Joint Responsibility of the Parent Company under Obligations of Subsidiary Company

Tatiana Vitalievna Melnikova, Yuliya Vladimirovna Shalyaeva, Evgeny Stepanovich Shcheblyakov, Anjelica Alisherovna Kuzhleva,

Abstract ***The objective of this article is to identify the problems of joint responsibility of the parent company for the obligations of the subsidiary company and propose a solution to them. The author has used the analysis method while studying the legislation governing the joint responsibility of the parent company, its law enforcement practice and scientific literature on problems in this area. The experience of legal regulation of joint responsibility of the parent company under the obligations of the subsidiary company has been compared with the legal experience of the United States of America. Studying the conditions for holding the parent company liable for the obligations of a subsidiary, the author has concluded that at present, the Russian legislation defining the legal status of the parent companies is imperfect and needs to be changed. Accordingly, a new version of paragraph 2 of clause 2 of Article 67.3 of the Civil Code of the Russian Federation has been proposed, as well as recommendations for the Supreme Court of the Russian Federation.***

Key Words: Parent Company; Subsidiary; Joint Responsibility; Instrumentality Rule.

I. INTRODUCTION.

Despite the reform of the Russian civil legislation on legal entities, not all controversial issues that exist in civil law and practice, including law enforcement, have been resolved. As noted by Ye. A. Sukhanov, "in the current Russian corporate law there is no comprehensive regulation of the law of concerns (or holdings) in the understanding of developed foreign legal orders. There are only a few attempts of such regulation, which are not based on any single well-thought-out approach to this one of the most difficult parts of corporate relations" [1]. The legal regulation of the joint responsibility of the parent company for the obligations of the subsidiary has several drawbacks. This, for example, is the problem of recognizing "subsidiary status" [2]. The nature of the responsibility of the parent company for the obligations of the subsidiary and its conditions continue to be the subject of discussion. This article is devoted to these exact issues.

Revised Manuscript Received on November 15, 2019

Tatiana Vitalievna Melnikova,Siberian Federal University
79 Svobodnyi Ave., 660041 Krasnoyarsk, Russian Federation
Yuliya Vladimirovna Shalyaeva, Katanov State University of Khakassia
90 Lenina Ave., 655017 Abakan, Russian Federation
Evgeny Stepanovich Shcheblyakov, Krasnoyarsk State Agricultural University,
90 Mira Ave., 660049 Krasnoyarsk, Russian
Anjelica Alisherovna Kuzhleva, Krasnoyarsk State Agricultural University,
90 Mira Ave., 660049 Krasnoyarsk, Russian

II. METHODS

In order to identify gaps in the legal regulation of joint responsibility of the parent company under the obligations of the subsidiary, the analysis method has been used, with the help of which Russian legislation on the joint responsibility of the parent company, court practice in this area and various scientific approaches related to the problems of legal regulation of these public relations have been studied; a comparative method by which the legal experience of Russia and the United States of America has been compared; a genetic method for assessing the legal nature of a given institution, as well as a formal legal method, the use of which was necessary, first of all, in studying the conditions of joint responsibility of the parent company.

III. RESULTS

2.1. Legislation: approaches to determining the conditions of joint responsibility of the parent company.

It should be noted that the current legislation not only does not contribute to the resolution of the investigated problem but introduces even more questions into it. So, according to paragraph 2 clause 2 of Article 67.3 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of the Russian Federation), the parent business partnership or company is liable jointly with the subsidiary for transactions concluded by the latter pursuant to instructions or with the consent of the parent business partnership or company (clause 3 of Article 401), except for cases of voting of the parent business partnership or company on the issue of approving a transaction at a general meeting of participants of a subsidiary, as well as approving a transaction by the management body of the parent business company if the need for such approval is provided for by the charter of the subsidiary and (or) parent company.

On the other hand, in accordance with paragraph 2 clause 3 Article 6 of the Law on Joint Stock Companies [3], the parent company (partnership), which has the right to give the subsidiary binding instructions, is liable jointly with the subsidiary for transactions concluded by the latter pursuant to such instructions. The parent company (partnership) is considered entitled to give binding instructions to the subsidiary only if this right is provided for in the contract with the subsidiary or the charter of the subsidiary.

