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Subsidiary liability of controlling persons for obligations of a company excluded from the Unified State Register of Legal Entities

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Abstract. The paper examines the issues of bringing controlling persons to subsidiary liability for the obligations of a company excluded from the Unified State Register of Legal Entities. The article determines the judicial procedure for holding controlling persons accountable for claims of creditors. It analyzes the provisions of Russian legislation and judicial practice regarding the grounds for prosecution under paragraph 3.1 Article 3 of the Law on Limited Liability Companies. The research reveals the effect of this rule of law over time and its essence, which excludes the use of the construction of limited liability of participants in a business company. An overview of the legal positions of the Constitutional Court of the Russian Federation on the issues under consideration including the circle of responsible persons, distribution of burden and circumstances of evidence is provided. The paper distinguishes characteristics of good faith and reasonable behavior of creditors and controlling persons as well as legal presumptions corresponding to the circumstance of the case. The conclusion is formulated on the recognition of subsidiary liability by inheritance of debts of a corporate organization. The paper investigates the competence of the court considering disputes on bringing to subsidiary liability of persons controlling a corporation and distinguishes between the corporate (under the general rules of litigation) and bankruptcy (under the rules of class action) proceedings. The characteristics of the powers of creditors acting in the interests of their civil law community are given. The research allows to ensure uniformity of judicial practice at interpreting the applicable rules of law.

Key words: corporate liability, subsidiary liability, debt inheritance, limited liability company, controlling persons, good faith behavior, liquidation of the company, exclusion of the company from the register

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Субсидиарная ответственность контролирующих лиц по обязательствам исключенного из ЕГРЮЛ общества

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Аннотация. Исследуются вопросы привлечения к субсидиарной ответственности контролирующих лиц по обязательствам исключенного из ЕГРЮЛ общества. Определяется судебный порядок привлечения к ответственности контролирующих лиц по искам кредиторов общества. Анализируются положения российского законодательства и судебной практики в части оснований привлечения к ответственности по пункту 3.1 статьи 3 Закона об обществах с ограниченной ответственности. Раскрываются действие данной нормы права во времени и ее сущность, исключая применение конструкции «ограниченной ответственности» участников хозяйственного общества. Приводится обзор правовых позиций Конституционного Суда Российской Федерации по рассматриваемой проблематике, в том числе по вопросам круга обязанных (ответственных) лиц и распределения бремени и обстоятельств доказывания. Разделяются отличительные характеристики добросовестного и разумного поведения кредиторов и контролирующих общество лиц, а также соответствующие обстоятельства дела юридические презумпции. Формулируется вывод о признании рассматриваемой субсидиарной ответственности наследованием долгов корпоративной организации. В работе исследуется компетенция суда, рассматривающего споры о привлечении к субсидиарной ответственности контролирующих корпорацию лиц, разделяются корпоративный (по общим правилам искового производства) и банкротный (по правилам группового иска) порядок рассмотрения дела. Дается характеристика правомочий кредиторов, действующих в интересах своего гражданско-правового сообщества. Исследование позволяет обеспечить единообразие судебной практики при толковании применяемых норм права.

Ключевые слова: корпоративная ответственность, субсидиарная ответственность, наследование долгов, общество с ограниченной ответственностью, контролирующие лица, добросовестное поведение, ликвидация общества, исключение общества из реестра

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Introduction

The most common legal form of a corporate organization is a limited liability company. This is due to the simplicity and timing of its establishment (registration), including the possibility of applying model articles of association¹.

At the end of 2016, Article 3 of Federal Law No. 14-FZ dated February 8, 1998 On Limited Liability Companies (hereinafter referred to as the LLC Law) was supplemented by a new provision – paragraph 3.1 – which came into force in July 2017, enshrining

¹ Order of the Ministry of Economic Development of Russia No. 411 dated August 1, 2018 On Approval of Model Articles of Association for Limited Liability Companies. Available at: <http://www.pravo.gov.ru/> [Accessed 17th April 2023].

liability of persons controlling the company to creditors². An interesting fact is that draft law No. 1001592-6 introduced by the Government of the Russian Federation (subsequently, Law No. 488-FZ) initially dealt with the issue of bringing legislation into line with the position of the RF Constitutional Court, set out in Resolution No. 10-P dated May 18, 2015³, namely the provisions of Article 21.1 of Federal Law No. 129-FZ dated August 8, 2001 On State Registration of Legal Entities and Individual Entrepreneurs (hereinafter referred to as the Law on State Registration of Legal Entities) which was directly indicated in the explanatory note⁴. In the second reading, the draft law included provisions on the subsidiary liability of persons controlling the company and on the deadline for the liquidation of the company. At the same time, the provisions under consideration did not affect Federal Law No. 208-FZ dated December 26, 1995 On Joint-Stock Companies.

