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ON THE DIFFERENTIATION OF STANDARDS OF PROOF IN CIVIL CASES**

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Subject. Russian civil procedure has adopted a differentiated approach to standards of proof in civil cases: not only is the "balance of probabilities" standard applied, but also prima facie, "clear and convincing evidence," and "beyond a reasonable doubt". This approach entails a number of difficulties, ranging from finding reasons to lower or raise the standard of particular categories of cases to identifying the permissible extent of differentiation within the context of legal certainty and predictability of judicial proceedings. The standards of proof inevitably influence well-established institutions of Russian procedural law (burden of proof, judicial review, etc.), at times requiring a reassessment of traditional approaches.

The purpose of the study. To describe the legal issues arising from the differentiation of standards of proof in cases involving damage compensation and bankruptcy proceedings.

Methodology. Methods of analysis and comparison based on practice of the Supreme Arbitration Court, of the Supreme Court, of scientific research in the field of civil procedural law.

The main results of research and the field of their application. The application of the "clear and convincing evidence" standard by the Supreme Court in cases involving compensation for damages caused by a person authorised to act on behalf of a legal entity may be justified from a policy and legal standpoint, but it is inappropriate in terms of the actual accessibility of evidence for the parties involved in the proceedings. When the burden of proving the reasonableness and good faith of actions is shifted to the defendant, the standard of proof is reduced to the "balance of probabilities." The application of heightened standards of proof in bankruptcy cases naturally increases the interest of creditors and bankruptcy trustees in seeking to revise court rulings issued prior to the initiation of bankruptcy proceedings. This, in turn, highlights the importance of defining the permissible scope of creditors' rights to challenge such rulings.

Conclusion. The adjustment of the standard of proof – whether upward or downward – must not be used as a situational tool. The adoption of a standard other than the "balance of probabilities" in civil litigation must be grounded in substantial justification and aligned with established procedural rules.

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1. Introduction

The standard of proof adequate for civil proceedings is the standard of "balance of probabilities" [1-7]. However, this standard is not perceived by judicial practice as a universal one, suitable for resolving any civil dispute. E.g,, when considering reasonability of a creditor's claim confirmed by an arbitration court decision, it is sufficient for a bankruptcy creditor to present prima facie evidence to the court, demonstrating significant doubts in existence of the debt[1]. When proceeding entry into the register of debtor's creditors' claims, the increased standard of "clear and convincing evidence" is applied[2]; when establishing the existence of a contract on which the claim of a creditor affiliated with the debtor is based, the compensatory nature of the debtor's financing by a controlling person, the standard "beyond reasonable doubt" is applied[3].

The approach assuming a high variability of standards of proof in civil cases is associated with a number of problems that require theoretical understanding.

2. Differentiation of standards of proof in cases of compensation for damages.

The "balance of probabilities" standard of proof in cases of damages recovery is established at the statutory level. According to paragraph 5 of Article 393 of the Civil Code of the Russian Federation, the amount of damages to be compensated must be established with a reasonable degree of certainty. The court can not refuse to satisfy creditor's claim for compensation for damages caused by non-performance or improper performance of an obligation solely because the amount of damages cannot be determined with a reasonable degree of certainty. In this case, the amount of damages to be compensated is determined by the court taking into account all the circumstances of the case based on the principles of reasonableness and ratability of liability and violation.

The legislation approach to confirming the amount of damages has been extended by the Plenum of the Supreme Court of the Russian

[1] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation dated 13.05.2014 №1446/14; Definition of the Supreme Court of the Russian Federation dated 09.10.2015 №305-KG15-5805; Definition of the Supreme Court of the Russian Federation dated 28.04.2017 №305-ES16-19572; Definition of the Supreme Court of the Russian Federation dated 02.2019 №305-ES18-19058.

