

Legal and economic regulation of a member's withdrawal from the limited liability company: Gaps and analogies

Regulación legal y económica del retiro de miembro de una Compañía de Responsabilidad Limitada: Brechas y analogías

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Content

- [1. Introduction](#)
 - [2. Research methods and materials](#)
 - [3. Research findings](#)
 - [4. Literature review](#)
 - [5. Discussion](#)
 - [6. Conclusion](#)
- [Bibliographic references](#)

ABSTRACT:

The article proposes the solution to the problem of vague legal classification of cancellation of the withdrawal application and actions for the simultaneous withdrawal of all members. There is no need to obtain a notarized consent from the spouse of a member of the LLC in case of the withdrawal from the company. The findings formulated proposals aimed at improving the current legislation and have drawn attention to the positive impact of analogy in ensuring the legality of intra-corporate interaction and increasing the effectiveness of notarial practice.

Keywords: economic methods, legal gaps, Limited Liability Company, legal similarity

RESUMEN:

El artículo propone la solución al problema de la clasificación legal vaga de la cancelación de la solicitud de retiro y las acciones para la retirada simultánea de todos los miembros. No es necesario obtener un consentimiento notariado del cónyuge de un miembro de la LLC en caso de retiro de la empresa. Los resultados formularon propuestas destinadas a mejorar la legislación actual y han llamado la atención sobre el impacto positivo de la analogía para garantizar la legalidad de la interacción intraempresarial y aumentar la eficacia de la práctica notarial.

Palabras clave: métodos económicos, lagunas legales, sociedad de responsabilidad limitada, similitud jurídica

1. Introduction

Like in some other countries, Russian law provides for such form of a closed nonpublic corporation as a Limited Liability Company specific features of which are the limited number of members, the absence of an organized market for the turnover of corporate shares, legal regulation based on a relationship of personal trust between the members, the possibility to use certain mechanisms to restrict or completely prohibit members' alienation of the shares

in the company authorized capital to the third parties, as well as granting the members with the preemptive right to acquire shares alienated by other members if such alienation is permissible. In addition to the mentioned above, international research papers consider such features of closed corporations as perpetual existence and centralized corporate governance, where owners, as a rule, are majority and often directly participate in the management of the corporation (Miller, 1997, Pinto, 2014). These features also refer to the Russian concept of a Limited Liability Company.

In Russian and foreign practice, the concept of the Limited Liability Company (*Gesellschaft mit Beschränkter Haftung*, *Société à Responsabilité Limitée*, *Private Limited Company*, in relevant variations) is commonly applied in business. Many people realize the advantage of a higher degree of permissibility and disposition principle within this concept, which ensures the simplest, more universal and low-cost corporate governance system possible, as well as flexibility of capital pooling (Pokorná and Večerková, 2014); some authors note the convenience of tax assets the Limited Liability Company provides for the business (Immerman and Millar, 2005).

At the same time, along with financial investments, members of private (nonpublic) closed corporations usually invest their personal efforts in the joint business and due to the limited liquidity of the corporate participation shares cannot diversify their investments, and therefore, if the majority shareholders of a closed corporation are opportunist and biased, then the market cannot be relied upon to correct the problem, unlike in the case of a public corporation (Gilson, 2005). Along with it, both management and dividend policy may fall into hands of the unscrupulous majority (Pinto, 2014).

Therefore, corporate law is forced either to increase the responsibilities of courts in resolving internal corporate conflicts characteristic of closed corporations by clarifying and taking into account fair expectations of the members (Gilson, 2005) or to provide mechanisms for withdrawal from the corporation. In this regard, many authors note that the impossibility of alienating a share in the authorized capital of a closed corporation (due to legal restrictions or actual circumstances) is the general legal and economic basis for the member's withdrawal (Scogin, 1993; Miller, 1997; Kuznetsov, 2011; Dagnaw, 2013).

At the same time, the specifics of the member's right to withdraw from the corporate structure of the Limited Liability Company put before the legislator an urgent task of providing maximally complete, consistent and conceptually sound regulation of the grounds for the occurrence, the execution procedure and limits of exercising this right.

Therefore, it is extremely important to determine the issues that are crucial for practice and, taking full advantage of analogy as a traditional general legal means of filling legal gaps, to formulate proposals for improving the current legislation and practice of its application. At the same time, we aimed to prove the socially positive role analogy plays in the legal regulation of economic activity on the example of a private, but significant aspect of the corporate law.

2. Research methods and materials

The research was conducted using general scientific (analysis and synthesis, abstraction and specification) and private scientific research methods (comparative legal, formal legal, technical and legal). The method of analogy was used as the leading scientific tool and at the same time, it was the subject of research.

To achieve the research objectives set, it was necessary to analyze the conceptual positions of Russian and international legal experts on the advantages and disadvantages of the Limited Liability Company as a non-public (closed) corporate and legal form of business, on the legal and economic prerequisites for securing the member's right to leave the closed corporation by submitting a withdrawal application, and on the most preferable approaches to choosing the form (imperative or dispositive) and content ("opt in" or "opt out" mode) of the legal mechanism of withdrawal.

