them in a mixed form, where some of the participants are present in person at the meeting place with a notary, and the rest are connected to the meeting remotely. An example of a country that allows such form of participation is Denmark. Italy has decided to transfer all board meetings to the online format in 2020, but with the obligatory control of the meeting and the execution of the minutes by a notary. In this case, the notary, with the counting committee, is at the place for this meeting.

3. Thus, today in Russia there are three main forms of participation of a notary in business relations:

- certification of the composition and adoption of a decision by the general assembly of an entity's stakeholders;

- participation of a notary in the sale of shares in the company's share capital;

- certification of the pledge contract for the shares of the company's share capital.

Regarding public joint stock companies, Russian legislator clearly establishes a ban on notarization of the decision of the board of such an organization due to the fact that it is not constant and is regularly updated. Therefore, it is quite difficult to verify the list of shareholders or to receive timely information about its change, especially for a notary who currently has a fairly limited right of access to information resources containing commercial, state and other secrets protected by law. In this regard, certification of the decision-making fact, since the list of the shareholders is provided directly to the person who keeps the register of shareholders and knows its exact composition at all times.

It should also be noted that Russian civil legislation (Article 67.1 of the Civil Code of the Russian Federation) does not contain a requirement for mandatory notarization of the decision of the board. Paragraphs 2 and 3 of the aforementioned provision also provide for alternative methods of certification: for example, in the case of non-public joint-stock companies, this can be carried out either by notarial deed or by the person who keeps the register of shareholders and the counting commission; with regard to limited liability companies - either with the help of a notary, or in any other way specified in the articles of association or adopted unanimously by the general meeting of the company. However, the analysis of judicial practice shows that often the courts, when responding to requests for recognition of the decision of the general meeting of the participants of the enterprise as invalid due to non-compliance with the requirements in the form of their confirmation, start from the fact that notarization is a priority means of certifying the decision and the composition of the participants in the general assembly, as well as the choice. The alternative certification order must also be authenticated.

5. Another issue that causes a fairly large number of disputes must be addressed: the need to authenticate the decision made by the sole participant in the company. For quite a long time, there was a practice in the absence of the need to carry out this action, and such decisions of the only participant in a trading company were formalized in a simple form, without its authentication.

However, this position was significantly changed by the Supreme Court of the Russian Federation in 2019, which clearly expressed its position: "the requirement of notarization, as defined by paragraph 3 of clause 3 of the Article 67.1 of the Civil Code of the Russian Federation, also applies to the decision of the sole participant of the company" (Review of judicial practice on some issues of the application of legislation on business companies (approved by the Presidium of the Supreme Court of the Russian Federation on 25.12.2019), p. 4). As stated in the document, the specified legal rule is intended to exclude the possibility of falsification of the decision taken by the supreme governing body of the company, and its effect, therefore, should extend to the decision of the sole participant, since they are subject to the same risk to the same extent.

Of course, it is difficult to disagree with the justification provided, but it should not be forgotten that paragraphs 2 and 3 of Art. 67.1 of the Civil Code of the Russian Federation also provide for alternative methods of certifying the decision once, either of the general assembly and of the sole participant. And,

therefore, you can certify the decision on an alternative method of confirmation and no longer resort to the help of a notary. It can be concluded that, in principle, the problem of falsification of this type of documents has not been eliminated and can only be completely resolved by recognizing notarial certification as the only way to confirm the decision made.

6. The need for new forms of notarial participation in corporate governance in the context of the development of the digital economy and the exacerbation of the pandemic. Companies are using digital technology to hold general meetings of shareholders online. And this not only demonstrates the effectiveness in solving a number of problems, but also generates risks of violation of the rights of participants in the corporate sphere (for example, unauthorized representation in a meeting, substitution of minutes meeting, violation of the interests of individual participants, etc.). Guaranteeing the rule of law and minimizing risks through notarial participation by videoconference meetings face the following difficulties. The first problem concerns the identification of the participants in the meeting. It is the notary, as an independent third party, who could resolve the question of the identification of the participants in the meeting, if the law gives him the appropriate powers and access to the necessary technical means. It is worth noting that the Russian notary is ready to use new digital tools in his work. Yet the notary must be sure that the system which issues the corresponding conclusion guarantees its reliability and that its information is recognized as reliable at the state level. Modern legislation establishes the right of notaries to use biometric technologies in their work, and the provision for notaries' access to the unified personal data information system will come into force in December 2020. But for full application of such a format in the issues under study, it is necessary to carry out significant work, both in terms of developing an appropriate regulatory framework, and in terms of creating an efficient and reliable mechanism for biometric identification, recognized at state level. The problem of personal identification is not new, here you should pay attention to the scientific paper of authors investigating the use of the blockchain system (Páez et al., 2020).

