

SOCIETY WITH LIMITED LIABILITY: CHANGES IN THE LEGISLATION

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SUMMARY

The given work is devoted to one of the most widespread organizational - legal form in the Russian Federation - to a society with limited liability. Substantive provisions about a society with limited liability, in particular, the state registration and a re-registration of a society are reflected. The author results examples from judiciary practice of Arbitration courts of Far East Federal District of the Russian Federation on the most actual positions connected to modification in constituent documents of the legal person.

Данная работа посвящена одной из наиболее распространенных организационно-правовых форм в России – обществу с ограниченной ответственностью. Основные положения об обществе с ограниченной ответственностью, в частности государственной регистрации и перерегистрации общества, также отражены в работе. Автор приводит примеры из судебной практики арбитражных судов дальневосточного федерального округа Российской Федерации по наиболее актуальным положениям, связанным с изменением в учредительных документах юридического лица.

According to item 1 of an article 2 Federal Law (FL) «About societies with limited liability», a society with limited liability admit founded as one or several persons an economic society, manual capital is shared into shares of the sizes determined by constituent documents; participants of a society do not answer under its obligations and carry risk of the losses connected to activity of a society, within the limits of cost of contributions brought by them

The society with limited liability is subject to the state registration the authorized state body in the order determined by the law on the state registration of legal persons (item 1 of an article 51 Civil Code of the Russian Federation). The state registration of legal persons at their creation is carried out by recording bodies on the location of a permanent agency, in case of that absence - on the location of other body or the persons having the right to operate on behalf of the legal person without the power of attorney (item 1 of an article 13 FL about the state registration).

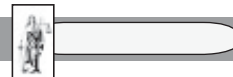
The society with limited liability is considered created from the date of entering corresponding record into the uniform state register of legal persons (item 2 of an article 51 CC of the Russian Federation). Since this moment there is legal capacity the legal person, that is an opportunity to have the civil rights corresponding to the purposes of activity of the given legal person, stipulated in its constituent documents, and to perform

the duties connected to this activity.

At the state registration of the created legal person to recording body are represented: 1) the application signed by the applicant for the state registration; 2) the decision on creation of the legal person as the report, contracts or other document according to the legislation of the Russian Federation; 3) constituent documents of the legal person; 4) an extract from the reg-

ister of foreign legal persons of a corresponding country of origin or other equal proof on a validity of the legal status of the foreign legal person - the founder; 5) the document on payment of a State Tax (an article 12 FL about the state registration).

In civil law of Russia constituent the documents having normative value which determine the status of the concrete legal person as the subject of the right, participant civil-law, labor, tax and others law relations, and also mutual relations of founders of the legal person among themselves and with the corresponding legal person refer to. [4] Legal person operates on the basis of the charter, or the constituent contract and the charter, or only the constituent contract. In the cases stipulated by the law, the legal person who is not being the commercial organization can act the basis of the common position about the organizations of the given kind. The constituent contract of the legal person consists, and the charter affirms its participants. The legal person created by



one founder, operates on the basis of the charter authorized by this founder (item 1 of an article 52 CC of the Russian Federation).

Until recently founders of a society with limited liability concluded the constituent contract and approved the charter. The constituent contract and the charter of a society were constituent documents of a society. According to an articles 11, 12 Federal Law «About societies with limited liability», in the constituent contract founders of a society undertake to create a society and determine the order of joint activity on its creation. The constituent contract determined also structure of founders of a society, the size of the authorized capital of a society and the size of a share of each of founders of a society, the size and structure of contributions, the order and terms of their entering in manual capital of a society at its establishment, the responsibility of founders of a society for infringement of a duty on entering contributions, conditions and the order of distribution between founders of a society of the profit, structure of bodies of a society and the order of an output of participants of a society from a society.

The charter of a society should contain: the full and reduced company name of a society; data on the location of a society; data on structure and the competence of bodies of a society, including about the questions making the exclusive competence of general meeting of participants of a society, on the order of acceptance by bodies of a society of decisions, including on questions, decisions on which are accepted unanimously or the qualified majority of voices; data on the size of the authorized capital of a society; data on the size

and a face-value of a share of each participant of a society; rights and duties of participants of a society; data on the order and consequences of an output of the participant of a society from a society; data on the order of transition of a share in the authorized capital of a society to other person; data on the order of storage of documents of a society and on the order of granting by a society of the information to participants of a society and other persons; other data stipulated by the law.

