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BRINGING PERSONS CONTROLLING THE DEBTOR TO SUBSIDIARY LIABILITY IN CASE OF BANKRUPTCY OF THE DEBTOR

Yury Alexandrovich Svirin
Doctor of Legal Sciences, Professor
All-Russian State University of Justice (RLA of the Ministry of Justice of Russia) - Russia
Financial University under the Government of the Russian Federation – Russia
ORCID ID: https://orcid.org/0000-0001-7616-2637
usvirin@mail.ru

Alexandr Anatolievich Mokhov
Doctor of Legal Sciences, Professor
Kutafin Moscow State Law University (MSAL) – Russia
ORCID ID: https://orcid.org/0000-0001-8139-7932

Eduard Eduardovich Artyukhov
First Deputy of the Prosecutor of Saint Petersburg - Russia
ORCID ID: https://orcid.org/0000-0002-7977-1515

Sergej Nikolaevich Shestov
Academy of Labor and Social Relations - Russia
ORCID ID: https://orcid.org/0000-0002-6117-1423

ABSTRACT

Background: In 2009, the Russian legislation established the institution of bringing to subsidiary responsibility the head of the debtor, as well as other persons controlling the debtor for causing harm to the debtor who is unable to satisfy all creditors' claims. To correctly interpret and apply the norms of law, the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 was adopted in 2017. Despite this, not all gaps related to bringing the debtor's controlling persons to justice have been resolved. **Objective**: The authors aim to identify the problems of legal regulation of bringing to subsidiary responsibility of persons controlling the debtor in the event of bankruptcy of the debtor. **Methods**: the disclosure of the topic was carried out from the standpoint of general scientific methods (systemic, structural-functional, historical), the method of theoretical analysis, private scientific methods (comparative jurisprudence, technical and legal analysis, concretization, interpretation). The methodological basis of the study was the method of the theory of knowledge. **Results**: The problem of the subjectivity of assessments in court is revealed and solutions are proposed. The conditions for bringing persons to subsidiary liability of persons controlling the debtor are determined.

Keywords: Bankruptcy. Subsidiary liability. Persons controlling the debtor. Conditions of bringing to responsibility.

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ATRACÇÃO DAS PESSOAS QUE CONTROLAM O DEVEDOR À RESPONSABILIDADE SUBSIDIÁRIA EM CASO DE FALÊNCIA DO DEVEDOR

RESUMO

Antecedentes: Em 2009, a legislação russa consagrou a instituição da responsabilidade subsidiária de um gerente do devedor, bem como de outras pessoas que controlam o devedor por causar danos ao devedor incapaz de satisfazer todos os pedidos dos credores. Em 2017, o Plenário da Suprema Corte da Federação Russa adotou a Resolução nº 53 a fim de interpretar e aplicar corretamente as regras da lei. Entretanto, nem todas as lacunas relacionadas com a responsabilização das pessoas que controlam o devedor foram resolvidas. Assim, a questão de quem deve ser considerado como uma pessoa controladora do devedor ainda é discutível. **Objetivo**: Identificar os problemas de regulamentação legal para levar à responsabilidade subsidiária de pessoas controladoras em caso de falência do devedor. **Métodos**: A divulgação do tema foi realizada a partir da posição dos métodos científicos gerais (sistêmico, estrutural e funcional), o método de análise teórica, métodos científicos privados (direito comparado, análise técnico-jurídica, concretização, interpretação). A base metodológica do estudo foi o método da teoria do conhecimento. **Resultados**: O problema da subjetividade das avaliações judiciais é revelado e as formas de sua solução são oferecidas. Foram determinadas as condições para levar as pessoas à responsabilidade subsidiária das pessoas que controlam o devedor.

Palavras-chave: Falência. Responsabilidade subsidiária. Pessoas que controlam o devedor. Condições de responsabilidade.

1. INTRODUCTION

One of the ways to protect creditors' rights in bankruptcy proceedings is to hold accountable persons controlling the debtor since the issue of holding accountable persons controlling the debtor is considered in every 15th bankruptcy case. Therewith, the requirements are met only in 11 percent (Shitkina, 2017). Such a low percentage of satisfaction of claims for bringing persons controlling the debtor to responsibility indicates the imperfection of the legal mechanism, which in turn determines scientific research in this area of law.

