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## **Analogy of Law in the Mechanism for Increasing Authorized Capital of a Limited Liability Company**

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***Abstract:***

*The article reveals imperfections in the legal regulation of the increase in the authorized capital of limited liability companies by various methods permitted by law, doctrinal and law enforcement approaches to resolving corporate conflicts arising in connection with this process are analyzed, and shows the role of the analogy of the law in filling the gaps found.*

***Keywords:*** *analogy of law, limited liability company, increase in authorized capital, minority participants, corporate conflicts.*

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## **1. Main Parameters of Increasing Authorized Capital of a Company**

It is difficult to overestimate the importance of complete and simultaneously flexible regulatory regulation of all the nuances of the mechanism for increasing the authorized capital of limited liability companies (Uvarova, 2013). In the literature, it is correctly noted that the ban on alienation of a share (part of a share) to third parties (if it is fixed in the company's charter) does not mean a ban on increasing the authorized capital at the expense of deposits of third parties (Erakhtina and Shirokova, 2015). The ability to facilitate the organization of investment in corporate capital and the provision of corporate investment-related investments is considered one of the most important tasks of corporate law (Hansmann and Kraakman, 2004).

The investment by a foreign investor of assets to a Russian corporation through participation in an increase in the authorized capital recognized as a form of foreign direct investment (Farkhutdinov *et al.*, 2013). Illegal reduction in the level of corporate control in science associates with violations when increasing the authorized capital of limited liability companies (Lomidze and Lomidze, 2012).

Such mechanism for increasing the LLC authorized capital, on the one hand, should be simple enough to replenish the material base of current activities and the development of company, to be an effective means of increasing the "threshold of seriousness" of the corporation evaluated by contractors and the maximum convenient way of attracting new participants (Erakhtina and Shirokova, 2015) and investments (Hansmann and Kraakman, 2004), including foreign ones (Farkhutdinov *et al.*, 2013), to the company's activities Parties, exclude the possibility of imbalance of interests of the participants of the company and not create grounds for abuse of law and the emergence of corporate conflicts (Lomidze and Lomidze, 2012).

According to paragraph 2 Article 17 of the Federal Law No. 14-FZ "On Limited Liability Companies" (hereinafter referred to as the Law "On Limited Liability Companies") as of February 08, 1998, the increase of the Company's authorized capital may be carried out at the expense of the property of the company, and, more interestingly and actually, at the expense of additional contributions of participants of the company, and (or), if it is not prohibited by the charter of the company, at the expense of deposits of third parties admitted to the company. In the norms of Article 19 of the Law "On Limited Liability Companies" with respect to the increase of the authorized capital of the company associated with the growth of the corporate estate, detailed rules are provided, differentiated for cases when it is carried out by attracting additional deposits from all participants of the company (paragraph 1 of Article 19) or from additional deposits of certain (one or several) participants of the company and (or) deposits of one or more third parties admitted to the company (paragraph 2 of Article 19).

## **2. Procedure for Increasing Authorized Capital through Additional Deposits from All Participants of the Company**

According to paragraph 1 of Article 19 of the Law "On Limited Liability Companies" the decision to increase the authorized capital of the company by replenishment of its assets by all participants of the company may be adopted by the general meeting of the company's participants by a majority of not less than two-thirds of the total number of votes of the participants of the company (if the need for a larger number of votes for such a decision is not provided for charter of the company). This decision should determine the total amount (value) of all additional deposits, and establish a common (equal) for all participants of the company ratio between the value of the additional deposit of the company's participant and the amount by which the nominal amount of their share is subject to increase (on the basis that the nominal amount share of a company's participant may increase by an amount equal or less than the value of their additional deposit).

Each participant of the company within two months from the date of adoption of the mentioned decision (if the charter of the company or this decision does not specify a different term) has the right to make an additional deposit that does not exceed part of the total value of additional deposits proportional to the size of the share of this participant in the authorized capital of the company.

Not later than one month after the end of the term for making additional deposits from the general meeting of participants of the company, it is required to take a decision on approval of the results of making additional deposits by all participants of the company and on amendments to the company's charter approved by the company's founders (participants), related to the increase of the authorized capital of the company (Shapovalova, 2013). Herewith, the nominal amount of the share of each participant of the company that made an additional deposit increases in accordance with the previously established ratio.

