

# THE LEGAL NATURE OF CAPITAL ADVANCES ON ACCOUNT OF FUTURE INCREASES IN CHILEAN LAW

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## Abstract

The object of this study is to present the legal nature and effects of a corporate financing practice, commonly known as “capital advances on account of future increases”. Chilean corporate legislation and doctrine do not refer to this mechanism, thereby preventing the provision of well-defined elements for its secure use by participating agents. To the preceding effect, this thesis proposes to consider this form of financing as a bilateral agreement submitted to a suspensive condition, using the resources provided by general legislation. The observations made by continental and Argentinian doctrine and case law have been taken into account in this study, especially with regards to the topic of its characteristics and, specifically, its irrevocable nature, which prevents the unilateral substitution thereof through other contracts, such as a loan agreement.

**Key words:** *Capital advances on account of future increases, advances, anticipated disbursements for future capitalizations, corporate financing, suspensive condition.*

## INTRODUCTION

Corporate financing stems from both internal and external sources, destined to endow the entity, whether in formation or constituted, with the necessary assets to carry out its corporate purpose. Internal sources of business financing are the result of the operation and promotion of goods or services, the contributions of partners, reinvested profits, depreciation and amortization of investments, and the sale of assets, among others. On the other hand, external sources are resources provided by third parties, namely suppliers, financial institutions and investors (banks, factoring companies, securities issuance, etc.).

However, there is another source of liquid and quick resources for companies, a generalized commercial practice from ancient times, called *capital advances on account of future increases*, which is not considered in Chilean corporate law. This practice is examined in an era in which the concept of social capital is under constant review, from legislative positions that, considering its function as a guarantee in favor of

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owners and creditors, urge *ex ante* control of the effectiveness of an initial nominal capital or of a determined increase (proportional to the business risk undertaken), and corporate legislation which contemplates ample freedom in this matter, such as our legislation, which does not regulate a minimum amount of statutory capital and its effectiveness (except for the case of banks, insurers and other relevant companies), replacing an *a priori* control of capital by promoting *ex post* controls, in terms of its material aptitude for traffic.

Thus, in the Chilean legal system, the definition of value and the intrinsic effectiveness of capital (considering all corporate assets) is transferred *ex post* upon formation of the corporation or at the moment of capital increase, to the market and economic agents that are contractually linked to the company, through the observation and interpretation of accounting information (assets, liabilities, equity, profits and reserves), financial information (debt ratio) and commercial information (cash flows), consolidated in the case of a company that forms part of a group of companies.<sup>1</sup> Professional creditors will have easy access and understanding of such information, due to their relative power within society.<sup>2</sup> However, other creditors, small, casual or ignorant ones (SMEs, consumers and creditors of extra contractual liability), have no economic capacity (transaction costs), or relative power over the counterparty, in order to obtain reasonable access to financial and accounting information.<sup>3</sup>

On the other hand, capital advance on account of future increases, which aims to provide more risk capital to the legal entity, can unfairly undermine the trust of third parties, a situation that calls for a reasonable dogmatic framework to eliminate doubt and conflict with regards to this financing mechanism, in whatever situation it may be used, either in a corporate or in a bankruptcy scenario. Therefore, the problems that might arise from this operation may be due to excessive delay of the partners or shareholders in formalizing their capitalization, to the ambiguity of the deed and/or of accounting, or to the unilateral will of either of the contracting parties manifested after the agreement, trying to characterize the advanced money as a loan agreement. Hence, in the present study, we will analyze the irrevocable essence of this capital advance and the possibility (or impossibility) of it being returned by the receiving entity.

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1 PUGA (2013), pp. 149-150.

2 These creditors also better control over the risk of the entity, being able to demand guarantees from the partners and / or charging the company a risk premium for the contracts they enter into.

3 In PAZ-ARES (1983), pp. 1587-1639, and in PAZ-ARES (1994), pp. 253-269, who, having expressed some skepticism about the absolute virtues of advertising as a substitute for adequate capital, attended to a number of practical situations that tend to undermine the trust of third parties, particularly the so-called ignorant creditors, advocates for their protection through the institute of the lifting of the corporate veil and the imposition of a duty of communication by the corporation to creditors, about the state and composition of its capital with regards to the business risk that the company is assuming at a given time.

In addition, we will explain that capital advances on account of future increases do not constitute an item of company's capital, since, precisely, its formal capitalization is pending.

This work, therefore, aims to determine the legal nature and characteristics of this method of corporate financing, in order to identify therefrom, its substantial effects, both with respect to the person that supplies the capital advance and the company receiving it, and with regards to events of formalization of the corresponding capital increase. For this purpose, we will recur to the norms and principles provided by general and corporate Chilean legislation, and to the contributions provided by continental and Argentine scholarship and case law, both of which are far more developed in this area. We have dispensed with Anglo-Saxon and North American corporate arrangements, considering their substantial differences with the continental legal system from which stems the Chilean legal system.

The object of this paper is ultimately to visibilize and prove the legal feasibility of this institution, providing those who enter into agreements with a corporation, as well as those called to eventually judge a possible conflict arising therefrom, with greater clarity, certainty and interpretative resources.

## 1. GENERAL CONCEPTS

### 1.1 Trying to build a concept

Capital advance on account of future increases can be defined as a financial agreement of corporate origin, by virtue of which a partner or a third party, with the consent of the administration of the company, supplies a company with sums of money or other liquid assets (checks, deposits) so that it may increase its capital, without waiting for the discussion and approval by the partners or the shareholders' of the capital increase.<sup>4</sup> The aforementioned capital advance is made prior to the subscription of the contract for shares (the aforementioned in the case of corporations and stock companies), and is also subject to the formal decision of the shareholders to capitalize the advance or not. As Cabañas and Machado point out, such disbursements "are made on account of a future capital increase, that is, an increase that has not yet been decided, therefore it is necessary to conclude that they cannot represent capital contributions. However, although they are not present, they aspire to be (capital increases)...".<sup>5</sup> Then, in the figure analyzed, the normal process of capital increase where execution follows the increase, does not occur.

4 VITOLO (1994), pp. 103-104, has conceptualized this operation as one in which "the society receives from the partner - although exceptionally it can do it from a third party -, without there being still a decision of the governing body to make an increase in capital, a benefit, to which qualifies as contribution, to affect the turn of the company, with the commitment to convene in due time to the Assembly to consider its capitalization".

5 CABAÑAS and MACHADO (1995), p. 56.

## 1.2 The institution in Chilean corporate legislation

The Chilean legal system, while not contemplating this financing mechanism, does not prohibit it either, as shown by widespread and long-standing commercial practice. In effect, capital advance does not oppose, either Article 1461, paragraph 3 of the Civil Code or Article 1467, and paragraph 2 of the same Code, or even to Article 1475, and paragraph 2, which establishes morally impossible conditions.

This legislative omission has happened for various reasons. One of those reasons, which seems to us the most relevant one, is that in Chilean corporate law there is no generic requirement that a company be constituted with a minimum nominal capital which must be maintained throughout the duration of the corporation. This circumstance demonstrates that the phenomenon known as infracapitalization has not been considered important to the Chilean corporate or bankruptcy legislator, which finally explains the regulatory silence with respect to this mechanism.<sup>6</sup>

## 1.3 Economic causes of this legal act, subjects involved and object

This legal financing instrument has been commonly used in companies with a small number of members and in groups of companies.<sup>7</sup> The motives are mainly: a) the financial emergencies of liquid funds which cannot be obtained through the financial system because of its higher cost (for example, preventing the auctioning of an essential asset or considering a business opportunity); b) the time it takes to adopt a formal capital increase; c) favorable tax treatment granted to these money advances, not yet formalized in capital increases; d) the need to maintain a business accounting that keeps liability at reasonable debt levels (debt ratios); or, finally, e) the requirements imposed by the corporate and/or foreign tax legislation in cases of undercapitalization, patrimonial status that forces the company to complete its nominal capital each time it decreases in accounting terms.<sup>8</sup>

This business law mechanism owes its emergence and consolidation, precisely, to the inventiveness of entrepreneurs and accountants, associated with contingent cash needs for certain necessary social operations, which may or may not be linked to insolvency symptoms of the legal person.<sup>9</sup> The parties involved, that is, the company and the partner or third party, are determined to obtain the following: the company is determined to obtain from the partner or third party a fast advance of

6 PUGA (2013), p. 172, referring to this corporate financing institute, observes the inexistence of a legal standard that allows the “reclassification of credits that really point towards future capitalization as capital contributions, and therefore subordinated loans, because in Chile capital increases are solemn ... If that modification does not occur and the bankruptcy of the company ensues, those funds are credits and not capital”.

