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Grounds for subordination of the claims of the debtor's controlling persons and persons affiliated with them in cases of insolvency (bankruptcy) of legal entities

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Introduction

Relevance of the research topic. In business practice, the model of financing a company's activities through loans issued to it by a shareholder or other controlling person is widely used. Compared to a contribution to the authorized capital, this model is much simpler and more convenient for a shareholder: to deposit funds, he does not need to initiate the procedure for increasing the authorized capital, and in order to withdraw them, he does not need to make a decision on paying dividends.

In most legal systems, including Russian, the financing of a company by its own shareholder through the issuance of loans is considered permissible.

At the same time, in the event of the company's insolvency, this method of financing allows the shareholder to claim a pro rata part of the proceeds from the sale of the bankruptcy estate, as well as in some cases - to control the bankruptcy procedure.

In this regard, the legislation and judicial practice of a number of countries have developed rules on subordination, that is, lowering the priority of claims of shareholders and other persons controlling the debtor. In some jurisdictions, such as Germany, any claims based on funding received by the company from its shareholder are subject to subordination (the "hard" model of subordination), while in others, the rules on subordination are applied if there are certain grounds, usually when providing funding to a company in crisis (the "soft" model of subordination).

In support of the necessity of subordination of controlling creditors' claims, many arguments are given, according to which subordination acts as a mechanism for fair distribution of risks between external and internal creditors, specific sanction for the negative consequences of delaying the opening of bankruptcy proceedings, measure aimed at stimulating earlier opening of bankruptcy proceedings, etc. Arguments of opponents of subordination are concentrated in the plane of negative incentives that subordination. In their opinion, it creates risks for shareholders who are trying to get the companies under their control out of a crisis situation by providing debt financing.

In Russia, the practice of subordination of claims of members of companies and related persons began to take shape in 2017-2018, and was systematized in the Review of the Supreme Court of 29.01.2020[1] and has since been actively used in the practice of arbitration courts. Thus, in accordance with the established practice, a subordinated claim is subject to satisfaction after the claims of bankruptcy creditors declared after the register of creditors' claims is closed, but it takes priority over the claims of persons receiving the debtor's property during the distribution of the liquidation quota. A creditor under a subordinated claim is restricted in the right to vote at a creditors' meeting and has only the procedural rights of a person participating in a bankruptcy case (paragraph 14 of the Review). The basis for subordination may be the occurrence of a claim either as a result of crisis financing, or in the circumstances initial undercapitalization (paragraph 3.1, paragraph 9 of the Review of the Supreme Court of 29.01.2020), that is, a "soft" model of subordination has been implemented in the domestic legal order.

To date, the grounds for subordination of claims of debtor’s controlling persons and their affiliates have not been established at the legislative level, and many controversial issues of subordination in crisis financing and initial undercapitalization have not been resolved even at the level of judicial practice. Draft Law No. 1172553-7, which is under consideration by the State Duma[2] of the Russian Federation, only transfers to the legislative level a significant part of the clarifications of the Review of the Supreme Court of 29.01.2020, but does not solve many problems of their application, such as defining the concept of a controlling person for the purposes of subordination, defining the concepts of financial crisis and insufficient capitalization, etc.

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[1] Review of judicial practice in resolving disputes related to the establishment in bankruptcy proceedings of the claims of the controlling debtor and persons affiliated with him (approved by the Presidium of the Supreme Court of the Russian Federation on January 29, 2020) // "Bulletin of the Supreme Court of the Russian Federation", No. 7, July, 2020, ATP "Consultant" Plus”, hereinafter - Review of the Supreme Court dated 01/29/2020, Review of the Supreme Court of the Russian Federation dated 01/29/2020, Review.

[2] Bill No. 1172553-7 “On amendments to the Federal Law “On Insolvency (Bankruptcy)” and certain legislative acts of the Russian Federation” (regarding reform of the bankruptcy institution), introduced to the State Duma of the Russian Federation by the Government of the Russian Federation on May 17, 2021, hereinafter referred to as - Bill No. 1172553-7. Source: https://sozd.duma.gov.ru/bill/1172553-7 (date of last access - October 26, 2023).

Subordination of claims of the debtor's controlling persons and persons affiliated with them considered in this dissertation should be distinguished from the concepts similar in semantics and meaning: contractual subordination[3], subordination of claims that arose as a result of restitution when the debtor's transaction was declared invalid (clause 2 of Article 61.6 of Federal Law No. 127-FZ of 26.10.2002 "On Insolvency (Bankruptcy)", hereinafter referred to as according to the text - the Bankruptcy Law)[4]. In these cases, subordination is used only as a legal means, the application of which is stipulated by law or contract. In turn, subordination of creditors' claims that are in a corporate relationship with the debtor has neither a legislative basis nor a long history of application in judicial practice, and in essence has prerequisites that are fundamentally different from other cases of subordination. In this regard, when speaking about subordination in the framework of this dissertation, the author refers exclusively to the subordination of claims of debtor's controlling persons and their affiliates.

It is also necessary to distinguish the "true subordination" considered in this dissertation from the so-called "false subordination" - cases when claims of persons affiliated with the debtor are subject to rejection due to the debtor's lack of a corresponding obligation (paragraph 5, paragraph 8 of the Review of 29.01.2020). These cases are often similar in their factual background to disputes about the subordination of a claim, but they do not relate to "true subordination", since subordination implies the existence of an obligation, and in the explanations given in paragraphs 5 and 8 of the Review of 29.01.2020, the obligation is recognized as absent.

The relevance of this study is determined by the following circumstances:

First, in the literature and explanations of the Supreme Court, there is no uniform and consistent understanding of the legislative and political-legal bases of

[3] See Tyazhbin M.D. Agreement of creditors of one debtor on subordination in the system of private law // Bulletin of Civil Law. 2021. N 3. P. 7 – 107, Rodina N.V. Contractual subordination of creditors' claims in Russian jurisdiction: specifics and implementation features // Entrepreneurial Law. 2021. N 3. P. 64 - 72.

[4] Federal Law of October 26, 2002 No. 127-FZ "On Insolvency (Bankruptcy)" // Collection of Legislation of the Russian Federation. - October 28, 2002. - No. 43. - Art. 4190, SPS "Consultant Plus".

the rules on subordination of claims of persons who are in a corporate relationship with the debtor. There are different and sometimes mutually exclusive ideas about why the claims of creditors affiliated with the debtor should be satisfied in a lower priority order compared to "external" creditors. The answer to this question depends on the range of persons whose claims can be subordinated, the conditions for their subordination, and exceptions to the rules on subordination.

Secondly, it is necessary to decide on the range of persons whose demands can be subordinated based on the goals of the institution of subordination. The concept of a debtor's controlling persons used in current practice was initially introduced for the purpose of applying the rules on subsidiary liability (chapter III.2 of the Bankruptcy Law), and does not always meet the goals and objectives of the institution of subordination.

Third, it is necessary to decide what mandatory claims can be considered to have arisen in connection with the provision of financing to the debtor, and whether the application of subordination rules should be limited to such claims in general.

Fourth, it is impossible to ensure uniformity of law enforcement practice without establishing common criteria for the financial crisis and initial undercapitalization - concepts used as the two subordination grounds provided for by the Review of 29.01.2020 and Draft Law No. 1172553-7.

In view of the above, the political and legal grounds, goals and objectives of the institution of subordination, as well as specific formal and legal grounds for applying the rules of subordination require scientific understanding and detailed legal regulation.

Degree of development of the topic. Due to the fact that the institution of subordination was adopted by the judicial practice relatively recently, and the corresponding legislative regulation is completely absent, the problems of subordination are discussed only in a small number of scientific papers.

The available works, both of a dissertation and other nature, which began to appear mainly after the first cases of the Supreme Court of the Russian Federation on the status of claims of shareholders in business entities, examine the arguments

for and against subordination as such, as well as the experience of foreign jurisdictions and the models of subordination used in them. At the same time, the theoretical understanding of the rules on subordination formed by the Supreme Court of the Russian Federation and the formulation of definitions of key concepts for these rules are still given rather little attention.

Among the dissertation studies devoted to the subordination of persons controlling the debtor, we should especially mention the dissertation of A.I. Shaidullin[5], whose author thoroughly investigated and summarized the history and peculiarities of regulating subordination issues in Germany and Austria, as well as analyzed the key arguments for and against the introduction of the institution of subordination and considered some issues of its application. To date, this work is the most comprehensive study of subordination as a legal phenomenon. At the same time, the study of specific grounds for subordination in the work of A.I. Shaidullin is given a very modest place, which can be explained by the author's commitment to the model of "hard subordination", in which all claims based on financing provided to the debtor by controlling persons are subject to subordination.

In the dissertation of I. V. Shirokova[6], the subordination of claims as a civil law mechanism is considered in detail, and the elements and stages of this mechanism are analyzed. N. V. Rodina's dissertation[7] is also devoted to the mechanism of subordination of claims in bankruptcy, which is considered from the point of view of the legal methods and legal means used, while special attention is paid to the agreement as a legal means of subordination of claims. Both of these

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[5] Shaydullin A.I. Subordination of the obligatory claims of debtor's controlling persons and persons affiliated with them in bankruptcy cases of business companies: a dissertation for the degree of candidate of legal sciences. https://izak.ru/science/dissertatsionnye-sovety/dissertatsionnyy-sovet-d503-001-01/subordinatsiya-obyazatelstvennykh-trebovaniy-kontroliruyushchikh-dolzhnika-i-affilirovannykh-s-nim-l/ (date of last access – 03.10.2023).

[6] Shirokova E.V. Civil law mechanism for subordination of creditors' claims in corporate bankruptcy. Dissertation for the degree of candidate of legal sciences. https://www.ulsu.ru/media/uploads/hairutdinova%40ulsu.ru/2021/07/10/%D0%B4%D0%B8%D1%81%D1%81%D0%B5%D1%80%D1%82%D0%B0%D1%86%D0%B8%D1%8F%20%D0%95.%D0%92.%20%D0%A8%D0%B8%D1%80%D0%BE %D0%BA%D0%BE%D0%B2%D0%BE%D0%B9%20.pdf (last accessed 05/28/2023).

[7] Rodina N.V. The mechanism of subordination of creditors' claims in the process of insolvency (bankruptcy) of legal entities: problems of legal regulation. Dissertation for the degree of candidate of legal sciences. https://istina.msu.ru/download/435266737/1qmtf3:VvI-mcNKwpp2LRFgqM5Z6w_6g7k/ (last access date: 10/01/2023).

studies have left out a detailed analysis of the grounds for compulsory (non-contractual) subordination of claims, which is the main subject of this dissertation.

Separate publications of such authors as Aloyan A.E.[8], Belousov I.A.[9], Galkin S.S.[10], Kokorin I.V.[11], Kudinova M.S.[12], Podshivalov T.P.[13], Ryapolova O.A.[14], Safonov A.V.[15], Suvorov E.D.[16], Fedotov D.V.[17], Chuprikov M.V.[18], Shevchenko I.M.[19] and others are also devoted to the problem of subordination of claims of shareholders and other controlling persons. Since these publications focus primarily on the fundamental question of the need for subordination and some specific issues of applying this institution in practice, there is a need for a comprehensive study of the grounds for subordination within the framework of the domestic legal order.

The object of the study is relations related to the exercise of creditors' rights by persons controlling the debtor in the framework of bankruptcy cases of business entities and legal entities.

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[8] Aloyan A.E. Problems of implementation of the doctrine of recharacterization in the Russian legal system // Bulletin of Civil Law. 2017. N 6. P. 221 - 240.

[9] Belousov I.A. Subordination of loan claims of corporation participants in a bankruptcy case // Bulletin of Economic Justice of the Russian Federation. 2018. N 5. P. 120 - 169.

[10] Galkin S.S. Subordination of creditor claims arising after the initiation of bankruptcy proceedings: possible law enforcement models de lege lata // Bulletin of the Arbitration Court of the Moscow District. 2020. N 2. P. 79 - 90, Galkin S.S. On the issue of competitive subordination of claims from capital-substituting transactions with the participation of persons controlling the debtor: political, legal and law enforcement aspects // Entrepreneurial Law. Application "Law and Business". 2018. N 3. P. 45 - 51.

[11] Kokorin I.V. All creditors are equal, but some are more equal than others. On the issue of subordination of corporate loans during bankruptcy in Russia, Germany and the USA // Bulletin of Economic Justice of the Russian Federation. 2018. N 2. P. 119 - 137.

[12] Kudinova M.S. Judicial practice of considering subordinated claims in bankruptcy proceedings // Arbitration disputes. 2021. N 3. P. 74 - 87.

[13] Podshivalov T.P. Protection of the debtor’s interests in a contractual obligation during bankruptcy and abuse of corporate control // Law and Economics. 2017. N 12. P. 41 - 45.

[14] Ryapolova O.A. The mechanism of subordination of creditors’ claims in bankruptcy cases from the position of the principle of good faith // Journal of Russian Law. 2022. N 3. P. 75 - 87.

[15] Safonov A.V. Fair queue of creditors. Commentary on the Determination of the Judicial Collegium on Economic Disputes of the Supreme Court of the Russian Federation dated July 23, 2018 N 310-ES17-20671 // Bulletin of Economic Justice of the Russian Federation. 2018. N 12. pp. 14 - 21.

[16] Suvorov E.D. The principle of equality of creditors as a tool for identifying abuses in bankruptcy: equal to equal, different to different // Law. 2020. N 9. pp. 39 – 52.

[17] Fedotov D.V. On the issue of subordination of claims of affiliated creditors in bankruptcy // Economic justice in the Ural region. 2018. N 4. P. 203 – 213, Fedotov D.V. Assignment of the right of claim to an insolvent debtor: ways to protect the rights of the assignee if there are grounds for subordination of the claim // Lawyer. 2021. N 2. P. 57 - 62.

[18] Chuprikov M.V. The moment when the obligation of controlling persons to report the financial difficulties of the organization arises // Bulletin of Economic Justice of the Russian Federation. 2022. N 4. P. 56 - 75.

[19] Shevchenko I.M. On the issue of lowering the order of satisfaction (subordination) of creditors’ claims in bankruptcy cases // Russian Judge. 2018. N 3. P. 10 - 14., Shevchenko I.M. On the issue of subordination of creditors' claims arising after the initiation of bankruptcy proceedings // Bulletin of Economic Justice of the Russian Federation. 2023. No. 6. P. 164-181.

The subject of the study is the problem of establishing grounds for lowering the priority (subordination) of mandatory claims of persons controlling the debtor in cases of insolvency of legal entities.

Research goals and objectives. The purpose of this study is to form a holistic view of the political and legal grounds for lowering the priority of claims of debtor's controlling persons and their affiliates, as well as to establish specific cases arising from these political and legal grounds in which the corresponding claims are subject to subordination.

The research objectives are as follows:

1. Consider the process of forming the institution of subordination in Russia and the main models of subordination abroad.

2. Study the main approaches to substantiating the political and legal goals of subordination, as well as arguments against applying the rules of subordination.

3. Formilate the optimal political and legal explanation of the need for subordination and assess the role of this institution in achieving the goals of legal regulation.

4. Determine the range of persons whose claims may be subject to the rules of subordination.

5. Define the concept of "financing" and the types of claims that can be recognized as financing for subordination purposes.

6. Study the peculiarities of certain subordination grounds: crisis financing and initial undercapitalization. Develop the criteria necessary to determine whether or not the relevant grounds exist.

The methodology and methods of research consist of general scientific methods of cognition (including analysis, synthesis, generalization, analogy, induction and deduction), as well as special research methods (including formal-logical, formal-legal, comparative-legal and the method of legal forecasting). The selected methods made it possible to carry out a comprehensive analysis of regulatory regulation and law enforcement practice on the issue of subordination of mandatory claims of debtor's controlling persons and their affiliates.

Regulatory framework of the study. Acts of domestic and foreign legislation regulating the priority of meeting the claims of debtor's controlling persons and their affiliates.

Empirical basis of the study. Law enforcement practice of Russian and foreign courts on lowering the priority of satisfaction of claims of debtor's controlling persons and their affiliates.

Theoretical foundations of the study. The research uses the works of such Russian and Soviet scientists as Belykh V.S., Yershova I.V., Ivanov A.A., Ioffe O.S., Kamen'kov M.V., Karapetov A.G., Karelina S.A., Koraev K.B., Miftakhutdinov R.T., Mokhov A.A., Petrov D.A., Popondopulo V.F., Skvortsov O.Y., Suvorov E.D., Sukhanov E. A., Tarasenko O. A., Telyukina M.N., Frolov I.V., Khvostov V.M., Shaidullin A.I., Shishmareva T.P. et al.

The research also uses the works of foreign researchers, in particular, Eidenmueller H., Gelter M., Madaus, S., Schmidt K., Skeel, D., Wessels B.

The scientific novelty of the dissertation research consists in a new approach to the study of subordination of creditors' claims as a mechanism for compensating for insufficient equity of a legal entity in order to increase the level of satisfaction of external creditors' claims. This approach allows us to form a holistic view of the political and legal grounds for lowering the priority of claims of debtor's controlling persons and their affiliates, according to which specific cases are established in which the corresponding claims are subject to subordination. In addition, the results of the study were suggestions for improving the rules on subordination in terms of defining the range of persons whose claims are subject to subordination, the concept of "financing" for the purposes of subordination, as well as a number of peculiarities of applying such grounds of subordination as crisis financing and initial undercapitalization, and exceptions to these rules.

The theoretical significance of the dissertation consists in forming a holistic view of the political and legal grounds for lowering the priority of claims of debtor's controlling persons and their affiliated persons, as well as establishing cases in which the corresponding claims are subject to subordination.

The practical significance of the dissertation consists in the formulation of specific criteria, in the presence of which the claim is subject to subordination, as well as presumptions that simplify the determination by the law enforcement officer of the presence or absence of these criteria. The results of the study can be used in the process of improving the bankruptcy legislation and practice of its application, as well as for educational purposes.

The degree of reliability and approbation of the results. The reliability of the main conclusions of this study is confirmed by the analysis of doctrinal sources, regulations and law enforcement practice of Russian and foreign courts.

The main conclusions of the dissertation are reflected in three scientific articles published in the publication recommended by the Higher Attestation Commission under the Ministry of Education and Science of the Russian Federation.

The main conclusions of the dissertation were contained in scientific reports and presentations at the international scientific seminar "PhD Workshop on European / International Insolvency Law" of the Stichting Bob Wessels Insolvency Law Collection, Faculty of Law of the University of Leiden with a report on "Subordination of the affiliated claims in Russia recent successes and prospects of development", at the VIII International conference of Young Scientists " Trends in the development of private Law "(MSLA) with a report on "Initial undercapitalization as a basis for subordination of claims of controlling persons", at the International Scientific and Practical Conference "Nevolin Readings-2022" with a report on "Peculiarities of proving the compensatory nature of financing in disputes about subordination of claims of controlling persons", at the II Annual International Scientific and Practical Conference on "Law and Business in Modern Realities: national, regional and international dimension" with a report on "The role of creditors affiliated with the debtor in bankruptcy: development of practice and prospects for legislative regulation".

Structure of the dissertation. The dissertation consists of an introduction, six chapters, a conclusion, and a list of references.

Main scientific results.

1. Critical analysis of the main approaches to justifying the application of the rules on subordination has been carried out[20]. A new approach has been developed to justify the application of the rules on subordination as a mechanism for compensating for the insufficiency of a legal entity's own capital in order to increase the level of satisfaction of the claims of external creditors[21].

2. Problems of subordination of claims that arose in connection with crisis financing has been considered[22]. A solution to the problem of the lack of clear criteria for a property crisis for the purposes of subordination is proposed by defining a property crisis as a difficult economic situation, the presence of which is assumed if the value of the debtor's net assets is less than its authorized capital. It is also proposed to establish at the legislative level special presumptions that simplify proof for parties interested in the subordination of claims[23]. In order to encourage pre-trial rehabilitation, proposals have been developed to formulate in the legislation exceptions to the rules on subordination for claims arising as a result of crisis financing, which was conditioned by the existence of an agreement between the controlling person and a majority creditor not related to the debtor, provided that as a result of the implementation of this agreement, the situation for minority creditors not participating in it did not worsen[24].

3. The problems of subordination of claims that arose during the initial undercapitalization of the company are considered. The criterion of insufficient capitalization proposed for legislative implementation is formulated and justified - the excess of the amount of controlled debt over equity capital by more than 3 times[25].

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[20] Esmansky A.A. Subordination of claims of persons controlling the debtor based on crisis financing: political and legal goals and current problems // Law. 2023. N 3. P. 159-163.
[21] Ibid, p. 164-165.
[22] Ibid, p. 166-168.
[23] Ibid, p. 169-170.
[24] Esmansky A.A. Debt restructuring: how to protect the interests of independent creditors? // Law. 2023. N 4. P. 96-97.
[25] Esmansky A.A. Initial undercapitalization as a basis for subordination of the claims of persons controlling the debtor // Law. 2022. N 2. P. 158.

Provisions submitted for defense.

1. The main political and legal justification for applying the institution of subordination is to use it as a mechanism for compensating for insufficient equity of a legal entity in order to increase the level of satisfaction of external creditors' claims.

The institution of subordination imposes an additional burden on the persons controlling the debtor, which, however, is disproportionately less than the costs that these persons and society as a whole would bear in the case of state control over the provision of organizations with their own capital.

2. Persons controlling the debtor for the purposes of subordination should be considered persons who, at the time of providing financing, had the opportunity to give the debtor mandatory instructions or otherwise determine its actions, with the exception of persons who had such an opportunity exclusively related to their employment or position in the management bodies of the debtor company. In addition, for purposes of subordination, creditors who provided financing to the debtor under the influence of the person controlling the debtor, as well as creditors who collectively have the ability to influence the debtor in the same way as the controlling person, and when providing financing acted in concert, are considered to be controlling persons.

At the same time, de lege ferenda most reasonable from the point of view of compliance with the goals of subordination as an institution, the need to maintain a reasonable balance of interests of creditors of the debtor and creditors of related persons, as well as ensuring legal certainty, is to extend the rules on subordination only to shareholders (property owners, founders) of the debtor.

3. Financing for the purposes of subordination should be understood as actions or omissions of the controlling person committed for the purpose of providing the debtor or saving property (property rights) on the terms of counter-provision within a period exceeding the usual counter-provision period in the event of the controlling person entering into a similar transaction with a counterparty that is not part of the same group of persons.

At the same time, the application of the criterion of having a goal to finance a controlled entity does not seem justified, taking into account the goals of subordination, and also generates many controversial situations in practice. In this regard, a regulatory model, in which any claims of controlling persons that have arisen during the financial crisis will be reduced in priority, is considered to be more optimal.

4. The first of the two possible grounds for subordination is capitalization in a crisis, which should be understood as financing a debtor who is not only and not so much in a state of objective bankruptcy as in a state of financial crisis. The concept of financial crisis used in judicial practice is proposed to define "a difficult economic situation, the existence of which is assumed if the value of the debtor's net assets is less than its authorized capital". At the same time, it is proposed to compensate for the complexity of determining the net asset value of the debtor at the time of providing financing by establishing special presumptions at the legislative level that simplify proof for persons interested in subordination of the claim.

5. The second ground for subordination is financing with initial undercapitalization, and the criterion of insufficient capitalization should be fixed by law. The proposed variant of this criterion is the excess of the amount of controlled debt over equity by more than 3 times.

6. Exceptions to the rules of subordination, such as the privilege of minority ownership and the privilege of rehabilitation, are considered reasonable.

The minority privilege should be understood as the exclusion from the rules on subordination of claims of shareholders whose share in the authorized capital of a business entity does not exceed a certain threshold, which is proposed to be set at 1%.

The privilege of rehabilitation should be understood as an exemption from the rules on subordination of claims arising as a result of crisis financing, which was due to the existence of an agreement between the controlling person and a majority creditor unrelated to the debtor, provided that the situation of non-participating minority creditors did not worsen as a result of the implementation of this agreement.

For the purposes of applying this privilege, it is proposed to exclude the possibility of recognizing any person affiliated with the debtor as a majority creditor, while most of the creditors' claims for these purposes should be established without taking into account all claims of persons affiliated with the debtor.

Chapter 1. Legislative and political-legal prerequisites for subordination of claims of debtor's controlling persons and their affiliates

§ 1. Legislative basis of the institution of subordination

The order of satisfaction of creditors' claims is established in articles 134 and 142 of the Bankruptcy Law, as well as some other provisions regulating the bankruptcy of certain types of organizations. Unlike the Law of the Russian Federation of 19.11.1992 N 3929-1 "On the Insolvency (Bankruptcy) of Enterprises", Article 30 of which provided for the satisfaction of claims of members of the debtor's labor collective who have a contribution to its property and other owners after the claims of bankruptcy creditors, modern legislation does not provide for a special order of satisfaction of creditors, who are debtor's controlling persons (below referred to as "internal creditors", while all other creditors will be referred to as "external").

The current Bankruptcy Law, as well as Federal Law No. 6-FZ of 08.01.1998 "On Insolvency (Bankruptcy)", which was in force before it, establishes only the definition of bankruptcy creditors, from which the claims of the founders (shareholders) of the debtor - legal entity for obligations arising from such participation are directly excluded (para. 8, Article 2 of the Bankruptcy Law). As noted by L.A. Novoselova, obligations to the founders (shareholders) of the debtor are internal in nature and cannot compete with external obligations, i.e. with the obligations of the debtor as a shareholder in property turnover to other shareholders in turnover[26]. Considering this provision, the Constitutional Court of the Russian Federation in its ruling No. 75-O-O of 27.01.2011 indicated that the founders (shareholders) of the debtor are not recognized as bankruptcy creditors, since the nature of the obligations of the founders (shareholders) of the debtor is directly related to the liability of these persons for the company's activities within the value

[26] Scientific and practical commentary (item by article) to the Federal Law "On Insolvency (Bankruptcy) / S.E. Andreev, V.V. Vitryansky, S.A. Denisov, etc.; edited by V.V. Vitryansky. M.: Statute, 2003. 1037 p.

of their shares. A similar position was expressed in the Decision of the Presidium of the Supreme Arbitration Court (hereinafter referred to as the Supreme Arbitration Court of the Russian Federation) No. 10254/10 of 30.11.2010 in case No. A45-808/2009, which noted that it is the shareholders of the debtor business company, which together constitute the highest management body of the company (the general meeting of shareholders), the activity of the company itself and, accordingly, carry a certain risk of negative consequences of its management. In this case, the Supreme Arbitration Court of the Russian Federation, with reference to Article 10 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of the Russian Federation), declared inadmissible the satisfaction in the same queue with other creditors of a person who is a creditor of the company under a guarantee agreement issued as part of a transaction for the sale of shares of the company.

For a long time, only claims based on the corporate relations of the shareholder (former shareholder) with the debtor were considered as claims arising from participation in a legal entity: first of all, claims for payment of the actual value of the share in the company[27], for repayment of the share contribution[28], for payment of dividends or distribution of profits in another form[29], for payment of to a shareholder of a business company being liquidated at the expense of the company's property, funds, upon termination of relations related to the ownership of shares (shares) by this shareholder[30], etc. Later, the corporate claims also included the

[27] Resolution of the Arbitration Court of the Moscow District of 10.11.2016 N F05-16008/2016 in case N A40-183128/2015, Resolution of the Arbitration Court of the Moscow District of 02.03.2016 N F05-428/2016 in case N A40-39242/2014, Resolution of the Arbitration Court of the Volga-Vyatka District of 05.05.2015 N F01-1047/2015 in case N A31-13132/2013, Resolution of the Arbitration Court of the Western-Siberian District of 04.02.2016 N F04-18/2016 in case N A70-10625/2015, Resolution of the Arbitration Court of the Volga District of 26.01.2017 N F06-17685/2013 in case N A65-17930/2013, Resolution of the Arbitration Court of the Volga District of 03.03.2016 N F06-6151/2016 in case N A55-5002/2014, Resolution of the Arbitration Court of the North Caucasus District of 12.08.2015 N F08-5601/2015 in case N A61-2137/2013.

[28] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 20.06.2013 N 3810/13 in case N A40-79131/11-74-348 "B", Resolution of the Arbitration Court of the West Siberian District of 06.07.2016 N F04-3028/2016 in the case N A46-14885/2015.

[29] Resolution of the Arbitration Court of the West Siberian District of 02.11.2016 N F04-4957/2016 in case N A46-9286/2015, Resolution of the Arbitration Court of the Volga District of 29.10.2015 N F06-13741/2013 in case N A65-20322/2013, Resolution of the Arbitration Court of the North Caucasus District of 20.04.2017 N F08-2270/2017 in case N A20-330/2015, Resolution of the Arbitration Court the Court of the Ural District of 31.03.2015 N F09-6209/14 in case N A47-867/2014, the Decision of the Arbitration Court of the Central District of 15.12.2015 N F10-4275/2015 in case N A36-6219/2013.

[30] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 30.11.2010 N 10254/10 in case N A45-808/2009.

shareholder's request to return the contribution to the company's authorized capital due to the invalidity of the decision to increase the authorized capital[31].

At the same time, the courts essentially separated from the claims arising from participation, claims based on the civil liabilities (most often – loans) of the debtor with its shareholders or other affiliated persons[3233].

Radical changes in judicial practice in this regard began with the Decision of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation No. 308-ES17-1556(1) of 06.07.2017 in the case No. A32-19056/2014[34], which for the first time gave an expanded interpretation of the concept of claims arising from participation in legal entity: "such obligations include not only those whose existence is directly stipulated by corporate legislation (payment of dividends, the actual value of the share, etc.), but also obligations that, although formally have a civil nature, in reality are not such (including due to the fact that their occurrence and existence it would not be possible if the lender did not participate in the debtor's capital)." The Supreme Court justified this by referring to the requirements of good faith, reasonableness and fairness applied by way of analogy of law (paragraph 2 of Article 6 of the Civil Code of the Russian Federation), according to which "the risk of bankruptcy of the person controlled by it, caused by indirect influence on the inefficient management of the latter, is subject to distribution to such a shareholder, by prohibiting other (independent) creditors". Taking into account the above, the Supreme Court concluded that the court has the

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[31] Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 15.02.2018 N 305-ES17-17208 in case N A40-10067/2016, item 16 of the Review of Judicial Practice of the Supreme Court of the Russian Federation N 2 (2018) (approved by the Presidium of the Supreme Court of the Russian Federation 04.07.2018).

[32] Resolution of the Arbitration Court of the North-Western District of 18.08.2016 N F07-6431/2016 in case N A56-60000/2015, Resolution of the Arbitration Court of the East Siberian District of 19.12.2014 N F02-5867/2014 in case N A33-20600/2013, Resolution of the Arbitration Court of the Ural District of 09.02.2017 N F09-7955/16 in case N A60-909/2016, Resolution of the Tenth Arbitration Court of Appeal of 15.04.2016 N 10AP-2759/2016 in case N A41-42676/15.