The charter of a society can contain also other positions which are not contradicting to the legislation.

As fairly marks V.V.Zalessky, this obligatory minimum of data in the charter can be supplemented with any positions which are not contradicting to the legislation. If participants have not provided something at the statement of the charter they have the right to add or change its positions. Inclusion in the charter of the positions breaking the legislation does not attract invalidity of the document. Only that its part which contradicts the legislation, and the fact of registration of the charter containing such positions is not subject to application, does not eliminate their invalidity. [1]

Since July, 1st, 2009 in the Russian Federation there is a re-registration of societies. The re-registration means, that constituent documents of all societies with limited liability which have been created up to the introduction of the Law valid, are subject to reduction conformity with it till January, 1st 2010. However on December, 17 2009. The president of the Russian Federation had been signed the Law № 310 – FL, which as it seems to us, has cancelled the

same term. According to the given Law which has entered by virtue of December, 22 2009, with limited liability which had not time to bring the constituent documents into accord with the new legislation, it has the right to make societies at the first change of charters the by.

Brought change will allow many societies to register with limited liability the changes in constituent documents during time convenient for them. It is necessary to note, that since January, 1st 2010. “Old” charters of such societies will be applied only regarding, not contradicting to the new legislation on societies with limited liability.

The federal Law from December, 17 2009. № 310 - FL excludes the obligatory requirement established earlier about term of a re-registration of societies with limited liability till January, 1st 2010. It is necessary to notice, as before acceptance of the specified act the Federal Tax Service of the Russian Federation specified, that not carrying charters of societies with limited liability in conformity with the Law № 312 - FL will not cause their automatic exception from EGRUL and, that recording bodies will carry out registration of changes of charters of societies with a view of their reduction conformity with the Law № 312 - FL and after January, 1, 2010.

It is necessary to notice, that changes in the legislation concern only societies with limited liability.

The re-registration of societies with limited liability represents registration of the changes connected to modification in constituent documents. Since July, 1st, 2009 of a society with limited liability operate on the basis of one constituent document - the charter.



Constituent contracts of societies have lost a validity of constituent documents.

Thus, with limited liability it is necessary for societies to make changes to the charter, in connection with the changes brought by the Law from December, 30 2008. № 312 - FL of the Civil Code of the Russian Federation and the Federal Law «About societies with limited liability» from February, 8 1998. № 14-FL.

Changes are brought in constituent documents of a society under the decision of general meeting of participants of a society. The changes brought in constituent documents of a society, are subject to the state registration (to item 4 of an article 12 Law of societies). The decision on the statement of changes in the charter is made out by the report or the decision of the unique participant. If in a society with limited liability are present two and more participants the decision is made out by the report. If in a society only one participant, then its decision.

For the state registration of changes it is necessary to submit to tax inspection the following documents:

- The application signed by the applicant for the state registration proves to be true, that the changes brought in constituent documents of the legal person, correspond the established legislation of the Russian Federation to requirements, that the data contained in these constituent documents and in the application, the order of decision-making established by the federal law on modification in constituent documents of the legal person is authentic and observed. In a place with that, the signature of the applicant should be certified in the notaries order (item 1 of an article

9 Law from August, 8 2001. № 129-FL).

- The decision on modification in the charter (as the report or the decision, depending on quantity of participants);

- Changes for the charter or the charter in a new wording;

- The document on payment of a State Tax (the payment assignment). The size of a State Tax is established by an article 333.33 Tax code of the Russian Federation and makes 400 rubles.

Such rules are established by an article 13 Federal Law from August, 8, 2001 «About the state registration of legal persons and individual businessmen».

At modification in constituent documents of the legal person tax inspection in time no more than five days from the moment of reception of documents brings corresponding record in the uniform state register of legal persons. Such order is established by item 1 of an item 8 Law from August, 8 2001. № 129 - FL. After all actions connected to registration of changes, the society with limited liability receives the certificate on entering record in the uniform state register of legal persons (EGRUL) (article 5 of the Decision of the Government of the Russian Federation from June, 19 2002 № 439 «About the statement of forms and requirements to the official registration of papers, legal persons used at the state registration, and also physical persons as individual businessmen».