Abstract theoretical conclusions on the potential of analogy as an effective legal concept that includes a wide range of legal means (understanding and interpretation of law, fact-finding,

assessing arguments and justifying decisions, initiatives to improve legislation) were applied to a specific segment of corporate legal relations and tested regarding the needs of notarial practice.

The normative basis of the study is constituted by the provisions of Russian corporate legislation enshrined in the Civil Code of the Russian Federation, Federal Law No. 14-FZ of February 08, 1998 "On Limited Liability Companies", Federal Law No. 312-FZ of December 30, 2008 "On Amendments to Part One of the Civil Code of the Russian Federation and certain legislative acts of the Russian Federation".

The empirical basis of the study is made up by materials of generalizing (clarifying) acts of supreme judicial authorities (Resolution of the Plenum of the Supreme Court of the Russian Federation No. 6, Plenum of the Supreme Arbitration Court of the Russian Federation No. 8 of July 1, 1996 "On certain issues related to the application of Part One of the Civil Code of the Russian Federation", Resolution of the Plenum of the Supreme Court of the Russian Federation No. 90, Plenum of the Supreme Arbitration Court of the Russian Federation No. 14 of December 9, 1999 "On certain issues of application of the Federal Law "On Limited Liability Companies", Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 of 23 June 2015 "On courts application of certain provisions of Section I, Part One of the Civil Code of the Russian Federation", Information Letter of the Presidium of the Supreme Arbitration Court of Russia of December 10, 2013 No. 162 "Review of the arbitration courts application practice of articles 178 and 179 of the Civil Code of the Russian Federation") as well as court decisions and resolutions on specific corporate disputes.

3. Research findings

The undertaken study enabled us to show the potential of the analogy in determining the most effective approach to the normative elimination of the main gap in the mechanism of the member's withdrawal from the Limited Liability Company as a closed nonpublic corporation, this gap occurring due to the excessive imperative nature of this regulation and the absence of a legal way to prevent the abusive withdrawal.

We considered and supported the updated formulation of the dispositive norms of Article 94 of the Civil Code and paragraph 1 of Article 26 of the Federal Law "On LLC", which as a rule "by default" eliminates the member's right to withdraw from the Limited Liability Company with the possibility to introduce a legal procedure permitting the withdrawal in the company's charter.

In this article, the authors demonstrated that some fairly acute practical issues associated with the functioning of the legal mechanism for withdrawing from the Limited Liability Company are still relevant.

Applying the legal analogy, we substantiated the need to allow the cancellation of the application for the withdrawal of the member from the company regardless of the will of the Limited Liability Company at any time prior to the entry in the Unified State Register of Legal Entities of the record about transferring the share of the withdrawn participant to this company. Besides, such cancellation should be considered legally untenable in all cases when the consequences of submitting such an application have legally affected third parties.

It is proposed to consider the withdrawal of any member as unsuccessful in a situation when the Limited Liability Company receives withdrawal applications from all members on one day.

By analogy with the absence of the necessity to ask for a spouse's notarized consent when issuing a notarized power of attorney in the name of a third person with the right to dispose of the common property of the spouses, it is concluded that a member of the Limited Liability Company may leave the company without the spouse's notarized consent. Moreover, the termination of the member's legal relation with the company by submitting a withdrawal application, as the realization of the individual corporate and legal right of the member, can be carried out without taking into account the opinion of the spouse.

4. Literature review

Russia has accumulated certain normative and law-enforcement experience regarding formalization and implementation of the mechanism of a member's withdrawal from the Limited Liability Company.

However, many points in the legal regulation and practical application of the withdrawal mechanism still have gaps.

According to the provisions of Article 94 of the Civil Code of the Russian Federation and the duplicative norms in paragraph 26 of the Federal Law of 08 February 1998 No. 14-FZ "On Limited Liability Companies" (Federal Law "On LLC") in the version that preceded the Federal Law of 30 December 2008 No. 312-FZ "On Amendments to Part One of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation" (Federal Law No. 312-FZ), members of the Limited Liability Company were entitled to withdraw at any time, regardless of the consent of other members.

In court practice, these norms were unconditionally qualified as imperative, and the corresponding right of the member to leave the corporation was considered inviolable, inherent in the very concept of the Limited Liability Company and non-restricted by incorporating documents. For instance, in paragraph 27 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 6, the Plenum of the Supreme Arbitration Court of the Russian Federation No. 8 of July 1, 1996 "On certain issues related to the application of part one of the Civil Code of the Russian Federation", it was pointed out that the conditions of incorporating documents of the said companies that deprive the member of this right or limit it should be considered insignificant, that is not generating legal consequences.

In academic papers, the right to withdraw from the corporation was recognized as one of the most specific rights members of the Limited Liability Company possess and which represents the main distinguishing feature of this organizational legal form (Petnikova, 2000). Even junior students of Russian law schools realize that the member of the Limited Liability Company has the right, at his own discretion, to sever unilaterally the corporate relationship with the corporation and it is the fundamental difference between his legal position and the shareholder status (Stepanov, 2009).

