

Debtor control does not mean registry control

The submission of monetary claims by the affiliated creditors in a bankruptcy case is usually accompanied by serious and sometimes lengthy legal disputes regarding the validity and sequence of such claims. This situation occurs due to the fact that to prove the unreality of business transactions performed by the affiliates and, as a result, to recognize the claims of the affiliate creditor as not a subject to inclusion in the register is sometimes quite difficult, more complicated than the requirements of an independent creditor. Since such creditors usually have a subjective connection with the debtor, through which they can access both the debtor's seals and the signatures of authorized persons on the relevant documents, and accounting registers and even information about the flow of funds on the accounts.

The term «affiliated» creditor in bankruptcy refers to persons who can influence the economic activities of a bankrupt debtor.

The basis for initiating bankruptcy proceedings is the failure to execute a judicial act in which all the circumstances of the court case have already been investigated, including the defendant's argument about the reality or imaginary nature of the transaction. Accordingly, the issue of the affiliation of the creditor-applicant in a bankruptcy case should not be examined by the court. In addition, other creditors cannot express their doubts about the affiliation of the creditor-applicant, due to the lack of the opportunity to participate in the consideration of the validity of the declaration of insolvency (bankruptcy) of the debtor.

It is the creditor-applicant, as a part of the consideration of the validity of the bankruptcy petition, is another procedural figure whose will is aimed on establishing the fact of the debtor's inability to settle his obligations, other than in the framework of the insolvency case. Thus, it bears the burden of refuting reasonable doubts about the imaginary nature of the contract on which its claim is based. Affiliated lender, in accordance with art. 65 of the Arbitration Procedure Code of the Russian Federation, must provide all possible evidence of the reality of the claim, disclose all material circumstances relating to the transaction, as well as prove the reasonableness and necessity of the actions performed in the transaction, as well as the conditionality of the transaction for «reasonable economic reasons».

The filing of the application by the affiliate creditor and its recognition as a justified allows, firstly, to choose the suitable candidate for arbitration manager, secondly, to influence decision-making at the meeting of creditors of the debtor, and thirdly, to reduce the percentage of monetary amounts that independent creditors will receive at the end of the bankruptcy procedure.

The argument about the affiliation of the debtor and the creditor is often a consequence of the corporate nature of their relationship. According to the recent legal position indicated by the Supreme court of the Russian Federation in case № A53-5956/2018, the existence of corporate ties is not a ground for refusing to initiate bankruptcy proceedings. Arguments about affiliation should be carefully considered

with consideration of the analysis of the corporate structure, since market relations assume that contractors are connected in order to achieve results and enter the Russian or international market. Even if the affiliation of creditors and the debtor is proved, the existence of a civil claim confirmed by the judicial act grants the right to initiate the procedure, regardless of whether the priority of satisfaction of such a claim is a subject to a reduction or not.

When considering the claim of an affiliated creditor for inclusion in the register already in a bankruptcy case initiated by a court, an ordinary standard of proof cannot be applied. The affiliated lender should not only provide clear and convincing evidence of the existence and amount of the debt, but also refute the corporate nature of the obligations from which it arose.

In the process of proving to an affiliate creditor, it is necessary to convince the court of the profitability, necessity and compliance with market conditions of the transaction. The purpose of a judicial review of such claims is to exclude both the court and other participants in the bankruptcy case from any reasonable doubts about the availability and amount of the debt, as well as its civil law characterization.

When submitting an application of the affiliated creditor to include a claim in the register of creditors' claims and accept it for production, it is presumed that other creditors of the debtor participating in the bankruptcy case of the debtor object to the declared claims. Competitive creditors can prove not only the legal affiliation of the applicant, but also the actual one. For example, in the case № A56-85167/2018 affiliated lender, was a member of the same holding company, in which the participants entered into agreement on cooperation and joint activities. The creditor submitted the documents to the court of the first instance that confirmed the provision of services to the debtor (the certificate of work performed, the set-off agreement), which was the basis for including the claim in the register of creditors' claims. However, the court of appeal excluded the specified claim from the register, as in the opinion of the judges, the documentary claims of the creditor were formed to artificially increase the accounts payable, and the judges did not see confirmation of the reality of the transaction.

The lenders must provide evidence of who and when the work stipulated by the contract could be performed, for example, photographs of the work performed, relevant examinations involving third parties that would testify to the validity of the transaction. Also, compliance with the claim procedure for long-term non-payment of debt will be an indicator of the integrity of the claimant's behavior, which will eliminate the suspicion of judges and other creditors about the imaginary transactions between the parties.

We have identified the following grounds for refusing to include the claims of affiliated creditors in the register of creditors' claims:

- inconsistency of accounting data regarding the accounts receivable of the creditor and the accounts payable of the debtor;

- contradictions in the data of the submitted documents;
- the same names appearing in the documentation of the creditor and debtor;
- lack of information about the details of the transaction and the services provided in open sources;
- lack of evidence of the validity of the contract.

Providing funds for business development or to support existing economic relations by entering into a loan agreement between the debtor and its controlling person is a common practice, since it is much more profitable to invest in a business than to close it. However, when including claims based on the loan agreement, there may be complications in bankruptcy, since there is a court practice on lowering the claims of the individuals, related to the re-qualification of the loan in the relationship to increase the authorized capital and subordination of the claims of the commercial lender. The creditor must prove that the existing loan agreement does not meet any of the four criteria for subordination of creditors' claims specified by the Supreme court of the Russian Federation : the loan agreement was not interest-free, the loan agreement is not perpetual, the loan indication in the Debtor's accounting statements, and the non-identity of the debtor's and the creditor's OKVED.

Thus, the creditor's affiliation with the debtor does not deny the fact of transactions, does not presume the fictitiousness of transactions, but increases the amount of evidence required for the court to exist of obligatory relations between the debtor and the creditor in order to balance the rights and interests of other debtor creditors.

Authors:

Zhanna Zhigalova - Junior Lawyer, GRATA International St. Petersburg

Andrey Matveenko – Lawyer Assistant, GRATA International St. Petersburg