[33] It should be noted that within the framework of this chapter, the legislative and political-legal bases of the rules on subordination are considered on the most obvious example of a creditor who is simultaneously the only participant in a bankrupt society. The problems of determining the list of persons to whom the rules of subordination and the grounds for their application are applicable are discussed further in Chapter 2 of this dissertation.

[34] See also the Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 06.07.2017 N 308-ES17-1556(2) in case N A32-19056/2014, item 18 of the Review of Judicial Practice of the Supreme Court of the Russian Federation N 5 (2017)" (approved by the Presidium of the Supreme Court of the Russian Federation on 27.12.2017).

right to re-classify the loan relationship as a relationship for increasing the authorized capital under the rules of paragraph 2 of Article 170 of the Civil Code of the Russian Federation or, if an illegal purpose is established , under the rules for circumventing the law (paragraph 1 of Article 10 of the Civil Code of the Russian Federation, paragraph8 of Article 2 of the Bankruptcy Law), having recognized the status of the covered claim as a corporate one, which is the reason for refusing to include it in the register. This approach to a certain extent reflects the opinion expressed by D.A. Petrov that obligations arising from the fact of participation may include obligations that, although formally of a civil nature, are not actually such (including due to the fact that their occurrence and existence would be impossible, if the lender did not participate in the debtor's capital)[35].

At the same time, almost immediately after the Supreme Court adopted the above-mentioned judicial acts, a number of shortcomings of the legal position set out in them became obvious.

First, the invalidity of a transaction under clause 2 of Article 170 of the Civil Code of the Russian Federation does not in itself entail subordination of the shareholder's claim.

As a rule, the actions performed by the shareholder when granting a loan are not sufficient for the occurrence of such legal consequences in the field of corporate relations as an increase in the authorized capital[36] or making a contribution without an increase in the authorized capital[37]. Since the covered transaction can also be declared invalid on the grounds established by the Civil Code of the Russian Federation or special laws[38], such corporate provision is most often based on a void transaction (clause 2 of Article 168 of the Civil Code of the Russian Federation).

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[35] Petrov D.A. Problems of fulfillment of obligations of a bankrupt debtor by a third party or founder // Information and analytical journal "Arbitration disputes". 2018. N 4. pp. 126 - 136.

[36] Article 19 of Federal Law No. 14-FZ dated 08.02.1998 "On Limited Liability Companies", Article 28 of Federal Law No. 208-FZ dated 26.12.1995 "On Joint Stock Companies".

[37] Article 27 of Federal Law No. 14-FZ dated 08.02.1998 "On Limited Liability Companies", Article 32.2 of Federal Law No. 208-FZ dated 26.12.1995 "On Joint Stock Companies".

[38] Paragraph 87 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 23.06.2015 N 25 "On the application by courts of certain provisions of Section I of Part One of the Civil Code of the Russian Federation".

167 of the Civil Code of the Russian Federation, according to which, if the transaction is invalid, each of the parties is obliged to return to the other everything received under the transaction, the shareholder will receive a restitution claim against the debtor in the amount of the loan[39] amount.

Consequently, the recognition of a shareholder's claim based on a sham transaction with the consistent application of the norms of the Civil Code of the Russian Federation in most cases will lead to the fact that this creditor will establish its claim in the register not on the basis of a loan agreement, but on the basis of a restorative claim for an invalid transaction. This circumstance was also noted by A. G. Karapetov in his commentary to the legal position on the above-mentioned case "Neftegazmash-Technologies"[40].

Of course, if the court determines that the shareholder's actions intend to circumvent the law, he may be denied judicial protection on the basis of clause 2 of Article 10 of the Civil Code of the Russian Federation. However, the mere necessity of applying the rule on abuse of law shows the failure of the entire legal structure based on the pretense of a transaction mediating financing.

Secondly, the application of rules on fake transactions and / or circumvention of the law is associated with the need to establish the direction of the will of the parties to the transaction. Taking into account the complexity of proving the intentions of the parties to the transaction for their opponents in the dispute, the Supreme Court suggested that the latter prove the existence of objective circumstances that indicate the corporate nature of the obligation (for example, the shareholder's admission of managerial errors in the performance of the functions of a manager, which he compensates by providing the company with a loan). If it follows from the case file that such circumstances occurred, then the burden of

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[39] Paragraph 3, paragraph 29.5 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of December 23, 2010 N 63 (ed. of 30.07.2013) "On some issues related to the application of Chapter III.1 of the Federal Law "On Insolvency (Bankruptcy)".

[40] See Karapetov A.G. Subordination of claims of persons controlling the debtor in bankruptcy: some interim theses // <url>. 2018. July 3. URL: https://zakon.ru/blog/2018/7/3/subordinaciya_trebovanij_kontroliruyuschih_dolzhnika_lic_pri_bankrotstve_nekotorye_promezhutochnye_t (last accessed on 07.05.2023).

proving that the applicant had other intentions when granting the loan passes[41] on to the applicant. In both cases, the parties may have serious difficulties in meeting their burden of proof, which is typical in general for all disputes about the establishment of subjective defects in transactions.

It is probably due to these difficulties that the practice of re-qualifying creditors' loan claims to corporate ones on the basis of clause 2 of Article 170 of the Civil Code of the Russian Federation has not become widespread: the last case of applying this position at the level of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation took place in early 2019[42], and then the re-qualification of loan claims to corporate ones gradually disappeared. The same can also be said about the lower courts' practice.

In its Review of 29.01.2020, the Supreme Court seemed to deviate from the broad interpretation of paragraph 8 of Article 2 of the Bankruptcy Law, pointing out that the mere issuance of funds by a controlling person to a controlled company through the conclusion of a loan agreement with it does not indicate that the obligation to repay the amount received arises from participation in the authorized capital (item 2 of the Review). Following this idea, the Supreme Court stated that the current bankruptcy legislation does not contain provisions on the unconditional lowering of the priority of satisfaction of non-corporate claims of creditors belonging to the group of persons controlling the debtor, while the latter, based on the principle of autonomy of will and freedom of economic activity, recognize the right to independently determine the legal form of investment-corporate or

[41] On the transfer of the burden of proof in similar cases, see Miftakhutdinov R.T. The Highest court continues to explain the rules of "evidentiary ping-pong". Comment to the Definition of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 17.05.2017 N 306-ES15-8369 // Bulletin of Economic Justice of the Russian Federation. 2017. N 7. p. 24-26.

[42] All examples of the application of this approach by the Supreme Court of the Russian Federation: Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 04.02.2019 N 304-ES18-14031 in case N A81-7027/2016, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 12.02.2018 N 305-ES15-5734(4,5) in case N A40-140479/2014, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 21.02.2018 N 310-ES17-17994(1,2) in case N A68-10446/2015, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 07.06.2018 in case N 305-ES16-20992(3), A41-77824/2015, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 04.02.2019 N 304-ES18-14031 in case N A81-7027/2016.

Explaining the prerequisites for subordination of the obligatory claim of the person controlling the debtor, the Supreme Court, in paragraph 3.1 of the Review, contrasts its actions with the model of behavior prescribed by the Bankruptcy Law: timely filing of an application for bankruptcy of the debtor (Article 9 of the Bankruptcy Law). Having deviated from this model, the controlling person should bear all the associated risks, including the risk of losing compensation financing in the event of an objective bankruptcy. These risks, according to the authors of the Review, cannot be transferred to other creditors (clause 1 of Article 2 of the Civil Code of the Russian Federation). Somewhat earlier, the Supreme Court, reasoning on the contrary, noted that there are no grounds for lowering the priority of satisfying the claim of the controlling person, if internal financing using the construction of the loan agreement is carried out in good faith, is not aimed at evading the obligation to file a bankruptcy application with the court and does not violate the rights and legitimate interests of other creditors of the debtor. As another reason for subordination, the Supreme Court pointed to the emergence of a controversial claim as a result of providing financing during the initial period of the debtor's business activity, if no other goals for choosing such a financing model are established, other than the redistribution of risk in the event of bankruptcy. (Item 9 of the Review dated 29.01.2020). In this case, the need to lower the priority was explained with reference to paragraph 2 of clause 4 of Article 65.2 of the Civil Code, according to which a corporation shareholder is obliged to participate in the formation of the corporation's property in the required amount, and to clause 4 of Article 1 of the Civil Code, according to which no one has the right to take advantage of one's illegal or dishonest behavior. According to the Supreme Court, loan financing at the beginning of the company's activity with a minimum authorized capital, as a rule, is made in order to redistribute the risk of losing a large contribution in case of failure of a commercial project in favor of the company's founder, and therefore this financing model leads to an imbalance of the rights of the debtor (internal creditors) and the rights of independent creditors. The reasons for the two listed grounds of subordination will be discussed in more detail below, in paragraph 3 of this chapter.

Despite the fact that the Supreme Court refrained from directly pointing out the illegal nature of the controlling person's actions in providing disputed financing, the logical sequence of its reasoning cannot be interpreted otherwise. In a later Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 10.02.2022 N 305-ES21-14470(1,2) in the case N A40-101073/2019, it is noted: the rules on subordination of claims based on compensation financing are applied due to the fact that the latter covers the debtor's insolvency from independent creditors. In this regard, the Supreme Court concluded that the financing provided after the bankruptcy case was initiated does not create a risk of concealing information about the debtor's unfavorable financial situation, and therefore the claims based on it are not subject to subordination. Thus, the above approach of the Supreme Court reflects a fairly common view in foreign literature on subordination as a kind of **responsibility for the consequences of crisis financing**, which are expressed in prolonging the unprofitable activities of the debtor and hiding its true financial situation from creditors.

At the same time, the wording given in the reasoning of the Supreme Court's legal position in paragraphs 3.1 and 9 of the Review of 29.01.2020 on the inadmissibility of transferring the risks of loss of compensation financing to external creditors corresponds to another explanation of subordination – as **a mechanism for fair distribution of risks** between internal and external creditors. The Supreme Court is somewhat more categorical in paragraph 14 of the Review on the procedural rights of subordinated creditors: "lowering the priority of repayment of the claim of the person controlling the debtor is caused solely by attributing the risk of providing compensation financing to him."

The above arguments are primarily political and legal and, as such, will be discussed in detail in the next section. Before proceeding to the political and legal analysis, we will consider the rules set out in the Review of 29.01.2020 from the point of view of the current legislation.

The absence in the Bankruptcy Law of clearly expressed rules on subordination of claims of shareholders of the debtor does not mean that this

institution of law does not have any regulatory grounds. In some cases, such grounds can be seen with a broad interpretation of the norm, or if there is a gap in the law-with the help of an analogy of law or an analogy of law (Article 6 of the Civil Code of the Russian Federation).

As a working hypothesis, it is necessary to consider the possibility of a broad interpretation of paragraph 8 of Article 2 of the Bankruptcy Law, according to which bankruptcy creditors do not include persons whose claims are based on obligations arising from participation in a legal entity. In advance of the well-known objection that the broad interpretation does not apply to exceptions to the rules, we note that the rule on corporate claims in bankruptcy is not an exception in itself, but only because of the peculiarities of legal technology is given in the paragraph on bankruptcy creditors. Similarly, paragraph 8 of Article 2 of the Bankruptcy Law could limit itself to defining the concept of bankruptcy creditors, and then separately introduce the definition of" corporate creditors", whose claims are based on obligations arising from participation in a legal entity.

As V.M. Khvostov pointed out, "if it turns out that the author of a norm, wishing to achieve a certain practical goal with its help, has given his thought too narrow a wording, so that the provision of law developed by him would not fully achieve its goal if applied literally; in these cases, the scope of application of the norm must be expanded beyond the its literal meaning, in order to fully realize the idea that the author of it had in mind[43]." An example of such a broad interpretation of paragraph 8 of Article 2 of the Bankruptcy Law is the classification of "corporate" claims of persons who are not themselves shareholders in the debtor, but acquired the corresponding claim by way of singular succession.

Can it be argued, similarly, that the legislator, when singling out "claims of the founders (shareholders) of a debtor - legal entity for obligations arising from such participation", also meant mandatory claims (for example, from a loan

[43] V.M. Khvostov. The experience of characterizing the concepts of aequitas and aequum jus in Roman classical jurisprudence // Scientific Notes of the Imperial Moscow University. Department of Law. - Moscow: University. type., 1895, Issue 10. - pp. 1-309.

agreement)? It seems that this conclusion is hindered by the phrase "for obligations arising from such participation": its existence would be completely meaningless if any claims of the shareholder were supposed to be attributed to corporate claims. It is impossible to recognize the correct broad interpretation, in which part of the normative text becomes completely meaningless.

Another hypothesis: the rules on subordination formulated by the Supreme Court should be considered as the result of filling a gap in the law by applying an analogy of law[44]. B. Windscheid noted in this regard: "when there are gaps, it is necessary, based on the words of the law, to weave further the thoughts of the legislator, which can result in an analogy (extension of the law): science, however, only needs to think out the thoughts of the legislator, and not slip them his own thoughts. The judge must ... understand how the legislator would express his own opinion if he paid attention to the issue that he did not think about when creating the law[45]."

In particular, S. S. Galkin points out that "a systematic interpretation of the norms of Article 2, paragraph 2 of Article 4, Article 148 of the Bankruptcy Law allows us to conclude that the shareholders in the debtor's obligations on corporate grounds are not bankruptcy creditors, their claims are not subject to qualification either as current or as registered and are satisfied at the expense of property remaining after distribution among external creditors, taking into account the requirements of priority and proportionality[46]." However, is it appropriate to say that the legislator, when determining the priority of satisfaction of creditors' claims or when defining the concept of a bankruptcy creditor, forgot about the existence of mandatory claims of shareholders to their own company and did not regulate their status relative to external creditors? Such an omission is unlikely in light of the fact

[44] Paragraph 3.1 of the Review does not contain a direct reference to the norms of the Civil Code of the Russian Federation on the analogy of law, however, such an indication took place in the above Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 06.07.2017 N 308-ES17-1556(1) in the case N A32-19056/2014.

[45] Cit. by: Shtoff V. A. Problems of methodology of scientific cognition. M.: Higher School, 1978. p. 6

[46] Galkin S.S. On the issue of competitive subordination of claims from the capital of substitute transactions involving persons controlling the debtor: political, legal and law enforcement aspects // Entrepreneurial Law. The application "Law and Business". 2018. N 3. pp. 45-51.

that bankruptcy, as well as other institutions of a market economy, had been in use for about ten years at the time of the adoption of the current Bankruptcy Law, and the practice of issuing loans to the company by its shareholders had never been rare or exceptional.

In addition, in accordance with paragraph 1 of Article 31 of the Bankruptcy Law, the founders (shareholders) of the debtor, the owner of the debtor's property - a unitary enterprise, creditors and other persons may provide financial assistance to the debtor in the amount sufficient to repay monetary obligations and restore the debtor's solvency (rehabilitation) as part of measures to prevent bankruptcy. Paragraph 2 of this article provides that the provision of financial assistance may be accompanied by the assumption of obligations by the debtor or other persons in favor of the persons who provided financial assistance (including shareholders in the debtor-approx. the author). Consequently, the occurrence of obligations of the debtor to the shareholder, namely, when providing financing within the framework of rehabilitation, was directly mentioned in the law, and the legislator was intentionally silent about the specifics of the order of satisfaction of the relevant claims.

There is a gap in this regulation only in the sense that it does not provide for the consequences of insufficient compensation financing for restoring the debtor's solvency. At the same time, in this case, it is also appropriate to say that the legislator made a qualified intentional omission, without establishing any negative consequences for the subject of rehabilitation of insufficient funding. The opposite would lead to discouraging rehabilitation entities and their refusal to bear the risks of insufficient funding provided, which, in turn, would not correspond to the goals and objectives of the insolvency law.

If we refer to the norm of Article 9 of the Bankruptcy Law mentioned in paragraph 3.1 of the Review of 29.01.2020 on the obligation to ensure timely submission of the debtor's application for its own bankruptcy, then in this case there is no need to talk about a gap in regulation, since Article 61.12 of the Bankruptcy Law explicitly provides for a special sanction for persons controlling the debtor in

the form of subsidiary liability for non-delivery (late submission) of the debtor's application.

In connection with the above, the existence in the positive law of the Russian Federation of norms on subordination of claims of shareholders in the debtor cannot be concluded either by virtue of a direct indication in the law, or on the basis of an extended interpretation of the law's norms or the application of an analogy of law or an analogy of law. It remains to be noted that the rules on subordination formulated in the explanations of the Supreme Court are an example of judicial law-making, disputes about the admissibility of which have long been conducted in modern[47] and pre-revolutionary[48] Russian literature, as well as abroad[49]. Both in Germany and Austria, the process of perception of the institution of subordination took place in a similar way: initially, the rules on subordination were formulated at the level of the supreme courts, and only then, in a modified form based on the experience of application, at the legislative level. A significant feature of the Russian process of implementing the doctrine of subordination is that they have become not so much a product of judicial practice, but rather the result of the abstract and systematic formulation of new rules by the supreme court, which are only partially based on current legislation[50].

The purpose of this study is not to assess whether the Supreme Court acted reasonably, taking upon itself the actual formulation of norms that are absent in the

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[47] See Ivanov A.A. Speech about precedent // Law. Journal of the Higher School of Economics. 2010. N 2, Bogdan V.V., Grineva A.V. On judicial precedent as a way to minimize private and public legal risks: debatable issues // Russian Judge. 2018. N 11. pp. 49 - 52.

[48] See Selected works on the general theory of law, civil and commercial law in 2 vols. Volume 2 / G.F. Shershenevich; comp. V.A. Belov. – M.: Yurayt Publishing House, 2017; p. 130, Vereshchagin A.N. Judicial lawmaking of the Governing Senate in the field of peasant law (dedicated to the 160th anniversary of the Great Reform and the 300th anniversary of the Russian Empire) // Law. 2021. N 11. P. 155 - 168.

[49] See Karapetov A.G. The struggle for the recognition of judicial lawmaking in European and American law. – M.: Statute, 2011. – 308 p.

[50] R.T. Miftakhutdinov and A.I. Shaidullin note that in foreign jurisdictions familiar with the institution of subordination, there is simply no such unification tool as abstract explanations of higher courts - Miftakhutdinov R.T., Shaidullin A.I. Decrease in Priority (Subordination) of the Claims of the Debtor's Controlling or Affiliated Persons in Russian Bankruptcy Law. Scientific and Practical Commentary to the Review of Judicial Practice of Dispute Resolution Related to the Establishment of Claims of Controlling Debtor and Its Affiliates in Bankruptcy Procedures Approved by the Presidium of the Supreme Court of the Russian Federation on 29 January 2020// Bulletin of Economic Justice of the Russian Federation. Appendix to the Monthly Magazine. 2020. N 9. Special issue. pp. 3 - 136.

legislation. At the same time, it should be noted that judicial law-making in general and in the case of the institution of subordination in particular is not able to fully replace legislative regulation. In the following chapters, we will provide many examples of controversial subordination issues that require a legislative solution. These examples should be preceded by the words of the chairman of the "bankrupt" judicial composition of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation (hereinafter – the Supreme Court of the Russian Federation) I.V. Razumov, expressed in relation to paragraph 12 of the Review of 29.01.2020: "We understood the will of the legislator so that, regardless of the procedure, an affiliated creditor should not vote on the trustee's candidacy. As for other issues, here again the legislator has the final say. For example, we cannot determine through judicial interpretation whether an affiliated creditor should vote on the terms of sale of the debtor's property[51]." Despite the above, the rules of subordination are de facto established in the Russian legal order and, as noted by S.A. Karelina and I.V. Frolov, subordinated creditors currently constitute a special group of creditors of the debtor[52].

Currently, the State Duma of the Russian Federation is considering Draft Law No. 1172553-753 on reforming the bankruptcy institution, which was introduced by the Government of the Russian Federation on 17.05.2021, and the prospects for its adoption are still unclear. Nevertheless, it is worth noting the inclusion in this draft law of Article 137.1 on subordination of claims of debtor's controlling persons and affiliated persons, which takes a significant part of the explanations of the Review of 29.01.2020 on subordination with some nuances that will be discussed in more detail in subsequent chapters.

In view of the above, further explanations of the Review of 29.01.2020 and the subsequent practice of the Supreme Court are considered in this paper as the de facto regulation of subordination issues in the Russian Federation.

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[51] Razumov I.V. The institute of bankruptcy is economically inefficient // Law. 2020. No. 9. pp. 8-20.
[52] Karelina S.A., Frolov I.V. On the issue of models of classification of creditors in bankruptcy cases // Bulletin of Arbitration practice. 2020. N 6. pp. 14-26.
[53] https://sozd.duma.gov.ru/bill/1172553-7 (last accessed on 10.05.2023).

§ 2. Main models of subordination in foreign jurisdictions

Since the institution of subordination was applied in Russia relatively recently and was unknown to the Soviet and pre-revolutionary legal systems, it is advisable to consider models of lowering the priority of shareholders' claims in foreign jurisdictions in order to better understand the current rules on subordination.

In world practice, there are four main models of subordination[54]:

1) Subordination of claims that arose in a crisis situation and/or during the initial undercapitalization ("soft subordination"). This model of subordination is historically the first and originated in Germany in 1930-1940s[55], after which, in the practice of the German Supreme Court, the doctrine of subordination began to take shape, based on the idea that when granting loans to a debtor during a crisis, a company shareholder has the goal of avoiding the obligation to file for bankruptcy. By 1980, the concept of a capital-substituting loan had developed in practice, that is, a loan issued by a shareholder to a company during a period when the latter could not receive a similar loan from third parties. These legal positions were largely consolidated and systematized at the legislative level in the norms that were in force until the 2008 reform. At the same time, the legislator moved away from applying the criterion of insufficient capitalization of the company, highlighting the presence of a crisis situation at the time of providing financing[56].

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[54] A.I. Shaidullin also identifies a fifth model - subordination of mandatory requirements that arose during the period of suspicion, but this model is still speculative and has not been applied in practice in any of the known jurisdictions – see Shaydullin A.I. Subordination of the obligatory claims of debtor's controlling persons and persons affiliated with them in bankruptcy cases of business companies: a dissertation for the degree of candidate of legal sciences. https://izak.ru/science/dissertatsionnye-sovety/dissertatsionnyy-sovet-d503-001-01/subordinatsiya-obyazatelstvennykh-trebovaniy-kontroliruyushchikh-dolzhnika-i-affilirovannykh-s-nim-l/ (date of last access – 03.10.2023).

[55] Shaidullin A.I. Reduction in priority (subordination) of loans of participants of legal entities in Germany and Austria // Bulletin of Economic Justice of the Russian Federation. 2018. No. 12. pp. 118-119.

[56] See A.I. Shaidullin, prev. op. p. 121, as well as the Institute of Insolvency (bankruptcy) in the legal system of Russia and foreign countries: theory and practice of law enforcement: monograph / A.B. Baranova, A.Z. Bobyleva, V.A. Vaypan, etc.; ed. S.A. Karelin, I.V. Frolov. Moscow: Justicinform, 2020. 360 p., § 5.

§ 1 of the Austrian Law on Capital Substitution (Eigenkapitalersatz-Gesetz).

In Austria, the Supreme Court and then the legislature, under the influence of their German colleagues, also formulated rules on capital-substituting loans, according to which loans provided by a shareholder to a company during a crisis are considered to replace equity[57] and, as a result, creditors on such loans in bankruptcy do not participate in the distribution of proceeds from the sale of the bankruptcy estate along with other creditors. As A.E. Aloyan notes, the main difference between the established Austrian doctrine and the German one (before 2008) is that the Austrian rules are more focused on insufficient capitalization and less on creditworthiness[58].

As follows from paragraphs 3.1-3.4, 9 of the Review of the Supreme Court of the Russian Federation of 29.01.2020, a similar approach, often referred to as "soft subordination", is currently adopted in Russia.

A slightly different version of "soft subordination" is adopted in Italy, where loans of the company's shareholders are repaid last after payments to other creditors of the insolvent debtor, if such loans were granted at a time when there was a disproportionate excess of debt in comparison with net equity, or when the company's financial situation would suggest that it would be more reasonable to recapitalize the company (Article 2467 of the Italian Civil Code).

2) Unconditional subordination of the claims of the shareholders of the legal entity ("hard subordination"). In 2008, a reform was carried out in Germany, which replaced the previous "soft subordination" model with an unconditional, "automatic" subordination rule: borrowed and other loan-equivalent claims of shareholders in legal entities were recognized as subject to satisfaction after the claims of other creditors (section 39 of the Insolvency Regulation).

In the explanatory materials to the draft law, as well as by German researchers[59], it was noted that the need to switch to the "hard" subordination model was caused, firstly, by the objective complexity of retrospective assessment of the

[57] § 1 of the Austrian Law on Capital Substitution (Eigenkapitalersatz-Gesetz).
[58] Aloyan A.E. Problems of implementation of the doctrine of recharacterization in the Russian legal system // Bulletin of Civil Law. 2017. N 6. p. 221 – 240.
[59] See A.I. Shaidullin, prev. op. p. 126.

circumstances of providing funding for the purpose of applying the "soft" subordination rules, and secondly, by the need to provide legal certainty regarding the status of funding provided by the shareholder. The legislator's desire to ensure legal certainty is reflected, inter alia, in section 42 (3) of the German Law on Limited Liability Companies, according to which loans, receivables and payables to shareholders, as a rule, must be indicated separately from other obligations of the company.

Similarly, a "hard" model of subordination is provided for in article 92 of the Spanish Insolvency Act. However, currently, within the framework of the bankruptcy reform in Spain, there is a discussion about the need to soften this model and remove from the rules on subordination of obligations to affiliated persons that have arisen as a result of financing in the framework of the company's debt restructuring[60].

3) Re-qualification of mandatory financing into corporate financing ("recharacterization"). In the United States, at the level of judicial practice of federal courts, the doctrine of re-qualification of mandatory financing into corporate financing was developed, some similarity of which was applied in the Neftegazmash-Technologies case considered above[61].

The re-qualification doctrine was based on the idea that if a transaction mediating financing has features that are more characteristic of the shareholder's contribution to the company's capital than of a loan, then the financing provided should be qualified as equity)[62].

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[60] See Equitable Subordination In Spanish Insolvency Proceedings: A Necessary Reform (https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/10/Equitable-subordination-in-Spanish-insolvency-proceedings-a-necessary-reform.pdf), Laura Ruiz Monge, Pérez-Llorca. Restated Insolvency Act: Spain, Practical Law UK Practice Note w029-1568 (https://www.perezllorca.com/wp-content/uploads/2021/05/restated-insolvency-act-spain.pdf) (last accessed on 14.05.2023).

[61] Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 06.07.2017 N 308-ESS 17-1556(1) in case N A32-19056/2014.

[62] Steel, David A. and Krause-Volmar, Georg, Recharacterization and the Nonhindrance of Creditors. European Business Organization Law Review (BAR), Vol. 7, p. 259, March 2006, U of Pain, Inst for Law & Econ Research Paper No. 07-13, Available at SSRN: https://ssrn.com/abstract=888182 (last accessed on 14.05.2023).

An 11-factor test consisting of the following criteria is used to check whether there are grounds for re-qualification of a mandatory claim by courts[63]:

- Names of documents confirming arrears.
- Repayment date and payment schedule.
- Fixed interest rate and interest payments;
- Source of payments.
- Sufficient or inadequate capitalization;
- Identity of interests between the lender and the shareholder;
- Security (if any);
- Possibility of obtaining financing from external credit institutions;
- The extent to which payments were subordinated to external creditors' claims;
- The extent to which the payments were used to purchase property, plant and equipment;
- The presence or absence of an amortization fund to secure payments.

Subsequently, criteria such as the impact of shareholder loans on equity and the level of their control over the debtor were added to this list[64].

4) Subordination due to bad faith of a creditor ("equitable subordination"). The practice of subordination due to bad faith of the creditor initially also arose at the level of judicial practice, and then was enshrined in law in paragraph 1 of Article 510c of the US Bankruptcy Code.

Explaining the difference between retraining and subordination due to bad faith, the Sixth Circuit Court of Appeals pointed out that in retraining, the court

[63] Gelter, Martin and Roth, Juerg, Subordination of Shareholder Loans from a Legal and Economic Perspective (2007). Journal for Institutional Comparisons, Vol. 5, No. 2, pp. 40-47, 2007, Harvard Law and Economics Discussion Paper No. 13, Available at SSRN: https://ssrn.com/abstract=998457 (last accessed date - 14.05.2023).

[64] In Re Micro-Precision Technologies, Inc., 303 Bankr.238 (Bankr. D. N.H. 2003), https://www.courtlistener.com/opinion/1912757/in-re-micro-precision-technologies-inc/ (last accessed date - 14.05.2023).

decides on the very existence of a binding claim, while in *equitable subordination*, the existence of the claim is not questioned, but instead the court assesses whether the creditor was involved in unfair behavior. As a measure of liability for such an unfair behavior, a reduction in the priority of satisfaction of its claim relative to the claims of other creditors is applied[65].

In the practice of federal appeals courts, and then at the level of the US Supreme Court, a test was formulated according to which a claim is subject to subordination if[66]:

- the lender acts in bad faith;
- actions of the creditor cause damage to other creditors of the debtor or provide the creditor with an unfair advantage;
- subordination of the claim complies with the provisions of the law.

It should be noted that not all legal systems in principle contain any clearly articulated rules or at least judicial doctrines on subordination, and at the level of European Commission documents, this approach is recognized as standard, and the presence of rules on subordination, on the contrary, is considered an exception. Examples of jurisdictions where shareholders' claims are not subordinated include Greece, Slovakia, the Czech Republic, Cyprus, Croatia, Bulgaria, and a significant number of other European countries[67].

§ 3. Political and legal grounds for subordination

As follows from the examples discussed above of regulating the order of satisfaction of claims of shareholders of legal entities in foreign countries, the presence or absence of rules on subordination is not an indicator of the development

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[65] In re AutoStyle Plastics, 269 F.3d, https://casetext.com/case/in-re-autostyle-plastics-inc (last accessed date - 14.05.2023).

[66] In re Mobile Steele Co 563 F.2d 692 (5th Cir. 1977), https://casetext.com/case/matter-of-mobile-steel-co (последнего обращения - 15.05.2023), United States v. Noland. 116 S. Ct. 1524, 1526 (1996), https://www.law.cornell.edu/supremecourt/text/517/535 (last accessed date - 15.05.2023).

[67] https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en (last accessed date - 14.05.2023).

or backwardness of regulation in the relevant jurisdiction, but rather reflects the political and legal choice of the legislator. In this regard, it is of particular interest to compare the arguments "for" and "against" that determine the choice of a particular regulatory model.

Considering the prerequisites for the introduction of the institution of subordination, it is necessary to immediately make a reservation that not every practical consequence of the application of the institution of subordination can be considered as its political and legal basis.

First of all, this concerns such a widespread justification of the need for subordination in the domestic literature as eliminating the possibility of internal creditors to influence the bankruptcy procedure due to claims under their control included in the "voting" third stage of the register of creditors. Such researchers as R. T. Miftakhutdinov, A. I. Shaidullin[68], and T. P. Podshivalov[69] speak about the institution of subordination as a tool for combating the abovementioned abuses of controlling persons in bankruptcy.