7 CABAÑAS and MACHADO (2011), p. 1601, ALEGRÍA (1995), pp. 67-69, and TOSI (2008), pp. 50-52.

8 ALEGRÍA (1995), pp. 67-69, CABAÑAS and MACHADO (1995), pp. 27-53, TOSI (2008), pp. 50-52 and HERNANDO (2014-2015), p. 504.

9 ARAYA and ARAYA (2013), pp. 750-751.

money or other liquid assets for operations, and the partner or third party to transfer the cash in a simple and fast way, without waiting for the receiving company to start the formal process of approval of capitalization by the partners and the consequent issuance of the new shares.

As for the parties involved, the party making the cash advance to the company will normally be a partner or shareholder (director or controller), and exceptionally a third party outside the ownership of the entity. The exceptionality of a third party agreeing to finance the company in economic emergency through this figure, is due to the double risk taken: the first, lack of the statutory right to call for a meeting of the board to decide the corresponding capital increase, and second, the problems that may arise as a result of exercising the right of preferential subscription of the shareholders, who could block the entry of this third party into the company, exercising their preferential rights.<sup>10</sup>

The object of the *advance* will be money. However, in the event of a cause of corporate financial emergency, which leads to a negotiation between the partner or third party through this financing instrument, the efficiency of the *advance* in eliminating or reducing the state of economic emergency and not only the intrinsic quality of the object of the contribution will be considered, so that, theoretically, it cannot be ruled out that these *advances* can be made in goods other than money, if the circumstances in fact require it.<sup>11</sup>

#### 1.4. A terminological issue

Capital advances on account of future increases, also known as irrevocable contributions on account of future subscriptions, contributions on account of future capitalizations, advances, anticipated disbursements or non-capitalized contributions, are sometimes confused with the contribution, which seems incorrect, in light of the strictly corporate meaning that should be assigned to this last term, because:<sup>12</sup>

a) Unlike the contribution, the capital advance contract and the benefit of the person executing the advance, takes place before approval of its capitalization by the partners or shareholders, and of the subscription of new shares, From this fact, significant differences are derived.

b) Conceptually, the contribution refers to the legal act by virtue of which the partner or shareholder transfers or promises to transfer ownership of property (money, rights, real estate, etc.) to the company, receiving simultaneously in return rights or shares of the company, figure that, as will be analyzed, does not coincide

10 LENNON (1994), p. 254.

11 MOLINA (2004), pp. 661-668. In Chilean corporate law, Article 21 of the D.S. No. 702 of 2011, provides strict regulatory controls on the contribution of assets other than money.

12 The name anticipated disbursements, is typical of Spanish scholarship. In Italy, this institution is known by the name *versamenti in conto future augmentation di capitale*, and in Argentina it is commonly called contributions on account of future capitalizations.

exactly with the institution that is the object of this study. This follows from articles 378 of the Commercial Code and 17 of Ley No. 18,046.<sup>13</sup> For this reason, I have preferred to use the term advance, or advance payment in lieu of contribution;<sup>14</sup>

c) In the case of capital contributions there is simultaneity in the birth of obligations, that is, following García Cuerva, there will be no partner without contribution and there will be no contribution that does not involve the acquisition by the contributor of partner status.<sup>15</sup> On the other hand, as previously mentioned, with regards to capital advances on account of future increases, and despite the fact that obligations are born simultaneously, (although conditional for the entity as expressed above), said simultaneity does not coincide with the execution of the benefits, even though the transfer of liquid assets (money) by the partner or third party to the organization is immediate, coeval with the birth of its obligation and prior to the capital increase. The benefit of the company, consisting of the delivery of shares, is not simultaneous, since it is executed after the *advance* contract, and only when the acts intended to summon the owners of the entity have been carried out and the increase has been approved by them;

d) The institute of capital advances on account of future increases does not constitute a preliminary contract, and the promise of advancement of money (making a comparison with a contribution promise), constitutes a figure distinct from the operation which is the object of this article, since the advance money is delivered to the *praesenti* society;<sup>16</sup>

13 VÁSQUEZ (2015), p. 294.

14 DUBOIS (1994), pp. 73-78, y ARAYA and ARAYA (2013), pp. 749-750.

15 GARCÍA CUERVA (1988), pp. 71-72, conceptually demarcates the advance on account of future increases from the contribution, and even when this author recognizes convergent objectives in both institutions, that is, in both cases there is an “entrepreneurial risk”, he attributes different meanings and effects to each one of them, pointing out that “the terms contribution and partner are correlative; there is no partner without contribution and there is no contribution that does not necessarily imply that the contributor acquires the status of partner ... The contribution being the obligation assumed by the partner in the subscription contract”. In Chile, on the contribution and its effects, see PUGA (2013), pp. 238-240 and RAZETO (2003), pp. 15-16. The simultaneity in the benefits by the company and the contributing partner, the first one, obliged to deliver to the partner the participation or rights equivalent to the contribution, and the second, to pay the company the value of the promised contribution when it is constituted or modified, which is also inferred from article 3 of Ley N° 18,046. The unanimous opinion in Chilean scholarship maintains that the legal person exists from the date of the deed, and the effects of the subsequent inscription and publication of the extract go back to the time of the deed. The Chilean doctrine is aligned with the contractualist thesis of corporate contribution, although delivery of the amount of the contribution is not done in a single instance but deferred in time.

16 *Santa Lucía S.A. vs/ Policastro* (1996), ruling of the Argentine National Chamber of Commerce, in which the feasibility of a promise of “advances” under the Argentinian law of corporations was established, in that, the signatory partners of a pact with a corporation intended to meet certain expenses, had subscribed a commitment (pledge) of periodic monetary contributions, by virtue of which the contributor would only have the right to propose the convening of the meeting, in order to capitalize the contributions made.

e) Finally, the contribution of the partner or shareholder to the corporate capital, whether constitutive or incremental, is a clause in the bylaws, by means of which a member transfers ownership of property to the entity. On the other hand, the so-called advances of capital on account of future increases are not constitutive in full of capital contribution, despite the fact that is what they intend to be, since they are made sub conditione, as set forth below.

In short, and in accordance with article 375 of the Commercial Code, the contribution to corporate capital must be made by the partner. The indissolubility of the partner/contribution duality is also evident in the wording of article 4 N° 5), of the Corporation Law, when it states that “The company’s deed must express: 5) ...; the form and terms in which the shareholders must pay their contribution ...”. Whereas, the advances under analysis correspond to an agreement prior to the operation of capital increase and outside the bylaws, entered into between a partner or a third party and the company represented by the administration; that is, and temporarily, this financing operation takes place prior to the decision of the partners or shareholders, and it means an immediate transfer of cash to the company, although its final fate depends on approval by the owners of the legal entity.

