ABOUT THE REPO AGREEMENT IN RUSSIAN LEGISLATION

Begmatova Shaxlo Faxriddin qizi
Tashkent Financial Institute
begmatovashaxlo93@gmail.com
https://doi.org/10.5281/zenodo.10441015

Abstract

The article deals with the repurchase agreement in the Russian legislation. The article analyzes the rules governing the grounds for concluding and terminating a repurchase agreement, the subject of the agreement, and defines the rights and obligations of the parties. In many respects, the norm contained in the law «On the securities market» does not sufficiently regulate relations under the repurchase agreement, so we have to refer to the Civil Code of the Russian Federation and other regulatory legal acts. The necessity of introducing a rule on the repurchase agreement by the legislator is justified. The author compares the concepts of «repurchase agreement» and « repurchase operations». The article reveals the weak legal regulation of the repo agreement in Russia and some other problems of this agreement.

Keywords: repo agreement, repo operations, securities market, security.

Аннотация

В статье рассматривается договор репо в российском законодательстве. Анализируются нормы, регламентирующие основания заключения и расторжения договора репо, предмет договора, определяются права и обязанности сторон. Во многом норма заключенная в Законе «О рынке ценных бумаг» в достаточной степени не обеспечивает регулирование отношений по договору репо, вследствие чего приходится обращаться к Гражданскому Кодексу РФ и другим нормативным правовым актам. Обосновывается необходимость введение законодателем нормы о договоре репо. Проводится соотношение понятий «договор репо» и «операции репо». Раскрывается слабая правовая регламентация договора репо в России и некоторые другие проблемы данного договора.

Ключевые слова: договор репо, операции репо, рынок ценных бумаг, ценная бумага.

In 2009, the legislator enshrined the institution of repurchase agreements in the Securities Law. Russian judicial practice has already encountered this agreement, as a result of which many problematic issues have arisen that require attention.

Operations under repurchase agreements were introduced back in 1996 by the Central Bank of the Russian Federation for the purpose of refinancing credit institutions. The reason was the active development of the market for government short-term bonds and federal loan bonds, however, the regulation of repo transactions as a separate type of agreement came only in 2009 (Article 51.3 of the Federal Law of April 22, 1996 No. 39-FZ “On the Securities Market” came into force on January 1 .2010) [1]. The repo transaction dates back to 1917 in the USA and was proposed as an alternative, a way out of the current

situation due to high taxes, which led to a decrease in the attractiveness of traditional forms of lending. At first, REPO was used for lending to commercial banks, but with the development of the financial market it began to be used in relations between other participants in the financial market [2, p.26].

Repo transactions are very important nowadays. For example, during the 2008 crisis, one of the largest investment banks, Lehman Brothers, used repo to reduce the level of credit debt in order to delay bankruptcy [3, p.1].

In order to define the concept of a "repurchase agreement," it is worth correlating it with the concept of a "repurchase transaction." The first term is defined in Federal Law No. 39-FZ dated April 22, 1996

"On the securities market" (hereinafter referred to as the Law) in clause 1. Article 51.3, "repo transaction" is defined in Article 282 of the Tax Code of the Russian Federation (part two) dated 05.08.2000 No. 117-FZ (hereinafter referred to as the Tax Code of the Russian Federation) [4]. Clause 1 of Article 51.3 of the Securities Law defines a repurchase agreement as:

"... an agreement under which one party (the seller under the repurchase agreement) undertakes, within the period established by this agreement, to transfer the ownership of securities to the other party (the buyer under the repurchase agreement), and the buyer under the repurchase agreement undertakes to accept the securities and pay for them a certain amount of money (the first part of the repurchase agreement) and under which the buyer under the repurchase agreement undertakes, within the period established by this agreement, to transfer the securities into the ownership of the seller under the repurchase agreement, and the seller under the repurchase agreement undertakes to accept the securities and pay for them a certain amount of money amount (second part of the repurchase agreement)..."

According to clause 1 of Article 282 of the Tax Code of the Russian Federation, a repo operation is:

"A repo transaction is an agreement that meets the requirements for repurchase agreements by the Federal Law "On the Securities Market." In this case, the first and second parts of the repurchase agreement are recognized as the first and second parts of the repurchase agreement, respectively. The buyer under the first part of the repo and the seller under the first part of the repo are the buyer under the repurchase agreement and the seller under the repurchase agreement, respectively. For the purposes of this article, obligations under the second part of the repo must arise subject to the execution of the first part of the repo."

If we compare these two terms, then in the Securities Law, it is more meaningful and in essence the term in the Tax Code reflects the fact that actions carried out under the first and second parts of the repurchase agreement are recognized as repurchase transactions. In both cases, we are talking about the purchase and sale of securities with an obligation to repurchase them.

Relations under a repurchase agreement are rightly recognized as civil law, but in the Civil Code of the Russian Federation itself (hereinafter referred to as the Civil Code of the Russian Federation) there is no definition of a repurchase agreement, or the possibility of concluding a purchase and sale agreement for a period or "reverse purchase and sale".

The essential terms of a repurchase agreement are subject, price and term.

