

SCTCMG 2019

International Scientific Conference Social and Cultural Transformations in the Context of Modern Globalism

JUDICIAL AND OBJECTIVE TRUTH IN COMPETITION LAW

Alim Ksanaev (a)*, Madina Alikaeva (b), Marina Dzagoeva (c),
Zuhra Tsakhkhaeva (d), Elena Karakaeva (e)

*Corresponding author

- (a) Federal Tax Service of Russia for Kabardino-Balkarian Republic, 31, Lenin Av., Nalchik, Russia
ksanai@bk.ru, +79287192900
- (b) Kabardino-Balkarian State University named after Kh.M. Berbekova,
173, Chernyshevskogo St., Nalchik, Russia, Alikai23@rambler.ru, +79287194004
- (c) Financial University under the Government of the Russian Federation, 7, Molodezhnaya St., Vladikavkaz, Russia
dzagoeva1971@mail.ru, 89284804575
- (d) Kabardino-Balkarian State University H named after Kh.M. Berbekova,
173, Chernyshevskogo St., Nalchik, Russia, hanuma.mag@yandex.ru, +79987258487
- (e) North Caucasus State Academy, 36, Stavropolskaya St., Cherkessk, Russia
elena_umarovna@mail.ru, +79283892231

Abstract

The article is devoted to the study of legal features of the process of bringing the judicial truth to the objective one when new circumstances arise after the judicial act in a case is made and entered into force. In the course of analysis it was established that the factual circumstances that had not exist at the time of consideration of the dispute and that appeared after the adoption of a lawful judicial act cannot serve as a basis for its revision due to newly discovered evidences. At the same time, the presence of such evidences can be the basis for presentation of new claims on other grounds. The judicial practice of resolving separate disputes arising in bankruptcy cases regarding the exclusion of creditor's claims from the register of creditors' claims of a legal entity that has lost legal grounds for being in the register was studied. It was established that in case of new facts and circumstances related to the termination of debtor's obligations or a change of person on the creditor's side that appeared during the bankruptcy case, sufficient grounds are created for excluding the creditor's claim from the register of claims and submitting the appropriate appeal to the courts. It was concluded that it was necessary to make changes and additions to bankruptcy legislation specifying provisions that regulate the procedure for excluding claims from the register of creditors' claims in order to prevent an insolvency case and provide balance for interested parties taking part in it.

© 2019 Published by Future Academy www.FutureAcademy.org.UK

Keywords: Bankruptcy, insolvency, register of creditors' claims, debt.



1. Introduction

The issue of development and further improvement of legal regulation of the institution of bankruptcy remains relevant, since despite numerous innovations in the legal rules governing the bankruptcy procedure many issues have not been resolved, which causes ambiguous arbitration practice and violates legal rights and interests of the parties in relation to insolvency.

As it is known, the main purpose of legislative regulation of bankruptcy procedures is to ensure maximum satisfaction of creditors' claims, because of the insolvency of debtors, their legal rights are significantly affected (Korayev, 2009).

The recognition of the debtor as insolvent and the introduction of bankruptcy in relation to it entails a number of consequences for its creditors, the main of which is that the creditors' claims are met exclusively in the procedural order established by the Federal Law "On Insolvency (Bankruptcy)" of 26.10.2002 No.127-FZ (hereinafter - the Law on Bankruptcy). An important and urgent problem in connection with the development of bankruptcy estate and its distribution among creditors is the maintenance of a register of creditors' claims (hereinafter referred to as RCC). Only such claims of creditors that were formed prior to the acceptance of the bankruptcy statement for the debtor's claim may be included in the RCC (Ksanaev, Alikaeva, Ksanaeva, & Zumakulova, 2019).

By virtue of the provisions of the Articles 71 and 100 of the Bankruptcy Law the creditors are entitled to submit their claims by sending a corresponding application to the arbitration court, enclosing documentary evidence of the accounts payable in the amount specified in the application. According to the procedural rules of evidence formulated in the Articles 65, 68 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the APC RF), the applicant must prove the circumstances to which he/she refers and disclose them to the persons involved in the case.