Although these two institutions present the differences noted above, they are similar in the purpose they pursue, since both the contribution and the advance of capital on account of future increases are constituted by obligations to perform an act, the purpose of which is to provide the company with risk capital on account of future profits (losses) translated into future dividends, either for the contributor or for the person who performs the so-called advance.<sup>17</sup> The same can be said about the commutativity of the contributions of the parties, demanded in principle for both institutes, that is to say: the partner or third party will deliver an amount of contribution or advance, and the company, for its part, will deliver shares equivalent in value to the advance received.<sup>18</sup>

17 VINCKEL (2017), pp. 4-5, and PUGA (2013), p. 172. A different thing occurs with the so-called partner loan or partner’s “checking account” (in France *comptes courantes d’associés*), a borrowing figure that should be separated from the “advances of capital on account of future increases”. Although both figures were born from commercial practice as a method of corporate financing or intra-group of companies (treasury operations), thus avoiding corporate rigidities, and without particular legislative treatment, the legal effects of the loan or “checking account” of the partner, are provided by the general law and banking law related legislation, that is, a loan agreement on fungibles (articles 2196 and following articles of the Civil Code) and money credit operations, respectively, and not by corporate law, manifesting then, radical juridical differences with the institution of advances. The operation of the partner “account” is subject to the principles that regulate the loan contract, notwithstanding the variable nature of the balance, which reflects an advance in the profits of the company, a business where it is perfectly acceptable to agree on a remuneration based on interest (different to dividends), the foregoing, by application of articles 2205 and 2206 of the Civil Code and 12 of Ley No. 18,010. On the contrary, and as analyzed, the advances of capital on account of future increases, are not remunerated, since they are made as business risk capital conditioned to the existence of corporate profits (losses) (articles 382 and 443 of the Commercial Code, Article 11 of Ley N° 19,857, and Articles 78 to 85 of Ley N° 18,046).

18 LYON (2003), p. 196, recognizes in principle, commutativity in the contribution contract, that is, equivalence between the value of the contribution of the member and the amount of shares

### 1.5 Some difficulties of the institute

The unique features of this method of corporate financing, in which there are quick advances, delivered ipso facto and prior to the summons and formal decision of the partners or the board, have provided material for great controversy in foreign doctrine and case law. This has occurred as the result of tensions generated between the contractors, in the time span between delivery of the cash until the capital increase is approved. If the cash advance is simultaneous to the decision of the partners or the shareholders' meeting, this exuberant financial figure does not concur and therefore tension between the parties are of another nature.

The pressure that this commercial institute causes during this intermediate time may arise, among other reasons, from:

- a) the status of company controller of the person making such advance payment, controller who may try to abuse the minority partners, eventually and unilaterally ignoring the contract and pretending that it was a loan, which would eventually seek to place his credit in a better position in the face of the company's payment crisis;
- b) the fact that the controller may abuse the delivery of advances, in order to force capital increases to augment his participation in the company in the event that the minority shareholders are not in a position to exercise their right of preferential subscription;
- c) the circumstance in which the controlling partner tries to block capitalization of the advance, either by omission in the summoning of the meeting or by his vote of opposition in said instance, and
- d) other times, problems arise from the erroneous or obscure accounting of the advances in the books of the receiving entity, when it is simply recorded as a liability under the name of advance payment of capital on account of future increase, or on occasions, accounting for such advances as being subject to payment or interest, in circumstances that the will of the parties expressed in the title, establishes their risk capital status, and other modalities in the same sense.<sup>19</sup>

## 2. THE DOCTRINAL DISCUSSION REGARDING THE LEGAL NATURE OF CAPITAL ADVANCES ON ACCOUNT OF FUTURE INCREASES

The legal nature of capital advances on account of future increases, contractually agreed upon between a partner or third party and the company, and/or recorded in its books, has been explained in various legal forms taken from general law.

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received in return, with the exception that the distribution of profits is agreed upon between the partners without proportionality to said contribution, according to the rule of article 2066 of the Civil Code

19 In this sense, accounting is an important indication of the will of the parties, although the legal classification of the operation will largely depend on the wording of the agreement signed between the partner or third party and the company's management, as has been decided by the Argentinian National Chamber of Commerce in *Santa Lucía SA vs Policastro* (1996).



## 2.1 Loan Agreement theory

Foreign doctrine that proposes this hypothesis indicates, in general terms, that when the law omits this figure of corporate financing and only regulates the contribution contract, this wrongly-called irrevocable contribution on account of future capital increases would not be a contribution proper, according to the meaning provided by corporate law. These advances, therefore, would be interest free loan agreements, since they are supplied without the decision of the corporate governance body, notwithstanding the intention of the partner or third party to participate in the business risk of the legal entity receiving the advance.<sup>20</sup>

In Argentina, scholars who defend this theory have indicated that the so-called contributions on account of future increases is really a loan in disguise and not technically contributions in the sense provided by Argentinian corporate law. Then, faced with possible nullity of this operation, either because it is not expressly contemplated in corporate law or because it does not meet the requirements of the object of the legal act established by the general law, Argentinian scholarship considers the possibility of conversion of a null business act into a valid one (loan agreement), resorting to the principle of good faith of the contracting parties and to the practical interest that they pursue with this financing operation. They conclude, therefore, that since this mechanism is not prohibited by law, and is moreover useful and legitimate as a mechanism for the provision of resources, this legal act should not be invalidated, since its nullity does not benefit anyone, admitting its validation or confirmation (*utile per inutile non vitiatur*).<sup>21</sup>

In Chile, article 1562 of the Civil Code, (albeit as an interpretative rule) would allow the preservation of the advance agreement, for example, considering the satisfaction of the purpose or practical utility of the capital advance and the protection of third parties. However, nullity of this clause has been argued.<sup>22</sup> Notwithstanding, the Chilean legal system does not have a general rule that supports conservation of the contract, nor is there a general regulation of partial nullity, and finally, article 1444 of the Civil Code is not considered by scholars as a sufficient basis to promote a broad application of the principle of contract conservation.<sup>23</sup> On the other hand, article 1684 of the Civil Code authorizes the validation of a relatively null contract.

20 NISSEN (1995), pp. 93-101.

21 NISSEN (1995), pp. 93-94, SARMIENTO (2001), pp. 124 and ss. This rationale received support in an Argentine ruling, *Žabala vs/ Radio Familia* (1985).

22 LÓPEZ (1998), pp. 441-442 and LYON (2017), pp. 410-411.

23 ELORRIAGA (2009), pp. 455-482, an exhaustive study on partial nullity, recognizing the absence of general rules on this matter. MARTINIC (1968), p. 88, expresses that, if by application of article 1444 of the Civil Code “the business act that lacks a special essential element is absolutely null or becomes a different act [conversion of the legal act] when a norm establishes it”, evidencing the difficulty in considering the institution of conversion of the legal act in the Chilean legal system in a broad manner (emphasis added).

However, we do not share this thesis, since the loan agreement differs clearly from the so-called irrevocable advance on account of capital increase. The loan, in effect, supposes the existence of a contract by which money is given to the borrower under a restitution term, in exchange for a remuneration called interest, aspects that are not contained in or are incompatible with the figure analyzed (article 2196 and articles 2205 to 2209 of the Civil Code, and article 1 of Ley No. 18.010, on “Credit Operations and Other Monetary Obligations”).

Capital advances on account of future increases have a completely different purpose to that of the loan (to be incorporated into the capital of the host company), and they cannot, therefore, become a loan agreement by the unilateral will of any of the parties. Thus, the remuneration of the advance in order to be capitalized, consists of the future and eventual right to dividends, once the governing body of the legal entity approves the capital increase. On the other hand, the loan from a partner usually involves payment of fixed interest.<sup>24</sup> In turn, once *status socii* is obtained by the person supplying the capital advance, he cannot get a reimbursement or refund of his contribution, now consolidated into the corporate capital, until termination and liquidation of the company. In a loan agreement, on the contrary, pay back of capital is made by the borrower on the date agreed upon between the parties, without waiting for dissolution of the company.<sup>25</sup>

In this sense, Argentine case law has tried to elucidate the limits between the loan agreement and the *capital advance* payment which is the object of this study, by observing several differentiating factors that act in a coordinated and complementary way:

- a) First, the determination of who is the person that supplies the advance;
- b) Then, the participation of the partner or several partners in similar contributions to the company;
- c) Third, the way in which the advance is registered in the company’s books; and
- d) Finally, the economic context in which it is carried out.

