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THE ISSUES OF LIMITATION OF ACTIONS IN CASES OF BRINGING TO SUBSIDIARY LIABILITY

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Abstract. *The article studies general positions on limitation periods and peculiarities of their application in isolated disputes on bringing the persons controlling the debtor to subsidiary liability within the framework of cases on insolvency (bankruptcy) of legal entities. The article considers subjective and objective limitation periods, their specifics, as well as grounds and conditions for restoration of missed periods. Special attention is paid to the legal positions of the European Court of Human Rights, the Supreme Court of the Russian Federation, and the Constitutional Court of the Russian Federation. Problematic aspects of the application of different versions of bankruptcy legislation in time and the influence of actual circumstances on the beginning of the limitation period are analyzed. It is concluded that the current regulation of the institute of limitation in bankruptcy cases is generally effective, but a number of issues related to the transitional provisions of the legislation remain discussable.*

Keywords: *bankruptcy, subsidiary liability, limitation period, persons controlling the debtor, isolated dispute, restoration of the term, objective term.*

In legal literature, the limitation of action is understood as a period established by law for the judicial protection of a violated right[1]. The limitation of action in the objective sense is a civil law institution, i.e., a system of legal norms regulating relations concerning the period for the protection of civil rights. In the subjective

[1] *Kirillova M. Ya.* Iskovaya davnost [Limitation of action] // Grazhdanskoe pravo [Civil Law] / Pod obshch. red. T. I. Illarionovoy, B. M. Gongalo, V. A. Pletneva. M., 2001. P. 257.

sense, the limitation of action refers to the right of a person whose interests have been violated to use this period to protect their infringed civil rights[1].

The legal definition of the concept of "limitation of action" is provided in Article 195 of the Civil Code of the Russian Federation, according to which the statute of limitations on actions is defined as the period for the protection of a right by means of a claim brought by the person whose right has been violated.

The limitations on actions encourage participants in civil legal relations to timely exercise the protective function of substantive legal norms. This institution prevents uncertainty in relationships between the subjects of civil law. It eliminates situations in which a person whose right has been violated might exert pressure on the violator without applying to the court for protection of their infringed rights. Moreover, after a lengthy period, collecting the evidence necessary for the effective administration of justice becomes increasingly difficult. Thus, by encouraging participants in civil legal relations to seek judicial protection of their violated rights in a timely manner, the statute of limitations on actions safeguards both private and public interests.

Based on the position of the European Court of Human Rights, statutes of limitations on actions protect potential defendants from outdated claims and relieve courts of the need to render decisions based on evidence that, over time, has become uncertain and incomplete. The right to defend one's interests in court would be compromised if courts were to render decisions based on an evidentiary foundation that has become deficient due to the passage of time (see the Resolutions of the Court dated 22 June 2000 in Coeme and Others v. Belgium, and 7 July 2009 in Stagno v. Belgium).

As a general rule, the statute of limitations on actions is three years (Article 196 of the Civil Code of the Russian Federation) and is calculated from the moment when a person became aware or should have become aware of the violation of their right and of the person who is the proper defendant in a claim for the protection of that right (Article 200 of the Civil Code of the Russian Federation).

Meanwhile, Article 197 of the Civil Code of the Russian Federation provides that special statutes of limitations on actions, either shorter or longer than the general period, may be established by law for certain types of claims. The legal mechanism for holding persons controlling the debtor subsidiarily liable is no exception in this regard. The Federal Law "On insolvency (bankruptcy)" provides for a special period for filing an application with the arbitration court.

Nevertheless, the provisions of Chapter 12 of the Civil Code of the Russian Federation are, for the most part, applicable to such special periods as well. When addressing issues related to a statute of limitations on actions that differs from the general period established by Article 196 of the Civil Code of the Russian Federation,

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[1] *Kirillova M. Ya., Krasheninnikov P. V.* Sroki. Iskovaya davnost [Statute of Limitations. Limitation of action] // Grazhdanskoe pravo [Civil Law] / Pod red. red. B. M. Gongalo. M., 2016. 80 p.

one must be guided not only by the relevant special provisions but also by Article 195, Paragraph 2 of Article 196, and Articles 198-207 of the Civil Code of the Russian Federation.

Since a claim for imposing subsidiary liability is independent and regulated by a separate chapter of the Federal Law "On insolvency (bankruptcy)", the legislator has included a separate provision in the law concerning the application of the statute of limitations on actions in such isolated categories of disputes.

