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Innovations and Analogies in the Legal Regulation of Withdrawal from a Limited Liability Company under Current Russian Law

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Abstract: The purpose of the study is to highlight the most significant legal gaps in the mechanism under study, find doctrinally relevant ways to overcome them casually in law enforcement, and propose options for generally filling the gaps in rulemaking. It is equally important to test the effectiveness of the analogy as a means to combat legal gaps. The methodological framework was formed by general (analysis, synthesis, abstraction, and concretization) and specific (comparative, formal, and technical legal) scientific research methods. The positive role of analogy as a method of combating legal uncertainty and the formation of legislative innovations was confirmed. The conclusion was made about the absence of a formal need for additional legislative authorization for Limited Liability Companies' members to create a conditional or individualized withdrawal procedure. Backed by the legal analogy, the necessity to extend the freedom-of-contract doctrine in determining the fair value of a withdrawing shareholder's share was argued. The achievements provided the basis for specific practical proposals to enhance existing Russian legislation and harmonize corporate relationships, which should improve Russia's business climate.

Keywords: legal gaps; analogy; limited liability company; closed corporation; right to withdraw; minority shareholder



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1. Introduction

One of the most relevant development and functioning aspects of corporate legislation is the balanced (taking into account the interests of a Limited Liability Company (hereinafter—LLC) as a type of closed corporations, its shareholders, and creditors) enhancement of the mechanism for a shareholder's withdrawal from the company.

Such a fundamental problem for closed corporations is imposed on natural procedural difficulties in determining the form and procedure of withdrawal. The majority shareholders are inclined to abuse their dominant position in the company (Shleifer and Vishny 1996). Therefore, it is essential to deal with the issue of legal and economic consequences of a shareholder's withdrawal from an LLC harmoniously but with an emphasis on the protection of minority shareholders (Bikulov 2017), including complete regulation of the procedure for determining the value of the withdrawing shareholder's share.

Gaps in legislation and its imbalance in terms of withdrawal procedure inevitably lead to an observed increase in the number of legal cases based on attempts to implement this procedure or counteract its implementation. The literature on this aspect notes that for case law on corporate disputes, the legal assessment of applications for shareholder withdrawal from the corporation (LLC) membership becomes a "cornerstone" (Lapteva 2016).

The instability of standards for the withdrawal of a shareholder from an LLC is well-known. The latest amendments were introduced into the Federal Law of 8 February 1998, No. 14-FL "On Limited Liability Companies" (hereinafter—the LLC Law) as part of the ongoing activities in the direction of "Incorporation" within the "Transformation of the business climate" Action Plan, approved by the Russian Federation (hereinafter—RF)

Governmental Order of 17 January 2019, No. 20-r. The withdrawal regime underwent general conversion to a discretionary one, which implies the ability of LLC shareholders to modify the parameters of the withdrawal mechanism themselves. All these factors exclude the possibility of avoiding gaps and obscure issues, which further actualizes the research undertaken.

2. Materials and Methods

The reliance on the analysis of regulations, related legal cases, theoretical and legal constructions, and reliable Russian and foreign scientific research on some corporate and legal issues makes it possible to classify this work as a doctrinal one (Smits 2017), characterized rather as a “law study” than a “study on the law” (Kharel 2018).

A key place in the regulatory framework of the study was taken by the legislative innovations introduced into Russian Company Law in 2020 with the adoption of the Federal Law No. 252-FL of 31 July 2020 “On Amendments to the Federal Law “On Limited Liability Companies” (hereinafter—Law No. 252-FL) in terms of enhancing the procedure for entering data into the Uniform Government Register of Legal Entities on the withdrawal of an LLC shareholder from the company.

The empirical basis for the formation of the provisions for the study included clarifying judicial acts of the highest courts of Russia, as well as a significant number of resolutions of lower courts on specific disputes related to the application of the rules on the procedure and consequences of the return of corporate investments by members leaving LLC.

As with any civilized doctrinal study, this work required the use of formal legal (legal-dogmatic) tools and other specific instruments of legal sciences (Luneva 2015) and traditional general logical techniques in the form of analysis and synthesis, induction and deduction, comparison, and generalization.

A notable role in the methodological framework of this study was played by the analogy method. It is one of the means to achieve a scientific result and one of the objects studied in terms of its ability to assist in overcoming gaps in the existing legislation and serve as a creative basis for developing new regulatory decisions.