In recent years, the possibility of holding liable the persons who manage business listed in Article 53.1 of the RF Civil Code, was assessed in two ways by scholars. On the one hand, bankruptcy law experts can positively assess this rule of law, which allows creditors, bypassing lengthy bankruptcy procedures, to satisfy their monetary claims by bringing persons controlling the company to subsidiary liability. In fact, Clause 3.1 of Article 3 of the LLC Law is considered in conjunction with the general mechanism for holding persons liable, which includes Article 61.11 of the Federal Law No. 127-FZ dated October 26, 2002 On Insolvency (Bankruptcy) (hereinafter referred to as the Bankruptcy Law). Moreover, this provision is directly correlated with paragraph 2, part 1, Article 399 of the RF Civil Code, indicating those subsidiary liable *persons* who are named in the law.

On the other hand, the “orthodox” approaches of scholars studying corporate law issues may regard these norms as destructing the “limited liability” construction (Gabov, 2016; Lotfullin, 2018; Laptev, 2020; Lomakin, et al., 2021; Belyaeva, et al., 2021). The most interesting thing is that both points of view have some grounds.

It should also be taken into account that paragraph 3 Article 64.2 of the Civil Code determines that the mere exclusion from the Unified State Register of Legal Entities (hereinafter referred to as USRLE) of a business entity whose activity is based on “limited liability” construction, does not in itself relieve the persons controlling it from liability. At the same time, this rule of law has an abstract content and does not contain any indication of a specific person in whose interests its application is allowed, in fact, expanding its scope by the possible interests of any interested parties.

The contradictions encountered in the judicial practice on interpreting the rules under study, required formulation of appropriate approaches by the Constitutional Court of the Russian Federation⁵.

² Federal Law No. 488-FZ dated December 28, 2016 On Amendments to Certain Legislative Acts of the Russian Federation // Corpus of Legislation of the Russian Federation. 2017. No. 1 (Part I). Article 29 (hereinafter referred to as Law No. 488-FZ).

³ Resolution of the Constitutional Court of the Russian Federation No. 10-P dated May 18, 2015 On the Case of Verifying the Constitutionality of Paragraph 2 of Article 21.1 of the Federal Law On State Registration of Legal Entities and Individual Entrepreneurs in connection with the complaint of a Limited Liability Company // Corpus of Legislation of the Russian Federation. 2015. No. 22. Article 3304.

⁴ Available at: <https://sozd.duma.gov.ru/bill/1001592-6> [Accessed 17th April 2023].

⁵ See: Resolution of the Constitutional Court of the Russian Federation No. 6-P dated February 7, 2023 On Verifying Constitutionality of paragraph 12, part 1, Article 61.11 of the Federal Law On Insolvency (Bankruptcy) and paragraph 3.1 of Article 3 of the Federal Law On Limited Liability Companies in connection with complaint of citizen I. I. Pokul // Corpus of Legislation of the Russian Federation. 2023. No. 8. Article 1414; No. 20-P dated May 21, 2021 On Verifying Constitutionality of paragraph 3.1 Article 3 of the Federal

When conducting this study we applied empirical methods of observation (including the development of domestic legislation in conjunction with judicial practice), comparison (of various positions of judicial practice), and description (of certain elements characterizing behavior of persons controlling a corporate organization and creditors), theoretical methods of analysis (of certain elements of bad faith and unreasonable behavior), synthesis, classification (of actions of controlling persons, the subject and distribution of the burden of proof), and modeling (when determining the subject of proof in a court case), private scientific formal-logical method (including the development of domestic legislation in conjunction with judicial practice).

The rule of law on subsidiary liability

The legal liability under consideration arises in cases where the persons controlling the corporation act in bad faith or unreasonably. Thus, the legislator provides for a variable qualification of actions of these persons:

- unfair (obvious, including intentional, negative actions or omissions),
- unreasonable (incompetent business management).