Russian and international researchers conduct a fairly detailed analysis of solid political and legal justifications for the imperative legislative allocation of any member of the Limited Liability Company with the right to withdraw, regardless the consent of other members. These justifications stem from the need to solve the problem of illiquidity of minority participation interests – one of the main problems of members of Limited Liability Companies as legal entities that have the features of closed nonpublic corporations (Art, 2003, Andersson, 2010). Indeed, due to the absence of an organized market for participation interests in such corporations, the minority shareholder who cannot dispose of his share under fair (market) conditions at any time (or does not have the right to alienate the share due to a statutory or other corporate ban securing the closed corporate body from third parties (Leacock, 2011)), can actually do nothing against the malpractice and incompetence of the legal entity management and its executives (Rasputin, 2009). From the economic point of view, the minority shareholder's investment capital becomes "locked" for an unspecified period and can be used at the discretion of the majority shareholder controlling the corporation, which essentially results in a kind of "confiscation" of minority shareholders' investments (Moll, 2005). The inability of the minority to withdraw from investment by selling a share in a free market allows the hostile majority to squeeze out the minority from the benefits of corporate governance, for example, by refusing to declare dividends.

In such a situation, the recognition of the minority shareholder's right to withdraw is clearly a viable and fair decision, since the termination of the corporate relationship of such a member with the company through their withdrawal is inevitably followed by the company obligation to pay the actual value of their share corresponding to the proportional share of the company's net assets and determined according to the data in its financial statements for the last reporting period preceding the day of filing an application for withdrawal from the company (paragraph 2 of Article 94 of the Civil Code of the Russian Federation,

paragraph 2 of Article 14, paragraph 6.1 of Article 23 of the Federal Law "On LLC"). This is why the corporate legal doctrine often defines the right to withdraw from the Limited Liability Company as a way to protect the rights and legitimate interests of the withdrawing member (Kuznetsov, 2011; Shevela, 2014).

Moreover, researchers have spoken on the need to improve the mechanism of the withdrawal from the company right as the means of preventive protection of the members' interests in nonpublic closed corporations that should be applied effectively before the conflict between minority shareholders and the majority shareholder reaches the stage of obvious oppression (Boyko, 2017).

Nevertheless, Russian doctrine has long recognized a serious gap caused by excessive rigidity and absolute inability to make adjustments inside the corporation regulating the member's right to withdraw and considering the corporation, the members and third parties. Similarly, there was criticism of the excessive freedom of exercising the right to withdraw by any member who has no need to take care of the corporation's future, to think about the interests of its other members and creditors and is not even obliged to prove the validity of the reasons for their withdrawal. There were fears that the unrestricted right of arbitrary withdrawal could lead to liquidation or even bankruptcy of the company and infringement of the rights of its creditors, which in general panders to abuse and negatively affects the stability of civil commerce (Avilov, 1997). Indeed, the abusive implementation of such a right can actually deprive the corporation of the basic (or even all) assets (Sukhanov, 1997).

In addition, regarding the stability (predictability) emphasized in civil law, one cannot fail to acknowledge that the imperative (unchanged, independent of the civil and legal status of the member, the size of the share owned by the member, the economic situation and interests of other members and the legal entity itself) provision of the member of the Limited Liability Company with an opportunity at any time to get out of the corporation, having withdrawn the proportional share from the corporation property or corporate assets, makes the legal model of the Limited Liability Company instable and unpredictable. In research papers, this state of affairs is qualified as a "defect of the member's stability principle" (Telyukina, 2012), while the "excessive guarantee" of the member's right to withdraw from the Limited Liability Company led to the situation when foreign investors in Russia began to ignore this form of a closed nonpublic corporation (Oda, 2010).

At the same time, if we compare the economic aspect of the member's withdrawal from the corporation with separating a certain share from the common property, i.e. that jointly used in business activity (this analogy is drawn as the member's withdrawal involves providing him a cash or in kind equivalent of the share of business equal to the withdrawing member's share), then the economic nature of the phenomenon disagrees with its legal "form": the withdrawal from the company is very similar to the consequences of a co-owner stepping out from the common property, but from a legal point of view it is clearly illegal to extend the regulations of Article 252 of the Civil Code of the Russian Federation on the withdrawal from a closed corporation, and there are no legal grounds for drawing any analogies with common property since the company's members are not part owners of the company's property (Bevzenko, 2006). In other words, there are reasonable doubts about the civil correctness of the concept of the right to withdraw from the Limited Liability Company.

It should be noted that international researchers have also pointed out the flaws of the tacit legal right of a member to leave a closed corporation: the right of free withdrawal questions the idea of a closed corporate form and the members' interest in closed investments; it also undermines the stability of the corporate form and makes creditors worry about the potential consequences of breaking corporate ties, as well as makes it difficult to determine the price of withdrawal (Means, 2009).