Without denying that the need to fight controlled bankruptcies served as one of the main incentives for judicial practice to accept the doctrine of subordination, one should doubt the possibility of using this argument to justify subordination. The latter is, first of all, a reduction in the priority of the claim of the controlling person, and only as a consequence of withdrawal from the third line of the register, the creditor loses the right to vote at meetings of creditors (paragraph 1 of Article 12 of the Bankruptcy Law, paragraph 14 of the Law of 29.01.2020).

If the purpose of regulation was to limit the ability of domestic creditors to influence bankruptcy proceedings, the obvious solution would be to directly deprive them of their right to vote at creditors' meetings. The corresponding restriction of rights would not prevent them from participating in the proportional distribution of proceeds from the sale of the bankruptcy estate on an equal basis with external

[68] Miftakhutdinov R.T., Shaidullin A.I., prev. op.
[69] Podshivalov T.P. Protection of the debtor's interests in a contractual obligation in bankruptcy and abuse of corporate control // Law and Economics. 2017. N 12. p. 41 - 45.

creditors. This approach has already been partially implemented in paragraph 12 of the Review dated 29.01.2020, according to which**, regardless of the subordination of the claim**, debtor's controlling persons or affiliated persons are not entitled to participate in the selection of a candidate for an arbitration manager or a self-regulating organization of arbitration managers. It should be noted that Draft Law No. 1172553-7 also offers solutions to the problem of the influence of domestic creditors on the bankruptcy procedure that are not related to subordination of their claims: in particular, it is proposed to introduce amendments to paragraph 2 of Article 150 of the Bankruptcy Law that provide for separate voting for the decision to conclude a settlement agreement by the majority of the following classes of creditors:

- creditors who are not interested in the debtor;
- creditors who are interested in the debtor (support for this class of creditors is not required if its claims amount to less than half of all unsecured claims);
- secured creditors[70].

Thus, the need to limit the influence of domestic creditors on the bankruptcy procedure cannot be considered as an independent argument in favor of subordination of their claims, but rather is only one of the consequences of such subordination. The goal of limiting the influence of domestic creditors on the bankruptcy procedure should be achieved and is already partially achieved in other ways that are not related to subordination.

Similarly, subordination should not be considered as a way to combat the inclusion of fictitious debt in the register. This position is quite common in the Russian literature due to the fact that the majority of "suspicious" claims originate precisely from internal creditors, who are able to issue any bilateral documents with the debtor on the existence of obligations even in the absence of real facts of

[70] See more details Esmansky A.A. Debt restructuring: how to protect the interests of independent creditors? // Law. 2023. N 4. pp. 90-104.

economic life. A.V. Safonov[71], for example, notes that the need for subordination of claims of persons controlling the debtor is predetermined, in particular, the fight against the artificial build-up of accounts payable[72]. A similar position is shared by I.M. Shevchenko, who believes that " the widespread use of subordination in relation to the claims of affiliated persons will significantly solve the problem of increasing fictitious debt in bankruptcy proceedings, since the application of such claims will simply become unprofitable[73]." At the same time, the Supreme Court of the Russian Federation itself, in its subsequent Review of 29.01.2020, drew a clear line between verifying the validity of the transaction and whether the debtor has an obligation on the basis of which the claim is made (paragraphs 1, 5 of the Review) and subordinating the claim of the creditor who has already passed the above check (paragraphs 3.1-3.4, 9 of the Review). Consequently, only those claims whose existence has already been confirmed on the basis of the "beyond reasonable doubt" standard of proof that is as strict as possible for a debtor-affiliated person are subject to subordination[74], and therefore the fight against the inclusion of fictitious debts of domestic creditors in the register cannot be considered as a political and legal basis for the institution of subordination.

Taking into account the above-mentioned reservations, the main political and legal arguments in favor of subordination of claims of shareholders in legal entities should include the following:

- subordination as a sanction for illegal behavior of the shareholder;
- encouraging earlier opening of bankruptcy proceedings;
- ensuring a fair distribution of risks between external and internal creditors;
- compensation mechanism for insufficient equity of the company.

These arguments are discussed in more detail below.

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[71] Safonov A.V. Fair queue of creditors. Commentary on the Determination of the Judicial Collegium on Economic Disputes of the Supreme Court of the Russian Federation dated July 23, 2018 N 310-ES17-20671 // Bulletin of Economic Justice of the Russian Federation. 2018. N 12. P. 14 - 21

[72] Ibid.

[73] Shevchenko I.M. On the issue of lowering the priority of satisfaction (subordination) of creditors' claims in bankruptcy cases // Russian Judge. 2018. N 3. p. 10-14.

[74] See more details Stelmakh A.V., Esmansky A.A. Procedure for establishing creditors' claims in bankruptcy: actual problems // Arbitration disputes. 2021. N 3. pp. 105-122.

3.1. Subordination as a sanction for illegal behavior of the shareholder.[75]

As can be seen from the models of subordination discussed above, historically, subordination appeared in the practice of German courts in the 1930s and 1940s precisely as a means of countering the behavior of a shareholder, which was characterized as contrary to good faith. To this day, in some jurisdictions, in particular, in the United States, subordination is applied as a sanction for unfair behavior (equitable subordination). The view of subordination of shareholders' claims as a responsibility is shared by some domestic and foreign researchers[76].

Indeed, subordination of a claim in a broad sense (not in relation to the claim of a public shareholder) may well be considered as a special kind of sanction, since the legislation already uses subordination as an unfavorable consequence of illegal behavior. For example, clause 2 of Article 61.6 of the Bankruptcy Law provides for a reduction in the priority of a claim arising after the return to the bankruptcy estate of property received under a transaction declared invalid on the basis of clause 2 of Article 61.2 and clause 3 of Article 61.2 of the Bankruptcy Law. These elements of invalidity assume that the counterparty is aware of the illegality of the transaction being concluded, and therefore subordination of the claim acts as a sanction for the party to the contested transaction. In clause 27 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 63 of 23.12.2010 "On certain issues related to the application of Chapter III.1 of the Federal Law " On Insolvency (Bankruptcy)" it was explicitly explained that lowering the priority of the reinstated claim on the basis of article 61.6 (2) of the Bankruptcy Law is a liability of a special nature[77].

The arguments of the Supreme Court of the Russian Federation in the Review of 29.01.2020, as well as in the legal positions preceding it and following them (see

[75] See also Esmansky A.A. Subordination of the claims of persons controlling the debtor based on crisis financing: political and legal goals and actual problems // Law. 2023. N 3. pp. 158-173.

[76] For example, Schmidt K. Vom Eigenkapitalersatz in der Krieg zur Krise des Eigenkapitalersatzrechts? In: GmbH-Rundschau. 2005; Fedotov D.V. On the issue of subordination of claims of affiliated creditors in bankruptcy // Economic justice in the Ural district. 2018. N 4. pp. 203 – 213.

[77] See also Yulova E.S. Title creditors' claims to be paid after the claims listed in the Claims register in insolvency proceedings // Bulletin of St. Petersburg University. Right. 2021. N 4. pp. 1034 - 1055.

Section 1 above for more details), suggest that subordination is considered by the highest instance as a kind of responsibility. Thus, while recognizing the loan financing of the company by its shareholder as legitimate in principle (paragraph 2 of the Review), the Supreme Court points out a deviation from the model of behavior, which consists in timely filing an application for bankruptcy of the debtor, when financing in the context of a financial crisis (paragraph 3.1 of the Review) and an illegal redistribution of risk in the event of bankruptcy (item 9 of the Review).

Since each of the cases considered by the Supreme Court as illegal or unfair behavior on the part of a company shareholder has its own essential features, it makes sense to consider them separately in the context of whether or not there is a reason to speak of subordination as a form of liability.

3.1.1. Crisis financing. In the pre-bankruptcy period, the main or even the only source of financing for a business is often its owners. As a rule, they are the ones who are most interested in saving the business and have the most complete information about its current state. In order to restore the company's solvency, shareholders may make additional contributions to the authorized capital or property in accordance with the procedure provided for by corporate legislation. However, in practice, the debtor's controlling persons often prefer to finance a struggling business through the provision of loans, fulfillment of the debtor's obligations to third parties, and other civil legal structures that are economically equivalent to providing debt financing (see chapter 3 below)[78].

Arguments to justify the illegality of the behavior of a shareholder providing borrowed financing to the company are usually based on the negative consequences for external creditors that crisis financing may have[79].

Indeed, temporarily keeping a business "afloat" with the subsequent inevitable bankruptcy can bring more harm to external creditors than the benefits of providing

[78] See Esmansky A.A. Subordination of the claims of persons controlling the debtor based on crisis financing: political and legal goals and actual problems // Law. 2023. N 3. pp. 158-173.

[79] See Gelter, Martin and Roth, Juerg, Subordination of Shareholder Loans from a Legal and Economic Perspective (2007). Journal for Institutional Comparisons, Vol. 5, No. 2, pp. 40-47, 2007, Harvard Law and Economics Discussion Paper No. 13, Skeel, D. and G. Krause-Vilmar (2006), “Recharacterization and the Nonhindrance of Creditors”, European Business Organization Law Review 7, 259–85.

crisis financing. Such consequences are especially fraught with cases when the debtor's operating activities are unprofitable, that is, the value of the potential bankruptcy estate decreases with each passing month. As M.V. Chuprikov notes, the sooner an organization, represented by its controlling persons, informs about the crisis by filing a bankruptcy application, the more likely it is to achieve legitimate goals both for the debtor (to return to normal operations) and for its creditors (to get the most complete and speedy satisfaction of their claims)[80].

In addition, artificially delaying the debtor's bankruptcy avoids challenging certain transactions that, at a later start of the bankruptcy procedure, will fall outside the periods provided for in Articles 61.2 and 61.3 of the Bankruptcy Law.

Does this give grounds to consider subordination a special form of civil liability? Let us turn to the concept of civil responsibility, which O. S. Ioffe very successfully formulated in the form of a combination of three main elements:

1) liability is a sanction for violation of civil rights, secured by persuasion and state coercion or its possibility;

2) it is based on public condemnation of the offender's behavior and encouraging him to engage in certain activities in the public interest;

3) it is expressed in the form of restoring the violated grounds and establishing negative consequences for the offender in order to ensure the conditions for the normal development of public relations regulated by civil law[81].

Similar elements of civil liability are given in the works of other researchers[82].

Despite the fact that granting a loan to a controlled debtor is not illegal, it can be argued that this is loan financing in a crisis situation, in which the controlling person must either recapitalize the company or initiate its bankruptcy. In particular,

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[80] Chuprikov M.V. The moment of occurrence of the duty of controlling persons to report on the financial difficulties of the organization // Bulletin of Economic Justice of the Russian Federation. 2022. N 4. pp. 56-75.

[81] Ioffe O.S. Responsibility under Soviet civil law. L., 1955. p. 17.

[82] See Bratus, Sergey Nikitich - Legal responsibility and legality : (Essay of theory).
Mozolin V.P. Civil liability in the system of Russian law // Journal of Russian Law. 2012. N 1. p. 33 – 40, Jourdan P. Principles of civil liability // Bulletin of Civil Law. 2021. N 4. P. 212 - 241; N 5. P. 233 - 255; N 6. P. 154 - 193; 2022. N 1. P. 200 – 229, Idrisov H.V. On certain types of legal responsibility: the essence, approaches to definition, specifics of implementation in the field of public civil service // Russian Justice. 2020. N 6. pp. 8-10, Gushchin V.Z. Civil liability // Modern law. 2014. N 1. P. 52 – 57, Piskunova N.I., Tselovalnikova I.Yu. General provisions on civil liability // Modern lawyer. 2018. N 3. pp. 60 - 65.

this view was taken by the German Supreme Court in one of its acts in 1984[83]. Among German theorists, this position had both supporters (K. Schmidt, R. Bork) and opponents (Kh. Eidenmuller)[84].

The disadvantage of this concept is that the standard of conduct imposed on the controlling person does not follow from the law, but is based on the assumption that immediate bankruptcy filing is always preferable for creditors than loan financing. This assumption is often contrary to business practice.

For example, if crisis financing is provided within the framework of a reasonable plan to restore the company's solvency, then its borrowed form does not in itself violate the rights of other creditors. Moreover, external creditors can benefit from crisis financing even if the controlling person's claim is not lowered in priority, since:

- there is a possibility that as a result of the support provided, the company will be able to maintain its solvency;
- in the event of bankruptcy of the company, its property mass will include the subject of financing in the form of cash or other property, the value of which will be distributed among all creditors on a parity basis.

In turn, financing in the form of additional capitalization of the company may differ for the better in that it does not burden the company with additional obligations, but it can also lead to negative consequences for creditors in the form of prolongation of unprofitable activities of the company and a later start of bankruptcy proceedings. Such consequences may be many times higher than the amount of the provided contribution to the authorized capital (for example, if this amount is sufficient only to repay the obligations that are closest in time for fulfillment).

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[83] "... the participant's responsibility for the proper financing of the business, which positively does not oblige the participant to compensate for the insufficient capitalization of the company during the crisis, but assumes that the participant cannot actually provide financial assistance conceived by him, instead of providing in the form of an increase in objectively necessary equity, to the detriment of creditors, in another less risky form of financing" - BGH. 26 März 1984 — II ZR 171/83, cit. by: A.I. Shaidullin. The main political and legal arguments pro and contra ideas of subordination of loans of participants of legal entities // Bulletin of Economic Justice of the Russian Federation. 2019. N 1. pp. 83 - 105.

[84] Ibid.

Consequently, crisis financing can have both negative and positive externalities, regardless of the form in which it is implemented: mandatory-legal or corporate. In such circumstances, it would be premature to impute the standard of conduct "recapitalization or immediate bankruptcy" to controlling persons, and even more so to consider a deviation from this standard as an unconditional violation of the rights of external creditors.

Finally, even if the legal order considered crisis financing a violation of the rights of external creditors, subordination as a measure of responsibility would not meet the principle of proportionality. Thus, in case of subordination, the controlling lender loses more, the larger the loan amount was and the higher the percentage of satisfaction of creditors' claims. These signs hardly indicate an increased harm and public danger of the actions of the controlling person. At the same time, a lender whose small loan amount has delayed bankruptcy for several months can cause significantly more damage to external creditors with less property losses for itself. Consequently, the appropriate way to protect creditors affected by crisis financing could be to collect commensurate amounts of money from the controlling person, but not to lower the claim in order of priority.

In addition, failure by a manager or other responsible person to comply with the obligation to file a debtor's bankruptcy application in a timely manner is an independent offense, the liability for which is provided for in Article 61.12 of the Bankruptcy Law. As I.M. Shevchenko rightly points out, if subordination is considered a measure of liability, it inevitably turns out that the controlling person is twice liable for misleading creditors: in the form of subordination of the claim, as well as on the basis of the rules on subsidiary liability, which contradicts the fundamental principle of law: non bis in in idem (there can be no two measures of responsibility for one act)[85].

[85] Shevchenko I.M. On the issue of subordination of creditors' claims that arose after the initiation of bankruptcy proceedings // Bulletin of Economic Justice of the Russian Federation. 2023. No. 6. pp. 164-181.

In the context of the illegality of crisis financing, the German Supreme Court[86] and the Russian Supreme Court[87] often mention such a negative consequence of crisis financing as creating the appearance of the company's solvency. Thus, I.A. Belousov points out that overcoming the crisis through non-public financing is unfair behavior, as it creates incorrect ideas about the financial state of the company among turnover shareholders, masking the crisis situation[88].

Recognizing the existence of this problem in practice, one cannot agree that subordination is an adequate means of solving it. Creating the appearance of solvency, if it has a negative impact, first of all, on those creditors who entered into binding relations with the company after receiving financing from their shareholder. Other creditors, even if they learn about the crisis situation of the company, as a rule, do not have the opportunity to get out of the ongoing relationship with the debtor. The practice of corporate bankruptcies does not give grounds for asserting that the availability of information about the debtor's crisis state at the time of granting financing would affect the behavior of all or most creditors in such a way that they could take measures to improve their situation, and do so in a way that does not lead to preferential satisfaction. In this regard, creating the appearance of the debtor's solvency cannot serve as a basis for subordination of the shareholder's claims. Similarly, the fact that crisis financing did not create such visibility cannot serve as a ground for exemption from subordination of the claim.

3.1.2. Initial undercapitalization[89]. As explained in clause 9 of the Review dated 29.01.2020, the claims of the person controlling the debtor for repayment of the loan granted during the initial period of the debtor's business activity are also

[86] Shaidullin A.I. Subordination of the obligatory claims of debtor’s controlling persons and persons affiliated with them in bankruptcy cases of business companies: dissertation for the degree of Candidate of Legal Sciences. pp. 100-101.
[87] See the above-mentioned Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 10.02.2022 N 305-ES21-14470(1,2) in case N A40-101073/2019.
[88] Belousov I.A. Subordination of claims on loans of corporation participants in the bankruptcy case // Bulletin of Economic Justice of the Russian Federation. 2018. N 5. pp. 120 - 169.
[89] See in more detail Esmansky A.A. Initial Undercapitalisation as a Ground for Subordinating the Claims of the Debtor's Controlling Persons// Law. 2022. N 2. pp. 152 - 162.

subject to subordination, unless other goals for choosing such a financing model are established, except for the redistribution of risk in the event of bankruptcy.

To this explanation, the Supreme Court gave an example in which a business company was initially endowed with a minimum authorized capital of 10 thousand rubles, and then received a large loan from a controlling person. This loan allowed the debtor to start implementing its statutory activities – the construction of an office center. In the future, the debtor was declared bankrupt, and the controlling person demanded that its claims from the loan agreement be established in the register of creditors' claims.

Paragraph 2 of paragraph 4 of Article 65.2 of the Civil Code of the Russian Federation imposes on a corporation shareholder the obligation to participate in the formation of the corporation's property in the required amount. Although the founder of a company may not know in advance whether the authorized capital they form is sufficient or not, in the case under consideration, the founders of the organization did not have any uncertainty about the scope of the company's activities. Even at the initial stage of the debtor's activity, it was obvious that the amount of 10 thousand rubles was not comparable with the volume of planned activities.

In such circumstances, the Supreme Court concluded that the controlling person intentionally abandoned the mechanisms of capitalization provided for by law through contributions to the authorized capital or contributions to property[90], with the aim of redistributing in its favor the risk of losing a large contribution in the event of bankruptcy by the company. The financing model chosen by the controlling person already at the time of its choice led to an obvious imbalance between the rights of the controlling person and the rights of independent creditors. The Supreme Court recognized such a redistribution of risks as unacceptable in accordance with clause 4 of Article 1 of the Civil Code of the Russian Federation, and therefore the corresponding claims of the controlling person from the loan financing are subject to subordination.

[90] Art. 27 of the Federal Law "On Limited Liability Companies", Art. 32.2 of the Federal Law "On Joint Stock Companies".

As can be seen from the above example, under insufficient capitalization, the Supreme Court understands the initial supply of the debtor by its founders with their own capital in an amount insufficient for the independent conduct of the business that the debtor will have to conduct[91]. In advance of further considerations, we will agree that the concepts of "equity" and" authorized capital", although not identical[92], are used as such in the framework of this study, since in most cases in the initial period of the company's activity, the amount of its equity capital is equal to or approximately equal to the amount of authorized capital.

At the same time, the mere provision of borrowed funds by a shareholder to the company along with contributions to the authorized capital does not always indicate insufficient capitalization of the company. A properly capitalized company may use borrowed funds, for example, to close short-term cash gaps when delivering goods to customers with deferred payments. Opening a credit line with a bank is usually associated with significant transaction costs for small businesses. In this case, it may be economically reasonable to obtain a loan from a company member, the claim for which will not be subject to subordination. Otherwise, the interpretation of the rules on subordination would be so broad that it would make it completely meaningless to explain paragraph 2 of the Review about the inadmissibility of subordination of the creditor's claim only on the grounds that it belongs to the number of persons affiliated with the debtor.

Based on the fact that in this case the shareholder does not fulfill its obligation to participate in the formation of the company's property in the required amount, the Supreme Court equates the establishment in the register of creditors of the claim of a shareholder from borrowed financing to taking advantage of its illegal or unfair

[91] This definition of undercapitalization was proposed by E.D. Suvorov even before the approval of the Review dated January 29, 2020: see Suvorov E.D. Requirements of persons associated with the debtor in the case of his bankruptcy: from objective to subjective imputation // Bulletin of Economic Justice of the Russian Federation. 2019. N 4. P. 130 - 161; N 5. P. 53 – 107, Suvorov E.D. On the issue of the legal nature of subsidiary liability for the obligations of an insolvent debtor for bringing bankruptcy // Laws of Russia: experience, analysis, practice. 2018. N 7. pp. 42 - 49.

[92] According to clause 66 of the Regulations on maintaining accounting and financial statements in the Russian Federation, the authorized (share) capital, additional and reserve capital, retained earnings and other reserves are taken into account as part of the organization’s own capital.

behavior, which is unacceptable in accordance with paragraph 4 of Article 1 of the Civil Code of the Russian Federation.

Is there a positive obligation of the shareholder to provide the company he is creating with sufficient capital to carry out its statutory activities?

Paragraph 2 of clause 4 of Article 65.2 of the Civil Code of the Russian Federation states that a corporation shareholder must participate in the formation of the corporation's property in the required amount, in the manner and within the time limits provided for by this Civil Code, other laws or the corporation's constituent document. The phrase "in the required amount" appeared in the wording of Federal Law No. 99-FZ of 05.05.2014; in an earlier version, clause 2 of Article 67 of the Civil Code of the Russian Federation established the obligation of shareholders in business partnerships and companies to make contributions in the manner, amounts, methods and within the time limits provided for by the constituent documents. This may lead the researcher to believe that in the course of the civil law reform, shareholders were required to set the amount of authorized capital in an amount comparable to the planned activity[93].

However, neither the explanatory note to the relevant draft law[94] nor the transcript of discussions in the State Duma of the Russian Federation[95] allow us to conclude that the lawmaker intended to introduce a new requirement for founders of corporations to ensure that the authorized capital corresponds to the scale of the planned activities of a legal entity. There are no such proposals in the Concept of Development of the Civil Legislation of the Russian Federation (hereinafter referred to as the Concept), where the problem of providing start-up capital for the company's activities and guaranteeing creditors' rights was proposed to be solved in a completely different way-by increasing the minimum authorized capital (clause 4.2

[93] Even before the approval of the Review dated January 29, 2020, such an interpretation was proposed, in particular, by I.A. Belousov, see Belousov I.A. Subordination of loan claims of corporation participants in a bankruptcy case // Bulletin of Economic Justice of the Russian Federation. 2018. N 5. P. 120 - 169.

[94] Bill No. 47538-6/12 "On Amendments to Part One of the Civil Code of the Russian Federation" https://sozd.duma.gov.ru/download/42BF60BD-EFB2-41C5-B336-D110076D982B (last access date: 05/18/2023).

[95] https://sozd.duma.gov.ru/bill/47538-6 (last access date – 18.05.2023).

of the Concept)[96]. Up to the approval of the Review dated 29.01.2020, judicial practice considered paragraph 2 of clause 4 of Article 65.2 of the Civil Code of the Russian Federation exclusively in the context of the obligation of a corporation shareholder to make contributions provided for in the statutory documents[97].

In this connection, the phrase "in the required amount" should be understood as nothing more than a stylistic clarification of the norm obliging the shareholder to pay his share in the authorized capital of the company. In turn, paragraph 9 of the Review contains a completely new interpretation of the norm under consideration, the validity of which remains very controversial under the current legislation[98].

It should be noted that in practice, there are examples of when a business building scheme as such is recognized as illegal. For example, in ruling No. 308-ES18-23771(11,12,13) of 18.08.2022 in case No. A63-6407/2018, the Supreme Court of the Russian Federation, when considering a cassation appeal on a separate dispute on bringing to subsidiary liability, noted that after the acquisition of corporate control over the group and its accounts payable, the new owner implemented a business model using the debtor's production facilities under the a tolling scheme in which the entire cost part of the production and sales chain (the "loss center") was assigned to the debtor in bankruptcy proceedings, and the accumulation of income from the sale of finished products issued by the debtor (the "profit center") was carried out by the toller, which in its entirety caused harm to independent creditors. At the same time, in contrast to this situation, the borrowed financing model itself does not lead to unprofitability of the Company's activities and does not lead to its bankruptcy.

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[96] Concept for the development of civil legislation of the Russian Federation (approved by the decision of the Council under the President of the Russian Federation for the codification and improvement of civil legislation dated October 7, 2009) // Bulletin of the Supreme Arbitration Court of the Russian Federation, No. 11, November 2009.

[97] For example, in the resolution of the Arbitration Court of the North-Western District dated November 20, 2019 in case No. A05-13032/2018, the resolution of the Arbitration Court of the West Siberian District dated March 22, 2019 in case No. A45-21714/2018.

[98] Let us note that the consistent application of such an interpretation may lead to the emergence of the practice of bringing controlling persons to subsidiary liability on the basis of clause 1 of Art. 61.11 of the Bankruptcy Law for insufficient capitalization of the company. This possibility, in particular, was discussed in Miftakhutdinov R.T., Shaydullin A.I., mentioned. Op.

Thus, subordination during the initial undercapitalization can also not be recognized as a sanction for misconduct due to the absence of signs of illegality in the actions of the lender.

Of course, subordination of claims in case of insufficient capitalization can always be justified by pointing out the unfair actions of the shareholder who implemented the least profitable scheme for financing their business for external creditors. This argument stems from a particular view on the fair distribution of risks between domestic and external lenders, and will be discussed in more detail later in section 3.3.

3.2. Encouraging an earlier start of bankruptcy proceedings. In Austria and Germany, there is also a widespread view that subordination of claims of controlling persons is intended to encourage an earlier start of bankruptcy proceedings[99].

As mentioned above, it is not clear that the immediate commencement of bankruptcy proceedings is always preferable to obtaining a loan from a controlling person. However, to test the hypothesis under consideration, let's assume that the institution of subordination aims to influence the behavior of business owners, encouraging them to file for bankruptcy earlier instead of risky crisis financing.

In this case, it is necessary to state that subordination as a means of coercion is completely incomparable in terms of the degree of influence with other factors that the business owner usually takes into account.

Thus, the main risk for such a person is, of course, the complete loss of the ability to receive income from the company's activities as a result of the latter's bankruptcy. As a rule, the possibility of preventing bankruptcy of a company has a disproportionately greater weight in making a decision on providing crisis financing than the prospects of establishing a claim in the register of creditors in the event that the company is still declared bankrupt. It is unlikely that the risk of subordination in the event of bankruptcy can in itself lead a reasonable business owner to abandon

[99] See for more details Shaydullin A.I., mention. Op. and https://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00124/index.shtml (last accessed: 05/18/2023).

the attempt to save his company from bankruptcy. As A.I. Shaidullin notes, "subordination only creates additional risks for saving a business, which means that it should force the controlling person to check more carefully how high the chances of public rehabilitation are, and deter him from unjustified rescue attempts[100]."

If the company's bankruptcy is obviously unavoidable for controlling persons, the key factor for them is the risk of being held vicariously liable for failure to submit (late submission) of the debtor's application for its own bankruptcy (Article 61.12 of the Bankruptcy Law). Given this risk, it is highly unlikely that the possibility of lowering the priority requirement will play any significant role in making a decision on granting funding.

In a survey of entrepreneurs conducted by the Center for Strategic Research Foundation, only **28%** of respondents said that subordination of claims fundamentally affects the decision to provide financing, for **15%** it is not important at all, and **57%** said that other factors influence such a decision. At **the same time, 85%** of respondents-entrepreneurs indicated that, despite the risk of subordination, they would nevertheless provide such financing (this number also includes some entrepreneurs who consider subordination to be a fundamentally important factor)[101].

Thus, since subordination in most cases is not an effective incentive to file for bankruptcy earlier, the corresponding influence on the behavior of controlling persons cannot be the main goal of this institution.

3.3. The mechanism of fair distribution of risks between external and internal creditors. It follows from paragraph 3.1 and, in particular, paragraph 9 of the Review dated 29.01.2020 that the Supreme Court's approach is based, inter alia, on the fact that the return of a shareholder on investment in the company's capital is usually unlimited and may significantly exceed the market value of lending for this company. The flip side of these opportunities is an increased risk of loss of

[100] Shaydullin A.I. Subordination of the obligatory claims of debtor's controlling persons and persons affiliated with them in bankruptcy cases of business companies: a dissertation for the degree of candidate of legal sciences. Page 94.
[101] Ibid, p. 116-117.

investment, taking into account Article 2 (8) and Article 148 of the Bankruptcy Law. According to the Supreme Court, by resorting to loan financing, the shareholder retains the opportunity to participate in the distribution of profits in the event of success of the business project, but instead of an increased risk, it bears the usual risk of the lender for mandatory claims. This idea can also be traced in other provisions of the Review dated 29.01.2020. Thus, in paragraph 11 of the Review, the Supreme Court clarified that the claims of a creditor participating in the authorized capital of the debtor for security purposes are not subject to subordination, since, in essence, the lender did not have the opportunity to participate in the distribution of the debtor's profit. Similarly, in paragraph 13 of the Review, the Supreme Court indicated that the claims of a public law entity should not be subordinated, since the reason for its actions to finance the debtor was not the beneficial interest characteristic of an ordinary controlling person to participate in the distribution of all possible future profits of the debtor.

The explanation of subordination as a way to restore a fair distribution of risks between internal and external creditors also has considerable support in the domestic and foreign literature. Proponents of this approach point out that the company's shareholder, unlike external creditors, has the opportunity to receive an additional unlimited benefit in the form of the company's profit in the event of its successful exit from the crisis. Therefore, when providing crisis financing, such a shareholder must also bear greater risks of losing the amount of financing than external creditors. This approach is often contrasted with the above-discussed view of subordination as a sanction for illegal actions of the shareholder. For example, I.A. Belousov points out that "one should not confuse the distribution of risk with responsibility. Persons guilty of bankruptcy or failure of creditors to fully satisfy their claims are held liable. In turn, to impose a risk, it is sufficient that the person was able to independently prevent the occurrence of adverse consequences, including by showing increased measures of care and prudence in comparison with the level that is required of him

by the nature of relations and terms of turnover[102]." S. S. Galkin's position is also noteworthy in this regard: "... subordination is not a sanction for the unfair behavior of the person controlling the debtor... the purpose of competitive subordination is a legitimate and fair determination by the court of the nature of the claimed claim..."[103].

