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Vakhitova G.V., Sinenko N.A.

Revisiting the role of the netting-out as part of the debtor's bankruptcy procedure

*Bashkir State University
(Russia, Ufa)*

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Аннотация

В данной статье автор анализирует сальдирование в рамках процедуры несостоятельности (банкротства) должника. В целях определения правовой природы данного правового явления автор рассматривает его в соотношении с зачетом, как способом прекращения обязательств, а также исследует материалы судебной практики, в которых определены основания применения сальдирования в рамках процедуры несостоятельности (банкротства) должника.

Ключевые слова: сальдо, сальдирование, перерасчет, несостоятельность (банкротство) должника, зачет, прекращение исполнения обязательств.

Abstract

In this article the author analyzes the netting-out as part of the insolvency (bankruptcy) procedure of a debtor. In order to determine the legal nature of this legal phenomenon, the author considers it in relation to set-off, as a way to terminate obligations, and also examines judicial practice materials that determine the basis for the use of netting-out as part of insolvency (bankruptcy) procedure of a debtor.

Keywords: balance, netting-out, recalculation, insolvency (bankruptcy) of the debtor, set-off, termination of obligations.

Currently, the issue of set-off in the insolvency (bankruptcy) procedure of a debtor is of great interest both from a scientific and practical point of view. Thus, the related civil-legal mechanism - netting-out - is actively applied in the debtor's bankruptcy procedure instead of the set-off of the counter similar claims.

There is currently no legal definition of balance or netting-out. In accounting, the balance refers to the balance of the account, the difference between the sum of the debit records and credit of accounts. In judicial practice, in particular, in the Decision of the Supreme Court of the Russian Federation No. 304-ES17-14946 in case No. A46-6454/2016 of 10.29.2018 [3], the following conditions for the use of netting-out in relation to construction contracts and leasing were formed: 1) the term of obligation fulfilment has arrived, 2) the automatic set-off is provided for in the contract and does not require the will of the parties, 3)

the legal relations in respect of which set-off is made follow from one contract or from interrelated contracts.

Set-off as a general method of termination is common to almost all contractual constructions, while netting-out is used only in leasing and contracting legal relations.

On the basis of the provisions of Article 410 of the Civil Code of the Russian Federation [1], the obligation shall be terminated in full or in part by the set-off of the counter similar claim, whose deadline has arrived or has been fixed, or has been defined by the moment of the demand. Thus, a set-off is permissible under the following conditions: 1) the claims must be similar, 2) the deadline of the obligations is arrived, 3) the creditor announced his intention to make set-off. The above-stated way of the obligation termination is impossible within the procedure of bankruptcy of a debtor after instituting receivership according to provisions of Article 63 of the Federal Law of 26.10.2002 No. 127-FZ “On Insolvency (Bankruptcy)” (further - the Bankruptcy Act) [2]. This restriction is not accidental, as if the creditor sets off counter similar claim, the rights of other creditors will be violated, which will be in violation of their procedure for satisfaction in the bankruptcy procedure of a debtor. Moreover, set-off as a unilateral transaction may be invalidated on the grounds provided for in Articles 61.2 and 61.3 of the Bankruptcy Act.

Based on the foregoing, it can be concluded that the main distinguishing feature of netting-out from set-off is the civil law construction and counter obligations arising from a single agreement or interrelated agreements.

An example is the Supreme Court of the Russian Federation Decision No. 304-ES19-11744 in the case No. A75-7774/2018 [4], in which the contractor against whom the bankruptcy procedure have been initiated and the customer in the construction contract have been stated that if the contractor fails to eliminate defects in the work within the time allotted by the customer, the latter has the right to withhold from the payments due to the contractor the amount of costs to eliminate the defects. On the basis of the court’s position, the term “retention” is used in this case in a different meaning than the one that laid down in Articles 359 and 360 of the Civil Code of the Russian Federation. The parties, in fact, have established an agreement on the recalculation of the contract price in case of poor quality of work performed, which does not violate the law. The contractor demanded payment for the work performed, the customer, in turn, demanded to eliminate the defects in the work that were identified by the latter. The Supreme Court of the Russian Federation indicated that “poor quality of work performed causes the need to recalculate the final payment of the customer by reducing the price of the contract by the amount of the customer's losses. Such netting-out arises from the nature of the contractual relationship and occurs due to the counter nature of the customer and contractor’s main obligations (on the basis of the provisions of Articles 328 and 393 of the Civil Code of the Russian Federation)”. As confirmation of the distinction between netting-out and set-off may be used the court’s conclusion that the above recalculation cannot be invalidated on the grounds of Article 61.3 of the Bankruptcy Act, since there is no preference for a creditor during netting-out.

Thus, the court found that netting-out is possible under this dispute due to the following: firstly, the obligations in respect of which the recalculation was carried out arose from the construction contract, which is based on the counter nature of obligations discharge, and secondly, the obligations, subject to netting-out, arose from one civil law contract in which the recalculation was carried out automatically.

If we pay attention to the legislative regulation of this institution in other countries, it becomes clear why categorical denial of set-off in the context of the debtor's bankruptcy proceedings does not always lead to fair satisfaction of creditors' claims. For example, the German Insolvency Act (Insolvenzordnung) allows a creditor to declare set-off if his claim arose earlier than the claim of the insolvent debtor against him; on the contrary, if the claim of the insolvent debtor arose earlier than the counter-claim, the set-off is not allowed. In France, according to the French Commercial Code, set-off is permitted only if a set of conditions are met, for example, the period of the obligation discharge must have arrived, the requirement

must be similar and certain. In Italy, set-off is permissible even after the introduction of bankruptcy proceedings; it is related to the principles of equity, all possible mechanisms for abuse of one's rights are excluded by the legislator, for example, the set-off under the obligation that arose during the bankruptcy proceedings is unacceptable. In English law, the purpose of bankruptcy set-off is defined by the following phrase: "to do subsidiary justice between the parties." Set-off in bankruptcy proceedings in the Republic of Turkey is possible if the claims become counterclaim before the opening of the tender proceedings. A set-off can be challenged if the creditor has created an artificial debt through which a counter-uniform claim can be set-off.

On the basis of the above, it can be concluded that the Supreme Court of the Russian Federation has formed a new judicial practice to the netting-out of the counter discharge of obligation as part of the debtor's bankruptcy procedure. This practice is not unambiguous, as the netting-out by its legal nature can be attributed to the set-off of counter similar claims, and the practice of the Supreme Court of the Russian Federation is aimed only at liberalization of the law enforcement practice with regard to termination of obligations by set-off. Liberalization, in turn, can contribute to abuse by creditors who will satisfy their claims, bypassing the order established by the Article 4 of the Bankruptcy Act. There may also be a situation where the recalculation will apply even in those cases when only set-off is applicable [5]. Other rules of law depart from the concept of categorical denial of set-off in bankruptcy procedure. This is primarily due to proportionality in the satisfaction of creditors' claims and fairness. The domestic legal order, under the pressure of judicial practice, is becoming closer to the legislative regulation of Western European countries, which will have an impact on the changes to the Federal Law "On Insolvency (Bankruptcy)" in the future.

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