3. Literature Review

When forming the LLC’s corporate structure, ensuring the shareholder’s right to withdraw from the organization unilaterally by applying for withdrawal is actively practiced and widely discussed because the withdrawal mechanism is an efficient, fair, and irreplaceable solution for closed corporations: LLC meets these criteria unconditionally (Mayfat and Gordeev 2019). Problems of illiquidity of minority shares in the absence of an organized market for their respective shares and the inability “to reach” their economic value (Leacock 2011) and the related problem of “locking” investments of LLC minority shareholders (Moll 2005) are vulnerable to abuse and unprofessional management of LLC and its controlling shareholders (Rasputin 2009; Shleifer and Vishny 1996). As a result, majority shareholders actually expropriate minority shareholders’ benefits from corporate involvement (Nagar et al. 2009).

Liquidation of a corporation in both Russian and foreign practice is considered to be an undesirable and extreme solution to the problem of minority shareholders’ oppression in closed corporations when other methods have been exhausted or are impossible (par. 29 of Resolution No. 25 of Plenum of the Supreme Court of the RF of 23 June 2015 “On application by courts of certain provisions of section I part 1 of Civil Code of the Russian Federation”). Therefore, withdrawal becomes the key tool requiring increased attention.

Amendments were introduced into the mandatory rule of art. 94 of the Civil Code of the Russian Federation (hereinafter—CCRF) and the duplicating provision of par. 1 art. 26 of the Federal Law of 8 February 1998, No. 14-FL “On Limited Liability Companies” (the LLC Law) concerning the inviolable and unliable to corporate or contractual infringement right of each shareholder of any company to withdraw from an LLC at any time regardless of the consent of other shareholders to the discretionary rule. This rule presumes the

absence of the right to withdraw and permits specially (when establishing company or making amendments to its Articles of Association by unanimous consent of the general meeting of shareholders) to formalize this right for a particular LLC. These measures enabled the legislator to eliminate the critical gap in the legal regulation of the shareholder withdrawal from a corporation—the uncertainty of the economic and legal consequences of the excessive rigidity of the LLC shareholder’s right to withdraw from the corporation. As noted in the literature, the “excessive security” of the shareholder’s right to unreasonably withdraw from an LLC led to the fact that foreign investors aimed at the Russian market began to ignore this form of a closed private corporation (Oda 2010).

With the adoption of the Federal Law of 30 December 2008, No. 312-FL “On Amendments to Part 1 of the CCRF and Certain Legislative Acts of the RF” (hereinafter—Law No. 312-FL), the right of LLC shareholders to suddenly and unconditionally withdraw from the corporation disposing of a part of the assets proportional to their share of the corporate involvement ceased to be legally (a priori) established. Provision for the possibility to enter the legal regime of the withdrawal permissibility (“opt-in”) (Sunstein and Thaler 2009) enabled to neutralize the so-called “defect of a LLC shareholder’s stability principle” (Telyukina 2012), while retaining the very possibility for the use of legal instruments for meeting the “natural economic needs” of minority shareholders of LLCs as closed corporations (Dagnaw 2013; Scogin 1993). It also made the LLC legal structure more stable and predictable for shareholders who consider their corporate presence in the company as a secure investment and for creditors who have to worry about the potential negative consequences of breaking the debtor’s internal corporate links (Means 2009).

The legislator provided an additional strength for LLC’s corporate structure while implementing the withdrawal mechanism with a new requirement to register the withdrawal application. According to par. 1 art. 26 of the LLC Law as amended by the Federal Law of 30 March 2015, No. 67-FL “On Amendments to Certain Legislative Acts of the RF as to Ensuring the Reliability of Information Submitted during the State Registration of Legal Entities and Individual Entrepreneurs”, the withdrawal application is subject to notarial certification according to the rules stipulated by the legislation on notaries for transaction certification. Really, the consistent increase in the notaries’ involvement in strengthening corporate relations has become a “clear trend” in recent years (Izmailova 2020) and showed a real positive impact on the conditions for doing business in the legal form of LLC.

Consummated on 11 August 2020, Law No. 252-FL indicated the possibility, at the will of shareholders, to give the right to withdraw from the company to specific shareholders listed in the Articles of Association, or shareholders who have a share of any size in the company’s authorized capital, or shareholders (groups of shareholders) who meet the criteria listed in the Articles of Association. The law also indicated the acceptability to pre-condition the right to withdraw by a certain term, consent of other shareholders or corporation itself, and occurrence or non-occurrence of different circumstances. Thus, the legislator has demonstrated the change in the modus of several corporate legal institutions from mandatory to discretionary ones, which is currently observed from a historical perspective (Coffee 1989) and in Russia today (Gutnikov 2020). The legislator has also advanced in ensuring the balance of flexibility of the investment vehicle in the equity participation.

