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INTERNATIONAL AND BUSINESS LAW DEPARTMENT

Graduation Qualification Thesis

Problems with Legal Defense Methods against Illegal Takeover of Property (Raidering) in the Kyrgyz Republic

Student: Alexandra Cherkasenko

Thesis advisor: Shamaral Maichiev

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Introduction

Economic situation in any state depends on favorable investment and business climate in the country, which in turn requires an effective mechanism for property rights protection. State legislation regarding corporate issues, which meets international standards, and an efficient judicial system are the most fundamental mechanisms in defending property rights. Before the year of 2009 progress in development of corporate legislation has been very slow and the attention of the legislators was not adequately focused on this issue. However, at the turn of 2008 at the initiative of National Alliance of Business Associations (NABA), the president of the Kyrgyz Republic announced the year of 2009 as the year of private property defense in the Kyrgyz Republic and most of the news were filled with articles about illegal takeover of property taking place in the Republic and about the necessity of finding ways to solve the problem.

The word "Raidering" was chosen to give a name for hostile takeovers of property in Kyrgyzstan. However, currently there is no official definition of "raidering" in the laws of the Kyrgyz Republic as well as in the laws of a number of major CIS countries. Some officials refer to "raidering" as to illegal attainment of control over companies' assets and operation, while others speak of it as hostile takeovers in general, which is considered to be legal, for instance, in the United States and European countries. In the US many people define a corporate raid as a particular type of hostile takeover in which the assets of the purchased company are immediately sold off or liquidated. A hostile takeover is not unusual for western and European business practice, and it usually means that a company acquisition takes place despite management opposition where raiders pay money to previous owners for what they get from them. In Kyrgyzstan and the rest of CIS countries, an opinion towards "raidering" is different and it refers to *illegal takeover of property* where different illegal and fraudulent methods are used for attainment of control over company and its assets.

In 2009 Institute of Constitutional Politics (ICP) conducted a research, which described a situation of raidering in Kyrgyzstan and tried to give a definition to this phenomenon. Also, the research found out what ways and resources raiders usually use to takeover property. As a result, by the end of the research, the ICP gave a number of recommendations in order to eliminate the raidering problem in the Kyrgyz Republic. Thus, the research came to a conclusion that one of the main reasons why companies were suffering from raidering was an imperfect legislation in this sphere; and the Institute suggested to improve appropriate laws and provided draft bills, majority of which were adopted by the Parliament of the Republic and came into force. The changes affected such laws as: Civil code, civil procedural code of the Kyrgyz Republic, Law on Joint Stock companies, Law on Bankruptcy, Law on business partnerships and companies, Law on securities market, Law on bankruptcy, Criminal code, and Criminal Procedural code. As far

as the author is going to concentrate this research only on raidering in the sphere of companies' takeover, specific provisions related to this issue will be analyzed in this work and these anti-raidering provisions in the laws will be the main object of the present research paper. Consequently, present work will concentrate on such laws as Civil code, Law on Joint Stock, Law on business partnerships and companies, and the Law on bankruptcy.

This research paper is going to cover problems with raidering defense in Kyrgyzstan. Thus, the *main research question* is as follows: What are the legal problems with defense methods against raidering in Kyrgyzstan? The research problem can be further divided into *three sub issues*. (1) The first sub-issue is to identify common raidering schemes used in Kyrgyzstan. Having the raidering schemes used most commonly, it will be possible to go on to the (2) second sub issue, which is identifying defense methods against raidering used in the Kyrgyz Republic. These defense methods will be compared with defense methods used in the United States of America for better understanding the difference of approach to the problem. This information will lead to the (3) third and the main sub-issue, which is the legal problems with the defense methods against raidering. In this part the author will try to identify the least effective methods and to explain why they do not work or will not function efficiently. The main purpose of the thesis is to identify whether the anti-raidering legislation was needed to solve the problem of raidering and what kind of gaps the current anti-raidering amendments to laws have. At the end of the thesis some recommendations will be given in conjunction with international experience of raidering defense.

While researching the issue of legal defense methods against raidering the following research methods will be used: analyzing of laws and cases, analyzing previous researches conducted, and interviews of experts in anti-raidering activities.

The structure of the thesis paper is organized in the following way. The first part of the work will review findings of the previous raidering researches conducted in Kyrgyzstan, Russia, and Ukraine as the unique nature of raidering is very similar in all post-soviet countries. Precisely, this chapter will give general information about raidering. Secondly, it will analyze and describe main characteristics of sophisticated takeover schemes in the over mentioned countries and their features. It also will highlight common well-known defense methods that might be used to prevent raidering or hostile takeovers in the present case or to protect an entity against raiders in the United States. Further, this part will explore whether the above mentioned anti-takeover methods can be applied in Kyrgyzstan. While analyzing all these methods, the chapter will use several examples of raidering activities taken place in Kyrgyzstan for the last 5 years.

The second part of the thesis will analyze main defense methods against raidering that exist on the territory of the Kyrgyz Republic. Namely, it will first of all analyze provisions of the amended laws dedicated to anti-raidering norms. Secondly, it will compare methods that used to exist before the amendments came into force and it will conclude whether the amendments were necessary for defending companies against raidering. In other words, problems of the current anti-raidering legislation will be explored. And finally the chapter will analyze other anti-raidering defense methods such as law suits, claims to other executive bodies, and self defense.

And the last, third part of the thesis will cover recommendations of the author for defending against raidering.

1. NOTION AND DEVELOPMENT OF LEGAL METHODS AGAINST RAIDERING

1.1. General Provisions on Raidering in CIS countries and Kyrgyzstan

Mergers and Acquisitions in the CIS countries

Raidering became a very popular term for the last couple of years. Some people are talking about it with blame, others with curiosity or even with admiration. Some experts refer to it as to something illegal and believe that it is a crime; other experts consider it to be totally legal and even beneficial for the overall economy. Thus, before going on to analyze raidering defense problems it's important to see what raidering actually mean and what methods raiders use in their activities.

Raidering is a comparably new term for the CIS countries and comes from an English word "raider", which is used in the context of hostile takeovers in the United States and Europe. "Hostile takeover" is an attempt to obtain a control over a company by the way of buying shares in the securities market against the will of management or majority shareholders of the company.[1] Also, the most common definition of a hostile takeover in western sources is used in denoting the deals on acquisition of a controlling interest in the target company by the bidder from its shareholders. Out of five terms that Civil code gives for identifying types of reorganization (consolidation, joining, transformation, division and detachment), such forms as consolidation and joining are the closest to takeover forms, that's why some authors imply by the term "consolidation" all the deals covered by "mergers and acquisitions" term[2]. The Civil code of the Kyrgyz Republic as well as other laws don't provide such term as an 'acquisition', yet the term of 'merger' exists in the Civil code, yet its meaning slightly differs from the one used in western countries in the context of 'Mergers and Acquisitions' business.

Merger is a takeover by purchase of securities or major capital; consolidation of the companies; joining of the companies (for instance, A+B=C (a merger) or A+B=A (a joining). Acquisition – purchase of shares; takeover (no consolidation of organizational structures occur); gain of controlling interest in another company (A+51% of B=A and B)[3]. So, if *merger* is joining of two and more business entities for formation of a new business entity, then *acquisition* is a transaction that is made for establishing control over a business firm by acquiring more than 30%

[1] ABBYY Lingvo dictionary (12 version)
[2] Belenkaya O. Analiz korporativnyh sliyaniy i poglosheniy. // Company management, 2001, #2, p. 3 available at http://www.e-xecutive.ru/knowledge/announcement/338266/, visited May 3, 2010.
[3] Shaihutdinova Y. Hostile takeover defense. // Graduation qualification thesis, AUCA 2004, p. 6.

of authorized capital (shares, stocks, etc.) of the acquired company. In the process of acquisition a legal independence of the company is saved.[4]

Therefore, hostile takeover is a part of Mergers and Acquisitions (M&A) business, and the nature of the term is buying the company without the consent of management of the company. This practice is accepted and legal in western countries. Hostile takeovers are usually conducted by a person or an organization called a "raider". A financial management dictionary gives the following definition of this term. So, "raider" is a person or an organization that acquires a substantial holding of the shares of a company in order to take it over or to force its management to act in a desired way.[5]

M&A business is a highly profitable business used to expand someone's business or to change an owner and it is considered legal in the world. Some economists think that M&A is a normal condition of the economics and that rotation of owners is necessary for maintenance of effectiveness and for prevention of business stagnation. Followers of this point of view usually face with "very legal" redistribution of companies usually practiced in western countries and Europe.

During the era of Soviet Union collapse in 90s, the M&A business came to the present CIS countries and other authors' opinions appeared on the topic where authors expressed an opinion that M&A is "killing" an honest competition, destroys stability in the business atmosphere of a country. Thus, Yuriy Borisov, in his book "Playing in 'Russian M&A" described a history of property redistribution in Russia and creation of private monster-companies after effect of mergers and acquisitions, which showed negative aspect of the notion. Another specialist in the sphere, Yuriy Ignatishin in the book of "Mergers and acquisitions: strategy, tactic and finances" considers M&A transactions as one of the instruments for development of a company that can give a very synergetic effect in case of smart use.

This variety of opinions shows that when M&A business came to the post soviet union countries, redistribution of property and companies was being done not always in the terms of how M&A business was functioning abroad. A term of "raidering", appeared during this time, is associated with illegal hostile takeover, when an owner did not agree to dispose the property, but the raider did that without the owner's agreement using various methods including illegal ones. This very characteristics of raidering make it illegal and, thus, not accepted.

[4] Ibid
[5] ABBYY Lingvo dictionary (12 version)

History of Raidering

Appearing of Mergers and Acquisitions was not the only raidering precondition in the CIS countries. According to some authors, the collapse of the Soviet Union and a wave of privatization was the main cause of raidering and this was the time when first raidering attacks appeared. Russia was the first country among other CIS states where raidering appeared as a notion. As it was mentioned before, beginning of the 90th can be regarded as a reference point of raidering history in Russia, thus in the Commonwealth Independent states territory. During this time massive privatization of companies took place after the collapse of Soviet Union. Thousands of state authorities and managers left the governmental sector and came to the private one. However, these former state employees kept in touch with supreme management of federal, regional and local level, as well as with state security bodies. This period was characterized by significant weakness of legal and economic system. As a result the process of privatization had many illegal aspects because many people that became businessmen and had good connections among political management, gained huge profit as they obtained control over valuable state assets that they were getting for a minimal value. They got an opportunity to influence state authorities, conduct illegal auctions, limit number of their participants, provide understated assessment of companies value at the auction, eliminate problems connected with licensing and tax authorities inspections at the companies, which they owned. At the same time, in the ninetieths there was a strong belief that every private company should have a so called "roof" for defense against attacks of organized criminals and from corrupt state authorities[6]. A more significant type of crime in the CIS countries during this time was so called racket, i.e. a compulsion of a businessman to pay kickback for services of defending the business. In some cases racket was followed by direct takeover of business – formal or not formal. In the view of representatives of the Institute of Constitutional politics[7], racket can be considered as a prototype of modern raidering.

Since that time nobody keeps an eye on raidering attacks statistics in Kyrgyzstan, but as a notion it appeared in Kyrgyzstan in the beginning of the XXI century and the number of raidering attacks started increasing after the March revolution of 2005. However, even before this time, some facts of raidering still took place. An example can be a takeover of publishing house (Vecherniy Bishkek). Revolution of 2005 directly promoted redistribution of property and was followed by such slogan as "steal stolen" and was justified by the opinion that former class

[6] Sattels, A., Rasprostranenie korrupcii: nasilstvennoe pogloshenie, korporativnoe reiderstvo I zahvat kompaniy v Rossii, 2009, p. 2.

[7] Institute of Constitutional Politics, Reiderstvo (vrazhdebnye poglosheniya) chastnoi sobstvennosti v Kygyzskoi Respublike, Informational-analytical document, Bishkek, 2009, p. 8.

of owners enriched itself at the expense of people by means of the government power[8]. The last April revolution of 2010 was also followed up by a big number of raidering attacks, and the slogan was the same. Therefore, very often redistribution of property in Kyrgyzstan has not only economic but also political reasons.

Differences between raidering, marauding, and unauthorized construction

Together with raidering other events happened in Kyrgyzstan during the revolutions: marauding (when looters were robbing stores and were taking over all the property and goods that they could find in the stores); the actual moment of the 2010 revolution was land takeover, when a big group of people were getting into others' houses with the use of force and were trying to turn the legal owners out of their houses in Mayevka village, as well as in other parts of the Bishkek; and when people were just choosing the land where they would like to live and started construction of houses on this land without any prior legal procedures. The mass media called all these events as raidering events even though in reality, it's difficult to call them raidering. In order to determine how to qualify these events, it's necessary to detect raidering criteria[9]:

- Performing activities aiming at taking over of others' property;
- Realization of these activities with minimum expenses;
- A necessity to legalize property rights for getting final benefit by the raider (usage of the property object, its reselling, etc)
- Realization of these activities under protest of the legal owner and on the conditions under which the legal owner would not make a deal;
- Realization of the activities with the use of criminal acts: fraud, abuse of trust, forcing of making a deal, black mail, falsification of documents, bribes, abuse of public authority, etc.

