

On the possibility of forming the authorized capital of goodwill

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Abstract. The legal nature of the business reputation of legal entities for a long time raises questions among members of the legal community. Analysis of the literature and judicial practice indicates a lot of problems around the definition of business reputation and its property content. The property nature of the right to business reputation of legal entities is studied at an interdisciplinary level and creates many difficulties for the legal and economic sciences.

Keywords: legal nature, business reputation, legal entities, authorized capital, goodwill

1. Introduction

Taking into account modern realities (that situation can meet the needs of the economy), the authorized capital of a newly created legal entity is partially formed by the positive business reputation of its founder, in which capacity another legal entity acts. The possibility of making a business reputation in the authorized capital of a legal entity can be considered as a step towards the development of investments in Russia. For example, large foreign companies can use this design. Their business reputation will be enough to start a legal entity on the Russian market.

Is it possible to consider the business reputation of a legal entity as a contribution to the authorized capital of a legal entity? This is the key question studies in the paper.

2. Materials and Methods

Normative legal acts, as well as doctrinal sources were used in this research. In particular, we have reviewed a number of textbooks, monographs, and scholarly articles on the problems raised in our study. In developing the research topic, the following methods were used: analysis, comparative law, interpretation, as well as structural and functional.

3. Review of Approaches and Key Results

The concept of the authorized capital of a legal entity is key in the system of corporate law. However, the normative definition of this concept is not fixed. Due to the lack of a common understanding, several concepts of the legal nature of the authorized capital can be distinguished in the scientific literature.

The first and most traditional is the concept of property. Within the framework of this concept, the authorized capital is a part of the company's assets, which is formed at the expense of the contributions of its participants. The authorized capital is a part of the property of the company. In accordance with this approach, the main function of the share capital is to guarantee the creditors. Supporters of the

property concept propose to increase the requirements for the minimum size of the authorized capital and to establish the dependence of the net assets of the company on the current size of the authorized capital. We can include V. V. Dolinskaya and E. A. Sukhanov to the authors adhering to the above concept [1, 2].

Also, the nominal concept of share capital stands out. Within the framework of this concept, the authorized capital is considered as an abstract value, fixed in the Charter, and which is used to establish certain ratios. For example, it is used to determine the allowable threshold for the reduction of the company's net assets.

According to the issuing concept, the authorized capital is the shares owned by the participants of the economic company. Based on this approach, the authorized capital is an asset that belongs not to the company, but to its participants. A. A. Glushetsky and D. Yu. Glyantseva are the supporters of this approach [3, 4]. The emission concept assumes that the main function is implemented not in relation to the company with creditors, but in relation to the company and its participants, namely in the distribution of their corporate rights. And on the part of the company, the authorized capital expresses its specific obligations to the participants.

Evaluation of the proposed concepts suggests that the property concept of authorized capital is contrary to the contemporary corporate practice. In accounting, the authorized capital is not fixed as part of the company's assets, but as part of liabilities. If the authorized capital was part of the company's assets, then in the balance sheet, it was reflected among the assets.

Analysis of the Civil Code of the Russian Federation (hereinafter, the Civil Code) and laws on business societies leads to the conclusion about the use in them of the emission concept of an authorized capital. These acts establish that the authorized capital of a joint stock company consists of shares acquired by shareholders. And the authorized capital of a limited liability company consists of the shares owned by the participants of the company. The law does not associate the authorized capital with the property of the company, but it assigns it to the participants.

In our opinion, changes made to the regulation of the general provisions on economic societies should be viewed through the prism of the emission concept.

The Federal Law of May 5, 2014 No. 99-FZ On Amendments to Chapter 4 of Part One of the Civil Code of the Russian Federation and on the Recognition Invalid of Certain Provisions of Legislative Acts of the Russian Federation introduced Article 66.1 into the Civil Code of the Russian Federation [5, 6]. The specified norm has fixed the list of contributions to the property of an economic partnership or a company. Contributions to property have become possible with cash, things, shares in authorized (share) capitals of other economic partnerships and companies, state and municipal bonds. Exclusive and other intellectual rights and rights under license agreements subject to monetary valuation may also be such a contribution, unless otherwise provided by law.

The provisions of Article 66.1 of the Civil Code of the Russian Federation were stipulated by the provisions of the Concept of Development of the Civil Legislation of the Russian Federation (it was approved by the Council under the President of the Russian Federation on the Codification and Improvement of Civil Legislation on October 7, 2009) (hereinafter referred to as the Concept) [7]. The Concept's Clause 4.2.1. states that Russian legislation follows the European legal tradition, according to which the presence of a "solid" authorized capital in an economic company is obligatory.