One of the regulatory innovations introduced by Law No. 252-FL has eliminated the lacunae noted in science (Povarov 2015) in the rules on a notary’s actions after certification of the shareholder’s application for withdrawal from an LLC. Now the notary who has certified the application for withdrawal must submit an application within two working days from the date of such certification to the tax authority registering legal entities for entering the conforming amendments to the Unified State Register of Legal Entities. Namely, the notary must enter information on the termination of the corporation shareholder’s rights in the person who has submitted an application for withdrawal to the notary and transfer of the equity participation of the terminated shareholder to the LLC. Then, within another working day, the notary shall hand over the shareholder’s application for withdrawal

certified by him to the company itself and inform the latter of the filing the application to the registration authority. This procedure brings complete clarity to the determination of the withdrawal time. It eliminates situations of so-called “hung shares” (when the shareholder had applied for the withdrawal, but the company has evaded from ensuring the registration of the share transfer to the company).

At the same time, some significant gaps in the mechanism under consideration have not been legally closed, such as the uncertainty discussed in Russian and foreign doctrine regarding the possibility, necessity, or inadmissibility of taking into account reduction factors (discounts) for illiquidity (lower liquidity) and minority (uncontrollability) in determining the exit price—the fair value of the equity participation to be paid to the withdrawing shareholder (Moll 2010; Tran and Vrublevskaia 2015; Belova and Makin 2017).

The expansion of the discretionary basics and freedom of contract in the formation of the LLC legal structure has aggravated the problem of shareholders’ negligence in the preliminary planning of possible (if not inevitable) breaking of corporate links (Matheson and Maler 2007) that is well-known for closed corporations (in which there are relatively few shareholders and therefore everyone knows everybody).

Moreover, some new discussion issues have arisen in connection with the practical application of the withdrawal mechanism; in particular: is it possible to extend ideas of dispositivity to the rules on the registration of application for withdrawal, and are the shareholders entitled to provide another (non-notarial) form of withdrawal in the Articles of Association?

Since legal uncertainty in corporate regulation (in particular, in the enforcement of shareholder agreements) forces foreign investors and even Russian individuals to avoid Russian law (Gomtsyan 2013), it seems urgent to move forward in eliminating the ambiguity of all corporate legal mechanisms, including such an important one as the mechanism for withdrawal from the corporation.

The literature argues that the analogy method is the oldest (Vida 2013), most effective (Weinreb 2005), and creative (Mikryukov 2020) tool for overcoming normative gaps in practice, and a general tool for facilitating the understanding and argumentation of positions in everyday discussions (Juthe 2005). It is noted that the reasoning and argumentation by analogy act as a “friend” and “problem solver” not only in common-law jurisdictions but also in civil-law systems (Rigoni 2014), including the Russian jurisdiction. Moreover, a suggestion was made that similar reasoning can be incremental by its nature (i.e., not only a means of slow legal change) and a way to quickly correct large parts of the law (Schauer 2009). Thus, it is highly relevant to work through the above issues (ambiguity areas), which remain beyond the Russian legislator’s sight when regulating the procedures of a shareholder’s withdrawal from an LLC, to assess unsuccessful legislative decisions in this area, and to verify the efficiency of the analogy method in the aspect of assessing gaps and innovations of the corporate legal mechanism under consideration.

4. Results

Due to the discretionary nature of the current rule on permission to formalize the right to withdraw from an LLC in the Articles of Association, the new rule (par. 1.2 art. 26 of the LLC Law as amended by Law No. 252-FL) is defined as excessive. According to this rule, it is permissible to make the right to withdraw from an LLC conditional on the occurrence of certain circumstances or terms. Under this rule, the right to withdraw may be given only to certain categories or specific shareholders listed in the Articles of Association. The appropriate permission is assumed, and therefore there is no legal need for a special regulatory reminder. It is proposed to regard this innovation actually as a reminder to corporate investors about the possibility and necessity to think over protective mechanisms, including the withdrawal mechanism, in advance.

At the same time, attention was drawn to the mandatory nature of the rule on notarial procedural formalities when applying for withdrawal from an LLC and, accordingly, to the impossibility for shareholders to determine a different order in provisions of the Articles

of Association. Given the increased degree of the dispositive norm of the LLC Law, this nuance should be specially stipulated normatively. The inadmissibility of avoiding the notarial procedure of withdrawal should also be pointed out.

There is an argument for the necessity of direct normative legal implementation of the rule: when calculating the fair value of a withdrawing shareholder's share, it is mandatory to account for the market value of LLC assets, and it is inadmissible to apply reduction factors (discounts) for minority and illiquidity of this share. Until the appropriate amendment of the LLC Law, in the practical dispute resolution, it is recommended to proceed from the possibility to carry out an expert assessment of the market value of LLC assets, based on the legal analogy, when calculating the actual value of the withdrawing member's share.