First of all, this is since there are several approaches to determining the legal status of persons controlling the debtor in the doctrine of law if the debtor's property is

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not sufficient to satisfy all creditors' claims. In addition, there is no possibility in Russia of holding accountable the company's participants and controlling persons in case of insufficient capitalization of the corporation. There are also no criteria for determining "asset mixing" and "management pooling", for example, when companies are managed by the same person in the same premises. In addition, the legal regulation of bringing to responsibility persons controlling the debtor has several other disadvantages, related on the one hand to a broad interpretation of such persons, and on the other – the impossibility of bringing them due to the lack of clear criteria for bringing to responsibility. Therefore, M.V. Krushevskaya (2021) quite rightly concludes that at present, if all the conditions for bringing to responsibility are not proven, a member of the company cannot be brought to subsidiary responsibility. Creditors bear adverse consequences as a result of the imperfection of legislative regulation.

2. METHODS

General scientific methods of cognition were used in the course of the research, including the principle of objectivity, consistency, as well as such methods as systemic and structural-functional. Special scientific methods were used along with general scientific methods of cognition: theoretical analysis, comparative law, technical and legal analysis, concretization, interpretation. The methodological basis of the study was the method of the theory of knowledge.

3. RESULTS

Bankruptcy always indicates the inability of the debtor to repay the creditors' claims in full. Very often, bankruptcy is preceded by circumstances in which individuals pursue their goals to the detriment of the debtor's property status (Svirin et al., 2019). Such persons should include, first of all, entities that control the debtor's activities before bankruptcy.

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An analysis of the discussions in the scientific community led to the conclusion that such a legal category as "controlling persons of the debtor" should be interpreted broadly, which makes it possible to bring the chief accountant or financial director of the debtor to subsidiary liability, as well as the opportunity to file an independent claim outside the bankruptcy process to bring the above persons to subsidiary liability, i.e., after the completion of the trial. The expansion of the scope of persons who can be held vicariously liable creates additional guarantees for creditors since courts often reject petitions to hold the chief accountant or financial director accountable.

Subsidiary liability of persons controlling the debtor in bankruptcy cases contributes to countering the abuse of the rights of persons controlling the debtor, for example, in cases of tax evasion, the conclusion of fictitious civil contracts, etc. In foreign legal systems, such legal constructions as "piercing the corporate veil" (UK, USA) or "penetrating responsibility" (Germany) are used to avoid abuse of the corporate form.

In the USA, it is typical to have a list of certain criteria that indicate abuse of the law, which leads to "piercing the corporate veil". For example, the courts of the state of California use a list of 20 items, which is based on the "alter ego" doctrine (Blumberg et al., 2004, pp. 31-32). In particular, this list includes:

1) Fraud or misrepresentation at the expense of a legal entity that has been pressured or influenced in making key decisions. The concept has a goal to prevent this kind of deception, which is understood to have a broader meaning than in common law (Cheng, 2011).

2) When the property of the company and the beneficial owner is mixed, which directly contradicts the limited liability.

3) In case of overlap of corporate functions of the executive body and the participant of the company. Such a coincidence, on the one hand, is not a violation of the requirements of the law, but always directly indicates a high level of control of the company to the owner.

4) Violation of mandatory corporate procedures (Schwartz, 2008). For example, violation of the procedure of the board of directors, failure of the company to provide information on mandatory requests of shareholders, etc.

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5) Insufficient capitalization of a controlled company, implying an actual insufficiency of property, which as a result, does not allow the company to start or continue to exist (Ibarguen, 1994, p. 14).

6) Following foreign judicial practice, if a company is found to have insufficient own funds, this fact will always be recognized as evidence of deception of creditors. Unfortunately, law enforcement agencies in Russian law enforcement practice adhere to a different concept and, as a rule, refuse to initiate criminal cases concerning existing civil legal relations, i.e. they do not consider these circumstances as fraud.

7) The predominant influence of the shareholder. In this case, this refers not only to the fact of owning a controlling stake (Berle & Means, 1935). If such a shareholder systematically influences the decisions taken by the executive body, then he/she should, from the point of view of American doctrine, share responsibility for negative consequences according to the rules applied to the executive body (Rands, 1999, p. 437).