Therefore, it's possible to give the following variant of raidering definition:

Raidering is an activity aimed at acquisition of somebody else's property under protest of the owner with minimal expenses by means of criminal and administrative

[8] Ibid

[9] Anti-corruption committee of the Russian Federation, Report on a research "Predlojeniya po povysheniyu effektivnosti borby s reiderstvom (nezakonnym zahvatom sobstvennosti)", 30.08.2008. The Report can be found at: http://www.vdcr.ru/content/view/1309/193/1/2/, p. 14.

punishable acts with the further legalization of the property obtained rights and reselling it on a market price to the requester of the raidering or to the bona fide buyer[10].

It happens often in Kyrgyzstan when politicians and journalists consider looting (marauding) to be a synonym of raidering. In fact, they are completely different terms and notions. Marauding, which can be regarded as a synonym for "robbery", differs from raidering because the "new owners" do not need further legalization of the property obtained rights in order to use the goods, in other words, looters can take into their possession a refrigerator from a store, but in order to use it, they don't need to register it and legalize their property rights. In the case of land takeover, it can be regarded as a robbery, i.e. an attack aiming to takeover of other's property by the means of physical violence. In some cases it can be regarded as a very primitive black raidering the information of which will be followed further in this research.

Difference between Raidering and Hostile Takeover

In May of 2008 a research was conducted in Russia under the following name: "Raidering as a social economic and political phenomenon of modern Russia". The research highlighted opinions of the well known experts in the sphere: the well known lawyers, politicians, businessmen, and economists. The most important data and outcome conclusions of the research were given in the social research on raidering. One of the respondents gave a broad but commonly used meaning of raidering: "Raidering is a hostile takeover of property and companies, land parcels and ownership rights, which is conducted by means of inadequacy of a legal basis and by the corrupt use of state, administrative, and power resources"[11].

From this definition it's possible to underline **three main objects of raidering**, which are: property and companies, land parcels, ownership rights. Due to the necessity to analyze a narrower aspect of the topic, *corporate raidering will be the main topic of this work.* Before going on to analyze defense against corporate raidering, it's necessary to understand what this term actually means and what the difference is between raidering in the CIS countries and hostile takeover in the rest of the world.

In the most countries of the world hostile takeovers or corporate raidering is a method of a company takeover by the way of buying-up of major holding of shares usually without a direct

[10] Ibid

[11] Report of a sociological research "Reiderstvo kak socialno ekonomicheskoe I politicheskoe yavlenie v sovremennoi Rossii", 2008, Moscow, p. 13, the document can be found at www.politcom.ru/tables/otchet.doc, last visited May 5, 2010.

consent of board of directors or shareholders, and after that at the expense of the obtained votes, which the shares gave, measures on increasing the value of shares are conducted (decrease of expenses, restructuring, downsizing, liquidation, sale of assets, etc.). As a rule, corporate raidering is leading to a situation when right after the takeover of a company, its value of shares is increasing, even though perspective of further development of the company can be disrupted. In this case, raiders have a goal to get benefits from the maximum increase of shares value by means of the fast and short redirection of investments. For example, when Microsoft company decided to buy Google, it offered to buy the shares of Google company and after getting a refusal from the major shareholders of the company, it started buying shares from the minority shareholders without a consent of the top management and by time obtained a big enough holding of shares[12].

Corporate raidering in Russia and the rest of CIS countries can have an extremely different nature, when prepared people literally take a company by storm, grab official documentation, cash, valuables, and get a legitimate owner out of the company. During this situation, the owner is left with nothing except debts, threatening of being arrested for nonpaying of taxes. This type of corporate raidering is making the owner to give assets of the company to the raider for free or for the price, which is much less than the marker one[13]. This described type of raidering is the most rigid one, in reality, other less rigid methods are used, but all these aspects have a common aspect, which is *illegality of raidering actions.*

The declared points of view are supported by some experts that were interviewed in the over mentioned research conducted in Russia. So, the experts tried to provide a difference between a hostile takeover and raidering. One of experts stated that the main difference between hostile takeover and raidering is that during the hostile takeovers usually legal methods are used. As one of the Russian experts said, "Hostile takeover is an absolutely legal form of takeover of property, when a whole sum of money is paid for the property in order to exclude a competitor; whereas raidering is a way to get a property for one hundredth or one tenth of its original price. In the first case the business is done with a help of money and courts, but in the second case, the business is done by means of force, courts, and in a considerable smaller level, by money"[14]. Therefore, it can be concluded that *raidering is a type of hostile takeover conducted by methods that are considered to be illegal.*

[12] Google Drives Microsoft's Hostile Bid for Yahoo, news portal, the document can be found at http//www.gigaom.com/.../google-drives-microsofts-hostile-bid-for-yahoo/, last visited May 5, 2010.
[13] Sattels, A., Rasprostranenie korrupcii: nasilstvennoe pogloshenie, korporativnoe reiderstvo I zahvat kompaniy v Rossii, 2009, p. 3.
[14] Report of a sociological research "Reiderstvo kak socialno ekonomicheskoe I politicheskoe yavlenie v sovremennoi Rossii", 2008, Moscow, p. 15., the document can be found at www.politcom.ru/tables/otchet.doc.

Classification of Raidering

As far as raidering is such a notion that cannot be put into one specific definition, classification was needed. The research on raidering conducted in Russia gives the following types of raidering existing in the CIS countries: greenmail, white, grey, and black raidering[15]. Each type of raidering has its own characteristics and unique features.

1. *Greenmail is the first and the most harmless type of raidering.*

Corporate greenmail is a complex of different unfriendly corporate activities, performed by minor shareholders against the company. Taking into account methods that greenmailers use, some researchers call the greenmail "a kind of highly intellectual extortion".[16] The reality is that some of minor shareholders who have a small holding of shares are more interested not in developing the company and gaining more dividends, but rather in selling the shares to other shareholders on overprice. They were granted with a comparatively big amount of rights by the Kyrgyz Republic law. For example, according to Article 63 of the Law on Joint Stock companies, a shareholder who has 10 percent of shares has a right to demand an audit conduct. In accordance with Article 62 of the same law, such shareholder can demand revision of financial-economical activities of the company at any time.

Greenmailers have a lot of schemes with the help of which they abuse their rights as minor shareholders and create problems for the company. For illustrations we will take the simplest scheme: first of all, a greenmailer buys a small holding of shares and sends a request to the company to provide him with internal financial documents. If the company refuses to give the new minor shareholder such information or just cannot give the information because of objective reasons (which happens not so rarely), the shareholder applies to administrative bodies, working with securities, against the company with a claim that the company violates his or her rights as a shareholder. Having the decision of administrative bodies in their hands, the greenmailers start the process of impleading authorities of the company and the company itself. Then the shareholder initiates anti-advertisement program of the company creating an image of an entity that violates the shareholders' rights. Numerous similar activities of minor shareholders lead to property sequestration and their goal on this stage is to "paralyze" business. In the process of all that, they offer the company to buy their shares on a very high price or to dispose a company's

[15] Ibid, p. 14.
[16] Gureev V.A., Problemy prav i interesov akcionerov, 2007, the article can be found at http://www.google.ru/search?hl=ru&newwindow=1&q=%D, last visited May 3, 2010.

property that the greenmailer needs. The company that dreams only about getting rid of such a problematic shareholder has to buy the shares at any price.

The most interesting moment in these schemes is that in fact such shareholders do not break the rule of law and their greenmail methods are legal as the law does not have any provisions limiting the rights of the minor shareholders to dispose their shares. In fact, they abuse the rights that the law provides them with. As an example, their greenmail instruments include request to the company to give them information, lawsuits to courts on nullifying the decisions of the company's bodies, challenging transactions performed by the company, recovery of damages made to shareholders by the Joint Stock Company, etc.

Activities of such greenmailers are especially dangerous for big companies as after those activities the reputation of the company worsens and it loses investors. Defense against greenmail can take different types and in some countries it is even considered as an offense. Thus, a number of European countries after the sad experience with greenmailers have a greenmail responsibility in criminal codes. The United States found another way to solve the problem - American legislation provides a "greenmail tax". Under Title 26 of the United States Code of Federal Regulations, the "Code imposes a tax equal to 50 percent of the gain or other income realized by any person on the receipt of greenmail, whether or not the gain or other income is recognized…"[17]. This tax makes it very unprofitable for bad faith shareholders to sell their shares.

Even though some experts include greenmailer's activities to the list of raidering types, in the context of the present research *greenmail cannot be considered as raidering* as it lacks an important part for admitting it to be corporate raidering - illegality of taking over methods.

2. *White raidering* – is a well planned takeover of the company, which is conducted even though against the will of an owner, but strictly according to the law. This type of raidering is mostly widespread in the western countries and can be called a *hostile takeover*. At white raidering corporate lawyers use loopholes of legislation in order to get benefits for the company-raider. Many experts say that it even helps to develop an economy and doesn't bring any major harm. This type of raidering is hard to call a crime; it's a legal and wide spread business, which is called Mergers and Acquisitions in the west. As a rule, such hostile takeover type is applied to companies with weak and not developed corporate governance and with financial problems.

[17] United States Code of Federal Regulations, Title 26, the document can be found at http://www.gpoaccess.gov/CFR/, last visited May 3, 2010.

Defense against white raidering usually takes place in the company itself, in judicial and administrative bodies.

3. Grey raidering – soft type of takeover of a company that is conducted with external legal methods, similar to the methods used in white raidering. However, complex of these methods forms a fraud scheme. This is a pretty widespread method of raidering; and in the schemes used, it's hard to examine even for an experienced specialist. Defense against raidering of this type is very difficult regardless the unlawful intention of the actions as far as very often it's almost impossible to prove the unlawfulness of the externally legal actions.

4. Black raidering – illegal takeover of property using criminal methods that can even be related to physical violence: subornation, black mail, force entry to the company, tampering with authorities (judges, workers of law machinery bodies), falsification of documents, etc. These methods of raidering are possible to apply against any company, but first of all against a non-public one. In Russian literature they say that this type of raidering is quite rare now and is going to be left in the past. However, raidering events during the marauding days on the 7-9th of April, 2010 in Kyrgyzstan, show that black raidering still exists in the Kyrgyz Republic and the state needs to defend against it. Defense against the black raidering is conducted with the help of all available methods, first of all in the law machinery and judicial bodies[18].

Some authors mark out the fifth type of raidering, and red color was chosen for it. Red raidering means that the state bodies take a role of a raider and take over private property themselves. This type of raidering is wide spread almost in all the CIS countries and shows the situation when the state obtains a big holding of shares for controlling the business branch.

As far as greenmail and white raidering are conducted via totally legal methods, these types of so called raidering cannot be regarded as corporate raidering in the context of the present research. Corporate raidering is conducted through the use of illegal methods; therefore, the further analysis will be concerned only about grey and black raidering. We will touch upon red raidering in some cases as well.

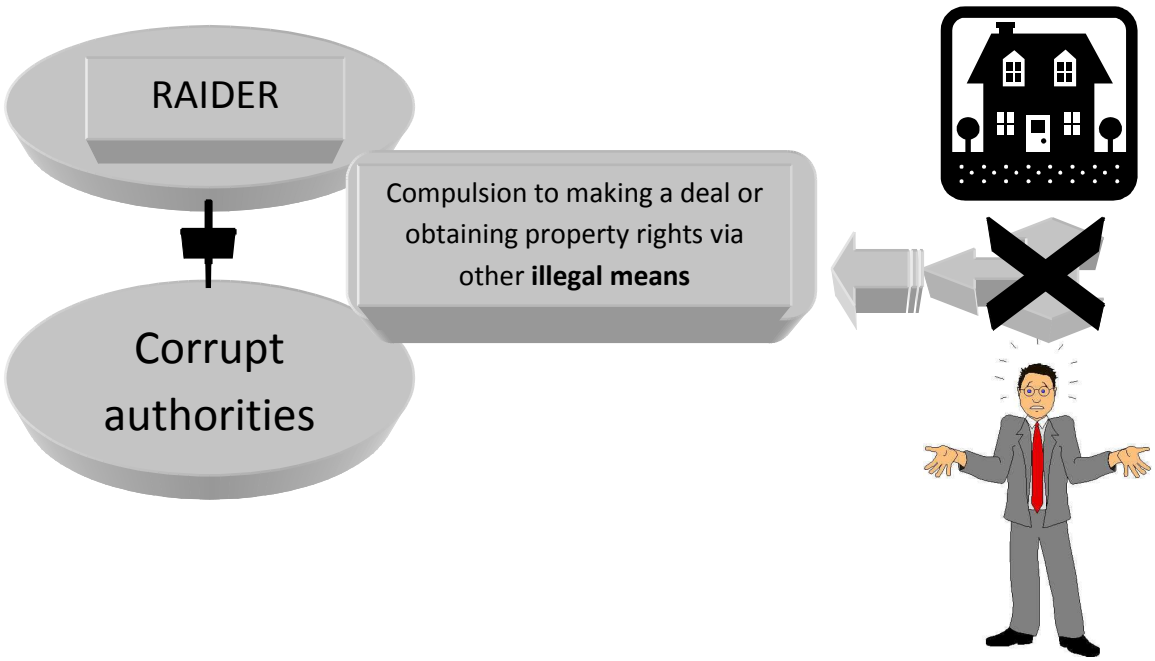
There are two main methods[19] that raiders use to take over the property:

[18] Report of a sociological research "Reiderstvo kak socialno ekonomicheskoe I politicheskoe yavlenie v sovremennoi Rossii", 2008, Moscow, the document can be found at www.politcom.ru/tables/otchet.doc p. 14. Anti-corruption committee of the Russian Federation, Report on a research "Predlojeniya po povysheniyu effektivnosti borby s reiderstvom (nezakonnym zahvatom sobstvennosti)", 30.08.2008. The Report can be found at: http://www.vdcr.ru/content/view/1309/193/1/2/, p. 20.

