

BIRCH LEGAL

Legal Alert

from Dispute Resolution Team

Joint and several liability for multiple companies of one group due to one company's failure to fulfill its obligations under an agreement

At present, the Russian courts are considering an array of cases concerning restrictions imposed by sanctions and the non-fulfillment of contractual obligations stemming from them. Included among them is a category of cases in which the plaintiffs are making claims for the joint and several recovery of debt from several defendants that are members of the same group of companies.

In this legal alert, we examine a few cases whose outcomes yielded judicial decisions in comparison with which similar examples have never been seen before in Russian court practice, and a case could be made for the occurrence of judicial law-making in this regard (independent of whether the courts' approach is correct or not).

Decision 1:

a Russian legal entity from a group of companies was held liable



In the case of PJSC "Sovcombank" against Citibank N.A. and JSC KB "Citibank" on the recovery of USD 24 million (A40- 167352/2023), the Arbitrazh court of the City of Moscow formed a new approach on the possibility of being held jointly and severally liable: **the debt under the agreement may be recovered not only from the foreign company that is a party to the agreement (Citibank N.A.) but also from the Russian company (JSC KB "Citibank") belonging to the same group as said foreign company.**

The court based its position on the rules regarding joint and several harm. In reaching a conclusion on the joint and several nature of such harm, the court took into account the following factors:

- the main function of JSC KB "Citibank" (Russian company) is to represent the interests of Citigroup (an international group of companies) in relations with Russian clients and regulators on the functioning of Citigroup's services in the Russian Federation
- Citigroup, represented by JSC KB "Citibank", receives profits in Russia which it then distributes within the group. For the group of companies, JSC KB Citibank performs the functions of a Russian division (branch)
- by blocking the plaintiff's funds in an account in the USA and/or the UK, the entire Citigroup of companies is enriched and has the opportunity to fulfill its obligations at expense of the Russian subsidiary – JSC KB "Citibank"
- the defendants have a single decision-making center, a single brand, are built into a single corporate structure with Citigroup headquarters and are positioned as a single whole where each member can and should be responsible for each other's debts
- JSC KB Citibank was involved as a co-defendant due to information publicly posted on the official websites of JSC KB "Citibank" and Citigroup about the reduction of their operations and presence in Russia
- both the actions of Citibank N.A. to block the plaintiff's funds as well as the inaction of JSC KB "Citibank" were bad faith since, from the point of view of Russian public order and principles of good faith, both companies should have taken joint actions aimed at adapting relations with the Russian plaintiff to the regulations changed by foreign legal orders and the timely fulfillment of obligations
- from the point of view of ordinary good faith behavior, it would not have been difficult for the defendants, taking into account their affiliation and control by a single decision-making center, to transfer the fulfillment of their obligations before PJSC "Sovcombank" to a Russian legal entity which is not subject to foreign sanctions
- if the plaintiff's demand is fulfilled by JSC KB "Citibank", the defendants will be able to settle the financial consequences of such execution within the framework of their intra-group legal relations

JSC KB "Citibank" is currently appealing the decision.

Decision 2:

joint and several liability in relation to several foreign companies from one group



In the decision in the lawsuit of PJSC Bank “FK Otkritiye” against three foreign companies - Goldman Sachs International (England), Goldman Sachs Group, Inc. (USA) and Goldman Sachs & Co LLC (USA) (A40-170819/2023) – on the recovery of RUB 615 million under the agreement concluded under ISDA rules, the court came to the decision that said three foreign companies were jointly and severally liable.

The court's justification for the joint and several liability is similar to that of the aforementioned case with Citibank N.A., despite there are important differences. Firstly, its reasoning is very laconic in comparison. Secondly, the court did not specify a single legal norm. Thirdly, from the point of view of the justification, the court also examined the payment documents for evidence of affiliation of the three foreign defendant companies:

- Goldman Sachs International (defendant No. 1) is part of the Goldman Sachs group of companies whose parent company is the American entity Goldman Sachs Group, Inc. (defendant No. 2), and the entity that owns the Goldman Sachs trademarks in Russia is the company Goldman Sachs & Co LLC (defendant No. 3). In the annual report of defendant No. 2 for 2022, defendant No. 1 is mentioned as one of the main subsidiaries of defendant No. 2, and certain guarantees for the performance of payment obligations of defendants No. 1 and No. 3 were present. The ultimate parent and controlling person of defendant No. 1, according to the annual report of the latter for 2022, is defendant No. 2
- the companies of the Goldman Sachs group are managed from a single center located in the United States, their activities are strictly regulated in accordance with the policies and orders of the parent company, as well as in accordance with the laws of the United States and the laws of other countries at the choice of the parent company despite the fact that some subsidiaries are created on the territory of other states
- according to the Anti-Money Laundering Program, the Goldman Sachs group of companies has officially declared compliance with sanctions imposed by the competent authorities of the United States, Great Britain and the European Union
- the joint nature of the defendants' activities is also indicated by the fact that defendant No. 3 is reflected as the responsible custodian of cash balances, securities and options in the personal account statement provided by the English legal entity to the plaintiff as confirmation of the “blocking” of payment upon the termination of transactions
- the Goldman Sachs group of companies is one of the world's largest financial conglomerates, which includes a number of financially and organizationally interconnected subsidiaries whose parent company operates in the United States as a public joint stock company and fully ensures the compliance of its activities, as well as the activities of its subsidiaries, with US legal regulations

Decision 3:

joint and several liability of two foreign companies



The abovementioned approach is confirmed by the higher courts. The court of appeal confirmed the joint and several liability of Citibank, N.A. (USA) and the Hong Kong affiliate of the American bank in the dispute under the lawsuit of PJSC “Rosbank” (A40-158893/23).

The court recognized the following actions as indicators of joint infliction of harm to the plaintiff:

- the Hong Kong branch, not being located in a state that supports sanctions against PJSC “Rosbank”, actually implements the sanctions restrictions imposed by the United States
- the blocking of the plaintiff's funds by the Hong Kong branch indicates the coordination of actions with an American person from the group of companies and the presence of a common will to cause harm to the plaintiff
- the actions of the Hong Kong branch to block the disputed funds are a consequence of the controlling instructions of the American bank
- the plaintiff claimed in its appeal for the Russian entity from the group of defendants to be brought to liability. The court refused to satisfy the claim since the Russian entity in the Citigroup did not participate in the case as a co-defendant in the court of first instance

Similar ongoing cases which have yet to be decided:

Similar claims on joint and several liability being borne by a number of defendants from one group of companies are being considered right now in various cases, in particular:

1. The lawsuit of PJSC “Sberbank Russia” against foreign companies belonging to the Glencore group on the joint and several recovery of EUR 115 million via the foreclosure on shares of Russian companies owned by the defendants (A40-153363/2023).
2. The lawsuit of PJSC “Sovcombank” against J.P. Morgan Securities PLC and LLC KB “J.P. Morgan Bank International” on the joint and several recovery of USD 14 million (A40-194447/2023).

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