In accordance with Paragraph 5 of Article 61.14 of the Federal Law "On insolvency (bankruptcy)", as currently in force, an application for imposing liability on the grounds set out in Chapter III.2 may be filed within three years from the date when the person entitled to file such an application became aware or should have become aware of the existence of grounds for imposing subsidiary liability, but no later than three years from the date of the debtor's declaration of bankruptcy (termination of the bankruptcy proceedings or return of the application for declaring the debtor bankrupt to the authorized body), and no later than ten years from the date on which the actions and/or omissions serving as grounds for liability occurred.

According to the 2 Paragraph of the same provision, if the time limit for filing an application was missed for a valid reason, it may be restored by the arbitration court, provided that no more than two years have passed since the expiration of the period specified in the first paragraph of this item.

Paragraph 5 of Article 61.14 of the Bankruptcy Law establishes a special statute of limitations on actions applicable within insolvency proceedings involving a particular person. In this regard, it is important to note that the legislator links the commencement of the statute of limitations on actions to the moment when the person whose right was violated became aware or should have become aware of the grounds for filing the relevant application with the arbitration court.

The Bankruptcy Law separately identifies three grounds for imposing subsidiary liability on persons controlling the debtor, which differ in terms of their substantive legal character, the subject of proof, and other characteristics.

Accordingly, it is advisable to consider matters related to the statute of limitations on actions in cases concerning the imposition of subsidiary liability on persons controlling the debtor in the context of the specific grounds for liability provided by the Federal Law "On insolvency (bankruptcy)".

Currently, when adjudicating cases concerning the imposition of subsidiary liability on persons controlling the debtor, courts should take into account that four distinct limitation periods on actions coexist under the current legislative framework[1]:

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[1] *Dobrachev D. V.* Problemy sudebnoy praktiki privlecheniya k subsidiarnoy otvetstvennosti kontroliruyushchikh dolzhnika lits v protsedure bankrotstva [Issues of judicial practice of bringing debtor's controlling persons to subsidiary liability in bankruptcy proceedings]. M.: Infotropik Media, 2019. P. 92.

1) Paragraph 5 of Article 61.14 of the Federal Law "On Insolvency (Bankruptcy) establishes a subjective limitation period, which is three years and is calculated from the moment the claimant became aware or ought to have become aware of the grounds for bringing the claim;

2) The same provision also sets out an objective three-year limitation period, which limits the time for filing a claim based on the date the debtor is declared bankrupt, the proceedings are terminated, or the application for declaring the debtor bankrupt is returned to the authorized body;

3) Paragraph 6 of Article 61.14 provides for another objective three-year limitation period, which is calculated from the date of completion of bankruptcy proceedings, applicable to persons who became aware or ought to have become aware of the grounds for the claim only after the conclusion of such proceedings;

4) Paragraph 5 further introduces a ten-year objective limitation period, which runs from the date of the actions (or omissions) of the defendant that form the basis for holding the controlling person subsidiarily liable.

It should be emphasized that the distinction between the subjective and objective limitation periods was incorporated into Russian legislative practice based on foreign jurisdictions' positive experience in regulating this issue.

The first legal instrument to articulate this approach was Information Letter No. 126 of the Presidium of the Supreme Commercial Court of the Russian Federation, dated 13 November 2008, "Review of Judicial Practice on Certain Issues Related to the Vindication of Property from Unlawful Possession". In this document, the highest judicial authority stated that, under Article 195 of the Civil Code of the Russian Federation, a limitation period is defined as the period within which a claim may be brought to protect a right that has been violated. At the same time, judicial protection is unavailable as long as the person whose right is violated is unaware of the identity of the violator — the potential defendant. Thus, although the owner lost possession of the property in 1997, the limitation period for the claim to recover it began to run only from the moment the claimant learned of its possession by the defendant.

Despite the fact that the division of the statute of limitations on actions into subjective and objective periods has taken root in Russian legal practice, its practical application is only possible from September 1, 2023, as explicitly stated by the Supreme Court of the Russian Federation in Paragraph 12 of Resolution of the Plenum of the Russian Federation No. 43 dated 29.09.2015 "On Certain Issues Related to the Application of Norms of the Civil Code of the Russian Federation on limitations on actions".

Bankruptcy cases, combining private principles with the presence of a public interest — characterized, among other things, by the large number of parties involved — rightly fall into the category of cases of increased complexity. In this

regard, issues related to the calculation of the limitation of action, particularly those connected to the knowledge of various circumstances, are especially complex.

In examining the problematic aspects of the limitation of action, including those associated with the number of persons involved in bankruptcy proceedings, I. V. Garbashev rightly concluded that a claim for holding a person controlling the debtor subsidiarily liable is, as a rule, indirectly collective in nature[1].

Given the varying levels of creditors' awareness of the debtor's activities prior to the initiation of bankruptcy proceedings, the question of whose knowledge is taken into account for the commencement of the limitation period remained debatable for some time.