- Creating of rights on a property object (when raider uses different illegal methods for legalization of the property right)

- Compulsion to the transaction (exerting pressure on the owner).

The common takeover method can be illustrated in the following scheme:



This scheme clearly shows the main parties of the raidering realization: raider with a help of corrupt authorities (judges, executive and administrative bodies) takes over the property object from the legal owner by the means of compulsion to concluding a deal or by obtaining the property rights to the property under protest of the legal owner using other illegal methods.

The next part of the research will analyze several specific widespread schemes that are used by raiders.

1.2. Common takeover schemes used by raiders

The CIS market for raidering is less than 20 years old, however, it has hundreds impressive numbers of raidering schemes. If we compare raidering schemes and hostile takeovers in the west and in Europe, then a key feature of the CIS market is the predominance of administrative resource help during the takeovers, i.e. it's an assistance of state officials. Such researches as Volkov, Demidova have found out many raidering schemes used in Russia. As an example, Radygin divided acquisition methods in Russia into main six groups. First is buying up various shareholdings on the secondary market. Second is lobbying for privatization transactions involving state-owned shareholdings. Third is the incorporation of the target company into a holding company or into other groupings with the aid of administrative means. Fourth is the buying up of debts and their transformation into equity in the target company. Fifth is the seizure of control through bankruptcy procedures. Sixth is the initiation of judicial rulings, including their falsification (e.g. rulings purportedly issued by nonexistent courts, not properly registered, or bearing a forged judge's signature)[20]. Unlike the situation in Russia and other CIS countries, in the USA and EU countries with their well-developed rules in the area of M&A business and high level of compliance with law, the misuse of administrative resources or of the judicial system for these purposes is unlikely. Moreover, the takeover of control by means of bankruptcy

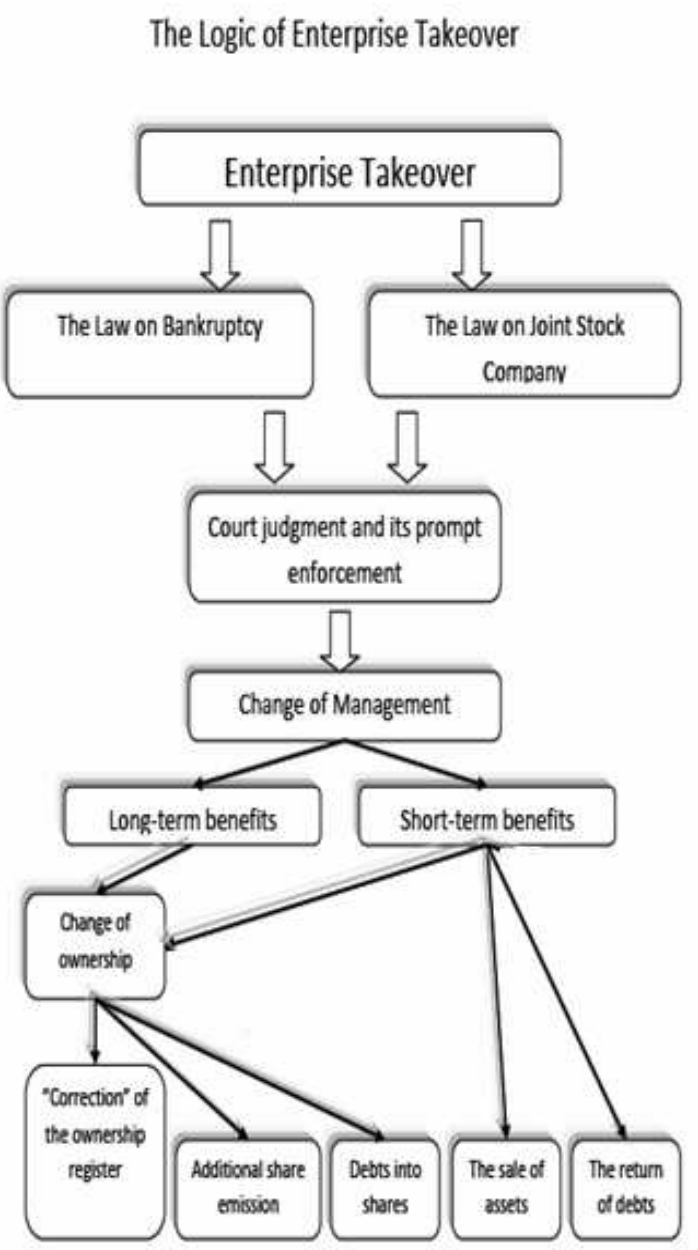


Figure 1
Vadim Volkov, 2004

[20] Kirill Tishchenko, Effective Defense methods against hostile takeovers and raiders in Russia, Helsinki, 2009, p. 21., the document can be found at http//www.hsepubl.lib.hse.fi/FI/ethesis/pdf/12130/hse_ethesis_12130.pdf, last visited May 5, 2010.

procedures and debt-equity swaps (when debt of the debtor is exchanged to the shares of his company) are not generally accepted takeover methods in the USA and the EU.

In spite of variety of takeover schemes, almost all researches argue that obtaining a controlling interest in target through aforesaid schemes tends to be based either on the Law on Bankruptcy or on the Law on Joint Stock Company (see Figure 1). According to V. Volkov, most often aggressors can either use the Law on Bankruptcy by initiating bankruptcy procedure or frame its assault as a defense of minority shareholders' rights and refer to the Law on Joint Stock Companies. Furthermore, the establishment of managerial control is a necessary precondition for reaching the main objective, which can be either a long-term or a short-term business interest. Consequently, procedures implemented through above stated laws are applied in order to give the change of management an appearance of legality[21]. Consequently, to obtain a controlling interest (ownership), the aggressor can further use an array of methods, such as amending the register of shareholders, issuance of additional shares, conversion of debts into shares, etc[22].

The array of methods showed in Figure 1 above is supported by cooperation of numbers of actors and agencies. One of the experts in this sphere, Kireev, argues that whatever the strategy is chosen, a prearranged and quick court decisions and the availability of a powerful enforcement agency are vital[23]. Local experts and researches also support the point of view of the over mentioned authors. Thus, *each raidering method relies on a particular combination of several actors and agencies as state courts, a governor or head of a local administration, law enforcement* (Public Prosecution Office, Ministry of Internal Affairs, or Ministry of Justice), other state authorities.

As far as the common logic of corporate raidering conduct is analyzed, it's a high time to look at specific methods in details and try to understand their nature. Nowadays corporate raiders invent new ways of a company takeover, they constantly change their schemes as the legislation, political and economic situations in the country are changing. Year by year raidering schemes are becoming more sophisticated. In general, illegal takeovers could be classified into the following categories:

[21] Volkov, V., Hostile Enterprise Takeovers: Russia's Economy in 1998-2002. Review of Central and East European Law 4, 2004, 534.
[22] Kirill Tishchenko, Effective Defense methods against hostile takeovers and raiders in Russia, Helsinki, 2009, the document can be found at http//www.hsepubl.lib.hse.fi/FI/ethesis/pdf/12130/hse_ethesis_12130.pdf, last visited May 5, 2010, p. 21-23.
[23] Kireev, A., Raiding and the Market for Corporate Control: The Evolution of Strong-Arm Entrepreneurship. Problems of Economic Transition, 30.

1. *Forced bankruptcy*

This scheme of raidering was one of the most widespread ones in Russia and Ukraine when raidering just appeared in these countries. Raiders use weakness of financial positions of the company as a takeover method. The raider-company buys debt instruments or one of suppliers of the company. Then they block payments and ignore attempts of the company to legally sink a debt. After that raiders send the case to the court aiming to get shares of the company and initiate its bankruptcy and sale of assets in an auction, that is conducted illegally, and that gave an opportunity to gain control over the company[24].

In Ukraine, the scheme is similar but due to many loopholes in their Law on Bankruptcy, the schemes are more sophisticated. First, the company-raider buys a company's debts and files claims on the company's accounts and assets. Second, the courts start bankruptcy proceedings, and the shareholders are not longer in control of the company. The creditor committee takes over the company and recommends (elects) a bankruptcy proceeding manager. In bankruptcy proceedings, a company's creditors may make a decision to issue new stock in order to satisfy creditors' claims and alienate assets of the company. This type of hostile takeover poses higher risks and costs. The company-raider objective is to gain control over the creditor's committee, which make decisions regarding the company's assets and operations. *In Ukraine, bankruptcy law allows creditors to sell and/or restructure assets, debts and capital of the bankrupt company.* The creditors' decision is subject to court approval. Secured claims, taxes and labor are to be satisfied before the unsecured creditors' claims. As a result, the company-raider is interested in debts with collateral on assets of the company. In this case, it may claim the most lucrative assets of the bankrupt company. Bankruptcy procedure is an extreme scenario since shareholders lose control over the property. In most the outrageous instances, companies are forced into bankruptcy when the "hostile company" buys outstanding debts, and then changes the company's accounts and requisites. The "attacked company" cannot transfer money to old accounts (pay its debts), and it discovers that a company-raider filed a bankruptcy petition[25]. Various scenarios and tactics are applied to defame the company's reputation and disrupt business operations that affect the solvency of the targeted company.

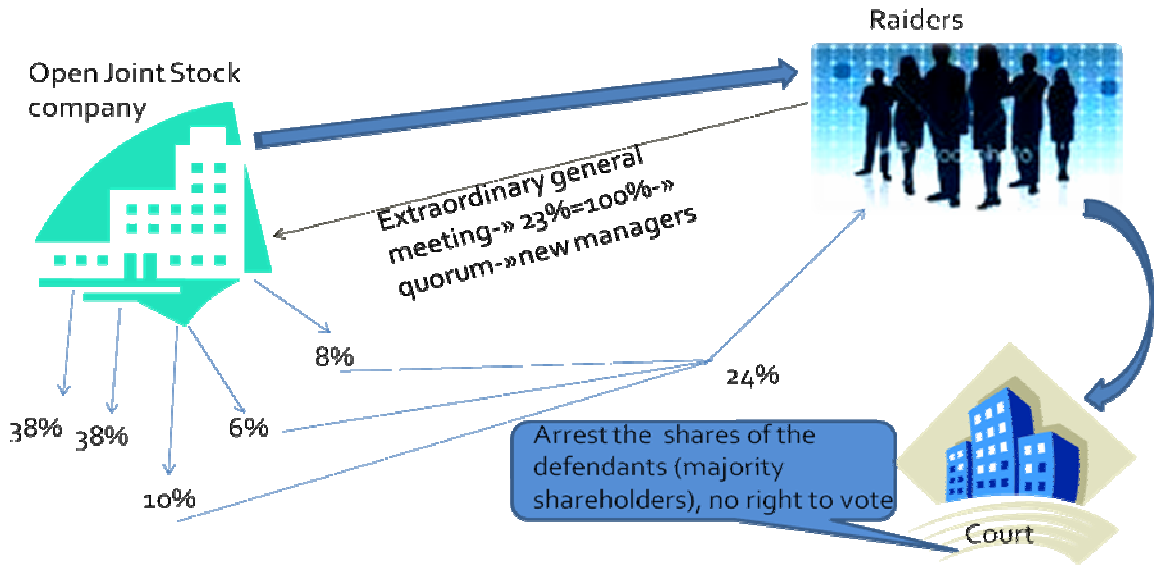
2. *Company stock and Shareholders use schemes*

[24] Sattels, A., Spreading of corruption: hostile takeover, corporate raidering and takeover of companies in Russia, 2009, p. 4.

