

Relevant changes to the Civil law related to LLC

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The Federal law №312-FZ About modification in the part I of the Civil Code of the Russian Federation and some acts of the Russian Federation has been passed on December, 30th, 2008, and this law made essential changes in the legislation about Limited Liability Companies (hereafter LLC). These changes affect all devoted to Companies with limited liability of article of the Civil Code of the Russian Federation and more half of articles of the Law on LLC.

Changes have been made to the Law on LLC and the additions, concerning following moments:

- The structure of foundation documents is changed;
- The size of an authorised capital stock is specified;
- The right of agreement undertaking of participants of the LLC is entered;
- Possibility of an exit of participants from the LLC is limited;
- The list of participants is founded;
- Powers of management in the LLC are expanded;
- The order of the repayment is changed by the LLC of shares of participation in an authorised capital stock;
 - Transition of the right to a share in an authorised capital stock is detailed;
 - The requirement of the notarial certificate of pledge of a share of participation is defined;
 - The limited term for the appeal of decisions of board of directors (supervisory board) is established;
- Regulation of transactions with interest and large transactions of the LLC is changed;
- LLC reorganisation is concretised.

Changes concern both existing, and again established LLC and come into force since July, 1st, 2009. Thus, LLC have enough time to be prepared for execution of new requirements.

Foundation documents and authorised capital stock

Changes provide an exception of the Article of Incorporation of the list of foundation documents of the LLC. The Article of incorporation ceases to be the foundation document of LLC. Since July, 1st, 2009, the Article of Incorporation will be necessary only at a stage of

initial registration of the LLC, and it is called already «the contract on establishment». This contract must contain the information which is necessary for the state registration, including, for example, the information on quality and price of shares in an authorised capital stock and this information will be brought in EGRUL, the sum, terms and share repayment terms of an authorised capital stock of the LLC also is defined and penal sanctions for its untimely payment can be provided. Unlike the charter it will not be necessary to give this document to interested persons under their requirement.

Now the Charter will be the unique foundation document of the LLC. Its maintenance also has got some changes: data on participants and shares belonging to them are excluded from it.

The minimum size of an authorised capital stock of the LLC makes 10 000 rubles while in the previous edition of the Law on LLC it was levelled 100 minimum salary rates for date of representation of foundation documents of a LLC for the state registration. In order to avoid questions and difficulties we recommend to provide conformity of an authorised capital stock to new positions of the Law.

Authorised capital stock payment is supposed in a corresponding part even after the expiration of a year from the moment of the state registration of a LLC if for whatever reasons separate participants have not been bring contributions to authorised capital stock payment. Shares (a part of shares) such participants pass to a LLC and should be realised a LLC when due hereunder. The contract on LLC establishment penalty (the penalty) for duty default on payment of shares in a LLC authorised capital stock can be provided.

Exit of the participant from a LLC

The exit of the participant has turned from obligatory institute in facultative which exists only in cases of its direct mention in the LLC charter (in depend on the consent of other participants). Thus, the norm is excluded from the legislation about possibility for the participant in any case to leave LLC – one of the most problem norms of the legislation on LLC, potentially putting any LLC before threat of essential blow on its actives owing to payment to the participant who has left LLC of the valid cost of its share.

Cost of its share in an authorised capital stock is paid to the leaving participant. The period on which basis calculation of the valid cost of a share of the leaving participant of a LLC since one year till last accounting period previous a filing of application is made is reduced. Term of payment of cost of a share is reduced from six about three months.

Under the Law the exit from a LLC of the unique participant is not supposed, no less than an exit of participants at which the LLC will not have got participants.

Thus the participant of LLC can is still free leave firm, having sold the share to other participants or the third party. However at sale (donation) shares on the party the notarial form of the transaction is obligatory. Non-observance of this form involves invalidity of the contract. It should become an obstacle for plunder of shares in LLC by raiders, firm sales to nonexistent persons.

As practice shows, abusing possibility of an unlimited exit from a LLC at absence subsidiary property responsibility of participants was widespread way of evasion from property claims for the losses caused to the LLC and its creditors, broke the rights and legitimate interests of remaining participants of a LLC.