Recently, researchers have paid more attention to the general assessment of the consistency of the legal mechanism for regulating the member's withdrawal from the Limited Liability Company regarding its legal imperative adequacy and have discovered certain private issues of this mechanism remain unexplored. As a consequence, the potential of the analogy has not been investigated in the area of corporate legal relations, despite the fact that in Russian and foreign publications analogy is generally recognized as the oldest (Vida, 2013), habitual

and effective means of overcoming legal gaps that is capable of ensuring legal regulation according to the principle of equality of all before the law and solving similar cases in a similar manner (Jakab, 2013, Kahn, 2015, Mikryukov, 2016). Analogy is also seen as one of the crucial elements for the protection of corporate rights (Laptev, 2016). The latter proves the relevance of the research on the problem posed.

5. Discussion

At present moment, there are gaps in the legal regulation of the procedure of a member's withdrawal from the Limited Liability Company, and this necessitates the search for scientifically justified ways of eliminating them in certain aspects of law enforcement, so that no more gaps occur in created regulatory acts.

Considering the goal of the study, first we assessed through the prism of the analogy the approach adopted by Russian legislators which enables to restrict the right of the Limited Liability Company members to leave the corporation at any time without the consent of other members, which would allow eliminating the main gap of the legal mechanism under consideration.

It was further shown that the transformation of the legal mechanism for the withdrawal of a member from the Limited Liability Company in line with the disposition principle did not completely bridge other serious legal gaps the overcoming of which is seen as urgent due to serious legal and economic consequences that are legally prescribed for the member in case of a withdrawal.

Then, we discussed practical issues arising in the connection with the actual use of the withdrawal mechanism: does the member have the right to cancel the withdrawal application, should all or some of these applications submitted on the same day be considered granted, and is the withdrawal from the Limited Liability Company of the member defined as a transaction requiring notarial approval by the spouse of the given citizen?

The method of analogy as the most natural means of eliminating legal gaps enabled us to propose conceptually grounded answers to the questions posed.

5.1. Filling the main gap in the legal regulation of the member's withdrawal from the Limited Liability Company

There are examples in Russian legal practice of how legal mechanisms that are economically inefficient, insufficiently flexible or dangerous for civil commerce continued to exist being modified according to the nature of their regulatory impact towards a fuller implementation of the disposition principle, which correlates with the phenomenon observed by researchers that implies the increase in the disposition principle of civil law regulation as a general development trend of Russian legislation (Zaitsev, 2015).

The problem of excessive rigidity of the right of the Limited Liability Company member to leave the corporation is solved by Russian legislators in a similar way. With the adoption of Law No. 312-FZ, the main gap in the legal regulation of the member's withdrawal from the Limited Liability Company was filled. The right of the Limited Liability Company member ceased to be automatic, lawfully (a priori) established. The right arises depending on whether the withdrawal is provided in the charter of a particular corporation. According to subparagraph 1, paragraph 1 of Article 94 of the current version of the Civil Code of the Russian Federation, the member of the Limited Liability Company may withdraw from the company regardless of the consent of its other members or the company itself, by submitting an application for withdrawal only if such a possibility is directly stated in the charter. At the same time, subparagraph 2, paragraph 1 of Article 26 of the Law "On LLC" clarifies that the member's right to withdraw from the Limited Liability Company may be provided by the charter of this company when it is incorporated or when amendments are made to its charter by the decision of the general members meeting, adopted unanimously by all members.

This legislative solution seems to be fairly balanced. The full elimination of the member's

withdrawal procedure from the legal concept of the Limited Liability Company, compared to its transformation, would be the opposite extreme and would not free the legal practices of this type of corporations from undesirable “imbalance towards mandatory regulation” (Serova, 2009). In this sense, the preservation of the right to exit in a dispositive form corresponds to the general tendency observed in the Russian legal science to strengthen the principle of disposability as the main principle of modern civil law (Leskov and Didenko, 2016).

One can also expect that many legal experts would see the legislative cancellation of the right to withdraw from the Limited Liability Company as an infringement on the freedom of association guaranteed by the Constitution of the Russian Federation that defines as inadmissible forcing someone to join or stay in any association (Filippova, 2006)

In this regard, one should pay attention to the fact that the new wording of the dispositive norms of Article 94 of the Civil Code and paragraph 1 of Article 26 of the Federal Law “On LLC” as a rule “by default” state not the existence of the right to withdraw with the possibility to limit or eliminate it in the charter, but the absence of such, that is these regulations have secured the legal possibility of withdrawal (“opt in”, Sunstein and Thaler, 2009), indicating only one of the permissible options for corporate legal design in this field. Regarding the member’s right to a free withdrawal, some lawyers consider it more appropriate to introduce a reverse rule (“opt out”) which would give the member a right to freely withdraw from the Limited Liability Company unless the opposite is stated in the company’s charter (Mirina and Bozhkov, 2012), and this approach seems to be optimal in this aspect. Considering the inertia of the intellectual activity in the field of law that was noted by researchers (Sunstein and Thaler, 2009), such a rule would lead to the situation when in the overwhelming majority of cases the members of the Limited Liability Company would prefer to use the normative model “by default” and would keep the right to free withdrawal from the corporation, which would prevent reaching the desired goal of stabilizing civil commerce. Indeed, if the relevant (dispositive) norms are designed as provisions applied insofar as the parties have not agreed otherwise, then due to the well-known “sticking” effect, in most cases these will be applied in practice as rules that parties stick to due to oversight or reluctance to create something new. Therefore, in terms of the regulatory impact, such norms will in fact have imperative properties (Stepanov, 2016, Madrian and Shea, 2001). In addition, as researchers claim, despite the general trend of increasing disposition and expanding contractual freedom when building the relationships within closed corporations, investors often demonstrate overly optimistic behavior at the stage of creating a corporation (Thompson, 1992-1993), and thus, they do not provide the necessary protective tools (also by limiting the possibility of leaving the corporation) in advance.