At the same time, such actions are assessed in relation to the negative consequences for creditors, expressed in the inability to repay the company's debts.

It should be noted that the rule of law on subsidiary liability of managers and main (majority) participants applies exclusively to those obligations that arose after Law No. 488-FZ came into effect, that is, after July 30, 2017. The comments of the Federal Tax Service of Russia in its letter No. CA-4-18/16148 dated August 16, 2017 (paragraph 12.3) that introduction of paragraph 3.1 Article 3 of the LLC Law formulated “new procedural mechanisms” for bringing to liability rather than substantive grounds for a claim allowing to bring to subsidiary liability persons committed illegal acts before July 28, 2017⁶ were partly hasty for judicial practice. It should be borne in mind that the tax authority was forced to formulate these clarifications in order to effectively work to collect debts from bankrupt organizations.

Subsequently, judicial practice closed this issue and specified inadmissibility to retroactive effect of Law No. 488-FZ and its application exclusively to those relations that arose after the rule of law came into force⁷.

The question of what should be taken as a reference point, whether we are talking about the date of conclusion of the contract or the date of fulfilment of obligations under a previously concluded contract, is debatable since they do not always coincide in time. Moreover, an obligation may arise not only from a contract (for example, supply, commission, or loan), but also after its execution (identified losses) or from a non-contractual obligation (unjust enrichment, infliction of harm). In cases where the contract on whose basis the disputed relations have arisen was concluded after the date specified above, various interpretations are practically excluded.

Law On Limited Liability Companies in connection with complaint of citizen G.V. Karpuk // Corpus of Legislation of the Russian Federation. No. 22. Article 3913.

⁶ This date is due to the original version of Law No. 488-FZ, before it was amended by Federal Law No. 266-FZ dated July 29, 2017 // Corpus of Legislation of the Russian Federation. 2017. No. 31 (Part I). Article 4815.

⁷ For example, Resolutions of the Supreme Court of the Russian Federation No. 310-ES22-11804 dated July 27, 2022; No. 301-ES21-23669 dated December 20, 2021; No. 305-ES21-11796 dated August 2, 2021, etc.

Difficulties in legal assessment may arise when the contract is concluded before July 30, 2017, and its execution, including by instalments, will take place after the specified date. It seems that in this case, the date of fulfilment of each individual obligation will be decisive (for example, the transfer of a batch of delivered goods or counter-performance upon its payment). This approach is also conditioned by the possibility of the company to repudiate the contract in accordance with Article 450.1 of the RF Civil Code. However, if the company does not use this right on the threshold of its exclusion from the USRLE, its management must be prepared to bear responsibility in accordance with paragraph 3.1 Article 3 of the LLC Law or substantiate its good faith.

After the enactment of the rule on subsidiary liability, the description of legal capacity termination, to which paragraph 3.1. Article 3 of the LLC Law may be applied seems to be an important issue. Thus, for the legislator, the purpose of adopting Law No. 488-FZ was to regulate the consequences of an *administrative exclusion* of a company from the register in accordance with Article 21.1 of the Law on State Registration of Legal Entities (in connection with the failure to submit reporting documents provided for by the legislation on taxes and levies, and failure to carry out transactions on bank accounts). The adoption of this law allowed the tax authorities to “cleanse” the Unified State Register of Legal Entities from shell companies, “abandoned” and/or other legal entities. At the same time, such procedure for exclusion from the Register also applies in cases of a record of inaccurate information in the USRLE concerning a legal entity, as well as in case of impossibility to liquidate the company due to the lack of funds for its liquidation. After all, it is no coincidence that in the legal literature the Unified State Register of Legal Entities is referred to as a “photograph” of the company (Gabov, 2022:209). In this regard, it is necessary to distinguish the considered case of bringing the persons controlling the company to subsidiary liability from holding the debtor liable in a bankruptcy case, to which the provisions of separate legislation apply (for example, Article 61.11 of the Bankruptcy Law).

Jurisdiction and procedure for considering cases

The subject composition of the parties to the dispute may include individuals and legal entities, as well as peasant (farm) holdings. In practice, the parties to the dispute are often individuals, some of whom are creditors (company counterparties), others are persons controlling the company. Back in 2017–2020, one could come across acts where the competence of the court was determined by the subject composition: for example, in the case when the parties to the case were legal entities the case was heard in commercial courts and when the parties were individuals the case was heard in courts of general jurisdiction⁸.

