On Bringing the Controlling Debtor to Subsidiary Liability (Clause in the Ruling of the Constitutional Court of the Russian Federation in the Case of Checking the Constitutionality of Clause 3.1 of Article 3 of the Federal Law "On Limited Liability Companies" Dated May 21, 2021No. 20-P)

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ABSTRACT
The article touches upon the problem of attracting persons controlling the debtor in the light of the clause on the interpretation of paragraph 3.1 of Art. 3 of the Federal Law "On Limited Liability Companies", which was made by the Constitutional Court of the Russian Federation in the Resolution of May 21, 2021 No. 20-P. In particular, the Constitutional Court indicated that the conclusion made in the Resolution of the Constitutional Court of the Russian Federation related to the subject matter of this case cannot in itself be considered as excluding the application of the same approach to the distribution of the burden of proof in cases where another subject acts as a creditor, rather than an individual, the obligation of the company to which arose not in connection with the implementation of entrepreneurial activities by the creditor.
Illustrating the grounds for ambiguous interpretation laid down in such a phrase, the author concludes that a narrow approach is still preferable, when the clause is interpreted in favor of only such a creditor who is "another subject, the obligation of the entity to which arose not in connection with carrying out entrepreneurial activity". According to the author, such a conclusion is not only consistent with the idea of fairness in the distribution of the burden of proof in terms of the status of creditors, but is generally consistent with the general prohibition on taking advantage of unfair behavior.
Keywords: subsidiary liability of persons controlling the debtor, resolution of the Constitutional Court of the Russian Federation, bad faith, evasion of responsibility

Introduction

The ruling of the Constitutional Court of the Russian Federation (hereinafter — RF CC) in the case of checking the constitutionality of clause 3.1 of Article 3 of the Federal Law "On limited Liability Companies" (hereinafter — FL on LLC) in relation to G.V. Kapruk from May 21, 2021 No 20 (hereinafter — RCC No20-P) is being actively discussed by professional community.

The positions of the Constitutional Court exert significant influence on the law enforcement practice, especially if not only content of the norm, which constitutionality is checked, but also the main clauses of the civil right are interpreted in other way or even reinterpreted.

Particularly, very interesting is not only the main position of the RF CC and conformed with it issue an "reverse force of explanations": if they are extended to all the requirements, which are satisfied after acceptation of RCC No.20, or if they are to be applied after including into FL on LLC clause 3.1 article 3. Likewise, the clause of the RF CC is very interesting: it can be interpreted twofold and can expand or significantly expand (depending on interpretation) the application of the legal position of the RF CC.

This article is dedicated exactly to the clause in context of RCC No.20-P.

The Reason for appeal to the RF CC with a complaint and its subject

Remember, that the reason for appeal was the fact, that the lender (a natural person — a consumer) won the trial (in June 2017), got an executive act (in July 2017) with initiation of enforcement proceeding (in August 2017), but was not able to achieve the execution, because in Mai 2018 the debtor-company was excluded from the Register of legal entities as an invalid legal entity. Accordingly, the enforcement proceeding has been terminated in September 2018 (clause 1 part 1.1 RCC No.20-P.).

The lender didn"t give up and attempted to bring to subsidiary liability the persons, who controlled the debtor (hereinafter PCD), who were at the same time the director, the participants and the accountant, by virtue of clause 3.1 art. 3 Federal Law on LLC, which determines the following: "The exclusion from the unified state register of legal entities in the order, determined by Federal law on state registration of legal entities for invalid legal entities, entails consequences, provided by the Russian Federation Civil Code (hereinafter — CC RF) for the main debtors refusal to fulfill his obligations. In this case, if non-fulfillment of obligations (including, due to causing harm) is caused by the fact, that persons mentioned in parts 1-3 art.53.1 CC RF acted unfair or unreasonably, so on the lenders application these persons can be brought to subsidiary liability on the obligations of this company.

The lender the case in all instances, which were advocated by the Russian Federation Supreme Court (hereinafter — RF SC). The reasons for loosing were, according to the judges:

a. The plaintiff didn"t provided the proofs of the fact, that PCD initiated the withdraw of all the marketable assets from the companies property sphere. Accordingly the absence of the proofs obviously indicating unfair or unreasonable actions (or inactions) of the defendants doesn"t let to bring the PCD to the subsidiary liability;
b. "By itself, the fact of applying of the defendants in the arbitrary court for declaring the company bankrupt is not sufficient proof for declaring bad faith by implementation of economic activities". (clauses 2-5 RCC No.20-P)[1].