5.2. Legal consequences for members on submitting an application for withdrawal from the Limited Liability Company

Due to the mentioned “sticking” effect, inertia of legal thinking and subconscious desire of the members of the Limited Liability Company created before the adoption of Law No. 312-FZ to maintain the current legal regime as a kind of acquired good, the charters of most companies like this still contain provisions on the members’ right to leave the corporation at any time freely and at will. However, paragraph 21 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of March 30, 2010, No. 135 specifically explains that if the charter of the Limited Liability Company adopted before Law No. 312-FZ entered into force contains a provision on the members right to withdraw, this right should be retained after this date, regardless of possible changes made to the company’s charter to bring it in line with the new legislation.

Therefore, slackening the legal mechanism for the member’s withdrawal from the Limited Liability Company by transforming it in line with the disposition principle and claiming that ‘by default’ there is no opportunity to leave the corporation has not reduced the importance of the proper classification of the consequences of such an action and has completely eliminated other serious gaps in this mechanism, which still remains a relevant issue.

Moreover, according to some researchers, the very dispositive nature of the updated Article 26 of the Federal Law "On LLC" may indicate the gaps in the regulation of the relationships under review, including the failure to solve the problem of whether the member's decision to withdraw should be expressed in a customary written notification or a contractual agreement (Zinkovsky, 2014).

According to the norm stated in paragraph 2 of Article 94 of the Civil Code and specified in paragraph 6.1. of Article 23 of the Federal Law "On LLC", in case of a member's withdrawal from the Limited Liability Company in accordance with Article 26 of the Federal Law "On LLC" (i.e. by submitting a notarized unilateral application of withdrawal to the company), his share is transferred to the company. At the same time, in clauses 7, 7.1 of Article 23 of the Federal Law "On LLC" it is stated that the relevant changes in the composition of the company's members (the withdrawal of a member and the transfer of his share to the legal entity) become effective for third parties from the moment of their state registration (documents for state registration of such changes must be submitted by the company's executive body to the registering authority within a month from the date of the transfer of a share or a part of a share to the company what it is in charge of).

At the same time, regarding internal corporate relations of the corporation and its members, the share of the withdrawn member is transferred to the legal entity directly from the date of receiving the member's application for withdrawal. Legislation rigidly links the date of the member's withdrawal (the date of the transfer of his share to the company) with the beginning of the three-month period within which the company should fulfill its obligation to pay out the actual value of the member's share estimated on the basis of the company's accounting data for the last reporting period preceding the day of filing the application (the charter of the Limited Liability Company can only adjust the duration of this period, but not the moment when such obligation arises). However, court practice demonstrates that the company's fulfillment of this obligation is a legal consequence of the person losing the status of a corporation member, and not vice versa, i.e., the very moment the company receives the member's application for withdrawal is when the corporate legal relationship between the member and the company is terminated (except for the member's obligation to contribute to the property incurred prior to filing the withdrawal application that remains in force as provided by clause 4 of Article 26 of the Federal Law "On LLC").

For instance, in one of the cases, the arbitration court refused the claim to invalidate the decision of the general meeting of the Limited Liability Company members since the claimant had already submitted a withdrawal statement by the date of the meeting and, therefore, was not a member of the company, thus, he did not have the right to appeal against decisions taken at the meeting. At the same time, the court rejected the claimant's argument that he was still a member of the company due to the fact it had not paid the actual value of the share, and pointed out that the circumstances concerning the company's fulfillment of the obligation to pay the actual value of their share to the withdrawn participant (including issues concerning the amount of money the claimant received as compensation for his share and the real value of his share) do not influence setting the moment of termination of the participant's rights (see: Federal Arbitration Court of Moscow District Decision of December 19, 2007 KG-A41/12173-07).

Therefore, it seems perfectly logical to tighten the procedure for preparation of the corporate withdrawal act. Thus, according to paragraph 1 of Article 26 of the Federal Law "On LLC" in the version of Federal Law No. 67-FZ of March 30, 2015 "On Amendments to Certain Legislative Acts of the Russian Federation with Regard to Ensuring the Reliability of Information Provided for State Registration of Legal Entities and Individual Entrepreneurs", the application of the member's withdrawal from the Limited Liability Company must be notarized according to the rules provided for by the legislation on notaries for transactions validation.