Resolution of the Plenum of the RF Supreme Court No. 46 dated December 23, 2021 On the Application of the Arbitration Procedural Code of the Russian Federation in Considering Cases in the Court of First Instance closes the issue of competence of the commercial court to consider disputes on subsidiary liability (paragraph 4)⁹. At the same

⁸ For example: Determination of the Supreme Court of the Russian Federation dated February 7, 2020 in case 48-KF19-1712-K7 on refusal to transfer the cassation petition of G.V. Karpuk to consider the case at a court session of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation. Available at: <https://vsrf.ru/> [Accessed 1st April 2023].

⁹ For example: Determination of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation No. 18-KG22-22-K4 dated June 7, 2022. Available at: <https://vsrf.ru/> [Accessed 1st April 2023].

time, the disputes in question are not specified in Article 225.1 of the Arbitration Procedural Code as corporate disputes, whose exclusive jurisdiction is determined by location of the corporation, despite the fact that paragraph 3.1 Article 3 of the LLC Law contains a direct reference to Article 53.1 of the RF Civil Code. In fact, the defendants in this case are persons directly or indirectly managing a corporate organization (sole executive body, majority shareholders, members of the board of directors, other persons). Thus, the composition of defendants, the legal assessment of their behavior and influence on the processes of corporate governance of the company are still determined by the norms of corporate law.

In this regard, despite the establishment of arbitration competence for the category of disputes under study, a reasonable question concerning jurisdiction (at the location of the company excluded from the USRLE under the rules for resolving corporate disputes or at the location of the defendant within the general approach) arises.

Judicial practice testifies to application of Part 4.1. Article 38 of the RF Arbitration Procedural Code when determining the competence of the commercial court at the location of the corporation, even though these disputes are not listed in Article 225.1 of the above Code¹⁰. At the same time, for the purpose of uniformity of judicial practice, it seems essential to formalise this approach separately in thematic reviews or the relevant RF Supreme Court Plenums.

When considering a claim for subsidiary liability, the applicant, as a rule, bases its claims not only on paragraph 3.1 Article 3 of the LLC Law, but also on Articles 15, 53.1, 399, and 1064 of the RF Civil Code, as well as Articles 61.11 and 61.12 of the Bankruptcy Law. Moreover, the Supreme Court has repeatedly mentioned the active role of the court and independent determination of the rules of law applicable to disputed relations (for example, paragraph 3 Article 9 of Resolution of the Plenum of the Supreme Court No. 25 dated June 23, 2015, paragraph 2 Article 36 of Resolution of the Plenum of the RF Supreme Court No. 46 dated December 23, 2021).

Regarding the procedure for bringing to subsidiary liability on bankruptcy grounds outside the framework of a bankruptcy case, to which the provisions of Chapters 25 and 59 of the RF Civil Code also apply in the relevant part, paragraphs 51–54 of Resolution of the Plenum of the RF Supreme Court No. 53 dated December 21, 2017 clarify that such an application shall be considered by the court according to the rules of Chapter 28.2 of the Arbitration Procedural Code (on class actions). Such application is considered as filed in the interests of the civil law community¹¹ – all creditors of the business entity. An essential feature of considering an application for subsidiary liability is the right of other creditors to join the dispute, of which the applicant notifies them by publishing in the Unified Federal Register of Bankruptcy Information (paragraphs 2 and 4 Article 225.14 of the RF Arbitration Procedural Code). In cases where the creditors did not avail themselves of this right to join the claim in a timely manner, the proceedings on such “subsequent” applications are terminated (paragraph 7 Article 225.16 of the RF Arbitration Procedural

¹⁰ For example: Determination of the Supreme Court of the Russian Federation No. 304-ES20-17004 dated November 9, 2020; Resolution of the Commercial Court of the Moscow District No. F05-4849/2020 dated May 20, 2020; Resolution of the Ninth Commercial Court of Appeal No. 09AP-88475/2022 dated March 22, 2023, etc. Within the framework of these disputes, cases were transferred according to competence to another commercial court at the location of the company excluded from the Unified State Register of Legal Entities with reference to the norms of Chapter 28.1 of the Arbitration Procedural Code of the Russian Federation.