In this way, if the advance was made by a partner who has previously made advances in the form of capital contributions, the advance may be considered again as a contribution of capital, and if other partners simultaneously made contributions, this conclusion is reinforced. If we add to this the fact that the company was in bad economic shape at the time in which this capital advance was made, the previous conclusion would be reinforced.<sup>26</sup>

24 DELPECH (2009), p. 3.

25 ALEGRÍA (1995), pp. 61-62, VINCKEL (2017), p. 6, and PUGA (2013), p. 172.

26 In *Palacio del Fumador S.R.L.* (1986), the court decided that the advance constituted capital contribution, since it was established that there was at least one other partner who made a similar contribution to the company. The financial effort of those who supply the “advance” evidences the expectation of participating in the eventual profits that the corporate activity will yield, in proportion to the initial contribution, and not a simple interest in obtaining reimbursement of the money. Such expectation

## 2.2 Theory of the irrevocable offer

According to this theory, the so-called irrevocable contributions on account of future increases must be considered a complex act, united by the same cause, in which two interrelated legal acts can be observed:

a) One, consisting of a unilateral and revocable offer made by the partner or third party that makes the cash *advance* to the company's management, which will be perfected as a bilateral contract at the time it is accepted by said administration;

b) The second one occurs when the company's administration (board of directors) agrees to receive the benefit consisting of the cash advance, thus completing a bilateral contract, and therefore waiving revocation of the *advance*.

In support of this theory, García Cuerva points out that the advance offered by the partner or third party is current and not future, because, as its name indicates, the advance payment is made by the person immediately, and is incorporated into the company's business.<sup>27</sup>

Although this theory presents a situation closer to reality, to our knowledge it does not fully satisfy the nature of capital advance on account of future increases. First, because the offer occurs during a previous stage to the irrevocable advance contract, since it has been incorporated *praesenti* to the company's funds. Second, because the offer would be a unilateral act of the partner or third party subject to the acceptance of the addressee thereof (article 97 of the Commercial Code), while the commented mechanism, as will be said below, constitutes a bilateral contract between the partner or third party and the company's administration, by virtue of which they are legally bound, one, to immediately disburse money to the company, and the other, to perform the internal corporate acts intended for the partners or shareholders to decide the increase by capitalizing said advance.

## 2.3 Theory of the contract *ad referendum* or subject to ratification

According to this hypothesis, this so-called irrevocable contribution is a bilateral contract by virtue of which the company, through the board of directors, is validly bound to the partner or third party who makes the advance payment, even though said act is subject to ratification on behalf of the board. This internal organic ratification of the company does not hinder the complete generation of the effects of the irrevocable advance contract to a certain extent with regards to the legal person.<sup>28</sup>

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outlines the distinction between a loan agreement and corporate contribution, concludes the decision. In *Audisio C., v. Salerno* (1959), the court decided that, once proven that the money was in the company's power, the contributing administrator-partner, who would surveil and control the investment as a supposed lender, did not make his best effort so that said money benefit was formalized as a loan agreement. Therefore, and not having done so, there is a presumption that the money advance was really a contribution.

27 GARCÍA CUERVA (1988), pp. 75-78.

28 ALEGRÍA (1995), p. 64.

The theory of the contract *ad referendum* constitutes a remarkable effort to explain this figure. However, in the Chilean legal system, the institution of ratification is not compatible with the acts carried out by the same person (in this case the company), but rather with those performed by third parties (article 2160 of the Civil Code).<sup>29</sup> In effect, in the capital advance mechanism, the final consolidation of the advance by approval of the capital increase (ratification) rests upon the same entity that consented to the bilateral contract of advance on account of future subscriptions, that is, the receiving company, this time through another body with different competence than the company's administration in the case of capital companies. In any case, the will that the owners of the entity finally express is verified *ex post facto*.<sup>30</sup>

Finally, the *ad referendum* contract theory runs up against the normal future effects that arise from any capital increase, if approved by the partners or the company's higher governing entity, since the political and economic rights of the partner or third executor of the advance payment would not be retroactive back to the time of the advance, but would start counting from the date of its formal capitalization.

#### 2.4 Theory of the sale of future property

This hypothesis is directly based on the rules contained in the Civil Code which authorize the sale of future things. This concerns the sale of some kind of "expectation", which is an aleatory contract, by virtue of which the buyer (partner or third party that makes the advance) pays the agreed price assuming the risk that the object to be delivered (rights or shares) does not finally come to exist.<sup>31</sup>

The contract of future property and the sale of future property that does not exist, but is expected to exist, are regulated in articles 1416 and 1813 of the Civil Code. This last legal provision, located in the part of the Code which regulates sales, has been used to argue that said contract is considered valid under the condition of existing, unless otherwise stated or that by the nature of the contract it appears that chance was actually bought. However, it seems to us that Article 1813 does not conform to the nature of this operation, since capital advance is not subject to chance in its legal consequences, but rather, as we will argue, to a condition precedent, incorporated into a bilateral contract.

Indeed, under the figure we are analyzing, the rights or shares that the company must deliver to the partner or third party that makes the advanced disbursement, do not yet exist, given that the higher instance of the entity has not decided on its capitalization. However, there is a bilateral commutative contract concluded between the subject making the advance payment and the company's administration, who will detail and value the amount of the capital increase that will be proposed to

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<sup>29</sup> Article 2160 of the Civil Code regulates express or tacit ratification in voluntary representation (mandate), that is, the ratification by an agent of an act held without power of the represented party or outside the scope of the powers conferred.

<sup>30</sup> BARRAU (2011), p. 7.

<sup>31</sup> LENNON (1994), pp. 253-259.

the partners or the entity's governing body, the current and future participation of the person that supplies the advance, the percentage of rights or number of shares that will be subject to future increase, its value in relation to the nominal capital and the term established for summoning the highest body of the entity.<sup>32</sup> That is, the object in this type of business contract is fully specified, and the object of the benefit given by the company (participation or shares) is entirely equivalent to the provision of the partner or third party.

As will be said below, the future capital increase would constitute a suspensive condition included in a bilateral commutative and synallagmatic contract, but not chance, since the genuine intention of the parties is, on the one hand, that the sum anticipated by the partner or third party be used in the company's business and risk, and, on the other hand, the company's management is obliged to carry out all the necessary internal acts so that its higher decision entity, if it deems it appropriate, decides its capitalization.<sup>33</sup>

## 2.5 Theory of the conditional contract

This theory, especially welcomed by Spanish scholarship, indicates that advance payment in money to the company is contracted under the condition that the partners or the shareholders' meeting approve the capital increase, including capitalization of the advances already verified by the partner or third party.

In adherence to this hypothesis, Cabañas and Machado express that, "the agreement must be established as a condition, more specifically, the contract can be understood as subject to the condition precedent that capital increase is approved". In this corporate financing operation, the authors point out, three situations occur in the contracts subject to suspensive condition: 1) *conditio pendes*, a phase subsequent to the conclusion of the contract between the contributing partner or third party and the company, "in which the event has not yet occurred [decision of the higher corporate body], but its occurrence is not impossible". And they continue "the condition, therefore, to which the subscription of the contract of future shares is subject, is of a suspensive type, notwithstanding their anticipated disbursement. Over these amounts, the company holds a *sub-conditio* ownership, by virtue of which it may retain them during the pendency phase, albeit without the power to dispose of them". 2) Then, comes the *conditio existit* phase, which takes place "when the company (*recitius*: its competent organ) decides to increase the capital under the same conditions in which the disbursements were verified. Once such event is verified, the amounts paid in advance are definitively consolidated into its assets, as a counterpart of the new capital figure". 3) Finally, these same authors warn about the last phase of the operation called *conditio deficit*, an event consisting of the non- occurrence or failure

32 According to the circumstances, other stipulations such as subordination of existing third-party credits to the advance payment, or penal clauses in case of non-compliance of the company, can be extremely useful in the event of bankruptcy of the company.