At the same time, the transfer of any general meeting of shareholders and participants of enterprises to a remote form is associated with the presence of legislative restrictions, the law does not provide for the possibility of electronic minutes of the meeting and to certify it with an electronic digital, there is no provision to store these documents in digital form. Also, the legislative restriction applies to the forms of decisions made within the framework of such assemblies: the decision of the corporation board must be certified by a notary, while the notary, by law, must appear at the meeting in person to, among other things, confirm the list of participants present at the meeting, and cannot certify decisions taken by videoconference.

7. Conclusion

The scientific importance of the study lies in the justification of the role of the notarial institution as a necessary element for the development of digital economic relations, of the importance of notarial procedures as a necessary element in the prevention of corporate disputes on the basis of the analysis of Russian and foreign experience. The practical importance of the study lies in the following: 1. identifying the most urgent problems linked to the new format of notary participation and 2. formulating measures for their eventual resolution. Nowadays, in the context of videoconferencing and, generally, with the complete

shift of business enterprise meetings to digital format, it is impossible to ensure full protection of the rights of participants in enterprises for several reasons. The first problem concerns the identification of the participants of the meeting. Now the law has already guaranteed notaries the right to use biometric technologies in their work, and the provision on access by notaries to the unified information system of personal data will come into force in December this year. Yet to apply such a format in the issues under study, it is necessary to carry out significant work, both in terms of developing an appropriate regulatory framework, and in terms of creating an efficient and reliable biometric identification method, recognized at state level. Another problematic issue in terms of remote procedures in corporate governance is the certification of voluntary decision-making by either meeting participant, there is also a number of legislative restrictions that must be resolved by making changes: ensure the possibility of creating electronic meeting minutes and certify it with an electronic digital signature, set standards on the storage of these documents in electronic form.

References

- Civil code of the Russian Federation of 30.11.1994 N 51-FZ.
http://www.consultant.ru/document/cons_doc_LAW_5142/
- Federal law № 99-FZ “On the amendment of chapter 4 of the first part of the Civil Code of the Russian Federation and on the recognition as invalid of certain provisions of legislative acts of the Russian Federation”. <http://www.consultant.ru/law/hotdocs/58439.htm>
- Gargo, P., Ljustina, D., & Baran, A. (2018). Data management and knowledge management in notary public service. In D. Barkovic, B. Crnkovic, M. Z. Susac, K. H. Dernoscheg, N. Pap, B. Runzheimer, & D. Wentzel (Eds.), *Management Research XIV (IMR) Conference, Opatija, Croatia 2018* (pp. 1069-1095). Josip Juraj Strossmayer University Osijek.
- Gultom, O. B., Ginting, B., Lubis, M. Y., & Azwar, T. K. D. (2020). The role of notaries in the economic growth of Medan city. *IOP Conference Series: Earth and Environmental Science*, 452(1), 012038.
- Páez, R., Pérez, M., Ramírez, G., Montes, J., & Bouvarel, L. (2020). An architecture for biometric electronic identification document system based on blockchain. *Future Internet*, 12(1), 10.
- Pavic, D., Gagro, P., & Balatinac, K. (2019). Management system of the notary public service. In D. Barkovic, B. Crnkovic, M. Z. Susac, K. H. Dernoscheg, N. Pap, B. Runzheimer, & D. Wentzel (Eds.), *Proceedings of Interdisciplinary Management Research XV (IMR) Conference* (pp. 275-294). Josip Juraj Strossmayer University Osijek.
- Review of judicial practice on some issues of the application of legislation on business companies (approved by the Presidium of the Supreme Court of the Russian Federation on 25.12.2019). <http://www.consultant.ru/law/hotdocs/58439.htm>
- Sullivan, C., & Burger, E. (2017). E-residency and blockchain. *Computer Law and Security Review*, 33(4), 470-481.