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ISSUES OF IMPROVING THE LEGISLATION ON INSOLVENCY (BANKRUPTCY) CASES IN RUSSIA

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Abstract

The relevance of the study of the problem of improving the legislation on insolvency (bankruptcy) cases in the Russian Federation is due to the need to develop legislative norms that ensure the optimal legal regime. In this regard, this article is aimed at identifying and disclosing the trend of changes in the Russian bankruptcy law, taking into account the actual needs of the practice. The leading research method for this problem is the modeling method, aimed at the theoretical construction of state-legal phenomena and the establishment of provisions for rule-making. The article presents the positions of Russian experts in the current area of bankruptcy law, their criticism with access to specific proposals of legislative novels. The prospects for the development of Russian legislation on insolvency cases in the Russian Federation based on the interests of the creditor and debtor are revealed, the reserves for improving the legal regulation of the insolvency regime in the form of pre-trial procedures, the legislation of special subjects of insolvency (bankruptcy) relations are identified. The study showed that the main trend in improving Russian bankruptcy legislation is a change in the nature of regulatory regulation in its evolution from supporting the interests of the creditor to protecting the rights of the debtor, which is typical for changes in the legislation governing the bankruptcy of legal entities in other countries. The materials of the article are of practical value for specialists in the field of civil law, arbitration, experts in theory.

Keywords: Arbitration process, bankruptcy, legal regulation.

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1. Introduction

Russian legislation on insolvency (bankruptcy) is developing dynamically, starting from the practical tasks of the economy, which is due to the peculiarities of state regulation of this sphere of relations. Historically, the scope of practice by types of bankruptcy entities varies significantly: the regulation of the institution of bankruptcy of legal entities in the Russian legal system is more than twenty years, and the institution of physical bankruptcy is only four years old.

Changes in the legislation per se are no reason to evaluate it as a blessing, or as its opposite. Nevertheless, the volume of legislative changes in such a short period of validity of the law governing the bankruptcy of individuals, some researchers do not allow to evaluate these dynamics positively. In particular, experts drew attention to the fact that

> The system of norms that enshrines the institution of insolvency in specialized acts has undergone a number of changes over a very short time, which does not contribute to the formation of a respectful attitude to the newly created institute of law. (Alekseev, 2016, p. 79)

It is not difficult to understand that this opinion reflects the assessment of the elaboration of the provisions of the Federal Law of 10.26.2002. No. 127-FZ “On insolvency (bankruptcy)”, which entered into force on October 1, 2015, and by now have already required many changes. Such a dynamics of changes can be explained by the fact that these legal relations are civil in nature and the peculiarities of legislative regulation may have a pronounced inclination towards the interests of one or the other side, the orientation of which should be established by research.

2. Problem Statement

Discussion of ways to improve Russian bankruptcy law comes from the specific problems that lawyers face in practice. The diverse nature of proposals for amendments and additions to the bankruptcy law is an unordered field of opinion that needs to be structured. Studying it with the aim of understanding a certain general ideology will allow us to formulate minimal interconnected novels in the bankruptcy law. The hypothesis is that at the present stage in Russia, the actual direction of changing bankruptcy legislation is to shift the weight of norms from supporting the interests of the creditor to protecting the rights of the debtor. This concept of improving the legislation on insolvency (bankruptcy) in the Russian Federation will be justified in this study.

3. Research Questions

The subject question is the gaps of the Russian bankruptcy law, identified in the process of law enforcement in arbitration courts.

4. Purpose of the Study

The purpose of the study is to identify and disclose the changes in the Russian bankruptcy law, taking into account the current needs of the practice of the arbitration process.

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5. Research Methods

As research methods, we used analytical, comparative legal methods, a modeling method aimed at the theoretical construction of state-legal phenomena and the constellation of provisions for rule-making.

6. Findings

Pavlova (2008) drew attention to the trend of legislative changes from supporting the interests of the creditor to protecting the rights of the debtor, examining Federal Law No. 127 of December 3, 2002. The researcher identified a number of key signs that indicate that the legislator sought to establish a certain balance of interests of the debtor and the creditor by the following legislative regulation measures:

- the bankruptcy procedure begins with low debt and is carried out in a short time;
- the introduction of bankruptcy at the request of the creditor should be preceded by enforcement proceedings, i.e. in addition to the debt obligation, the creditor must submit to the Arbitration Court the court that established the actual existence of the debt must precede it;
- quantitative barriers were established for recognizing the creditors meeting as eligible (it is necessary that the owners of 10% of the claims come forward with the initiative to hold the meeting);
- introduced a new procedure that has not been used previously - financial recovery of the debtor, in order to provide the debtor with the opportunity to restore his financial condition and solvency;
- a norm has been introduced that allows the debtor to pay off debt at any stage of the bankruptcy procedure;
- increased responsibility of the head of the debtor enterprise for improper actions (up to administrative and criminal liability).