[25] Edilberto Segura, Andrey Bubnovsky, Hostile Takeovers in Ukraine, Public policy paper, The Bleyzer Foundation, p. 3., the document can be found at http//www. sigmableyzer.com/File/economic/Hostile_takeovers_in_Ukraine.pdf, last visited May 5, 2010.

After adoption of anti-raidering norms raiders have to invent new schemes, and schemes when raiders use shareholders for reaching an aim are very popular now and they are similar to the methods used in western countries: for example, raiders buy shares for gaining legal access to accounting documents or getting places in the board of Directors for obtaining control over the company's activities and access to the information. Then raiders try to change a register of shareholders, thus, they are passing right formally in a legal manner. Also, in the raiders' schemes law enforcement bodies can be used. They can be forced to initiate an investigation with confiscation of main documents of the company; these documents can be later falsified for passing property rights to the raider.

Figure 2



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In the Figure 2, expressed above, one of the most widespread schemes is illustrated. Almost always targets of raiders become companies, which have "skeletons in the closet", i.e.,

which themselves performed something illegal in the past or keep on doing that in the present. Taking it into account, raiders chose as a target a company, which has two or three major shareholders that possess total 76% of shares. Besides the major shareholders, the company has minor shareholders, each of which possesses from two to 10 shares. Raiders apply to the major shareholders with an offer to buy their shares for a very low price, and when they got refusal, they started buying shares from minor shareholders with a use of various methods of persuasion, including illegal ones such as black mail. When they obtained the shares, they can apply to the court with claims against other shareholders and a company as a whole. So, raiders go to the court with a claim against the company about illegal obtaining of shares in the past and making loss to the company. Simultaneously a petition on putting an arrest to the shares of the majority shareholder with deprivation of voting right was presented in the court. In raidering activities courts play a huge role, and very often they appear to be corrupt and make a decision that will satisfy a raider. In our case, the judge satisfies all the demands of raiders and the majority shareholders cannot vote. Then raiders initiate an extraordinary general meeting, where they decide that 23% are 100% at the moment and this is a quorum. They appoint new managers who start selling off the assets of the company to third parties. After some transactions, raiders buy the assets from a bona fide purchaser. The major shareholders are left with nothing, even though the whole process of depriving shareholders of their votes was illegal, but this is the essence of raidering in the Kyrgyz Republic.

Other schemes in this group apply to the conflict between majority and minor shareholders. Majority shareholders use an additional issue of shares as the most widespread method of "*washing out*" share proportions of minor shareholders. The scheme used is also very simple: a decision is being adopted by the company to increase founding capital on 300%. This increase is made through an additional issue of shares conduct. That means that if a minor shareholder has 8% of shares, after the issue he will possess only 2,7% of shares. Of course the shareholder can buy additional shares in addition to remain the same percent of shares packet, but not all the shareholders will be ready to pay money and do it. Another scheme is based on a situation when a minor shareholder, who is voting by warrant, filing a suit on damnification from the side of the majority shareholder. If the court makes a decision for the plaintiff, then shares of the defendant are sold at an illegal auction, which lets the raider, who controls the minor shareholders, to get the portion of shares. The best raider's victim is a company that breached a right of a minor shareholder during privatization and consolidation of shares.

In Ukraine most of the corporate raidering attacks at this group are conducted by means of shareholders' meetings and registrars. There are many abuses or wrongdoing related to shareholders' meetings and company share registries. For instance, "in order to obtain the "necessary" decision, the party to a raider company may breach shareholder right and law by open falsification of shareholder meetings protocols, convening alternative shareholders meetings that appoint new executive and oversight Committees, manipulating shareholder meeting quorums by denying access of shareholders at the general meeting, convening meetings at poorly accessible or hard to find locations, forging powers of attorney, creating multiple registrations before the vote on "necessary" issues, incorrectly counting votes by the Mandate commission (controlled by Executive Committee), etc.

The company stock Registrar plays an important role in raidering as well. The company-raider may attempt to buy the Registrar before the attack, or buy (bribe) the information from the shareholders' registry. Control and/or access to the shareholders' registry helps delay the registration of new shareholders (on official grounds despite the 5 day period provided by law for share property rights registration), use older versions of registries at the general meeting (ignoring new owners), convene an alternative general meeting, certify the powers of attorney for the proxy vote, etc"[26].

In some cases of such schemes, it is a criminal offense, while in others it is a result of mismanagement and conflicting legislation.

3. *Schemes with the use of creditors*

[26] Edilberto Segura, Andrey Bubnovsky, Hostile Takeovers in Ukraine, Public policy paper, The Bleyzer Foundation, p. 4, the document can be found at http//www.sigmableyzer.com/File/economic/Hostile_takeovers_in_Ukraine.pdf, last visited May 5, 2010.
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New schemes with the support of *banking sector* appeared during the current economic crises in Russia. According to the information given by the National committee on war against corruption, creditors take part in raidering schemes by means of banking information on credits and deposits. Using such scheme raider is working in touch with banking managers of the middle level that help him to identify debtors whose financial positions are weakened by the crises. As soon as the company refinances the credit, bank gets information on financial position of the company-debtor. If managers of the bank are associated with raiders, they can unite in order to seize assets of the company and leave the debtor with unpaid debts.

As far as the debtor uses his assets as the credit security, the bank can conduct reassessment of his assets and decrease their value. Then the bank can inform the debtor about the necessity to bring in an additional pledge for securing the credit. Aiming to exert pressure to the debtor, very often bank acts together with tax inspection and other bodies of supervision. If the debtor is not able to bring in an additional pledge, then bank files a claim to the court that the debtor doesn't fulfill his obligations and demand the debtor to return the credit and penalty fee immediately. The bank then takes all the measures to ensure that the pledged assets of the company-debtor would be assessed lower than the amount of the credit and the raider gets the assets on a lower price. As a result, the debtor loses his property, which passes to the raider. Also, the raider still has the bank debt for the same amount of money as the sum of money that the raider paid for the property, doesn't cover the credit or the penalty fee, which is set by the court's decision[27].

4. Fraud

Falsification of documents, such as minutes of meetings, falsification of signatures, bribes to registrars, produce of falsified documents, tampering of authorities, is another scheme of raidering. The most wide spread and checked form of raidering is re-election on the basis of fake and semi legal meetings of shareholders, when they are conducted by 3-5% of shareholders and re-elect a director general. A Russian expert shared information on this scheme: the new general director starts fulfilling his obligations on the basis of the court decision on removal of the

[27] Ibid

former general director. During the time when the rest of 95% of shareholders prove in the court that this person is not the general director but a swindler, he manages to sell the company's assets to the innocent buyer that acted in good faith or he can transfer the assets to another form of ownership through a front company. Another popular method of illegal takeover of property in Russia is falsification of a court decision that is made in another region, which is situated far away with the maximum difference in time. Raiders with such a decision come to a bailiff in another city and he starts directing to claim to property, which is situated in another city. It's not very easy to check reality of such a decision[28].

5. *Manipulation with Tax Code*

Raiders tend to use connections with state authorities in order to conduct illegal takeover of companies. One of the schemes that is associated with state authorities is related to tax code. For example, a businessman that has some connections among politicians comes to an agreement with an inspector of a local tax body officer that he "detects" violation of tax code that foresees a significant fine. Then they set to a "violator" an outrageously big fine or they don't let the violator to redress. After that the local tax inspection confiscates assets of the company and sells them on an illegal auction, which lets the corrupt businessman to get the assets for a very cheap price. Even if later another court makes a decision for the benefit of the legal owner, he gets only the sum of money for which the assets were bought on the auction but not the real value of the lost assets[29].

6. *Company Management*

Corrupt management of the company can support illegal takeover of property. Thus, the company's Chief Executive Officer (CEO) has extensive powers to support raidering. The shareholders may significantly reduce the powers of CEO by delegating certain powers to the Board of Directors. Since the CEO manages the operations of the company, unrestricted authority over purchasing the loan decisions and company assets are frequently used to drive the company into bankruptcy and/or strip the most valuable assets. A good example of management use is illustrated in the case when in 2006, former director of "Kazan orthopedic plant" Vladimir Urusov was sued in the Kazan court for increasing insolvency of the plant in purpose for the benefit of third persons. According to Urusov's plan, by the end of 2004 debt of the company

[28] Report of a sociological research "Reiderstvo kak socialno ekonomicheskoe I politicheskoe yavlenie v sovremennoi Rossii", 2008, Moscow, p. 18.
[29] Sattels, A., Spreading of corruption: hostile takeover, corporate raidering and takeover of companies in Russia, 2009, p. 5.

before the creditors was supposed to be around 20 million of rubes. After that the plant would be admitted as a bankrupt. The scheme is pretty simple: in January of 2004 the director without noticing the owner (Ministry of health) got an 8 million credit in a bank and pledged turnover of capital. In reality of course there was no need in obtaining the credit for the organization. A formal reason was absence of money on the bank account of the company. The plant had unfinished producing with the value of 7,3 million of rubles. As a result of the financial operation, the damage of 1,7 million of rubles was caused to the plant (because of interests for using the credit). Bad deeds of the manager of the company were not over yet, the prosecutors found out other cases when the manager was acting for the benefit of third persons. As a result, the court recognized Urusov only in the attempt of deliberate bankruptcy. He was recognized as innocent for the rest of 11 episodes of incrimination and he was sentenced only to two years of probation[30].

7. Takeover of a company by physical methods

Usage of physical methods as means of a company takeover was widely practiced during privatization in the ninetieths when companies were taken over as a result of violent incidents. Nowadays corporate raiders continue using physical force for takeover of property or for getting access to founding documents with the help of which it's possible to reregister the company to another owner. Such cases started to happen in Kyrgyzstan during the time of April revolution when raiders decided to use the unstable situation in the country and takeover private firms and companies. According to the information agency "Kabar", the Ministry of Internal Affairs of Kyrgyzstan gets information that some strong guys come to owners of private companies and demand to talk to an owner and show the documents on property rights; at the same time they find out who supports the company. Recently, during the last Kyrgyz Revolution of April 2010, namely on April 9 "Kontinent" company was exposed to black raidering where physical force was used. "People in masks that had guns entered the territory of the organization and started literally throwing away company employees, that's what Director of the company, Gennadiy Davidenko told during the press conference. The raiders introduced themselves as employees of a security agency "Alfa-center", which was in long last conflict with "Kontinent" and even on

[30] Examples of property takeover, Management use, 17.09.2009 Examples of property takeover, Management use, 17.09.2009.. the document can b found at http://www.ya2b.ru/ya2b/articles/elements/23006/, last visited April 15, 2010 .

February 25 took away part of the offices. This time they took the control over the whole company and seized all documents of the firm"[31].

8. Velvet Reprivatization ("Barhatnaya reprivatizaciya")

It's not a secret that a state or state bodies can be very active in taking over control over companies. During the last years a term of "velvet reprivatization" appeared in Russia. This term can be described through a situation when a state reconstructs and strengthens its control over companies, which work in different spheres of a industry. In many cases the state already has a portion in these companies, but such policy supports further passage of companies' property from private persons to the state. During the velvet reprivatization recently created state organizations get control package of shares in hundreds of private companies. These state corporations, thus, get leading positions in key spheres, including nanotechnologies, export of high technology, building of objects for Winter Olympiad of 2014 in Sochi, etc. Experts explain the notion of velvet reprivatization via the natural reaction to the companies, which privatized their property in the ninetieths, and the desire to control these companies regarding their benefits, taxes and making social contribution to the state. This process lets the state to play a main role in making commercial decisions, which previously were being made by private companies[32]. Even though there are enough people who supports velvet reprivatization and believe in existence of many positive moments in it, the situation with corrupt government can appear to be sad as it happened in Kyrgyzstan during ruling of the ex president K. Bakiev and his relatives. Created Fund of Development controlled most of the main companies in the Republic and was under the supervision of the younger son of the president.

[31] Ella Kuvshinkina, Reiderstvo po-kirgizski – u novogo pravitelstva novaya golovnaya bol, April 13, 2010, http://www.ekonbez.ru/news/cat/4944, Ella Kuvshinkina, Raidering in Kyrgyz way: new government has got a new headache, April 13, 2010.

[32] Sattels, A., Spreading of corruption: hostile takeover, corporate raidering and takeover of companies in Russia, 2009, p. 6.

1.3. Common defense methods against hostile takeovers and raidering in the Kyrgyz Republic, Russian Federation, and the USA

As far as hostile takeovers are quite developed and widely spread in the western countries, a big range of defense methods are practiced in the USA. The defense methods are concerned about hostile takeovers defense and in the year of 2004 another student of the AUCA, Yulia Shaihutdinova, researched this topic and wrote a graduation qualification thesis about hostile takeover defense in the USA and whether they could be implemented in the Kyrgyz Republic companies. In her work she analyzed such defense methods as (1) the so-called 'greenmail' and 'standstill agreement'; (2) invitation of the so-called 'white knight'; (3) assets and liabilities restructuring; (4) shares redemption; (5) litigation; (6) the so-called 'Pac-man defense'; (7) charter amendments (shark repellants'); (8) "poison pills"; "golden, silver, and tin parachutes"; "change of the registration place"; recapitalization of the highest grade.