Applying for the RF CC, the applicant states that clauses part 3.1 Art.3 of the Federal Law on LLC doesn"t conform with Constitution of RF "in such a measure, in which they let the opportunity of avoidance of persons mentioned in clauses 1-3 Art. 53.1 RF CC from the subsidiary liability on the obligations of the company, excluded from the unified state register of legal entities in the order, determined by Federal law "On State Registration of Judicial Entities and Individual Entrepreneurs" for invalid legal entities" (the last paragraph part 1.1 2-5 RCC No.20-P) (hereinafter — FL on state Registration).

Determined by the RF CC constitutional-legal meaning of Clause 3.1 Article 3 FL on LLC

Finally the RF CC refused to consider the clause 3.1 Art. 3 FL on LLC unconstitutional, but detected its constitutional-legal meaning, which is public-obligatory and excludes any other meaning in law enforcement practice. It is also caused by the fact that the RF CC determined frequently, that in legal practice the constitutional interpretation of implemented clauses (Rulings from December 23th, 1997 No.21-P, from February 2nd, 1999 No. 4-p and from March, 28th, 2000 No. 5-P and others) has to be provided.

In particular, in Paragraph 1 part 4 RCC No.20-P the RF CC determined that clause 3.1 part 3 FL on LLC:

- "implies its implementation by the courts by bringing persons, who controlled the company excluded from the unified state register of legal entities in the order, determined by Federal law for invalid legal entities, to subsidiary liability on his debts according to the creditors claim — a natural person, before which appeared the obligation of the company not in connection with the implementation of entrepreneurial activity and the claims of a creditor have to be satisfied by court,
- According to the supposition, that exactly inaction of these persons causes the impossibility to fulfill the obligations to the plaintiff — the creditor of the company, until another is not proved according to the factual circumstances of the case".

In other words, the RF CC introduced the rebuttable presumption of unfair inaction of PCD with the aim of implementation of clause 3.1 Art. 3 FL on LLC by such type of creditors, as "creditor — a natural person before which appeared the obligation of the company not in connection with the implementation of entrepreneurial activity and the claims of a creditor have to be satisfied by court.

The essence of the RF CC"s positions

The examination of clauses 2-5 RCC No.20-P lets to emphasize two significant ideas, forming the main positions of the RF CC.

Firstly, the fail distribution of the burden is more important that the rules of bringing to the delict liability.

According to the RF CC, despite the fact that the provided in clause 3.1 Art. 3 FL on LLC subsidiary liability considers to be a kind of civil-legal liability with application to it of the main principles of delict liability and the rules of proving the delict (paragraphs 4,5 clauses RCC No.20-F) the priority is the fair distribution of the burden of proof.

It is caused by the fact, that "by applying to the court with an appropriate claim, the proving by the creditor of unreasonable and unfair actions of persons, controlling the exclusion of invalid legal entity from the register is objectively difficult. As a rule, the creditor has no access to the documents containing information about economic activity of the company, and has no

[1] Detailed about the implementation of part 3.1 article 3 FL on LLC and related practical issues see: Alekseeva U.S., Voskresenskaya E.V. Special Characteristics of Assigning of Subsidiary Liability on the Participant of Limited Liability Company in the Mechanism of Restoration of the Creditors Violated Rights. Leningrad Juridical Magazine. 2018. No. 1. Pp. 77-84; Gutnikov O.V. Development of Corporative Liability in Legal Practice. Magazine of Russian Law. 2021. No. 6. Pp. 48-65.

other sources of information about the activity of a legal entity and persons who control it. Accordingly, making demands of the plaintiff-creditor (especially is it is a natural person- -a consumer, but not to be restricted by this case), which are bound with proving of causing the harm by behavior of persons controlling the defendant, obviously entails inequality of proceeding opportunities of defendant and plaintiff, because the plaintiff is requested to provide the proofs, about which he can not know because of non-involvement in corporative legal relations (paragraphs 1,2 clause 3.2 RCC No.20-P).

Secondly, the creditors inaction doesn"t mean his indiscretion and bad faith.