[2] Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 25.09.2017 № 309-ES17-344(2); Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 18.09.2017 № 301-ES15-19729(2); Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 31.01.2024 № 303-ES23-17584; Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 13.07.2018 № 308-ES18-2197.
It should be noted that, in defining the "clear and convincing evidence" standard as the most suitable for this category of cases, the Supreme Court referred to paragraph 26 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 22.06.2012 № 35 "On Certain Procedural Issues Related to Proceeding Bankruptcy Cases". This paragraph is currently not applicable due to adoption of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 17.12.2024 № 40 "On Certain Issues Related to Implementation of Federal Law dated 29 May 2024 № 107-FZ "Amending the Federal Law "On Insolvency (Bankruptcy)" and Article 223 of the Arbitration Procedure Code of the Russian Federation". At the same time, the Plenum of the Supreme Court does not explain (at least literally) what standard of proof should be applied to proceedings on including claims in the register of claims of the debtor's creditors, but at the same time it corrects the previous clarification of the Supreme Arbitration Court (clause 27 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 12/17/2024 № 40).

[3] Clauses 1, 3.4 of the Review of judicial practice in resolving disputes related to establishment of claims of persons controlling the debtor and persons affiliated with the debtor in bankruptcy proceedings (approved by the Presidium of the Supreme Court of the Russian Federation on 29.01.2020).

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Federation to proving a cause-and-effect relationship. The court stated: “according to Articles 15 and 393 of the Civil Code of the Russian Federation, the creditor presents evidence confirming the existence of losses, as well as establishing a reasonable degree of certainty of their amount and a cause-and-effect relationship between non-performance or improper performance by the debtor and the said losses” [4].

Reasonable certainty means that compensation may be awarded to the plaintiff where the loss is more likely to have occurred in the amount alleged by the plaintiff than in another amount; where the existence of a cause-and-effect relationship is more probable than its absence. In this sense, the legislator’s approach and the Supreme Court’s approach allows us to speak about the existence of the “balance of probabilities” proof standard in Russian law. V.V. Baibak, analyzing the new version of Article 393 of the Civil Code and paragraph 5 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 24.03.2016 № 7, indicates that a reasonable certainty should be understood as the “balance of probabilities” proof standard, characteristic for civil disputes [8]. A.A. Smola [9] also believes Article 393 of the Civil Code is similar to the “balance of probabilities” standard.

Meanwhile, the "balance of probabilities" standard is not recognized by the courts as optimal for resolving any dispute on recovery of losses. The Ruling of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated September 30, 2019 № 305-ES16-18600 (5-8) states the following: "the standard of proof for claims (Article 53.1 of the Civil Code of the Russian Federation) on recovery of losses from persons who have the actual ability to determine actions of a legal entity (clear and convincing evidence) differs from the corresponding standard for disputes on invalidation of transactions on special grounds of bankruptcy legislation (balance of probabilities)".

In a dispute on recovery of losses from a director, a plaintiff must prove the fact of the defendant's breach of fiduciary responsibilities (unreasonableness and (or) impropriety of his actions), damages, and causal connection. A literal reading of the Court's position leads to the conclusion that the plaintiff must present evidence that will confirm the facts, the conditions for satisfying the claim at the level of the "clear and convincing evidence" standard. Let’s raise a question: is such an increase in the standard of proof justified?

The choice of the standard of proof is based on probable negative consequences for society is the court falsely favors one or the other party. As an erroneous conviction of an innocent person clearly causes enormous harm not only to the convicted person, but also (indirectly) to the whole society, this harm is significantly greater than the harm from an erroneous acquittal of the guilty. This explains the use of the "beyond a reasonable doubt" standard. At the same time, in a civil dispute negative consequences of a judicial error in favor of the plaintiff and an error in favor of the defendant are the same. Therefore, the standard of proof in civil proceedings – “preponderance of evidence” – is chosen to make errors in favor of the plaintiff and the defendant equally probable [10,11].

Any increase in the standard of proof is a reflection of the thesis: the price of erroneously recognizing a fact as existing is higher than the price of erroneously recognizing a fact as absent [12, pp. 47-49]. As for the director's liability, this means that erroneous recovery of losses from him is more undesirable than a refusal to do so

[4] Clause 5 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 24.03.2016 № 7 "On the application of certain provisions of the Civil Code of the Russian Federation on liability for breach of obligations".

when grounds actually exist.

Justification of this approach can be found in the area of law policy. When determining grounds, conditions, and procedures for holding a director accountable, it is necessary to find a balance between two significant goals: stimulating entrepreneurial initiative and counteracting unfair, unreasonable behavior of managers [13,14]. When the first goal is of primary importance, holding the director accountable is limited, also by procedural provisions (presumptions, standards of proof, etc.); when the primary goal is to counteract the illegal behavior of persons acting on behalf of a legal entity, holding the director accountable is simplified and requires less procedural activity from the plaintiff in a claim on compensation.