There was a certain practice on questions of a recognition void decisions of founders, decisions FTS on registration of changes in data on the legal person, connected with changes in constituent documents, on invalidity of record on the state registration. So about application of consequences of inva-

lidity of the insignificant transaction under claim of Gurova D.B. to respondents of Open Company «Rosmorflot» in which the Arbitration court of the Kamchatka Krai has established the following:

«The claimant, Gurov D.B., has addressed in Arbitration court of the Kamchatka Krai with the claim to respondents, Open Company «Rosmorflot», Open Company «Kamchatmorflot», in which on the basis articles. 167, 168, 346 CC of the Russian Federation, the article 64 FL «About an inconsistency» № 127-FL from 26.10.2002 asks court:

1. To recognize void the decision of the unique founder of Open Company «Fleet - 1» from 05.12.2007 and the Constituent contract of Open Company «Fleet - 1» from 05.12.2007,

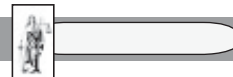
2. To recognize void the report of assembly of founders of Open Company «Fleet - 1» from 18.02.2008 and the Constituent contract from 18.02.2008,

3. To nullify decision FTS on. Petropavlovsk-Kamchatski from 19.12.2007 and from 29.02.2008 about registration of changes in data on the legal person, connected to modification in constituent documents,

4. To oblige FTS of Russia on. Petropavlovsk-Kamchatski to bring to the Uniform state register of legal persons in record about invalidity of record about the state registration of changes from 19.12.2007 and from 29.02.2008 and to cancel corresponding certificates.

As the third party which is not declaring independent requirements concerning a subject of dispute, it is involved with Open Company «Fleet - 1».

In judicial session the representative of the claimant has sup-



ported claim requirements completely on the bases stated in the claim and additions to the claim. Has explained, that under the insignificant transaction about which application of consequences the claimant asks, understands acceptance in structure of Open Company "Fleet - 1" of Joint-Stock Company "Kamchatmorflot" and the prisoner between Joint-Stock Company "Kamchatmorflot" and Open Company "Rosmorflot" the constituent contract. Asked to consider business on the materials submitted in it, the claim - to satisfy.

The representative of the respondent of Open Company "Rosmorflot" has not recognized the claim. In satisfaction of the claim asked to give up.

From materials of an affair cost of a share of Open Company "Rosmorflot" in Open Company "Fleet - 1" after acceptance in structure of participants of a society of Joint-Stock Company "Kamchatmorflot" and Company "Kamchatmorflot" follows, that, the Company makes 1000000 rubles that proves to be true the constituent contract of Open Company "Fleet - 1" from 18.02.2008, extracts from EGRUL concerning Open Company "Fleet - 1" on 23.04.2008, 17.10.2008.

In this connection, the court does not accept a reason about essential reduction of a subject of a pledge, as no validated by materials of an affair.

The documents submitted in FTS on. Petropavlovsk-Kamchatski for the state registration of changes in constituent documents of Open Company "Fleet - 1" on accepted FTC to decisions and brought in EGRUL to records, on completeness, the form and the contents there correspond to the requirements established by an

item of 19 Federal laws «About societies with limited liability», an article 17 Federal law «About the state registration of legal persons».

Having considered materials of an affair and on the basis of all stated the court comes to a conclusion about absence of legal grounds for satisfaction of the claim in full. [2]

As one more example we shall result the following.

The closed joint-stock company "AVT Ltd." has addressed in Arbitration court of the Sakhalin area with the application for a recognition illegal inactivity of an individual agency - the general director of a society with limited liability "Breeze" and its compulsion to fulfillment of the actions necessary for the state registration of changes in constituent documents of Open Company "Breeze".

Definition of court from 11.01.2008 in participation in business as the third parties involves participants of Open Company "Breeze" A.L., P., S. and the general director of Open Company "Breeze" of Ampere-second.

From 25.03.2008 the court has recognized as the decision of court illegal inactivity of director of Open Company "Breeze" on unfulfilling the state registration of the changes brought in constituent documents of a society and has obliged the specified person to make such actions. The court has specified brought changes based on the report of extraordinary general meeting of founders from 16.11.2007.