33 ALESSANDRI (2004), pp. 28-29, on the exceptionality of aleatory contracts in Chilean law.

of the suspensive condition, by which the company becomes a debtor of the restitution of sums received as early disbursement, because the withholding of advances loses its cause, as the highest competent body of the company has decided not to approve the capital increase charged to the anticipated disbursements.<sup>34</sup>

### 2.6 Theory of the “*sui generis*” contract

There are authors who consider this figure of corporate financing as a commercial institution, as *sui generis*, atypical, that does not correspond exactly with other institutions of general law, and, therefore, has a particular operating regime that is different from the known general categories.<sup>35</sup>

### 2.7. Our opinion

The figure under analysis presents a unique quality as a quick, extra statutory corporate financing contract, other than the contribution, since, as noted above, the normal time sequence of a capital increase is reversed. As we will see, this institution is subject to a possible setback before the partners or shareholders, which makes it difficult to classify in the traditional institutions of general law. In spite of this, we agree with the clear position posed by Cabañas and Machado, and Hernando and Dubois, who state that this institute is a bilateral, commutative and conditional contract, celebrated between a partner or third party and the company’s administration, nature that adequately conforms to the Chilean legal system and practice.<sup>36</sup>

The suspensive condition present in capital advance on account of future increase, is simply optional for the debtor (company), and consequently valid in our civil system (article 1478, paragraph 2 of the Civil Code). There is no legal disadvantage in that the creditor (partner or third party) executes his monetary benefit pending the *sub-conditions* provision of the company (article 1485, subsection 2 of the Civil Code). In the contract perfected between the partner or third party and the administration of the entity, the obligation undertaken by the debtor company is subject to a voluntary act of the latter, dependent not only on its mere will, but additionally on the verification, or not, of a series of circumstances, such as the effective legal celebration of the meeting, the exercise or not of the right of preferential subscription of the former shareholders in partial or total form, of the tenor of the advance contract, among others.<sup>37</sup>

34 CABAÑAS and MACHADO (1995), pp. 61-73.

35 VITOLO (1994), pp. 112-113 and TOSI (2008), pp. 50-52.

36 CABAÑAS and MACHADO (1995), pp. 65-73, HERNANDO (2014-2015), pp. 501-503, and DUBOIS (1994), pp. 76-78.

37 HERNANDO (2014-2015), p. 503, supporting the conditional nature of the advance contract, states that, “... when there is no subjective identity between the administrators and the partners that have to decide the increase, it cannot be considered that the effectiveness of the agreement is left to the discretion of one of the parties”.

In effect, the company, through its administration, has bound itself before the partner or third party to make its best effort to summon the partners or the superior decision-making body, in order to decide on the capitalization of the advance, a power, especially in corporations and less so in companies limited by shares, is given to different bodies (board of directors, directors in power and shareholders' meeting).<sup>38</sup> In this figure, there is no will of the corporate entity left to a mere whim. There is, on the contrary, a serious will, that is, the definitive and consolidating fact of the advance in capital contribution by the higher corporate body, which reveals a shared will with various reasons and circumstances that are far removed from a capricious act.<sup>39</sup>

If the partners or the superior body of the entity approve the capital increase and decide to capitalize the advance, it is understood that the obligation that was subject to suspensive condition has been fulfilled, and thus, the partner or third executor of the advance payment acquires *status socii*. In turn, if the partners reject capitalization, or the board never calls the shareholder's meeting, despite being obligated to do so, or the board meeting summoned to decide on the capitalization of the contribution is not held, despite being convened by the board of directors, it can be argued that the suspensive condition (future event generating the *status socii* in favor of the subject making the *advance*, article 1479 of the Civil Code), has failed. Once the condition has failed, the contributing partner or third party is authorized to claim restitution of the advanced sum from the company (article 1482 of the Civil Code).

With that being said, if we now look more closely at this financing operation from the angle of the company (recipient of the money), the entity may disapprove capitalization or breach the advanced payment contract. Then, two situations may be verified:

- a) First, if the capital increase charged to the advance is disregarded by the entity, which, knowing the terms and conditions of the contract agreed between the partner or third party and the company's administration, decides in exercise of its legal powers to not capitalize it, the effects of the failed suspensive condition will operate. The debtor company, therefore, will be subject to the obligation to return the money received from the contributing partner under such condition, since its retention as capital has lost its cause, as we will discuss below.<sup>40</sup>
- b) The second possibility is given by a breach attributable to the company (failure to hold the meeting at the agreed time, among other events), which, in our opinion,

38 CABAÑAS and MACHADO (1995), pp. 64-73 and 101.

39 PEÑAILILLO (2003), pp. 364-365 and VODANOVIC (2001), p. 239.

40 DUBOIS (1994), pp. 79-80, with whom we disagree, in terms of considering failure of capitalization as the operation of an ordinary resolutive condition for the company, since it would imply considering that the obligations of the *advance* contract would have produced all its effects, as if it were pure and simple. However, we have pointed out that one of them, that is, the company's obligation to perform, will not begin to produce its effects until the decision to capitalize has been adopted by the partners or shareholders.

makes fictional fulfillment of the condition operate, empowering the partner or third party executing the advance money to demand of the entity compliance with the obligation, that is, delivery of the company shares, as a penalty to the good faith generated in the person supplying the advance. In this event, the suspensive condition does not fail due to a natural event, but due to the unlawful intervention of the debtor company or its partners in the very circumstances of the *sub conditione* event (article 1481, paragraph 2 of the Civil Code). We will study these situations in further detail.

Given the above, correct wording of the deed of the advance contract is particularly relevant, so that the object is explained in detail, as well as the entity's obligation to perform, operating guidelines of the suspensive condition and its effects in scenarios of rejection and approval of the increase, especially considering the rule of article 1483 of the Civil Code. With regards to this point, and in the case of companies whose capital is divided into shares, there is nothing to prevent said deed from being incorporated into the shareholders' agreement, although its effects will not affect the company (considering that they strictly bind the subscribing shareholders), which will sovereignly decide the capitalization of the anticipated disbursement included in the pact, as will be seen below.<sup>41</sup>

### 3. OUTSTANDING FEATURES OF THIS INSTITUTE

#### 3.1 About the irreversibility of the capital advance on account of future increases

In spite of the tensions that the figure under analysis may bring about, foreign dogmatic and case law have come to characterize it as an irrevocable act for the partner or third party that makes the advance, either because this has been agreed upon with the receiving company, or because it emanates from the nature of this operation.

In this way, this financing instrument contains the will of the partner or third party that supplies the money advance and of the company receiving it, that its amount becomes part of its capital, through the issuance of new participations or shares.<sup>42</sup> In other words, the advance is verified by the partner or third party

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41 ALEGRÍA (1995), p. 98, has indicated that in Argentine corporate law, it is perfectly feasible that the figure of "advances of capital on account of future increases" is incorporated into a shareholders' agreement, for example contemplating that the subscribers of the agreement will vote favorably on the increase, although he warns that "these agreements do not bind the company, and they only generate an obligation of a certain conduct of the signatories and their extra-corporate responsibility for their eventual non-compliance". In Spain and in a similar sense, CABAÑAS and MACHADO (1995), pp. 105-107. In Chile, PUGA (2013), pp. 311-332, and VÁSQUEZ (2006), pp. 485-519, authors who adhere to the merely relative effect of the parasocial pacts, not binding the company.