Establishment of the list of participants

Chapter III.1 devoted to conducting of the list of participants is brought in new edition of the LLC Law. All LLC from the moment of registration are obliged to conduct the list of the participants. It will include the information on founders, including the data about their addresses, data on shares belonging to them and their payment, the data about the shares which have passed to a LLC. The person who is carrying out functions of an individual executive office of the LLC, provides conformity of the information containing in the List of Participants, to data in EGRUL.

What for it is necessary to duplicate EGRUL as the information from the last always has a priority before the LLC list? In accordance with the law the list is including the document for the third parties. Counterparts of a LLC have the right to count on reliability of the list. Therefore LLC which has committed in this document of an error, cannot refer to its discrepancy to EGRUL data in relations with the third parties operating only taking into account data, specified in the list.

The list is important also because LLC charter is not obliged to contain any more data on the size of a share of each of participants. Except the list of participants, this information can be found only in EGRUL data.

Management in a LLC

Changes have considerably expanded a circle of powers of Board of directors of a LLC, having included in it, in particular, definition of the basic directions of activity of a LLC, the decision of questions on participation of a LLC in associations and other associations of legal bodies, appointments of auditor checks, the statement or acceptance of the documents regulating the organisation of activity of a LLC (internal documents of a LLC), creation of branches and opening of representations of a LLC.

As well for a LLC executive office the new duty – in a current of 10 days after drawing up of the report of carrying out of general meeting of participants is provided, the head of a LLC is obliged to dispatch a report copy to all participants of the LLC.

Relations between participants of a LLC can be regulated now by the agreement on a procedure of the rights of the participant on which they undertake to carry out definitely the rights and (or) to abstain from realisation of the specified rights, including to vote definitely on general meeting of participants of a LLC, to co-ordinate a variant of voting with other participants, to sell a share or a share part under the price defined by the given contract and (or) at approach of certain conditions or to abstain from alienation of a share or a part of a share before certain conditions, and also to carry out in coordination other actions connected with management by a LLC, with creation, activity, reorganisation and LLC liquidation. Such contract consists in writing by drawing up of one document signed by the parties.

Share of the participant – sale and pledge.

The repayment the LLC of shares of participation in an authorised capital stock

One of the most considerable changes was the new order of alienation of a share participants of a LLC. Since July, 1st 2009 the transactions directed on alienation of a share or its pledge are subject to the notarial certificate. Notarial assurance it is not required for the transactions made with participation of the LLC. If earlier for this purpose was to conclude the contract of purchase and sale of a share in the simple written form enough, to notify a LLC on the taken place transaction, to confirm the new charter and to submit documents to registering body now for fulfilment of the similar transaction presence of the notary is required: the legislator has established for purchase and sale contracts the obligatory certificate of the transaction the notary. Non-observance of the form of the contract attracts its invalidity. After appropriate registration of the transaction the notary in a current of three days directs to registering body together with a copy of the contract of purchase and sale of a share (its part) the statement from the participant of the LLC alienating a share or its part, with the requirement to bring respective alterations in EGRUL. Also the notary in a current of three days after the transaction certificate transfers a copy of this statement and the contract of purchase and sale of a share in a LLC.

The notary is obliged to check up the validity of the property right of the seller on an alienated share. The right of the seller to a share in the LLC authorised capital stock should be confirmed by the contract, according to which the corresponding share has been earlier got by the seller (if it is got after July, 1st, 2009 such contract should be notarially certified), and also an extract from EGRUL d, containing the information on the property right of the seller on a share.

The payment raised by notaries for assurance of contracts on transition the property right to shares, will make 0,5 % from a sum of transaction, but not less than 300 rubles and no more than 20 000 rubles.

Besides it will be necessary to show at least to the notary:

- An extract from EGRUL (no more 30-day prescription);
- The decision on LLC creation;
- Notarially certified copy of the contract on LLC establishment;
- The document expressing the maintenance of the transaction in the simple written form.

The law does not establish the exhaustive list of the documents necessary for the purposes of notarial assurance. So, in practice the notary can demand and other documents.

The notary in turn, should:

- To certify the transaction on share alienation;
- To notify the tax department conducting EGRUL.