2. Problem Statement

In case when after the court decision was adopted and entered into force, the creditor organization's claim was included in the relevant register, which continued to carry out its activities at the time of litigation, but was liquidated and excluded from the Uniform State Register of Legal Entities (USRLE) until the debtor's obligations were repaid to this person, the court truth contradicts with an objective (real) situation, since, on the one hand, a liquidated legal entity cannot exercise its rights due to the loss of its legal capacity, and on the other hand, this circumstance is not a reason to exclude debt from the register of creditors' claims. This leads to a violation of rights of both the creditor organization and its successors, and the legitimate interests of debtor and other creditors, which is particularly acute in cases where the liquidated legal entity is a majority creditor (Zumakulova, Ksanaev, Makhiyeva, & Tutukova, 2018). In the light of the above bringing the judicial truth to an objective one seems to be an urgent task of the theory and practice of Russian law, the solution of which would ensure the protection of legal rights and interests of the parties in a bankruptcy case.

3. Research Questions

The purpose of the study has identified the formulation and solution of the following tasks: a study of regulatory framework for the preparation and maintenance of the RCC; analysis of judicial practice on the issue of exclusion of creditors' claims from the RCC who have lost the legal basis for being in the register; development of proposals for the improvement of existing legal rules governing the bankruptcy procedure.

4. Purpose of the Study

The purpose of the study is the analysis of the legal features of the process of bringing judicial truth to the objective one when new circumstances and facts arise after the judicial act in the case is issued and entered into force on the basis of competition law, and the development of recommendations for improving certain provisions of insolvency (bankruptcy) law.

5. Research Methods

The study is based on the use of general scientific analytical method of cognition and private and scientific methods arising from it, i.e. technical and legal, analytical and comparative.

6. Findings

The RCC is a set of tables containing information about the creditors of all the queues, the size of their claims, as well as information about the lenders whose claims are excluded from it. The RCC format was approved by the Order of the Ministry of Economic Development of the Russian Federation No. 233 of 1 September 2004.

As established by the Article 16 of the Bankruptcy Law, the RCC is entitled to maintain the arbitration manager or the registrar. The involvement of a specialized organization, i.e. the registrar becomes mandatory in cases where the number of bankruptcy creditors is 500 or more (Popandopulo, 2016). However, in order to save the debtor's bankruptcy, it is often the economic responsibility of the arbitration manager to keep the RCC, since attracting a specialized registry organization is not economically viable (Shchelokova, 2017).

The rules of the RCC are approved by the Decree of the Government of the Russian Federation of 09.07.2004, No. 345 (hereinafter referred to as the Rules). According to the specified Rules the RCC is allowed both in electronic and in paper formats (Pakshin & Ulyanova, 2018).

Upon completion of the bankruptcy procedure, the debt to creditors that has not been repaid due to the insufficiency of property of the debtor is considered to be repaid. Indebtedness to creditors, not recognized as a bankruptcy trustee, is also considered to be repaid if the creditor did not go to court to establish his claims or such claims were recognized by the court as unfounded. Thus, the creditors who claim to satisfy their claims need to take measures to include them in the debtor's RCC (Novakovskaya & Selivanovskaya, 2017).

Along with the inclusion in the RCC there is a reverse procedure, i.e. the exclusion of requirements from the RCC provided for by paragraph 6 of the Article 16 of the Bankruptcy Law. The procedure for excluding creditor's claims from a debtor's RCC causes many legal disputes, since it involves a conflict of interests of the parties to the bankruptcy case (Kravchenko, 2012). As established by provisions of the Bankruptcy Law, the arbitration manager or the registrar is entitled to include or exclude creditors; claims from the RCC only when there are court decisions that have entered into force and establish the composition and amount of payables (Katsiyan, 2018).