Thus, we can conclude that the trend of improving the legislative regulation of insolvency relations in the direction of the interests of the debtor began to appear even before the publication of the law on insolvency of individuals.

However, the practice of law enforcement has shown that the legislation unsatisfactorily protects the rights and legitimate interests of an individual who is declared insolvent. The presence of vulnerabilities in the legal regulation can be seen in all areas of relations: in the plane of relations with the state, with the lender and with the financial manager.

In particular, the issue of interpreting the written-off debt of an individual recognized as insolvent from the point of view of the Tax Code of the Russian Federation, according to which such debt is considered to be income and taxed at a rate of 13 % tax on personal income (Epifanova, Uncle, & Nadolinskaya, 2018), has not been resolved. It seems that this norm of the Tax Code in relation to the category of individuals declared insolvent, it is advisable to cancel.

In the plane of relations of an insolvent debtor with creditors, issues of legal protection and restoration of the rights of an insolvent individual who are violated in the process of debt collection need legal support (Barkatunov, Pokramovich, & Podosinnikov, 2017), in particular, art. 46-48 of the 1998 Constitution of the Russian Federation. A clear legislative framework is required for permissible actions

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of creditor organizations, collection organizations for debt collection, which would not be in conflict with the constitutional rights of a citizen. The most productive tool that ensures both the interests of the creditor and the rights of the citizen can be an insurance tool. In this regard, you can pay attention to the proposed proposal to legislate the obligation of credit organizations to insure the solvency of borrowers in case of loss of a permanent source of income. One could agree with this proposal, if you do not consider how much insurance payments will increase the financial burden of an individual, increasing the likelihood of his insolvency.

The plane of relations of the insolvent debtor with the financial manager also requires improvement of the legislative regulation. First of all, to resolve the issues of remuneration of a financial manager, at the root of which there is an imbalance of interests: the high cost of the services of a financial manager for an insolvent debtor and unsatisfactory remuneration for a financial manager.

To resolve this contradiction, various short stories are proposed. For example,

> Fixing reference norms to regional legislation, which would establish a threshold minimum and the cost of bankruptcy proceedings depending on the average per capita cash income of the population. In other words, it is worth differentiating the amount of debt for bankruptcy of citizens depending on their income, living standards in the regions. (Epifanova et al., 2018, p. 143)

It is also proposed "to reduce the degree of dependence of the financial manager's remuneration on the value of the sold property..., to fix a fixed amount of remuneration of the financial manager for the entire bankruptcy procedure" (Grishmanovsky & Sotnikova, 2019, p. 33). In order to save the funds of the insolvent debtor it is proposed to

> Provide in paragraph 7 of Art. 213.26 Federal Law No. 127 the possibility, on the basis of an application submitted to a court, to unite into one process of cases of bankruptcy of spouses and to interact with one financial manager who would conduct a bankruptcy case. (Grishmanovsky & Sotnikova, 2019, p. 34)

A regional link would be advisable if there was a bank interest on a loan different from region to region. The fixed cost of services when untied from the bankruptcy estate will only produce negative selection in the ranks of financial managers and the need for frequent legislative adjustment of this static value in response to a changing economic situation.

Analyzing the practice, it can be concluded that an increase in the number of cases of insolvency of the debtor of an individual, together with an increase in the number of financial managers, will lead to a pure formalization of bankruptcy procedures for individuals in the short term, reducing the nuance of individual cases to a statistically insignificant minimum, which will manifest itself in categories of cases, for each of which a specific rating of financial management services in bankruptcy cases will be formed, compromising taking into account the interest s both the insolvent debtor and the financial manager. In the law, it would be expedient to establish not the amount of a fixed amount of remuneration (as established in paragraph 3 of article 213.9. FZ dated 10.26.2002 No. 127-FZ (as amended on 07.07.2019) "On insolvency (bankruptcy)" and referral in it, to clause 3 of article 20.6 of this Law, introduced by the Federal Law of December 30, 2008 No. 296-FZ), and the minimum amount of remuneration.