The legislator has made changes to an order of use by participants of the right of priority to share acquisition. The law allows participants to provide the price identical to all on which the share can be redeemed and which can be defined in the different ways: in a firm sum of money or on the basis of one of the criteria defining cost of a share (cost of a net wealth of a LLC, balance cost of actives of a LLC for last accounting date, net profit of a LLC and others). The price of purchase of a share Thus in advance defined by the charter or share parts is identical to all participants of a LLC without dependence from an accessory of such share or such part of a share in a LLC authorised capital stock.

One more requirement about obligatory notarial assurance has concerned contracts of pledge of shares – the notarial certificate for contracts of pledge of a share becomes obligatory. Thus the notary, also as well as in a case with share purchase and sale, is obliged in a current of three days from the date of the certificate of the contract of pledge, to carry out transfer to registering body of the corresponding statement from the participant with the appendix of the contract of pledge of a share or its part.

The notary bears the property liability for damages, caused by it as a result of the illegal certificate of the contract of transfer of a share. For simplification of compensation of a damage the notary insures the civil liability.

The participant of a LLC has the right to demand now the repayment of its share a LLC. It occurs in case: 1) the participant voted against the decision on fulfillment of the large transaction or increase in an authorised capital stock by entering of additional contributions (or if the participant did not take part in voting); 2) participants have refused acquisition of a share of the participant in cases when alienation of a share is forbidden to the third parties by the charter of a LLC; 3) the consent of other participants to share alienation to other participant of a LLC or the third party in a case when necessity of reception of such consent is provided by the LLC charter is not received. Thus term of payment of the valid cost of a share of the participant makes only 3 months from date when such duty at a LLC has arisen. The valid cost of a share now not according to a year in which the statement has been submitted, and according to last accounting period is defined. Other term of payment can be specified in the LLC charter.

Besides, the share passes to a LLC in case the consent to share transition to successors of the died citizens or assignees of the liquidated legal persons-participants of a LLC is not received or the consent to share transition to the third parties which have acquired the right to a share at its acquisition at the public auctions is not received.

Establishment of the limited term for the appeal of decisions of board of directors (supervisory board)

According to new changes, the participant can appeal against the decision accepted by board of directors (supervisory board) of the LLC, by a filing of application in court not later than 2 months from date in which the participant has learnt, or should learn about such decision.

Regulation of transactions with interest and large transactions

Positions about approval of large transactions and transactions in which fulfillment there is an interest are detailed. These positions are similar to positions of the Law on joint-stock company. The innovation provides that the decisions accepted by general meeting of participants, approving the forthcoming transaction in which fulfillment there is an interest, will hold good to following annual meeting of participants if other is not provided in the corresponding decision. The given change is actual for today and reflects judiciary practice.

LLC reorganisation

Possibility to be transformed as reorganisation in any economic Company, economic association or production co-operative whereas now admissible forms of transformation are only joint-stock company, a LLC with additional responsibility or production co-operative is given a LLC.

The federal law №312-FZ comes into force since July, 1st, 2009, and it means that from this day charters and foundation contracts of all LLC will operate only in a part of the Russian Federation not contradicting specified acts. Besides, they are subject to reduction in conformity with the changes which have entered validity not later than January, 1st, 2010.

What threatens to the company if it till January, 1st, 2010 does not bring the charter into accord with new edition of the Civil code and the Law about LLC?

"Wrong" points of the foundation document will not be applied. But it is not the most important thing. The company can liquidate under the claim of tax inspection.

Similar claims are known in arbitration practice. Following explanations of the higher arbitrators, courts can suggest to bring the organisations the charter into accord with the law and to register these changes in tax inspection. And if only the company does not execute court instructions, last deals with a question on its liquidation.

Besides, in these situations the court should be guided by a position of the Constitutional Court of the Russian Federation, according to which law infringement should be so essential to demand the termination of Open Company for protection of interests of other persons. Following this position, in one of arbitration affairs the court has refused liquidation as incorrect position of the charter can be corrected.

Thus, arbitrators apply the law taking into account a number of positions of superior courts protecting the company. However it does not release participants of Open Company from necessity to bring charters of the societies into accord with the law.