¹¹ For more information about the civil law community, see: (Laptev, 2022).

Code), except for the case where non-joining the claim is recognized valid when considering the initial application.

Examination of the rules of law allows to assume the existence of two variable modes of considering the case:

- by action proceedings in the interests of one or more creditors-applicants (the application is based solely on paragraph 3.1 Article 3 of the LLC Law);
- by class action in the interests of all creditors of the company (the application is based on paragraph 3.1 Article 3 of the LLC Law, Articles 15, 53.1, 399, and 1064 of the RF Civil Code, Articles 61.11 and 61.12 of the RF Bankruptcy Law).

For corporate practice, such an ambiguous interpretation is not correct and requires legal certainty. In view of the foregoing, the applicant's reference solely to paragraph 3.1 Article 3 of the LLC Law, does not prevent the court from applying the norms of the RF Civil Code and the Bankruptcy Law; the latter even have precedence over other rules of law (paragraph 2 of Resolution of the Plenum of the RF Supreme Court No. 53 dated December 21, 2017). In this regard, for the purpose of procedural economy and to eliminate the risk of conflicting judicial decisions, it is proposed to establish a unified approach to considering all applications for subsidiary liability (regardless of references to the rules of law): these applications should be considered according to the rules of class actions in the interests of all potential creditors using the provisions of Article 225.14 of the Arbitration Procedural Code. At the same time, this approach will comply with the provision of the analogy of the law applied by courts (Part 5 Article 3 of the Arbitration Procedural Code), since all creditors of a company excluded from the Unified State Register of Legal Entities will be granted an equal right to protect the infringed right, while individual actions of certain creditors on monetary claims (fragmentary approach) in some cases allow them to gain an unjustified advantage over other creditors.

Liable defendants in the case

It is known that the list of controlling persons listed in Article 53.1 of the RF Civil Code is publicly available and may be determined by the court, taking into account the specific circumstances of the case. Methodologically, from the point of view of collecting evidence and distributing the burden of proof for legal practice, it is advisable to divide these persons into the following groups:

- sole executive body (head);
- members of the collegial executive body or board of directors;
- majority and minority shareholders;
- other persons who have the actual ability to manage the company's actions.

The possibility of bringing the mentioned persons to liability is based on the fact that they had the actual ability to determine the actions of the corporate organization (Egorov, 2022; Biryulin, 2022; Tuzhilova-Ordanskaya, 2022).

Subject of proof

In practice, questions arise concerning the subject of proof, including two circumstances: the company has already been excluded from the USRLE and it is impossible to request or offer to submit to court any documents on its production and economic activities; the plaintiff is limited in the procedural ability to independently collect

information to prove the bad faith or unreasonableness of the controlling persons. It seems appropriate to prove the following:

- unconditional evidence of bad faith and/or unreasonable actions (inaction) of controlling persons;
- intent or gross negligence of the head, which directly resulted in impossibility of fulfilling obligations to the counterparty in the future;
- the fact that the defendant failed to file an application to declare the company bankrupt;
- withdrawal of liquid assets of the company by the controlling person;
- the degree of influence on the corporate governance of the company;
- the limits of ordinary business risks;
- affiliation of the creditor and the controlling person;
- actions taken to liquidate the company in the prescribed manner and discharge the debts incurred in its business activities.

In order to objectively consider the case on the merits of the dispute, the court must evaluate all the mentioned circumstances.

Despite the peculiarities of implementing procedural rights in this category of disputes, the plaintiff is not relieved of the obligation to prove the “triad” of circumstances: unlawful behavior, harm, causal connection between them (including the offender’s fault) (paragraph 3 of Resolution of the RF Constitutional Court No. 20-P dated May 21, 2021). This approach is explained by the purpose of legal regulation which is to ensure the balance of interests of all participants in public relations (civil and trade turnover).

The competence to manage corporate organization suggests not only statutory rights, but also responsibilities, as periodically indicated in the legal literature (Bainbridge, 2017; Beveridge, 1996; Black, et al., 2006; Core, Holthausen & Larcker, 1999; Doralt, Nowotny & Kalls, 2003; Koehnen, 2004; McGuinness, 1999; Sukhanov, 2014; Andreev & Laptev, 2018) and in judicial practice¹². The exclusion of a company from the Unified State Register of Legal Entities as inactive legal entity, as well as its liquidation, is the result of certain actions or omissions of its current management and other controlling persons (majority shareholders, chairman and members of the board of directors, beneficiaries, “puppeteers”, etc.).