In relation to legal entities, the practice of applying bankruptcy legislation in Russia is more saturated than in relation to physical ones (Popondopulo, 2015). With all the diversity of law enforcement

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practices, various changes in the bankruptcy law, the main task of state regulation of bankruptcy relations of legal entities remains unchanged - this is the creation of an organizational and legal field focused on the development of market relations, as well as stimulating mechanisms of market self-organization. Pavlova (2008) rightly noted that "... the main purpose of the bankruptcy procedure is to preserve and restore the business, including by replacing an inefficient owner with an effective one" (p. 135). That is, the legal instrument of a civilized resolution of the contradictions that have developed regarding debt, according to the legislator, should contribute to a more constructive way out of the legal entity from the crisis. This estimate can also be seen in the work of researchers Kirillova and Demidova (2017). However, according to all-Russian statistics, only 3–5 % of enterprises that have gone through bankruptcy recover from the crisis (Pavlova, 2008). From this dry fact, among others, we can conclude that not all reserves for improving bankruptcy law have been exhausted.

Among the most relevant areas for improving the legislation on bankruptcy of legal entities, one can single out such features as the bankruptcy of financial organizations and the bankruptcy of individual entrepreneurs. There is reason to support the position of Sharonov (2004), which is that in determining the characteristics of bankruptcy of organizations such as insurance organizations, pension funds, investment funds, management companies, professional participants in the securities market, particular attention is paid to determining the procedure and conditions for the return of the funds raised by these organizations funds of individuals and legal entities.

More detailed legislative regulation also requires legal relations arising as a result of insolvency of individual entrepreneurs, in respect of which the priority of regulation still belongs to judicial practice (Paharukov & Tyukavkin-Plotnikov, 2012; Smirnyh, 2010).

The characteristic feature of alignment of the interests of the creditor and the debtor characteristic of changes in the legislation governing the bankruptcy of legal entities in other countries (Bigus, 2002; Stef, 2018) can serve as a reliable guide for improving the Russian bankruptcy law. The relative balance of interests of the debtor and the creditor, achieved in the domestic bankruptcy law, could also be strengthened by attention to the interests of third parties in bankruptcy cases. Although this aspect of legislative regulation is in the sphere of legal regulation of administrative legislation, nevertheless, as the researchers showed, the question of the procedural status of the person opposing the applicant in the bankruptcy arbitration process is open. The procedural status of other persons participating in the bankruptcy case, including third parties (claiming and not claiming independent claims regarding the subject of the dispute) is not disclosed in the APC of the Russian Federation. In Chapter 28 of the Arbitration Procedure Code of the Russian Federation, devoted to the consideration of bankruptcy cases, there is no indication of the possibility of third parties participating in the proceedings of these cases" (Gotra, 2018). A similar practice was noted by Glukhova and Shevyakov (2017). Gotra (2018) showed an unjustified approach,

> According to which the participation of third parties in the arbitration process in the bankruptcy case is excluded due to the absence of a direct reference to this in the agribusiness complex of the Russian Federation and in the Bankruptcy Law. Attracting (joining) third parties to participate in the arbitration process in the insolvency (bankruptcy) case is permissible in the presence of a

dispute on the right within the framework of a separate dispute in the manner prescribed by art. 50, 51 of the APK of the Russian Federation. (p. 175)

Obviously, the ending of this polemic could be a norm in addition to the insolvency law, taking into account the interests of third parties in the insolvency case.

Also, resources for applying pre-trial sensational procedures, the norms on which could be developed in supplementing the norms of the bankruptcy law with the aim of systematizing and detailing the existing measures to prevent the insolvency of debtors, are still not used up (Outleeva, 2014). In particular, Zhukova and Kondratiev (2012) rightly pointed out the need to regulate such aspects of the procedure for conducting pre-trial procedures as the grounds for their discovery and the procedure for termination. A similar point of view was expressed by Grishmanovsky and Sotnikova (2019).

7. Conclusion

Thus, the main tasks of improving the legislation on bankruptcy include the task of compromising the interests of the debtor and the creditor, as well as the institution of financial managers in the context of the goals of the state socio-economic policy. At the same time, the prospects for the development of legislation on insolvency (bankruptcy) cases in the Russian Federation are associated precisely with the legislative alignment of the interests of the creditor and the debtor, the improvement of the legal framework that inspires confidence in the debtor and the willingness to use this institution to rehabilitate the financial condition of both business entities and of citizens.

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