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Debtor control does not mean registry control

The submission of monetary claims by the affiliated creditors in a bankruptcy case is usually accompanied by serious and sometimes lengthy legal disputes regarding the validity and sequence of such claims. This situation occurs due to the fact that to prove the unreality of business transactions performed by the affiliates and, as a result, to recognize the claims of the affiliate creditor as not a subject to inclusion in the register is sometimes quite difficult, more complicated than the requirements of an independent creditor. Since such creditors usually have a subjective connection with the debtor, through which they can access both the debtor's seals and the signatures of authorized persons on the relevant documents, and accounting registers and even information about the flow of funds on the accounts.

The term «affiliated» creditor in bankruptcy refers to persons who can influence the economic activities of a bankrupt debtor.

The basis for initiating bankruptcy proceedings is the failure to execute a judicial act in which all the circumstances of the court case have already been investigated, including the defendant's argument about the reality or imaginary nature of the transaction. Accordingly, the issue of the affiliation of the creditor-applicant in a bankruptcy case should not be examined by the court. In addition, other creditors cannot express their doubts about the affiliation of the creditor-applicant, due to the lack of the opportunity to participate in the consideration of the validity of the declaration of insolvency (bankruptcy) of the debtor.

It is the creditor-applicant, as a part of the consideration of the validity of the bankruptcy petition, is another procedural figure whose will is aimed on establishing the fact of the debtor's inability to settle his obligations, other than in the framework of the insolvency case. Thus, it bears the burden of refuting reasonable doubts about the imaginary nature of the contract on which its claim is based. Affiliated lender, in accordance with art. 65 of the Arbitration Procedure Code of the Russian Federation, must provide all possible evidence of the reality of the claim, disclose all material circumstances relating to the transaction, as well as prove the reasonableness and necessity of the actions performed in the transaction, as well as the conditionality of the transaction for « reasonable economic reasons».

The filing of the application by the affiliate creditor and its recognition as a justified allows, firstly, to choose the suitable candidate for arbitration manager, secondly, to influence decision-making at the meeting of creditors of the debtor, and thirdly, to reduce the percentage of monetary amounts that independent creditors will receive at the end of the bankruptcy procedure.

The argument about the affiliation of the debtor and the creditor is often a consequence of the corporate nature of their relationship. According to the recent legal position indicated by the Supreme court of the Russian Federation in case № A53-5956/2018, the existence of corporate ties is not a ground for refusing to initiate bankruptcy proceedings. Arguments about affiliation should be carefully considered with consideration of the analysis of the corporate structure, since market relations assume that contractors are connected in order to achieve results and enter the Russian or international market. Even if the affiliation of creditors and the debtor is proved, the existence of a civil claim confirmed by the judicial act grants the right to initiate the procedure, regardless of whether the priority of satisfaction of such a claim is a subject to a reduction or not.

When considering the claim of an affiliated creditor for inclusion in the register already in a bankruptcy case initiated by a court, an ordinary standard of proof cannot be applied. The affiliated lender should not only provide clear and convincing evidence of the existence and amount of the debt, but also refute the corporate nature of the obligations from which it arose.

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