If the creditors didn"t use the stated by law measures, which allow to prevent exclusion of the legal person from the unified state register of legal entities (USRLE) (clauses 3,4 Art. 21.1 RF FL on state registration), it doesn"t mean that they forfeit the right for compensation of losses according to clause 3.1 Art. 3 FL on LLC.

"Anyway, we can expect taking appropriate measures preventing the exclusion of a debtor company from register from professional participants of market, but we cannot came in legal regulation from using the mentioned measures by citizen, who are not subjects of entrepreneurial activity, it would be over-standing requirements for their reasonable and prudent behavior" (clause 3.2 RCC No.20-P).

Clause of the RF CC (paragraph 4 clause 4 RCC No.20-P) and reasons for ambiguity

"The conclusion, having been made in the Ruling of the Constitutional Court of the Russian Federation and related to the subject of considering the mentioned case, by itself cannot exclude implementation of the same approach for distribution of the burden of proving in the case when creditor is another subject, not a natural person, and the obligation before which appeared not according to the implementation of entrepreneurs activity by the creditor. Anyway, the federal legislator have an opportunity to add any changes in conformity with legal positions determined in this Ruling, to the legal regulation of subsidiary liability of the persons, controlling the legal entity excluded from the USRLE in administrative order.

It can be considered in different ways.

From one hand, it can be considered as admission by the RF CC of the fact of existence of a practical problem, which dimension goes beyond the subject of the claim, by which the RF CC is restricted. And this admission appeals to the legislator.

Supporting this approach can be mentioned, that the RF CC made such "hints" to the legislator earlier as well.

For example, in clause 3 Ruling of the Constitutional Court of the Russian Federation No. 1-P from 23/01/2007 "On the case of checking the constitutionality of clause 1 Article 779 and clause 1 Article 778 Civil Code of the Russian Federation in relation to the claims of the LLC "Agency of Corporate Safety and the citizen V.V. Makeev" the following has been concluded:

"So, the clauses 1 Article 779 and clause 1 Article 778 Civil Code of the Russian Federation, as not implying in the system of current legal regulation any relationships of paid provision of service the satisfaction of the requirement of the contractor on payment the award on the agreement or contract of paid provision, if this requirement is justified by the condition, making the amount of payment dependent on the courtsdecision, which will be taken in the future, cannot be considered to be contradicting to the Constitution of the Russian Federation.

It doesn"t except the right of federal legislator in accordance with particular conditions of legal systems development and in conformity with constitutional principles to foresee the opportunity of other legal regulation, in particular within the framework of especial legislation about the order and conditions of realization of the right for qualified legal assistance.

It has to be mentioned, that the legislator has reacted to this hint, although not very quickly, having confirmed the address of the appealing. So, the Federal Law No. 400 from 02.12.2019 supplemented the Article 25 of the Federal Law No. 63 from 31.05.2002 "On Lawyer Activity and Advocacy in the Russian Federation" with clause 4.1: "according to the rules, established by the Council of the Chamber of Advocates, the Agreement of legal assistance can include the condition, that the amount of principal"s payment depends on the result of the assistance, provided by a lawyer, with the exception of legal assistance on a criminal case or on a case on an administrative offence".

In such a way we cannot but mention the refusal character of RCC No.20-P, which accepts clause 3.1 Article 3 Federal Law on LLC not contradicting the constitution. This circumstance together with the limit of claim leads to a conclusion about significance of the rule of subsidiary liability against the debtor's administrators in the form it is determined. More so, the mentioned rule in the system of legal regulation is connected with clauses 1-3 Article 53.1 CC RF, which constitutionality wasn"t been questioned.

From the other hand, not to speak formal, the formulation of the clause gives a reason for its isolated interpretation, if we concentrate on the practice problems especially. More so, the appeal to the legislator has been formulated in one sentence, and the pointing to non-exclusion of the position, formulated by RF SC, and for other cases is formulated separately.

So, paragraph 4 clause 4RCC No.20-P begins with the statement, that the provision of fair burden of proof is important also for other creditors. At the same time, the explanation, which creditors are being meant, can be read in two ways. It is either *another subject at all*, which is being *opposed* to another natural person, obligation to which appeared not in accordance with entrepreneurial activity (option 1), or it is *another subject, obligation to which appeared not in accordance with entrepreneurial activity*; and such subject-non-entrepreneur is opposed to the natural person-consumer, which is mentioned in the ruling (option 2).