8) Compliance with the general ground of fairness (Thompson, 1991, pp. 1044-1045). Since the law does not establish such criteria in the Russian Federation, the decision on the fact of violation by persons controlling the debtor is made by judicial authorities based on their ideas about commercial justice.

The absence of legally established criteria has both positive and negative sides. On the positive side, creditors are not deprived of the opportunity to recognize that their rights have been violated, limiting themselves only to a list of reasons based on which such recognition is possible. Therewith, the discrete powers of the court always indicate the subjectivity of the decisions taken.

The institution of "piercing the corporate veil" used in common law countries also has its drawbacks and advantages. On the one hand, it increases the objectivity of the decision being made, since the criteria for such a decision are fixed by judicial precedent. On the other hand, there is an unresolved question about what to understand by a company when piercing the corporate veil. From our point of view, a company or a group of companies and their largest shareholders act as a single entity of the economic space, therefore, not only the company itself but also its shareholders can be held accountable. It seems to us that the most effective solution to prevent fraud by creditors is to merge all participants into a corporation, rather than "piercing the corporate veil" and trying to find the culprits.

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The analog of "piercing the corporate veil" in Russian legislation is the institution of subsidiary liability since quite often the signs that attract subsidiary liability are similar to those used in such cases in foreign law and order. For example, the most frequent case of bringing a controlling debtor to responsibility is bringing to responsibility for the so-called "withdrawal of assets" (withdrawal of funds, alienation of assets at an undervalued value, withdrawal of liquid assets, etc.).

The courts of the Anglo-Saxon legal system often resort to referring to scientific research in the course of legal proceedings, thus relying on the doctrine of law. The doctrine is not recognized as a source of law in the Russian legal system; therefore, it is not used by the courts, and legal regulation is not perfect.

The Law on Bankruptcy in Russia establishes the procedure for bringing the debtor's manager and other persons controlling the debtor to the following types of liability:

- subsidiary liability for the impossibility of full repayment of creditors' claims (Article 61.11 of the Bankruptcy Law);

- subsidiary liability for non-submission (late filing) of the debtor's bankruptcy application (Article 61.12 of the Bankruptcy Law);

- liability for violation of bankruptcy legislation based on Article 61.13 of the Bankruptcy Law;

- liability for losses caused to the debtor on the grounds provided for by corporate legislation (Article 61.20 of the Bankruptcy Law).

Bringing the persons controlling the debtor to subsidiary liability is an exceptional mechanism for restoring the violated rights of creditors. When applying it, courts need to take into account both the essence of the structure of a legal entity, assuming the property isolation of this entity (paragraph 1 of Article 48 of the Civil Code of the Russian Federation); its independent responsibility (Article 56 of the Civil Code of the Russian Federation); the presence of corporations, founders of unitary organizations, other persons who are part of the bodies of a legal entity, broad discretion in making (approving) business decisions (Constitutional Court of the Russian Federation, 2004), and the prohibition on causing harm to independent participants in turnover through unfair use of the institution of a legal entity (Article 10 of the Civil Code of the Russian Federation).

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When bringing persons controlling the debtor to subsidiary liability in the part that does not contradict the special provisions of the bankruptcy law, the general provisions of Chapters 25 and 59 of the Civil Code of the Russian Federation on responsibility for the violation of obligations and liabilities for damage are subject to the application (Plenum of the Supreme Court of the Russian Federation, 2017).

Proceeding from the above, it should be said that the most important participant in the bankruptcy process is the person controlling the debtor (PCD), which means a natural or legal person who has or has had no more than 3 years before the appearance of signs of bankruptcy, as well as after their occurrence before the adoption by the arbitration court of the application for recognition of the debtor as bankrupt, the right to give binding instructions to the debtor or the ability to otherwise determine the actions of the debtor, including the execution of transactions and determination of their conditions (State Duma of the Federal Assembly of the Russian Federation, 2002).

As a general rule, a necessary condition for assigning a person to the number of persons controlling the debtor is that he/she has the actual ability to give the debtor mandatory instructions or otherwise determine his/her actions.