The construction of “limited liability” should not facilitate avoidance of company’s obligation of consideration (in contractual obligations) but compensate for the incurred harm (including that arising from non-contractual obligations), or return unjust enrichment.

The creditor must justify the amount of harm caused to it, which, as a rule, is not difficult, since the requirements for subsidiary liability are usually based on a judicial act on the recovery of funds from a company excluded from the USRLE. It is also necessary to substantiate the unlawful behavior of the defendants (in this case, unreasonable or in bad faith), as well as cause-effect relationship between this behavior and the company’s failure to fulfil its obligations (loss of the opportunity to fulfil its obligations) to the creditor, i.e., the plaintiff in the case.

Obviously, the mere exclusion of a company from the USRLE does not indicate the “complete” set of losses in the context of Articles 53, 53.1, 401, and 1064 of the RF Civil Code. In this case, the court should assess the behavior of the persons controlling the company prior to its exclusion from the USRLE.

¹² For example: Determination of the Constitutional Court of the Russian Federation No. 1564-O dated July 3, 2014 // Consultant Plus Reference Legal System.

The applicant creditor of the company excluded from the Register is given the opportunity to prove that the bankruptcy procedure or failure to undertake other legally significant actions by the defendant could have contributed to the repayment of the debt. Moreover, in most cases, the company could have continued to conduct business activities if it were not for its exclusion from the USRLE. In practice, it may be argued that before the company was excluded from the Register, a clone company was established (with the same or similar name) or key production (business) assets were transferred to a “friendly” company that operates in the same field of economic activity. All the above circumstances in their interrelation with the economic effect (their consequences) should be taken into account by the court.

In this matter, it is necessary to assess the possibility of interpreting the rule of Article 2 of the RF Civil Code, including those directly applicable to such commercial organizations as limited liability companies. The right to carry out entrepreneurial activities at one’s own peril and risk corresponds not only to the risks of losing the authorized capital – the basic or start-up asset necessary to start doing business, but also to the risk of subsidiary liability in accordance with Article 399 of the RF Civil Code, paragraph 3.1 Article 3 of the LLC Law, or Article 61.11 of the Bankruptcy Law.

It should be borne in mind that the rules on subsidiary liability for the debts of a legal entity are not new to Russian law. In fact, subsidiary liability is borne by a company whose actions brought a subsidiary to bankruptcy (Article 67.3 of the Civil Code); participants in a general partnership (Article 75 of the Civil Code); members of a peasant farm established as a legal entity (Article 86.1 of the Civil Code); members of a production cooperative (paragraph 1 Article 106.1 of the Civil Code); owners of the property of a state-run enterprise (paragraph 3, item 6 of Article 113 of the Civil Code); members of a consumer cooperative (paragraph 2 Article 123.3 of the Civil Code), and others. Notably, the above cases do not require to prove the guilt of the liable party and the cause-effect relationship between them since liability arises by virtue of the law.

Jointly inflicted harm caused by subsidiary liable persons is compensated jointly and severally (paragraph 4 Article 53.1 of the Civil Code), which should be indicated in the judicial act. In paragraph 3.1 Article 3 of the LLC Law, the solidary nature of liability is assumed based on the fact that the legislator included in the circle of liable persons only those who determine the decisions of the company, including the sole executive body, the majority participant, the chairman of the board of directors, and/or other persons controlling the corporate organization.

Burden of proving bad faith and/or unreasonable behavior

The degree of bad faith or unreasonable behavior of the defendants – persons controlling the company – is subject to assessment in each specific case. In all cases, it is necessary to prove the fact of bad faith or unreasonableness.

In terms of legal practice, it would be useful to answer the following questions: Is there a *presumption of culpable* behavior of persons controlling the company? And if so, is there any possibility to rebut it?

A presumption of culpable behavior is stated in paragraph 1 of item 4 of Resolution of the RF Constitutional Court No. 20-P dated May 21, 2021, by virtue of which the liability of the persons controlling the company is presumed due to their inaction, expressed in evading the proper management of the corporation, prudent and diligent business conduct,

etc. The formation of this presumption was largely influenced by the provision of Article 61.11 of the Bankruptcy Law (on liability of persons controlling the debtor). This approach is conditioned, inter alia, by the complexity of proving the circumstances in the case, which nevertheless does not exempt the plaintiff (creditor) from bearing the burden of proof.