The liquidation of the uncertainty as to the possibility of contractual or statutory change of size or procedure of fair value payment of the withdrawing shareholder's share is offered by normative confirmation of discretionary character of the rules of art. 23 of the LLC Law. It predetermines the conclusion on the acceptability of the appropriate individual contractual regulation, including the possibility to formalize a fixed extent of payment to the withdrawing shareholder in the form of a flat fee or concerning the indicators defined in the Articles of Association (by analogy with such possibility in par. 4 art. 21 of the LLC Law of fixing a predetermined share price in the realization of preemption). In this regard, to enshrine the corresponding permission in clause 6.1. art. 23 of the LLC Law directly is proposed.

5. Discussion

5.1. The Problem of Accounting for the Market Value of LLC Assets When Determining the Fair Value of a Withdrawing Member's Share

The essential legal and economic consequence of an application to withdraw from an LLC (in addition to termination of the corporate status of the person submitting such an application) is that according to par. 2 art. 94 of CCRF, and par. 2 art. 14, par. 6.1 art. 23 of the LLC Law, the company is obliged to pay fair value of the withdrawing shareholder's share (share in the authorized capital of LLC), which corresponds to the part of the LLC net assets value in proportion to the share size, and is determined based on the LLC's financial statements for the past accounting period.

The legislator has replaced the mandatory rule concerning a shareholder's right to withdraw from an LLC by the discretionary rule concerning the presumed absence of such right. This amendment has substantially defused an acute problem. It refers to the seizure of part in the assets (in the form of the fair value of a share), unforeseen for the company, its shareholders, and creditors in case of unilateral withdrawal of one of the shareholders. If the right to withdraw in is not provided in the Articles of Association, such a right just cannot be implemented. However, for cases when the shareholders of a particular LLC implement the regulatory permission and enshrine the shareholder's right to withdraw unreasonably from the company in the Articles of Association, serious gaps remain in regulating the procedure for determining the particular size of fair value to be paid.

Suppose the apportionment of the LLC assets in kind is technically possible. In that case, the withdrawing shareholder could agree to obtain the property and avoid possible disputes about the share value in cash. However, in most cases, the withdrawing shareholders refuse to receive property in kind (Ruchkina 2019). Conversely, if the shareholder agrees and insists on obtaining a part of the real company assets in kind proportional to its share size, the corresponding claim of the shareholder in the absence of the company's good will is not subject to enforced execution. The courts take the position that in case of shareholder withdrawal from the LLC, the latter only has the right but is not obliged to give the assets in kind to such shareholder in compensation for the fair value of his share in the company's authorized capital (Decision of the Arbitration Court of Far Eastern District of 15 December 2016, No. F03-6003/2016; Decision of Federal Arbitration Court of Volgo-Vyatka District of 05 June 2014, No. A82-567/2011). Therefore, the most acute problem in the calculation of the cash equivalent of the fair value of a share is the fact that

the legislator is silent about consequences of divergence of such value determined as a proportion of the total amount of net assets according to the company's financial statements with the value determined in proportion to net assets at their fair market value. That is, the legislative gap is the main difficulty in the practical solution of the issue about the fair value of the share.

This gap has not been closed at the level of by-laws either. Thus, according to the Order of the Ministry of Finance of the RF No. 84n of 28 August 2014 "About approval of the procedure for determining the cost of net assets", the net asset value is determined as the difference between the amount of assets and liabilities of the company taken for calculation at the value to be reflected in the balance sheet in net value less regulating values. However, as the financial department indicated itself, due to inflation, accounting methods, the presence of "hidden" and "imaginary" assets and liabilities, and other factors, the company book value of assets may differ significantly from their fair market value (Letter of the Ministry of Finance of the RF of 02 December 2014, No. 03-04-07/61655).