42 This work does not contemplate the situation of increased capitalization by increasing the nominal value of the shares. On the other hand, although legally it is also admissible that the capitalization of "advances" allows absorbing accumulated losses of society, which should be expressly indicated



with the unequivocal purpose of participating in the business risk of the receiving entity, of forming risk capital, and with the expectation of the contributing partner or third party of achieving partner benefits, with all its rights and obligations, which will only occur once the capital increase has crystallized, complying with the legal requirements of the corporate type in question.<sup>43</sup>

In the meantime, that is, before the deliberation regarding the increase, the partner or third party cannot claim its return in advance and unilaterally, which does not exclude the possibility that the agreement may fail and be rendered ineffective, as we will review below.<sup>44</sup> The advance is a credit of the partner or future third party subscriber of capital, as the creditor of an obligation to do, which is a credit relationship different from a loan, which must be offset by the contribution debt assumed by the company's management, at the time that the shareholders or the board approves the object of the advance, increasing the capital on account of its value.<sup>45</sup> Therefore, we emphasize that the irrevocable connatural characteristic of this figure is not absolute, but conditional, since the subject who makes the advance will acquire membership status or increase his participation and the advanced sums of money will definitively become capital of the legal entity, once the partners unanimously, or the board with the legal quorums, sovereignly adopt the decision to accept capitalization of the advances, issuing the corresponding shares.

The inalienable character of the advance subject to suspensive condition may be elucidated through interpretation of the document that contains it. Thus, in Chilean law, the rules of contract interpretation contemplated in articles 1563, paragraph 1, 1564, paragraph 1, and 1546 of the Civil Code, may justify the application of the rule of non-relinquishment of this financing mechanism.<sup>46</sup> If we add to the above the fact that verification that the company is in disposition and materially directed towards an increase of effective capital, through the acts defined in corporate laws (summoning of the meeting, writing up of the approval agreement, etc.) the irrevocable nature of this institute is confirmed.

Between the partner or third party and the company, the inconvertibility of said advance into a loan can be agreed upon explicitly or implicitly. In this sense, an advance agreement without interest payments and/or without a period of restitution of the advance, is naturally covered by the figure analyzed. Likewise, the advance verified by a member on account of a future subscription confirms its irrevocable na-

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in the respective "advancement" contract, such situation is not addressed in this work, where it is of increases through the issuance of new shareholdings or shares, which do not have the attribute of eliminating accounting losses. In turn, the capitalization of reserves, considered such by the partners or the board, differs from the capitalization of "advances" on account of future increases, since those are not essentially destined to be capitalized, instead the "advances of capital on account of future increases", they always are.

43 GARCÍA CUERVA (1988), p. 71.

44 GRISPO (2017), pp. 87-100.

45 CABAÑAS and MACHADO (1995), p. 18 and HERNANDO (2014-2015), pp. 506-507.

46 LÓPEZ (1998), pp. 389-407, 436-462 and BOETSCH (2011), pp. 130-135.

ture, when the latter is in turn controller or administrator of the receiving company, especially if at the beginning of the legal relationship with the receiving entity it did not take any precaution in order to formalize the operation as a loan agreement.<sup>47</sup>

The irrevocable character of the institute presents an additional difficulty when it is a third party that makes these anticipated disbursements. In this case, the third party does not participate in the company, lacking political rights specific to the shareholder status, and especially, the possibility of promoting summons of the governing body in order to decide the capitalization, and to exercise the rights of information that allow, for example, to anticipate eventual bankruptcy. In this situation, failure to capitalize the advance on account of future increases has been problematic. Argentinian case law and scholarship have solved it by declaring:

- a) The obligation of the company to make the capital increase against the *advance*, or,
- b) In bankruptcy events, admit the third party to verify in the company's insolvency procedure as a subordinate creditor to the unsecured others.<sup>48</sup>

In Chile, this last solution is debatable, because if the conditional nature of the agreement under analysis is taken into account, a breach of the obligation to perform that bound the company (for example, omission to call a meeting to decide the increase), confers the diligent creditor the right to sue in bankruptcy proceedings the immediate restitution of the value of the *advance*, due to the loss of cause of the retention for the entity, through the verification of his credit as valista creditor (articles 70, 170 and 179 of Ley N° 20.720).

In our opinion, the remedies of Argentinian case law which address the damage suffered by a third party due to the failure of the capitalization agreed with the company, derived not from the natural failure of the suspensive condition (with the exception of the bankruptcy contest previously noted), can also be applied analogously to the minority shareholder who makes an advance, based on the principle of good faith and its dual integrating and interpretative function of positive rules.<sup>49</sup> Consequently, if the entity's conduct with respect to said minority partner has been unfair and contrary to good faith, or exercised abusively and/or arbitrarily in contradiction to the advance contract, the minority partner could additionally claim the penalty that derives from article 1481, paragraph 1 of the Civil Code, that is, fictitious fulfillment of the suspensive condition, to which we will return later. The aforementioned is without prejudice to the right to claim the restitution of the value of the advance, provided its absolute loss of cause.

47 *Palacio del fumador SRL* (1986) and *Helvetia S.A. vs/liquidación s/inc, revisión por Proligar S.A.* (2002).

48 *Angeleri vs. Szyzkowski Elba et.al.*, (1994) and in *Tosi* (2008), pp. 84-86. In the event that the third party demands the verification of the credit for the sole purpose of avoiding contributing to the losses of the company in payment default.

49 *Tosi* (2008), p. 79 and *BOETSCH* (2011), pp. 61-72 y 115-123, the latter who abundantly highlights the integrating and interpretive functions of the principle of good faith, especially in cases of absence of specific rules or gaps, in order to provide satisfactory and fair solutions to emerging conflicts in contractual relationships.

In order to understand in greater depth the irrevocable characteristic of this institute, it is interesting to observe the way in which it has been addressed by various foreign judicial rulings, resorting to the principle of good faith as such, through its manifestation in the principle *venire contra factum proprium non valet*, and the doctrine of abuse of legal personality.<sup>50</sup> In the case of Argentina, this feature of the revised figure can be seen in the cases *Shoijet, Mirtha Susi vs. Silean S.A. and others*, in *Helvetia S.A. s/liquidación s/inc, revised by Proligar S.A.*, and in *Angeleri Szabo Marta E. v. / Szyszkowski Elba H. and others*.

Thus, in the first case cited, the principle of *estoppel* is used in the decision of the court, who states that the figure under analysis arises when a partner delivers money to a company as a contribution:

he is giving up the possibility of retracing his steps and claiming restitution of what was contributed, because the fate of the “advance” had been the venture capital of the host society, which cannot be affected by the will of the “contributing” partner to arbitrarily and unilaterally convert the “advance” operation on account of future capital increases into a loan.<sup>51</sup>

In the second court case cited, a controlling shareholder made an advance in money destined for venture capital and subsequently demanded its restitution, since the liquidated company did not proceed to increase its capital, despite having received the share package equivalent to the amount of the advance. The court said in this case:

it was the power [of the controlling shareholder] to call the meeting to agree on the capital increase and issue the corresponding shares, as it would imply excessive rigor to allege breach of legal formalities that the interested party could have made.<sup>52</sup>

Finally, in *Angeleri Szabo Marta E. vs. / Szyszkowski Elba H. and others s/ modification of contract and rendering of accounts*, the sentencing judges, applying the “doctrine of abuse of legal personality”, indicated:

In the case of a limited liability company, whose only two partners and members of the administrative body were (or should have been) aware of the monetary contribution made by one of them, they cannot legitimately hide behind breach of legal formalities for the modification of the corporate agreement with the purpose of avoiding the

50 In *Alegria vs Jorquera* (2010), our Supreme Court pointed out a concept regarding the doctrine of estoppel: “... general principle of law that states that no one can act against their previous actions created from a relationship or situation of law that they have undertaken to respect, so that in no way their legal consequences can be modified or extinguished (...) thus acting against the good faith that must preside over the fulfillment of obligations validly contracted”. Also, PADILLA (2013), pp. 135-183, EKDAHL (1989), pp. 67-73 and UGARTE (2012), 699-721.

51 *Shoijet, v. Silean S.A. y otro* (1992), *Ganga, c/La Rectora Compañía Argentina de Seguros SA* (2004), this last ruling also on the “doctrine of estoppel”, but this time with regards to the contribution of real property.