According to A.I. Shaidullin, the satisfaction of a shareholder's loan claim in the same queue with external creditors is unfair due to the fact that a shareholder of a legal entity, which must fully bear the risks of business success by providing a loan and becoming a creditor of its company, reduces the chances of satisfaction of other creditors from the bankruptcy estate, transferring its risks including on them[104]. Similarly, A.V. Safonov points out that the need for subordination of claims of persons controlling the debtor is due, inter alia, to considerations of social justice between the claims of creditors and those who led the company to bankruptcy[105]. This position is also reflected in paragraph 3.1 of the Review of 29.01.2020, where the Supreme Court stated that the risks of loss of compensation financing in the event of bankruptcy cannot be transferred to other creditors. More specifically, the Supreme Court's commitment to this approach is expressed in the Definition of the SCEC of the Supreme Court of the Russian Federation No. 307-ES21-7195 of 17.11.2021 (2,3): "The institution of subordination of claims is primarily aimed at protecting the interests of independent creditors by distributing the risk of bankruptcy of the debtor to controlling persons."

It should be noted that the above approach does not provide a satisfactory explanation of why it is crisis financing that is subject to subordination, and not any loan financing provided by a controlling person. Getting unlimited benefits from participating in society is even more likely if the shareholder provides financing not for getting out of a financial crisis, but for business development. Proponents of the

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[102] Belousov I.A., mention. Op.
[103] Galkin S.S. On the issue of competitive subordination of claims from capital-substituting transactions with the participation of persons controlling the debtor: political, legal and law enforcement aspects // Entrepreneurial Law. Application "Law and Business". 2018. N 3. P. 45 - 51
[104] Shaydullin A.I., mention. op..
[105] Safonov A.V., mention. op.

concept of risk redistribution R.T. Miftakhutdinov and A.I. Shaidullin are consistent in this regard and insist on applying a model of strict subordination, in which the claims of internal creditors are subject to subordination regardless of the moment of their occurrence[106]. This model was adopted in Germany in 2008, replacing the previous practice of subordinating claims resulting from crisis financing[107]. In turn, I. M. Shevchenko points out the comradely nature of relations within a group of individuals and notes that the opposition of claims of such "comrades" to external creditors is unacceptable due to the universal idea of civil law hat internal relations are not contrasted with external ones[108].

At the same time, the explanation of subordination as a way to restore justice, violated by the use of a borrowed form of financing, is also not perfect, since there is no obligation of the shareholder to finance the company's activities solely by its additional capitalization. On the contrary, by virtue of the principle of autonomy of will and freedom of economic activity, the right of controlling persons to independently determine the legal form of investment is recognized (paragraph 2 of the Review of the Supreme Court of 29.01.2020). At the same time, the reference to the principle of autonomy of the will does not in itself imply the failure of the argument about subordination as a means of restoring justice. As Belov V.A. and Skvortsov O.Y. note, these values are often opposed to each other: the movement towards absolute freedom inevitably leads to infringement of justice; an attempt to achieve absolute justice stops the movement of society forward[109]. In this regard, the issue of equity in the context of financing by controlling entities should be considered in more detail.

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[106] Miftakhutdinov R.T., Shaydullin A.I. Mentioned Op.

[107] As a motive for establishing a regime of strict subordination, the authors of the bill indicated the need to simplify regulation, in which most of the participants' demands were in any case lowered in priority - see the text of the bill with an explanatory note at the link https://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/16_wp/gmbhmomig/rege.pdf;jsessionid=FBA481AC8F16A5991F953A1DFC8429CC.1_cid359?__blob=publicationFile&v=1 (last access date: 05/18/2023).

[108] Shevchenko I.M. On the issue of subordination of creditors' claims arising after the initiation of bankruptcy proceedings // Bulletin of Economic Justice of the Russian Federation. 2023. No. 6. P. 164-181.

[109] Belov V.A., Skvortsov O.Yu. Justice vs freedom = law: antagonistic contradiction and its solution // Law. 2023. N 2. P. 120 - 130; N 3. P. 114 - 125.

Loan financing from a controlling entity does not create additional risks for external lenders in comparison with financing from other sources. On the contrary, it is even more preferable for external creditors for a debtor to receive an unsecured loan from its shareholder than if the same debtor took out a loan from a bank secured by its property. Consequently, when choosing a borrowed form of financing, a company shareholder does not redistribute its own risks to external creditors, but only determines the amount of risk assumed.

Researchers often mention the possibility of a shareholder receiving unlimited profit from the company's activities, which is also not a reason for lowering the priority of the shareholder's claim. First of all, it is more correct to characterize the possible profit of a shareholder as "uncertain", rather than "unlimited". The amount of profit extracted is not limited only legally, but from an economic point of view is limited by competition, state regulation of prices, economic growth rates and other factors. The profitability of any business has objective limitations, but its limit is really unknowable. Similarly, at the time of establishing the creditor's claim, the register cannot determine the amount that the creditor could have received as a result of inclusion in the third stage, but loses as a result of subordination. Consequently, the potential benefit of the shareholder from the continuation of the debtor's activity and its costs from subordination of the claim can be proportional to each other only by the rarest chance. Similarly, potential losses of external creditors from the debtor's bankruptcy do not correlate in any way with these values. In such circumstances, the redistribution of risks by subordinating the shareholder's claims cannot be considered as an expression of corrective justice, which dictates the restoration of balance and equivalence in interpersonal relationships[110]. According to K. B. Koraev, it is the fair and even distribution of the debtor's property among all its creditors that is the primary task of the insolvency institute[111].

Thus, attempts to explain subordination by fundamental considerations of fairness are based on the assumption that the shareholder in the company should

[110] Karapetov A.G. Economic analysis of law. M.: Statute, 2016. P. 16, 110.
[111] Koraev K.B. Legal status of bankruptcy creditors in a bankruptcy case. M.: Wolters Kluwer, 2010. 208 p.

have taken care of the interests of creditors better than his own. This assumption, if accepted correctly, can lead the researcher much further than he would like. For example, it may be necessary to raise the issue of refusing to protect a business decision[112] or modify it in such a way that the persons controlling the company strive not to extract maximum profit, but to ensure the business model that is as safe as possible for creditors. In other words, it would be equally reasonable to argue that the controlling person, making a potentially very profitable and at the same time risky business decision, acts contrary to the interests of creditors, who, if the plan is successfully implemented, will not receive the notorious "unlimited profit", and in case of failure, will suffer losses as a result of the bankruptcy of the company. However, it is unlikely that normal business conduct would be possible if the business owner had to measure each step with potentially more favorable behavior patterns for creditors. In this regard, it seems fully justified that the general direction of regulating the balance of interests of external creditors and controlling persons (first of all, Chapter III.2 of the Bankruptcy Law) is to prevent actions to the detriment of creditors, but not to force them to find the safest and most profitable business solutions for them. Similarly, subordination of shareholders 'claims cannot be justified from the point of view of the idea of the most favorable financing model for creditors as a proper and fair standard of conduct, deviation from which must necessarily lead to the restoration of violated creditors' rights by lowering the priority of shareholders' claims. The above is not an argument against subordination of shareholders' claims as such, but arguments against considering subordination as an institution necessary to ensure a fair balance between the interests of internal and external creditors. On the contrary, many jurisdictions do not have any rules on subordination at all, and this does not indicate a fundamental injustice of the insolvency laws in the respective countries. Subordination is only a tool for

[112] See paragraph 18 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated December 21, 2017 N 53 “On some issues related to holding persons controlling the debtor liable in bankruptcy,” as well as Borisenko D.R., Tereshchenko T.A. Protection of a business decision: problems and application standards // Arbitration disputes. 2022. N 4. P. 75 - 85.

achieving certain political and legal goals, which are described in more detail in the next subsection.

3.4. The mechanism of compensation for insufficient equity. The practical result of subordination of controlling persons' claims is that external creditors account for a larger part of the debtor's assets than would be the case without subordination. In other words, it becomes easier for the debtor to settle with external creditors, or to agree with them on debt restructuring, since for every ruble of debt of third-tier voting creditors, there are more assets.

At the same time, the amounts of crisis financing subject to subordination for external creditors play the same role as share capital, although they are not formally taken into account as part of the company's equity. This role of subordinated liabilities is clearly seen in the example of banking practice.

Thus, due to the specifics of their activities, credit institutions are subject to the strictest supervision in terms of capital adequacy, and after the global economic crisis of 2007 - 2009, they were assigned many additional obligations to maintain their own capital. One of the most common ways to increase the amount of capital and maintain its adequacy at the required level in banking practice is to attract subordinated loans[113]. That is why, as part of the Basel Committee on Banking Supervision's "Basel III" reforms, subordinated debt is explicitly listed in the bank's regulatory capital along with its share capital[114]. This rule was stipulated in clause 2.3.3 of the Bank of Russia Regulation No. 646-P of 04.07.2018, according to which sources of additional capital of credit institutions include, among other things, subordinated liabilities. Moreover, accounting for subordinated loans as capital when calculating the creditworthiness of a legal entity is also found in practice in relation to companies that are not engaged in banking activities. For example, the press release of the Expert RA rating agency on establishing the credit rating of CONTROL Leasing LLC indicates that " ... the autonomy coefficient adjusted for

[113] Baryshev M., Ushakov O. Subordinated bonds: features of regulation and application // Banking Review. Application "BankNadzor". 2019. N 2. P. 6 - 13.

[114] See, in particular, paragraph 49 of the Basel III standard: Completion of post-crisis reforms, https://www.bis.org/bcbs/publ/d424.pdf (last accessed: 05/18/2023).

quasi-capital *(hereafter highlighted by the author)* will be reduced to approximately 7%. When calculating this indicator**, a subordinated loan** from an investor in the amount of about 0.7 billion rubles was taken into account. The Agency also takes into account a possible **increase in investment by this counterparty** over the rating horizon, which **supported the assessment of the capital position**»[115]."

For the majority of business entities that do not engage in banking or other financial activities, it is obviously impossible to apply mechanisms similar to Basel III for monitoring capital adequacy or at least some control over the level of net assets. As A.A. Glushetsky rightly points out, companies do not maintain the nominal size of their authorized capital "in a fixed amount", but easily reduce it by manipulating an economically meaningless nominal value. In corporate practice, they do not adjust the size of assets (property) to the figure in the charter, but rather revise this figure, adjusting it to the current size of net assets[116]. In this regard, R. T. Miftakhutdinov and A. I. Shaidullin also point out that the provision of clause 4 of Article 30 of the Law on LLC (clause 6 of Article 35 of the Law on Joint-Stock Companies) on the need to maintain compliance of the net asset value with the authorized capital of the company, or its liquidation, is inoperable[117]. Due to the absence of the need to comply with any standards of equity security outside of specially regulated activities, the practice of voluntary subordination has not gained any significant distribution. At the same time, after the systematization of disparate judicial practice in the Review of 29.01.2020 and the formulation of a number of actually new rules in it, the practice of involuntary subordination of claims of controlling persons has become very widespread.

The use of involuntary subordination in order to rehabilitate the debtor is not a completely new phenomenon. So, in March 2013, in order to implement the rehabilitation of two of the largest banks in Cyprus - Bank of Cyprus (BoC) and Cyprus Popular Bank (Laiki), customer deposits exceeding the amount of insured

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[115] https://raexpert.ru/releases/2023/mar07 (last access date: 12.10.2023).
[116] For more details, see Glushetsky A.A. Authorized capital of a business company: economic analysis of the norms of corporate law // Bulletin of civil law. 2020. N 2. P. 217 - 278.
[117] Miftakhutdinov R.T., Shaydullin A.I., mentioned Op.

funds (100 thousand euros) were forcibly subordinated. All depositors' claims exceeding the established limit were converted into shares of the bank at the exchange rate: 1 euro is 1 share[118]. It should be noted that in Italy, one of the reasons for subordination is precisely the provision of financing in conditions of significant undercapitalization of the company (Article 2467 of the Italian Civil Code), i.e. a situation in which the company needed to provide additional capital from shareholders[119].

The current rules of subordination allow courts to qualify the loan of a controlling person as subordinated, that is, it increases the company's ability to fulfill obligations between external creditors. In other words, debt financing is transformed by the court into a "quasi-capitalization" of the company, and with retroactive effect[120].

The institution of subordination in this form acts as a fairly effective alternative to monitoring the provision of organizations with their own capital, the problem of which has long been discussed in the domestic literature. For example, one of the main critics of the "thin capitalization" prevailing in business turnover, E. A. Sukhanov, noted that the absence or symbolic nature of such property [transferred to a legal entity as deposits of shareholders] either makes the existence of the legal entity itself as an independent subject of property relations meaningless, or turns it into a "dummy", a deliberately fraudulent organization intended only to deceive counterparties[121]. Since it would be impractical to establish appropriate regulatory requirements for non-financial organizations, the rule on qualifying as subordinated loans of controlling persons granted by them in the context of a financial crisis applies. Subordination serves as a protective mechanism that allows supporting a

[118] Zavyalov S., Marchenkov B. Subordination of bank creditors' claims during reorganization using the bail-in model // Banking Review. Application "BankNadzor". 2019. N 2. P. 70 - 74.
[119] Madaus, S., Wessels B., Instrument of the European Law Institute - Rescue of Business in Insolvency Law (September 6, 2017). Instrument of the European Law Institute - Rescue of Business in Insolvency Law (2017), ISBN: 978-3-9503458-9-6, P. 246, https://ssrn.com/abstract=3032309 (last access date - 28.10.2023).
[120] The retroactive effect of the subordination of a claim is expressed in the fact that payments made by the debtor under it can be challenged according to the rules of Art. 61.3 of the Bankruptcy Law as transactions made with preference to one creditor over other creditors.
[121] Sukhanov E.A. Property law: scientific and educational essay. M.: Statute, 2017. 560 p.

company in crisis by depositing property, the counter-obligations for which will be imperatively considered subordinated to external creditors. For the latter, crisis financing will actually be equivalent to additional capitalization of the company. At the same time, subordination is carried out regardless of the presence and degree of guilt of the controlling person in the occurrence of a financial crisis. Even if such a crisis was not caused by the actions or omissions of the controlling person, its occurrence should be considered as an integral part of the entrepreneurial risk of the company's shareholder. If, despite the provided financing, the crisis is not overcome, then in the course of bankruptcy proceedings, this financing is retroactively recognized as compensatory, that is, it makes up for the lack of the company's own capital. In this regard, it seems quite justified to apply the rules of subordination specifically to the claims of controlling persons that have arisen in a situation of financial crisis.

Thus, the political and legal purpose of subordination is to increase the level of satisfaction of external creditors' claims.

The advantage of subordination from the point of view of the interests of external creditors is that it applies to financing already received by the debtor, which is provided by the controlling person often without taking into account the prospects for consideration of claims in the event of bankruptcy of the debtor. So, in addition to obtaining the right of claim for participation in a bankruptcy case, there are the following reasons why a business owner may prefer to borrow financing to recapitalize the company:

- loan financing, as a rule, can be provided without a decision of the general meeting of shareholders of the debtor;
- after overcoming the crisis, the loan amount can be returned to the shareholder just as easily and quickly, without any corporate procedures;
- the person providing the financing may not be a member of the company at all, but may control it indirectly.

Despite the adoption of the Review of 29.01.2020, the practice of leveraged business financing is still very widespread in business turnover, since other factors

of its attractiveness remain: mainly, the convenience of providing and then withdrawing funds. These factors, rather than the ability to participate in bankruptcy proceedings as a lender, are the main reason for choosing a borrowed business financing model for many entrepreneurs.

Considering subordination as a tool for improving the position of external creditors through a retrospective review of the status of obligations to internal creditors, it should be assumed that this tool is neither the only nor the most effective means of improving the security of companies with their own capital. At the same time, in the absence of political will to tighten business conditions (especially for small and medium-sized enterprises) and the potentially significant social costs of such measures, subordination plays its role in mitigating the negative externalities of the activities of undercapitalized societies.

Separately, it is necessary to consider the costs of applying subordination rules, which affect not only creditors whose claims are lowered in order, but also potentially negatively affect the business community as a whole. Thus, the most common argument against subordination is that subordination prevents effective attempts to save the debtor (type 2 error) or cannot prevent ineffective attempts (type 1 error)[122]. As A. Engert noted, if the shareholders ' loans are precisely subordinated, the latter lose the incentive to finance and sanitize their business, thereby bringing it out of the crisis[123]. This argument should be viewed with skepticism in view of the conclusion made in section 3.2 above about the insignificant role of subordination perspectives in decision-making by controlling persons. A. I. Shaidullin agrees with this assessment: "... as a rule, the company's insolvency is considered by controlling persons as a rather remote risk, the worst possible scenario, which they tend to assess as unlikely, which means that the subsequent subordination of their claims in bankruptcy has little effect on their decisions. This circumstance knocks out the basis

[122] Gelter, Martin and Roth, Juerg, mentioned op.., Skeel, D. and G. Krause-Vilmar (2006), mentioned op.
[123] Die okonomische begrundung der grundsatze ordnungsgemasser Unternehmensfinanzierung, Zeitschrift Zeitschrift fur Unternehmens-und Gesellschaftsrecht. 2004, S. 813, cit. from: Institute of Insolvency (Bankruptcy) in the Legal System of Russia and Foreign Countries: Theory and Practice of Law Enforcement: Monograph / A.B. Baranova, A.Z. Bobyleva, V.A. Vaipan et al.; resp. ed. S.A. Karelina, I.V. Frolov. M.: Justitsinform, 2020. 360 p.

for the key argument of opponents of subordination of mandatory claims of controlling persons[124]." At the same time, it should also be noted that in some jurisdictions, for example, Switzerland, this argument about the difficulty of rehabilitation prevailed as the main motive for refusing to introduce rules on subordination[125].

Conclusion on the chapter: the most convincing political and legal justification for applying the institution of subordination is its use as a mechanism for compensating for insufficient equity of a legal entity in order to increase the level of satisfaction of external creditors' claims. The institution of subordination thus imposes an additional burden on the persons controlling the debtor, which, however, is disproportionately less than the costs that these persons and society as a whole would bear in the event of state control over the provision of organizations with their own capital. It seems most reasonable to extend the rules of subordination to claims that have arisen as a result of crisis financing or during the initial undercapitalization.

[124] Shaydullin A.I. Subordination of the obligatory claims of debtor's controlling persons and persons affiliated with them in bankruptcy cases of business companies: a dissertation for the degree of candidate of legal sciences. Page 117.

[125] Des Obligationenrechts (GmbH-Recht sowie Anpassungen im Aktien-, Genossenschafts-, Handelsregister- und Firmenrecht) vom 19. Dezember 2001. (1.3.6.) // https://www.admin.ch/opc/de/federal-gazette/2002/index_16.html (last access date - 19.05.2023).

Chapter 2. Determining the range of persons whose claims are subject to the rules of subordination

§ 1. Types of legal entities in whose bankruptcy the rules on subordination are applicable

In accordance with clause 1 of Article 65 of the Civil Code of the Russian Federation, legal entities may be declared bankrupt, with the exception of a state-owned enterprise, institution, political party, religious organization, public law company, as well as a state corporation, a state company and a socially useful fund (unless otherwise provided by a special law on relevant legal entities). The literature notes the redundancy of such a restriction on the number of persons who can be recognized as insolvent[126], but this problem is not included in the subject of this study.

In the literature and judicial practice, the problems of subordination are discussed primarily in the context of business companies' bankruptcies.

At the same time, other types of legal entities, primarily state and municipal unitary enterprises, can also be considered bankrupt. For example, in 2022, there were filed 258 applications for declaring bankrupt state and municipal unitary enterprises. During the year, 113 such debtors were subject to bankruptcy proceedings for a total debt of more than RUB 4 billion[127].

Paragraph 13 of the Review of the Supreme Court of 29.01.2020 examines, among other things, an example of considering the issue of subordination of a recourse claim of an authorized body based on the performance of a state guarantee provided to a beneficiary to ensure proper performance by a state unitary enterprise of its obligations to this beneficiary. With regard to this situation, the Supreme Court

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[126] Popondopulo V.F. Some problems of improving bankruptcy legislation // Journal of Entrepreneurial and Corporate Law. 2016. N 1. P. 44 - 52.

[127] See the report on the work of the arbitration courts of the constituent entities of the Russian Federation in considering bankruptcy cases for 12 months of 2022 (http://www.cdep.ru/userimages/Statistika_2022_godovaya/1aAS-svod_vse_sudy-2022.xls, date of last access: 04/25/2023).

clarified that the establishment of an enterprise by the Russian Federation and the provision of a state guarantee for its obligations was caused by the need to solve socially significant tasks, and therefore the recourse claim of the authorized body is not subject to subordination. This explanation, however, does not contain the conclusion that the rules on subordination do not apply to the owners of the property of a unitary enterprise as such, and the application of subordination to the claim of the owner of the property of a unitary enterprise is theoretically possible. At the same time, it is difficult to imagine a situation in which the funding provided by public education will not be recognized as implemented in order to solve socially significant tasks. In this regard, it is not surprising that in practice there is not a single example of subordination of public education that took place following the consideration of a separate dispute by the courts of all instances in which it was considered.

In turn, the Draft Law No. 1172553-7 does not specify in any way the list of types of legal entities in bankruptcy of which the rules on subordination apply.

It seems that, since subordination is a mechanism for compensating for insufficient capital, the rules on subordination can be applied to the founders, shareholders, shareholders and property owners of any legal entity that can be declared bankrupt by virtue of clause 1 of Article 65 of the Civil Code of the Russian Federation, and at the same time has an authorized capital (authorized fund). It should be noted that from the point of view of another view of subordination, which is the most widespread in the Russian literature, as a mechanism for redistributing risks between internal and external creditors, the issue of subordination should have been considered only in relation to commercial organizations: economic partnerships and societies, peasant (farmer) farms, economic partnerships, production cooperatives, state and municipal unitary enterprises (clause 2 of Article 50 of the Civil Code of the Russian Federation).

For the sake of simplicity of presentation, the generalizing term "shareholder" is used later in this paper for all the persons listed above, except in cases where a specific type of legal entity is relevant.

§ 2. Problems of defining and using the concept of debtor's controlling persons for purposes of subordination of claims in bankruptcy

When formulating rules on subordination and applying them in practice, it is necessary, first of all, to determine the list of persons whose claims are subject to these rules.

Historically, the most common criterion for determining such persons was the status of a shareholder. For example, Section 1 of the Austrian Capital Replacement Act (Eigenkapitalersatz-Gesetz) provides that replacement equity is a loan provided by a shareholder of a company during a crisis. At the same time, a number of legal acts provided for a "minority privilege", which excluded the claims of minority creditors from the subordination rules (for example, in Austria, the subordination rules do not apply to a shareholder with a share of less than 25%, if it is not a controlling shareholder for other reasons)[128].

The Russian judicial doctrine of subordination has taken a slightly different path.

By the time the rules on subordination began to spread in Russian judicial practice, the domestic legislator and arbitration courts actively applied such concepts as "controlling person of the debtor", "affiliated person", as well as "actual affiliation" in bankruptcy cases[129]. These concepts are used as universal designations of an intra-group relationship, which is not limited to direct ownership of shares in the authorized capital of the debtor, but has a much broader meaning. As M.V. Kamenkov notes, within the framework of the current law enforcement practice, affiliation can be deduced from any situations: not only from those where related

[128] § 5 Austrian Federal Capital Substitution Act (Eigenkapitalersatz-Gesetz).

[129] See the Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 15.06.2016 N 308-AC 16-1475 in the case N A53-885/2014, the Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 26.05.2017 N 306-ES16-20056(6) in the case N A 12-45751/2015, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 26.05.2017 N 306-ES16-20056(6) in the case N A 12-45751/2015, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation Court of the Russian Federation of 28.05.2018 N 301-ES17-22652(3) in case N A43-10686/2016, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 06.08.2018 N 308-ES17-6757(2,3) in case N A22-941/2006.

persons actually acted, but also from those where, at a superficial glance, persons could be recognized as affiliated, but in reality, based on their actual relations, they are not such, for example, in the case of indirect relations with different companies or individuals (relations between close, and even more distant relatives may be far from benevolent; the mere ownership of the authorized capital of a sister company does not always mean that the management of another organization fulfills all the instructions of the owner of such a company; representative office although and assumes the existence of a fiduciary relationship between the principal and the attorney, but in itself does not determine the unity of goals of both and their mutual conditionality in all matters, etc.)[130]. However, it cannot be denied that the need to apply control and affiliation criteria is associated with the prevalence of complex business ownership schemes and the use of other companies controlled by the common beneficiary in transactions with the debtor.

This was probably the reason why the Supreme Court of the Russian Federation, in its Review of 29.01.2020, formalized the rules on subordination as applicable to debtor's controlling persons (paragraphs 3 and 9 of the Review), and in some cases to persons affiliated with them (paragraph 4 of the Review). The review does not contain any reference to the legal definitions of debtor's controlling person and affiliated person, nor any specific definition of these concepts for the purposes of applying the rules of subordination. Draft Law No. 1172553-7, which, among other things, sets out the rules on subordination, does not provide for any specific definition of the concept of "controlling person of the debtor" for the purposes of subordination. In this regard, if this draft law is adopted in the appropriate version, the approach to determining the circle of addressees of the rules on subordination should not change.

The concept of a debtor's controlling person is defined in clause 1 of Article 61.10 of the Bankruptcy Law in chapter III.2, dedicated to subsidiary liability in bankruptcy cases, as follows: "*a natural or legal person who has or had the right to*

[130] Kamenkov M.V. Problems in judicial practice of identifying the actual affiliation of persons // Law. 2021. N 11. P. 116 - 127.

give binding instructions to the debtor or the ability to determine otherwise not more than three years prior to the appearance of signs of bankruptcy, as well as after their occurrence before the commercial court accepts the application for declaring the debtor bankrupt actions of the debtor, including making transactions and determining their terms." Paragraph 2 of this article contains the main examples of circumstances that indicate that it is possible to determine the actions of the debtor: 1) being related to the debtor, having an official position; 2) having the authority to make transactions on behalf of the debtor on the basis of a power of attorney, regulatory legal act or other special right; 3) due to the official position (for example, filling the position of chief accountant, financial director, etc.); 4) otherwise, including: including by forcing the head or members of the debtor's management bodies. Other provisions of this article establish evidentiary presumptions, and paragraph 5 provides for the right of the court to recognize a person as controlling the debtor on other grounds not specified in the law. By definition of A. R. Nikolaev, the person controlling the debtor is understood as a person who could determine the debtor's will to commit or not commit actions either independently or under the influence of other persons[131]. The presence of actual control over the debtor is also possible in the absence of formal and legal signs of affiliation (paragraph 2, paragraph 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 of 21.12.2017 "On certain issues related to bringing persons controlling the debtor to responsibility in bankruptcy").

It should be noted that the presence in Article 61.10 of the Bankruptcy Law of unnamed other grounds for recognizing a person as controlling the debtor does not contribute to a precise distinction between persons controlling the debtor and persons otherwise related to the debtor. A good illustration of the "rubber" nature of this norm is the Letter of the Federal Tax Service of Russia dated 16.08.2017 N CA-4-18/16148@ "On the application by tax authorities of the provisions of Chapter III.2 of Federal Law No. 127-FZ of 26.10.2002", which explains to the authorized

[131] Nikolaev A.R. Legal status of persons controlling the debtor in insolvency (bankruptcy) procedures: Dis. ...cand. legal Sci. M., 2013. P. 35.

bodies that any informal personal relationships, including those established by operational search measures, for example, cohabitation (including a state in a so-called civil marriage), long-term joint official activity are considered possible grounds for recognizing a person as a controlling person (including military service, civil service), co-education (classmates, classmates) , etc. This position of one of the largest system creditors is also reflected in court practice[132].

Such an approach of the legislator and the law enforcer to determining the range of controlling persons favors the trustee and bankruptcy creditors when proving that the defendant has the status of a debtor's controlling person on the application for subsidiary liability. This regulation is intended to cover the maximum number of persons involved in the management of an insolvent debtor, including "informal directors" and "shadow beneficiaries", in relation to the objectives of the institute of subsidiary liability and the specifics of its application to the current business environment. 61.10 of the Bankruptcy Law, the term "controlling person" includes both direct and indirect business owners, as well as managers who do not own any share in the business.

Paragraph 2 of the Review dated 29.01.2020 mentions that due to the common economic interests of the debtor and the company controlling it, the lender's claim cannot compete with the claims of creditors who do not have the actual ability to give binding instructions to the debtor or otherwise determine its actions. A.I. Shaidullin characterizes this fragment as a successful definition of the person controlling the debtor, 61.10 of the Bankruptcy Law[133].

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[132] See, for example, Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated August 10, 2020 N 307-ES20-1992 in case No. A21-11420/2017, Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated March 30, 2017 N 306- ES16-17647(7) in case No. A12-45752/2015, Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated September 25, 2020 N 310-ES20-6760 in case No. A14-7544/2014, Ruling of the Judicial Collegium for Economic Disputes Supreme Court of the Russian Federation dated December 16, 2019 N 303-ES19-15056 in case N A04-7886/2016.

[133] Shaydullin A.I. Subordination of the obligatory claims of debtor's controlling persons and persons affiliated with them in bankruptcy cases of business companies: a dissertation for the degree of candidate of legal sciences. Page 59 (https://izak.ru/science/dissertatsionnye-sovety/dissertatsionnyy-sovet-d503-001-01/subordinatsiya-obyazatelstvennykh-trebovaniy-kontroliruyushchikh-dolzhnika-i-affilirovannykh-s-nim-l/ (last date appeal – 04/06/2023).

However, the presence of common economic interests is not only typical for affiliated companies and members of the same group. Individuals who are not bound by any corporate, family, or even contractual ties may also have common economic interests. For example, subcontractors involved in the same construction project and creditors of the same debtor who are interested in maintaining their ability to service their debts have a common interest.

In addition, controlling and controlled persons have common interests quite often, but not always: the practice of arbitration courts is full of examples when a controlled company makes unprofitable transactions in the interests of a majority shareholder or shareholder[134].

Consequently, the criterion of having common economic interests simultaneously covers an excessively broad group of persons that does not correspond to the tasks of the institution of subordination, and at the same time unreasonably leaves out of the scope of regulation persons who have an objective conflict of interests with the company under their control.

It seems that in the considered fragment of paragraph 2 of the Review of 29.01.2020, the presence of commonality between the parties to the transaction is rather an obiter dictum of the plot given by the Supreme Court, rather than part of the definition of the person controlling the debtor for the purpose of applying the explanations given in this Review.

Thus, the rules on subordination developed by the Supreme Court should be considered de lege lata as intended to apply to controlling persons, that is, persons who have the ability to give binding instructions to the debtor or otherwise determine its actions.

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[134] See, for example, Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 02.12.2018 N 305-ES15-5734(4.5) in case No. A40-140479/2014, Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 15.11. 2018 N 301-ES18-9388(1) in case N A43-5622/2016, Ruling of the Arbitration Court of the Moscow District dated 03.31.2022 N F05-23593/2019 in case N A40-302815/2018, Resolution of the Arbitration Court of the Moscow District dated 26.10 .2021 N F05-7826/2021 in case N A40-18093/2019, Resolution of the Arbitration Court of the Ural District dated July 10, 2020 N F09-1002/20 in case N A07-24393/2018.