Further, in 2.1. Article 19 of the Law "On Limited Liability Companies" in relation to the company the obligation is fixed within a month from the date of adoption of the decision on approval of the results of making additional deposits by the company's participants to submit to the body conducting state registration of legal bodies the set of documents for the state registration of amendments to the articles of association and In the Unified State Register of Legal Bodies of information related to the change in the amount of the authorized capital, the amount and nominal amount of the participants' shares of Creatures.

### **3. The Procedure for Increasing Authorized Capital by means of Additional Deposits of One or Several Participants of the Company and (or) Contributions of One or More Third Persons Admitted to the Company**

By virtue of paragraph 2 of Article 19 of the Law "On Limited Liability Companies" the issue of increasing the authorized capital of the company on the basis of an application by a company's participant (applications of company participants) on

making an additional deposit and (or) a third person's application (applications of third parties) on their acceptance into the company and making a deposit also falls within the competence general meeting of the company's participants. Herewith, the corresponding decision is taken by all participants of the company unanimously.

Simultaneously with this decision, unanimous decisions should be taken on the acceptance of third parties to the company and making deposits to them and determining the nominal amount and the size of the shares of such persons, on introducing amendments to the company's charter in connection with the increase of the authorized capital, on increasing the nominal amount of the shares of the participants who submitted applications for additional deposits, and, if necessary, changes in the size of the shares of the company's participants. It is established that making additional deposits by the company's participants and third parties and must be carried out not later than within six months from the date of adoption by the general meeting of the participants of the company of the mentioned decisions.

The results of making additional deposits by law are not provided for. Therefore, the monthly period for the fulfillment of the company's obligation to submit to the body that is carrying out the state registration of legal bodies, an established set of documents for state registration of changes in the charter of the company and information entered in the Unified State Register of Legal Bodies related to changes in the size of the authorized capital, size and nominal amount of shares of the company's participants, third parties to the company and the determination of the nominal amount and the size of their shares, is tied to the time of the actual additional deposits by participants of the company or by third parties on the basis of their applications.

#### **4. Consequences of Violation of the Procedure for Increasing the Company's Authorized Capital**

In case of violation of the listed requirements to the procedure for increasing the authorized capital in each of the two options in paragraph 2.2 and paragraph 3 of Article 19 of the Law "On Limited Liability Companies" provide for the same imperatively determined consequences: an increase of the company's authorized capital is recognized as failed, while the company is obliged to return the deposits made to the participants of the company and third parties that actually contributed them within a reasonable time.

#### **5. Gaps in the Governing Regulation of the Mechanism for Increasing the Company's Authorized Capital and Ways to Overcome Them**

At first sight, these rules are very capacious, clear and unbreakable. However, in actual practice this mentioned normative material was not sufficient to unambiguously answer to number of significant issues. Thus, it is not clear whether an increase in the authorized capital of a company is permissible on the basis of a

corporate decision adopted by the established law by a majority vote, if all or some participants belonging to a minority voted against such decision and in the allotted time did not make additional deposits to the part falling to them? This mentioned question reveals the lack of legal clarity in whether a company can increase its authorized capital not by the initially approved amount but by the amount of additional deposits actually contributed by majority participants, while the size of the minority shareholders' shares, while retaining the previous nominal amount, will decrease in proportion to the new value of the authorized capital.

Bearing in mind that positive answer to this question involves the actual conversion to increase the authorized capital by deposits of all participants in having a separate regulation (paragraph 2, Article 19 of the Law "On Limited Liability Companies") procedure for attracting additional contributions of only some of the participants and taking into account that such a decision is a serious basis for a corporate conflict, coupled with the significant decrease in the degree of corporate control participants of the company, refused to make additional deposits to the courts recent time almost universally denied the public the right to consider the increase of the authorized capital held if at least one of the participants contributed their part of the deposit (See, for example: Decision of the Federal Arbitration Court of the Urals District in case No. A60-9854/06 as of November 22, 2006; Decision of the Federal Arbitration Court of the Moscow District in case No. KG-A40/2020-07-P as of April 02, 2007; Decision of the Federal Arbitration Court of the Central District in case No. A62-5125/2010 as of September 12, 2011; Decision of the Federal Arbitration Court of the North Caucasian District in case No. A32-29224/2010 as of September 16, 2011).

Herewith, they were based on a purely formal interpretation of the provisions of Article 19 of the Law "On Limited Liability Companies" and guided by the explanation formulated in paragraph 10 of the Decision of the Plenum of the Supreme Court of the Russian Federation No. 90 and the Plenum of the Supreme Arbitration Court of the Russian Federation No. 14 as of December 9, 1999 "On certain issues of application of the Federal Law "On Limited Liability Companies": failure to meet the deadline for making deposits by individual participants entails recognition of the increase in the authorized capital by the failed; when actually making deposits by participants, they in this case are subject to return to them within a reasonable time.