In practice, in most cases, the administrative exclusion from the USRLE of a defunct company is preceded by a record of unreliable address, which subsequently resulted in the loss of legal capacity (Article 21.1 of the Law on State Registration of Legal Entities) (Gavrilina, 2022; Cherepanova, 2021). Even the debt to the budget is not an absolute obstacle to the administrative exclusion of a company from the USRLE (Article 6 of Resolution of the Plenum of the RF Supreme Commercial Court No. 67 dated December 20, 2006 On Some Issues in the Practice of Applying the Provisions of the Law on Bankruptcy of Absent Debtors and Termination of Inactive Legal Entities¹³). Consequently, with the active performance of the persons controlling the company, the exclusion of the company from the Register could have been avoided. In turn, the defendants are not deprived of the right to prove in court their diligence and discretion, as well as all kinds of actions aimed at repaying the company's debt to its creditor. The court also evaluates the conditions of business turnover in the relevant area of economic activity, as well as established procedure between the parties to the contract (Article 431 of the RF Civil Code).

The issue of distribution of the burden of proof in cases where paragraph 3.1 Article 3 of the LLC Law or paragraph 12 Article 61.11 of the Bankruptcy Law are applied by court (the impossibility of repaying the creditors' claims occurred due to the actions and/or inaction of the debtor's controlling person), was the subject of constitutional proceedings (Resolution of the RF Constitutional Court No. 6-P dated February 7, 2023).

The founders' choice of a model for conducting their economic activities through establishing a corporate organization in the form of a limited liability company does not imply the use of an "*indestructible*" construction of "limited liability". This choice of the founders should be considered as a convenient, in their opinion, form of management of a corporate organization and distribution of powers between its bodies. Administrative exclusion from the USRLE of a company at the initiative of the tax authority is never abrupt for the persons controlling the corporation, as we have indicated above. Consequently, in most cases, with conscientious and due reasonable behavior, such an exclusion from the Register cannot take place. In fact, even if a decision to voluntarily liquidate their company is made (for example, due to the objective inexpediency of running a loss-making business), the participants are obliged to actively contribute to this procedure and, at their own expense, jointly and severally bear the expenses necessary to complete liquidation (paragraph 2 Article 62 of the RF Civil Code). Moreover, voluntary liquidation allows to streamline relations with the company's creditors and take their interests into account (Vaypan, et al., 2021:73).

Introduction in 2005 into the Russian legislation of the rule on the administrative exclusion of the organization from the USRLE¹⁴ contributed to unscrupulous participants in civil turnover to circumvent the proper procedures established by law for terminating

¹³ Bulletin of the Supreme Commercial Court of the Russian Federation. 2007. No. 2.

¹⁴ Federal Law No. 83-FZ dated July 2, 2005 On Amending the Federal Law On State Registration of Legal Entities and Individual Entrepreneurs and Article 49 of the Civil Code of the Russian Federation // Corpus of Legislation of the Russian Federation. 2005. No. 27. Article 2722.

activities, in particular, liquidation or, in case of insufficient property for settlements with creditors, bankruptcy. Only in 2016, the provisions of Law No. 488-FZ equalized the balance of interests of all participants in the relevant public relations, entrenching the subsidiary liability of controlling persons.

Moreover, in July 2023, the legislator adopted a rule on a simplified procedure for excluding companies that are small and medium-sized businesses from the Register by decision of the participants (Article 21.3 of the Law on State Registration of Legal Entities)¹⁵. This authority, on the one hand, allows the owners of small and medium-sized enterprises not to undergo lengthy liquidation procedures and terminate the legal personality of the company in a simplified manner, and, on the other hand, facilitate unscrupulous owners of these enterprises to promptly terminate their business (Article 10 of the RF Civil Code), including for the reason of creditors missing the three-month deadline for filing objections to the forthcoming exclusion the company from the USRLE.