The main purpose of all the defense methods is to make the takeover more complex and much costly for the potential acquirer. As a result, the cost of the operation can be increased up to such level where it is economically purposeless to take over the company. "Raiders are interested in the company takeover if the value of the process is 10-30% because almost any takeover is connected with further reselling. If the value for takeover is bigger, than raiders usually just give up"[33].

According to many researches defensive measures are usually divided into three groups:

1. Preventive measures

Preventive measures are applied before the threat of a takeover arises. This strategy implements a number of measures to create legal and economic barriers to prevent raidering or hostile takeover. Preventive group includes such methods as:

- Asset protection (transferring assets to a third party). This is a widespread means of defense in Russia;
- 'Golden parachute' (executive rewards method when there are provisions in employment contract or separate agreement with top management of a company

[33] Olga Zaikina, Real sector, direct investments newspaper, To save from the ordinary raider, #02(58)2007, p. 48.

that provide good payments if their employment is terminated after a change in control);

- Creation of strategic alliance (alliance between two or more firms where companies will defend each other in the case of undesirable takeover);
- Supermajority (requiring shareholder approval to be by at least two-third votes and sometimes by 90 percent of the voting for all transactions involving change of control).
- Poison pill (detachable rights issued to the shareholders of a company in addition to their shares).

2. Operational measures

Operational measures are effective when a takeover bid has already been made or when some steps towards takeover conduct are performed. The operational group of measures includes the following:

- "White knight" (choosing another company with which the target prefers to be combined – choosing lesser evil, which will give more money for the company);
- Counterattack (Pac Man defense) – making of a counterbid to buy up the shares of the raider company;
- "scorched earth" tactic (reorganizing financial claims; assuming liabilities in an effort to make the proposed takeover unattractive to the raider. For example, presenting profits and balance sheet in the least attractive light);
- Litigation (lawsuits can be costly and can take long time. The lawsuits can be: violation by the acquirer of the anti-trust legislation, improper disclosure of information by the acquirer);
- Share buybacks (when the company is buying up its shares on the open market. It can increase income per share and market capitalization);
- Asymmetric solutions (complains and letters to the president, Ministry of Internal Affairs, etc.).

3. Universal measures

Such measures can be applied either before or after the takeover. This group includes:

- "Poison pill";

- Strategic acquisition (purchase of assets that will be unattractive to an aggressor, which may also create obstacles to the acquisition from the point of view of antimonopoly or other types of legislation).

These methods are used by companies in the USA, in Russia, and in Kyrgyzstan. Of course not all the methods can be implemented in Kyrgyzstan; however, many of them can work out in fighting against white raidering.

Regarding grey and black raidering, the situation is different because raiders use not only accepted and world admitted strategies of a company takeover, but they do it illegally or they use norms in laws in such a way when the essence and main point of the laws are distorted.

In this essence, it's possible to underline three main methods of defense against raidering, each of them has its own peculiarities, advantages, and disadvantages:

- Legislation amending;
- Lawsuit;
- Claims to other executive bodies;

2. COMMON DEFENSE METHODS OF RAIDERING COUNTERING AND PROBLEMATIC ASPECTS IN EACH METHOD

1. Legislation amending

As it was mentioned above, in May 2008 the research on the topic of "Raidering as social economic and political phenomenon of modern Russia" was conducted in Russia. Some respondents of the research concluded that the legislation system should be improved and only in this case such phenomenon as raidering will be abolished. However, among these respondents there were some experts that believed that change in legislation will not solve the problem: "Our attempts are facing very serious opposition. But it's not even an issue. We need to clearly understand that even if tomorrow we adopt new laws or amend the current legislation, nothing will change, raiders will find new ways to takeover the property. Nothing will change if the practice will not be assessed in a sufficient manner and if the court will continue to judge on the basis of a call or a price-list"[34]. Part of the respondents was sure that the laws had already all necessary articles; they believed that it was more important to improve law enforcement practice. This is an opinion of one of Russian analysts: "The current legislation has all necessary norms for defense against raidering and for fighting against corrupt authorities. There are no bodies who will realize these norms"[35]. Such responses draw us to a conclusion that weakness of Russia is that it's not the legal norm that has a main meaning, but a law enforcement practice. Changing of legislation could be used for that very raidering because usually strong lawyers work for companies that conduct raidering activities in our countries. However, a bigger amount of respondents concluded that changes in the legislation were anyways needed and that loopholes in the laws that raiders are using for doing their business, should have been closed. As a result, some of the recommendations that were given by the end of the research, were to amend the laws and create so called "anti-raidering" legislation that will not allow companies to conduct raidering activities so freely. Consequently, the "anti-raidering" package of laws (in fact that was a list of amendments to such laws as Civil code, Law on Joint Stock Companies, Law on Bankruptcy, etc.) were adopted.

Following an example of the Russian Federation, in 2008 the President of the Kyrgyz Republic signed a Decree, according to which, he announced the year of 2009 as the year of private property defense. Right after this Decree, the Institute of Constitutional Politics working

[34] Report of a sociological research "Reiderstvo kak socialno ekonomicheskoe I politicheskoe yavlenie v sovremennoi Rossii", 2008, Moscow, p. 55, the document can be found at www.politcom.ru/tables/otchet.doc, last visited May 5, 2010.
[35] Ibid

as part of National Alliance of business associations, conducted a similar research under the name of "Raidering: problems of takeover (hostile takeover) of private property in the Kyrgyz Republic". The research gave a list of recommendations which were presented to public and legislators; it was suggested to amend several laws, such as Civil code, Civil Procedural Code, Law on Joint Stock Companies, Law on Bankruptcy, Criminal code, and Criminal Procedural Code. The loopholes that raiders used in order to takeover property of others were closed down, as it's said by Nurlan Sadykov, director of the Institute of Constitutional Politics.

Absence of Raidering definition in the law

Even though an issue of defense against raidering is a very urgent topic in our society, the legislation still doesn't have a definition and features of this term. This fact gives rise to topicality of exposure of meaning, features and legal essence of raidering.

In connection to absence of a raidering conception in the current legislation, some CIS countries including Kyrgyzstan started to consider a suggestion to bringing in a new legally defined crime – illegal takeover of corporate management in a legal entity.

According to G. Zdornok, a Russian author, *raidering is gaining management (control) over a company with the use of illegal methods and means, which allows disposing assets of the company*[36].

Research conducted by the Institute of Constitutional Politics also tried to give a definition of raidering and suggested to include "raidering" as a new legally defined term to the Criminal code. The definition that will follow is just working and not final, however, it tried to outline main features of raidering. So, according to this research, *"raidering is illegal takeover or destroying of property as well as gaining rights for management of the commercial organization with an aim of enrichment and getting benefits for oneself or an organization or takeover of market of production distribution using own means or by the order of third persons. All participants (accomplices) executing raidering takeover shall be called raiders."*[37] Despite the fact that this definition was suggested for including into the law, it was never adopted and currently there is no raidering definition in the Kyrgyz Republic law.

[36] Zdoronok G, Business controversy or "raidering"// Legal Practice. – 2008. April 2009. --#18-19, p. 28. the document can be found at www.zahvat.net/konsultacii/38/997/, last visited April 2, 2010

[37] Institute of Constitutional Politics, Reiderstvo problem zahvata (vrazhdebnogo poglosheniya) chastnoi sobstvennosti v Kygyzskoi Respublike, Bishkek, 2009, p. 23.

In opinion of law enforcement agents, absence of a raidering definition in the laws leads to a fact that only single such cases reach a court. In another point of view, this approach is considered to be unlikely as it's very difficult to prove. If such legal definition brings in, then another question is showing up – then what is a legal takeover of corporate management? The idea of legislators is clear, but it will be hard to realize it in technical and legal way. Moreover, in the Criminal Code, there are conceptions similar to raidering such as "larceny" or "fraud".

According to another expert in the field, Shamaral Maichiev, "the current legislation has all the means to defend against raidering and it's purposeless to give a legal definition to raidering in the Criminal code because raidering is a phenomenon. Corruption is also a phenomenon and even though the current Criminal code has an article called "corruption", there are no any court cases on corruption in the Republic. Components of specific crimes are in the laws, thus, they are enough to fight against raidering". This expert's point of view is the closest to my position. There are no any cases related to the crime of corruption in the Kyrgyz Republic because it's hard to prove a subjective side or the motive "to corrupt"; instead other Criminal code articles of the same name are used in case of giving and taking bribes. A similar situation is with raidering: the criminal code already has articles for such crimes as: fraud, forgery, theft, and other articles related to illegal acquisition of another's property. Depending on a raidering scheme a specific criminal law article or a complex of articles will be used. Therefore, *there is no point and no need to include such article as "raidering" into the Criminal Code of Kyrgyz Republic.*

An example of Russia and Ukraine supports the point of view of lack of necessity to have "raidering" phenomenon in the legislation. By this time none of the countries included "raidering" into the laws even though this word is so popular among businessmen and politicians as never before.

Amending some legislative acts

Besides a suggestion of including raidering definition into the law, the legislators and business associations started working on anti-raidering bills, namely, many of the Kyrgyz Republic laws regulating corporate relationship and other spheres related to raidering were amended. The main purpose of legislators was to eliminate loopholes and gaps in the laws that raiders used for conducting raidering activities. The next part of the thesis will analyze major of so-called *anti-raidering* changes of the laws, motives of their adoption, and will answer the question whether these changes were needed to defend the property rights of company owners

and whether they are carrying a positive and important impact to the issue of defense against raidering in the Kyrgyz Republic.

- **The law on Joint Stock Companies, Law on Business Partnerships and Companies**

With an aim to defend ownership rights defense and fighting against raidering, in June of 2009 legislators changed some provisions of the Law on Joint Stock companies, business partnerships and Tax code[38].

(1) For protection of shareholders' rights in the court, bringing claims against the individuals of a company, challenging the decisions of a company, and emission validity *there must now be a violation of property rights of shareholders and causing them property damage.* Previously the mentioned condition was not mentioned in the law. Moreover, *direct personal involvement of the shareholder in a court hearing* will be necessary. Generally saying, this provision has some positive impact and relates to a scheme when a court decision could be made without a direct presence of a shareholder in the hearing. However, damage to property rights is easy to falsify, and usually raiders come to the court with a prior prepared scenario of their violated property rights.

(2) Range of persons entitled to be the holder of *the registry of shareholders is narrowed* now. Previously, the holders could be the company itself, which floated its shares, or an independent registrar; now the holder of the registry of a company may only be an independent registrar, operating under license and under a contract with the company. The purpose of this amendment adoption is an attempt to limit access for raiders to the original registry of shareholders. In the past, they could have access to the registry by an illegal invasion to the territory of an organization. Changing data in the registry, they would change shareholders and would alienate assets of the organization. Therefore, this amendment was supposed to solve this problem and eliminate this scheme that raiders used. In fact, raiders find new ways of stealing and changing the registry because it can be stolen from the independent registrar as well or this person can be bribed. This way, the registry still might be in the hands of a raider and he'll be able to make changes to the shareholders of the company.

(3) Duties of the registrar to disclose information on shareholders and nominee shareholders of a company also were changed. If a previous version of the Law established the duty of the registrar to disclose information on request about before mentioned persons without

[38] The Law of the Kyrgyz Republic «On amendments to some legislative acts of the Kyrgyz Republic» dated July 24, 2009 № 245.

specifying the shares held by them, then the current edition of the *Law prohibits disclosing information on those shareholders who own less than 5% of the issued shares*. This information is confidential and can only be obtained on the basis of a court legal act that came into force. This provision was created in order to don't let work the following scheme: a shareholder that has around 20 percent of shares might want to get a control holding of shares, which will let him to manage the company. In order to do it, shares of minor shareholders might be useful. Such 20-percent shareholder calls the minor shareholders, sometimes using criminal ways of persuasion such as threat, blackmail, etc. and gets the rest 31 percent from the minor shareholders. In order to defend the rights of minority shareholders and decrease the number of such takeovers, the amendment was created. However, this amendment not only defends against raidering, but also makes hostile takeovers be problematic for implementing.

In the western countries, this scheme with minor shareholders is widely used by companies that use hostile takeover as a method of gaining control over a company. An example here may be a situation mentioned in the first chapter of the research - when Microsoft wanted to buy Google. First, Microsoft offered the managers and majority shareholders to sell shares to them. When they received a refusal, they started buying shares from minor shareholders, which is not raidering under the context of the present research.