However, as it seems to us, it is necessary to evaluate the actions of the persons controlling the debtor depending on such criteria as being with the debtor (the head or members of the debtor's management bodies) in a relationship of kinship or property; official position; due to the presence of the authority to conclude transactions on behalf of the debtor based on a power of attorney, regulatory legal act, or other special authority; by virtue of the official position (in particular, the replacement of the position of the chief accountant, financial director of the debtor, or other position that provides the opportunity to determine the actions of the debtor).

To attract persons controlling the debtor to subsidiary liability, the court must analyze whether there was coercion of the head or members of the debtor's management bodies or exerting a determining influence on the head or members of the debtor's management bodies in another way. In Russian judicial practice, cases of any informal personal relationships are considered as such circumstances, including those established by operational investigative measures, for example, cohabitation; long-term joint public service, civil service; co-education (classmates, classmates, classmates), and so on.

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The Plenum of the Supreme Court also clarifies that the exercise of actual control over the debtor is possible regardless of the presence/absence of formal legal signs of affiliation (through kinship or property with persons who are part of the debtor's bodies, direct or indirect participation in capital or management, etc.).

The court should establish the degree of involvement of the person being held vicariously liable in the debtor's management process; it is necessary to check how significant his/her influence was on making significant business decisions regarding the debtor's activities. Thus, in one of the cases, the court brought CJSC "International Industrial Bank" P.S.V. to subsidiary liability for the obligations of having actual, not legal, control over the debtor. The court's conclusions were based on the following circumstances:

- the existence of a system of the Bank, approval, and decision-making, whereby without the approval of the P.S.V., the Bank could not make any decision (conducting interviews with potential job candidates, agreeing on incentives for bank employees, participating in workshops, giving direct instructions to bank officials to sign transactions on behalf of the bank, negotiating with third parties on behalf of the bank, the need to agree on any decisions and transactions of the bank);

- P.S.V. has a personal office space in the bank's office.

The legal basis for bringing a person to subsidiary liability is the impossibility of full repayment of creditors' claims due to the actions and (or) inaction of the PCD. It is important to emphasize that when considering a case in court, the applicant's task is to prove that the person being prosecuted has the status of a PCD.

The absence of a person's shares of the debtor, as well as if it is not part of the debtor's management bodies (including through other persons) does not mean that it is not controlling. In this case, the status of the PCD can be proved by the testimony of witnesses.

In addition, reports from the mass media can be used as evidence of a person's PCD status. For example, following the Decision of the Arbitration Court of the Moscow district, the fact that the G.V.V. was a controlling person of JSCB INVESTTORGBANK (PJSC), is confirmed, among other things, by the fact that he gave interviews to the Vedomosti newspaper, the Banki.ru information portal, the Finmarket magazine about the bank's activities, problems, and plans for the near future.

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The actions (inaction) of the PCD, which led to the impossibility of repayment of creditors' claims, are understood only as such actions or inactions that resulted from the bankruptcy of the debtor, that is, those without which objective bankruptcy would not have occurred. Thus, the court should assess the significance of the impact of actions (inaction) of PCD on the position of the debtor, the presence of a causal relationship between these actions (inaction), and the actual objective bankruptcy should be checked.

The following circumstances may indicate the unlawfulness of the actions (inaction) of the PCD:

- agreement, conclusion, or approval of a transaction on obviously unfavorable terms or with a person who is unable to fulfill an obligation ("one-day company", front persons);

- giving instructions on the implementation of clearly unprofitable operations;

- appointment to senior positions of persons, the result of whose activities will subsequently not correspond to the interests of the headed organization;

- creation and maintenance of a debtor management system, the purpose of which is to systematically extract benefits from a third party to the detriment of the debtor and its creditors.

Persons controlling the debtor may also bear subsidiary liability in the following cases:

- when the impossibility of repayment of creditors' claims occurred as a result of the actions and/or omissions of the PCD, however, the bankruptcy proceedings were terminated due to the lack of funds sufficient to reimburse court costs for carrying out the procedures used in the bankruptcy case or the application of the authorized body for declaring the debtor bankrupt was returned;

- the debtor began to meet the signs of insolvency not due to the actions and (or) inaction of the PCD, but after that, the PCD committed actions and (or) inaction that significantly worsened the financial situation of the debtor (State Duma of the Federal Assembly of the Russian Federation, 2002).