From 16.06.2008 resolution part of the decision of court from 25.03.2008 is stated to the decision of appeal instance in other edition according to which challenged inactivity of an individual

agency - directors of Open Company "Breeze" is recognized illegal, director of Open Company "Breeze" is obliged to make the actions necessary for modification in constituent documents of Open Company "Breeze" and their state registration.

P., not agreeing with judicial certificates, in the cassation complaint asks them to cancel. Referring on non-observance about convocation and carrying out of extraordinary general meeting of participants of a society from 16.11.2007, stipulated by articles 33, 36, 37 Federal Law "About societies with limited liability" and the charter of Open Company "Breeze", the applicant believes wrongful requirements of the claimant, based on the decision which has no a validity. In this connection counts judicial acts accepted without finding-out of circumstances important for an affair and with infringement of norms of the substantive law.

In a response on the complaint of Joint-Stock Company "AVT Ltd." were expressed with the consent with the accepted decision of court.

From other persons participating in business responses have not acted.

In session of court of cassation instance representatives of the parties and the third parties informed properly about time and a place of proceeding, were not.

Having checked up legality of the decision from 25.03.2008 and decisions from 16.06.2008, the Federal arbitration court of Far East district considers their subject to a cancellation, proceeding from the following.

As it is established by arbitration court of both instances, 26.07.2007 participant of Open Company "Breeze" V. under the

contract № 1 concession has sold Joint-Stock Company "AVT Ltd." a share in the authorized capital of Open Company "Breeze", a component 18, 75 %.

On fulfillment of the given transaction the seller has notified Open Company "Breeze", to which Joint-Stock Company "AVT Ltd." were directed with 22.08.2007 requirement about carrying out of extraordinary general meeting participants of a society of Open Company "Breeze" for the decision of a question on modification to constituent documents of a society on structure of its participants.

In connection with that Open Company "Breeze" the decision on carrying out of such assembly is not accepted, Joint-Stock Company "AVT Ltd." has called extraordinary general meeting participants of a society on which 16.11.2007 the decision on change of the constituent contract and the charter of Open Company "Breeze" on structure of its participants is accepted.

The report of the given assembly among other documents of Joint-Stock Company "AVT Ltd." has directed to the general director of Open Company "Breeze" of Ampere-second. For their representation for the state registration of the changes brought in constituent documents of a society. Referring to inactivity of an individual agency, Joint-Stock Company "AVT Ltd." has addressed in arbitration court with the present claim.

Satisfying requirements of the claimant, the court of the first and appeal instance has recognized challenged actions illegal as Open Company "Breeze" in infringement of item 2 of article 33, item 2 of article 35 of the Federal law "About societies with limited liability" has not made the decision

on carrying out of extraordinary general meeting participants of a society, has evaded from acceptance of such decision and has not made the state registration of changes of constituent documents of a society.

Meanwhile, by consideration of an affair by court it is not given estimations to that Joint-Stock Company "AVT Ltd." realized the right stipulated by item 4 of article 35 of the Federal law "About societies with limited liability", having carried out convocation and carrying out of extraordinary general meeting of participants of a society.

The decision accepted at this assembly which has been made out by the report from 16.11.2007, Joint-Stock Company "AVT" has specified Ltd. as the basis for the state registration of changes in constituent documents of Open Company "Breeze".

The decision on modification in constituent documents of the legal person is represented in recording body according to item 1 of article 17 of the Federal law "About the state registration of legal persons and individual businessmen" among necessary documents for the state registration of the changes brought in constituent documents of the legal person.

As the requirement of Joint-Stock Company "AVT Ltd." regarding the state registration of changes in constituent documents is based on the decision of general meeting of participants of a society, to court followed in view of the explanations given in article 24 of the Decision of Plenum of the Supreme Court of the Russian Federation № 90 and Plenum of the Supreme Arbitration court of the Russian Federation № 14 from 09.12.1999 "About some questions of application of the Federal

law about societies with limited liability", to find out a question on a validity of this decision.

However the given circumstances important for an affair are not investigated by arbitration court of both instances.

