

Legislative Recognition of the Public Creditor Access to the Partial Seizure of Property and the Future Revenues of the Russian Citizen-The Debtor, in Russia and Abroad

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Abstract: In the article, the variants are given of the Russian and the foreign regulation of the public creditor access to the partial seizure of the property and the future revenues of the debtor and the conclusion is made about the possibility and the necessity to introduce such a mechanism of relieving from debts in the Russian Federation. The authors performed a comparative analysis of the legislation in England, the USA, Canada and Russia. Based on the analysis the conclusion is made that modern systems have a tendency of applying the bankruptcy regulation systems depending on the size of the debt and the debtor's income. The authors believe that in the bankruptcy system, it is necessary to research the procedures that prevent declaring bankrupt and in particular-the procedures that give the debtor an opportunity to get relieving from debts in accordance with the legislation, avoiding the full sale of the property of the private person. To improve the existing bankruptcy prevention system, it is proposed to legally define the debt plan as a procedure allowing the debtor to change the conditions of the debt repayment as compared to the bankruptcy procedures, at the expense of the future revenues during several years and possible partial sale of the property, guided by the arbitration manager and controlled by the arbitration court.

Key words: Consumer bankruptcy • Citizens • Payment capacity restoration • Public access of the creditors to the property seizure • Relieving from debts • Debtor • Debt repaying plan • Restructuring

INTRODUCTION

The idea of the public creditor access to the partial seizure of the property and the future revenues of the debtor is well-known to the legislations of the foreign states. The so-called "procedures surpassing the debtor's acknowledgement as a bankrupt" gain their popularity in the whole world and in particular-the legislative opportunity of relieving from debts with no full realization of property, basically at the expense of the future revenues seizure during a definite period of time [1, 2]. With this, at the present time Russia is passing through a phase of developing of both the legal regulation of the consumer bankruptcy as a whole and the public access idea in particular.

To the benefit of the Russian legislation development, it would be useful to study and compare the foreign models of the bankruptcy regulation and in particular-the American, English and Canadian models.

The System of the Private Person Bankruptcy Regulation in the American Federal Law: Let us refer to the foreign legislation: The system of the private person's bankruptcy regulation in the American Federal law created (*As referred* to the citizen who is not a businessman, but the so-called consumer)-and this is the typical characterizing feature of the Anglo-Saxon system of regulating the insolvency in the whole [3]-created not only as the process of collective satisfying of the creditors' claims but as an instrument of the debtor protection [4].

In spite of the fact for many years the restoration of rights was not available for the private persons (this type of bankruptcy was *first* introduced in the 30s of the XX century and gained popularity in 1979), at present the USA practice a legal ethical postulate of apparent evidence that after each economical failure a debtor should have an opportunity for the so-called "new start" [5].

The American law proposes two ways to relieve from debts for a private person in a financial trouble. The debtor can either donate his property to the creditors through the tender process (with some exclusions from it) and so keep his future revenue [6] (Procedure as per Chapter 7 of the Bankruptcy Code), or, having chosen a plan of the debt regulation, keep his property but sacrifice a part of his future revenue [7] (hereinafter referred as Procedure as per Chapter 13).

The alternative of Chapter 7 for the debtor is Chapter 13 that “regulates the debts” and this, in accordance with the opinions of numerous private insolvency foreign researches, can be more profitable for the debtor [8-12]. The main reason for the Chapter 13 application is the necessity to save the assets which would be lost otherwise in case Chapter 7 is applied. Chapter 13 of the Bankruptcy Code was developed to help the debtors who have an income which is enough for their protection from the creditors, to partially or fully pay off their debts from the future revenue during several years in accordance with the plan prescribed by the court.

The peculiar feature of the debt regulation process for persons having regular income is the fact that it gives a chance to the debtor to collectively divide between him and his debtors the current revenues through a compromise and so after a certain period the debtor can be relieved from the remaining debt having avoided his full property sale.