According to paragraph 2 clause 3 Article 6 of the Law on Limited Liability Companies [4], the parent business company (partnership), which has the right to give binding instructions to the subsidiary company, is liable jointly with the subsidiary for transactions concluded by the latter pursuant to such instructions.

Thus, the contradictions between the aforementioned regulatory legal acts consist, first of all, in the fact that, in accordance with the Civil Code of the Russian Federation, unlike the Law on Joint-Stock Companies and the Law on Limited Liability Companies, one of the conditions for joint responsibility of the parent company may be, among others, its consent to conclude a transaction by a subsidiary. In addition, the Law on Joint-Stock Companies establishes, in comparison with the Civil Code of the Russian Federation, a mandatory additional condition for joint responsibility of the parent company - the right of the latter to give instructions should be provided for in the contract with the subsidiary or in the charter.

This discrepancy of the legislation and the need for its elimination has been repeatedly indicated in the scientific literature [5].

2.2. Judicial practice on the conditions of joint responsibility of the parent company.

Judicial practice proceeds from the fact that in order to bring the parent company to joint liability, it is necessary to have a combination of three conditions: two business entities must be in the parent and subsidiary relations; the parent company should have the right to give binding instructions to the subsidiary; the transaction must be concluded in pursuance of such instructions [6].

At the same time, arbitration courts more often refuse to satisfy claims, justifying this by the fact that the complainant did not prove that the transaction was concluded by the corporation pursuant to binding instructions or with the direct consent of the company [7], in connection with which it should be noted that the legal norm, enshrined in paragraph 2 clause 2 Article 67.3 of the Civil Code of the Russian Federation, is almost inoperative.

2.3. Scientific approaches to determining the list of conditions for joint responsibility of the parent company for transactions concluded pursuant to its instructions or with its consent by the subsidiary.

Some possibilities for interpreting this phenomenon can be gleaned from classical Roman constructions, which established the subject's responsibility for the actions of a third party. So, for actions committed by the subject with the knowledge of the owner, the responsibility lies with the owner. Claims from quasi-delicts ("from the poured out and thrown out of the windows of the house" to the owner of a ship or hotel for damage to the property of guests) allowed the victim to receive compensation at the owner's expense, regardless of the latter's participation in the damage (D.9.3) [8].

Responsibility from a quasi-delict could arise if it was not possible to establish the perpetrator of illegal actions. The owner responded by virtue of his position. If there are several possible offenders, and, for example, if it was difficult to determine the occupant of which premises on the top floor caused harm, a lawsuit was brought against any of the owners. The latter was granted the right to demand compensation from the others in a partnership claim, i.e. on the basis of joint responsibility (D.9) [9].

Thus, it seems quite logical that in medieval and modern Romanesque jurisprudence it was from this institution that responsibility for third parties who were entrusted with liability grew.

Currently, science has developed various approaches to determining the list of conditions for joint responsibility of the parent company for transactions concluded pursuant to its instructions or with its consent by the subsidiary. So, A. N. Zakharov singles out "the presence of corporate control (the presence of two persons in the parent and subsidiary relations) as "conditions for bringing the parent company to joint responsibility"; performance by the parent company of actual actions that determined the actions of the subsidiary in relations with third parties" [10]. In turn, A. Vorozhevich indicates as such the transactions concluded by the subsidiary pursuant to the instructions of the parent company, as well as the transactions concluded by the subsidiary with the consent of the parent company [11].

Thus, both researchers, proposing their own ways to resolve the analyzed problem, do not attach importance to the general conditions of civil and legal liability.

In this regard, the position of V. V. Gromov is interesting, who writes that "joint and special conditions of civil liability should be distinguished by the obligations of a subsidiary. Joint are the conditions of civil and legal liability under the obligations of a subsidiary, in the presence of which liability is borne by the subsidiary as an independent legal entity. Special conditions of civil and legal liability for the obligations of a subsidiary are conditions stipulated by civil law under which liability for obligations of a subsidiary arising due to the existence of joint conditions is assigned to the parent business company" [12].