In the literature, it was also noted that by regulating the increase of the authorized capital of the company from the deposits of all its participants, the legislator "speaks rather about the rights of participants in making deposits than about duties", while the abstention of a participant of the company from the exercise of this right (expressed in not paying them the established term of the additional deposit) entails recognition of the increase in the authorized capital by the failed, and due to the imperative nature of the norms of Article 19 of the Law "On Limited Liability Companies" the authorized capital of a limited liability company cannot be increased

by the amount of actually contributed deposits by other participants of the company with a simultaneous decrease in the amount of the share belonging to the participant who refused to make the deposit (Lomakin, 2008). Practitioners of investment lawyers were forced to state that this method of increasing the company's authorized capital is impossible without the unanimity of all participants, while the law (paragraph 1 of Article 19 of the Law "On Limited Liability Companies") remains silent on this issue (Kozlov, 2013).

It should be recognized that the above variant of overcoming the norms of Article 19 of the Law "On Limited Liability Companies" of uncertainty, excludes the possibility of unmotivated and unreasonable ousting of minority participants who have not expressed a desire to participate in the increase of the authorized capital of the company (dilution of their shares), and is most favorable to them. Indeed, in science, compliance with the principle of proportionality and the priority of participants in incrementing their shares in closed corporations is considered one of the key factors in preventing opportunistic behavior on the part of majority shareholders in relation to minority shareholders (Rock and Wachter, 1999).

However, such an exceptionally formal decision leads to ignoring the reasonable interest of the controlling corporate majority of the corporation's participants and the corporation itself. Minority participants of the company may (in an unreasonable and unmotivated manner) block (by evasion from making an additional deposit) a legally adopted decision of the majority shareholders (Khuzin, 2011). Herewith, innocent participants of the company who voted to increase the authorized capital and actually make their additional deposits to the authorized capital are dependent on the arbitrariness of the minority and are forced to incur losses (organizational, temporary, financial) connected with the recognition of the increase in the authorized capital by the failed.

In turn, company itself in such a situation is deprived of perspectives to use the additional deposits of participants in the development of the core business, and often do lose their ability to carry out certain kinds of economic transactions, for which performance the formation of the authorized capital of a given magnitude legally recognized as necessary (including the license) condition (for example, classes for production of ethyl alcohol and alcoholic products with an ethyl alcohol content of more than 15 percent by volume of the finished-products (except for vodka), organizations must have paid authorized capital of at least 10 million rubles, for the production of vodka at least 80 million rubles, and for the retail sale of alcohol products, the state authorities of the constituent entities of the Russian Federation establish the minimum amount of paid-up authorized capital In the amount of up to 1 million rubles (paragraph 9 of Article 8, paragraph 2.1., paragraph 2.2. Article 11, paragraph 5 of Article 16 of the Federal Law No. 171-FZ); significant amounts of the minimum authorized capital are also established for organizations that intend to attract money from participants in shared construction for the construction (creation) of an apartment building and (or) other real estate objects (paragraph 2, 2.1. Article 3

of the Federal Law No. 214-FZ). In essence, the idea of maximizing corporate profit, which is recognized in science as the theoretical foundation of corporate governance and the goal of corporate law, is undermined (Sharfman, 2014).

Under these mentioned circumstances, attempts of scientific (Kurdzhev and Medvedskaya 2008) and sometimes law enforcement justification of another variant of overcoming the discovered uncertainty could not fail to occur, suggesting the principle permissibility of increasing the authorized capital by combining additional deposits of the participants of the company even in cases when not all participants are in solidarity with this increase and not all contribute their deposits. (See, for example: Decision of the Federal Arbitration Court of the Urals District in case No. A50-10384/2007-G24 as of 12 March 2008; Decision of the Federal Arbitration Court of the Moscow District in case No. A40-14073/07-138-85 as of 13 February 2008; Decision of the Federal Arbitration Court of the Moscow District in case No. A41-10596/12 as of May 30, 2013; Decision of the Federal Arbitration Court of the East Siberian District in case No. A74-2913/2010 as of May 05, 2011).