The reference in judicial acts that the decision of assembly from 16.11.2007 is not challenged, and infringements of procedure of its convocation have not the right of value for the true dispute, contradict the specified explanations and are erroneous.

Besides at the resolution of dispute the arbitration court has not found out, whether there corresponds to the law the way of protection of the rights of the participant of a society elected by the claimant.

Thus the court should take into account, that the responsibility of an individual agency is stipulated by article 44 of the Federal law "About societies with limited liability". Contest of its inactivity in the judicial order as a way of protection of the rights of participants of a society is not stipulated by the law. Presence on the party of a society of not executed duty to make the actions necessary for the state registration of changes, brought in constituent documents of this society when the corresponding decision was not accepted by an individual agency, gives the basis to the participant of a society to demand execution of this duty from a society.

Meanwhile concerning Open Company "Breeze" the decision is not accepted court, whereas it is specified in the application of the claimant as the respondent.

Under the stated circumstances the decision from 25.03.2008, the decision from 16.06.2008, accepted on is incomplete to the



investigated circumstances and with infringement of norms of the substantive law, it is impossible to recognize lawful and proved, therefore judicial acts on the basis of parts 1, 2 article 288 of agrarian and industrial complex of the Russian Federation are subject to a cancellation with a direction of an affair on new consideration in court of the first instance.

By new consideration of an affair the arbitration court should check up legality of the decision of extraordinary general meeting of participants of Open Company "Breeze" from 16.11.2007, to specify a subject of the claim, to establish the appropriate respondent and to resolve dispute with correct application of norms of the right subject to application.

Being guided by articles 286 - 289 Arbitration remedial code of the Russian Federation, the Federal arbitration court of Far East district has decided: the decision from 25.03.2008, the decision from 16.06.2008 on business N A59-4528/2007-C25 of Arbitration code of the Sakhalin area to cancel. Business to direct on new consideration to the same court. [3]

It is necessary to note, that the judiciary practice resulted by us is dated 2008, therefore both the decision, and the decision of courts, accordingly, are regulated by normative acts working on that moment.

Changes in the legislation on societies with limited liability concern the data contained in the charter: about the order of fulfillment by a society of large transactions; about the order and consequences of an output of the participant from a society; about an estimation of not monetary contributions in уставный the capital; about the questions making the exclusive

competence of board of directors of a society, etc.

It is necessary to notice, that the basic innovation is exception of the constituent contract of structure of constituent documents. However exception from among constituent documents of the constituent contract does not mean, that at establishment of a society with limited liability its founders should not sign the contract about establishment (item 1 of an article 89 CC of the Russian Federation).

In connection with that the constituent contract concluded at establishment, has lost the status of the constituent document, the positions explaining its contents, 12 Law of societies with limited liability in an item 11 specified Law have been transferred from an item. It is necessary to notice, that as a whole these positions repeat earlier working except that now in the contract about establishment it is not required to specify structure of participants, the order of distribution of the profit between them, structure of bodies of a society and the order of an exit from it.

Earlier effective standards of the Law on Open Company, concerning contents of the constituent contract, provided an opportunity of the instruction in the contract of the responsibility for infringement of a duty on entering the contribution. However these positions did not explain, what can be the responsibility. Now the item establishes 16 Law on Open Company, that the contract about establishment can contain a condition on penalty for default of a duty on payment of shares in the authorized capital of a society.

Little changes are brought in regulations about the contents of the charter of a society. Now in the charter data on the size and a face-

value of a share of each participant of a society can not be specified. Earlier at change of the size of shares of participants of a society, the society has been obliged to make the given changes to the charter and the constituent contract, and accordingly in EGRUL, now it is not required, if the charter of a society does not contain corresponding data. Besides the data on the order and consequences of an output of the participant from a society are reflected in the charter, only if the right on an output from a society is stipulated by the charter.

The literature:

1. Zalessky V.V. Comments to the Federal law «About societies with limited liability», - Moscow, 1998, P. 40.
2. The decision of Arbitration court of the Kamchatka krai on business № A 24-1901/2008 from November, 06 2008
3. The decision of Federal Arbitration court of Far East district from October, 27 2008 № F 03 4098/2008
4. Tikhomirov M.U. Constituent documents of legal persons: the practical manual. - Moscow, 2003. P. 14.