Unlike previous approaches, the authors associate the subject of discussion with the joint conditions of civil and legal liability. At the same time, the author's approach to the definition of these conditions raises the question of on what basis the parent society should be responsible for the illegal actions of another subject of law.

IV. DISCUSSION

It seems that in order to solve the problem of the conditions of joint responsibility of the parent company under the obligations of the subsidiary, it is necessary, firstly, to distinguish between the issue of such conditions and the problem of the legal status of the subject of liability; secondly, - to analyze all the conditions of joint responsibility of the parent society and identify their specifics.

3.1. As for the legal status of the subject of liability, without touching upon the issue of recognition of "subsidiary status" in this study, which is no less complicated than the problem of the conditions of responsibility of the parent company, we will touch on the question of how fair is the assignment of joint responsibility to the parent company.

Science does not give a definite answer to this question. Thus, A.V. Egorov and K.A. Usacheva write about the joint responsibility of the parent company that "such mechanism hardly coincides in its purposes and means of their implementation with what the doctrine of "removal of corporate cover" implies [13]. O. V. Gutnikov believes that this problem should be solved in favor of subsidiary responsibility of the parent company [14].

It seems that the correct solution is to maintain the joint responsibility of the parent company. We should agree with Thomas Chang that the parent company should be liable for the obligations of the subsidiary company, firstly, because the purpose of creating the subsidiary is to diversify the risks of the first,

which should not affect the risks of creditors. Secondly, the parent company has the ability (by virtue of full or predominant participation in the authorized capital of the subsidiary) to manage the risks of the latter [15].

That is, the activities of the subsidiary are essentially the activities of the parent company.

In this connection, the position of the Supreme Court of the Russian Federation on one of the cases is interesting when it canceled the acts of the lower courts by its ruling and sent the case for reconsideration due to the fact that the latter did not evaluate the arguments of the defendant that "since the Company is a subsidiary of the joint-stock company Russian Railways and was formed on the basis of the property of Russian Railways JSC, the rules of law imposing an obligation on Russian Railways JSC to provide the bodies of special transportation with the property necessary for their core business activities".

As a result, the Supreme Court of the Russian Federation has allowed the parent company and its subsidiaries to be treated as a "single economic entity". Such unity of parent and subsidiary corporations in the interests of creditors should be realized in the joint responsibility of corporations.

3.2. As to the question of the conditions of joint responsibility of the parent company for the obligations of the subsidiary company, it follows from the analysis of paragraph 2 clause 2 Article 67.3 of the Civil Code of the Russian Federation that for the onset of joint responsibility of the parent company it is necessary to have such conditions as illegality, as well as, as a rule (depending on the measure of civil and legal responsibility), the presence of damage or losses and a direct causal link between the illegal behavior of the parent company and the resulting harmful consequences. Proof of guilt in the actions of the cause of harm, taking into account the legislator's reference to the clause 3 Article 401 of the Civil Code of the Russian Federation, is not required. Each of these conditions has its own specifics.

3.2.1. Wrongfullness

The legislation does not disclose the specifics of the content of such a condition of joint responsibility of the parent company as wrongfulness. The wrongfulness cannot consist in the fact that the parent company has given instructions or consent to the conclusion of the transaction to the subsidiary company. Nor is the conduct of the parent company wrongful by virtue of the fact that the actions of the subsidiary company are wrongful, since the conduct of the subject being held liable may be wrongful.

It seems that the wrongfulness of the conduct of parent company lies in the intention to harm another subject.

In this regard, it is interesting to consider foreign experience, in particular, that of the United States. For example, in one of the cases, the US court explained that in order to hold the parent company liable for the obligations of the subsidiary, it is necessary to take into account the following factors: "(1) Such domination and control of the parent company that is so complete that the subsidiary corporation cannot have a separate opinion or will; (2) the use of such domination and control for the purpose of fraud or other dishonest or improper conduct; (3) damage or unfair loss as a result of such control" [17]. This rule is called InstrumentalityRule in US law.

