

**AN OVERVIEW OF
THE RUSSIAN BANKRUPTCY CASE LAW,
published in the third quarter of 2015**

To determine whether it is necessary to assess the market value of the target of a contested transaction to prove that the debtor's consideration is inadequate, one should take account of the circumstances of the case.

(Ruling No. 304-ES15-3591 of the Chamber for Commercial Disputes of the Russian Supreme Court dated 5 August 2015 in case No. A02-629/2010) (Ruling of the CCD of the RCS dated 3 June 2015 in case No. A80-17/2013)

During bankruptcy litigation, a debtor's receiver applied to the state commercial court to contest a transaction to purchase and sell a transport vehicle under the grounds set in article 61.2(1) of the Bankruptcy Law, as a transaction made for an inadequate consideration.

By a ruling of the state commercial court of the first instance, which was upheld by the courts of appeal and of cassation, the claim was dismissed.

The courts of all three levels pointed out that the receiver failed to provide valid evidence to confirm the actual market price of the vehicle and to file a motion seeking that a court expert review be arranged to determine the market price at the court of first instance.

It followed from the actual circumstances of the case that the price of the contested transaction was many times lower than the price of the vehicle sold, at which the debtor bought it shortly before the transaction was consummated.

The Chamber for Commercial Disputes of the Russian Supreme Court (the "CCD of the RSC") set aside the judgments of the lower courts and sent the case for a new trial and pointed out as follows.

When the courts referred to the receiver failing to confirm with valid evidence the actual market price of the vehicle, they did not give any legal assessment of the argument that the vehicle purchased at RUB 1,100,000 was sold at RUB 100,000 two months after it was purchased with no evidence being provided that it was damaged and had lost most of its value during the two months mentioned.

During the new trial, the courts was recommended that a legal assessment be given of the arguments of the receiver that the price of the vehicle was reduced tenfold two months after the debtor made a transaction to purchase the vehicle, with no evidence being provided that the vehicle lost most of its value.

To avoid the risks of transactions being subsequently contested as transactions with inadequate consideration, we recommend that you, when consummating transactions, compare

the conditions and time limits when the debtor has purchased property and take account of the factors that may materially influence the value of property over the period when it was in the debtor's possession.

Current legislation does not prohibit any civil law contracts (including loan contracts) between a company and a member of it and claims of a member of a company arising out of the contract may be included in the register of the company's creditors.

(Ruling No. 302-ES15-3973 of the CCD of the RCS dated 6 August 2015 in case No. A33-16866/2013)

During debtor's bankruptcy, a creditor filed a claim with the state commercial court seeking that its claims arising out of a loan contract be included in the debtor's register of creditors.

When dismissing the claim, the court of first instance proceeded on the basis that the creditor was a member of the debtor, holding a 70% membership interest, for which reason such loan contracts should be treated as internal relationships between the member and the debtor, and the member's claim that loans be repaid may not compete with the obligations of the debtor as a party to business transactions before other transacting parties. In court's opinion, the member of the debtor may lay claims only to the property left after the claims of all other debtor's creditors are satisfied.

In addition to the conclusion that the claims fall under corporate relationships between the debtor and its member, the court of first instance also pointed out that the founding creditor did not have any financial means to transfer the funds to the debtor under loan contracts.

The court of appeal did not agree with the conclusions of the court of first instance that the creditor did not have the financial means to grant a loan and stated that the case files do not confirm that the creditor falsified the documents submitted or misstated the figures in the payment documents. For this reason, the lack of money granted under the loan contracts was not supported with the corresponding evidence which would clearly show that no money had been deposited by the lender.

At the same time, the court of appeal, when stating that the error by the court of first instance did not result in a wrong judgment being issued, agreed with the conclusion of the court that the creditor's claim relates to the corporate relationship between the debtor and its member, because the loan contracts were aimed at replenishing the debtor's current assets.

The state commercial court of the circuit upheld the conclusions of the court of appeal.

The Chamber for Commercial Disputes of the Russian Supreme Court (the “CCD of the RSC”) set aside the judgments of lower courts and referred the case for a new trial. It stated that the claim of the creditor, which was the debtor’s founder, relies on the loan contracts concluded between the creditor and the debtor and that such relationships were to be regulated by Chapter 42 of the Civil Code about a loan and were not of a corporate nature.