Introducing the “clear and convincing evidence” standard of proof in a dispute over the recovery of losses from persons who have actual ability to determine actions of a legal entity reflects the intention to reduce liability deterrent effect for a company's manager, to provide the director with significant freedom in making management decisions, and to allow him to take higher risks in order to maximize profits.

At the same time, the standard of proof is not only the means of avoiding the most harmful judicial errors for society, but also a mechanism for eliminating inequality of evidentiary capabilities of parties in a case [15,16,17]. And if we understand the increased (decreased) standard of proof as a way to eliminate evidentiary asymmetry, the Supreme Court approach cannot be justified. Because in cases of recovery for losses from the director, the evidence, as a rule, is concentrated in hands of a legal entity (Article 89 of the Federal Law of 26.12.1995 № 208-FZ "On Stock Companies", Article 50 of the Federal Law of 08.02.1998 № 14-FZ "On Limited Liability Companies"), and the defendant has access to them, while the plaintiff, on the contrary, is limited in information and evidence, and has only the information provided by others. By raising the standard of proof to the “clear and convincing evidence ”level the Supreme Court fails to take into account the fact that the burden of proving lies on the plaintiff, and the inequality of evidentiary ability is in favor of the defendant.

A.G. Karapetov and V.V. Baibak state that asymmetry of evidentiary ability may in some cases be present in cases of compensation for damages – the plaintiff, as a rule, has much broader access to evidence of existing of damages, while the defendant has limited access to evidence of absence of such damages. Therefore, “when it is obvious that the plaintiff clearly fails in collecting and presenting evidence, and the defendant will simply be unable to meet the burden of refutation, it is a condition for a moderate increase of the standard of proof compared to the basic symmetrical balance of probabilities” [17, p. 1333]. Calling the Supreme Court’s approach an oversimplification, the authors state: “It is one thing to prove a breach of their fiduciary duties by a director or other controlling person, another thing - to prove the existence of damages, and a third one - to prove the existence of a causal connection between the breach and the caused damages. Applying a moderately higher standard of proof seems to be acceptable for proving the existance of damages, but is hardly appropriate for proving a causal connection, and may give rise to disputes regarding proving a breach of fiduciary duties” [17, pp. 1333-1334].

While agreeing with the approach in terms of proving the illegal behavior and the causal connection, we note that the authors' position on the standard of proof of damages in disputes between a participant (a legal entity) and a director is not entirely fair. Any evidence, including those of causing damages themselves, is usually concentrated in hands of the defendant. The plaintiff in such a dispute usually

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cannot be reproached for being able to present more evidence, but not doing so.

The Supreme Court's approach also requires scrutiny in terms of the rules on burden of proof shifting from the director in cases of recovery of damages, introduced by the Supreme Arbitration Court. In paragraph 1 of the Resolution of the Plenum of 30.07.2013 № 62 "On certain issues of compensation for damages by persons affiliated to bodies of a legal entity" the Court indicated: in the event of a director's refusal to provide an explanation or their obvious incompleteness, if the court considers such behavior of the director to be unconscientious (Article 1 of the Civil Code of the Russian Federation), the burden to prove the absence of a violation in acting in the interests of a legal entity in good faith and reasonably may be imposed by the court on the director.

Firstly, this explanation is based on inequality of evidentiary capabilities of the plaintiff and the defendant, where the defendant has an information advantage. This is why a situation may arise in which the director wins the case by simply denying the facts underlying the claim, counting on the plaintiff to fail with the burden of proof. Clause 1 of the Plenum Resolution does not allow this: the director cannot win the case by being passive. A.A. Kuznetsov notes that stimulating the director to provide explanations regarding causing of losses deserves support because a case of recovery of losses from the director is, as a rule, a confrontation between the uninformed (plaintiff: the affected legal entity or its participants) and the informed (defendant: director) parties. The defendant has all the information about his mistakes, he is a professional, while the plaintiffs are forced to collect evidence bit by bit. Therefore, it is necessary to compensate for this information imbalance between the parties [18]. Raising the standard of proof for the facts underlying a claim is based on the opposite assumption, and therefore does not fit into rules for distributing the burden of proof for this category of disputes developed by judicial practice.