The Concept's Clause 4.2.3. also provides that restrictions on contributions to the share capital in a non-monetary form should be set (similar to those provided for in the EU directives and in the legislation of some foreign countries). Things and rights that have a monetary value, can act as non-monetary contributions. At the same time, the rights to use the property (rental rights, etc.) should not be paid into the authorized capital. At the same time, the introduction of rights under a license agreement, as well as certain types of securities (such as promissory notes and bonds) and the rights of claim of a participant in an economic company both to the company itself and to a third party are possible.

Thus, the developers of these provisions to the concept of property in determining the legal nature of the authorized capital of the economic company and recognize the contribution to the authorized capital of a form of contribution to the property of the economic company.

However, the innovation of Article 66.1 of the Civil Code of the Russian Federation was perceived by the laws on joint-stock companies and limited liability companies as a new method of gratuitously increasing assets, using which the ratio of shares of participants did not change.

In 2016, Article 32.2 appeared in the Federal Law of December 26, 1995 No. 208-FZ on Joint-Stock Companies (hereinafter, the Law on JSC), which gives a direct reference to the provisions of Article 66.1 of the Civil Code of the Russian Federation [8]. However, the provisions of Paragraph 2 of Article 34 of the Law on JSC still provide for the possibility of payment for shares in cash, securities, other things or property rights or other rights that have a monetary value.

A similar situation is seen in the Article 15 of the Law *on JSC* on payment of the authorized capital and in the Article 27 of the Federal Law of February 8, 1998 No. 14-FZ on Limited Liability Companies on contributing to the company's property [9]. Consequently, the payment of shares in the authorized capital by other rights having monetary value is possible. Thus, to make a business reputation in the authorized capital, it must be valued in monetary terms.

Along with other intangible benefits, in accordance with the Article 128 of the Civil Code, business reputation is subject to civil rights. The provisions on the protection of business reputation are enshrined in the Article 152 of the Civil Code. The key problem, from which all the others follow, is the problem of the unresolved content of the notion "business reputation." The absence of a statutory business reputation structure makes it difficult to assess its value. The rules on business reputation in law, including civil law, are fragmented and often contradict each other.

There is no common definition of business reputation in the civil science, but we can distinguish three main approaches to the definition of the concept of business reputation. Representatives of the first approach believe that business reputation is a positive assessment of the business qualities of a person engaged in entrepreneurship, reflected in the public consciousness [10]. Within the framework of the second approach, business reputation is interpreted more broadly and is defined as a set of qualities and ratings with which their carrier is associated in the eyes of its customers, consumers, contractors, fans (for show business), work colleagues and personified among other professionals in this field [11]. Representatives of the third approach suggest considering business reputation in a narrow and broad sense. For instance, E. M. Dyachenko understands business reputation in a broad sense, as a positive public assessment of professional, official qualities of individuals and legal entities. He understands business reputation in the narrow sense, as a positive assessment of the business qualities of the participants in the business turnover: commercial legal entities, non-commercial legal entities involved in business activities, and citizens-entrepreneurs [12].

The first and third approaches are untenable, since current legislation provides protection regardless of the subject (the right to protection of business reputation is enjoyed, among other things, by non-commercial legal entities, state and municipal authorities).

However, business reputation of citizens and legal entities cannot be determined equally. The Supreme Court of the Russian Federation noted this in the Resolution of the Plenum of February 24, 2005 No. 3 on Judicial Practice in Cases of Protecting the Honor and Dignity of Citizens, as Well as the Business Reputation of Citizens and Legal Entities. It states that for citizens, business reputation is a constitutional right, and it is a condition for successful activity for legal entities [13].

The problem of determining the business reputation of legal entities, which has not received an unambiguous interpretation within the framework of jurisprudence, justifies turning to the economic definition of this concept in order to enable a meaningful analysis.

The academic economists are discussing the opportunities that business reputation opens for a legal entity. For instance, G. I. Grekova understands business reputation of an organization as an opinion about an organization, which is objectively established and confirmed by collective practice. This opinion is formed over time for all stakeholders on the basis of an assessment of the economic, social, and environmental aspects of the organization's activities based on reliable information received,

personal experience of interaction or mediated contacts [14]. In addition, the author makes a distinction between the image of the company, he calls the emotionally colored image and idea of the organization' business reputation as its integral characteristic. The author defines business reputation as a category that determines not only the attraction of contractors, but the possibility of retaining them and returning for cooperation again. According to G. I. Grekova, the main structural components of business reputation are the quality of goods and (or) services, financial condition, financial indicators and their dynamics, as well as financial stability, etc. [14].

According to the Regulation on Accounting and Financial Statements in the Russian Federation (RAFS), approved by the Order of the Ministry of Finance of the Russian Federation of July 29, 1998 No. 34n, the organization takes its business reputation into account when accounting is carried, relating it to intangible assets [15]. It is noteworthy that the RAFS divides business reputation into positive and negative, and, starting from this, distinguishes the methods of depreciation.