It appears that this issue was resolved with the adoption by the Supreme Court of the Russian Federation of Resolution of the Plenum of the Russian Federation No. 53 dated 21.12.2017 "On Certain Issues Related to Bringing Debtor's Controlling Persons to Liability in Bankruptcy". Paragraph 59 of this resolution provides clarifications stating that, as a general rule, the limitation period for a claim to hold a party subsidiarily liable is calculated from the moment when either the trustee in bankruptcy acting in the interests of all creditors or an independent creditor entitled to file such a claim became aware or ought to have become aware of the existence of grounds for bringing a person to subsidiary liability — namely, the combination of the following circumstances:

1) the identity of the defendant (the controlling person);
2) his unlawful actions;
3) the insufficiency of the debtor's assets to satisfy all creditors' claims.

The mechanism developed by the legislator, which allows a person whose claims against the debtor have been confirmed by a judicial act that has entered into legal force to join an application for holding the persons controlling the debtor subsidiarily liable, in conjunction with the provisions of Article 225.16 of the Arbitration Procedural Code of the Russian Federation, excludes the possibility of subsequently bringing claims against the same defendant on the same grounds by a creditor who has not exercised this right[2].

It is also noteworthy that the Supreme Court, in the final paragraph of Paragraph 59 of Resolution of the Plenum No. 53, provided for the possibility of

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[1] *Garbashev I. V.* O nekotorykh materialno-pravovykh aspektakh privlecheniya k subsidiarnoy otvetstvennosti v razyasneniyakh VS RF [On certain substantive legal aspects of bringing to subsidiary liability in the clarifications of the Supreme Court of the Russian Federation] // Vestnik grazhdanskogo prava [The Bulletin of Civil Law]. 2018. No. 4. Pp. 154–202.

[2] *Altukhov A. V., Levichev S. V.* Protsessualnye osobennosti rassmotreniya zayavleniy o privlechenii kontroliruyushchikh dolzhnika lits k subsidiarnoy otvetstvennosti pri bankrotstve [Procedural peculiarities of consideration of applications for bringing persons controlling the debtor to subsidiary liability in bankruptcy proceedings] // Sudya [Judge]. 2018. No. 4. Pp. 27–32.

restoring the rights of creditors in the event of bad faith conduct on the part of the trustee in bankruptcy acting in the interests of the person controlling the debtor. The restoration of such violated rights is ensured by excluding the period during which the dishonest trustee exercised their powers from the calculation of the limitation period.

Subparagraph 2 of Paragraphs 5 and 6 of Article 65.14 of the Federal Law "On Insolvency (Bankruptcy)" provides for the possibility of restoring a missed procedural deadline for filing an application for bringing controlling persons to subsidiary liability, provided that the delay occurred for a valid reason. However, such a deadline may only be restored within two years from the expiry of the period provided for in Paragraph 1.

Paragraph 62 of Resolution of the Plenum No. 53 of the Supreme Court of the Russian Federation clarifies that the limitation period may be restored for the bankruptcy trustee and for creditors who are legal entities or entrepreneurs only in exceptional cases, when they were genuinely deprived of the opportunity to timely apply to the court due to reasons beyond their control.

At the same time, the three-year and ten-year limitation periods — calculated from the date of recognition of the debtor as bankrupt (termination of the bankruptcy proceedings, return of the bankruptcy petition to the authorized body), or completion of receivership, or from the commission of unlawful acts (or omissions) that caused harm to creditors and led to subsidiary liability — are not subject to restoration[1].

Pursuant to Paragraph 2 of Article 199 of the Civil Code of the Russian Federation, the statute of limitations shall be applied by the court only upon a motion of a party to the dispute made prior to the issuance of the court's decision. In the context of a separate dispute on holding the person controlling the debtor subsidiarily liable, such a motion must be made by the controlling person before the issuance of a procedural act suspending the proceedings — where the court finds grounds for imposing liability — or before the issuance of a ruling or decision imposing such liability.

An important issue, along with others, is determining which version of the Bankruptcy Law should be applied by the court when resolving whether the statute of limitations on actions for filing a claim with the commercial court seeking to hold the persons controlling the debtor subsidiarily liable has been missed. This issue arises due to the legislator's significant change in approach to the statute of limitations on actions applicable to this category of cases. Previously, the rules

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[1] *Bykov V. P., Chernikova E. V., Markelova I. V.* Privlechenie kontroliruyushchikh dolzhnika lits k subsidiarnoy otvetstvennosti za nepodachu (nesvoevremennuyu podachu) zayavleniya o bankrotstve dolzhnika [Involvement of persons controlling the debtor in subsidiary liability for failure to file (late filing) a bankruptcy petition of the debtor] // Sovremennoe pravo [Modern Law]. 2018. No. 7–8. Pp. 61–68.

on subsidiary liability were governed by Article 10 of the Bankruptcy Law, which provided for a one-year statute of limitations on actions.