At the same time, based on the initial purposes of establishing the concept of a debtor’s controlling person in Article 61.10 of the Bankruptcy Law, the provision of paragraph 1 of the corresponding article on limiting this concept to the period of control: "no more than three years prior to the appearance of signs of bankruptcy" should be recognized as applicable only for the purposes of bringing to subsidiary liability, subordination of claims. This provision is not applicable to subordination of claims insofar as the status of the debtor’s controlling person is determined at the time of granting financing. The clarifications of the Review dated 29.01.2020 do not give grounds for extending the rules on subordination to persons who were controlling in the past, but at the time of providing funding, lost control.

At the same time, if actual control took place at the time of granting the financing, it does not matter for what period before the appearance of signs of bankruptcy this financing was granted. This follows from the meaning of clause 9 of the Review dated 29.01.2020, which provides for subordination of claims from financing provided at the beginning of the company's activities. It would not be reasonable to link the grounds of subordination to the beginning of the activity if the applicability of the rules on subordination was limited to three years (or at least in this explanation it would be noted that this rule applies only to companies that have signs of bankruptcy at least three years after the beginning of the activity).

In addition, the problem of applying the rules on subordination to persons who, without having a direct or indirect share in the debtor's business, according to the rules of Article 61.10 of the Bankruptcy Law, can be recognized and are recognized in practice as persons controlling the debtor remains unresolved. Such persons include, first of all, the head, members of collegial management bodies and other officials of the company. In accordance with the literal meaning of the Review's clarifications of 29.01.2020, subordination of the claims of these persons is not excluded, even though they perform only the functions of managing the company.

It should be noted that in relation to persons who held managerial positions in a company declared insolvent, the rule on subordination of part of their claims is

already fixed in the legislation. Thus, in accordance with clause 2.1 of Article 134 of the Bankruptcy Law, claims of the head of the debtor, his deputies, persons belonging to the collective executive body of the debtor, the chief accountant of the debtor, his deputies, the head of the branch or representative office of the debtor, his deputies, the chief accountant of the branch or representative office of the debtor, his deputies for payment of severance pay and (or other compensations, the amount of which is established by the relevant employment contract, in case of its termination in the part exceeding the minimum amount of the corresponding payments established by the labor legislation, do not belong to the number of claims of creditors for current payments and are satisfied after the claims of creditors of the third stage are satisfied. At the same time, the issue of subordination of other claims of the listed persons, for example, subrogation claims arising from the repayment of the company's debt on the basis of a guarantee agreement, remains unresolved.

Judicial practice on this issue has not been fully developed at the time of writing this paper, but there are examples where the claims of the former head of the company are subordinated by the courts, apparently only on the basis of the very fact that they hold the relevant position135.

In the literature, views on this problem differ.

A. E. Aloyan, for example, points out that the general director, who provides borrowed funds to the company, actually performs the corporate function of a shareholder in the company's capitalization and is responsible for incorrect management decisions and a possible default of the company, which in turn should become the basis for subordinating[136] his claim to other claims of external creditors in bankruptcy[137] proceedings. This approach is reflected in the American doctrine of recharacterization, under which the so-called insiders, including managers who do

[135] См., например, Постановление Семнадцатого арбитражного апелляционного суда от 13.10.2022 N 17АП-9577/2021(12)-АК по делу N А60-15753/2021, Постановление Двадцатого арбитражного апелляционного суда от 09.02.2023 N 20АП-8929/2022 по делу N А62-3612/2021.

[136] See, for example, Resolution of the Seventeenth Arbitration Court of Appeal dated October 13, 2022 N 17AP-9577/2021(12)-AK in case No. A60-15753/2021, Resolution of the Twentieth Arbitration Court of Appeal dated 02/09/2023 N 20AP-8929/2022 on case No. A62-3612/2021.

[137] Aloyan A.E. Problems of implementation of the doctrine of recharacterization in the Russian legal system // Bulletin of Civil Law. 2017. N 6. P. 221 - 240.

not own a share in the business, are subject to re-qualification from obligatory to corporate claims[138].

According to I. M. Shevchenko, based on the idea of subordination as a rule of risk distribution, it should be extended to all those who can receive potentially unlimited benefits from their activities, including the director, since the latter can receive part of the profit in the form of bonuses[139].

A different opinion is shared by R. T. Miftakhutdinov and A. I. Shaidullin, whose joint work[140] notes that it is fundamentally important that the controlling person directly or indirectly is actually a co-owner (beneficiary) of the business and has the goal of making a profit, which is achieved primarily (but not exclusively) through a direct or indirect controlling interest in capital. At the same time, researchers also point out the danger of abuse, in which shareholders, due to a close fiduciary relationship with the hired director, will issue their funding through him. As a solution to this problem, the authors suggest that if there are certain prima facie doubts that the director acted in his own interests, and not in the interests of the beneficiary of the company, by providing funding, the burden of refuting these doubts should be placed on the applicant of the claim. At the same time, it is proposed to establish an increased standard of proof "beyond reasonable doubt" for such a refutation[141].

Within the framework of the author's view of subordination as a mechanism for filling the insufficiency of the company's own capital, subordination of civil law claims of the company's officials cannot be considered justified.

This, of course, does not negate the applicability to persons who held managerial positions in the company of the legal position formulated in paragraph 8

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[138] Skeel, David A. and Krause-Vilmar, Georg, Recharacterization and the Nonhindrance of Creditors. European Business Organization Law Review (EBOR), Vol. 7, p. 259, March 2006, U of Penn, Inst for Law & Econ Research Paper No. 07-13, Available at SSRN: https://ssrn.com/abstract=888182 (last access date – 30.04.2023).

[139] Shevchenko I.M. On the issue of subordination of creditors' claims arising after the initiation of bankruptcy proceedings // Bulletin of Economic Justice of the Russian Federation. 2023. No. 6. P. 164-181.

[140] Miftakhutdinov R.T., Shaydullin A.I., mention. Op.

[141] As an example of the practical implementation of this approach, the authors of the mentioned work cite the Ruling of the SCES of the Supreme Court of the Russian Federation dated July 30, 2020 N 310-ES18-12776(2) in case N A68-7860/2016.

of the Review dated 29.01.2020: a person who is held vicariously liable for the inability to fully repay creditors' claims cannot receive satisfaction of his claim against the debtor on an equal basis with the claims of other creditors. As the Supreme Court rightly noted in its ruling of 25.08.2022 No. 305-ES14-1659(20) in the case A41-51561/2013, the essence of this position is that if the inability to perform in the form of bankruptcy arose due to the fault of the creditor, then the creditor loses the right to demand performance of the obligation in its favor until it is completed. eliminate the consequences of their own behavior (paragraph 4 of Article 1, paragraph 1 of Article 6, paragraph 4 of Article 401, Articles 404, 406 and paragraph 2 of Article 416 of the Civil Code of the Russian Federation). However, the application of this legal position, being an example of "false subordination", should entail not lowering the claim in the order, but a complete refusal to establish it in the register of creditors ' claims.

§ 3. Approaches to solving the problem of determining the range of persons whose claims are subject to subordination

The solution to the problems of using the concept of a debtor’s controlling person in applying the rules of subordination should be sought in the political and legal grounds for subordination as such (discussed above in Chapter 1 of this study), as well as in comparing the pros and cons of choosing a particular regulatory model.

It seems that the understanding of the controlling person laid down in Article 61.10 of the Bankruptcy Law would correspond to the goals of subordination if the latter were considered responsible for the consequences of crisis financing. With this explanation of subordination, it is important, first of all, to be able to determine the debtor's choice of one of two behaviors: whether to continue operating at the expense of borrowed funds or file for their own bankruptcy.

Similarly, the persons referred to in Article 61.10 of the Bankruptcy Law may be accepted as addressees of the subordination rules if these rules are considered to encourage earlier opening of the procedure.

The American doctrine of recharacterization, in which a loan provided by an insider lender is considered by the courts as a contribution to the authorized capital, stands apart. According to the Bankruptcy Code 11 U. S. C. § 101(a) (31), the concept of "insider" for corporations is defined as broadly as possible: it includes directors, officers, supervisors and other affiliated persons.

With other explanations of subordination, which, in the author's opinion, are closer to the truth than those indicated above, the criteria for determining the controlling person specified in Article 61.10 of the Bankruptcy Law are not applicable when considering issues of subordination of creditors' claims.

A.I. Shaidullin, for example, notes that since subordination of claims of persons controlling the debtor is a consequence of the inadmissibility of transferring business risks to external creditors, and not punishment for giving any instructions and unfair behavior, the criterion for having control should be the beneficial interest in relation to the borrower company or its direct shareholder[142]. According to the researcher, a necessary prerequisite for subordination of a creditor's claims is that it has both the right to control and the right to participate in a previously undefined and unlimited profit143.

The disadvantage of the criterion of beneficial interest is the lack of any satisfactory definition of this concept in the legislation and scientific literature. The difficulty of defining this concept is that an almost unlimited number of persons may be interested in continuing the debtor's activities: first of all, shareholders, but also employees, suppliers of goods and services, customers, "neighbors" on the production site or industrial park, partners in industrial cooperation, and finally, the state as a tax recipient.

On the basis of what criterion can a specific "beneficial interest" be distinguished, if it does not follow from the ownership of shares in the authorized capital or shares of the company? A. I. Shaidullin suggests considering as such a

[142] Shaydullin A.I. Subordination of the obligatory claims of the controlling debtor and persons affiliated with him in bankruptcy cases of business companies: a dissertation for the degree of candidate of legal sciences. Page 56, 58.
[143] Ibid, p. 66.

criterion the existence of "the right to participate in a pre-determined and unlimited profit" of the company. Who can be attributed to the beneficiaries of the company according to this criterion, other than direct shareholders? For example, lenders on mezzanine loans who, in addition to interest on the amount of debt, receive remuneration, the amount of which depends on the financial results of the debtor. Other business partners of the company may also participate in the company's profits: for example, an exclusive distributor (agent, commission agent, etc.) of the company's products may receive a percentage of the value of the company's products sold. Their "share" in the revenue of retail outlets and restaurants, as a rule, is received by landlords-owners of commercial real estate. Finally, agreements on joint implementation of construction projects often involve one of its shareholders (for example, the owner of a land plot) receiving a share in the project profit of another (for example, a developer). Thus, there are many life situations in which one entity has the right to participate in the financial results of another, which in itself does not mean their participation in one holding company or other group of persons. The initial assumptions of the approach to subordination as a "redistribution of risks" can serve as a justification for subordination of claims, the size of which is determined depending on the financial results of the counterparty, since there is a participation in a pre-defined and legally unlimited profit. At the same time, it is difficult to justify the fact that such counterparties are in a worse position than those who have agreed with the debtor on a fixed remuneration.

Of course, it can be argued that in most of the above situations, it is not a question of participating in the profit of an economic entity as such, but of receiving a share in its revenue, or in the profit of a separate project. However, with such a narrow and formal understanding of the right to share in profits, the latter can only be recognized as a shareholder of the company, as well as a person to whom the company has committed to transfer the established part of its profit at the end of the year (the author is not aware of examples of using such a construction in the domestic legal order). In this case, the allocation of the right to participate in profit

as an independent criterion would not make sense: it would be enough to point out that the rules on subordination apply to shareholders of business companies.

It seems that in order to separate the usual "horizontal" business relationships from intra-group ones, A.I. Shaidullin's research suggests the second necessary criterion - the presence of the right of control, which "implies the possibility of making business decisions regarding the fate of the company[144]." The cited work does not explain whether the author separates the concept of "right of control" from actual control, which can take place even in the absence of legal registration. In another publication mentioned earlier, Miftakhutdinov R. T. and Shaidullin A. I. suggest using for these purposes the criteria specified in Article 67.3 of the Civil Code of the Russian Federation on subsidiaries[145], namely, the possibility of determining the company's actions due to the prevailing participation in the authorized capital, or in accordance with the agreement concluded between them, or otherwise. It seems that due to the open nature of the list of control methods mentioned in this norm, the corresponding definition does not provide much clarity compared to the definition in paragraph 1 of Article 61.10 of the Bankruptcy Law. However, one way or another, the control criterion allows you to remove the claims of obviously "external" creditors from the threat of subordination.

Which of the persons controlling the debtor can be recognized as having a beneficial interest?

First of all, these may include majority shareholders of the company's shareholder itself, and so on, up to individuals who are the ultimate owners of the group of companies (hereinafter referred to as **indirect participation**). Their participation in the profits of the "grandchild" company may not be guaranteed by the corresponding corporate rights, but it is possible insofar as they can influence the disposal of the corresponding rights by the parent company and at the same time have a direct right to participate in the profits of such a company.

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[144] Ibid.
[145] Miftakhutdinov R.T., Shaydullin A.I., mention. Op.

When applying the criteria of control and beneficial interest, it is also possible to subordinate the claims of those persons indirectly participating in the authorized capital of the debtor who do not have a predominant share in the authorized capital of the debtor's parent company, but are otherwise able to determine the actions of this parent company (for example, due to the fact that the remaining shares in the authorized capital of the parent company belong to family members of this person). As noted above, the formal definition of the right of control does not make practical sense, so we should proceed from its broader interpretation, which is not limited to the status of a shareholder of the company.

Finally, the expanded interpretation of the concept of "beneficial interest" allows applying the rules of subordination to persons who do not participate in the authorized capital of the debtor either directly or indirectly, if such persons are controlling and at the same time participate in the debtor's profits in a different way: for example, by systematically withdrawing funds through one-day firms or turning the debtor into a "loss center" that generates profit for the "profit center" owned by the controlling entity[146]. In these cases, the beneficial interest does not have a legal basis, but it can be proved based on the actual existing relations for the redistribution of benefits between economic entities bound by a single control.

The weak point of the considered approach is that the use of the control criterion is not explained by the political and legal prerequisites of subordination, but only functionally restricts the list of persons who can be recognized as having the right to participate in the company's profit. In other words, the control criterion would not be necessary if the criterion of participation in the company's profit did not cover an excessively wide list of persons that does not correspond to the goals of subordination.

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[146] See, for example, the Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 14.11.2022 N 307-ES17-10793(26-28) in case N A56-45590/2015, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 18.08.2022 N 308-ES18-23771(11,12,13) in case N A 63-6407/2018, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 06/29/2021 N 305-ES20-14492(2) in case N A40-192270/2018, Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation dated 25.09.2020 N 310-ES20-6760 in case N A14-7544/2014.

Summing up, it should be concluded that the existing approaches to determining the circle of persons whose claims are subject to subordination proceed from the priority of maximum coverage by the rules on subordination of claims of those creditors who have a common ultimate beneficiary with the debtor or are themselves such a beneficiary. In this regard, the prerequisites for applying the rules of subordination to the creditor in practice are as close as possible to the criteria for determining the persons controlling the debtor for the purpose of bringing to subsidiary liability.

On the one hand, this makes it possible to achieve the most favorable conditions for the "external" creditors of the debtor, eliminating competition for them with the claims of persons who may be considered related to the final beneficiary of the debtor.

On the other hand, the principal feature of establishing the status of a controlling person for the purposes of subsidiary liability is that control over the debtor is manifested through specific illegal actions: for example, giving instructions on the alienation of the debtor's property in its own favor or in favor of another controlled person. The commission of the objective side of the offense, as a rule, in itself confirms the existence of the status of a person controlling the debtor, because in the absence of the ability to determine the actions of the debtor, it would not be possible to impose a deal that is obviously unprofitable for the debtor. In this regard, as I. V. Gorbashev reasonably notes, the subject of proving the composition of an offense entailing subsidiary liability, in the absence of formal ties with the debtor, will very often coincide ("collapse") with the subject of evidence on the issue of determining the status[147]. In turn, the provision of financing by itself does not indicate that the lender has control over the debtor. This control has to be established on the basis of other, often indirect evidence.

Thus, the establishment of control for the purposes of subordination is usually more difficult than for the purposes of bringing to subsidiary responsibility. Even

[147] Gorbachev I.V. On some material and legal aspects of bringing to subsidiary responsibility in the explanations of the Supreme Court of the Russian Federation // Bulletin of Civil Law. 2018. N 4. pp. 154 - 202.

with the usual standard of proof "balance of probabilities", this determines the increased risk of erroneous recognition of a person as controlling and subordination of his claim. This problem is even more pronounced in relation to the subordination of claims of creditors affiliated with such a controlling person (for more details, see section 5 below).

In relation to subordination, the problem of the type I error is often discussed: the forced refusal of a company shareholder from a potentially successful attempt to rehabilitate the company due to the risk of subordination of the claim if the company still goes bankrupt. In chapter 1 of this study, it is concluded that in relation to the motives of the average reasonable shareholder, the probability of such a refusal of funding is low, and in this form the problem seems exaggerated. However, in the case of an independent company, even if it has separate connections at the level of shareholders, the situation may be fundamentally different: a lender initially ready to provide crisis financing may find the risk of subordination unacceptable. Consequently, the ambiguity of the concept of a controlling person, which is included both in the current explanations of the Supreme Court and in the wording of Draft Law No. 1172553-7, may negatively affect the prospects for rehabilitation of debtors who are in a pre-bankruptcy state. The approach discussed above, which is based on the criteria of control and beneficial interest, does not change the situation in this regard.

Of course, the problem of the lack of legal certainty in establishing the existence of relationships such as informal control, beneficial interest, or de facto affiliation is not unique to disputes over the application of subordination rules. For example, when considering creditors' claims, the courts apply an increased standard of proof if the applicant is a person affiliated with the debtor (paragraph 1 of the Review of the Supreme Court of 29.01.2020). Similarly, affiliated (interested) persons are subject to presumptions that simplify proving the existence of grounds for declaring the debtor's transactions invalid (Articles 61.2 and 61.3 of the Bankruptcy Law). In these cases, the establishment of the fact of affiliation often prejudges the outcome of the dispute not in favor of the person recognized as an

affiliate. However, when entering into a transaction with a debtor, a bona fide creditor has the opportunity to record and then use evidence of the reality of economic relations or the compliance of the transaction with the interests of creditors, despite its affiliation. In contrast to these examples, the risk of subordination cannot be eliminated or overcome by the actions of the person providing the financing. That is why, in relation to subordination, the price of uncertainty in determining the status of a creditor for civil turnover is significantly higher than in other cases of applying the concept of a person controlling the debtor and other similar concepts.

In addition, it is necessary to take into account that the institution of subordination is not aimed at preventing any illegal behavior, unlike such institutions as subsidiary liability and challenging the debtor's transactions. Deliberate embezzlement of the future bankruptcy estate causes such damage to creditors that it seems quite justified for the legislator and law enforcement agencies to try to protect their interests by using such "rubber" concepts as "controlling the debtor" and "actually affiliated" persons. In turn, the debtor's financing itself does not cause harm to other creditors, so there are no grounds for using these and similar concepts in their uncertainty when applying the rules on subordination. The often discussed problem of prolonging the debtor's unprofitable activity due to the fault of the controlling person who provided crisis financing and thereby delayed the inevitable bankruptcy does not change the above. The considered case is a private, not obligatory consequence of the provision of crisis financing, and should be considered from the point of view of applying the rules on subsidiary liability (Article 61.12 of the Bankruptcy Law) and / or losses in bankruptcy (Article 61.20 of the Bankruptcy Law), but not the rules on subordination, which is not a measure of liability and is applied regardless of positive or negative consequences of financing.

In view of the above, the extension of subordination to persons determined on such grounds as the ability to determine the actions of the debtor and the right to participate in its profits does not seem to be justified by the goals and objectives of

the institution of subordination and may lead to a limited circle of potential investors in restoring the solvency of companies that are in a pre-bankruptcy state.

Referring to the latest practice of the Supreme Court on subordination of claims, it is worth noting as encouraging an example of the higher instance's suppression of attempts by lower courts to extend the application of the rules on subordination to persons only indirectly related to the debtor.

Thus, in one case, the courts of three instances subordinated the creditor's claim under the following circumstances. The sole shareholder of the debtor was citizen B. The courts established that citizen B. in 2010-2014 was a recipient of income and an employee of company I. In turn, since 2016, 49% of the shares in the company I. belonged to the State Corporation "VEB.RF". As an auditor of VEB.RF" was E.'s company, which is one of the world's "big four" audit service providers. A subsidiary of E., which was also the debtor's auditor, filed an application for establishing a debt in the register of creditors' claims based on an audit services agreement. The courts concluded that E.'s company was affiliated with the debtor through VEB.RF" and refused to include the request in the register.

The Supreme Court, having considered the appeal of the company E. on its merits, pointed out that the fact of posting on the website of the state corporation information about the company's compliance with certain requirements imposed by the corporation to service providers, does not indicate that the company is affiliated with the state corporation. The loss of this link from the chain of relations described by the courts (the beneficiary of the company - the company - a state corporation and its controlled entities - company E. – company debtor) did not allow the company and the company to be recognized as affiliated persons[148].

Thus, judicial practice today lacks clear criteria by which a person should be considered controlling for the purposes of subordination, and therefore it is necessary to state the presence of legal uncertainty in this matter.

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[148] Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of 03/24/2022 N 308-ES21-21416(2) in case N A53-19872/2019.

§ 4. A shareholder of the company as a proper addressee of the rules on subordination of claims in bankruptcy

As described in detail in chapter 1 of this paper, in the author's opinion, lowering the priority of shareholders' claims is a mechanism for compensating for insufficient equity. Equity capital is formed at the expense of deposits and contributions[149] of the company's shareholders. In the event of its initial insufficiency or insufficiency, which manifested itself in a crisis situation[150], the mandatory claims of these shareholders are subordinated, that is, from the point of view of independent creditors, they turn into a surrogate of equity (hence the term "capital-substituting financing", which is common in the literature). In this regard, subordination is inextricably linked with the status of a company shareholder, and not so much with its rights to exercise control and receive dividends, but with its **obligation to make a contribution** to the company's authorized capital (clause 2 of Article 67 of the Civil Code of the Russian Federation), **the amount of which is determined on the basis of the will** expressed by the shareholders in the company's charter (Article 14 Federal Law No. 14-FZ of 08.02.1998 "On Limited Liability Companies", Article 25 of Federal Law No. 208-FZ of 26.12.1995 "On Joint-Stock Companies"). Instead of increasing the threshold of the minimum authorized capital and / or strengthening control over the sufficiency of equity capital for most business entities, the legislator can provide subordination as **a measure of support for independent creditors at the expense of shareholders,** who, by their will, created a company with initially insufficient equity capital, or did not ensure the maintenance of equity capital at a level sufficient to maintain the company's solvency in the course of the company's activities. Subordination of claims is precisely the implementation of such a mechanism.

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[149] Article 27 of the Federal Law "On Limited Liability Companies, Article 32.2 of the Federal Law "On Joint Stock Companies".

[150] For the specifics of subordination in the initial under-capitalization and crisis financing, see Chapter 5 of this dissertation.

Thus, it is the shareholder (shareholder, property owner, founder) of the debtor de lege ferenda who should be the addressee of the rules of subordination. It should be noted here that for the purposes of subordination, it is important to have the appropriate corporate status at the time of granting funding. If a shareholder has issued a loan to the company and then sold its share to another person, the rules on subordination are nevertheless applicable to its mandatory claim. A similar explanation is contained in paragraph 7 of the Review of the Supreme Court of 29.01.2020, where it is stated that the subsequent sale by the creditor of a block of shares, which ceased the possibility of exercising control over the debtor, did not lead to an increase in the priority of satisfying the claim of the former majority shareholder. Finally, in the Ruling of the Judicial Board for Economic Disputes of 27.01.2022 N 308-ES18-3917(2) in case N A20-3223/2017, the Supreme Court of the Russian Federation explicitly stated that "as a general rule, the grounds for subordination are established at the time of the obligation to return compensation financing." It seems that this logic should also work in the opposite direction: if the lender first provided financing, and only then acquired a share in the authorized capital of the company, then the previously arisen obligatory claim is not subject to subordination. This will facilitate the decision of individual creditors of the debtor to restructure its debt on the terms of acquiring a share in its authorized capital, which should have a positive impact on the prospects for satisfying the claims of other creditors and the continuation of the debtor's activities. The relevant legal position was taken by the courts in case no. A60-56184/2020, where the application of the rules on subordination was refused on the grounds that the credit obligations were drawn up by the applicant prior to the acquisition of the debtor's shares[151].

Since, as stated above, subordination as a mechanism for compensating for insufficient equity capital has a pronounced corporate nature, its extension to persons who are not shareholders has no basis in itself. Indirect shareholders,

[151] Resolution of the Seventeenth Arbitration Court of Appeal of 09.07.2021 N 17AP-2299/2021(2,3,4,5,6)-AK in case N A60-56184/2020.

informal beneficiaries, and shadow managers are equally excluded from this approach from those whose claims are subject to the subordination rules.

Of course, despite the above, the rules on subordination can also be extended to persons who are not shareholders in the debtor by an imperative indication of the law. This approach can be justified by the prevalence of holding structures in the business turnover, within which one company – financial center - can distribute financing among all companies included in the group, including those that are not subsidiaries of the lender. It would seem that independent creditors of the debtor will be put in an even better position if the rules on subordination apply to all persons belonging to the same group of persons as the debtor. The risks associated with legal uncertainty in determining the criteria for entering this group of persons can be overcome by establishing special criteria for subordination: for example, "a shareholder in the debtor, as well as a person who has more than 50% of the shares in the authorized capital of the shareholder" and so on in an ascending line. At the same time, such a departure from the principle of independence of a legal entity and the isolation of its property leads to an additional complication of the turnover of shares, shares and rights of claim, which seems undesirable and not justified by the potential benefits for creditors that they may receive as a result of expanding the circle of persons subject to the rules on subordination.

Thus, the approach proposed in this paper, on the one hand, restricts the application of rules on subordination to the claims of shareholders in business entities, and on the other hand, allows them to be applied to shareholders regardless of whether they are controlling persons of the debtor or not. Of course, the requirement is far from any shareholder regardless of the size of the share, it should be subject to subordination – in particular, this applies to public joint-stock companies, which may have thousands of shareholders with insignificant shares in the authorized capital of the company. In the absence of a control criterion as a mandatory criterion for subordination, the possibility of an exception to the rules on subordination for minority shareholders in business entities should be considered.

§ 5. The problem of the applicability of the rules on subordination in the implementation of financing through third parties

Since the grounds for subordination of claims are in any case inextricably linked to the identity of the creditor (the original creditor in the case of succession), the question inevitably arises about the applicability of the rules on subordination in the implementation of financing through third parties – primarily controlled by the person from whom the will to finance comes.

In many foreign legal systems, the rules of subordination apply not only to direct shareholders in business entities, but also to indirectly participating in their capital or other controlling persons. Thus, the German Insolvency Regulation does not specify the list of persons subject to the rules on capital-substituting financing, but in accordance with the established practice, these rules apply not only to claims of company shareholders, but also "and to financing of third parties, if they are economically equivalent to a company shareholder"[152]. In their joint work, R. T. Miftakhutdinov and A. I. Shaidullin also note that in Germany, courts can equally subordinate third-party loans granted at the expense of a person controlling the debtor – such a creditor is designated by the term "Strohmann" ("puppet")[153].

In Austria, a similar approach is established at the legislative level: Section 8 of the Capital Replacement Act states that for the purposes of subordination, creditors who (1) are members of another legal entity, which, in turn, is capable of influencing the debtor company (indirect control), or (2)are treated as a shareholder in a company. is an indirect shareholder in a debtor company with a share of at least 33%, or (3) has direct or indirect control over a company that owns at least 25% of the debtor's authorized capital[154].

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[152] BGHZ 31, 258; 118, 107, 110 ff.; ebenso BGH, Urt. v. 3. November 1976 - I ZR 156/74, WM 1977, 73, 75, BGH Urt. v. 21.11.2005 – II ZR 277/03.

[153] Miftakhutdinov R.T., Shaydullin A.I., mention. Op.

[154] Shaydullin A.I. Downgrading (subordination) of loans from participants of legal entities in Germany and Austria // Bulletin of Economic Justice of the Russian Federation. 2018. No. 12. P. 118-119.

In a similar way to the German law enforcement agency, the Russian Supreme Court, in paragraph 4 of the Review of 29.01.2020, clarified that the claim is "in fact, a claim for the return of compensation funding" and is subject to subordination in the following cases:

- the creditor has provided compensatory financing under the influence of the person controlling the debtor; however, the provision of financing under the influence of the latter is assumed if the actions of the creditor do not correspond to the expected behavior of any reasonable shareholder in civil traffic not related to the debtor;
- financing is provided by several affiliated persons who do not individually control the debtor, but collectively have the ability to influence the debtor in the same way as the controlling person, unless they prove that their actions were not coordinated, but were caused by independent economically justified motives.

In the first of the cases considered, the basis for extending the rules of subordination to the creditor is its control by the same person who controls the debtor, and the implementation of financing under its influence. Miftakhutdinov R. T. and Shaidullin A. I. note that in such a situation there is an obvious way to circumvent the rules on lowering in priority (subordination): in the context of a control relationship (vertical linkage), the controlling person, instead of providing a loan to a controlled company on its own, may instruct another of its controlled companies to do so[155]. Since there are no other motives in the Review of 29.01.2020, it should be assumed that the purpose of this explanation is to prevent attempts to circumvent the rules on subordination by using the property of a controlled person, which the controlling person has the opportunity to indirectly dispose of as his own.

By giving such an actual possibility legal consequences in the form of subordination of the claim, the law enforcement officer departs from the principle of

[155] Ibid.

separation of the property of a legal entity[156]. Meanwhile, the creditor company itself may be declared insolvent, and in this case the subordination of its claim will negatively affect the prospects for satisfying the claims of its own creditors. As a rule, the interests of creditors of companies that issue doubtful loans to affiliated persons can be protected by challenging transactions in accordance with Chapter III.1 of the Bankruptcy Law. However, in the present case, the specified path is a dead end: the restorative claim will be subject to the same rules on subordination that make challenging a compensatory financing transaction practically useless for the creditors of the person who provided such financing[157].

Consequently, the price of fighting the alleged circumvention of the law in the interests of creditors of one company is a potential violation of the rights of creditors of another company belonging to the same group of persons. How justified is this "exchange"? Each business entity has its own assets and its creditors, who, when entering into relations with debtors, proceeded from information about the property mass that belonged to each of them. For the sake of justice, it should be noted that this problem can be solved by consolidating the assets and liabilities of a group of companies with simultaneous bankruptcy of companies belonging to this group. The institute of substantive consolidation applies in the United States and some other jurisdictions[158]. Recently, the method of consolidation of assets of related parties is also used in the practice of Russian courts, but its application is still limited to such private issues as the validity of debt collection as current payments[159]. It is obviously premature to talk about the existence of consolidation in Russian law as a full-

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[156] As N.V. Kozlova noted, a legal entity not only has the right, but is even obligated to possess separate property, which may belong to it by right of ownership or other property right (Clause 1 of Article 48, Article 216 of the Civil Code of the Russian Federation) - Kozlova N.V. Legal personality of a legal entity. M.: Statute, 2005. 476 p.