The Accounting Regulation "Accounting for Intangible Assets" (AR 14/2007), approved by the Order of the Ministry of Finance of the Russian Federation of December 27, 2007 No. 153n, states that for accounting purposes, the value of acquired goodwill is determined by calculating the difference between the purchase price paid to the seller when acquiring an enterprise as a property complex (as a whole or part of it) and the sum of all assets and liabilities in the balance sheet at the date of its purchase (acquisition) [16].

In paragraphs 17, 18 of Section VII of the Order of the Ministry of Economic Development of the Russian Federation of June 22, 2015 No. 385 on Approval of the Federal Assessment Standard "Valuation of Intangible Assets and Intellectual Property" (FSO No. 11), any future economic benefit is determined for the purposes of evaluation in determining the value of positive business reputation (goodwill). This benefit is generated by a business or assets that are inseparable from a given business or groups of assets within its structure. Examples of such benefits include the increased efficiency resulting from business combinations (lower operating costs and economies of scale not reflected in the value of other assets) and organizational capital (for example, the benefits arising from the established network or the possibility of entering new markets, etc.). The value of goodwill is the amount remaining after deducting from the value (purchase price) of the organization the value of all identifiable tangible assets, including cash and intangible assets. Costs are adjusted for actual or potential liabilities [17].

Such approaches do not allow to determine the value of business reputation before the sale of an enterprise as a property complex.

In 2010, the Ministry of Finance of the Russian Federation (hereinafter, the Ministry of Finance) published an explanation in which it gave a negative opinion regarding the possibility of making business reputation as a contribution to the authorized capital.

These conclusions are based on the provisions of the Article 150 of the Civil Code of the Russian Federation in the old edition. From the Response of the Ministry of Finance it follows that business reputation refers to personal non-property rights. However, the legal incorrectness of the combination of intangible goods and the rights to them was eliminated in this article by the amendments made to the Civil Code of the Russian Federation. Currently, the code lists intangible benefits and their essential features.

Regarding the nature of the right to business reputation, there is no consensus in the legal literature. Such authors as M. V. Markina, S. P. Grishaev, M. A. Rozhkova substantiate the property content of the right to the business reputation of legal entities.

Another argument is the provision of Paragraph 4 of RA 17/2007, according to which the goodwill that arose in connection with the acquisition of an enterprise as a property complex (in whole or in part thereof) is also taken into account as part of intangible assets.

From this provision, the Ministry of Finance concludes that the business reputation of one of the participants cannot be accepted as a contribution to the authorized capital of a business entity. However, such an argument cannot be considered sufficient to solve the problem posed.

Clause 11 of RA 14/2007 states that the actual (initial) value of an intangible asset contributed to the authorized (share) capital (including in the case of making state or municipal property as a contribution to the authorized capital of open joint-stock companies), statutory fund, unit fund of an organization is its monetary value. It is approved by the founders (participants) of the organization, unless otherwise provided by the legislation of the Russian Federation.

After changing the Civil Law, these provisions should be applied taking into account paragraph 2 of clause 2 of article 66.2 of the Civil Code of the Russian Federation, according to which the monetary valuation of the non-monetary contribution to the authorized capital of a business company must be carried out by an independent evaluator. The participants of the economic company are not entitled to determine the monetary value of the non-monetary contribution in the amount exceeding the valuation amount determined by an independent evaluator.

4. Discussion

Summarizing the above regulations, we must conclude that there is no regulatory ban on making business reputation as a contribution to the authorized capital of a business entity. However, the problem is in assessing the value of business reputation, since the mechanism that would allow an assessment to be made before the sale of the enterprise is not fixed. In addition, there are no obstacles to the goodwill contribute to the authorized capital. This is included in intangible assets because already has a value.

5. Conclusion

The possibility of making the business reputation of a legal entity as a contribution under a simple partnership agreement is not in doubt. In accordance with the Article 1042 of the Civil Code of the Russian Federation, the contribution of a companion is to admit everything that he or she contributes to a common cause, including money, other property, professional and other knowledge, skills and abilities, as well as business reputation and business connections. According to Paragraph 2 of the same article, the contributions of partners are assumed to be equal in value, unless it follows otherwise from the contract of simple partnership or actual circumstances. The monetary evaluation of the contribution of the partner is made by agreement between the partners. In one of the court cases, the contribution under a simple partnership agreement in the form of professional knowledge, business reputation, and business ties in monetary terms was evaluated by the parties to the agreement at 11,284,045 rubles [18].

From the relevant court practice, it follows that in a joint venture without forming a legal entity under a simple partnership agreement, business entities have no problem with assessing the value of business reputation and business ties when they are made as a contribution. And the monetary value of such contributions in some cases is quite impressive.

At the same time, the conclusion about the special material nature of the legal entity's right to business reputation is obvious. The introduction of a mechanism for assessing the business reputation of a valid legal entity will help solve law-enforcement problems related to the protection of business reputation, as well as provide an opportunity to contribute business reputation as a contribution to the authorized capital.

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