5.3. Eliminating relevant gaps in the current legislation on the member's withdrawal from the Limited Liability Company

In view of the serious and urgent nature of the consequences following the member's submitting the application for withdrawal to a Limited Liability Company and in the light of a new requirement to notarize this application, there are some extremely relevant issues regarding the legal doctrine and law enforcement practice that do not have direct normative answers.

First, it is unclear whether breaking the relationship between the Limited Liability Company and the member submitting the application for withdrawal is irreversible, i.e. whether the member still may "change his mind" and cancel (withdraw) the application.

On the one hand, since the system of legal facts classifies the member's withdrawal from the Limited Liability Company into the category of unilateral transactions both in the doctrine (Laptev, 2016, Filippova, 2007), and in court practice (see: Statement of the Supreme Court of the Russian Federation of April 11, 2017 No. 305-ES16-14771, clause 1.2.1 of the Letter of the Federal Tax Service of Russia No. SA-4-14/11453 of July 01, 2015 "On sending the Review of Court Practice on disputes involving Registration Authorities No. 2 (2015)", paragraph 13 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of December 10, 2013 No. 162 "Review of the arbitration courts application practice of articles 178 and 179 of the Civil Code of the Russian Federation"), the member's wish to leave the corporation, like any other unilateral transaction, is the matter of the dynamics (emergence, change or termination) of subjective civil rights and obligations. Therefore, we see the position of some authors as fairly logical that the rights arising from such actions are "inviolable (paragraphs 1 and 2 of Article 1, Article 9 of the Civil Code of the Russian Federation), that is, once established, they cannot be arbitrarily terminated or taken away, including by the person who provided them in due time" (Belov, 2015). Similar reasoning can be found in some judicial acts. For example, in one of the cases the court pointed out that there is no other way to cancel the legal consequences of a member's application for withdrawal from the Limited Liability Company, except for challenging such a claim in court in line with the rules on invalidity of transactions (Decree of the Nineteenth Arbitration Appeal Court of May 16, 2016 No. 19AP-1548/2016). In another case, the court stated that a unilateral transaction for the member's withdrawal from the corporation resulted in the emergence of a liability relationship between the member and this corporation; such a relationship is subject to the norms of civil liability legislation, including those stipulated in Article 310 of the Civil Code concerning the principle of the inviolability of the obligation. In addition, the decision of the member to withdraw his application may violate the legitimate interests of persons who acquired the interest lost by a person leaving the company (Decision of the Federal Arbitration Court No. A57-1600/2011 of Volga Region of December 15, 2011).

On the other hand, paragraph 16 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 90, Plenum of the Supreme Arbitration Court of the Russian Federation No. 14 of December 9, 1999, "On certain issues of the application of the Federal Law "On Limited Liability Companies" formulates an approach according to which the unilateral change in the consequences following the submission of an application for withdrawal from the Limited Liability Company does not exclude the possibility of the company satisfying the member's request for the withdrawal of such an application. Lower courts have adopted and elaborated this approach: it is considered that a member who left the Limited Liability Company unilaterally can be restored in his corporate rights not according to the decision of the sole executive body, but by canceling the previously submitted application by agreement with the supreme corporate body, i.e. the general meeting of the members (Resolution of the Federal Arbitration Court of the Urals Okrug of February 19, 2009 No. F09-494/09-C4.).

It seems that the total denial of the member's right to "change his mind" and cancel the application of withdrawal, as well as recognizing his ability to exercise such a right only upon receiving the consent of the company, cannot be straightforwardly supported or rejected without relevant provisions on the stage of the corporate relations development initiated by filing a withdrawal application corresponding to a relevant stage in the legal procedure of restoring the withdrawn member in his corporate status.

Full ban on cancelling the withdrawal application, regardless of how far this procedure has gone (whether changes in the members composition have been made concerning the third parties, whether documents have been filed for the Unified State Register of Legal Entities on the transfer of the leaving member's share to the corporation, whether there has been a subsequent distribution or repayment of this share) does not cover the seriousness of consequences of the withdrawal and contradicts the principle of stability of the corporation members composition and stability (predictability) of corporate relations. In turn, permitting the cancellation of the application by agreement with the Limited Liability Company at any stage of the corporate legal relationships after the entry in the Unified State Register of Legal Entities on the transfer of the share of the leaving member to the company is in fact not a "withdrawal cancellation" but a "return" of the member which implies the application of corporate procedures specifically designed for such a return (acquisition of the share, accepting a member in the company that results in an increase in the authorized capital, etc.).