The above indicates that, according to generally accepted principles, the PCD, who creates conditions for a further significant increase in the imbalance between the value of the debtor's assets and the size of his/her obligations, is subject to subsidiary liability in full, since it is presumed that due to their actions (inaction), the possibility of

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implementing rehabilitation measures aimed at restoring solvency against the debtor is finally lost.

If due to the actions (inaction) of the PCD committed after the appearance of signs of objective bankruptcy, there was an insignificant deterioration in the financial situation of the debtor, such PCD may be brought to civil liability in the form of compensation for losses on other grounds unrelated to subsidiary liability (Plenum of the Supreme Court of the Russian Federation, 2017).

In the Russian doctrine there is a refutable presumption of a causal relationship between actions (inaction) of PCD and the impossibility of full repayment of creditors' claims in the presence of one of the following circumstances:

1) substantial damage has been caused to the property rights of creditors as a result of the commission by this person or in favor of this person or the approval by this person of one or more transactions of the debtor (the commission of such transactions at the direction of this person), including transactions specified in articles 61.2 and 61.3 of the bankruptcy law (suspicious transactions and transactions with preference).

2) Accounting documents and (or) statements, the responsibility for management (drafting) and storage of which are established by the legislation of the Russian Federation, by the time of the determination of the introduction of monitoring (or the day of the appointment of an interim administration financial institution) or the decision to declare the debtor bankrupt missing or do not contain information about the objects provided for by the legislation of the Russian Federation, the formation of which is required following the legislation of the Russian Federation or the information is distorted, resulting in significant difficulty performing procedures used in the bankruptcy case, including the development and implementation of the bankruptcy estate.

The presumption is relevant to those persons who are entrusted with the following duties:

- organization of accounting and storage of accounting documents and accounting statements of the debtor;

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By itself, the absence of the transfer of the necessary documents by the former head of the company to the new head does not release the new head from

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responsibility and does not state the absence of guilt, since the conscientious and reasonable approach of the head obliges to take actions to request documentation from the previous head.

3) Claims of creditors of the third priority for the principal amount of debt arising from an offense for the commission of which a decision came into force on bringing the debtor or his/her officials, who are or were his/her sole executive bodies, to criminal or administrative liability for tax offenses, including claims for payment of debts revealed as a result of proceedings on cases of such offenses exceed 50% of the total amount of claims of third-priority creditors for the principal amount of debt included in the register of creditors' claims (State Duma of the Federal Assembly of the Russian Federation, 2002).

4) Documents, the storage of which was mandatory following the legislation of the Russian Federation on joint-stock companies, on the securities market, on investment funds, on limited liability companies, on state and municipal unitary enterprises, and regulatory legal acts adopted following it, to at the time of the issuance of a ruling on the introduction of supervision (or by the day of the appointment of the temporary administration of the financial institution) or the decision to declare the debtor bankrupt are absent or distorted.

The presumption is applied concerning the sole executive body of a legal entity, as well as other persons who are entrusted with the responsibility for the preparation and storage of documents provided for by the legislation of the Russian Federation on joint-stock companies, on the securities market, on investment funds, on limited liability companies, on state and municipal unitary enterprises and regulatory legal acts adopted following it.

5) As of the date of initiation of the bankruptcy case, information subject to mandatory entry following federal law has not been entered, or inaccurate information about a legal entity has been entered: into the unified state register of legal entities based on documents submitted by such a legal entity; in the Unified Federal Register of Information on the Facts of Activities of Legal Entities in terms of information, the obligation to enter which is assigned to the legal entity.

The applicant must provide the court in the process of considering the application of the presumption in question with explanations as to how the lack of relevant information, or the presence of inaccurate information in the register,

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influenced the conduct of bankruptcy procedures. The person being held liable has the right to refute the presumption in question, proving, in particular, that the identified shortcomings did not lead to significant difficulty in conducting bankruptcy procedures.

PCD is not subject to subsidiary liability if its actions, which entailed adverse consequences on the debtor's side, did not go beyond the usual business turnover and risks, and also did not have the purpose to violate the rights and legitimate interests of the business entity.