The object of the repurchase agreement is securities, in paragraph 2 of Article 51.3 of the Law "On the Securities Market". It should be noted that the lender often does not need a security as a commodity, especially since the lender is often a credit institution or its subsidiary, i.e. e. professional market participant. The lender needs the security only as security for repayment of the loan.

The subject of the agreement, based on its legal definition, is the actions of the seller in transferring securities into ownership of the buyer and, accordingly, the actions of the buyer in accepting them and paying the established price for them (under the first part of the agreement) and the actions of the buyer in transferring securities into the ownership of the seller and, accordingly, the actions of the seller upon their acceptance and payment of the established price for them (under the second part of the contract).

The subject of the agreement must be specified, that is, the agreement must indicate which securities are being transferred, the quantity or procedure for determining them, requirements for securities (volume of issue, etc.), which party is given the right to select securities.

A repurchase agreement is bilaterally binding, compensated, since in each of its component transactions of purchase and sale of securities, the obligation to transfer them into ownership corresponds with the obligation to pay their cost [5, p.11].

The repurchase agreement is concluded in accordance with the general rules for concluding an agreement, clause 1, article 432 of the Civil Code of the Russian Federation, i.e. repurchase agreement is consensual.

The exception is repurchase agreements, which are concluded at organized auctions. When the trade organizer records the correspondence of differently directed orders to each other, at the moment of such registration the contract is considered concluded [6].

The terms of the repurchase agreement on the price of securities are considered agreed upon if the parties have agreed on the price of the securities transferred under the first and second parts of the repurchase agreement, or the procedure for determining it (clause 4, article 51.3 of the Law).

It is important to note that in the event of disagreement on the terms of the price, the norm of clause 3 of Art. cannot be applied to the repurchase agreement. 424 of the Civil Code of the Russian Federation on the execution of a contract at a price that, under comparable circumstances, is usually charged for similar goods, work or services.

In addition to the subject and price, the parties are required to agree on the deadline for paying the price for the first and second parts of the agreement (can be determined by the moment of demand, with a mandatory indication of this in the agreement), as well as the deadline for the transfer of securities (clause 5. Article 51.3 of the Law).

Let's move on to consider the form of the repurchase agreement. Article 51.3 of the Securities Market Law does not contain special rules on the form of a repurchase agreement. Therefore, in this case Art. 434 of the Civil Code and relevant provisions on transaction forms. However, in practice, a repurchase agreement is almost always concluded in writing due to the complexity of its design and the high value of the subject of the agreement.

The main obligation of the seller under the first part of the repurchase agreement is to transfer, within the period established by the agreement, to the buyer the securities that are the object of the repurchase agreement, free from any rights of third parties, except for the

case where the buyer under the repurchase agreement has agreed to accept securities encumbered with the rights of third parties (Clause 7, Article 51.3 of the Law).

In the second part of the repurchase agreement, the rights and obligations of the parties to the agreement are reversed: the original seller is obliged to accept and pay for the securities, and the original buyer is obliged to transfer ownership of the securities to the seller. In this connection, the above can equally be applied to the rights and obligations of the parties under the second part of the repurchase agreement.

According to clause 9 of Article 51.3 of the Law, when the buyer fulfills the obligation to transfer securities, it should be taken into account that the buyer must transfer to the seller under the second part of the repurchase agreement securities of the same issuer, certifying the same volume of rights, in the same quantity as the securities , transferred to the buyer under a repurchase agreement under the first part of the repurchase agreement.

The buyer is obliged to transfer the securities free from any rights of third parties, except for the case when, in pursuance of the first part of the repurchase agreement, the buyer under the repurchase agreement received securities encumbered with the rights of third parties.

When the buyer fulfills his obligations under the second part of the repurchase agreement, it is necessary to take into account the provisions of clause 13 of Art. 51.3 of the Law, on "...transferring to the seller an amount of cash, as well as other property paid (transferred) by the issuer or the person who issued the securities, including in the form of dividends and interest on securities...".

The parties have the right to demand replacement of transferred securities and revaluation of obligations.

As for the regulatory requirements for the execution of a repurchase agreement and liability for its non-fulfillment/improper execution, it is necessary to refer to the Law on the Securities Market. The following can be cited as basic norms:

Clause 7 of Art. 51.3, where the buyer, in the event of a violation by the seller of the obligation to transfer securities, has the right to demand termination of the repurchase agreement.

Clause 15 of Art. 51.3, liability in the form of a requirement for early fulfillment of obligations under the second part of the contract.

Termination of obligations under a repurchase agreement (Clause 16, Article 51.3 of the Securities Market Law) in the presence of any of the circumstances listed in the paragraph (this rule applies to cases of failure to fulfill the second part of the repurchase agreement by one or both parties).

A repurchase agreement may be terminated due to termination of the agreement, as well as on certain grounds specified in Chapter 26 of the Civil Code of the Russian Federation [6] and Article 51.3 of the Law on the Securities Market, as well as by depositing funds or securities with a notary or court (Art. 327 of the Civil Code of the Russian Federation).