Considering the abovementioned, it seems that using the analogy of the law (legal similarity of the relations under consideration with the relations settled by Article 439 of the Civil Code of the Russian Federation on the withdrawal of the acceptance), it is possible to cancel of an application for the member's withdrawal from Limited Liability Company at any time prior to the entry in the Unified State Register of Legal Entities concerning the transfer of the member's share to the company and to prohibit (consider legally unsound) such cancellation in all cases when the consequences of submitting the application have ceased to be a solely internal affair of the corporation. In this way, since the civil law does not provide for the regulations on the possibility and the procedure for revoking the consent to a transaction, in paragraph 57 of Resolution No. 25 of June 23, 2015 "On the court application of certain provisions of Section One of Part One of the Civil Code of the Russian Federation" (as provided in paragraph 1, Article 6 of the Civil Code, by analogy with Article 439 of the Civil Code), the Plenum of the Supreme Court of Russia allowed the withdrawal of the consent based on the regulations for withdrawing the acceptance: a third person who gave preliminary consent to the transaction, may revoke it, notifying the parties before the moment of its settlement, while the withdrawal of consent that was announced to the parties of the transaction after its settlement is considered to be invalid.

Second, it is unclear how one should classify the situation when all members of a specific Limited Liability Company or all members except one file an application for withdrawal from the company at the same time (within one day)?

According to paragraph 2 of Article 26 of the Federal Law "On LLC", the withdrawal from the Limited Liability Company resulting in a situation when there are no members remaining in the company, as well as the withdrawal of a single member are not allowed. It might seem that this ban is clear and unambiguous. At the same time, in the court practice, there is a clear idea that in order to avoid violation of this ban, it is necessary to consider the circumstances of the members' withdrawal from the Limited Liability Company, which includes estimating the order of priorities, i.e. to determine which of the members left and exercised their right to withdrawal (Definition of the Supreme Court of the Russian Federation of April 11, 2017 No. 305-ES16-14771).

However, the moment of submitting a withdrawal application is considered to be the day (regardless the time of day) of filing it by the participant to both the board of directors (supervisory board) or the executive body of the company, and to the employee responsible for transferring the application to the right person, and in the case of sending the application by mail – the day it was received by the relevant department or by the employee performing these functions in the company (Paragraph 16 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 90, Plenum of the Supreme Arbitration Court of the Russian Federation No. 14 of December 9, 1999 "On some issues of the application of the Federal Law "On Limited Liability Companies"). Therefore, one may see a legal gap in the fact that if all members of the Limited Liability Company submit withdrawal applications on the same day, each of them, taken separately, does not formally violate the ban mentioned above as it relies on the open, publicly visible and comprehensive information contained in the Unified State Register of Legal Entities on the composition of the

participants, whereas notaries performing notarization of applications for the withdrawal of each of these members may not check the number of members remaining after the person who applied to them leaves since signing and notarizing the application itself does not require the member to actually present it to the company.

Due to this, basically, it may be possible that due to formally legal actions of members and notaries they employ, the Limited Liability Company receives applications for withdrawal from all members on one day.

It is a different matter that the further development of this corporate situation should be classified according to the legal analogy by applying the requirements of reasonableness, good faith and equity: the sole executive body not only has the right to sign an application for entering in the Uniform State Register of Legal Entities a record concerning the transfer to the company of the shares of all those wishing to withdraw, but also should not give preference to any of the members and should not try to order the applications according to the time of the day. In this case, the withdrawal of all members should be seen as invalid. The court practice knows examples of the adequate application of the legal analogy in similar cases. For instance, in the Decision of the Federal Arbitration Court of the North-West District of May 31, 2007 in case No. A44-3016/2006-7, the court, having found that the considered legal relationship in dispute is not regulated by the norms of the current legislation (namely – mandatory rules do not provide for announcing several winners of the competition at the same time) and it is impossible to use the legal analogy, the issue should have been resolved proceeding from the requirements of good faith, reasonableness and equity (paragraph 2, Article 6 of the Civil Code of the Russian Federation).

In addition to this, there may be some doubt whether all participants, except one, have the right to withdraw from the Limited Liability Company together because of concerted actions, leaving the former partner as a single member. In this case, one should note that in such a situation there is unfair and unjust infringement of the rights of that single member. Indeed, as the last (the only), such a member will not be able to free from the corporate burden through withdrawal and will be forced to govern the corporation alone and bear the attendant legal risks. At the same time, if such a member used to be a minority, he may be financially and organizationally not ready to bear the corresponding burden and risks.

In this regard, it seems right to support the position emerging in court practice that the possibility of a person to acquire the legal status of a single member of the Limited Liability Company and, if necessary, to run the company, including liquidation of the latter, refers to the ordinary entrepreneurial risks of a member in civil commerce (Decision Of the Eighth Arbitration Appeal Court of September 3, 2015 No. 08AP-6933/2015).

Third, it is not obvious whether the withdrawal from the Limited Liability Company of the member – a married person, – is regulated by the requirement of paragraph 3 of Article 35 of the Family Code of the Russian Federation regarding the need to obtain a notarized consent of a spouse for the transaction for which the law prescribes a statutory notarized form.