In other words, the wrongfulness of the parent company's behavior consists in the use of control over the subsidiary corporation in achieving goals that contradict legal acts. Such an understanding of wrongfulness can be found in court practice, as well as in other states. For example, in New Jersey, the wrongful conduct of a parent company is considered to be a violation of a statutory duty of fairness that harms others or through which an unfair advantage is derived at the expense of another person [18].

In this connection, it seems that it is necessary to enshrine in the Russian legislation a provision on wrongfulness in the conduct of the parent company as a condition of its joint responsibility. At the same time, wrongfulness should consist precisely in the dishonest use of control over a subsidiary company.

3.2.2. Presence of damage or losses

As for such a condition of civil and legal liability as the presence of damage or losses, it can now be, as follows from clause 2 of Article 67.3. of the Civil Code of the Russian Federation, only contractual. Obviously, this is not the right situation, and the joint responsibility of the parent company should be extended to cases of non-contractual damage.

3.2.3. Causal relation

The existence of a causal relation, in accordance with clause 2 of Article 67.3 of the Civil Code of the Russian Federation, is determined by the existence of instructions or consent of the parent company to the transaction made by the subsidiary. However, as noted above, this provision, first of all, makes the legal provision on joint responsibility of the parent company unviable, in this connection, obviously, this requirement of the legislation should be excluded. A causal relation should be established when the parent company or its affiliates have obtained any illegal benefit as a result of the subsidiary's activities.

V. CONCLUSION

Thus, Russian civil legislation needs to be improved. In order to solve the problem of the conditions of joint responsibility of the parent company under the obligations of the subsidiary company, it is necessary to make changes to paragraph 2, clause 2, Article 67.3 of the Civil Code of the Russian Federation, formulating it in the following wording: "The parent company or company is jointly responsible with the subsidiary for losses or damage caused to third parties as a result of its misuse of control over the subsidiary (clause 3 Article 401). However, the misuse of control is assumed, unless the parent company proves otherwise.

The Supreme Court of the Russian Federation, in turn, taking into account the existing experience, both Russian and foreign, should give an explanation of what facts indicate the unfair use of control by the parent company. It seems that such facts may include the fact that the subsidiary company has not been given sufficient assets to conduct its business activities; that the subsidiary company has committed a public offence as a result of which losses or damage to third parties have been caused; that the subsidiary company has been established in order to prevent the use of its rights by anyone; and that the subsidiary company is fictitious, as evidenced, for example, by its management and document management by the parent company, etc.