[157] See paragraph 18 of the Review of Judicial Practice in Resolving Insolvency (Bankruptcy) Disputes for 2022 (approved by the Presidium of the Supreme Court of the Russian Federation on April 26, 2023), Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated December 29, 2022 N 307-ES21- 14747(5,6) in case No. A05-1780/2020, Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated March 28, 2022 N 304-ES19-9345(5) in case No. A81-3986/2016, Ruling of the Judicial Collegium on economic disputes of the Supreme Court of the Russian Federation dated January 27, 2022 N 308-ES18-3917(2) in case N A20-3223/2017.

[158] See for more details Anashkin S.P. The theory of personalized bankruptcy estate // Bulletin of economic justice of the Russian Federation. 2022. N 10. P. 191 – 208, Senshin A.E. On the problem of participation in bankruptcy procedures of interrelated entities // Law and Business. 2021. N 4. pp. 13 – 18.

[159] See paragraph 31 of the Review of Judicial Practice in Resolving Insolvency (Bankruptcy) Disputes for 2022 (approved by the Presidium of the Supreme Court of the Russian Federation on April 26, 2023.

fledged institution covering all cases of bankruptcy of two or more interconnected companies, and the question of the possibility and feasibility of introducing such an institution is beyond the scope of this study.

Thus, it seems that in the absence of an obvious explanation of why the interests of some should prevail over the interests of others, the legislator should maintain the status quo and not extend the application of the rules of subordination to other persons controlled by the debtor's beneficiary. The objection may be raised: does not the application of the rules on subordination equally restrict the rights of creditors of the company's own shareholder, and why, in this case, do we not abandon the application of the rules on subordination altogether? At the same time, in the case of subordination of the shareholder's claims, it is a consequence of its own business risk, the acceptance of which may lead to an increase in its property mass as a result of restoring the solvency of the subsidiary. In turn, when a claim is subordinated to a "sister" company, the latter is actually imputed to someone else's entrepreneurial risk, the bearing of which is usually not justified by economically justified expectations of a corresponding risk benefit for the lender company. This is the danger of moving away from the principle of property isolation of a legal entity in the absence of rules on the consolidation of assets of a group of companies in bankruptcy.

The second case of subordination of persons jointly controlling the debtor and those acting in concert, given in paragraph 4 of the Review dated 29.01.2020, on the contrary, is quite reasonable within the general logic of the Supreme Court's approach to the applicability of the rules on subordination to persons controlling the debtor. Indeed, since the actions of creditors in relation to the debtor are united by a single purpose and intent, and in the aggregate they can be recognized as controlling persons of the debtor, the order of satisfaction of their claims should be determined as for any other person controlling the debtor. It seems that the affiliation of two persons who collectively control the debtor in this context is not a condition for subordination of their claims, but one of the signs of consistency of actions, which is considered sufficient to proceed from the presumption of such consistency.

It should be noted that in both cases indicated by the Supreme Court, the basis for extending the rules on subordination is not so much affiliation with the debtor, but rather the ability to determine its actions: in the first case, the controlling person common to the creditor and the debtor, in the second-in the aggregate of two creditors, whose mutual affiliation acts only as a sign of consistency their actions. In this regard, the most correct wording for referring to the rules of subordination in the current form is "subordination of claims of debtor's controlling persons and other persons under their control". However, based on the title of the Review dated 29.01.2020, a slightly different wording "subordination of claims of debtor's controlling persons and affiliated persons" has been fixed in the literature and practice. Despite the usual wording, it is the concept of a debtor's controlling person de lege lata discussed in section 2 of this chapter that is the key concept for determining the range of persons whose claims are subject to subordination.

Thus, considering the prospects of regulating subordination at the legislative level, the author of this paper considers it preferable to limit the circle of persons whose claims are subject to subordination to shareholders (shareholders, property owners, founders) of legal entities. Neither striving for the maximum number of persons related to the debtor to be covered by the rules on subordination, nor opposing circumvention of the rules on subordination can justify the potential harmful consequences that the blurring of the principle of property isolation of a legal entity entails. At the same time, even the approaches to subordination of the claims of "sister" companies implemented in court practice do not guarantee the prevention of circumvention of the rules on subordination. So, knowing about the content of paragraph 4 of the Review dated 29.01.2020, an unscrupulous controlling person is more likely to refrain from financing through a company that is clearly under its control, and agree to finance through a friendly but independent lender, or to carry out hidden financing with the involvement of one-day firms[160]. It is

[160] For a rare example of establishing the fact of such hidden financing, see the ruling of the Arbitration Court of the city of St. Petersburg and the Leningrad Region dated July 14, 2021 in case No. A56-18086/2016. In practice, disclosure of such schemes by third parties is extremely difficult, and often completely impossible.

necessary to emphasize once again the fundamental difference between the institution of subordination and the institution of subsidiary liability: the task of subordination does not consist in the inevitable punishment of the guilty; its basis is not the commission of an offense, but the desire to improve the situation of creditors at the expense of the company's shareholders. If the shareholder had the right in principle to refrain from providing financing to his society, then he has the right to carry out this financing through a third party ("quod pro minore licitum est, et pro majore licitum est" - what is legal in relation to the lesser is also legal in relation to the greater).

Conclusion on the chapter:

Based on the above, within the framework of the current model implemented in the Review of 29.01.2020, persons who had the opportunity to give binding instructions to the debtor or otherwise determine its actions at the time of providing financing should be considered as controlling persons for subordination purposes, with the exception of persons who had such an opportunity exclusively related to their occupation or position in management bodies the debtor company. In subsequent parts of the paper, the term "controlling person of the debtor" or "controlling person" is used in this sense. In addition, for purposes of subordination, creditors who provided financing to the debtor under the influence of the person controlling the debtor, as well as creditors who collectively have the ability to influence the debtor in the same way as the controlling person, and when providing financing acted in concert, are considered to be controlling persons.

At the same time, de lege ferenda the most reasonable from the point of view of compliance with the goals of subordination as an institution, the need to maintain a reasonable balance of interests of creditors of the debtor and creditors of related persons, as well as ensuring legal certainty, is to extend the rules on subordination only to shareholders (property owners, founders) of the debtor.

Chapter 3. Problems of qualification of obligational relations of debtors and their controlling persons as financing

§ 1. The concept of financing for subordination purposes

Granting a loan is the most common method of financing a controlled company, but it is far from the only one. The Supreme Court, in its Review of 29.01.2020, refers to crisis (compensation) financing, including such actions as the fulfillment of the debtor's obligations to third parties, as well as inaction in the form of failure to take measures to collect debt from a controlled entity.

Despite the fact that crisis financing can be provided to the debtor free of charge, for the purposes of subordination, only such actions (inaction) of the controlling person are important, as a result of which it receives or retains a binding claim against the debtor. In this regard, transactions that do not entail a counter-obligation for the debtor are not considered below: for example, gift or debt forgiveness transactions.

Most often, a distinctive feature of crisis financing in the literature is that the economic consequences of its provision are equivalent to the provision of credit[161]. This approach was adopted in section 39 of the German Insolvency Regulation. Similarly, the Supreme Court of the Russian Federation in paragraphs 3.2-4 and 6.1-6.3 of the Review listed the most common equivalents of debt financing, but did not establish the exact semantic boundaries of the concept of crisis financing.

Further, the Supreme Court, in its ruling No. 307-ES19-18598(27,29) dated 04.08.2022, indicated that a distinctive feature of compensation financing is its provision by a controlling person in a situation of a debtor's financial crisis **in order to return it to normal business activities**. This criterion already makes it possible to separate crisis financing from other civil transactions. At the same time, this approach to defining the concept of crisis financing allows subordinating a claim

[161] For example, Miftakhutdinov R.T., Shaidullin A.I., ment. Op.., Belousov I.A., ment. Op.

only if, when providing financing, the controlling person was aware of the debtor's crisis situation. The position on the need to take into account the awareness of controlling persons creates additional opportunities for the latter to protect themselves from subordination, which have not yet been widespread in practice. Such a position would not only limit the scope of the institution of subordination, but would also not correspond to its legal nature, which is based on the objective undercapitalization of the company, and not on the illegal behavior of the controlling person (for more information on taking into account the awareness of controlling persons about the existence of a financial crisis, see chapter 4 below). In this regard, we can only hope that definition No. 307-ES19-18598 (27,29) describes only a particular case of compensation financing, without excluding other cases in which the debtor's crisis state is not as obvious as in the above-mentioned case.

In turn, Miftakhutdinov R. T. and Shaidullin A. I. suggest that when considering the requirement to establish the will of the controlling person aimed at financing the controlled company. At the same time, taking into account clause 1 of Article 317.1 of the Civil Code of the Russian Federation, a sign of financing is any discrepancy in the time of counter-obligations under the concluded contract, except for cases when the postponement of counter-performance is due to objective features of the relevant market of goods, works, and services[162].

At the same time, the "standard" and widespread market conditions for deferral does not exclude the presence of a controlling person's intention to provide financing to a controlled person. Since it is a question of establishing the will of the controlling person, a more accurate indicator of intentions is its own contractual practice of relations with independent counterparties. If the controlling person supplies such counterparties with the relevant goods (works, services) exclusively on an advance payment basis, then granting any deferral to the controlled person should be considered as financing. Conversely, if the controlling entity and all its counterparties operate under deferral conditions that are not typical for the industry

[162] Miftakhutdinov R.T., Shaidullin A.I., ment. Op

as a whole, then granting a similar deferral to the controlled entity does not indicate that there is a goal to finance its activities. An assessment of the specific features of the relevant market should be made only if the controlling person does not have a representative number of independent counterparties. At the same time, the burden of refuting that the deferral was granted for financing purposes in both cases should be placed on the person who granted this deferral, since it is he who has all the information about the terms of the contracts he enters into, and in the absence of such information, has professional knowledge about the state of the market in which he operates. The evidence presented by such a person should be evaluated by the courts, taking into account that it can intentionally present only those contracts that contain conditions for deferral, and not disclose the rest. Depending on the circumstances of the case, such "selective" disclosure should be evaluated independently, including by recognizing that the goal of financing the debtor is established.

In this regard, within the framework of the concept outlined in the Review of 29.01.2020, financing for subordination purposes can be defined as **actions or omissions of a controlling person committed for the purpose of providing the debtor or saving property (property rights) on the terms of counter-provision within a period exceeding the usual counter-provision period in the event of a controlling person entering into a similar transaction with a counterparty who are not part of the same group of people.** In other cases, a monetary claim that arose from the creditor during a financial crisis, but was not fulfilled by the debtor due to the introduction of a moratorium on the performance of obligations, is not subject to subordination.

When evaluating this regulation *de lege ferenda*, it should be noted that the criterion of having a goal to finance a controlled entity is controversial. This approach is more typical for the US doctrine of re-characterization) of claims in equity[163], which the Supreme Court rejected with the adoption of the Review of

[163] Ponoroff, Lawrence, Whither Recharacterization (April 18, 2016). Rutgers Law Review, 2016, Available at: https://ssrn.com/abstract=2766596 (last access date – 18.01.2023).

29.01.2020[164]. In turn, the current Russian model does not imply the use of subordination as a means of reconstructing real economic relations. In this regard, it is appropriate to raise the question: if the subordination of crisis financing is in principle involuntary, then why should the law take into account the will of controlling person? This discrepancy can be explained by the need to ensure the stability of civil law relations – a similar role is played by the norm of paragraph 2 of Article 61.4 of the Bankruptcy Law, which protects against challenging a transaction made in the ordinary course of business. However, with rare exceptions, the application of the rules of subordination does not entail restitution under the transaction, but only the inability to participate in the distribution of income from the sale of the bankruptcy estate. The stability of civil law relations under such circumstances is inevitably violated even without subordination: the factors of the duration of the procedure and, as a rule, a low percentage of satisfaction of creditors' claims are sufficient. It is doubtful that such a reduction in the scope of the rules of subordination is justified. In this regard, in the legislative regulation of subordination, a model is seen as possible, in which **any claims of controlling persons that have arisen during the financial crisis will be subject to lowering in priority**.

At the same time, Draft Law No. 1172553-7 so far only fixes the approach to the qualification of civil law relations as financing described in the Review of 29.01.2020: according to paragraph 2 of Article 137.1 of the Bankruptcy Law, in the wording proposed by the authors of the draft law, the provision of financing for the purposes of this article includes the provision of a loan, the sale of goods, provision of services on credit, including deferral, payment by installments, or failure to perform the property obligation to be performed, issuing a guarantee or independent guarantee, as well as the acquisition by a person controlling the debtor from a third party of its claim against the debtor.

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[164] Re-qualification of loan agreements issued by controlling persons on the basis of clause 2 of Art. 170 of the Civil Code of the Russian Federation was applied by the Supreme Court before the adoption of the Review dated January 29, 2020 - see Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated July 6, 2017 No. 308-ES17-1556(1) in case No. A32-19056/2014.

§ 2. Peculiarities of subordination of certain types of claims

2.1. Claims within the framework of borrowed or equivalent financing. The Review of 29.01.2020 lists the following actions (omissions) that are recognized as crisis financing for subordination purposes:

1) Provision of funds or other property on the terms of return or payment in the future (clause 3.1, clause 4 of the Review). The most common type of financing is the provision of funds under a loan agreement. However, in practice, cases of granting goods or other property to a controlled company on the basis of civil contracts for ownership, possession and/or use, performance of works, provision of services on the terms of subsequent payment are also common.

As noted above, de lege lata the key feature of financing in this case is that the creditor has the goal of providing the debtor with property (property rights) on the terms of counter-provision within a period exceeding the usual counter-provision period in case the controlling person enters into a similar transaction with a counterparty that is not part of the same group of persons.

At the same time, it should be noted that only monetary claims are subject to subordination under the current model, and the rule on subordination can be applied to creditors' claims for non-monetary property obligations (on the transfer of property to ownership, performance of works and provision of services) only if the corresponding non-monetary claim has been transformed into a monetary claim for repayment the debtor of the payment received under the contract prior to the initiation of bankruptcy[165] proceedings.

2) Granting the debtor a deferral (installment plan) for the performance of an obligation under a civil contract (clause 3.3. Above) is considered as financing, since as a result of granting such a deferral (installment plan), the debtor saves money (albeit temporarily). From an economic point of view, the actions of a

[165] See paragraph 33 of the Review of Judicial Practice of the Supreme Court of the Russian Federation No. 3 (2016)" (approved by the Presidium of the Supreme Court of the Russian Federation on October 19, 2016).

creditor granting a deferral (installment plan) to the debtor are equivalent to the provision of a new loan aimed at repaying the previous one.

However, in exceptional circumstances, the provision of deferral (installment plan) may not be recognized as financing. For example, in the Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation No. 307-ES21-7195(2,3) of 17.11.2021 in case No. A56-94223/2020, the following situation was considered: on 31.03.2020, during the initial period of the coronavirus pandemic, the bank extended the loan agreement. As the debt was not repaid, on 23.10.2020 the bank applied for declaring the debtor bankrupt. The courts of appeal and cassation concluded that the bank's claim is subject to subordination, since the extension of the loan agreement on the eve of bankruptcy was a form of compensation financing. The Supreme Court overturned these judicial acts, noting that on 31.03.2020, the inevitability of introducing a moratorium was already obvious for all market participants: the relevant draft law was already under consideration by the State Duma. In other words, the extension of the term of the loan agreement was not financing, since the bankruptcy moratorium introduced on 01.04.2020 in any case protected the debtor from accrual of penalties and enforcement of creditors' claims for the duration of the moratorium (Article 9.1 of the Bankruptcy Law).

3) Failure to take measures to recover the debt of a controlled entity (paragraph 3.2 of the Review). Financing for subordination purposes is also recognized as non-demand by the controlling person of the loan within a reasonable time after the expiration of the term for which it was granted, as well as refusal to exercise the right to early claim the loan or signing an additional agreement to extend the repayment period of the loan.

This explanation is a logical extension of the rule that deferral is considered as financing, since non-collection of debt has the same economic effect – saving money by the debtor. Moreover, signing an agreement to extend the loan repayment period is practically indistinguishable from granting a deferral in terms of its consequences.

At the same time, it is necessary to clarify the question of what models of behavior of the lender can be considered as non-demand of the loan amount within a reasonable time. It seems that, as a general rule, the actions of such a creditor who has ensured compliance with the mandatory claim procedure within a reasonable time and filed a claim for debt collection in court cannot be recognized as financing. At the same time, if after the court decision on debt collection came into force, the creditor did not take minimum measures to enforce this decision within a reasonable time, its actions should be considered as non-collection of debt. Such minimum measures should be understood as applying for the initiation of enforcement proceedings or presenting an enforcement document for execution in accordance with Articles 8 or 8.1 of Federal Law No. 229-FZ of 02.10.2007 "On Enforcement Proceedings".

4) Performance for the debtor of its obligations to third parties (clause 6.1, clause 6.3 of the Review). Paragraph 6.1 of the Review addresses the issue of subordination of a controlling person's subrogation claim based on an agreement concluded with an independent creditor to provide security for the debtor by the controlling person. In the example given by the Supreme Court, the guarantee agreement was concluded by the company in the context of a financial crisis of the main debtor under its control. According to the Supreme Court, the controlling person, by issuing a guarantee, in fact, provided the debtor with compensation financing, and therefore the claim transferred to him by way of subrogation was subject to subordination. Similar rules apply to other types of collateral – collateral, independent guarantee, etc.

It seems that this rule should not be limited to sureties issued under obligations to independent creditors, but should equally apply to guarantees issued under obligations to affiliated creditors. The fulfillment of the debtor's obligation to an affiliated person to the same extent leads to saving money within the meaning of the definition of financing formulated above.

With regard to the specifics of proof in such situations, it should be noted that the performance of an obligation at the expense of security, as a rule, in itself implies

the presence of a crisis. If there is no crisis situation, then a reasonable party to the contract will rather not allow delay and recourse to collateral, but will agree with the lender on a different method of debt settlement. In this regard, the performance of an obligation at the expense of collateral may give rise to a refutable presumption[166] that the debtor has a financial crisis.

2.2. Subordination of claims acquired by way of singular succession. Separately, we should consider the specifics of subordination of claims acquired by the creditor in the order of singular succession (usually under an assignment agreement).

1) Assignment of a claim from a controlling person to an external creditor: the rules on subordination apply regardless of the change of person in the obligation

As the Supreme Court reasonably explained in paragraph 7 of the Review, since the original creditor cannot assign more rights to the new creditor than it itself has, a claim that would be subject to subordination if presented by the assignor cannot change its status as a result of the transfer of the right to the assignee. This rule goes back to the well-known maxim of Roman law "Nemo plus iuris transferre potest quam ipse habet"[167].

It should be noted that this rule poses a certain threat to assignees, who, due to the complexity of corporate relations and the lack of information about the circumstances of initial financing, may not have known about the existence of grounds for subordination of the claim they acquire. D. V. Fedotov and A. E. Aloyan, in particular, pay attention to this problem. Thus, D. V. Fedotov considers as its solution, first of all, civil legal remedies: the use of the institution of assurance about the circumstances, termination of the contract in court, a broad interpretation of the provisions of Article 475 of the Civil Code on the consequences of transferring low-quality goods to the buyer, and challenging the transaction as made under the

[166] For more details see Mokhov A.A. On presumptions in civil proceedings in Russia // Legal World. 2006. No. 4. pp. 42–45.
[167] No one can transfer more rights than he himself has (lat.).

influence of a significant error (Article 178 of the Civil Code)[168]. In turn, A. E. Aloyan believes that the rule on subordination of claims of controlling persons in bankruptcy proceedings should not be opposed to third (independent) persons, and such claims should be considered through the prism of standards of good faith and reasonableness[169]. Developing the idea of the mentioned author, we can assume the creation of a rule that protects a bona fide acquirer of the right of claim and frees him from subordination, just as a bona fide acquirer of a thing who did not know about the existence of this encumbrance is released from a pledge encumbrance (clause2, clause 1, Article 352 of the Civil Code of the Russian Federation). At the same time, taking into account the ease of turnover of rights of claims, this would create a wide field for abuse by alienating subordinated rights of claim in favor of fake "bona fide" purchasers. In this regard, it is most reasonable to fully follow the principle of "nemo plus iuris" and subordinate claims regardless of their subsequent assignment to third parties.

2) Acquisition by a controlling person of a claim that was not subject to subordination: the rules on subordination apply if the claims were acquired during a financial crisis. In clause 6.2 of the Review of 29.01.2020, the opposite situation is considered – the acquisition by a controlling person of a claim from an independent creditor. The Supreme Court recognized the claim acquired in this way as subject to subordination, since, by acquiring a claim against the debtor from an independent creditor, the controlling person created conditions for delaying repayment of the debt under the loan agreement, i.e., actually financed the debtor, giving him the opportunity to continue business activities. In another example of the Supreme Court, the situation with the acquisition of a claim by a controlling person, the deadline for which has not yet come, is considered. The Supreme Court pointed out that this circumstance does not prevent subordination of the claim, since at the time

[168] Fedotov D.V. Assignment of the right of claim to an insolvent debtor: ways to protect the rights of the assignee if there are grounds for subordination of the claim // Lawyer. 2021. N 2. P. 57 – 62.
[169] Aloyan A.E. Problems of implementation of the doctrine of recharacterization in the Russian legal system // Bulletin of Civil Law. 2017. N 6. P. 221 - 240.

of the debtor's financial crisis, it was obvious to the controlling person that the debtor would not be able to fulfill the obligation when the deadline for its fulfillment came.

However, the above does not allow us to conclude that it is necessary to qualify the acquisition of a claim as such as one of the forms of financing. Replacing an external creditor with an internal one (or one internal creditor with another) does not in itself lead to the debtor saving property for the duration of the financial crisis. Financing takes place only if, after the succession, the new creditor has not initiated debt collection or has not continued the collection process initiated by the original creditor.

With regard to this explanation, it should also be noted that the acquisition of a claim against an insolvent debtor by a person controlling it is considered by some researchers as an action that circumvents Article 113 of the Bankruptcy Law. Thus, D. A. Petrov notes that if the founder or a third party that is controlling in relation to the debtor performs the latter's obligations outside the scope of the specified article (for example, in the pre-bankruptcy period), then such performance cannot be recognized as legal[170].

Conclusion on the chapter:

Taking into account the above, in accordance with the current practice regulated by the Review of the Supreme Court of 29.01.2020, as well as based on the content of Draft Law No. 1172553-7, the concept of financing for the purposes of subordination is defined as actions or omissions of a controlling person committed for the purpose of granting property (property rights) to the debtor or saving it on the terms of counter-granting within a period exceeding the usual counter-grant period in the event of a controlling person entering into a similar transaction with a counterparty that is not part of the same group of persons.

At the same time, the application of the criterion of having a goal to finance a controlled entity does not seem justified, taking into account the goals of subordination, and also generates many controversial situations in practice. In this

[170] Petrov D.A., mention. Op.

regard, a regulatory model, in which any claims of controlling persons that have arisen during the financial crisis will be reduced in priority, is considered to be more optimal.

Chapter 4. Peculiarities of subordination of claims that have arisen in connection with crisis financing

§ 1. Financial crisis criteria for subordination purposes[171]

1.1. Content of the concept of financial crisis for the purposes of subordination. Within the framework of the current regulatory model, the fact that the company is financed by a controlling person is not considered as a sign of a financial crisis. This is also evidenced by a fairly significant number of cases of refusal of subordination due to the lack of a state of financial crisis at the time of providing funding[172].

The Supreme Court of the Russian Federation, in paragraph 3 of the Review, links the subordination of the controlling person's claim with the occurrence of this claim on the basis of a contract, the performance of which was granted to the debtor in a situation of financial crisis. The Review does not describe the criteria for a financial crisis in an exhaustive way, but it is noted that a financial crisis occurs in the presence of any of the circumstances specified in paragraph 1 of Article 9 of the Bankruptcy Law. This paragraph lists cases where the debtor's manager is required to file for bankruptcy, including:

- the presence of signs of insolvency and (or) insufficient property;
- inability to satisfy all creditors ' claims while satisfying some of them;
- impossibility or significant difficulty of economic activity when foreclosing on the debtor's property;
- the presence of outstanding debt to the debtor's employees for more than three months due to insufficient funds.

[171] See also Esmansky A.A. Subordination of claims of persons controlling the debtor based on crisis financing: political and legal goals and current problems // Law. 2023. N 3. P. 158-173.

[172] See, for example: resolutions of the Moscow District Court of December 10, 2020 in case No. A40-48600/2019; AS of the North-Western District dated December 22, 2021 in case No. A56-122126/2018; Thirteenth AAS dated 10/19/2021 in case No. A56-29405/2020/vst.1; Twentieth AAS dated January 28, 2022 in case No. A23-1141/2020.

Despite the apparent similarity with another major category of disputes - on bringing to subsidiary liability for failure or late submission of the debtor's application (Article 61.12 of the Bankruptcy Law) - the assessment of the debtor's condition for subordination purposes has a number of important features.

Thus, the concept of a financial crisis, defined by the Supreme Court of the Russian Federation as a "difficult economic situation", is hardly limited to the circumstances in which the debtor's manager is obliged to file for bankruptcy. This is also reflected in the Ruling of October 19, 2020 No. 307-ES20-6662 (4), where the Court formulates this part of the subject of proof in a broader way: "...what was **the property status** (highlighted by the author) of the debtor at the time of receiving funding." The property situation can also be recognized as a crisis in a situation where the company remains solvent and has enough property to fulfill its obligations to existing creditors, but new claims are expected in the future, for which the company's property may not be sufficient. For example, this situation may arise when new regulatory requirements are introduced, the implementation of which requires incurring significant costs, and failure to comply entails the imposition of significant fines or suspension of activities. It should be emphasized that in order to establish the existence of a financial crisis, future objective bankruptcy does not necessarily have to be inevitable. R. T. Miftakhutdinov and A. I. Shaidullin also come to the conclusion that the concept of a financial crisis is not limited to the circumstances specified in Article 9 of the Bankruptcy Law, and this state can occur before the appearance of signs of bankruptcy[173]. A similar conclusion follows from the position of T. P. Shishmareva, according to which insolvency reflects a certain stage of the debtor's financial crisis, which differs from the usual delay in fulfilling the obligation, which is not characterized by the presence of signs of a property problem[174] that has occurred.

Based on the conclusions set out in Chapter 1 of this dissertation on the political and legal grounds of subordination, the subordination of claims that arose

[173] Miftakhutdinov R.T., Shaidullin A.I., ment. Op. C. 51, 52.
[174] Shishmareva T.P. Institute of Insolvency in Russia and Germany. M.: Statute, 2015. 332 p.

during crisis financing is not related to the guilty actions of controlling persons. Since the establishment of creditors' guilt for subordination is not required, the **subjective awareness** of these persons **about the financial crisis does not matter**. In this regard, when considering disputes on subordination, a significant part of the practice of bringing to subsidiary liability is not applicable, where courts assess the subjective awareness of controlling persons[175] about the company's crisis state. Hypothetically, a situation is possible in which a reasonable controlling person may not have known about the onset of a crisis, but the court will still determine its presence at a given time, based on an analysis of objective information about the debtor's condition. It should be noted that, despite this, courts in some cases still take into account the subjective side of the controlling person's actions, including the purpose of providing financing and awareness of the debtor's financial difficulties[176]. It seems that this practice is a consequence of some courts' perception of subordination as a measure of responsibility — an approach that can be confirmed in the words of the Supreme Court of the Russian Federation on the consequences of deviating from the prescribed behavior model prescribed by Article 9 of the Bankruptcy Law (paragraph 3.1 of the Review). At the same time, the shortcomings of this approach were considered in detail earlier and a conclusion was made about a different legal nature associated with compensation for insufficient equity capital and assuming **that only the objective property status** of the company is taken into account.

At the same time, as R. T. Miftakhutdinov and A. I. Shaidullin note, the subjective approach to determining the financial crisis for the purposes of subordination has been used in the practice of German and Austrian courts for quite

[175] As explained in paragraph 9 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated December 21, 2017 No. 53 “On some issues related to holding persons controlling the debtor liable in bankruptcy,” the manager’s obligation to file a bankruptcy petition with the court arises at the moment when a bona fide and a reasonable manager in similar circumstances, within the framework of standard management practice, taking into account the scale of the debtor’s activities, was obliged to objectively determine the presence of one of the circumstances specified in paragraph 1 of Art. 9 of the Bankruptcy Law.

[176] See: rulings of the Arbitration Court of the North-Western District dated December 22, 2021 in case No. A56-122126/2018, dated January 24, 2022 in case No. A56-29405/2020; AS of the Central District dated 02/11/2022 in case No. A68-2850/2016; AS of the Ural District dated 06/08/2022 in case No. A60-56184/2020.

a long time[177]. This approach assumes that a financial crisis occurs in a situation where the company can no longer receive loan financing from external creditors of individuals, that is, it is not creditworthy. When assessing the debtor's financial position using a subjective approach, the courts determined the existence of a crisis based on those external signs that would guide independent creditors: the content of the balance sheet, the availability of free property that can be used as collateral for the fulfillment of obligations, the level of reduction in revenue and profitability, the equity adequacy ratio, etc.[178]

The application of a subjective approach to the definition of a financial crisis cannot be considered justified and appropriate in connection with the following.

First, there is nothing to support the premise that any non-debtor-related lender would refuse to finance a company in crisis. In business practice, there are cases when an investor provides a loan to a struggling company on the terms of increased interest or other remuneration. At the same time, if the debtor already has significant obligations to a certain creditor, then this creditor may be more interested in providing the debtor with financing to overcome the crisis, since otherwise it risks losing the funds already invested. Consequently, the existence of external sources of financing does not exclude the fact that the company is in a state of crisis.

Secondly, most creditors do not have the ability to reliably determine the financial condition of the debtor. Even a professional lender may be misled by outdated or inaccurate accounts of the debtor. This is also indirectly indicated by the practice of challenging transactions under clause 3 of Article 61.3 of the Bankruptcy Law, where in the overwhelming majority of cases the courts recognize that the creditor could not have known about the sign of insolvency or insufficiency of property or about the circumstances that allow us to conclude about the sign of insolvency or insufficiency of property.

Third, the subjective approach restricts the court's determination of facts about the financial situation only to those information that, by virtue of law and business

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[177] Miftakhutdinov R.T., Shaidullin A.I., ment. Op.
[178] Ibid.

practices, is available to the lender when providing financing. Such a restriction would only make sense if the claims of independent creditors could be subordinated, and it would be unfair to impose a cover-up of the debtor's financial situation. However, since the necessary condition for subordination is that the debtor is controlled by the creditor (or both-by a single beneficiary), there is no reason to protect the "prudent creditor".

Thus, the property status for the purposes of subordination should be understood as the objective state of the debtor at the time of providing financing.

1.2. Differentiation of financial crisis and other financial difficulties. A variety of difficulties may arise in the company's activities that hinder the implementation of its business plans and the achievement of certain financial indicators. Based on the assumption that the purpose of subordination is retroactive quasi-capitalization of an insolvent debtor, **only such difficulties that can lead to bankruptcy should be recognized as a financial crisis**.