What happens is that raiders that are so interested in getting extra shares from minor shareholders have other sources of getting to know who they are. They might bribe the registrar and he will disclose this information, and it will be very hard to prove this fact in the court. And in reality, raiders can use the amendment for their own benefits. They can become minor shareholders themselves and can start causing problems for the company and overload the company with claims to the court. Even if the company already knew that the particular person or an organization is interested in taking the company over, the shareholders will not be able to find out that because it is prohibited to disclose such information according to this amendment.

(4) In accordance with another new rule of law, in case of compensated shares alienation, making notes in the register of an open joint stock company is carried out solely on the basis of documents of Stock Exchange or the Depositary that the transaction for the disposal of shares was made on the Stock Exchange. This rule prevents the appearance of disputes over the validity of transactions for the disposal of shares.

In other words, even though this norm was created for making sure that all the transactions with shares disposal will be done on the Stock Exchange, this norm can work for a raider. It's

not usually a problem for the raider to make a transaction in the Stock Exchange, even if the methods used for coming to this deal are illegal. Moreover, there can be “own people” in the Stock Exchange that can organize the transaction formation easily. However, in the court, this document, which will say that the transaction was made in the Stock Exchange, will be an ace in the hands of a raider because the court will have another document as an evidence that the transaction was made in an appropriate and legal way.

(5) Lawmakers made changes to the Tax Code. Previously, for cooperation of tax service bodies with the bank, banks were required to provide information about opening or closing taxpayers’ accounts and to provide information about operations carried out with the testing taxpayer’s account on the basis of written demand by the tax authority. Now such information is possible to get only on the basis of a legal court document that came into force.

(6) The Law of the Kyrgyz Republic «On Business Partnerships and Companies» changes affected the rules about exclusion of a member from a limited liability company. If previously members could be excluded by the decision of the general meeting for gross violations of the constituent documents of the company and thereby causing damage to its interests, then now a member of the limited liability company may be expelled only according to the court’s decision and only when there is substantial harm to the company or to the rest of its participants.

From one side, it’s an effective amendment that will not let founders of a company exclude a member without serious reason and get the portion of this member. However, from another point of view, now it’s hard to get rid of a company’s member that brings harm to the company and even if this member commits gross violations of the constituent documents. From now on, in order to exclude this member, it’s necessary to prove in the court substantial harm caused to the company, which is not easy sometimes to prove.

In this regard, analyzed amendments of the Law on Joint Stock Company and the Law on business partnerships and companies show that even if they are aimed at strengthening the defense against raidering and eliminating loopholes, they close some ways that raiders used before, but they also create new ways that raiders can use in order to take over the property and sometimes even help raiders with their business.

- **Law on Bankruptcy**

As it was shown in the previous Chapter of this research, bankruptcy is one of the wide-spread means for a raider to takeover a company or its property. Having in mind an idea to improve the Law on Bankruptcy, legislators presented "anti-raidering" changes to this document as well. The "anti-raidering" law is governing new changes and additions to the Law on Bankruptcy and the Law on Preservation, bankruptcy and liquidation of banks[39]. According to businessmen and the judiciary bodies, which lobbied for the law, certain rules described in the Law were obsolete long time ago, and even the very definition of bankruptcy in the law was incomplete, which was used by raiders pretty actively. The following analysis of major changes shows the extent of effectiveness of the amendments.

Before amendments	**Amended version**
Bankruptcy (insolvency) is recognized by the court and announced by the creditors at the consent of the legal entity its disability to satisfy in whole demands of the creditors on monetary obligations, including disability to provide mandatory payments to the budget and non-budgetary funds.	Bankruptcy (insolvency) is recognized by the court and announced by the creditors at the consent of the legal entity its disability to satisfy in whole and in **set up terms justified** demands of the creditors on monetary obligations, including disability to provide mandatory payments to the budget and non-budgetary funds **as a result of taken to itself obligations on its quick assets.**

First of all, the definition of bankruptcy is changed in the part of recognition as a bankrupt a person who is unable to satisfy the obligation to his/her creditors in the set up terms. Earlier, reference to the set up terms was not given in the definition of bankruptcy. From one point of view, now it doesn't allow creditor to file for bankruptcy of a company in case the term for making payments is not over yet. From another point of view, if we take into account that as a rule all bankruptcy cases are related to failing of pay off the debt within the period of time set up for payment in a contract, then this specification doesn't change anything in practice.

Also, in the new definition, legislators made an emphasis that the creditors' claims and demands must be justified, which means that the creditors need to prove the unfulfilled obligations of the debtor. Even though this is a very good refinement, in practice, all these documents are presented to the court by the raiders as they buy or get debts of the companies-

[39] The Law of the Kyrgyz Republic «On making amendments to the laws of the Kyrgyz Republic "on bankruptcy (insolvency)" and "Preservation, liquidation and bankruptcy of banks" dated 24 July 2009 N 247.

debtors and have all the documents that prove unfulfilled obligations in fact. Therefore, despite the positive moment of this amendment, the problem is still not solved.

Quite serious changes have affected the determination of insolvency of the debtor[40]. For example, one of the circumstances under which the debtor may be declared bankrupt is the failure to satisfy the claims of creditors on monetary obligations due to its commitments over its quick assets (cash, deposits, securities, and all other assets that can be easily transferred to cash). Previously, failure to satisfy the creditor over other commitments (goods, services, etc.) could also lead to bankruptcy. Refusal of the debtor to satisfy the creditor's claim for payment of debts in full is no longer a basis for establishing the insolvency of the debtor. From these amendments we can conclude that the legislator tried to eliminate norms that would give a raider an opportunity to use the letter of law to recognize a debtor as a bankrupt without serious breaking the law.

Now, the debtor may be declared bankrupt only if debtor's financial obligation to the creditor, who is declaring his insolvency, is in the amount exceeding the minimum amount of debt, i.e. 500 payment units when there is one or more creditors, and 5 payment units if the creditor is an individual, including the private entrepreneur[41]. Amount of monetary obligations should be established; and it's considered to be established if it is confirmed by a judicial act that has already entered into force or if it's admitted by the debtor in writing during the court hearing on examination of case on his bankruptcy with explanation of consequences of such admission. And if the debtor disputes the claims of creditors and the amount of monetary liabilities is not defined by a legal act, then the debtor cannot be adjudged insolvent and the bankruptcy case should be terminated[42]. These provisions were not in the previous version of the law and play a positive role in eliminating old schemes of raidering.

At full performance of a monetary obligation by the debtor or any third person to the lender, who has declared its inability to pay, pending a court decision on the merits or before the court decision comes into legal force, the production of a bankruptcy stops even if the debtor has other creditors, not stated in the court of his insolvency[43]. In other words, if the debtor pays off the debt before the court made a decision on his bankruptcy, than the case shall be closed. This norm is also quite positive and from now on it's more expensive to bankrupt the debtor for a

[40] Law of the Kyrgyz Republic "On bankruptcy (insolvency)" dated October 15, 1997 #74, last amended June 24, 2009, Art. 9.
[41] Ibid, art. 9-1.
[42] Ibid, p. 3. art. 9.
[43] Ibid, p. 5. Art. 9.

raider as now the sum of money should be big enough to deprive him of his property. However, still, in practice majority of cases involve such sum of money that the debtors are not able to pay off.

If the court gets a petition on recognition of a debtor as a bankrupt, then the information about it and about the date of the case examination in the court, full name of the debtor, amount of debt and the date of the bankruptcy proceedings should be published in the state media[44]. This amendment is aimed at making sure that the debtor himself will be informed about the bankruptcy proceeding as sometimes raiders do everything to not let the debtor come to the court and even notifications of appointment to the court come to different addresses.

In addition, lawmakers reduced the period during which the person entitled to make application to court for declaring the debtor bankrupt, could go to the court to resume the process of bankruptcy in case of discovery of assets concealed by members or managers of the debtor company. Earlier this period was 10 years. Parliamentarians have reduced it to 3 years[45], which improves position of the debtor.

Article 27-2 of the Law on Bankruptcy lists parties that can apply to the court for recognition of a debtor as a bankrupt: debtor, creditors, state bodies on cases on bankruptcy. In the previous version of the law, it was prescribed that these persons had right to apply to the court with a petition on recognition the debtor as a bankrupt without following the pre-trial order of dispute resolution (pretention letter). Some raiders used this loophole and filed claims to the court without even pre-noticing the debtor about the close consequences of the debt. The new version of law eliminated this loophole and now the pretention order of pre-trial dispute resolution is needed in all cases except when the sum of debt is already determined by the judicial act that is entered into force. Even though this is a quite positive anti-raidering norm, however, raidering methods are so different and developed that it will unlikely stop the raider as he will still try to get a judicial act on the sum of the debt and if there is an actual debt, then this new amendments don't help in this situation either.

The rest amendments are related to the role of special and interim administration in the sphere of bankruptcy. All the raidering activities that are using the bankruptcy law need an interim administrator's role in these activities. The role of an interim administrator (a person that is appointed to manage the company before a decision on bankruptcy is made) is different from

[44] Ibid, p. 6, art. 9.
[45] Ibid, Art. 26.

the role of a special administrator (after the decision on bankruptcy is made), but before the amendments, according to p. 4 of Art. 63 of the law, the interim administrator, if necessary, could limit access of parties or managers of the debtor to the territory of the debtor's company, including working areas of it. The new version of law eliminated this right of the interim administrator. Regarding the rights of the special administrator, if earlier he could dispose a portion or shares of the company without public auctions, then now it's possible to do only through public auctions at the stock exchange.

After analysis of the new amendments to the Law on bankruptcy, it's necessary to admit that the law became more perfect and now many loopholes, which raiders used for applying the bankruptcy scheme for raidering attacks, were eliminated. However, bankruptcy is an instrument that raiders used and even a broken instrument can be used by raiders that decide to use illegitimate court decisions, for example. Therefore, even these positive amendments do not solve the problem of raidering.

- **Civil Code and Civil Procedural Code**

The most crucial and controversial amendments were made to the Civil and Civil Procedural codes of the Kyrgyz Republic. These very provisions faced a lot of dissatisfaction notes from the side of citizens and lawyers of the Republic.

Article	Before amendments	After amendments
Article 199 (Invalid Transactions' Limitation Terms) of the Civil Code dated July 24, 2009.	The suit for application of consequences of invalidity of a void transaction may be brought within **five** years from the date when the performance of the transaction has been started.	The suit for application of consequences of invalidity of a void transaction may be brought within **three** years from the date when the performance of the transaction has been started.
Article 221 (Claims not Covered by Statute of Limitations)	4) Claims by owners and other possessors of property for elimination of any infringements of his rights, even though these infringements are not combined with dispossession;	Paragraphs 4), 5), 6) are excluded.

	5) Claims by property owners or other persons for invalidation of acts of organs of state administration or organs of local self-government which infringe that persons' rights of possession, use and disposal of property belonging to them; and 6) Where provided by law-to other claims.	

One of the civil code amendments was related to changing the Limitation terms for invalid, void transactions (Art. 199 of the Kyrgyz Republic Civil Code). Previously the term was five years and during this period the legitimate owner could apply to the court for his or her property rights defense. Even though the motives that that the legislators were using during changing this article was to defend property rights, they decreased the term during which the owner can use his property rights defense mechanisms, which means that they in fact worsened the situation of a legitimate owner.

The second article that was said was changed was Article 221. Previously this article was giving 6 claims that were not covered by Statute of Limitations, which means that the legitimate owner or a claimant in this case, could apply to the court any time and this time period was not limited. The amending law excluded the following paragraphs from the list:

- Claims by owners and other possessors of property for elimination of any infringements of his rights, even though these infringements are not combined with dispossession;
- Claims by property owners or other persons for invalidation of acts of organs of state administration or organs of local self-government which infringe that persons' rights of possession, use and disposal of property belonging to them; and

- Where provided by law-to other claims.

This novelty of the law worsens the position of an owner as well. Especially in the case when the owner can file a claim for invalidation of acts or organs of state administration or organs of local self-government only during the limited period of time, which is only 3 months.

It’s not a secret that in Kyrgyzstan state bodies make mistakes very often and therefore, there were many claims from owners to the courts for invalidating the acts.

Another article that was changed and that makes the owners’ rights weaker is Article 215 of the Civil code. In the earlier version of the code, the expiration of the term of statute of limitations prior to filing a lawsuit provides the grounds for the court to dismiss a lawsuit, unless the court establishes that the reason for running the term of the statute of limitations is valid. The last edition of the court does not let the court to find the reasons valid and to restore the statute of limitations. Point 2 of Article 215 provides that statute of limitations on claims for defense of violated rights of a legal person (regardless of a form of ownership as well as state bodies and local administration bodies), citizens that are involved in entrepreneurial activities as well as other persons that present to the court claims on defending their rights and other violated rights for entrepreneurial objects, cannot be restored. The court is obliged to dismiss such lawsuit. In other words, the shareholder, for instance, whose rights were violated, will be limited in defending his property rights and in case the term of state of limitations is expired, he will not be able to defend his rights at all.