Concerning civil contractual relations, the failure of the head to comply with the requirements of the bankruptcy law on applying to the arbitration court with the debtor's bankruptcy application indicates unfair concealment from creditors of information about the unsatisfactory property status of a legal entity. Such behavior of the manager entails the adoption by the insolvent debtor of additional debt registry obligations in a situation where existing obligations cannot be fulfilled and creates a deliberate impossibility of satisfying the claims of new creditors from whom the facts were hidden, and, as a result, the occurrence of losses on the side of these new creditors who were misled at the time the debtor was provided with performance.

Entrepreneurial activity does not guarantee a result from its implementation in the form of profit, but at the same time, it involves protection from risks associated with illegal actions (inaction) that violate the normal, established business regime.

One of the legal mechanisms ensuring the protection of creditors who are not aware of the significant disproportion between the number of the debtor's obligations and the size of his/her assets due to the fault of the debtor's manager is the imposition of subsidiary liability on such a manager for new civil obligations if the bankruptcy estate is insufficient (Lotfullin, 2021).

The head of the debtor is obliged to submit the debtor's application to the arbitration court within one month from the date of occurrence of one of the following circumstances:

- satisfaction of the claims of one creditor or several creditors makes it impossible for the debtor to fulfill monetary obligations or obligations to pay mandatory payments and (or) other payments in full to other creditors;

- the debtor's body, authorized following its constituent documents to decide on liquidating the debtor, decided to apply to the arbitration court with the debtor's application;

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- the body authorized by the owner of the debtor's property, a unitary enterprise, has decided to apply to the arbitration court with the debtor's application;

- foreclosure on the debtor's property will significantly complicate or make impossible the debtor's economic activity;

- the debtor meets the signs of insolvency and (or) signs of insufficient property;

- there is a debt outstanding for more than three months due to insufficient funds for the payment of severance payments, wages, and other payments due to an employee, a former employee in the amount and the manner established following labor legislation.

The manager's obligation to file a bankruptcy petition in court arises at the moment when a bona fide and reasonable manager of a business company, who is in similar circumstances, within the framework of ordinary managerial work, had to objectively determine the existence of one of the circumstances specified in paragraph 1 of Article 9 of the Bankruptcy Law.

In cases where the debtor's constituent document provides that the authority to speak on behalf of a legal entity is granted to several persons (directors) acting jointly or independently of each other, as a general rule, these persons bear subsidiary responsibility jointly and severally.

The liquidator or the liquidation commission is obliged to apply to the arbitration court with the debtor's application within 10 days from the moment of detection of signs of insolvency and (or) signs of insufficiency of the debtor's property. As a general rule, the members of the liquidation commission bear subsidiary responsibility jointly and severally.

Members of the liquidation commission who acted in good faith, taking all measures in their power to submit a bankruptcy petition by the commission (in particular, demanded to convene a meeting of commission members, voted for the adoption of the appropriate decisions, etc.), but their position was not supported by other members of the liquidation commission.

A person who is not the debtor's manager, liquidator, or a member of the liquidation commission may be held vicariously liable for failure to submit (late filing) the debtor's own bankruptcy application if there are a combination of the following conditions:

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- the person was a controlling person, including based on presumptions about the control of the majority participant of the corporation that he/she did not refute (clause 2, clause 4, Article 61.10 of the Bankruptcy Law);

- he/she could not be unaware of the debtor's being in such a state in which on the side of its head, the liquidation commission there was an obligation to file a bankruptcy petition with the court, and about their failure to fulfill this obligation;

- this person had the authority to convene a meeting of the debtor's collegial body, whose competence includes the adoption of a corporate decision on liquidation, or had the authority to independently make the appropriate decision;

- it has not properly performed actions aimed at convening a meeting of the collegial management body to resolve the issue of filing a bankruptcy petition with the court or making such a decision.

A court in Russia has the right to reduce the amount or completely release from subsidiary liability a person brought to subsidiary liability in two cases:

- if the person proves that when performing the functions of the governing bodies or the founder (participant) of the legal entity he/she did not exert a decisive influence on the activities of the legal entity (he/she performed the functions of the governing body nominally);

- if due to the information provided by this person, the person who controlled the debtor has been established; the hidden property of the debtor and the PCD have been discovered.

The above circumstances in Russian judicial practice also apply to cases of bringing to responsibility for failure (late filing) by the debtor of an application for its bankruptcy.