Some practicing lawyers answer positively to this question, pointing out that the withdrawal of a member from the Limited Liability Company is similar to a transaction aimed at ending the legal relationship with the company and dealing with the share in the authorized capital of the company, taking into consideration that according to Article 34 of the Family Code of the Russian Federation this share is seen as acquired in a marriage through the total income of the spouses and is recognized as the common property of the spouses (Expert advice No. 155939, 2016). In research papers, one can find opinions supporting this position. Experts proceed from the fact that the withdrawal of a member from the Limited Liability Company is recognized as the alienation of a share in favor of the company by virtue of a direct indication to this in the law (paragraph 1, Article 26 of the Federal Law "On LLC"), from which it is concluded that the member's withdrawal is a unilateral transaction aimed at alienating a share in the authorized capital of a company and subject to mandatory notarization, for which the spouse's notarized consent must be obtained (Kuznetsova, 2017). In addition, it is suggested that when a spouse decides to leave the business corporation, then if there is no a marriage contract, the person actually makes the transaction which in

some way affects the joint ownership (Piskunov, 2017). According to V.V. Tikhonov, a literal interpretation of the norms of family and corporate law implies that a spouse's withdrawal from the Limited Liability Company is a transaction that requires a notarized consent from the other spouse, and a situation may occur when the spouse who has left the company actually forces the other spouse to carry corporate status and gets the opportunity to control this status through the mechanism of approving the withdrawal (Tikhonov, 2017).

However, some researchers give arguments in favor of the opposite decision. It is proposed to differentiate the property rights of the spouses from the corporate rights belonging to each spouse, and use this distinction as the grounds to consider that the transaction on the withdrawal from the corporation according to Article 26 of the Federal Law "On LLC" is not a transaction implying the disposal of shares as the common property of spouses and does not imply dealing with this share as a legal goal, while the application for withdrawal itself aims to exercise non-property corporate right of participation (Chashkova, 2016).

In our opinion, in situations different from those when an unscrupulous spouse attempts to bypass the requirement to obtain a notarized consent of the spouse to make a notarized transaction for the alienation of a share in the authorized capital to a third party (such practice of a sham withdrawal with simultaneous entry of a third person is justly classified in the court practice as an unacceptable abuse (Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation of January 21, 2014 No. 9913/13)), a member of the Limited Liability Company has the right to exercise a corporate legal possibility to withdraw without taking into account the opinion of the spouse. In this case, one cannot apply family legislation to the procedure for disposition of the common property of the spouse. Indeed, as pointed out by the Presidium of the Supreme Arbitration Court of the Russian Federation, the rights of a member in the Limited Liability Company arise due to personal participation in the company and are regulated by the norms of corporate, and not family legislation, and consequently, the application of the norms stated in Article 35 of the Family Code of the Russian Federation is erroneous (Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation of September 11, 2012 No. 4107/12).

Moreover, to justify the latter position, it seems necessary to pay attention to several crucial points. For instance, the legislator links legal consequences of breaking the corporate relation between the member and the Limited Liability Company and the emerging obligation of the company to pay to the member the real value of their share not from the moment of registering the withdrawal application, but from the moment of its submission (paragraph 2 of Article 94 of the Civil Code of the Russian Federation, paragraph 6.1 of Article 23 of the Federal Law "On LLC"). At the same time, the law does not directly recognize the application for withdrawal as a transaction and states only the requirement for its certification according to the rules provided for by the law on notaries to certify transactions.

This means that the notarization of the withdrawal application does not by itself result in a change in the legal status of the member (such a member may not submit such an application and, consequently, they may not lose their share in the corporation).

It is also possible to draw an analogy with the situation when one of the spouses notarizes a power of attorney with the right to dispose of common property (including shares in the authorized capital of the Limited Liability Company) to a third party: since the issuance of a power of attorney does not by itself imply the disposal of the common property of the spouses, there is no requirement to obtain the spouse's consent to file such a power of attorney.

6. Conclusion

The conducted research made it possible to use the example of a private, but very significant area of the corporate law to prove the socially positive role of legal analogy. We demonstrated the potential of analogy to ensure the direct implementation of the principle of good faith, which would enable to overcome the main gap in the mechanism of a member's withdrawal from the Limited Liability Company caused by the absence of a legal opportunity to prevent the abusive withdrawal.

In view of serious and immediate consequences arising when a member submits his withdrawal application to the Limited Liability Company, the fact that this problem is still relevant for most corporations and in the light of the new regulatory requirement for notarization of the withdrawal application, we applied the method of analogy and obtained answers to the most pressing issues that do not have a direct regulatory solution.

For instance, we proved it necessary to allow the cancellation of an application of a member's withdrawal from the company regardless of the will of the Limited Liability Company and other members at any time prior to the entry in the Unified State Register of Legal Entities on the transfer of that member's share to the company. At the same time, it was argued that cancelling such a withdrawal was not legal in all other cases when the consequences of the statement of withdrawal have legal effect on third parties. It is also proposed to consider the withdrawal of any member as unsuccessful in a situation when the Limited Liability Company receives an application for withdrawal from all members on the same day.

By analogy to the situation when it is not necessary to ask for a spouse's notarized consent to issue a notarized power of attorney in the name of a third person with the right to dispose of the common property of the spouses, it is concluded that there is no need to obtain the notarized consent of the spouse of a member of the Limited Liability Company to withdraw from the company.

The findings obtained in the course of the research created the conceptual basis for specific proposals for improving the current legislation and practice of its application.

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[Index]

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