5.2. Alternate Law-Enforcement and Regulatory Solutions to the Problem of Accounting for the Market Value of LLC Assets When Determining the Fair Value of a Member's Share

On the one hand, in line with the general trend of the increasing role of courts in resolving internal conflicts typical for closed corporations by clarifying and taking into account the shareholders' fair expectations (Gilson 2005), Russian courts are generally positive about this approach. According to it, a member who has withdrawn from the LLC and does not agree with the calculation of fair value of the share that is due and payable to him based on the company's financial statements, has the right to insist on another calculation considering the market value of movable and immovable assets owned by the company (Decree of the RF SAC Presidium of 6 September 2005, No. 5261/05, and of 10 September 2013, No. 3744/13). Courts recognize the expert opinion or report of an independent assessor as the adequate evidence of the market value of LLC assets (Decision of the RF SAC of 05 February 2014, No. SAC-829/14; Decision of the Arbitration Court of Volga-Vyatka District of 31 March 2017, No. F01-661/2017; Decision of the Arbitration Court of Central District of 17 September 2018, No. F10-3588/2018). Moreover, courts hold that the calculation of the fair value of the share belonging to the shareholder who has withdrawn from the LLC must take into account the market value of property. Due to the specifics of the accounting of the respective assets, this value may be not reflected in the company's balance sheet but is used in its business activities and brings profit, for example, know-how (Decision of the RF SAC of 05 February 2014, No. SAC-829/14). In the doctrine, such interpretation of true legislator's will, which does not directly arise out of the letter of the law, and, accordingly, the identification of the concepts of "fair value" and "market value" are considered as a consequence enforcing art. 6 of the CCRF on the analogies of statute and law (Shchepot'ev and Kulakova 2010). A different procedure (linking the fair value of the share to the accounting data of assets regardless of its significant difference from the market value of the respective assets) is considered unfair, inconsistent with market, competitive conditions of civil circulation, and the level of development of the independent market evaluation institute (Ulyanov 2012).

On the other hand, in some cases rigid conformity to the literal interpretation of the law and actual reliance on the thesis "fair value is not fair market value" (Potter 2011) predetermine the opposite law-enforcement approach, according to which the fair value of the LLC shareholder's share is determined according to the financial statements, and is not based on the market value of assets (Decision of the Federal Arbitration Court of West Siberian District No. A75-9387/2010 of 10 June 2011). The courts, in particular, indicate that the determination of the fair value of a share based on the market value of the company's assets is not stipulated by the existing legislation (Decision of the Federal Arbitration Court of Volga-Vyatka District of 10 February 2005, No. A17-248/1/10) and reject the arguments for mandatory accounting for the market value of assets, as not based on the law (Decision of the Federal Arbitration Court of Volga District of 27 June 2006, No. A49-10614/2005-20AO/20). In this case, even supporters of accounting for a market

evaluation of assets note the “piecemeal” nature of the relevant approach, which cannot act as a complete replacement for determining the market value of the share itself and is formally beyond the norm of par. 6.1 art. 23 of the LLC Law (Ulyanov 2012).

Therefore, it seems necessary not only in terms of practical resolution of cases to proceed from the possibility of expert assessment of the market value of LLC assets when calculating the fair value of the withdrawing shareholder’s share. At the federal law level, it is necessary to expressly enshrine a provision that fully meets the requirements of reasonableness, good faith, and justice (analogy of law). According to this provision, the fair value of a share in the LLC authorized capital corresponds to a part of the market value of the company’s net assets, proportional to the share size, regardless of the fact of reflecting the respective assets in the company’s balance sheet.

5.3. The Problem of Accounting for the Coefficients (Discounts) for Illiquidity (Low Liquidity) and (or) Minority (Lack of Control) When Determining the Fair Value of a Withdrawing Member’s Share

Furthermore, no less acute is the problem caused by the legal uncertainty, which has not been eliminated to date, in resolving the issue of the possibility or inadmissibility of applying reduction factors (market discounts) for illiquidity (low liquidity) and/or minority (non-controllability) in determining the price of the fair value to be paid to the shareholder withdrawing from the LLC.

The existing procedure in the joint-stock legislation for share repurchase by the corporation after shareholder’s demand (art. 75 of the Federal Law No. 208-FL of 26 December 1995 “On Joint-Stock Companies”, hereinafter—the JSC Law) provides for the necessity to repurchase at a price determined by the JSC Board of Directors not lower than the market value. It should be calculated by an independent assessor without considering price adjustment as a result of the company’s actions which caused the right of obligation to assess and repurchase shares. The doctrine interprets this rule as follows: the repurchase price approved by the board of directors is based on the market value of each individual share and may not be decreased due to the insignificance of the number of shares owned by a minority shareholder or increased due to the majority shareholder control (Lomakin 2013). The courts point out that the above provisions of the JSC Law oblige to determine and approve a single price for all shareholders of the share purchase without differentiation by the number of shares they own. It is evidenced, in particular, by the guarantee enshrined in art. 31 of the JSC Law that each ordinary share of the company provides the shareholder, its owner, with the same measure of rights (Decision of the Arbitration Court of Volga District of 20 November 2015, No. A49-3645/2015).