But such attempts, deprived of more weighty reason, rather than a mere interpretation of the provisions of Article 19 of the Law "On Limited Liability Companies", had no chance of universal success. The situation radically changed only when the principle of the analogy of law was put in the service of proving the validity of the legitimacy of ignoring the will of a minority of participants of the company, which requires, in the absence of a direct expression of will by the legislator, to determine the rights and obligations of the parties based on the general principles and meaning of civil law, based on the requirements of fair practices, reasonableness and justice (paragraph 2 of Article 6 of the Civil Code of the Russian Federation).

In the literature, it is correctly noted that in this case it is a question of obvious analogy of corporate relations that arise within the limited liability companies and joint-stock companies. Bearing in mind that the corporate legislation is really intended to provide the participants of the regulated relations the opportunity in each specific case to find a reasonable balance of interests on the basis of constitutionally significant principles of civil legislation, the Constitutional Court of the Russian Federation within the framework of the verification of the norm of Article 19 of the Law "On Limited Liability Companies" for compliance with the Constitution of the Russian Federation in Decision No. 3-P as of February 21, 2014, made an analogy with his previously stated positions on the possibility of limiting the individual rights of participants in joint-stock companies with similar corporate nature (Blokhin, 2014) (in case of redemption Consolidation of fractional shares and stakes of minority shareholders (Decision of the Constitutional Court of the Russian Federation No. 3-P as of February 24, 2004; The Definition of the Constitutional Court of the Russian Federation No. 681-O-P as of July 03, 2007) and concluded: the reduction of the one of its participants' share in the authorized capital of a limited liability company (a participant who has not realized the possibility of paying an

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additional contribution to the authorized capital as it increases) may be recognized as permissible (lawful) from the point of view of the principles set forth in the Constitution of the Russian Federation, if it is caused by reasonable goals the achievement of a common interest for a given company and the participant whose share (in proportion to the new size of the authorized capital) is reduced, guaranteed effective mechanisms to protect their legitimate and economically reasonable interests.

The minority shareholder is not given the right to veto the decision by the participants, but the disproportion in corporate control is removed through the option that the minority shareholder is granted by virtue of the law (Stepanov, 2015). Since the law establishes quite sufficient guarantees for the protection of the participants' rights who do not approve the assignment of the obligation to increase the authorized capital of the company to all its participants (such dissenting participants are given the opportunity to actually make an additional deposit and retain their share in the company (Stepanov, 2015), they are entitled to demand from the company to buy out their share in the authorized capital with the payment of the actual (real market) value calculated in relation to the net assets of the organization.

In order to achieve a balance of internal interests, provisionally provide for a decision in the company's charter to take a decision to increase the authorized capital more than two-thirds, by a majority vote), the Constitutional Court of the Russian Federation made a general conclusion, according to which the provisions of Article 19 of the Law "On Limited Liability Companies" should be interpreted and applied by the courts, first of all, taking into account the general corporate interest, namely, as not involving the recognition of the decision on increasing the authorized capital of the company taken by the additional required by the law (and the charter of the company) deposits by all participants invalid and (or) recognition of the increase in the authorized capital of the company is failed made on the basis of this decision only on the grounds that some participants of the company who remained in the minority (or voted for a decision but later changed their will) did not make additional contributions in accordance with the law and (or) by the resolution of the meeting.

In the opinion of the Constitutional Court of the Russian Federation, another would imply an unlawful attack on the Russian Federation's principle of stability of civil traffic resulting from the constitution, as well as the violation of the constitutionally significant principles of the basic civil law principles of the inadmissibility of arbitrary interference of anyone in private affairs and the prohibition on the exercise of human rights and freedoms and citizen with simultaneous violation of the rights and freedoms of others.

This example once again proves that the practice of reasoning in analogy is not only common for jurisprudence (since analogies are an integral part of everyday life in general), but also creates long-term consequences for the company (Kahn, 2015). In



this case, the analogy not only served as the basis for a radical coup in the practice of applying the provisions of Article 19 of the Law "On Limited Liability Companies", but also served, as it should be (Kuznetsova, 2006), the channel of direct action of the main principles of civil legislation.

The analogy of law, having the property of retaining the regulatory influence within the principle of equality of all before the law, dictating the duty to treat similar cases in a similar manner (Jakab, 2013), is able to positively manifest itself in the solution of another no less significant issue caused by some uncertainty in the provisions of Article 19 of the Law "On Limited Liability Companies": whether the increase in the authorized capital of the company is lawful on the basis of an application by a participant (several participants) of the company to make an additional deposit and (or) a third party's application (applications of third parties) to accept it into the company and make a deposit if additional deposits are made by company participants and (or) by third parties was to be carried out in violation of the established time limit or was it not carried out in full (less than the amount specified in the relevant statements and the decision of the general meeting)?