The CCD of the RSC pointed out that the debtor’s obligations to its founders (members) arising out of membership in the company include obligations that correspond to the corporate rights of the members and are regulated by corporate law. However, in case at hand no relevant and admissible evidence was submitted that the intent of the loan contracts was to replenish debtor’s current assets.

Therefore, the CCD of the RSC has formulated a legal position under which the fact that the debtor’s member acted as a lender is not sufficient to conclude that there is no lending relationship between the member and the company and that they only implemented the corporate relationship.

In referring the dispute for a new trial, the CCD of the RSC also pointed out that when the courts concluded that the creditor had no financial incapacity to transfer funds under loan contracts, they did not consider whether the debtor could have obtained funds from other sources.

Subsequent payments to repay credit made as provided for by a contract may not be considered related transactions.

(Ruling No. 309-ES15-2399 of the CCD of the RCS dated 7 August 2015 in case No. A50-20878/2012)

During a debtor’s bankruptcy, the receiver filed a claim with a state commercial court seeking that transactions be invalidated when the bank debited the debtor’s account and such transactions were closed less than a month before the debtor’s bankruptcy filing.

When it reconsidered the case, the court of first instance sustained the claims in part and stated that some of the bank’s actions in directly debiting the account as a repayment of the credit did not exceed one per cent of the debtor’s assets for the recent reporting period. For this reason, the court held those payments to be payments made in the ordinary course of business of the debtor to repay the credit under the credit contract.

When changing the ruling of the court of first instance, the court of appeal indicated that the court of first instance had wrongly reached the above conclusions that the price of the property (money) transferred under the transactions should be determined in respect of each separate payment.

In the opinion of the court of appeal, the payments in dispute were homogeneous and related, because they pursued the same objective, namely to discharge the monetary obligation to repay a bank credit and the payments were made under the same contract and between the same parties over a short period of time.

The court of appeal indicated that the specific feature of a credit contract as a contract for crediting a bank account (overdraft) does not affect the need to treat the payments in dispute as related transactions, because it is not possible to conclude that each separate payment was an isolated transaction aimed at repaying isolated tranches.

The state commercial circuit court upheld the conclusions of the court of appeal.

The Chamber for Commercial Disputes of the Russian Supreme Court (the “CCD of the RSC”) set aside the judgments of the lower courts and upheld the ruling of the court of first instance.

The CCD of the RCS pointed out that the courts of appeal and cassation did not take into consideration that the contract provided for the bank to directly debit the client’s account by the amount of arrears from the principal. Therefore, the subsequent payments made to repay the credit (direct debiting of the debtor’s account) were ordinary current payments under the loan contract that could not have been held related transactions.

The CCD noted that to determine whether the transaction was made in the ordinary course of business of the debtor, the court of first instance had reasonably considered that the debt under the contract was repaid in accordance with contractual terms that were not different from similar transactions that the debtor consummated on several occasions over a long period of time.

A court-appointed administrator whose claims seeking that debtor’s assets be handed over to him were dismissed may challenge the dismissal in accordance with article 61(3) of the Bankruptcy Law.

(Ruling No. 302-ES14-7980 of the CCD of the RCS dated 18 September 2015 in case No. A74-5012/2012)

During bankruptcy litigation, a court-appointed administrator filed a claim with the state commercial court seeking that an obligation be imposed on a former executive of the debtor to hand over assets in accordance with article 126 of the Bankruptcy Law.

By the ruling of state commercial court of first instance, the court-appointed administrator's claims were dismissed.

By returning the appeal against the ruling and citing article 264(1)(2) of the Commercial Procedure Code, the court of appeal held that the ruling of the court of first instance that the receiver sought to challenge could not be challenged under the appeal. The reason is that this was a ruling to refuse that evidence be produced (what is called "discovery of evidence"), which the court of first instance issued having regard to rules of article 66 of the Commercial Procedure Code (rules for recovering evidence) and in accordance with the explanations set in Resolution No. 35 of the Plenum of the Supreme Commercial Court dated 22 June 2012.