The same factors that constrain the development of society can change their nature when circumstances change: for example, a high debt burden with a moderate interest rate can only put pressure on profitability, but with a sharp increase in the cost of refinancing, it becomes a threat to the very existence of the business.

Consequently, the courts are faced with a difficult task to determine from what point the difficulties experienced by the debtor become a financial crisis. It should be noted that this is precisely a matter of law, the decision of which the court cannot delegate to a forensic expert. The latter may be assigned to conduct research on issues related to the assessment of the debtor's financial condition, but the establishment of a financial crisis as a legal category is within the exclusive competence of the court[179].

[179] On this matter, see: Ruling No. 310-ES20-7837 dated September 28, 2020, where the Supreme Court of the Russian Federation rightly noted that “insolvency, from the point of view of bankruptcy legislation, is a legal category, the determination of the existence of which falls within the exclusive competence of the courts... before an expert can only raise a question of fact (in this case, an assessment of the debtor’s financial condition), while establishing signs of insolvency relates to questions of law.”

The task of the courts is further complicated by the fact that often the transition to a state of crisis cannot be linked to specific external or internal events for society, and the transition to a state of crisis is a long process. It is usually reflected in the dynamics of the company's financial performance. Legislation and judicial practice do not have any generally accepted criteria that would allow distinguishing a crisis state from the usual state of an economic entity, accompanied by difficulties characteristic of this type of activity. In this regard, when assessing the property status of debtors, the courts refer primarily to **non-fulfillment of obligations** to external creditors[180] and **insufficient property** to repay the claims of all creditors[181]- circumstances that directly indicate that the debtor's manager has an obligation to file an application for bankruptcy. This practice covers the most obvious cases of crisis financing.

In disputable situations, other signs of a financial crisis are also given, in particular:

- whether the debtor **has an uncovered loss** based on the results of operations for a certain period[182],
- **negative dynamics of the debtor's profit and other key** performance indicators[183],
- **inability to operate independently** without permanent funding from the controlling person[184].

[180] Resolutions of the Central District Court of May 30, 2022 in case No. A09-9475/2019; AS of the Moscow District dated May 23, 2022 in case No. A41-17512/2021; Thirteenth AAS dated 04/14/2022 in case No. A21-12386/2019-5.
[181] Resolutions of the Moscow District Court of August 9, 2022 in case No. A40-291982/2019; AS of the Volga-Vyatka District dated January 14, 2022 in case No. A43-27273/2019; AS of the Far Eastern District dated June 17, 2022 in case No. A73-8958/2021
[182] Resolutions of the Moscow District Court of September 15, 2022 in case No. A40-28465/2021; AS of the West Siberian District dated August 25, 2022 in case No. A45-39627/2019; AS of the Far Eastern District dated 04/05/2022 in case No. A73-18800/2020; AS of the North-Western District dated November 12, 2021 in case No. A56-15903/2020; AS of the Volga-Vyatka District dated 08/12/2022 in case No. A17-1898/2021.
[183] Resolutions of the Arbitration Court of the Ural District dated July 1, 2022 in case No. A07-27580/2017; Tenth AAS dated 08/11/2021 in case No. A41-21704/2020.
[184] Ruling of the Supreme Court of the Russian Federation dated August 10, 2020 No. 306-ES20-1077(2) in case No. A65-1704/2019; resolutions of the AC of the North-Western District dated 09/13/2022 in case No. A21-1627/2021, AC of the Central District dated 02/11/2022 in case No. A68-2850/2016.

I. V. Stasyuk and A. S. Ulezko also identify such signs of a financial crisis as insufficient capitalization, the presence of negative net assets, and an increase in accounts payable[185].

The main sources of information about the debtor's condition in the periods preceding bankruptcy are its accounting statements and financial analysis data based on them, which are carried out by the temporary manager during the monitoring procedure (Article 70 of the Bankruptcy Law). The rules for conducting this financial analysis provide for the calculation of coefficients of financial and economic activity provided quarterly for at least a two-year period preceding the initiation of insolvency proceedings.

Even at the dawn of modern Russian bankruptcy law, the following key coefficients were identified:

- current liquidity ratio (threshold value-2);
- the equity security ratio at the end of the reporting period is set to (the threshold value is 0.1).

If the values of these coefficients were lower than the threshold values, the balance sheet structure of the enterprise was considered unsatisfactory, and the enterprise itself was considered insolvent[186].

Similar recommended values of these and other coefficients are fixed in the Methodological Recommendations for analyzing the financial and economic activities of organizations[187]. At the same time, the Methodological Recommendations themselves note that for normally functioning organizations, the value of indicators **may be lower than recommended** (for example, for organizations with high asset turnover). Taking into account the variability of the structure of assets and liabilities depending on the specifics of economic activity, some researchers point out the need to develop industry-specific financial

[185] Crisis states of a legal entity in Russian bankruptcy law / I. V. Stasyuk, A. S. Ulezko. – Moscow: Statute, 2022. – 158 p. P. 93.
[186] See: clause 5 of Appendix No. 1 to the no longer in force Decree of the Government of the Russian Federation of May 20, 1994 No. 498 “On some measures to implement the legislation on the insolvency (bankruptcy) of enterprises.”
[187] Approved by the State Statistics Committee of Russia on November 28, 2002.

coefficients[188]. Deviations from the recommended indicators can also be caused by the specifics of the individual company's business, including taking into account its relations with business partners and affiliates.

There are also alternative methods for numerically expressing the company's financial condition, for example, the Model for assessing the probability of bankruptcy threat by E. Altman, the method for calculating the Argenti A-account indicator, and others[189]. At the same time, none of these methods can claim to be universal and irrefutable conclusions applied to each specific company.

Thus, the output of certain coefficients of financial and economic activity beyond the recommended values does not always indicate the presence of crisis phenomena. When evaluating the conclusion based on the results of financial analysis, even experienced and well-understood judges can make different conclusions about the same set of financial indicators. In this regard, the lack of a single algorithm for assessing the debtor's property status has a noticeable deterrent effect on the formation of a uniform practice of subordination of claims based on crisis financing.

1.3. Presumption of financial crisis. Uniformity of the practice of assessing the property status of debtors can be achieved by establishing a presumption of the existence of a crisis when one or more financial parameters of the company's activities reach a certain level (levels). This presumption must, on the one hand, correspond to the most relevant indicator of a financial crisis for the purposes of subordination, and on the other, be refutable, so that the court can take into account the arguments of the controlling person about the absence of a crisis state, despite the formal deviation of a certain parameter from the norm.

Returning to the legal nature of the institution of subordination discussed earlier, we note that it is aimed at quasi-capitalization of an insolvent debtor and in this respect acts as a less restrictive alternative to controlling the security of

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[188] See: Fedorova E.A., Chukhlantseva M.A., Chekrizov D.V. Standard values of financial stability coefficients: features of types of economic activity // Management Sciences. 2017. T. 7. No. 2. pp. 44–55.

[189] Astrakhantseva I.A., Kukukina I.G. Accounting and analysis of bankruptcies: a textbook. 2nd ed., revised. and additional Moscow: INFRA-M, 2021. 377 p.

organizations with their own capital. The need for such a measure is related to the fact that for a long period before its bankruptcy, the actual value of the company's net assets may be less than the authorized capital, and taking into account the fact that most companies have the authorized capital set at the minimum allowable level, the net asset value of such companies is often negative.

As noted by I. V. Stasyuk and A. S. Ulezko, although negative net assets cannot be identified with signs of bankruptcy, a decrease in the value of net assets can be considered as a financial crisis and a harbinger of signs of bankruptcy[190].

Therefore, as an indicator of the existence of a financial crisis for the purposes of subordination, it is advisable to use the discrepancy between the value of net assets and the authorized capital of the company or a negative value of this indicator. Such a state of a legal entity when adopting relevant regulatory changes can be considered as a basis for applying a presumption, that is, an assumption about the existence of a financial crisis fixed by a legal norm[191].

Since even a negative value of the net asset value under certain circumstances, taking into account the specifics of a particular business, may be normal and not indicate that there is a real possibility of bankruptcy of the company, the applicant of the claim should be given the right to refute this presumption of the existence of a financial crisis.

It should be borne in mind that in practice the actual net asset value rarely corresponds to the balance sheet value, even if it is determined in full compliance with the accounting rules and its reliability is confirmed by the auditor. The market value of the company's assets may deviate either up or down.

In this regard, the method of determining the date of objective bankruptcy of an organization, proposed by researchers of the Department of Economics of the National Research Tomsk State University, is of interest. The authors of the methodology propose as one of the stages to evaluate individual items of assets and

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[190] I.V. Stasiuk, A.S. Ulezko, mention. Op. pp. 93-94.

[191] Mokhov A.A., Vorontsova I.V., Semyonova S.Yu. Civil process (civil procedural law) of Russia: textbook / rep. ed. A.A. Mokhov. - M.: LLC "LEGAL FIRM CONTRACT", 2017. P. 117.

liabilities of the organization based on market value. At the same time, it is possible to request additional documents, check debtors and creditors for the reality of their claims, and identify unrealistic ones for collection and fulfillment of obligations. The result of such a comprehensive assessment is the compilation of the organization's balance sheets based on the market value of assets and liabilities[192].

We agree that it is necessary to conduct such an assessment in disputable situations, but it should be noted that it is inappropriate to impose on the arbitration manager and external creditors the obligation to prepare an appraiser's report in all cases of consideration of the issue of subordination. This would lead to an increase in the costs of the bankruptcy estate and the parties to the process by paying for the services of an appraiser, even in cases where the crisis nature of financing is quite obvious from the accounting statements and without adjustments to market value.

It is optimal to use the "presumption within a presumption" construction, in which the insufficiency (negative value) of the net asset amount is assumed if it follows directly from the debtor's accounting statements. At the same time, all parties to the dispute have the right to refute the parameters calculated on the basis of accounting statements by evaluating individual items of assets and liabilities of the organization based on market value. In other words, having received an objection that the financing was provided at a time when the amount of net assets on the balance sheet was negative, the applicant of the claim can get them included in the third stage of the register of creditors in one of the following ways:

1) conduct a market assessment of the organization's assets and liabilities and prove that the actual net asset value exceeded the established value;

2) prove that, despite the insufficiency (negative value) of the amount of net assets, taking into account the specifics of the debtor's business, it was not in a state of financial crisis. For example, an excess of the amount of liabilities over the value of assets could be accompanied by a high return on assets and a comfortable

[192] See: Khloptsov D.M., Belomyttseva O.S., Balandina A.S. On the methodology for determining the date of objective bankruptcy of an organization // Property relations in the Russian Federation. 2022. No. 1. P. 30–40.

repayment schedule, which makes it possible to recognize the debtor's condition as normal, and not as a crisis.

It should be noted that the proposed presumptions not only simplify the establishment of facts for the courts and evidence for those interested in subordination, but also do not worsen the situation of the debtor's controlling persons – applicants of claims. Thus, the current clarifications already provide that due to the significantly greater awareness of the debtor's condition compared to independent creditors, it is the controlling person who should bear the risk of negative consequences of failure to perform procedural actions to provide evidence of the absence of a financial crisis in the form of lowering the priority for satisfying his claim (paragraph 3.4 of the Review of 29.01.2020). In such circumstances, the establishment of the presumptions discussed in this chapter will only add legal certainty to determining the status of claims of debtor’s controlling persons and their affiliates in bankruptcy cases.

1.4. Specifics of assessing the value of the debtor's net assets. The limited sources of information on the company's condition at the time of providing financing also determine limitations on the accuracy of determining the company's condition at a given date. So, depending on the accounting policy of the organization, the court and the parties can access the company's financial statements as of the end of the month, quarter or year. The company's financial position may change significantly between the two reporting dates. In some cases, additional information can be used to assess this provision, including management accounting data for a date closer to the date when funding is provided. However, in all other cases, estimates of net assets are based on data from the last reporting date.

Another limitation of the net asset value as an indicator of the presence of a financial crisis is that its calculation does not pay attention to accounting items that are on off-balance sheet accounts[193]. In practice, off-balance sheet liabilities can significantly affect the debtor's financial position. Such obligations include collateral

[193] According to clause 4 of the Procedure for determining the value of net assets, approved by Order of the Ministry of Finance of Russia dated August 28, 2014 No. 84n.

issued by the debtor for third-party obligations. Even if such a guarantor has high indicators of its own net assets, then in the event of non-fulfillment of the secured obligation, it itself risks being in a state of financial crisis. At the same time, a guarantee can also be issued with a near-zero probability of default on the main obligation solely for the purpose of assigning a higher quality category of loan debt by the bank.

In this regard, when estimating the amount of net assets for subordination purposes, it is necessary to adjust for off-balance sheet obligations of the debtor if additional claims may still be made against the debtor at the time of consideration of the creditor's application on the basis of a security obligation. This will allow controlling persons, if there is an appropriate opportunity, to repay the secured claim or agree to replace the security issued by the debtor with another one. In addition, if the amount of net assets decreases by the amount of collateral, it is fair to take into account the estimated value of the right of claim that the debtor will receive by way of subrogation in the event of performance of its security obligations.

§ 2. Prospects of legislative regulation[194]

The involuntary nature of subordination of the claims of controlling persons implies the need for legislative consolidation of the relevant rules in the legislation. Draft Law No. 1172553-7 "On Amendments to the Federal Law "On Insolvency (Bankruptcy)" is currently under consideration by the State Duma[195], which contains Article 137.1 on rules of subordination. These rules, as formulated in the Review of 29.01.2020, provide for subordination of claims of controlling persons in two cases of providing financing to the debtor:

[194] See also Esmansky A.A. Subordination of claims of persons controlling the debtor based on crisis financing: political and legal goals and current problems // Law. 2023. N 3. P. 158-173.

[195] Bill No. 1172553-7 “On amendments to the Federal Law “On Insolvency (Bankruptcy)” and certain legislative acts of the Russian Federation.” URL: https://sozd.duma.gov.ru/bill/1172553-7 (last access date: 05/27/2023).

1) after the debtor is obliged to submit an application for declaring it bankrupt in accordance with paragraph 1 of Article 9 of this draft law (capitalization in a crisis);

2) if the authorized capital formed during the creation of this debtor is obviously insufficient to carry out the activities for which it was created (initial undercapitalization, see chapter 5 below for more details).

As follows from the above wording of subclause 1 of clause 1 of Article 137.1, the draft law, unlike the current Review of 29.01.2020, does not use the concept of "financial crisis", but instead connects the basis for subordination with the moment when the debtor has an obligation to file an application for declaring it bankrupt[196]. This reduces the total number of cases when the financing will be recognized as a crisis, to the circumstances directly provided for in paragraph 1 of Article 9 of the Bankruptcy Law.

The practical consequence of this approach is that it will be somewhat easier for courts to determine the presence or absence of signs of insolvency or property insufficiency, rather than to assess the debtor's condition in terms of signs of a crisis in a broader sense.

At the same time, the controlling person, wishing to establish his claim in the third stage of the creditor's register, will be able to refer to the presence of the company's management of an economically justified plan to get out of the crisis, part of which was the provision of crisis financing. In other words, subordination will be a consequence of financing a debtor that is already in a hopeless situation, and not just a crisis.

Such regulation would be justified if subordination was considered as a liability for the fact that, contrary to the legally established obligation to initiate bankruptcy, the controlling person artificially supports the debtor afloat with loans. Then there really would be no reason to lower the priority of a claim that has arisen

[196] See: art. 137.1 of the Bankruptcy Law as amended by bill No. 1172553-7.

as a result of helping a debtor who is in crisis, but does not yet have the characteristics listed in paragraph 1 of Article 9 of the Bankruptcy Law.

In addition, this position of the authors of the draft law could be justified by its general rehabilitation orientation, within which the desire to create the most favorable conditions for attracting crisis financing for a debtor who is not in a state of objective bankruptcy is understandable. However, as noted, there is no reason to believe that in practice the prospects of subordination have a significant deterrent effect on the decision to grant it.

Separately, it should be noted that after referring to the norm of Article 9 of the Bankruptcy Law, the authors of the draft law indicate the term "capitalization in crisis" in parentheses. This term corresponds to a different, more correct, in the author's opinion, approach to subordination as a way to improve the position of creditors of an undercapitalized company. However, capitalization in a crisis should be understood as financing not only and not so much in a state of objective bankruptcy, but with an insufficient level of net assets of the debtor. The complexity of determining the net asset value could be offset by establishing the legislative presumptions described in this section. In this regard, the author considers it unjustified to limit cases of subordination in the wording of subclause 1 of clause 1 of Article 137.1 of the Draft Law No. 1172553-7.

In turn, from the point of view of supporters of the theory of subordination as a mechanism for redistributing risks, the crisis or pre-bankruptcy state of the debtor should not be taken into account at all, and any claims of controlling persons are subject to subordination, with some exceptions.

The perception of the "hard subordination" model seems to be one of the possible options for the development of legislation, the main advantage of which is greater predictability of the order of satisfaction of claims and lower costs for establishing and proving the existence of a financial crisis or initial undercapitalization.

Under this model, the fate of controlling persons' loans in the event of bankruptcy will be determined in advance, and the main disputes will shift to the

area of preventing attempts to repay such loans in the run-up to bankruptcy mainly to other creditors, as well as establishing the facts of hidden intra-group financing disguised as financing from external creditors. In order to make better use of the advantages of legal certainty under such a model, it would be advisable to change the structure of the balance sheets of business entities, indicating their obligations to controlling persons in separate lines.

Along with "hard subordination", an alternative model of subordination of claims proposed by I. V. Kokorin also deserves attention, which also does not require the court to analyze the debtor's financial condition: "It seems logical to establish an approach according to which loans of affiliated persons can be subordinated if they are made within one year before the obligation to apply to the court with an application arises 9 of the Bankruptcy Law), by analogy with the period of suspicion when challenging certain transactions in bankruptcy[197]." This approach has an obvious disadvantage in the form of the arbitrary nature of any pre-set duration of the pre-bankruptcy period. However, if equally arbitrary periods are provided for in Articles 61.2 and 61.3 of the Bankruptcy Law and are successfully applied in practice, then the establishment of a similar period for subordination purposes cannot be excluded.

Conclusion on the chapter:

Draft Law No. 1172553-7 may not have received any development over the past year, but it can still be considered a starting point for legislative regulation of the grounds of subordination. The current version of the draft law is based on a contradictory approach to subordination as a measure of responsibility and unduly narrows the scope of application of the rules on subordination, linking them to the existence of grounds provided for in paragraph 1 of Article 9 of the Bankruptcy Law.

It is best to include in the legislation the concept of "financial crisis" and the procedure for proving its existence or absence, based on the presumptions described

[197] Kokorin I.V. All creditors are equal, but some are more equal than others. On the issue of subordination of corporate loans during bankruptcy in Russia, Germany and the USA // Bulletin of Economic Justice of the Russian Federation. 2018. No. 2. pp. 119–137.

in this chapter. The concept of "financial crisis "for the purposes of legislative regulation can be formulated as "a difficult economic situation, the existence of which is assumed if the net asset value of the debtor is less than its authorized capital".

Chapter 5. Peculiarities of subordination of claims that arose during the initial undercapitalization of the company[198]

§ 1. Initial undercapitalization as a basis for subordination of a claim

The usual method of financing the activities of a business company by its participant (shareholder) is to contribute property to the authorized capital. The return of investments made in this way is made through the sale of a share in the authorized capital, payment of dividends or participation in the distribution of the liquidation quota. At the same time, the participant bears the risk of non-return of investments in the event of bankruptcy of the company, since by virtue of paragraph8 of Article 2 and Article 148 of the Bankruptcy Law, the claims of the debtor's participants for obligations arising from such participation are satisfied last after settlements with other creditors.

At the same time, when creating business entities, in practice, no significant property is often contributed to the authorized capital, and the company is financed by loans from its participants or by other equivalent means. The response to this practice was paragraph 9 of the Review of the Supreme Court of 29.01.2020, which explains that subordination is subject to claims of persons controlling the debtor for repayment of a loan granted during the initial period of the debtor's business activity, if no other goals are set for choosing such a financing model, except for the redistribution of risk in the event of bankruptcy.

As discussed above in chapter 1 of this paper, under the current legislation, there are no grounds to consider subordination at the initial subordination as a sanction for misconduct due to the absence of signs of illegality in the actions of the creditor.

At the same time, based on the arguments of the Supreme Court in paragraph 9 of the Review and from the point of view of most domestic researchers, the key

[198] See in more detail Esmansky A.A. Initial undercapitalization as a basis for subordination of the claims of persons controlling the debtor // Law. 2022. N 2. P. 152 - 162.

prerequisite for subordination is the redistribution of risks when providing debt financing to the company. As noted above, the provision of financing under any circumstances can hardly be considered as a reallocation of risks. However, in relation to the problem of initial undercapitalization, this argument does not apply at all: in the vast majority of cases, loan financing is provided to a company that does not yet have any creditors. The same creditors that he will have in the future, when doing business wisely, can take into account the structure of his capital, information about which, as a rule, is publicly[199] available. In this regard, it cannot be said that loan financing violates the rights **of specific** creditors included in the register (with the possible exception of involuntary creditors, the problem of accounting for the rights of which is common to bankruptcy law and deserves a separate study).

At the same time, in addition to protecting the rights of specific creditors who have already faced the insolvency of their counterparty, the legal order is interested in creating conditions for the emergence of companies initially secured by their own capital, as the authors of the Concept, in particular E. A. Sukhanov[200], pointed out during the discussion on increasing the minimum amount of authorized capital. At the same time, according to D. I. Stepanov[201], an increase in the size of the minimum authorized capital as such is impractical: the legal structure of the authorized capital itself cannot fully protect the interests of creditors, and its increase will negatively affect the investment climate in the country.

In this regard, the rule on subordination formulated by the Supreme Court in case of initial undercapitalization can be considered as a step towards solving the problem of providing start-up capital for the company's activities without erecting an additional administrative barrier in the form of raising the minimum amount of authorized capital. As with crisis financing, subordination acts as a kind of

[199] For example, from balance sheets posted on the state information resource for accounting (financial) reporting https://bo.nalog.ru/ (last access date: 10.10.2023).
[200] Sukhanov E.A. Authorized capital of a business company in modern corporate law // Bulletin of civil law. 2012. No. 2. P. 4–35.
[201] Stepanov D.I. Why is a minimum authorized capital required and how to determine its level? // Review of the Supreme Arbitration Court. 2011. N 4. P. 43 - 65.

mechanism for retrospective conversion of borrowed capital into own capital, which improves the position of external creditors.

As an advantage of subordination as a mechanism for compensating for initial undercapitalization, it should be noted that this rule applies only to already insolvent companies, whose creditors really need guarantees, and does not have a significant deterrent effect on the emergence of new businesses and the expansion of existing enterprises. As Professor H. Eidenmuller notes, ex ante effects are always more significant than ex post effects: the former apply to all firms, while the latter are important only for those that are in a state of financial crisis[202]. Of course, it can be assumed that in some cases a potential investor will find financing the company being created through contributions to the authorized capital excessively risky and will refuse to implement the project. However, there is no reason to believe that such phenomena will become widespread and may have a negative impact on the investment climate in the country.

The rule specified in clause 9 of the Review of 29.01.2020 deprives the founders of business entities of the opportunity to reduce the risk of loss of their invested funds as one of the motives[203] for using the loan financing model instead of providing property in the form of contributions to the authorized capital. In the long run, this can contribute to greater transparency of the capital structure of Russian business entities and make the published balance sheets more informative in terms of the ratio of equity and borrowed funds, as well as other indicators taken into account by potential counterparties.

In view of the above, we can only support the proposal of the authors of the Draft Law on the legislative consolidation of the rule of subordination in the case of initial undercapitalization.

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[202] Eidenmueller H. Comparative Corporate Insolvency Law. European Corporate Governance Institute (ECGI) — Law Working Paper № 319/2016, 2016.

[203] Of course, the choice of a debt financing model can be explained by other motives, for example, the intention to withdraw profits from the company under the guise of repaying a loan or paying interest on it.

§ 2. Criteria for the adequacy of the authorized capital

Special attention should be paid to the fact that in paragraph 9 of the Review, the reason for subordination is not the company's insufficient capitalization in itself, but the absence of controlling persons for other purposes of choosing a loan financing model, except for the redistribution of risk in the event of bankruptcy.

The Supreme Court placed additional emphasis on the subjective side of the actions of controlling persons, mentioning that, as a general rule, the founders of a business entity may not know in advance whether the authorized capital formed by them is sufficient or not. The example given by the Supreme Court shows that the existence of such an intention is assumed if, at the time of granting the loan, the company's capital formed by the participants was **obviously insufficient** to conduct its statutory activities[204].

Similarly, according to the wording proposed by the authors of the Draft Law, subclause 2 of clause 1 of Article 137.1 of the Bankruptcy Law, the claim of the controlling person is subordinated if the authorized capital formed during the creation of the debtor **is obviously insufficient** to carry out the activities for which it was created.

This fact directs judicial practice to identify cases of capital-substituting financing only when there is a clear undercapitalization, and not borderline, which could be associated with inaccurate forecasts or macroeconomic changes.

This approach frees founders from excessive risks associated with incorrect calculation of the permissible ratio of equity and debt capital in the balance sheet of the company being created. In addition, in the event of a dispute, the parties and the courts do not bear the costs of determining the exact amount of capital required for the company's activities, which is very difficult even with the involvement of the

[204] The explanation of paragraph 9 of the Review does not exclude proving the intention of the controlling person to redistribute the risks of the debtor's bankruptcy in its favor in another way, in addition to identifying this ratio: for example, if correspondence or minutes of meetings have been preserved, where the controlling persons directly indicate that they use a debt financing mechanism for the specified purposes. However, in practice, such information, as a rule, is either not recorded at all or is not available to participants in the bankruptcy case.

most qualified experts. A clear disproportionality of capital, taking into account the planned activity, can be established by a court even without special knowledge, which is indirectly confirmed by the existing practice of applying paragraph 9 of the Review, where courts draw appropriate conclusions without involving experts or specialists.

The Table 1 below shows examples from practice that show that in most cases the courts recognize the initial authorized capital as obviously insufficient for conducting the planned activity, if it **is 2-3 orders of magnitude less** than the amount of loans issued by the participant (the minimum difference among the studied judicial acts is 60 times).

Table 1

Judicial act	**Authorized capital**	**Loan**
Resolution of the Commercial Court of the Far Eastern District of 10.12.2020 in case no. A73-4982/2019	50 000 rub.	40 000 000 rub.
Resolution of the Commercial Court of the West Siberian District of 22.07.2021 in case No. A81-9873/2020	30 000 rub.	1 756 290,85 rub.
Resolution of the Commercial Court of the West Siberian District of 28.05.2021 in case No. A45-14032/2019	10 000 rub.	2 000 000 rub.
Resolution of the Commercial Court of the Moscow A40-15788/2020	10 000 rub.	30 694 550 rub.
Resolution of the Commercial Court of the Volga District of 03.12.2020 in case no. A65-33498/2019	100 000 rub.	6 000 000 rub.

Continuation of Table 1

Judicial act	Authorized capital	Loan
Resolution of the Commercial Court of the North Caucasus District of 24.11.2020 in case no. A53-29199/2019	10 000 rub.	6 136 000 rub.
Resolution of the Commercial Court of the Ural District of 29.07.2021 in case no. Case no. A60-13394/2020	10 000 rub.	8 400 000 rub.
Decision of the Ninth Commercial Court of Appeal of 05.06.2020 on case No. A40-65282/2014	10 000 rub.	116 995 328,13 rub.

Of course, the sufficiency of the authorized capital should be determined individually for each business entity, taking into account its industry and other specifics.

At the same time, it is advisable to develop a general guideline for the ratio of the amount of debt financing from the controlling person and the authorized capital, above which the company's capitalization is considered obviously insufficient. As such, the "thin capitalization" rule provided for in Article 269 of the Tax Code of the Russian Federation can be used, according to which companies whose controlled debt exceeds their own capital by more than 3 times[205] include interest on such debt in expenses in a limited amount. This rule was developed for the purposes of calculating corporate income tax, but it reflects the maximum level of equity-to-debt ratio that the legislator considers normal for most organizations.

[205] Similar ratios are provided for in some foreign tax laws, for example: 3: 1 in Turkey, 4: 1 in Denmark, Czech Republic, Slovenia, Lithuania, Latvia, 5: 1 in Belgium. See: https://taxfoundation.org/thin-cap-rules-in-europe-2021 (accessed 28/05/2023).

Exceeding this level, as a rule, also indicates insufficient capitalization for the purpose of resolving the issue of subordination of the claim[206]. The exception is made by organizations that, due to the specifics of their business, have a fundamentally different balance sheet structure, for example, leasing companies. Thus, if the "thin capitalization" rule is used as a guideline, then with the authorized capital of 1 million rubles, there is a risk of subordination of the controlling person's loan exceeding 3 million rubles.

As additional signs of insufficient capitalization, courts may also take into account the purposes for which the debtor used the borrowed financing. For example, the use of loan financing for the construction of an object or the purchase of equipment, materials, furniture and other goods necessary for the debtor's main business[207] may indicate an initial undercapitalization of the company. Another indirect sign of insufficient capitalization is the significant duration of the loan and its constant extension at the end of the term[208].

§ 3. Implications of the dynamics of a company's equity position

At the moment, when checking the claim of controlling persons, the courts determine whether the company had signs of a clear lack of capital **at the time of providing it with loan financing**, in connection with which the above-mentioned claim was made. The subsequent dynamics of the company's equity provision is not taken into account either by the Review or by current court practice.

In a situation where the initially acceptable ratio of equity and debt capital changes for the worse for the company, the provision of additional debt financing to

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[206] It is characteristic that the concept of “thin capitalization” has already been used by the courts when considering the claims of controlling persons, see: resolution of the Ninth AAS dated March 17, 2020 in case No. A40-243386/2015.

[207] See: resolutions of the Court of Justice of the West Siberian District dated July 22, 2021 in case No. A81-9873/2020, dated May 28, 2021 in case No. A45-14032/2019; AS of the Ural District dated July 29, 2021 in case No. A60-13394/2020.

[208] See: resolution of the Autonomous District Court of the Volga District dated December 3, 2020 in case No. A65-33498/2019 (“... by converting the obligations under the loan agreement into bills of exchange, the creditor, in essence, provided the debtor with a new long deferment for the repayment of the debt amount until 08/11/2046, which indicates the lack of economic feasibility of transactions").

the company can be considered from the point of view of paragraph 3 of the Review on Compensatory (Crisis) Financing.

However, the opposite situation is also possible: an initially undercapitalized company may eventually bring the amount of its own capital to normal values: for example, at the expense of retained earnings or additional contributions to the authorized capital. In the future, the company may become insolvent for any reason, and the court will consider the issue of subordination of the claim for the loan of the controlling person issued to the company when it was established. Will the subordination of the claim be justified in this case? At the moment, neither the Draft Law nor the judicial practice address the issue of taking into account the subsequent positive dynamics of the company's own capital provision.