The statute of limitations novelties were also reflected in the Civil Procedural code, which was changed as well. Article 316 of the code provides now that procedural term for filing an appeal claim cannot be restored unless the claimant, who did not participate in the court hearing during the trial in the court of the first instance, proves that he didn’t know about the court decision. In practice it’s not always easy to prove because as soon as the decision is made the enforcement procedure starts and the owner gets to know about the decision. As far as the term for filing an appeal claim is not so long – only one month, the claimants who are not always aware of law amendments, lose their right to appeal the decision that deprives them of their property rights. The same norm touched upon the cassation and Supreme Court limitation period.

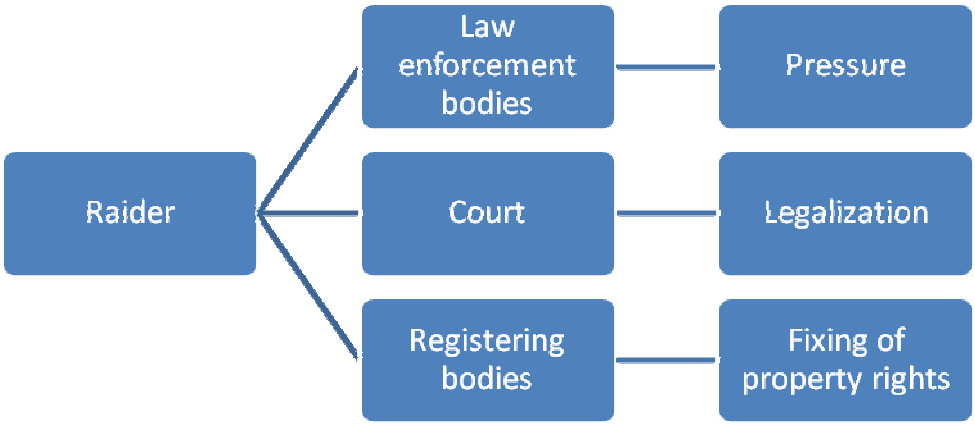
And lastly, article 361 was changed in part that from now on judicial acts cannot be revised on newly-discovered circumstances for the decision on announcement a debtor as a bankrupt where the procedure of special administration was applied as a result of which the debtor was liquidated and excluded from the state registry of legal entities. The earlier edition of the code didn’t have such norm and any person could apply to the court for revising the case on newly-discovered circumstances and it was the only means to defend the property after the Supreme Court made a decision. In this case the rights of a debtor are worsened a lot because in practice the evidence that the Company X falsified the debtor using illegal means, appear after the

Supreme Court made a decision. Because of the new norm, the debtor will not be able to fight for his rights after the Supreme Court made a non-favorable decision for him.

After analysis of anti-raidering norms in such normative legal acts as the Civil code, Civil Procedural code, the Law on Joint Stock Companies, the Law on Business partnerships and companies, and the law on Bankruptcy, it's possible to conclude that even though some of the norms are quite positive for the property rights defense against raidering, most of them create new schemes that raiders can use and some of them actually worsen the position of a legitimate owner and deprive him or her of an opportunity to use defensive mechanisms of law against raidering.

Courts and law enforcement bodies

Analysis of typical schemes of raidering shows that state bodies play a crucial role in their realization. Below is the scheme of key needs of raiders, which can be satisfied by the state bodies.



Law enforcement bodies

Law enforcement bodies have authorities that let them seriously influence legal and physical persons. A typical example of influence on a physical person (owner) – illegal application of restraint – arrest of a physical person on criminal case, which was instituted against other persons on a basis of reports and other fabricated documents with an aim to limit opportunities of the person to defend his or her property rights. Being restraint the physical person is under control, and raiders get more opportunities to conduct activities on destabilization of the company's activities and gaining initiative and factual control over the company. A typical example of an influence towards a legal entity is when within the boundaries

of an investigation of a criminal case basis for conduct of investigation activities (search, seizure) are fabricated with an aim to block and stop the company's activities by the means of seizure, arrest of production facilities and disturbance of an official documents turnover[46].

Registering bodies (registers of rights)

Registering bodies on the basis of falsified documents register transfer of property rights, and via these actions raiders get priority to conduct their illegal activities as far as all third persons are oriented at official documents that are issued by the unified register by the registering bodies with the information about the property owners. In this case, the registering bodies can act in good (when all the presented by the raider documents conform to the law) or bad (when registering officers enter into collusion with raiders and register property rights even though there is not legal evident basis for that) faith[47].

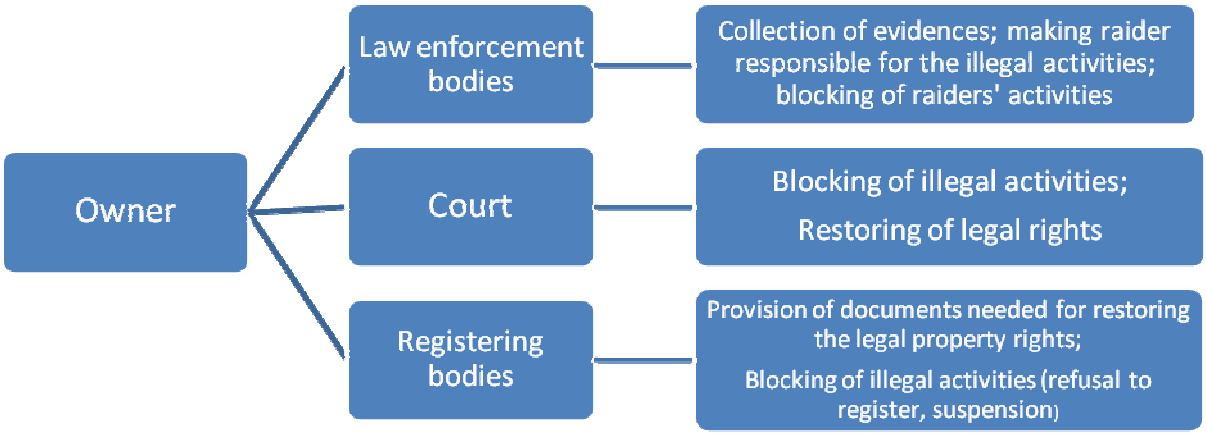
Court

In the process of raidering takeover courts conduct a function of legalization. Under the legalization in this case it's understood obtaining of official documents, which certify property rights, i.e. formal recognition of property rights that were gained via falsified documents. In this case, the court, as well as the registering bodies, can act in good or bad (when judges are corrupt) faith.

Below there is a scheme that shows key needs of a legitimate owner during the defense against the raidering takeover

[46] Anti-corruption committee of the Russian Federation, Report on a research "Predlojeniya po povysheniyu effektivnosti borby s reiderstvom (nezakonnym zahvatom sobstvennosti)", 30.08.2008. The Report can be found at: http://www.vdcr.ru/content/view/1309/193/1/2/, last visited April 25, 2010

[47] Ibid



One of the most important for an owner function of state bodies during the defense against raidering is collection of evidences, blocking of raider's activities, and restoring of the property rights.

Law enforcement bodies

In the situation of the raidering takeover when transfer of property rights are conducted on the basis of falsified documents and other similar activities, help of law enforcement bodies is necessary for the owner in order to collect evidences that all the documents were falsified. For instance, if a document, on the basis of which the property rights were transferred, was notarized, it's possible for the law enforcement agents to conduct investigation and interrogate the notary. If in reality under the same registry number, under which the falsified document was presented, appears to be a different transaction certification, then it's a basis for recognizing the transfer of property rights as void.[48] *In case when legal owners get to know about illegal registering activities, they should have an opportunity to apply to the law enforcement bodies for urgent temporary blocking of registering activities as far as it's impossible to get the securing measures of the court.*

Court

During defense of property rights of a legal owner it's very important to get securing measures that will let block illegal registering activities, arrest assets for making sure that they will not be sold to third persons. In practice, it's pretty hard to realize such securing measures.

Registering bodies

[48] Ibid

Also, it's very important to get urgent, temporary suspension of registering activities by the owner (in order to have a possibility to get securing measures in the court). In registering bodies evidences of illegal activities, falsified documents as well as documents certifying rights of legal owners are collected. When registering documents and cases get lost, owners are deprived of evidences for restoration of their rights through the court[49].

From the information given above it's possible to conclude that needs of raiders and legal owners differ; and these differences need to be taken into account during working on specific measures for countering raidering takeovers.

Two main ways to counter illegal takeover of property is applying to **law enforcement bodies and to the file a lawsuit**. However, both of them: law enforcement bodies and court, can act in bad faith and show by this their corruptive interest in conduct of raidering activities. Below you can find a table where it's shown in what way law enforcement bodies and the court can show their bad faith interest and what role they have in promoting raidering activities. The table is taken from the report of the Russian Federation Anti-corruption committee.[50]

	Function	Indicator	Comments
Law enforcement bodies (police)			
1	Covering illegal actions of the raiders	1. Formal attitude towards the inspection of circumstances, which are written in the application of the legal owner (factual ignoring of the application); 2. Refusal to institute a criminal case on "formal" criterions, omission in investigation of cases against raiders, closing or suspension of such cases; 3. Procrastination of terms for	

[49] Anti-corruption committee of the Russian Federation, Report on a research "Predlojeniya po povysheniyu effektivnosti borby s reiderstvom (nezakonnym zahvatom sobstvennosti)", 30.08.2008. The Report can be found at: http://www.vdcr.ru/content/view/1309/193/1/2/, last visited April 25, 2010

[50] Ibid, Appendix 4.

		inspection conduct; 4. A refusal in administration of complains on law enforcement bodies' employees (formal approach).	
2	Putting pressure on an owner	1. Institution of a criminal case against director general or an owner	Institution of the criminal case or activation of old materials simultaneously with the beginning of corporate conflict, shares buy out or during the very property takeover of the victim.
		2. Performing of operative and investigation activities with rough violations of the procedural legislation (operative body within the boundaries of the criminal case, for instance, can demand the documents from a subject that is not related to the case)	Based on someone's report or unchecked operative information search at people's that are not privy to the cause. In the boundaries of such a search, operative (police) agents take away whatever they find. Such searches can also be conducted in houses and at night time. Seizure touches upon money, computers, documents. Private original documents can be lost, and that can result in problems appearing, which are connected with restoring them. In such a way, it's possible to seize documents, which raiders are in need, on transfer of rights to shares. It will be very difficult in the court to fight for his or her

			rights in the future.
		3. Arrest or detention of the owners and other directors general of companies	This method can help when time of hardening the investigation procedures coincides with a specific moment in raidering takeover (important court hearing or a need to pay off a big credit, etc). It lets the raider to isolate the owner for some time, plus it plays a role of pressure.
3	Manipulations with evidential base	1. Legalization of evidences	It's possible to fix defectively seized documents in the protocol and then to "find" in seized materials a document that raider needs for strengthening his position or reinforcing the pressure. For instance, a falsified contract or note.
		2. Refusal in providing needed documents for the court	
		3. Refusal in certifying copies of the seized documents	
		4. Refusal in providing original documents for the expertise	
		5. Destroying of needed evidences for criminal case and for corporate relations, switching the evidences.	
		6. Within the investigation procedure – to conduct expertise of evidences with	

		preferable result.	
4	Source of information that is difficult to access	1. Groundless seizure of documents during an inspection or investigation activities that are not related to the criminal case that is being investigated.	
		2. Providing raiders with a criminal case for acquaintance	
	Blocking of the owners' arrangements with assets that he/she possesses	1. Arrest of stocks with a ban to vote	
		2. Arrest of immovable while it is not the object of the dispute	
		3. Arrest of stocks while they are not the object of the dispute.	
Court			
	Blocking of the owners' actions	1. Refusal of the court to satisfy securing measures that can block raiders' strategies	When raidering takeover is being conducted and the owner is deprived of an opportunity to impose securing measures (i.e. to block the situation), the object of the dispute is going through a chain of "bone fide buyers". As a result it's very problematic to prove bad faith of this chain and a chance to return the property is minimized.
		2. Imposing securing measures	In a situation with active

		on the raider's claims in relationship to all the immovable property, disproportionately of claimed demands.	raidering takeover a court on the claim on securing measures of the raider in relationship to one object of immovable property, imposes the measures to all the immovable property and thus, blocks the owner's opportunity to get urgent funds for defending his property rights.
		3. Arrest of stocks and shares with a ban to vote in a situation when there are not claims on challenging the rights to shares	
		4. Refusal to arrest assets under dispute	
		5. Inhibition to get acquainted with the case materials	A judge refuses in getting acquainted with the case under pretence that he is busy, "the case is not filed yet", "not all the documents are ready", etc.
		6. The protocol doesn't include petitions and applications of the parties	As far as the protocol sometimes is single evidence in a case when a petition is presented orally, as a result the defending party looses an opportunity to prove that the petition was actually filed.
2	Legalization	1. Indication of needed wordings and fact findings in the declaration of the court decision	In a situation when a raider supposes that the decision will be taken not in his favor, he is using this opportunity to certify finding of some facts in