The court proceeded on the basis that provisions of article 61(3) of the Bankruptcy Law regulating the procedure for challenging certain rulings issued during bankruptcy litigation should not be applied in case at hand, because neither the Bankruptcy Law nor the Commercial Procedure Code provide for a challenge to be made to a ruling of a court issued based on a receiver's claim that discovery of evidence be given and this does not impede the progress of the case.

The commercial court of cassation upheld the ruling of the commercial court of appeal.

The Chamber for Commercial Disputes of the Russian Supreme Court (the "CCD of the RSC") set aside the judgments of the courts of cassation and of appeal and referred the isolated dispute to the court of appeal so that it could decide whether to admit the receiver's appeal for hearing.

The CCD pointed out that, since the Commercial Procedure Code does not provide for rulings to be issued and, therefore, challenged with regard to the discovery of a debtor's accounting and other documents, seals, stamps and assets, the court must resolve the corresponding issue under the rules for the discovery of evidence.

Since, after the question of the discovery of documents and tangible items has been resolved, a court-appointed administrator may be granted a writ of execution enabling him to enforce the court ruling, the interested party should be able to challenge the ruling issued on the above matter. Otherwise, the interpretation of the law by the courts under the case would groundlessly restrict the right to a legal defence.

The CCD of the RSC has formulated a position whereby a person on whom an obligation was imposed to give discovery of documents and tangible items that had been claimed. The

court-appointed administrator, whose claims were dismissed, may challenge the corresponding ruling in accordance with the procedure provided for in article 61(3) of the Bankruptcy Law.

It is worth mentioning that in its Ruling dated 4 February 2015 in case No. A07-3871/2012, the CDD of the RSC developed a similar legal position with regard to the right of any person on whom an obligation has been imposed to give discovery of documents and tangible items claimed and to challenge the corresponding court decisions.

The violation by a debtor's executives of the rules for accounting and cash flow received through a cashier does not constitute the grounds for depriving a participant in shared construction, who has discharged his obligations in good faith, of the right to claim that the residential premises be delivered to him, provided he has proven that the money was paid to the debtor

(Ruling No. 307-ES15-8607 of the CCD of the RCS dated 29 September 2015 in case No. A21-6725/2013)

A developer and a participant in shared construction concluded a number of preliminary agreements and, subsequently, principal contracts for shared construction of multiple family dwellings. The participant in shared construction made payments under the above contracts by paying money through the debtor's cashier.

After the developer was declared insolvent (bankrupt), with the rules for bankrupting a developer being applied, as provided for by clause 7 Chapter IX of the Bankruptcy Law, the participant in shared construction applied to the state commercial court, which was hearing the bankruptcy case, seeking that its claims be included in the debtor's register of creditors' claims and that the residential premises be delivered to him.

In dismissing the claims, the courts of three instances proceeded on the basis that the participant in shared construction failed to substantiate the need for paying cash to the debtor given that the applicant had a bank account and failed to prove the fact that money was paid to the debtor based on paying-in cash slips of the developer submitted to the case files. The reason was that the debtor's accounting documents (cash book) do not reflect the above money being received and credited to the debtor's account.

The Chamber for Commercial Disputes of the Russian Supreme Court (the "CCD of the RSC") set aside the judgments of the courts of three instances and referred the case for a new trial at the court of first instance.

The CCD of the RSC stated that the list of evidence to decide whether the money was actually transferred, which was given in clause 26 of Resolution No. 35 of the Plenum of the Supreme Commercial Court dated 22 June 2012, was not an exhaustive list. Similarly, it may not be ruled out that claims based on money being transferred to the debtor, may be found grounded, as evidenced by the paying-in cash slips, provided such a transfer is proven by other case materials.

The CCD of the RSC pointed out that the claimant had proven the fact that money was paid, in accordance with the agreement reached by the parties to the shared construction contract, with paying-in cash slips. The receiver did not claim that the documents were falsified or were inaccurate. The case files contain evidence that the participant in shared construction had the financial means to pay the money in the corresponding amount.

The CCD of the RSC has formulated the position in accordance with which the fact that the debtor's executives violated the rules for accounting and cash flow received through the cashier does not constitute grounds for depriving a participant in shared construction, who has discharged his obligations in good faith, of the right to claim that the residential premises be delivered to him. Meanwhile, the case was referred for a new trial on the grounds that the courts did not examine the above evidence confirming that the participant in shared construction could have performed the contract.