It seems that if the company's equity capital is subsequently increased to a sufficient level while maintaining its debt obligations to the controlling entity, there are no negative consequences of the initially chosen financing model. In other words, if the company achieves acceptable indicators of equity security, the company's creditors are protected as well as if it immediately had sufficient capitalization.

Subordination of the claim of the person controlling the debtor from the initially issued loan in such a situation can only be justified by the fact that the threat of subsequent subordination will deter some founders from choosing a borrowed financing model at the initial stage of the company's activity. However, if such a financing model is already chosen, the controlling person has less incentive to eliminate its negative consequences by increasing the authorized capital or refusing to distribute profits in the form of dividends.

However, determining the size of the company's own capital in the dynamics of its development may involve significant difficulties, which in any case should not become an obstacle to subordination of the controlling person's claims. On the contrary, such a person, as the one who is most knowledgeable about the debtor's activities, should bear the burden of proving that in the course of its activities the company has achieved sufficient indicators of equity security, and the subsequent bankruptcy of the company is not causally related to its initial undercapitalization.

§ 4. Determination of the initial period of a debtor's business activities

When determining the grounds for subordination of claims, it is crucial to determine the period that, for the purposes of subordination, is characterized as the beginning of the debtor's activity.

As follows from the example given by the Supreme Court, for the purposes of determining the initial period of activity of the debtor, the moment of the beginning of its actual activity, which is systematic[209], is important, and not the moment of registration as a legal entity.

At the same time, paragraph 9 of the Review does not explicitly resolve the issue of whether claims for loans issued for the development of an existing company are subject to subordination.

We should agree with R. T. Miftakhutdinov and A. I. Shaidullin[210] that the approach to subordination of loans issued to the company at its establishment and loans issued with a significant expansion of the scale of its activities should not be fundamentally different.

However, in practice, the implementation of such a position may face significant difficulties. Thus, it is quite difficult, and sometimes impossible, to distinguish fluctuations in the financial indicators of ordinary economic activity, which require replenishment of working capital, from the implementation of a business project that requires new investments. It is possible to reliably distinguish one from the other, provided that the loan agreement explicitly states its intended nature, the company itself has publicly announced the expansion of its activities, or the amount of funds allocated significantly exceeds the value of the company's assets.

However, the concept of "initial period of activity" should be considered not formally (from the moment of registration), but meaningfully: as the period of actual

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[209] Ershova I.V. The concept of entrepreneurial activity in theory and judicial practice // Lex russica. 2014. N 2. P. 160 - 167.
[210] Miftakhutdinov R.T., Shaidullin A.I., ment. Op.

commencement of economic activity, as well as the period of commencement of a new type of activity for the company or a significant change in the scale of existing ones provided by external sources of financing for the company.

Conclusion on the chapter:

Another reason for subordination is financing with initial undercapitalization. The main problem is the lack of criteria for insufficient capitalization of the company at the beginning of its activity.

In practice, courts usually subordinate claims only if the company's capitalization is clearly insufficient. A broader application of this rule can be facilitated by establishing clear criteria for the company's capital adequacy at the legislative level, for example, the ratio of the amount of debt financing provided by the controlling person to the authorized capital, similar to the "thin capitalization" rule in tax law. A possible variant of this criterion is the excess of the amount of controlled debt over equity by more than 3 times.

Chapter 6. Exceptions to the rules of subordination

§ 1. Minority privilege

The minority privilege is understood as the exclusion from the rules on subordination of claims of participants whose share in the authorized capital of a business entity does not exceed a certain threshold.

The current Review of the Supreme Court of the Russian Federation of 29.01.2020 does not explicitly provide for any exceptions for minority participants, which is explained by the use of the concept of "controlling person" in determining the circle of persons whose claims are subject to the rules on subordination (for more information, see Chapter 2 of this dissertation). Based on the literal application of this concept, established by Article 61.10 of the Bankruptcy Law, minority shareholders are not recognized as controlling persons only by virtue of the very fact of their participation in the authorized capital of the company[211]. Thus, paragraph 6 of Article 61.10 of the Bankruptcy Law explicitly provides that persons cannot be considered as controlling persons of the debtor if such assignment is exclusively related to direct ownership of less than ten percent of the authorized capital of a legal entity and receipt of ordinary income associated with this ownership. Consequently, under the current regulatory model, subordination rules do not apply to the debtor's minority founders who do not have formal or actual control over the debtor.

At the same time, as noted earlier, de lege ferenda it is more consistent with the goals of the institution of subordination to extend the rules of subordination only to participants (shareholders, property owners, founders) of the debtor. If the legislator chooses such an approach to determining the circle of persons to whose claims the rules on subordination apply, then it will be necessary to resolve the issue of establishing the minority privilege.

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[211] Miftakhutdinov R.T., Shaidullin A.I., ment. Op.

Referring to foreign experience, it should be noted that even within the framework of the German model of "hard" subordination, an exception to the rules on subordination is provided for claims of a participant whose share in the authorized capital of the debtor does not exceed 10%[212]. In turn, Section 5 of the Austrian Federal Law on Replacement of Equity Capital provides that the rules on subordination apply to participants who have at least 25% of the company's authorized capital (in this case, it is assumed that the participant has the ability to exert controlling influence).

Russian researcher A. I. Shaidullin also justifies the need to establish the minority privilege at the level of 25%. According to the scientist, this level is optimal, taking into account the fact that according to Article 91 of Federal Law No. 208-FZ of 26.12.1995 "On Joint-Stock Companies", the most extensive information opportunities are provided for shareholders who own at least 25% of the company's voting shares[213]. At the same time, A. I. Shaidullin noted that the privilege of minority ownership has its drawbacks, since minority shareholders must also bear the risks of entrepreneurial activity[214].

In addition, as an important argument in favor of removing non-controlling participants from the rules of subordination, it is noted that, as a rule, they do not have a decisive influence on what initial capital will be established by the company's charter, and the ability to independently increase the authorized capital of an existing company. According to I. V. Kokorin, protecting the interests of such minority participants plays an important role in the development of venture financing[215].

According to the author of this paper, since awareness of the company's activities does not serve as a prerequisite for subordination (this argument is discussed in detail in Chapter 1), its absence cannot be a reason for not applying the

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[212] Clause 5 § 39 German Insolvency Regulations.
[213] Shaydullin A.I. A model for downgrading (subordination) of loans from participants in legal entities in Russia: in search of optimal regulation. Commentary on the Determination of the Judicial Collegium on Economic Disputes of the Supreme Court of the Russian Federation dated 02/04/2019 N 304-ES18-14031 // Bulletin of Economic Justice of the Russian Federation. 2019. N 10. pp. 24 - 46.
[214] Shaydullin A.I. Main political and legal arguments pro and contra the idea of subordination of loans from participants of legal entities // Bulletin of Economic Justice of the Russian Federation. 2019. No. 1. pp. 83–105.
[215] Kokorin I.V., mention. Op.

rules of subordination to a particular person. Moreover, a meaningful assessment of awareness cannot be reduced to accounting for the size of the share in the authorized capital. Even if a participant owns a small share, he may have access to all information about the company's activities, if, for example, he is its head or is a member of the board of directors.

Based on the thesis about subordination as a mechanism for compensating for insufficient equity capital of a legal entity in order to increase the level of satisfaction of external creditors' claims, justified in Chapter 1 of this paper, the presence or absence of a minority shareholder's ability to influence the structure of the debtor's liabilities does not in itself constitute grounds for not applying the rules on subordination to its claim.

The argument mentioned above about the need to grant privileges to minority owners in order to develop venture financing also does not seem convincing. Venture capital investments, as a rule, are impossible without a high risk tolerance of the investor and a willingness to lose the entire amount of investments in order to multiply them many times. The possibility of full participation in competitive procedures in the event of a project failure is unlikely to be considered by the investor as one of the decisive conditions for participation in it.

At the same time, these concerns are not unfounded with regard to bond loans issued by public companies. Thus, an investor may own an extremely small share (significantly less than 1%) in a public company and simultaneously be a holder of its bonds. The risk of subordination of claims from a bond loan is already so high that the purchase of securities with a yield corresponding to the market level would be unreasonably risky. This state of affairs, given the rather limited choice of issuers in the domestic stock and debt markets, could lead to a decrease in their attractiveness to investors.

In this regard, it seems reasonable to establish the minority privilege in the legislation. It seems that a sufficient threshold level for this privilege will be **1% of the authorized capital**. Higher levels seem to have no political, legal or economic

justification, and at the same time create a temptation for participants to deliberately split shares to the level corresponding to the minority privilege.

§ 2. The privilege of rehabilitation[216]

In accordance with clause 10 of the Review of the Supreme Court of the Russian Federation dated 29.01.2020, claims of controlling persons are also granted the privilege of rehabilitation: if the crisis financing was due to the existence of an agreement between the controlling person and a majority creditor not related to the debtor, the priority of satisfaction of the controlling person's claim is not reduced, provided that as a result of the implementation of this agreement, the position of minority creditors who did not participate in it did not worsen.

The purpose of the remediation privilege is to encourage out-of-court restructuring, which is perhaps even more important to the economy than bankruptcy proceedings. Thus, a significant increase in the number of bankruptcies in 2022 was avoided, among other things, due to the widespread use of debt restructuring by banks. According to the Bank of Russia, only in 18 major banks, the balance of large business debt restructured in the period from February 19 to December 31, 2022 exceeded 9.8 trillion rubles, or 20% of the total portfolio of banks. The restructured debt of small and medium-sized businesses amounted to RUB 1.16 trillion.[217] At the same time, the total amount of included claims for procedures completed in 2022 did not exceed 5 trillion rubles.

Out-of-court restructuring can be considered as financial assistance in the context of Article 31 of the Bankruptcy Law regulating rehabilitation, but this article in any case does not provide for meaningful legal regulation of restructuring.

2.1. Rehabilitation privilege: scope of application. A distinctive feature of the Russian version is that such a privilege is granted to any person controlling the

[216] See Esmansky A.A. Debt restructuring: how to protect the interests of independent creditors? // Law. 2023. N 4. P. 90 - 104.
[217] See: https://www.cbr.ru/analytics/drknb/ (access date: 10/16/2023).

debtor: both the former one who controlled the debtor before the crisis, and the new one who received control in exchange for providing restructuring. In turn, according to the legislation of Germany and Austria, the privilege of rehabilitation is valid only for new participants who have acquired a share for the purposes of rehabilitation of the company[218]. Thus, if in the" homeland "of the subordination doctrine, the privilege of rehabilitation is aimed only at stimulating external financing of the debtor, in Russia the corresponding privilege is also used by" internal" investors.

The priority of the new debtor participant over the old one could be justified only if subordination was considered as a kind of responsibility of the former participant for the fact that the company was in a state of crisis under its management. At the same time, since subordination does not assess the quality of corporate governance of the debtor, nor the fault of the controlling person in the occurrence of a crisis situation, it would be incorrect to consider subordination as a kind of sanction for improper management. In this regard, it seems correct for the Supreme Court to extend the privilege of rehabilitation to any, and not just new, controlling persons.

At the same time, it should be recognized that from the point of view of incentive impact, the privilege of rehabilitation affects most strongly new investors, who are more inclined to a nuanced risk assessment than the original beneficiaries of the debtor. For the latter, the risk of subordination of claims from crisis financing is not so important in comparison with the risk of business loss and potential subsidiary liability as a result of bankruptcy.

2.2. The privilege of rehabilitation: legal grounds. Nevertheless, the legal basis of the privilege of rehabilitation itself raises significant questions, for consideration of which it is necessary to refer to the origins of the legal position set out in paragraph 10 of the Review of the Supreme Court of the Russian Federation of 29.01.2020.

[218] Shaydullin A.I. Downgrading (subordination) of loans from participants of legal entities in Germany and Austria // Bulletin of Economic Justice of the Russian Federation. 2018. No. 12. pp. 116–158.

Even before the adoption of the Review of 29.01.2020, the Supreme Court considered the case of Anchor Development»[219]. It evaluated the claims of the debtor's controlling person submitted by him on the basis of an agreement with another major creditor of the debtor, while the terms of this agreement explicitly stipulated that the claims of the controlling person are not subject to subordination. The Supreme Court pointed out that the inclusion of such a condition can be considered as an action aimed at subsequently concluding an agreement between creditors on the procedure for satisfying their claims against the debtor (Article 309.1 of the Civil Code of the Russian Federation), in view of which the claim of the controlling creditor is not subject to subordination.

In paragraph 10 of the 2020 Review, adopted a year later, the Supreme Court has already explicitly extended the remediation privilege to all creditors, including those who did not participate in the restructuring agreement. The agreements reached with the majority creditor regarding the refusal to subordinate the claims of persons affiliated to the debtor, contrary to clause 3 of Article 308 of the Civil Code of the Russian Federation, actually began to apply to minority creditors who did not participate in the restructuring agreement. Even if the situation of minority creditors has not worsened as a result of the restructuring, the consent of the majority creditor to provide crisis financing in accordance with the current legislation cannot in itself affect the rights of minority creditors, including their right to receive satisfaction in a preferential manner over the subordinated creditor[220].

In this regard, the application of the current resolution privilege rule requires the adoption of a special rule that allows an affiliated creditor to avoid subordination to a minority creditor with the consent of the majority creditor.

2.3. Features of applying the rehabilitation privilege. Granting the majority creditor the right to actually determine the position of the debtor's controlling person before the minority creditors creates significant risks for the latter. The presence of

[219] See: Ruling of the Supreme Court of the Russian Federation dated 02/04/2019 No. 304-ES18-14031 in case No. A81-7027/2016.
[220] Miftakhutdinov R.T., Shaidullin A.I., ment. Op.

such power over the rest of the largest creditors can only be justified by the fact that the majority and minority creditors have a common interest — repayment of debt. Following this logic, a reasonable majority lender will not agree on a restructuring plan that is unfavorable for the community of creditors, since in this case its own interests will suffer first. It should be noted that M. V. Telyukina among the principles of bankruptcy law highlights, among other things, the availability of greater opportunities for creditors with a large number of claims (i.e., more interested in the fate of the debtor)[221]. At the same time, debt restructuring is often urgent and does not allow for timely holding of an meeting of creditors. In addition, premature and public disclosure of the terms of restructuring can in some cases even harm the debtor, creating additional difficulties for him in relations with counterparties.

In view of the above, the privilege of rehabilitation has strong political and legal grounds, especially in the context of expanding opportunities for saving businesses at the pre-trial stage. However, effective protection of the interests of minority creditors can be ensured only if the following problems are resolved, which are currently not resolved either in the explanations of the Supreme Court or in the practice of lower courts:

1) determination of the creditor (s) whose consent is required for the application of the rehabilitation privilege. The literal meaning of the term "majority creditor" includes any creditors who, at the time of providing financing, hold more than 50% of the claims against the debtor. This may also be a person affiliated with the debtor, whose interests directly contradict the interests of independent creditors, to ensure the interests of which the subordination doctrine was introduced. In other words, in the literal sense of the term "majority creditor", the controlling creditor will be allowed to negotiate with itself about the absence of subordination only on the basis that the amount of its claims against the debtor exceeds the amount of claims of independent creditors.

[221] Telyukina M.V. Fundamentals of bankruptcy law. M.: Wolters Kluwer, 2004.

Therefore, we believe that persons affiliated with the debtor (regardless of the subsequent subordination of their claims) cannot act as a "majority creditor" for the purposes of applying the privilege of rehabilitation;

2) proof of the fact that the position of minority creditors has (not)deteriorated as a result of the restructuring. In accordance with paragraph 10 of the 2020 Review, the remediation privilege is not applied if, as a result of a later start of the bankruptcy procedure, the position of minority creditors has worsened compared to what it would have been if no financing had been provided and the debtor's property had been immediately sold in the liquidation procedure.

To determine how the restructuring has affected the position of minority creditors, it is necessary to assess how the real value of the debtor's net assets has changed, as well as to take into account other factors, such as the appearance of encumbrances, off-balance sheet obligations, etc.

When distributing the burden of proof, it should be taken into account that in the procedure for establishing claims, the adversarial capabilities of competing creditors are often limited: at the time of consideration of the claim, they may not yet enter the case or enter, but do not have access to all documents on the debtor's financial situation. The controlling person is obviously better informed than any other creditors about the financial situation of the debtor and has access to any documents held by the debtor. Based on the above, it is advisable to place the burden of proof on the controlling person that the situation of minority creditors has not worsened as a result of the later start of the bankruptcy procedure.

In addition, even if the controlling person proves that the bankruptcy estate did not decrease as a result of the postponement of bankruptcy, competing creditors may refer to other circumstances that made their situation worse: for example, if as a result of restructuring, part of the debtor's potentially contested transactions was outside the periods provided for in Articles 61.2 and 61.3 of the Bankruptcy Law;

3) specification of claims for which the controlling person's claim will be subordinated in the event of a deterioration in the position of minority creditors. It is obvious that the claim of the controlling person in this case should

be subordinated, at least in relation to the claims of creditors who did not give consent to the provision of crisis financing. Should it be subordinated to the claim of the majority lender that gave such consent?

If not, creditors who did not participate in the restructuring agreement are entitled to receive satisfaction in the share determined without taking into account the subordinated person's claims, and the specified person and the majority creditor are satisfied from the remaining share in proportion to the size of their claims without taking into account subordination.

Attributing some of the risks of subordination to the majority creditor seems fair, since a reasonable creditor, when giving consent, must verify the validity of the debtor's plan to get out of the crisis, request all the necessary documents to assess its property situation and bear the consequences of making an incorrect business decision.

At the same time, if the legislator sets a political and legal goal to promote restructuring, then the opposite solution is also possible: when subordinating the controlling person's claim, put the majority creditor in the same position as the minority creditors. In this case, majority creditors will be more willing to agree to the restructuring, which corresponds to the declared objectives of the Bankruptcy Law reform. This aspect of regulation is unlikely to have a significant impact on the willingness of supervisors to finance the debtor, since they are most interested in saving their business and are generally more likely to take on risk than independent creditors.

2.4. Prospects for regulating the rehabilitation privilege. Draft Law No. 1172553-7 provides for subclause1 of clause 4 of Article 137.1 of the Bankruptcy Law, which establishes the privilege of rehabilitation with the following features[222].

[222] Full text of the proposed norm: “Claims arising from financing provided on the basis of an agreement on pre-trial rehabilitation (provided for in Article 31 of this Federal Law), concluded by the person controlling the debtor who provided such financing, and the creditor (creditors) are not subject to subordination and are satisfied in third place. who is not a person controlling the debtor and has more than half of the creditors’ claims included in the register of creditors’ claims, and providing for non-subordination of the claims of this person controlling the debtor. The court has the right to refuse to apply the said agreement in terms of non-subordination of the claims of the controlling debtor of the person if it is proven that the rehabilitation plan envisaged by this person (restoring the debtor's solvency) was objectively not economically realistic or provided for the satisfaction of the claims of creditors not participating in

First, a creditor that is not a debtor's controlling person and has more than half of the creditors 'claims included in the register of creditors' claims is recognized as a proper counterparty of the controlling person under the resolution agreement.

It appears that the indication "not a person controlling the debtor" allows obtaining consent on behalf of an affiliated person who does not have control over the debtor. Regardless of the existence and degree of control, agreements between affiliated companies should not affect the legal status of independent creditors.

At the same time, determining the majority of claims of all creditors unreasonably narrows the scope of the rehabilitation privilege, making it impossible to apply it in cases where the largest part of claims against the company is concentrated in the hands of the beneficiaries of the latter and their affiliates. In order to preserve the possibility of its application to such companies, it is advisable to exclude the claims of persons affiliated with the debtor from the calculation for the purpose of determining the majority creditor. A similar decision was reached by the Supreme Court in paragraph 12 of the 2020 Review, according to which the choice of a candidate for an arbitration manager is determined by the decision of creditors who are not persons controlling the debtor or affiliated with the debtor.

Secondly, the Draft Law provides that in order to apply the privilege of rehabilitation, the relevant agreement must explicitly state the condition of non-subordination of claims, similar to what was in the Anchor Development case considered above. This requirement seems reasonable, as it provides legal certainty and avoids unnecessary disputes about the interpretation of the terms of restructuring agreements.

Third, instead of assessing the actual consequences of the resolution for minority creditors, the authors of the Draft Law propose to assess the" economic realism "of the plan and check it for conditions that provide for the satisfaction of

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this agreement in a smaller amount than with that which they would receive if the debtor filed an application for declaring him bankrupt before the provision of financing by the person controlling the debtor. To make a decision on the economic feasibility of the plan, the arbitration court has the right to order an examination, including on its own initiative."

minority creditors' claims in a smaller amount than they would have received if the debtor had immediately filed for bankruptcy. In other words, if an economically realistic plan initially did not imply infringement of the interests of minority creditors, but their situation objectively worsened as a result of the postponement of bankruptcy, the privilege of rehabilitation is valid and the claims of the controlling person are not subject to subordination. The chosen regulatory option is aimed at minimizing the risks of the lender providing financing, which also corresponds to the objectives of the reform — to expand the practice of rehabilitating problem debtors, albeit at the cost of some concessions in terms of protecting minority creditors.

At the same time, the introduction of an assessment criterion of economic realism instead of more specific criteria for the deterioration of the situation of creditors significantly increases the role of judicial discretion. This is not a disadvantage in itself, but it should be expected that only a small proportion of plans will be considered unrealistic, which again reflects the political and legal bias towards encouraging restructuring.

Thus, Draft Law No. 1172553-7 partially adopted the sanation privilege introduced in paragraph 10 of the 2020 Review, making a number of important changes to the Law that contribute to its wider application at the cost of less protection of the interests of minority creditors, which can be justified by the general ideology of the Draft Law. But even if we share this ideology with the authors of the Draft Law, we believe it is more correct to exclude the possibility of recognizing any affiliated person as a "majority creditor", and not just the debtor’s controlling person. Most of the creditors' claims for these purposes should be established without taking into account all claims of persons affiliated with the debtor.

§ 3. Claims of lenders exercising corporate control for security purposes

Paragraph 11 of the Review of the Supreme Court of the Russian Federation dated 29.01.2020 explains that the presence of a creditor that provided financing to

the debtor, the right to control the activities of the latter to ensure the return of this financing is not a reason for lowering the priority of satisfaction of the claim of such a creditor, who does not

This clarification applies primarily to the common banking practice of controlling the debtor, including through participation in corporate governance. For example, in the example given by the Supreme Court, the bank, by virtue of the agreement concluded with the majority shareholder to pledge the debtor's shares, had the right to vote at the general meeting of shareholders with the corresponding shares and exercise other rights of the debtor's shareholder, including the right to receive information about its activities.

The Supreme Court motivated its position by the fact that the bank, taking into account the increased risk of non-repayment of the loan issued by it, agreed to grant it the right to participate in the management of the debtor's activities in order to prevent the possible withdrawal of assets, create guarantees for the use of borrowed funds for their intended purpose, etc., payment of a fixed percentage on it. The Supreme Court contrasted this situation with the actions of the controlling person, who, "by providing financing, expects not only and not so much to receive benefits in the form of interest agreed in the loan agreement, but rather to participate in the distribution of all the potential profit of the debtor, which is indefinite and unlimited in advance."

However, as discussed above in chapter 1 of this dissertation, the legally unlimited amount of profit extracted by the participant cannot serve as a criterion for subordination or non-subordination of the claim, since the potential benefit of the participant from continuing the debtor's activities does not correlate in any way with its costs from subordination of the claim, or with potential losses of external creditors from the debtor's bankruptcy. In other words, subordination under such an approach would not be the restoration of a fair and proportionate balance of risks, but rather an arbitrary change in it with completely random consequences.

In addition, the lender's calculation solely for receiving interest does not in any way indicate the modesty of these claims and the need to provide the lender with

reduced risks. In some cases, a high fixed interest rate on a loan is preferable to the prospect of participating in "unlimited profits". The term "zombie company" is widely known, which refers to companies whose interest payments for many years exceed the amount of net profit. In addition, there is a certain spread of so-called "mezzanine financing", in which the amount of payment for the use of funds can be tied to the debtor's profit.

In this regard, granting lenders a special privilege in the form of maintaining the order of their claims in the presence of control (participation in the authorized capital of the debtor) does not seem to be justified either from a formal legal point of view or from a political and legal point of view.

Despite this, the authors of Draft Law No. 1172553-7 propose to fix the corresponding exception to the rules on subordination in clause2, clause 4, Article 137.1 of the Bankruptcy Law, extending it to the claims of " a credit institution that has received the opportunity to determine the actions of the debtor for security purposes on the basis of a corporate agreement, a pledge agreement for participation (shares) in the authorized capital of the debtor, credit agreement, participation in the authorized capital of the debtor, if this opportunity was used exclusively for the purpose of repayment of loans issued by this credit institution and was not aimed at participating in the distribution of the debtor's profit."

It should be noted that in contrast to paragraph 11 of the Review of the Supreme Court of the Russian Federation dated 29.01.2020, according to which the privilege can be granted to any lender, the norm proposed by the authors of the Draft Law restricts the operation of the privilege to the claims of credit institutions. This restriction also cannot be explained by the goals and objectives of subordination institutions, and is a continuation of the policy of creating more favorable conditions for participation in bankruptcy procedures for creditors who are credit institutions (see, for example, Article 7 (2), Article 138 (2) of the Bankruptcy Law).

§ 4. Privilege of public creditors

Paragraph 13 of the Review of the Supreme Court of 29.01.2020 provides for another exception to the rules on subordination – for the claims of public legal entities. The introduction of this exception is motivated by the fact that financing from such entities is conditioned by public interest, and not by the desire to participate in the distribution of all possible future profits of the debtor. In the example given by the Supreme Court, a recourse claim based on the fulfillment by the Russian Federation of the state guarantee provided to the beneficiary to ensure the proper performance of the obligations of a state unitary enterprise was exempted from subordination. A similar exception with the same reasoning was made to the rule on the inadmissibility of participation of a creditor (authorized body) affiliated with the debtor in voting on the issue of choosing a candidate for the debtor's arbitration manager established by a public legal entity.

It seems that for the purposes of applying this privilege, it is necessary to have a public interest in providing financing that is different from multiplying the invested funds, which in a different context could be considered as an independent public interest. Thus, the reasons given in the Supreme Court's explanation will not apply to the claims of a public creditor from the bonds of a publicly owned company, if the purchase of these securities was determined only by the possibility of generating income for the budget of the appropriate level.

From the point of view of the political and legal prerequisites of subordination, granting an exception for claims of public-law entities arising from financing conditioned by the public interest could be justified only if subordination is recognized as a form of responsibility for illegal behavior. However, this approach was rejected in Chapter 1 of this dissertation, and it is also not supported by the majority of researchers. In all other approaches to justifying the need for subordination, the purpose of providing funding cannot be the basis for any exceptions.

The withdrawal of claims of public legal entities from the rules of subordination, therefore, should not be considered as an exception due to the nature, goals and objectives of the institution of subordination. This exception is a veiled privilege of a public creditor in a bankruptcy case, aimed at increasing the level of return on budget investments at the expense of other creditors. It should be noted that a side effect of granting such a privilege may be a lower willingness of counterparties of state and municipal enterprises to provide them with loans and commercial loans, if the corresponding claims are not guaranteed by the founder of the enterprise.

Draft Law No. 1172553-7 contains subclause3, clause 4, Article 137.1 of the Bankruptcy Law, according to which claims of a state corporation and (or) organizations of a state corporation arising from obligations arising in connection with the fulfillment by a state corporation of public legal obligations imposed on it by federal law or other regulatory legal acts are not subject to subordination and are met in the third turn. functions and (or) in connection with the implementation of measures by organizations of the state corporation to assist the relevant state corporation in performing these functions.

This norm formally narrows the explanation of the Supreme Court of the Russian Federation to a certain type of public creditors – state corporations. However, is it possible, based on the teleological interpretation, to assume that the authors of the draft law considered the claims of the Russian Federation and other public entities to be less priority than the claims of state corporations and granted the privilege only to the latter?

On the one hand, such state-owned corporations as the Deposit Insurance Agency and VEB.RF", "Rostec", are indeed creditors in many bankruptcy cases, where the question of subordination of their claims may be raised. Losses and loss of control over bankruptcy proceedings related to subordination could have a significant impact on the operations of such state-owned corporations, while the application of subordination rules to other public creditors is not likely to have the same significant impact on the ability to perform public functions. On the other hand,

granting a special privilege specifically to state-owned corporations seems to be a controversial decision, given that, as V. S. Belykh noted, state-owned corporations are neither corporations (they do not have membership), nor state organizations (being private owners of their property), nor non-profit organizations, since in some cases they are created specifically by the state for carrying out business activities[223]. Analyzing the activities of one of the state corporations, O. A. Tarasenko comes to the conclusion that the social tasks assigned to it - managing the state internal and external currency debt and performing the functions of a state management company for the trust management of pension savings of citizens - are of a limited nature and time span[224]for it. In this regard, there is a high probability of continuing to apply paragraph 13 of the Review of the Supreme Court of the Russian Federation of 29.01.2020, while maintaining the privilege for all public creditors, despite the indication in the Draft Law only of state corporations and (or) their organizations. In view of the above, it is not possible to justify the preference for one or another option solely by legal arguments, as well as, in principle, the expediency of preserving the privilege for public entities.

[223] Belykh V.S. Economic analysis of law: controversial issues of theory and practice // Business Law. 2021. N 4. P. 3 - 10.
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Conclusion

Based on the results of the study, it should be concluded that the institution of subordination itself is not a reflection of universal justice in relations between internal and external creditors. Subordination is only a tool in the hands of the legislator, which can be used by him discreetly in order to provide additional support to external creditors at the expense of internal ones.

This support can be expressed either in a narrow way (subordination of individual types of claims that arose during the crisis or during the initial undercapitalization), or in a broader way (subordination of any claims of internal creditors).

Currently, in the explanations and practice of the Supreme Court of the Russian Federation, a narrow approach or a "soft" model of subordination prevails. This model provides a more selective approach: the interests of only those internal creditors who financed the company under their control in a situation of insufficient equity are affected, that is, with such subordination, the loan is actually retrospectively transformed into capital (with some assumptions).

Since subordination significantly restricts the rights of the respective creditors, the rules on subordination certainly need to be legislated. At the same time, it is clearly not enough to fix the approaches already developed in judicial practice in the Bankruptcy Law alone. The legislator should resolve those issues that are objectively difficult to solve by judicial interpretation: these are, first of all, quantitative and qualitative criteria for a financial crisis and insufficient equity. Finally, there is a need to settle the circle of internal creditors whose claims are subject to subordination, as well as to establish the concept of financing for the purposes of subordination or to abandon it in favor of subordination of the claim, depending only on the moment and circumstances of granting in favor of the debtor, but not on the causa of this provision. These areas are the most promising both in the context of legislative work and in terms of future theoretical research.

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