By virtue of the principle of mandatory court decisions (Part 1 of the Article 16 of the APC RF), the arbitration manager does not have the right to re-initiate the question of verifying the validity of a creditor's claim after the court made a determination to include the debt owed to him in the RCC (Derzhavina, 2018). The basis for reviewing judicial acts in the order of Chapter 37 of the APC RF is the discrepancy of facts established by the court, the real state of affairs that existed at the time of the consideration of the dispute, however, was not known to the parties and the court for objective reasons, i.e. the discrepancy of judicial truth to the objective one. At the same time, the circumstances in principle could not be taken into account and investigated by the court if they arose after the court made the decision. Therefore, the emergence of new circumstances after the adoption of a court decision cannot discredit the judgment rendered. Therefore, these circumstances cannot be the basis for the revision of a judicial act in the order of Chapter 37 of the APC RF (Rogalsky, Ryzhkov, & Gordyuk, 2004). The presence of new circumstances and facts is the basis for the presentation of a new claim (the procedure of which cannot be terminated on the basis of sub-clause 2 of clause 1 of the Article 150 of the APC RF since the bases of the claims would be different).

Thus, in the event when a bankruptcy case includes facts indicative of the termination of debtor's obligations owed to the creditor, and indicating that there are sufficient grounds for excluding the claim from the RCC the persons involved in the case (Article 34 of the Bankruptcy Law) have the right to file court a statement on the exclusion of this debt from the RCC in the manner prescribed by law (Article 60 of the Bankruptcy Law).

When considering the application of the interested person to exclude payables from the RCC to the applicant, the court does not revise the judicial act on the inclusion of this requirement in the RCC, but establishes the legality of finding relevant claims in the RCC after the occurrence of circumstances indicating the termination of the debtor's obligations (Mamatelashvili & Khisamova, 2017).

The procedure for excluding a requirement from the RCC is implemented in exceptional cases to which it may be attributed, i.e. the cancellation of a judicial act in accordance with the legally established procedure on the basis of which the requirement was included in the RCC; invalidation of the decision of tax authority to recover arrears, in case of replacement of the creditor; on the written request of the creditors to exclude claims from the RCC made by them earlier (item 8 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 15 December 2004 No. 29 "On some issues of the practice of applying the Bankruptcy Law").

However, the judicial practice on the issue of exclusion claims of creditors from the RCC who have lost their legal grounds for being in the register is not straightforward (Kozyrsky, 2016).

It is important to consider the Resolution of the Arbitration Court of the Moscow District of 19.07.2016 N F05-15705/2015 in case N A40-133653/2014.

In a bankruptcy case the creditor's claims were found to be justified and included in the debtor's RCC. Subsequently, the specified creditor ceased its activities. After that the debtor appealed to the court with a statement about the exclusion of his claims from the RCC. The decision of the court of first instance upheld by the appellate court the application of the debtor was satisfied, i.e. the creditor's claims were excluded from the RCC.

Disagreeing with the court acts that took place another person involved in the case filed a cassation appeal with the court to revoke them. The judicial board left the contested judicial acts unchanged arguing that the debts owed to creditors were included in the debtor's RCC and were excluded from it by the arbitration administrator solely on the basis of the judicial acts that have entered into force. The specific grounds for exclusion of requirements from the RCC are not fixed by law. Consequently, the interested party has the right to apply to the court with a statement to exclude the debt from the RCC on any grounds, including if he/she becomes aware that the debtor's RCC includes the requirements of the liquidated legal entity. This gives the right to other creditors to more fully satisfy their claims.

At the same time, considering the application for exclusion of creditor's claims from the debtor's RCC, the court does not revise the determination to establish these requirements, but considers the issue of legality of finding the requirements in the register after the occurrence of the circumstances and facts on the basis of which the applicant applied.

Having established the fact that the creditor lost its legal capacity due to liquidation, the courts of both instances came to a fair opinion that there are legal grounds for satisfying the debtor's statement on the exclusion of creditor's claims from the debtor's RCC, and the actual absence of the creditor whose claim is included in the debtor's RCC is followed by the disturbance of the balance of persons involved in bankruptcy case.

In the disposition of the forensic act it seems necessary to consider the Resolution of the Arbitration Court of the Central District of 05.12.2018 N F10-5459/2018 regarding the case N A09-3837/2015.

By the court of first instance, the requirements of the creditor, i.e. the legal entities were established and included in the debtor's RCC. After the liquidation and exclusion of the creditor organization from the Unified State Register of Legal Entities, the bankruptcy trustee submitted a statement on the exclusion of the creditor's claims from the registry due to its liquidation to the arbitration court.