REFERENCES

1. Suhanov E. A. Sravnitel'noe korporativnoe pravo (Comparative Corporate Law). M.: Statut publ., 2014. P. 254.
2. This problem is considered, for example, by Lomakin D.V. Ocherki teorii aktsionernogo prava i praktiki primeneniya aktsionernogo zakonodatel'stva (Essays on the theory of joint-stock law and the practice of applying joint-stock legislation). M., 2005. P. 71; Portnoy K. Ya. Pravovoe polozhenie kholdingov v Rossii: Nauchno-prakticheskoe posobie (Legal status of holdings in Russia: Scientific and practical guide). M., 2004. P. 21; Ruzakova E. V. Entrepreneurial multi-entity formations: legal model and reality // Pravovoe polozhenie sub"ektov predprinimatel'skoy deyatel'nosti (The legal status of business entities). Pod red. V.S. Belykh. Ekaterinburg, 2002, P.220; Tikhomirov M. Yu. Pravovoe polozhenie kholdingov v Rossii: Nauchno-prakticheskoe posobie (Legal status of holdings in Russia: Scientific and practical guide). M., 2004. P. 21.; Responsibility of the parent company for the obligations of the subsidiary // Korporativnye strategii (Corporate strategies). 2008. No. 31.
3. Federal'nyy zakon ot 26.12.1995 N 208-FZ (red. ot 15.04.2019) «Ob aktsionernykh obshchestvakh» (Federal Law of 26.12.1995 N 208-ФЗ (wording as of 15.04.2019) "On Joint Stock Companies") // SPS Konsul'tant Plyus.
4. Federal'nyy zakon ot 08.02.1998 N 14-FZ «Ob obshchestvakh s ogranichennoy otvetstvennost'yu» (Federal Law of 08.02.1998 No. 14-ФЗ "On Limited Liability Companies" (wording as of 23.04.2018) (red. ot 23.04.2018 g.) // SPS Konsul'tant Plyus.
5. Gutnikov O. V. Legal responsibility in corporate relations // Vestnik grazhdanskogo prava (Civil law journal). 2014. No. 6. P. 51-117; Shishkin I. S. Korporativnoe pravo (Corporate law). M.: VoltersKluver publ., 2007. 648 p.
6. For example, Postanovlenie FAS Ural'skogo okruga ot 19 aprelya 2013 g. № F09-4093/11 po delu № A76-20279/2010 (Resolution of the Federal Antimonopoly Service of the Urals District No. Ф09-4093/11 of April 19, 2013 in case No. A76-20279/2010) // SPS Konsul'tant Plyus.
7. For example, Opredelenie VS RF ot 22.02.2017 po delu № 308-ES16-20854; Opredelenie VS RF ot 15.02.2017 po delu № 308-ES16-20313; Opredelenie VS RF ot 26.01.2017 po delu № 301-ES16-19496; Opredelenie VS RF ot 25.01.2017 po delu № 305-ES16-19126; Opredelenie VS RF ot 14.10.2016 po delu № 303-ES16-14074 (Ruling of the Supreme Court of the Russian Federation of 22.02.2017 in case No. 308-ES16-20854; Ruling of the Supreme Court of the Russian Federation of 15.02.2017 in case No. 308-ES16-20313; Ruling of the Supreme Court of the Russian Federation of 26.01.2017 in case No. 301-ES16-19496; Ruling of the Supreme Court of the Russian Federation of 25.01.2017 in case No. 305-ES16-19126; Ruling of the Supreme Court of the Russian Federation of 14.10.2016 in case No. 303-ES16-14074) // SPS Konsul'tant Plyus.
8. Pamyatniki rimskogo prava: Zakony XII tablits. Institutsii Gaya. Digesty Yustiniana (Monuments of Roman law: Laws of XII tables. Institutions of Guy. Justinian Digests). M. Zertsalo publ., 1997. P.315-328.
9. The same.
10. Zakharov A. N. Privlechenie osnovnogo obshchestva k solidarnoy otvetstvennosti po obyazatel'stvam dochernego obshchestva (Bringing the parent company to joint and several liability for the subsidiary's obligations). Avtoreferat dis. na soiskanie uch. step. kand. yurid. nauk. M., 2015. P. 8.
11. Vorozhevich A. Joint responsibility of the parent company for the debts of its subsidiaries: is it possible to raise // Korporativnye strategii. 2017. No. 46.
12. Gromov V. V. Pravovoy status khozyaystvennogo obshchestva kak sub"ekta grazhdansko-pravovoy otvetstvennosti po obyazatel'stvam dochernego obshchestva (Legal status of the business entity as a subject of civil liability for the obligations of the subsidiary). Avtoreferat dissertatsiya na soiskanie uchenoy stepeni kand. yurid. nauk. M., 2005.3. 9.
13. Egorov A. V., Usacheva K. A. The doctrine of "removal of corporate cover" as a tool for distribution of risks between members of the corporation and other subjects of turnover // Vestnik grazhdanskogo prava (Civil law journal). 2014. No. 1. P. 64.
14. Gutnikov O. V. Ukaz. soch. P. 110.
15. Thomas K. Cheng. An Economic Analisis of Limited Shareholder Liability in Contractual Claims // Berkeley Business Law Journal, Vol. 11, N 1, 2014. P. 160-161.
16. Opredelenie VS RF ot 06.06.2017 po delu № 305-ES17-822 (Ruling of the Supreme Court of the Russian Federation of 06.06.2017 in case No. 305-ЭС17-822). The same - Opredelenie VS RF ot 16.02.2017 po delu № 302-ES16-15043 (Ruling of the Supreme Court of the Russian Federation of 16.02.2017 in case No. 302-ЭС16-15043).
17. New York Association for Retarded Children Inc. v Keaton, N 68629, 1993. N. Y.App.Div. WL 539770.
18. Macfadden v Macfadden, 139 A 2d 774, 49N.J.Super. 356 (App.Div. 1958).