The main way to terminate a contract is its termination by agreement of the parties (clause 1 of Article 450 of the Civil Code of the Russian Federation). By agreement of the parties, the repurchase agreement can be terminated at any time without restrictions. An agreement to amend or terminate a contract is made in the same form as the contract, unless otherwise follows from the law, other legal acts, the contract or business customs.

The repurchase agreement can be terminated in court in accordance with clause 2 of Art. 450 of the Civil Code of the Russian Federation at the request of the seller or buyer; in case of coincidence of the seller and the buyer in one person (Article 413 of the Civil Code of the Russian Federation). Such a coincidence may occur in cases of universal succession: inheritance, reorganization; as a result of innovation; debt forgiveness; terminated if, as a result of the issuance of an act of a state body, the fulfillment of an obligation becomes impossible in whole or in part, the obligation is terminated in whole or in the relevant part. The parties who suffered losses as a result of this have the right to demand compensation in accordance with Articles 13 and 16 of the Civil Code of the Russian Federation; in the event of liquidation of one of the parties to the agreement, since the liquidation of a legal entity entails its termination without the transfer of rights and obligations by way of succession to other persons.

It is necessary to take into account that the death of an individual who is a party to a repurchase agreement does not entail termination of the agreement, since the obligation can be made without the personal participation of the debtor and is inextricably linked with his personality and the personality of the creditor. In this case, the heirs of the deceased individual become a party to the repurchase agreement.

One of the main problems of repurchase transactions and other cases of security transfer of title is that the creditor who has received title to the debtor's property often finds himself in a privileged position not only in a legal but also in an economic sense. The most common is a lending mechanism in which the debtor transfers title to the property to the lender at a price significantly below market value. The repurchase is provided at a higher price, which can be considered as the return of the loan amount with interest [8, p.148.]. Thus, the creditor not only receives ownership of the property, but also at a reduced price, which puts him in an extremely privileged position.

Many lawyers express the opinion that the rules on collateral should be applied to a repurchase agreement; P.V. Khlustov spoke about this in his works back in 2013. So, in the classical sense, a repurchase agreement can be defined as a loan with title security [9]. The parties to the agreement act as a lender and a borrower. The buyer under a repurchase agreement acquires securities as a lender, in turn, the borrower (seller) receives funds from the lender, and after some time sells this property to the borrower (seller), but at a price higher than the original, which, by analogy with a loan agreement, can amount to interest . There are also some nuances here.

In paragraph 1. Article 51.3 of the Law states that securities are transferred into ownership. Thus, if the buyer goes bankrupt during the period between the first and second parts of the repurchase agreement, the property remains with him, since he is not the mortgagee, but the owner.

At its core, a repurchase agreement is a repurchase of securities, with the subsequent obligation to resell them at a higher cost, so the design of the agreement consists of 2 parts, or as you can call it

"two sales". At the same time, the complexity of the contract design is that a long period of time may pass between the execution of the first and second parts, and in the case that the subject of the contract is securities, it can cause difficulties in their subsequent sale, since the nominal value of the securities directly depends on the stability of the economic situation in the country and the world. In Article 51.3. the main rights and obligations of the

parties arise from the very definition of the repurchase agreement and consist in the fact that one party undertakes to transfer securities to the other party within a certain period of time in a certain quantity, and the other party undertakes to accept and pay for them; a similar construction applies to the second part of the agreement. The parties have the right to demand revaluation of securities or replacement of securities.

It is worth noting that the legislator paid insufficient attention to the repurchase agreement, which caused many contradictions in law enforcement practice. The repurchase agreement was known back in 1996, but received little regulation 14 years later (the norm came into force on January 1, 2010). Basically you have to refer to the Civil Code of the Russian Federation.

References:

1.О рынке ценных бумаг: Федеральный закон от 22.04.1996 № 39-ФЗ // Российская газета, № 79, 25.04.1996.

2.Зарубежная практика осуществления операций репо /А.С. Горда. - Экономика и управление, №. 3 (69), 2017,

3.Операции РЕПО на российском рынке ценных бумаг: итоги и перспективы / И.А.Алексеевна, Е.А Баргуева. - Baikal Research Journal, № 3(8), 2017,

4.Налоговый кодекс Российской Федерации (часть вторая) от 05.08.2000 № 117- ФЗ // Российская газета от 6 августа 1998 г. № 148-149

5.Договор РЕПО в гражданском обороте/Д.В.Лубягина, А.И.Бычков. - Юрист.2017. № 4.

6.Об организованных торгах: федеральный закон от 21.11.2011 № 325-ФЗ // СПС «Консультант Плюс»

7.Гражданский кодекс Российской Федерации (часть первая) от 30.11.1994 № 51-ФЗ // Российская газета от 8 декабря 1994 г. № 238-239

8.Судьба обеспечительных сделок при банкротстве участников: в поисках модели регулирования / Плешанова О.П.-Вестник экономического правосудия Российской Федерации. 2017. № 8.

9.Проблема формирования конкурсной массы должника, заключившего договор репо / П.В. Хлюстов // Закон.ру. 2015. 14 янв.