The first option of interpretation is more widespread than the first one, but both of them, in one way or another, create potential for changing an law enforcement practice in benefit to retreat from presumption of good faith of participants of civil turnover. Reasons for and against any of these options can easily be found.

"For" the first option. Beside the common consideration, that the other creditors don"t participate at corporative relationships and that"s why have difficulties in taking proofs of bad faith and unreasonableness of the persons controlling the debtor, analyzing the grammar structure of this statement cannot be left, that in the whole text of RCC No.20-P the following terminology is used: *"the creditor is the natural person, before whom the obligation of the company appeared not in accordance with the implementation of entrepreneurial activity by the creditor, and whose claims were satisfied by court*". In this meaning, another subjects is all other persons.

At the same time clause 3.1 RCC No.20-P purposely emphasizes, that professional participants of the market are subjected to increased requirements of discretion for the purpose of their rights protection.

"For" the second option. But if when drawing a parallel with rules of the Article 431 RF C (on interpretation of contracts), when in case of ambiguity of a literal text the whole document and its essential contest must be learned, the attention must be paid to the fact that the discussed norm by itself is constitutionally accepted, and the meaning detected by the RF CC is restricted to the complaints subject, the factual retreat from the rules of delicts proving (explicit exception from the common rule and principles of tort liability) is taken on motives of necessity of fair burdens provision, taking into account the differences in the stratus of the object of civil turnover and different strictness of demands, made to discretion, etc. At the same time, all the interpretations aren"t interpreted expansively, but the principle of interpretation in favor of a smaller commitment is implemented in the doctrine for the goals of interpretation[2].

In this way, insofar as particularly the fairness of distribution of burden of proof from the point of creditors status is highlighted by the RF CC, the second option seems to be more consistent despite of all "failure" because of ambiguity of formulations.

Conclusion

Time will reveal, if the clause, made in paragraph 4 clause 4 RCC No.20-P will exert any directly influence on law enforcement practice, so before any legal changes and amendments, and if so, in what a form .

However it have to be mentioned that enacting the presumption of bad faith, the RF CC directly demonstrates that at the court the controlling person can give explanations for reasons of excluding the company from the register and present evidence of good faith. The presumption of bad faith is practically implemented in such a case only, "if the defendant refuses to give explanations or if they are not sufficient, or to present to the court the documents, so the burden of proof of legality of persons, controlling the company, and absence of causal relationship between activities and impossibility of fulfillment of obligations for the creditor, — in all these cases the defendant would be blamed" (the last paragraph RCC No.20-P).

Being distracted from the question, in what extent it is reasonably to equate the good (bad) faith and (il)legality, and the evaluation of incompleteness of explanations, can be mentioned that this approach corresponds to the ruling of part 1 Article 1 RF CC on prohibition to benefit from bad faith, and the changing of legally determined burden of proof — to consider as imposing of negative consequences on the misusing party.

Such approach seems to be multipurpose and allows to estimate the situation comprehensive and to tend to the balance of interests of not only the creditors, but also the debtors ant controlling persons[3].

References

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[2] More detailed about principles of interpretation see, for example: Sosipatrova N.E., Burov A.U. Interpretation of civil legal agreements in Russian and foreign legal systems. [Electronic resource] URL: http://www.unn.ru/pages/e-library/vestnik/19931778_2018_-_1_unicode/17.pdf (date of access: 27.07.2021).

[3] More so, in the newest practice the idea of attentive attitude to the person, controlling the debtor, is being consequently implemented. In particular, clause 19 Review of SC practice No. 1 from 2021 (approved by the Supreme Court of the Russian Federation 07.04.2021) specifies, that the non-payment of the debt to creditor on the particular agreement as itself doesn't indicate the necessary bankruptcy of the debtor, and in this conformity this fact cannot be considered as absolute proof of their necessary referring of its head to the court with bankruptcy appellation (Determination No. 305-ЭС20-11412) [Electronic resource] URL: http://vsrf.ru/stor_pdf_ec.php?id+1949716 (date of access: 27.07.2021). This explanation restricts obviously the opportunities of creditors to take the persons, controlling the debtor (in particular the director) to subsidiary liability, if in spite of the debt on one deals, in general the company runs stably.