Proceeding from substantial analogy (both in legal attributes and in economic substance) of the mechanism for paying up JSC shares, repurchased at the request of the shareholder and payment for the fair value of the withdrawing shareholder’s share, it is logical to assume that the application of market discounts is also illegal concerning the fair value of a share in the LLC’s authorized capital. In reality, it is not possible to talk about the free market sale in situations that cause a shareholder’s right of compulsory acquisition and cases when a LLC’s minority shareholder is oppressed. Therefore, the purpose of regulation is not to imitate it but to provide reasonable funds to compensate for the investment with which the LLC shareholder is parting. In this regard, Russian and foreign literature asserts that, in the case of LLCs, discounts on minority and illiquidity bring considerable uncertainty to the assessment process, prevent the control of repressive behavior of majority shareholders (representatives of the majority), and therefore should be ignored (Miller 2011; Boyko 2017a).

This doctrinal approach is generally well perceived in the case history. In disputes on the recovery of the fair value of withdrawing shareholder’s share, though not referring to the analogy with art. 75 of JSC Law, the courts confidently proceed from the fact that in determining rate of such share value, the coefficients considering the non-controlling nature and insufficient liquidity of the share are not provided by the existing legislation for assessment of shares in the LLC authorized capital. Therefore, they are not subject to

the application (Decision of the Arbitration Court of Central District of 26.12.2018 No. F10-5658/2018). The courts indicate that the literal interpretation of the regulatory provisions (art. 26 of the LLC Law) requires the use of only the company's reported financials without any market discounts as a basis for determining the fair value of a share (Decision of the Arbitration Court of Moscow District of 23 January 2019, No. F05-22780/2018). It is noted that the application of such coefficients would lead to an unreasonable increase or decrease in the value of shares of company shareholders who remained in the company after the withdrawal of another shareholder (Decision of the RF SAC Presidium of 14 October 2008, No. 8115/08; Decree of the Arbitration Court of Moscow District of 29 July 2016, No. F05-9208/2015).

At the same time, with the adoption of the Decree of the Presidium of the Supreme Court of the RF of 09 November 2016, No. 336-PEC16, which is significant for this area of corporate relations, concerning the widely known in the business community "Raevsky case", it became impossible to talk about achieving certainty in the application of discounts. In this case, Raevsky, a citizen of Russia, who withdrew from the group of LLCs and did not agree with the withdrawal price received from the company (calculated by the company as the fair value of the shares of the former shareholder), failed to challenge at court the application of reduction factors (discounts) by the appraiser for non-controlling nature and insufficient liquidity of shares of third-party issuers affiliated in LLC assets. Most importantly, it was impossible to challenge the application of reduction factors to the non-controlling nature and low liquidity of Raevsky's share in the LLC's authorized capital. As pointed out by the Presidium, the procedure of a shareholder withdrawal from an LLC is regulated by the LLC Law, which does not set limits indicated in par. 3 art. 75 of the JSC Law. In this connection with, the analogy with the said norm cannot be considered justified. Regarding the new position of the Presidium, in one of the similar cases, the Judicial Panel of the Supreme Court of the RF on economic disputes canceled the judicial acts, which found the calculation of the fair value of the share to be correct without the application of reduction factors for non-controlling nature and insufficient liquidity of the share (Court Decision of 19 August 2019, No. 301-ES17-18814).

5.4. A Compromise Approach to Solving the Problem of Accounting for Coefficients (Discounts) for Illiquidity (Low Liquidity) and (or) Minority (Lack of Control) When Determining the Fair Value of a Withdrawing Member's Share

A more balanced approach seems to be the compromise one implemented by some courts, according to which, if discounts are not applied to the share value, they can be applied in assessing the net assets of a company from the amount of which the share is calculated derivatively (Decision of the Arbitration Court of the Moscow District of 12 March 2020, No. F05-3234/2020).

For the reasons set out above, it seems expedient and necessary, based on the analogy with the norm of art. 75 of the JSC Law, to expressly enshrine the provision in the JSC Law according to which the fair value of the share in the LLC's authorized capital is calculated as a part of the market value of the company's net assets proportional to the share size, regardless of market coefficients for non-controllability and illiquidity of this share. It does not exclude the application of appropriate factors when determining the market price of shares in the authorized capital of corporations that constitute the asset of a particular LLC. Such legislative improvement will be in line with the idea that corporate law is aimed rather at achieving general social and economic efficiency and improving the welfare of all those affected by the company's activities than at maximizing profits of the corporation and financial return for its controlling shareholders (Armour et al. 2009). It will also be well consistent with the clearly worded position of the Constitutional Court of the RF on the right of the legislator within the mandate given to him, taking into account the economic essence of the LLC. It consists in establishing such legal regulation of determining the share value payable to the company's shareholders, which, along with reflecting the repayable fair value of the share in the authorized capital, would protect creditors' interests and maintain the existing balance of mutual property interests of other LLC shareholders

(Determination of the Constitutional Court of the Russian Federation of 15 November 2007, No. 758-O-O).