52 *Helvetia S.A. s/liquidación s/inc, revisión por Proligar S.A.* (2002).

consequences of the irrevocable contribution of capital, exclusively under the consequences of the legal personality of the entity. Faced with this situation, it is preferable to dispense with that legal personality and make the consequences of the legal act celebrated by one of the partners fall on the company itself, as if the necessary acts had been carried out to satisfy the ultimate purpose of that act, which may not be anything else than incorporation of the partner in the proportion that corresponds to the contribution made in accordance with the expressed will (explicitly or implicitly) of the totality of the members of the company.<sup>53</sup>

In Spain, the irrevocability of the advance of capital on account of future increases, has also been the subject of recent judicial decisions made by the Supreme Court, in the case of *Inversiones Dogarmater, S.L. with Teruel Termal Desarrollos, S.L.* The case revolved around an agreement signed by two limited liability companies, breached by one of them by not increasing capital up to the amount of money stipulated in the agreement, the court said:

we are facing a pact of partners ..., in order to carry out an urban project that was meant to be financed through a particular financing method: an expansion of social capital of the company Termal Desarrollos, SL, which had to be carried out in four phases. Operation not unknown in the legislations and case law of our environment (Italy, Germany and France) that refer to the anticipated disbursements or on account of future capital increases (*versamenti in conto future aumento di capitale*), that if not formalized, the anticipated amounts cannot continue to form part of the company's assets, and must be restored immediately to the contributor, because it is a contribution without cause. ... [A]lthough the thesis according to which the partners' agreement is invalid because it has not been subscribed by all those listed in the document, it would anyhow be required to return the amount, otherwise, the delivery of money would imply payment of a non-existent obligation (payment of the undue).<sup>54</sup>

Application of these principles, by the Argentinian and Spanish courts, have sought to prevent the conduct of the subject who, having paid money in advance in order to provide more capital to the company, unfairly dissociates himself from the agreement, either to allocate the money for a purpose other than that stipulated in the advance agreement, or to obtain *a posteriori* a more favorable financial or bankruptcy treatment than the one received by capital advance, often invoking a loan agreement.

However, if the decision adopted at the highest level of the company is to reject the capital increase, the irreversibility of the advance falls and the right of the partner or third party to demand restitution of the advance as the result of the failed suspensive condition.

<sup>53</sup> *Angeleri v. Szyszkowski and otros* (1998).

<sup>54</sup> *Dogarmater, S.L. con Teruel Termal Desarrollos, S.L.* (2014).

## 2.2 On the shareholders' autonomy regarding the advance contract

We have said above that the company, at its highest decision level, is not "bound" by the irreversibility of this method of financing. On the contrary, according to the law and the bylaws, it is free and autonomous with regards to deciding or not to carry out the proposed capitalization, while it is up to the shareholders individually considered to decide whether or not to exercise their right of preferential subscription, circumstances that make up the voluntary conditional event dependent on the debtor.<sup>55</sup>

In our opinion, and in order to mitigate this "contingency" inherent to the suspensive condition to which the obligation of the debtor company is subject, the controller may be allowed to subscribe, in its shareholder capacity, the advance agreement jointly with the partner or third party and the social administration, thus binding the controlling partner to approve capitalization and waiving all or part of the exercise of its right of preferential subscription. In this way, the advance contract would be given greater protection in favor of the creditor, and failure to comply with the agreement by the controlling partner at the meeting could lead to a law suit for damages against the latter. (Article 1489 of the Civil Code).

The possible problem this mechanism presents, in terms of the presence of a conditional obligation dependent on the will of the company receiving the *advance* (which may decide not to capitalize it, following total or partial exercise of the preferential subscription right conferred on the former shareholders), is reflected in the apparent temporary restriction on the exercise of the pre-emptive right of new shares (articles 25 of Ley No. 18,046 and 26 of Supreme Decree No. 702, on the Regulation of Corporations), as of the date of the extraordinary shareholders meeting that decides affirmatively on the capital increase. Notwithstanding this possible stumbling block, and following Puelma, we consider that if the shareholders of a closed corporation unanimously establish a form of waiver of the exercise of this right of preferential subscription other than the legal one, such agreement would be valid, since rules in this matter are intended only to protect them, thus paving the way to granting greater certainty to the figure under study.<sup>56</sup>

However, in the case of companies limited by shares, their shareholders are empowered by law to establish, in the corporate bylaws, the right to waive the right to pre-emptively subscribe future shares, and the right to not even not make the preferential offer to the other shareholders (article 439 of the Commercial Code), which makes this external corporate financing mechanism more efficient.

55 ARAYA and ARAYA (2013), pp. 749-782, authors with whom we agree, insofar as the advances, due to their nature of immediacy and speed, are accepted by the administration of the entity and not necessarily and immediately by the owners of the capital constituted legally through the unanimity of the partners or through the maximum decision-making body, as the case may be, the latter being verified, will fully express the will of the legal entity.

56 PUELMA (2003), p. 534.

### 2.3 On the restitution of the advance

We have indicated that the advance payment contract for future capital increases is subject to the suspensive condition that the partners or the board approve capitalization of the advance. Said condition agreed a priori between the person supplying the advance and the company's administration (articles 1483 and 1484 of the Civil Code), will normally be accompanied by a maximum term for approval of the capital increase.

In such a way that, if the suspensive condition is fulfilled, that is, if the partners or the shareholders' meeting approve the capitalization of the advance in accordance with the contract entered into, amendment of the bylaws will be carried out, increasing capital, and the subscription of shares according to the type of company concerned. In this case, advance payment cannot be reimbursed.

However, within the broad freedom of the partners or shareholders to approve the aforementioned capitalization within the maximum term agreed upon, it is possible that they will choose not to accept capitalization for various reasons and normal circumstances:

- a) Because the shareholders exercise their pre-emptive right to new shares thus completing the amount of the proposed capital increase;
- b) Because the partners or shareholders make a counteroffer;
- c) The partners reject capitalization for financial or corporate reasons.

In these events of rejection of the operation by the company, it must fully restore its value, as the suspensive condition has failed, an uncertain event that has been previously agreed to by the contracting parties as a possibility of the planned business transaction (article 1482).<sup>57</sup> In these cases there is no breach of the obligation to perform on behalf of the company, but rather the normal failure of the obligation *sub conditione*. Failure of the suspensive condition authorizes the partner or third party to claim restitution of the amount of the anticipated payment, and consequently, obliges the company to return it, as it has caused the condition to fail, thus making the purpose of the financing operation disappear (articles 1479 and 1482 of the Civil Code), losing cause to retain the amount of the advance on the part of the organization.<sup>58</sup>

Regarding the amount to be returned by the company, because of the credit originated in favor of the partner or third party, as a consequence of the failed condition, it will be determined by analyzing the agreement and the accounting entries made. Reimbursement made must be duly readjusted between the time of the advance payment and the date of the failed suspensive condition. That is, only in that amount in which the company was enriched at the expense of the partner or third party who made the advance, who in the face of a failed suspensive condition, must

57 VODANOVIC (2001), p. 249, and CABAÑAS and MACHADO (1995), pp. 103-104.

58 CABAÑAS and MACHADO (1995), p. 104, VODANOVIC (2004), p. 249.

be compensated.<sup>59</sup> However, considering that the advance has been made as risk capital, in the case of eventual tardiness in returning it the within the period agreed to by the partners or shareholders, it must be restored with default interest.