The courts of first and appeal instances refused to satisfy the claims and the bankruptcy administrator filed a cassation appeal to annul the decisions of these courts, stating that the courts violated the substantive law, since the creditor was not capable of liquidation and was not legally in the RCC.

The judicial board upheld the contested court decisions, arguing that in a particular case there were no legal grounds for excluding the creditor's claims from the RCC, and by virtue of the provisions of the Articles 61 and 419 of the Civil Code of the Russian Federation (hereinafter - the Civil Code), the Articles 71 and 100 of the Bankruptcy Law, as well as item 5 of the Rules, to exclude creditors' claims from the debtor's RCC, it is necessary to establish unconditional circumstances that confirm the illegality of finding the creditor's debt in the RCC. By virtue of provisions of the Article 16 of the Law on Bankruptcy the liquidation of the creditor organization and its exclusion from the Register are not included to such circumstances (Glukhova & Shevyakov, 2017).

A similar legal position is contained in the Decrees of the Arbitration Court of the Central District of 20.06.2016 N F10-318 / 2014 regarding the case N A64-4634/2012, of 14.08.2017 N F 10-2833/2017 regarding the case N A23-4677 / 2014.

The judicial board indicated that if the lender has a legal successor to the bankrupt organization, he/she is entitled to file an appeal to the court about the procedural succession, which is why premature elimination of the debt of the liquidated creditor organization from the RCC may violate the rights of legal successor of creditor.

The appellate court noted that the exclusion of the creditor's claim, recognized by the court's ruling that had come into force from the RCC violated the current procedure for revising the judicial acts that had entered into legal force and the principle of mandatory court acts, which is guaranteed by the Article 16 of the APC RF.

The existing gap in the law, when resolving disputes related to the exclusion from the RCC, leads to a violation of rights of persons involved in a bankruptcy case.

More fair, in our opinion, is the law enforcement position set forth in the decision of the Arbitration Court of the Moscow District of 07/19/2016 N F05-15705/2015 regarding the case N A40-133653/2014.

It is necessary to mention wrong conclusions of the court of appeal referred to by judicial board of the Arbitration Court of the Central District of 05.12.2018 N F10-5459/2018 regarding the case No.A09-3837/2015 that the exclusion of the creditor's claim recognized as valid by an arbitration act which entered into legal force from the debtor's RCC contradicts the established order of review of the judicial acts that have entered into legal force and the principle of the binding nature of judicial acts, guaranteed by the Article 16 APC RF.

In this case, the factual circumstances, i.e. the liquidation of the creditor appeared after the judicial act had been issued, and their appearance could not discredit the judicial act issued on the inclusion of the creditor's requirements in the register since they could not be taken into account in its adoption. New circumstances of the case lead to a discrepancy between the judicial truth and the objective one; however, they are not grounds for revising it. At the same time, their presence serves the basis for a new claim, i.e. to exclude the requirement of liquidated creditor from the debtor's RCC.

The court indicated that creditor's liquidation, taking into account Article 419 of the Civil Code of the Russian Federation, is not an unconditional circumstance indicating that the creditor's claim was unlawful in the RCC, since the liquidated creditor could have a legal successor to the debtor-bankrupt.

The norms of the Bankruptcy Law are very special in relation to the Civil Code of the Russian Federation and are applicable directly. The liquidation of the creditor organization in the order established by the legislation, which debt was included in the RCC, causes an imbalance in the interests of the debtor and the creditors, since he/she is no longer able to exercise his rights and obligations. This leads to an incorrect distribution of votes of creditors, the debt to which is included in the RCC, which leads to violation of the procedure for holding a meeting of creditors. In cases where such a creditor is a majority, this makes it impossible to make decisions related to the competence of meeting of creditors, unreasonably delays the bankruptcy procedure and infringes the rights of other creditors (Tugushev, 2016).

It should be noted that the property of the liquidated creditor including the right to claim other persons is allowed in the process of liquidation of specified person. By the time the record is made in the

USRLE of the liquidation of creditor the rights of claim against the debtor can and should be assigned (creditor, sold, returned to the participant) or written off.