5.5. The Problem of the Conditional and Individualized Mechanism of Shareholder's Withdrawal from an LLC

Since LLC is a closed form of private corporations, its shareholders are generally a limited group of persons who know each other personally and whose relations are informal and confidential (Boyko 2017b). It means that by definition, they should be given powerful capabilities to create convenient mechanisms to ensure the stability of the corporation's structure, among others, to determine the presence or absence of the right to withdraw variably, as well as the procedure and terms for withdrawal.

Based on the observed trend of increasing dispositivity in the status regulation of private corporations and interpreting the well-known rule of "argumentum a majori ad minus", it should be concluded that, even without special permission, LLC shareholders authorized to act on a large scale (with power to prohibit the withdrawal completely), are authorized to act on a smaller scale (empowered to condition, limit, and personalize the withdrawal). In particular, it is possible to provide for the right to withdraw for specific (named) individuals or for shareholders who have certain features or meet certain criteria. These can be shareholders with an ownership interest of no less or no more than some definite size. Others can have power to condition the occurrence or frustration of the withdrawal right for all or certain shareholders on occurrence or non-occurrence of certain circumstances or terms or a combination thereof. It also seems natural and logical to include the implied right of LLC shareholders concerning the decision on granting the right to withdraw to specific shareholders in each specific situation in the competence of the general meeting as the highest governance body of the corporation. In other words, the freedom of LLC members to configure different legal models of withdrawal is implied, and legislative innovations (par. 1.2 art. 26 of the LLC Law as amended by Law No. 252-FL), especially emphasizing the existence of such freedom, multiply the exact language without any real need and are unnecessary in legal terms.

Simultaneously, despite the general trend of increasing dispositivity and expanding freedom of contract in modeling relationships within closed corporations, investors often demonstrate behavior that is too optimistic and, therefore, do not think through the necessary protective tools in advance, and miss the opportunity to customize the withdrawal procedure. This circumstance justifies the innovation in question to the extent that, at the stage of entering the corporation, it encourages LLC members to actively use the discretionary measure provided by law and to independently formulate measures for protecting minority shareholders from oppression. In this case, individual conditions may be provided for termination of corporate relations because of the withdrawal. In particular, this innovation will likely reduce the number of corporate conflicts related to the problem of "key persons", which is typical for many closed corporations and whose loss (because of their withdrawal) can have a significant negative impact on business (Burns and Novak 2015). Moreover, the expansion of the practice of formulating individual conditions for withdrawal from an LLC may reduce the risk of such situations when all shareholders withdraw from the "distressed" corporation simultaneously, except one because of concerted actions. As a result, they leave the former partner in the status of the sole shareholder, depriving him of the opportunity to offload the corporate burden, and forcing him to perform corporate governance alone and bear the associated financial and legal risks.

The legislative innovation under consideration, focusing the corporate investors' attention on the discretionary nature of the rule concerning the possibility of entering in the regime of the permissibility of withdrawal from an LLC, actualizes the solution of dispositivity limits of the regulatory mechanism of withdrawal and limits of freedom of shareholders' discretion in its individual modeling. In particular, in the absence of a special ban on changing the notarial form of the application to withdraw provided in art. 26 of the LLC Law, the general strengthening of the discretionary principles in the regulation

of the withdrawal may lead to the conclusion about the possibility of providing another form in the LLC's Articles of Association. Since the norm of art. 26 of the LLC Law does not contain an indication of invalidity of another form of the application to withdraw, the literature expresses the opinion (though with doubts about its applicability) that it can be interpreted as discretionary, which implies the freedom of the company shareholders to establish a simple written or even oral form (Mayfat and Gordeev 2019). However, based on the special protective purpose of involving notaries in the process of registration of withdrawal from an LLC, the corresponding norm should still be recognized as imperative. By analogy with the way the law allows statutory changes of the regulatory presumptions about the need for notarization of decisions of LLC shareholders' general meetings, special legislative permission is required enabling the exclusion of notarization of the application for withdrawal. It is necessary to include a special rule on the inadmissibility of ignoring the notarial withdrawal procedure in the LLC Law.