The following entities have the right to file an application for subsidiary liability for the impossibility of full repayment of creditors' claims on behalf of the debtor: the arbitration manager on his/her initiative or by decision of the creditors' meeting or the creditors' committee; bankruptcy creditors; a representative of the debtor's employees, employees or former employees of the debtor to whom the debtor has a debt; the authorized body.

The right to apply to subsidiary liability for non-submission (late submission) is possessed by: bankruptcy creditors, a representative of the debtor's employees, employees, or former employees of the debtor or authorized bodies, the debtor's

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obligations to which arose after the expiration of the term; the arbitration administrator on his/her initiative on behalf of the debtor in the interests of these persons.

In the interests of creditors, the legislator secured the presumption of guilt of the persons controlling the debtor when they commit several actions (inaction) provided for by law, additionally stipulating that these entities are not liable if they acted following the usual conditions of civil circulation, in good faith and reasonably in the interests of the debtor, its founders (participants), without violating the property rights of creditors, and if they prove that their actions were committed to preventing further damage to the interests of creditors.

For comparison, in foreign doctrine, there is no unified approach to solving the issue of the possibility of bringing controlling persons to responsibility for extreme risk, and it has not developed in foreign jurisprudence. Thus, French courts, as a rule, do not dare to review the decisions of business entities, but sometimes there are decisions containing conclusions that the risk initially assumed may constitute a violation of the duty to ensure interests when evidence of the riskiness of an operation becomes apparent even before it is committed. Therewith, the Irish courts initially assumed that decisions in the field of entrepreneurial activity do not entail liability if they do not violate the charter or cannot be classified as dishonest or extremely incompetent. However, the courts over time began to distinguish between calculated risks and reckless decisions (Evteev, 2017, pp. 110-111).

The criteria of extreme risk were most clearly developed by the German courts, which recognized that speculative investments constitute a violation of the duty to ensure interests and are not protected by the rule of business judgment if the probability of failure is higher than the probability of success; the risk is disproportionate to the potential profit; investments endanger the existence of the company.

At the same time, even very dangerous investments are not considered illegal in Poland (Gerner-Beuerle et al., 2013, p. 324).

Therewith, researchers both in Russia and foreign countries have noted a tendency to expand the grounds of subsidiary liability in the conditions of the economic crisis. Taking into account the negative trends developing in the global economy, including those related to the spread of new coronavirus infection, it seems that the development of the institution of subsidiary responsibility will acquire new scales and forms.

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To reduce the scope of application of value judgments by the courts, it is seen that there is a need for legislative consolidation in the civil legislation of clear criteria for the dishonesty and unreasonable behavior of persons controlling the debtor, taking into account the standards of rationality and rules of business judgment developed in jurisprudence.

Given the potential competition between the interests of shareholders and creditors, it is important to determine the position from which the reasonableness and integrity of the behavior of the controlling debtor are assessed. In our opinion, priority should be given to the legislative concept, which provides for the need to take into account the interests of creditors, considered not in the context of an autonomous obligation, but as one of the aspects of activities for the benefit of economic entities.

4. CONCLUSION

Based on the above, it is necessary to draw the following conclusions:

1) in Russia, there are two conditions for bringing persons to the subsidiary liability of persons controlling the debtor:

- subsidiary liability occurs when it is impossible to fully repay creditors' claims;

- subsidiary liability occurs for failure (late filing) of the debtor's bankruptcy application;

2) It is necessary to prove the following to be held vicariously liable for the debtor's obligations:

- the presence of harm (insufficiency of the debtor's property to satisfy creditors' claims);

- the defendant has the right to give mandatory instructions to the debtor or otherwise determine his/her actions;

- the commission by the defendant of illegal actions indicating the use of the said right and (or) opportunity, directly or indirectly aimed at bringing the organization to bankruptcy, or the failure of those actions that he is obliged to perform following the bankruptcy law to prevent the bankruptcy of the organization (the objective side of the offense);

- the guilt of the subject of responsibility, based on whether this person has taken all measures for the proper performance of the above-mentioned obligations with

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the degree of care and prudence that was required of him/her by the nature of the obligation and the conditions of turnover;

- the presence of a causal relationship between the actions (inaction) of the defendant and their consequences in the form of the inability to satisfy creditors' claims; moreover, according to the courts, only a direct (direct) causal relationship has legal significance.

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