7. Conclusion

Thus, in order to prevent bankruptcy proceedings and disrupting the balance of interests of persons participating in a bankruptcy case, the succession upon the request of a liquidated creditor previously included in the debtor's RCC should be procedurally executed before making an entry on the lender's liquidation. To this end, it seems necessary to make appropriate amendments to the Bankruptcy Law, and to specify provisions regarding the procedure for excluding creditor's claims from debtor's RCC, which has lost the legal basis for being in the register.

References

- Derzhavina, V. (2018). *The newly discovered circumstances. How to distinguish them from new evidence that were not known to the parties*. Retrieved from: <https://legalbest.ru/vnov-otkryvshiesya-obstoyatelstva-kak-otlichit-ix-ot-novykh-dokazatelstv-kotorye-ne-byli-izvestny-storonam.html>
- Glukhova, O. Yu., & Shevyakov, A. Yu. (2017). Competitive proceedings in the procedure of insolvency (bankruptcy). *Social and economic phenomena and processes*, 2, 184–188.
- Katsiyan, N. S. (2018). *Responsibility of the arbitration manager in the competitive process. Modern problems of legal science and law enforcement practice*. Kaliningrad: Immanuel Kant Baltic Federal University.
- Korayev, K. B. (2009) *Fulfillment of obligations by an insolvent debtor by third parties in a competitive process*. Retrieved from: <https://www.lawmix.ru/bux/19700>
- Kozyrsky, D. A. (2016). The human rights nature, goals and objectives of insolvency (bankruptcy) proceedings of the debtor. *Education and Law*, 3, 148–154.
- Kravchenko, T. (2012). *Bankruptcy disputes: legal status of creditors*. Retrieved from: <https://www.eg-online.ru/article/193280/>
- Ksanaev, A. B., Alikaeva, M. V., Ksanaeva, M. B., & Zumakulova, Z. A. (2019). Analysis of the effectiveness of introduction of bankruptcy procedure. *Economics and Management: Problems, Solutions*, 4(85), 142–149.
- Mamatelashvili, O. V., & Khisamova, Ts. T. (2017). Development of institution of bankruptcy in Russia: on some aspects of implementation of bankruptcy procedure. *Herald USOTU. Science, education, economics. Series: Economy*, 3(21), 13–18.
- Novakovskaya, A. V., & Selivanovskaya, Yu. I. (2017). *Some issues of protection of rights of creditors in bankruptcy proceedings: civil law and criminal law aspects*. Retrieved from <https://cyberleninka.ru/article/n/nekotorye-voprosy-zaschity-prav-kreditorov-v-protsedurahbankrotstva-grazhdansko-pravovye-i-ugolovno-pravovye-aspekty>
- Pakshin, A. A., & Ulyanova, V. A. (2018). The register of creditors' claims in the bankruptcy of legal entities: order of reference, grounds for inclusion and priority of satisfaction. *Typical problems of Russian private law*. Saransk: OOO YurEksPraktik.
- Popandopulo, V. F. (2016). *Bankruptcy. Legal regulation: scientific and practical guide*. Moscow: Prospect.
- Rogalsky, S. V., Ryzhkov, Yu. V., & Gordyuk, A. V. (2004). *The practice of considering cases related to revision of judicial acts that entered into legal force due to newly discovered circumstances*. Retrieved from <http://fassko.arbitr.ru/novosti/vestnik/archive/8340.html>
- Shchelokova, T. V. (2017). Features of formation of the register of creditors' claims. *Bulletin of Lugansk National University named after Vladimir Dal*, 1–2(3), 197–201.
- Tugushev, A. P. (2016). On the question of the role of creditors in the organization of bankruptcy proceedings. *Bulletin of Scientific Conferences*, 4–5(8), 221–222.
- Zumakulova, Z. A., Ksanaev, A. B., Makhiyeva, T. T., & Tutukova, L. A. (2018). *The expediency of the committee of creditors with a small number of bankruptcy creditors. Breakthrough Development of the Russian Economy: Conditions, Tools, Effects*. Nalchik: KBSU Publishing House.