However, it may happen that the capital increase proposed by the company's management will never be made, for reasons other than the legitimate rejection of the shareholders, and thus, failure to capitalize the advance may occur due to events of non-compliance attributable to the entity with regards to its obligation to perform, under condition. This could happen when the company does not perform the necessary legal acts to summon the partners or convene the meeting, or in case of capital increase beyond the term established in the contract, or when the company, despite deciding to capitalize the advance, approves the increase in a different manner from that stipulated in the advance contract, affecting the percentage of participation or number of shares assigned to the partner or third party in the corresponding agreement within the boards' powers.<sup>60</sup>

Then, once the suspensive condition has failed for reasons attributable to the entity, the consequences assigned by the rule of article 1481, paragraph 2 of the Civil Code, called fictitious fulfillment of the condition, will come about.<sup>61</sup> Responsibility will come about when the debtor company has not cooperated or has arbitrated unlawful means in order to make the condition fail, that is, having carried out acts or omissions contrary to *good faith*, acts that may be formally legal, but were executed to prevent or hinder natural compliance or fortuitous failure of the condition, hence their illegality.<sup>62</sup> Such would be the case, for example, of inactivity or obstacles and positive manipulations of the administrators and/or of the partners or shareholders, to meet or form the legal quorums of the board within the agreed term (despite the summons made by the administration or the board). In such an event, of fictitious compliance of the condition, the conditional creditor of the advance may sue the company to force compliance of the obligation to perform such duties, which is, delivery of the agreed upon shares.<sup>63</sup>

59 CABAÑAS and MACHADO (1995), pp. 126-128.

60 In *Dogarmater, S.L. vs. Teruel Termal Desarrollos, S.L.* (2014), cited above, the Supreme Court declared that the meeting called to agree on capital increase of the advance received, was never called or held, forcing restitution of this advance, for having lost its cause. See HERNANDO (2014-2015), p. 503, who adheres to the decision contained in this ruling.

61 VODANOVIC (2001), p. 233, PEÑAILLO (2003), pp. 370-373 and PEÑAILLO (1985), pp. 6-36, authors who, among others, consider that this rule is of general application to obligations and not only to testamentary assignments, as may appear.

62 PEÑAILLO (1985), pp. 16-29, clearly highlights that illegality of the acts does not only refer to the commission of criminal or fraudulent acts, but also includes the illegitimate exercise of rights, which occurs when the debtor company and/or its owners, exercised their rights with the purpose of making the condition fail, that is, not capitalize the advance, illicit purpose that contaminates the means employed.

63 In HERNANDO (2014-2015), pp. 511-513, there is economic responsibility that could affect the administrators, due to the omission attributable to them, regarding the obligation to call a meeting to decide possible capitalization of the advance.

Finally, we should add that, in cases of restitution of the advance, it is not appropriate to reduce capital, since the value of the cash advance did not finally become company capital, since the operation failed without consolidating that sum into net worth. Consequently, in closed corporations and companies limited by shares, it will be the board that decided to reject capitalization of the anticipated disbursement, which must simultaneously order restitution, without making any capital decrease.

## 4. FINANCIAL ASPECTS AND APPLICABLE TAXES

### 4.1 Financial aspects

In our opinion, advances of capital on account of future increases must be recorded coherently in a transitory account of the company's assets accompanied by a note to the financial statements (for example, indicating the conditions and terms of the contract until its formalization into capital).<sup>64</sup> That is, they must be recorded without being accounted for in the capital account, considering that reform of the bylaws which would capitalize the anticipated disbursements has not materialized yet in a way that authorizes an increase in net social equity.

Likewise, we are of the opinion that such anticipated disbursements should not be accounted for in the required liabilities, given that they do not constitute a loan.<sup>65</sup> As we have demonstrated, the advance specifically aims to become capital of the receiving entity, either by the written intention of the parties and/or by the nature of the figure itself, constituting resources of restricted availability for the company, due to the fact that they are in transit towards their possible consolidation. Therefore, the entity is obliged to retain them, because, even if they are directed to net equity, they may have to be eventually returned. Legally, we must remember that the partner or third party who made the cash advance is a current creditor of the capitalization agreed to with the administration of the entity (shares or rights), and simultaneously is also an eventual creditor of the anticipated amount, which must be repaid in case the capital increase fails.<sup>66</sup>

The accounting entry of this figure in a transitory asset account, gives clarity and certainty to company creditors, preventing confusion with company liability, which allows these third parties a precise financial approach and the possibility of taking safeguards in the eventual case of reversal of the aforementioned account, due to failure of the condition included in the advance contract.

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64 The annotation of the cash advance should be lodged in a patrimony account either as cash or bank, with an equivalent counterpart in liabilities, subject to approval of capitalization.

65 HERNANDO (2014-2015), p. 500, states that the economic function of accounting, has exceeded its registration function, in the face of demands arising from epistemology, which claim the *nomen iuris* "granted by the parties or the adopted legal form", point on which we are in full agreement.

66 GARCÍA (2000), p. 22, and PUGA (2013), p. 172, the latter who makes a difference between the provision of cash resources into the partner's account or partner's loan account and advance against future increases, but admits the difficulty of delivering a conclusive answer.



## 4.2 Applicable taxes

The accounting or financial reality of the figure described herein, is not contemplated in Chilean Income Tax Law, D.L. N° 824, of 1974, modified by Ley N° 20,899, of 2016, law which did not prohibit it but put a limit on it.<sup>67</sup> The current article 41 of the Income Tax Law states, where appropriate, that “The money amounts that have been incorporated into the company’s business will form part of the company’s capital”, so that, nowadays, the assets contributed by the entrepreneur or partner to the company, in any capacity, must be incorporated into capital through the formalities proper of the amendment of bylaws according to the corresponding corporate type (Circular N° 15, of March 17, 2014, and 44, of July 12, 2016, of the Internal Revenue Service).

In spite of greater fiscal rigidity, with the apparent purposes of collection efficiency (especially in the case of the reinvestment of profits) which promotes that the financing mechanism be formalized through the corresponding capital increase, so that it not remain indefinitely within the company’s assets, the norm does not prohibit or affect the validity of the institution. It has only been compressed for the purposes of calculating the company’s capital (monetary correction) and the tax cost of the contribution of the partner or entrepreneur in the event of its sale.

## CONCLUSIONS

- a) The figure of corporate financing known as capital advances on account of future increases, responds to an old commercial need not contemplated in our corporate laws, albeit not prohibited either. With this mechanism, a partner or third party irrevocably anticipates money to a company, prior agreement with the administration of the entity, generating in its favor an expectation of *status socii*.
- b) This unique business acts is a bilateral contract, subject to a suspensive condition dependent on a voluntary act of the debtor, which is that the shareholders or the board decide on a capital increase charged to the amount of the advance received. This conditionality is accepted by civil law, and is not repelled by corporate law, so that its use, across the spectrum of civil and commercial legal persons is broad.
- c) The irrevocable nature of this institution emanates from the agreement itself or from its nature, since the value of the advance seeks to be integrated into the corporate capital of the receiving entity. In turn, the availability of resources advanced to society is restricted, since they are received by it, *sub conditione*. Once capitalization of the advance has failed, the entity is irremediably forced to restore its value because retention loses its justification.
- d) Ambiguity or obscurity in the wording of the contract and/or its accounting, may harm any of the parties of the advance agreement, and in passing, would also damage the confidence of the creditors, who exert an *ex post* control over the information of

<sup>67</sup> The D.L. N° 824, in its article 41 N° 9, says: “For these purposes, all assets paid by the partners, in whatever capacity, to the respective company of persons will be considered capital contributions”.

the debtor company, whose rights would be violated. However, this problem can be reasonably addressed by the judge, taking into account the nature of this figure. By applying the rules of interpretation of contracts and various legal principles, covered by the principle of contractual good faith, the partner or company shareholder may be prevented from unilaterally modifying the agreed course of action, intended to irrevocably incorporate these disbursements anticipated into corporate capital, without affecting creditors.

e) Accounting for this figure corresponds to a transitory patrimonial account with a tendency to become capital. Its registration in a liability account constitutes a simplification lacking legal basis, which denatures this financing mechanism. Finally, the current tax legislation addresses this figure indirectly. Without mentioning it, it puts important pressure on it so that the advance of money made to a company with the expectation of becoming capital, is unfailingly formalized through the corresponding capital increase.

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