When considering this category of cases, it is allowed to assess the unfair behavior of persons controlling the corporation not only at the request of the plaintiff, but also at the initiative of the court (paragraph 2.1 of Resolution of the RF Constitutional Court No. 6-P dated February 7, 2023). At the same time, this approach is not new for domestic justice (see: paragraph 4 of item 1 of Resolution of the Plenum of the RF Supreme Court No. 25 dated June 23, 2015 On Application by Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation) (Gribov, 2020:128–135; Yudin, 2022:30–38). This approach is based on the principle of “expected result” from the participants in public relations and the standard of conscientious behavior.

Participants (parties) of contractual relations initially rely on the conscientious fulfilment by counterparties of principle, reciprocal, derivative, and other obligations. In practice, in each specific case, the court makes an independent assessment of the circumstances of the case, and it is difficult to develop any standard approaches. All evidence should be assessed in conjunction with the type of economic activity carried out by the company, production and business operations, and legally significant actions preceding the exclusion of the company from the Unified State Register of Legal Entities.

The presumption of guilt of the person controlling the company is rebuttable. We have already noted above that the plaintiff’s claims to bring controlling persons to subsidiary liability, as a rule, are based on an effective court judgment to recover funds from the company subsequently excluded from the USRLE¹⁶. In this case, the defendant must prove lack of guilt in failure to fully repay the creditors’ claims. In particular, it proves compliance with normal business practices and taking actions aimed at preventing large negative consequences (for example, the general director’s request to the company’s participants for additional financing of the company’s activities or exiting unprofitable line of business, etc.).

An important issue is the degree of care and prudence of the creditor. It is no coincidence that, by virtue of Article 1083 of the RF Civil Code, courts are obliged to evaluate the creditor’s behavior for its intent on creating this debt; facilitating the

¹⁵ Federal Law No. 249-FZ dated June 13, 2023 On Amendments to the Federal Law On State Registration of Legal Entities and Individual Entrepreneurs and Article 3 of the Federal Law On Limited Liability Companies // Corpus of Legislation of the Russian Federation. 2023. No. 25. Article 4438.

¹⁶ In addition, by virtue of clause 3.2 of the resolution of the Constitutional Court of the Russian Federation dated December 25, 2023 No. 60-P, the prejudicial value of court decisions presupposes the truth of established facts only until it is refuted.

emergence of greater debt (or other harm) and other circumstances that do not testify to the creditor's good faith behavior (for example, applying to court with monetary claims against the company on the eve of its exclusion from the USRLE and beyond the limitation period, realizing that the company will no longer participate in the traditional adversarial litigation). At the same time, in this case, the courts should assess the fine line that lies between the legitimate rights of the creditor, which it may take advantage of (even untimely), and its deliberate unreasonable actions (Aliev & Charykova, 2021; Avdeeva, Agafonova & Belyaev, et al., 2020). One may also take into account the degree of affiliation of the creditor with the company excluded from the USRLE or the defendants (controlling persons), as well as pre-existing business and economic ties between them, including their dependence in the production and economic cycle.

The above analysis allows us to define subsidiary liability as a continuation of the idea of inheritance of a legal entity (Laptev, 2020:34–39), namely, *inheritance of debts of a corporate organization*.

Conclusion

The issues discussed above testify to the constant development of legislation and flexibility of judicial practice on the issue of bringing managers and members of the company to subsidiary liability, which largely depend on judicial discretion and which will be discussed many times by the Supreme Court and Constitutional Court of the Russian Federation, since the basis of this type of liability constitutes a fundamental industry-wide principle of conscientious behavior of participants in public relations.

The subsidiary liability of the persons controlling the corporation is joint and several; it does not arise by virtue of law and in the presence of an outstanding obligation of a company excluded from the Unified State Register of Legal Entities, but on the basis of a judicial act issued as a result of an adversarial civil proceedings.

It is proposed to enshrine in the procedural legislation a provision on the jurisdiction of commercial courts over claims for bringing to subsidiary liability of controlling persons at the location of a corporate organization excluded from the USRLE.

In the course of hearing the case, a set of circumstances should be proved to assess the good faith and reasonableness of actions (inaction) of controlling persons in terms of impossibility of fulfilling obligations to the company's counterparties. At the same time, it is necessary to reconsider the criteria for determining business risk and ordinary business turnover in the legal doctrine.

It is proposed to grant commercial courts the authority to independently distribute the burden of proof between the parties to the case, taking into account the factual circumstances and the real procedural ability of the party to prove.

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