			order to rest upon them in what follows.
3	Tightening of the restoration rights process	1. Suspension of the case consideration with an aim to tighten the proceeding	In the court practice while considering several cases on one object of the dispute, examination of the claim, which is the latest chronologically, can be suspended till a decision on the earlier claim is made.
		2. Tightening the date of the court hearing arrangement	A court has an opportunity to procrastinate the court hearing for an enough long time using different grounds for that: for discovery of evidences by the court, for expertise conduct, etc.
4	Manipulation with evidences	1. Denial of the court to satisfy petitions on reclamation of evidences on the case;	
		2. Attaching/refusal to attach specific evidences to the case materials that will make a difference in a decision making.	
		3. In a case when documents that are the basis of raiders' claims to the court are falsified, groundless denial of the court to satisfy the petition on falsification of the documents and an expertise conduct can ruin the owner's strategy in the court.	In a case when originality of some documents are in question in the court, the judge can act according to two scenarios: either not to attach the evidence or to appoint an expertise for making sure that the documents are not falsified and can be attached to the case. In a case of the judge's interest in the case, he/she acts

			according to the third scenario – announcing that the petition of the party of falsification is not argued well and groundless.
		4. Loosing of important originals of documents or their destroying	As if somebody stole it from the case or there was a flood in the archive and these very necessary documents were destroyed.
		5. Transfer of burden of proof to the victim in the case	An example can be when a transaction is made on the basis of a falsified contract, the victim states that he/she did not sign the contract, but the court makes the victim to provide the court with an original of such a contract and prove that he did not sign it. Such a demand contradicts to the burden of proof rule prescribed by the law.
5	Acceleration of the process	1. Too rapid arrangement of the case proceeding on raiders' claims	
		2. Non-notification of the party on date and time of the trial	The court is obliged to notify both parties on the trial appointment by any possible means. In a situation when a court has its own interest in the case, one party gets the notification, but another' notification is getting lost or an empty envelope comes to it[51].

[51] Ibid

Therefore, above analyzed problems in using law-enforcement bodies and the court for countering raiders' activities shows that even though the current legislation has most of the means to counter the raidering strategies in the court and law-enforcement agencies (procedure of working with cases is described in the laws), but however, corrupt interest of the state bodies let the raiders, disregard the laws, conduct their illegal takeover activities.

3. Recommendations and Self-defense

This research has analyzed three main methods of countering raidering attacks. This part of the work will give recommendations to improve the methods of defense against the illegal takeover of property. Also, a number of recommendations of using self-defense as a method of countering raidering will be given.

Regarding the law enforcement bodies, specific difficulties in the work on discovering raidering criminal activities is appearing because there are no unified approaches to defining of criteria of crimes on raidering takeovers, and in these issues every law-enforcement body is relying on its own data. As a result, work of law-enforcement bodies is hard to call satisfactory. It's necessary to change approaches to the work on preventing, revelation, and investigation of crimes on raidering. A unified tactics and methodology on investigation of criminal cases in this category of economic crimes should be worked out. Law-enforcement agents should go through a special studying program on working with materials and criminal cases on raidering takeovers.

Very often raidering takeovers are conducted by the same group of people and that's why it's necessary to know the content of these groups and methods that they use. In this regard, it would be a good idea to create a unified data base of persons that are engaged in corporate takeovers of companies and their property. Similar recommendations[52] were given in the Regulations of coordinating board of heads of law-enforcement bodies in the Russian Federation, and they are aimed at future work on countering of corruption and raidering.

Moreover, one of the best mechanisms of countering the raidering takeover is improving procedural legislation, which has many gaps in regard to court proceedings. For instance, regarding the problem with **protocol**, which a secretary of court proceeding should fill in during the hearing. As it was mentioned before, very often the protocol does not include information that was said by the parties during the proceedings, and the secretary writes down to the protocol the information that the judge asks him/her to put into it during the hearing. During a court hearing it happens that a party files an oral petition, which does not appear in the protocol and which the judge ignores. In the appellate instance, it will be almost impossible to prove that something important was said of filed during the proceeding if it is not in the protocol. Thus, a recommendation here shall be to record the proceeding to the tape recorder in order to compare what is written in the protocol and what was said in reality in the court in a case of a dispute.

[52] Final speech of General prosecutor of the Russian Federation Yuriy Chaika at the Coordinating board of the head of law-enforcement bodies "O hode I rezultatah vypolneniya meropriyatiy, predusmotrennyh nacionalnym planom protivodeistviya korrupcii, utverjdennyh Prezidentom RF 31.07.2008, a takje postanovleniem Koordinacionnogo soveshaniya rukovoditelei pravoohranitelnyh organov Rossiyskoi Federacii ot 24.09.2008", the document can be found at http//www.*genproc.gov.ru/files/0610093.doc*.

Amendments that were made to the Civil and Civil Procedural codes in the part of impossibility to restore the **limitation period** and shortening the limitation periods play a negative role in the process when a legitimate owner defends his/her property as far as raiders can ensure that the limitation period is already over before the owner get a possibility to get into a court. Therefore, a judge should have a right to restore a limitation period if reasonable excuses are given by the party.

Corruption in the courts is probably the main reason why raidering attacks are so successful and it could be shown in the table given in the previous chapter. Nowadays court system works in such a way that judges are appointed by the chairman of the court, thus, it's not a problem to promote a "friendly" judge if a party is in a good relationship with the chairman. In order to ensure independency of judges, which is a key stone in the just judicial system, a recommendation will be to appoint judges through a procedure of making a draw (ballot), when the cases will be distributed among the judges randomly, and the party will know what judge is going to consider the case right before the proceeding.

In this regard, may changes can be made into the court system of the Kyrgyz Republic and these changes are necessary. More specific recommendations on improving the court system should be given by experts in this field that are facing with raidering attack cases and with problems of proving the legitimate position of owners in the court.

Self-defense

Even though the criminal code does not have such an article as raidering, other articles such as fraud, theft, giving a bribe, etc. can be used for punishing raiders and blocking their attacks. However, the criminal code as well as other codes does not solve the problem of *preventing raidering attacks* and even if the owner knows that his company is an aim of a raider, he can do nothing applying to the state bodies as far as his rights were not violated yet. In this case, companies should think of defending their business themselves.

Defense against raidering is very individual work, which requires individual approach, which shouldn't be announced because if the raider understands technology of defense, he will change his methods. Defense against raidering should include such activities as optimization of founding documents; counter buy up of shares; regular obtaining of information from tax and other government bodies. For an illustration, some preventive and operational anti-raidering measures are given below.

Preventive measures:

As far as the best way for a raider to takeover a business is to find gaps and problems in the company, in order to defend a company against a raider, it's necessary to first of all, (1) adjust in accordance with the law all the documents certifying the property rights for all the assets. Also, It's a good idea to (2) conduct a legal expertise of the whole chain of property rights transfer of this asset, especially if the company got this property by the means of privatization or at the time when the legislation was changing. In other words, on this stage it's important to analyze "weak spots" and to restore needed documents. In this case the internal imperfections will not play a role of aces in the raiders' hands.

Operational measures:

If a company already knows that it will be a victim of raidering and the attack has already started, there are several operational measures53 that can help to defend against raidering:

1 Organize operational interaction with judicial bodies in order not to miss any claims with motion on securing the claim. Of course according to Art. 142 of Kyrgyz Republic Civil Procedural Code, the judge does not notify a defendant or other parties when he secures the claim and attaches the property. Owners of the company, which is in risk to be taken over, should as minimum to control this situation in order not to be had over the barrel because of information on attachment of the property or prohibition to dispose it. This information can be obtained in a court office.

2 If the company is a Joint Stock Company, another way to defend is to control movement of shares in the register. The owner of the company can commit the register holder to inform him about all operations, conducted with shares of this Joint Stock Company. This is a paid service, but its value is not comparable with losses because of the information absence that will allow you to react on unusual interest towards shares of the company.

3 It's also possible to call for a special general meeting in order to fix some moments in the Charter that will give a possibility for a raider to take over the business. For instance, it's possible to establish a different quorum in a shareholders' meeting for making decisions related to changing of interested persons in the Company or to property disposing. For instance, in case of coming to a contract on disposing of property or when value of a deal is 50 percents or more of balance value, agreement of two thirds of general meeting of shareholders is needed. Article 73 of the Law on Joint Stock Companies prescribes that the Charter can provide a norm that even if a transaction value is less than 50 percent of the

[53] http://www.bishelp.ru/red.php?rurl=www.businesspress.ru, Raiders are at the threshold: methods of fighting.

balance value, the general meeting can be a body who will make a decision on it. Thus, such provision can be included into the Charter in order to minimize a chance of a raider to dispose property easily.

4 It's also possible to execute a preliminary communication with executive bodies and to notify them about a probably raidering attack towards the company. In this case, raiders' letters and claims concerning the company will fall into a prepared ground.

5 Another method is to dispose main assets, which are likely to be the main reason of raiders' interest towards the company. However, in order to do it, all the property rights for valuable assets should be put into an official and legal shape.

6 The company also can burden the property by some obligations, for instance, by pledge. However, in order to do it, there should be well established relationship between the company and the creditor.

7 The last resort, the company can initiate liquidation of itself. In accordance with Art. 18 of the law on Joint Stock Company, property that is left after settle with creditors, shall be distributed among shareholders. If the raider is not a creditor yet and has a small amount of shares, this method can be a good option. It's obvious that this way is not that attractive, but it might be the last chance to defend and save the property rights to the assets.

8 Another way is to start attacking the raider company using the same methods. It might not solve the problem, but it will help to withstand the pressure and get more time for solving the problem.

Finally, we can conclude that knowing raidering methods a company can adopt such policy and anti-raidering mechanisms to the corporate governance that a chance for raiders to take over the company will be minimal.

Conclusion

During recent years the word “raidering” became an initial part of the business dictionary and is used without any additional explanations. However, explanations are absolutely needed because not all people understand the real notion of this phenomenon and confuse it with other relative terms. Studying of raidering is necessary now because it’s important to understand what this phenomenon actually mean in practice and what to expect in the future: whether this notion will disappear or not and what to do in order to defend property rights against raiders.

In accordance with objectives of the thesis, the research was conducted for answering the following main question: What are the legal problems with defense methods against raidering in Kyrgyzstan? The research question was further divided into three sub issues:

- To identify common raidering schemes used in Kyrgyzstan
- To identify common defense methods against raidering used in the Kyrgyz Republic
- To identify legal problems with the defense methods against raidering and to find out why the defense methods do not function efficiently.

During working on the thesis anti-raidering amendments to a list of normative legal acts was analyzed; also, several previously done researches conducted in the Russian Federation, Ukraine, and the United States were studied; and some experts in the field were interviewed. Based on this methodology the conducted research helped the author to make the following conclusions:

1. Raidering and hostile takeovers are different notions whereas in hostile takeovers legal methods are used, and in raidering illegal methods are used, which is a distinguishing characteristic of raidering in the CIS countries area;
2. All raidering schemes involve a role of a state body (court, law-enforcement body or other executive agencies), without support of which, raidering in the Kyrgyz Republic would be impossible;
3. In the Kyrgyz Republic three methods of raidering are used:

- Legislation amending;
- Claims to the court, law-enforcement bodies, and other state agencies;
- Self defense.

4. Each of these methods has advantages and disadvantages. Regarding the **legislation amending** that took place in 2009 and changed a big list of laws, including the Civil code, Civil Procedural code, Law of the Kyrgyz Republic on Bankruptcy, Law of the Kyrgyz Republic on Joint Stock companies, etc., some of the changes played a positive role in the process of eliminating loopholes that raiders used for property takeover. However, the majority of them created new ways that raiders could use for raidering activities; and some of the amendments worsened the position of a legitimate owner and improved a situation of a raider. Therefore, we can conclude that even though we should seek to a perfect legislation, there is no need to change the law significantly in order to defend against raidering as far as the current legislation of the Kyrgyz Republic has enough mechanisms to counter the illegal takeover of property.

Despite the full range of methods of defense from illegal takeover of property, raidering still has place in our society because of incoordination of state law enforcement and judicial bodies, corruption in this system, i.e. corruptive interest of state agents in raidering attacks. Therefore, it's necessary to conduct educational anti-raidering activities among law-enforcement agents and to reform the judicial system, to ensure that judges are independent in practice.

The most effective method of defense against raiders is self-defense, i.e. applying measures, which are unrepugnant to the law, and that make the process of illegal takeover more difficult. Through studying of typical mechanisms of raidering it's possible to adopt defensive mechanisms into the company in advance.

Hence in order to promote the situation with safe business doing in the Kyrgyz Republic and attracting of investments it's necessary to improve the mechanisms of property rights defense that already exist in the country and to ensure guarantees for normal entrepreneurial activities. Together with that businessmen should improve corporate governance in their companies and internal mechanisms of defending their property rights.

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