Secondly, a question arises: when the court shifts the burden of proof on the defendant, what standard should be applied to his proof of good faith and reasonableness of his actions?

The Supreme Court formulated applying of the "clear and convincing evidence" standard in a very general way ("the standard of proof for claims"), which allows us to put forward several assumptions. The first is that this standard applies to proving any fact of the case, regardless of whether it underlies the claim or the objection to the claim, or who bears the burden of proof. This reading, however, is erroneous when it comes to the asymmetric standard of proof: there is no reason why the plaintiff's proof of a fact and the defendant's proof of a contrary fact should be ruled by an equally higher standard. The second assumption is that shifting of the burden of proof means that the standart of proof of a contrary fact for a defendant is simultaneously lowered (e.g. to a prima facie standard). This approach is consistent with the thesis: “an erroneous victory of the plaintiff is worse than their an erroneous loss”, but in fact it negates sanctions for procedural passivity established by paragraph 1 of the Resolution of the Plenum of the Supreme Arbitration Court of 30.07.2013 № 62. Therefore, the only possible option is the third: the “balance of probabilities” standard must be applied to the defendant.

The above discussed approach of the Supreme Court presupposes a rather profound differentiation of the standards of proof: a standard is established not simply for a category of disputes, but for individual facts, and changes due to procedural behavior of the parties and shifting of the burden of proof. At the same time, researchers see benefits in introducing standards

of proof: they allow for the necessary certainty of law [19] predictability of the outcome of a trial [20-22]. However, searching for the optimal standard of proof for each particular case of fact establishment obviously does not allow the desired benefits.

3. Standards of proof and the creditor's right to review ruling of the court.

The Supreme Court has introduced higher standards of proof in disputes over including a debt in the register of creditors' claims in bankruptcy proceedings: the creditor must prove their claim meeting the "clear and convincing evidence" standard. If the creditor entering the register is affiliated with the debtor, he must meet the standard of "beyond reasonable doubt" in order to successfully prove rightfulness of the transaction underlying the application.

The requirement to apply higher standards of proof was extended by the Supreme Court to cases involving appeals by creditors and bankruptcy trustees against court rulings on debt collection from a bankrupt debtor. Regarding appeals against judicial decisions[5], the Supreme Court stated: “Considering that the defendant is declared bankrupt and that the decision in this case actually predetermines proceedings on including the plaintiff’s claims in the register of claims of the defendant’s creditors, the appellate court could not conclude that the claim was valid, limiting itself to a minimum set of evidence <…> the basis for satisfying the claim would be plaintiff’s submission of evidence clearly and convincingly confirming the existence and amount of the debt owed to him and refuting objections of the creditor appealing the judicial decision” [6]; "the bankruptcy trustee and the debtor's creditors must state arguments and/or point to evidence that, with a reasonable degree of certainty, would allow the court to doubt the sufficiency and reliability of the evidence presented by the debtor and the plaintiff to substantiate the existence of the debt. The burden of refuting these doubts lies on the plaintiff in whose favor the contested judicial act was ruled". [7]

This approach is correct, because reviewing the court's ruling on the basis of the ordinary standard of proof would lead to inequality of creditors claiming for the debtor's property. Those who collected the debt before the bankruptcy would have a clear advantage over creditors who presented their claims during the proceeding - if the former could prove their claim meeting the "balance of probabilities", the latter would successfully enter the register only having met the standard of "clear and convincing evidence" or "beyond reasonable doubt".

At the same time, the appeal model had many shortcomings and was subject to criticism. The discussion about the optimal mechanism for protecting the creditor’s rights [23-25] led the legislator to the following decision: a revision of the judicial act confirming the creditor's claim to the bankrupt debtor, based on newly discovered circumstances, is needed. By Federal Law № 107-FZ dated 29.05.2024 “On Amendments to the Federal Law “On Insolvency (Bankruptcy)” and Article 223 of the Arbitration Procedure Code of the Russian Federation”, Article 16 of the Law “On Insolvency...” is supplemented by paragraph 12. Let’s quote paragraph 1 of this clause: “If the

[5] Clause 24 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated June 22, 2012 № 35 "On Certain Procedural Issues Related to Consideration of Bankruptcy Cases" (not applicable, clause 65 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated December 17, 2024 № 40).