5.6. The Problem of Individualized Dispositive Determination of the Size or Procedure for Calculation and (or) Procedure for Fair Value Payment of a Withdrawing Member's Share

Another aspect of the uncertainty in the discretionary boundaries of the withdrawal rules brings back the central issue for this sphere of paying the fair value for the shareholder who exercised the right to withdraw from the LLC. Thus, the current language of the LLC Law does not give a direct answer to the question of whether it is permissible to include the provisions or conclusions of the corresponding agreements between the shareholder and LLC in the company's Articles of Association, specifically determining the specific size or individual procedure for calculating the fair value of the share and/or the procedure not provided by law and/or differing from the normative terms for settlement of accounts with the withdrawn shareholder.

On the one hand, in most cases, the courts state the mandatory nature of the provisions of art. 26 of the LLC Law (Decision of the Arbitration Court of West Siberian District of 31 May 2017, No. F04-1243/2017). They specify that the extent of payment in favor of the person who declared his withdrawal from the membership of LLC, including payment in the form of provision in kind of part of the property, is regulated by the rules of law and cannot be changed by the agreement of the parties (Decision of the Arbitration Court of West Siberian District of 27 December 2016, No. F04-6215/2016). The courts invalidate agreements providing for a longer period to pay the share (Decision of the Arbitration Court of Far Eastern District of 1 April 2016, No. F03-1035/2016), and other forms of payment (neither monetary, nor pecuniary but, for example, in the form of services) (Decree of the RF SAC Presidium of 12 July 2006, No. 2664/06).

On the other hand, some courts focus on the legally established freedom-of-contract doctrine (art. 421 of CCRF). If the actions of the LLC shareholder, which agreed on the amount of the fair value and the procedure for its payment, do not show any signs of abuse, the courts ignore the mandatory nature of the par. 6.1 art. 23 of the LLC Law and recognize individually determined share value and procedure for paying thereof as valid (Decision of the Arbitration Court of Ural District of 26 September 2017, No. F09-5734/17).

The noted uncertainty should be considered from the following positions. First, it is necessary to rely on the widely promoted idea of the need to maximize the expansion of the freedom-of-contract doctrine in the Company Law as much as possible, the feasibility of giving corporate lawyers the contractual tools they need for legal experiments, innovations and, ultimately, for the fullest satisfaction of the needs of the current global business community (Reyes and Vermeulen 2011). Secondly, it is necessary to draw an analogy with how the legislator allows for maximum variability in par. 4 art. 21 of the LLC Law in determining the share value in the LLC's authorized capital in preference of its purchase by the company's shareholders or the company itself. It can be expressed in a fixed monetary amount or based on one of the criteria, such as the company's net asset value, its book value as of the last reporting date, net profit of the company, etc. As a result, it seems possible and necessary to eliminate the noted uncertainty. For this purpose, it is required to enshrine a clarification into the LLC Law about the discretionary nature of the rules of

par. 6.1 art. 23 of the law, guaranteeing the shareholders freedom in determining the size of the fair value of the share in the relevant agreement (various methods of its calculation and/or change when certain circumstances occur or do not occur) and the form and period for its payment. It should be done both in the articles in advance and ex post facto during or after withdrawal procedure implementation.

The fears that during the process of approving the relevant provisions of the articles or agreements the shareholders and companies themselves will abuse their rights by infringing the interests of other shareholders or creditors of the company should not be an obstacle to making the withdrawal mechanism more discretionary and flexible. Since “abusus non tollit usum”, the corporate law is well aware of the methods of combating detected abuses (the above court positions were clearly a reaction to the unfair behavior of the shareholders of the respective relations). In this case, the advantages of discretionary determination of the size and conditions of the fair value payment (reduction of costs associated with the calculation and independent market assessment, simplification and acceleration of the payment procedure, the possibility of a balanced consideration of individual characteristics and the real needs of the company and withdrawing shareholders, ensuring conflict-free withdrawal and continuation of the company routine operation) are undisputed.

6. Conclusions

The research showed that intensive development and updating of corporate legislation regulating such an essential protective mechanism as a shareholder’s withdrawal from an LLC, eliminating some gaps, inevitably generates new controversial issues and areas of legal uncertainty. In this case, the legal analogy proves to be an efficient tool for casual filling and normative closing gaps.

The trend toward strengthening the discretionary nature of corporate legal regulation and expanding the freedom-of-contract doctrine in corporate law determines the demand for an analogy as a means of modeling individual conditions for exercising the right to withdraw from an LLC.

Despite the revealed legislative shortcomings, the renewal of the legal order when leaving the LLC, coupled with the strengthening of its dispositivity, increases the efficiency and attractiveness of the Russian LLC structure from the standpoint of foreign investors.

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