To resolve the issue of whether the law in this case should have retroactive effect, it is necessary to determine whether the statute of limitations on actions is governed by substantive or procedural rules.

According to the legal position of the Constitutional Court of the Russian Federation, granting retroactive effect to a law is an exceptional form of its temporal application, which lies within the exclusive prerogative of the legislature. Retroactive application is allowed only when expressly stated in the text of the law or in the legislative act governing its entry into force. When exercising this prerogative, the legislature must take into account the specific character of the legal relationships subject to regulation. Retroactive effect is typically permitted in legal relations between individuals and the state — primarily in the individual's favor (e.g., in criminal or pension law). In private relations between individuals or legal entities, retroactive application is not permitted, as the interests of one party to the legal relationship cannot be sacrificed to the advantage of the other party who has not violated the law (Decision of 1 October 1993 No. 81-p; Rulings of 25 January 2007 No. 37-O-O, 15 April 2008 No. 262-O-O, 20 November 2008 No. 745-O-O, 16 July 2009 No. 691-O-O, 23 April 2015 No. 82-O, and others).

This position was subsequently reaffirmed in Resolution No. 3-П of the Constitutional Court of the Russian Federation dated 15 February 2016 "On the case concerning the constitutionality of Part 9 of Article 3 of the Federal Law "On Amendments to Subsections 4 and 5 of Section I of Part One and to Article 1153 of Part Three of the Civil Code of the Russian Federation,' in connection with the complaint of citizen E.V. Pototsky".

Paragraph 57 of Resolution No. 53 of the Plenum of the Supreme Court of the Russian Federation dated 21 December 2017 "On Certain Issues Related to Holding Controlling Persons of the Debtor Liable in Bankruptcy" clarifies that the grounds for claims for subsidiary liability — claims that require substantiating the status of the controlling person — are understood not as references to legal norms but as factual circumstances forming the basis of the creditors' demand for compensation against a specific individual.

Thus, the circumstances listed in Paragraph 4 of Article 10, which set forth substantive presumptions, may themselves serve as independent grounds for holding a person subsidiarily liable.

Based on the above legal position, the presumptions set forth in Paragraph 4 of Article 10 of the Bankruptcy Law are of a substantive character.

In Paragraph 2 of the Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 27 April 2010 No. 137 "On Certain Issues Related to the Transitional Provisions of Federal Law No. 73-ФЗ dated 28 April

2009 "On Amendments to Certain Legislative Acts of the Russian Federation", it is clarified that the provisions of the Bankruptcy Law as amended by Law No. 73-ФЗ (in particular, Article 10) regarding subsidiary liability of relevant persons for the debtor's obligations apply if the circumstances constituting the grounds for holding them liable (e.g., issuance of instructions to the debtor by a controlling person, approval of a transaction by the controlling body, or conclusion of a transaction on behalf of the debtor) occurred after the effective date of Law No. 73-ФЗ.

If such circumstances took place prior to the effective date of Law No. 73-ФЗ, then the provisions of the Bankruptcy Law regarding subsidiary liability for the debtor's obligations in the version effective prior to the entry into force of Law No. 73-ФЗ (in particular, Article 10) shall apply, regardless of the date on which the bankruptcy proceedings were initiated.

Thus, the applicability of a particular version of Article 10 of the Bankruptcy Law (or Articles 61.11 and 61.12 of the Bankruptcy Law) to the regulation of substantive legal relations depends on when the factual circumstances that form the basis for holding the debtor's controlling person subsidiarily liable occurred (Determination of the Supreme Court of the Russian Federation dated 06 August 2018 No. 308-ЭС17-6757 (2,3) in case No. A22-941/2006).

When applying the statute of limitations on actions to the relevant legal relations, the courts justify their conclusions regarding the applicable version of the law, inter alia, based on the moment when the person entitled to file a claim became aware or should have become aware of the real opportunity to bring the claim, even without waiting for the exact amount of subsidiary liability to be determined (Ruling of the Arbitration Court of the Ural District dated 21 August 2019 No. Ф09-4388/15 in case No. A60-28614/2011).

Thus, the legal institution of the statute of limitations on actions in isolated disputes concerning the imposition of subsidiary liability on persons controlling the debtor — aimed at safeguarding the rights of such persons and ensuring legal certainty — is currently regulated by the legislator in a sufficiently effective manner. However, the issue of which version of the Bankruptcy Law should be applied in determining the limitation period remains unresolved, resulting in a lack of uniform judicial practice among arbitration courts on this matter.

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