[6] Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation dated 21.02.2019 № 308-ES18-16740.

[7] Clause 17 of the Review of Judicial Practice of the Supreme Court of the Russian Federation № 2 (2018) (approved by the Presidium of the Supreme Court of the Russian Federation on 04.07.2018).

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bankruptcy trustee and (or) creditors believe that the rights and legitimate interests of creditors are violated by a judicial act (including a ruling of the court of general jurisdiction and a judicial act of the arbitration court, as well as determination on compulsory execution by an arbitration court decision), on which the creditor's claim stated in the bankruptcy case is based, the said persons have a right to apply - in accordance with procedures established by procedural legislation - a statement on cancellation of the judicial act in accordance with rules of reviewing based on newly discovered circumstances."

In this case, newly discovered circumstances are circumstances that are important to the case and that were not and could not have been known to the applicant (Article 311 of the Arbitration Procedure Code of the Russian Federation). An application to review of a judicial act based on newly discovered circumstances may be granted if: 1) arguments presented by the parties to the proceedings and the evidence provided indicate existence of circumstances that are important to the case and were not known to the court at the time the judicial act was ruled and that could lead to a different decision in the dispute [8]; 2) the circumstances important to the case arose before the judicial act was ruled – the basis for such review is the discovery of circumstances that, although objectively existed, could not be taken into consideration because they were not and could not have been known to the applicant[9].

However, changing the standard of proof with the onset of bankruptcy assumes that the very start of bankruptcy proceedings creates an interest for the creditor or the bankruptcy trustee to challenge the court decision made in favor of the creditor. Not only new objections or evidence can lead to a decision different from that previously made by the court, but also the very application of a higher standard of proof for the facts underlying the claim.

Using a higher standard of proof in bankruptcy cases leads to the conclusion that if the creditor enters the register of claims on the basis of a court ruling, other creditors and the bankruptcy trustee must have a right to review this decision by applying a different, higher standard of proof in the case.

Let's give an example. Creditors in a bankruptcy case have information about the fictitious nature of the transaction underlying the judicial act, about the affiliation of the parties to the legal relationship. If the dispute between the creditor and the debtor was proceeded by the court without taking these arguments into consideration, the creditors, in accordance with the new version of Article 16 of the Law "On Insolvency...", can apply for cancellation of the court decision due to newly discovered circumstances. However, reviewing a judicial act is impossible if based on circumstances that arose after its ruling, as well as due to the need to apply regulatory provisions different from those applied by the court during the initial proceedings. And if the argument about the fictitious nature of the agreement has already been considered by the court, and it concluded that the transaction is valid, the bankruptcy creditor will not be able to insist on reviewing the decision. From the point of view of procedural legislation, reviewing a judicial act based on newly discovered circumstances is

[8] Clause 46 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 17.12.2024 № 40 "On Certain Issues Related to Implementation of the Federal Law of 29 May 2024 № 107-FZ "On Amendments to the Federal Law "On Insolvency (Bankruptcy)" and Article 223 of the Arbitration Procedure Code of the Russian Federation".

[9] Clause 4 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 30.06.2011 № 52 "On application of provisions of the Arbitration Procedure Code of the Russian Federation when reviewing judicial acts based on new or newly discovered circumstances".

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inadmissible due to a change in the standard of proof.

4. Conclusion

The differentiation of standards of proof in civil cases, applied by the Supreme Court, is unjustified in a number of cases. The Court applying the "clear and convincing evidence" standard of proof in cases of compensation for damages caused by a person authorized to act on behalf of a legal entity (Article 53.1 of the Civil Code of the Russian Federation) may be justified by political and legal considerations, but is incorrect in regards of actual availability of evidence to the parties in the proceedings. In turn, using higher standards of proof in bankruptcy cases predetermines the unconditional interest of creditors and the bankruptcy trustee in challenging court decisions made outside the bankruptcy case, and therefore raises the question of limits of the creditor’s right to review court decisions.

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