Although there is no direct answer to this question in paragraph 2 of Art. 19 of the Law "On Limited Liability Companies", dedicated to the mechanism for increasing the authorized capital due to the deposits of individual participants and (or) accepted by third parties, the logic of the presentation of the normative material and the systematic interpretation of the provisions of Article 19 of the Law "On Limited Liability Companies" as a whole, at first glance, suggest that the answer should be negative. Thus, the mechanism under consideration does not provide for summing up the results of making additional deposits, requires approval of changes in the company charter that fix the increased amount of the authorized capital, already at the stage of making a decision on the satisfaction of applications of participants and (or) third parties on their deposits, that is, deviation of the total amount of actually received deposits from the originally declared.

In addition, in paragraph 2.1 of Article 19 of the Law "On Limited Liability Companies" among the documents that the company is obliged to submit to the body that is carrying out the state registration of legal bodies, the documents confirming the contribution by the participants of the company of additional deposits or deposits by third parties in full measure.

At the same time, hardly such a negative answer can be given unconditionally, without taking into account the possible unanimity of the participants, who do not make additional deposits, participants and (or) accepted third parties who replenish the authorized capital of the company, and the company itself in the matter of the possibility and necessity of fixing the increase in the authorized capital by the amount of actually contributed deposits. In this aspect V.F. Yakovlev correctly concluded that the analogy serves also as a means of deepening the legalistic character of civil-law regulation (Yakovlev, 2006). It seems that the appeal to the

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analogy, the basic principles of civil legislation and the sense of regulatory regulation of corporate relations (in the presence of the unity of corporate will) quite allows the participants of the company to modify the provision laid down in paragraph 2 Article 19 of the Law "On Limited Liability Companies" the mechanism and by analogy with the procedure for increasing the authorized capital due to the deposits of all participants to proceed to approve the amendments to the articles of association of the companies after the expiry of the term for making additional deposits (Yakovlev, 2006) or to take paragraph 2, Article 19 of the Law "On Limited Liability Companies" new unanimous decisions on summarizing the results of making additional deposits, on re-confirming changes to the charter and on determining the new (changed) sizes of shares of the company's participants.

At the same time, due to the predominantly dispositive and permissive orientation of the corporate legal impact on non-public public relations, such formal deviations from the general regulatory parameters of the mechanism for increasing the authorized capital should not prevent legalization (giving legal effect to third parties through state registration) of the changes that have occurred (just as in paragraph 6 of Article 43 of the Law "On Limited Liability Companies" the legislator allows to take decisions of the general meeting of the company's participants on issues not included in the agenda of this meeting in cases when all participants of the company attended the general meeting of the participants of the company) or without the necessary for the decision of the majority of votes of the participants of the company, are not valid irrespective of their appeal in a judicial procedure).

This conclusion is confirmed in the jurisprudence (see: Decision of the Arbitration Court of the West Siberian District in case No. A03-407/2015 as of September 18, 2015, in which the court, having established the actual receipt by the company of cash in payment of an additional deposit to the authorized capital from a third person admitted to the company, concluded that some formal violations committed with an increase in the authorized capital, cannot discredit the corporate status of such a new participant).

## **6. Conclusion**

The study of the regulatory mechanism for increasing the authorized capital of a limited liability company in a practical aspect made it possible to establish that, despite a very detailed and differentiated for various ways of increasing regulation, some situations prove to be bleak, which does not allow, remaining strictly within the norms of Article 19 of the Law "On Limited Liability Companies", in each specific case, to achieve a proper balance of interests of all persons participating in the relevant legal relations, and to find a right-realization solution that best meets the requirements of fair practices, reasonableness and justice.

An attempt to fill in the identified gaps by identifying (on the basis of interpretation) the meaning of the norm that determines the general contours of the gap relationship

can lead to unreasonable infringement of the interests of innocent majority of participants of the company and ignoring the goal of achieving a common corporate interest, the content of which is effective management of company and maximization of profit.

The most effective way of overcoming legal uncertainty in these aspects of implementing the mechanism for increasing the authorized capital of a limited liability company is the analogy of law, using which direct participants in relevant corporate relations experience the direct effect of the principles of civil legislation, and courts receive an effective legal means of establishing harmony of opposing private interests.

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