Of course such procedure is allowed only for the persons who get regular income no matter if they have independent or dependent occupation, or the property interest fee, with this the amount of the secured claims cannot exceed 350000 \$ and the amount of the non-secured claims cannot exceed-100000 \$ [13].

The court appoints a manager who is to define the financial position of the debtor, to preliminary check the claims of the creditors, to help the debtor to develop a plan to distribute the debtor’s income in accordance with the plan conditions and to support the debtor till the debt regulation plan is completely fulfilled [14].

In his claim for the Chapter 13 procedure application, or no later than the following 15 days, the debtor is to present a debt repayment (regulation) plan which is to be approved by the court.

The debt regulation plan is approved by the court on conditions that the proportioned part of the debtor’s income is distributed, the simple and privileged creditors are fully satisfied, similar attitude to the creditors of the same rank, individual agreement of the secured creditors, conscientiousness of the debtor, the period of the plan

fulfillment does not exceed 3 years (in some cases the court can allow a 5-year term). In case the interested party has a request to cancel the plan approval decision within 180 days after such a decision came into force, the court can cancel the decision providing it was based on the fraud [14].

Thus, American law provides for the debtor a choice of conditions for satisfying his creditors, but there are opinions among the consumer insolvency researches that such a choice of conditions involves possibilities of misuse [15].

The Opportunities for a Consumer in Bankruptcy in the English Law: The English law is not so friendly to the debtors as the American one. In England, the consumers are ashamed of the bankruptcy process because the bankruptcy is accompanied by a public discredit. But in spite of this, the bankruptcy legislation in England gives an opportunity to avoid the bankruptcy process by creating the administrative order and submitting a proposal for the compromise agreement with the creditors for paying the debt off and providing a scheme (a plan) for the debtor’s affairs regulation.

The English law provides for an opportunity for minor debtors to avoid the bankruptcy procedures by submitting of the administrative order [16,17]. Such an opportunity is given to the debtors who are not capable of paying the amount prescribed by the court and in case the amount does not exceed 5000 pound sterling. The right of applying is granted to the debtor himself. His application form is submitted together with a list of the creditors and the plan of payments, the latter providing for a partial release from debts. The administrative order prescribes regular payments from the current debtor’s income during 10 to 25 years. In case the plan fulfillment is ignored by the debtor there are no sanctions defined.

The tool of the public meeting the claims of the creditors is the debtor’s salary and other income distraint.

This process is rather time-taking and not efficient due to the absence of the sanctions for the non-fulfillment.

The English legal insolvency committee and the Cork Committee strive to modify the administrative order into a debt regulation scheme (plan), i.e. a voluntarily agreement of the private person [18,19].

The debtor on his own can apply to the court in case he intends to pay the amount in accordance with the compromise agreement with his creditors, or he can propose a plan (scheme) of his affairs regulation

(a voluntary agreement). This proposal gives the specially appointed person the right to act as a trust owner or to participate in the voluntary agreement for the observation of the conditions fulfillment.

The request can be submitted by the debtor himself, by the trust owner or by the official receiver in bankruptcy.

The meeting of the creditors organized in accordance with the legally defined order, studies the voluntary agreement proposed by the debtor. The meeting can accept the agreement with amendments in case the debtor agrees to all the amendments introduced.

The voluntary agreement inspector is the person who is performing the functions of the appointed person, or is a court representative of the appointed person when the voluntary agreement decision is made.

Relieving from the Consumer Debts as per the Legislation of Canada: The bankruptcy legislation of Canada [20] also provides for the consumer relieving from debts. In accordance with the Canadian bankruptcy and insolvency law, private persons are subject to two procedures: the procedure of the consumer bankruptcy including two types-the simplified consumer bankruptcy and common consumer bankruptcy,-and the procedure of the customer rehabilitation.

The procedure of the simplified consumer bankruptcy is possible in case the sum of all the debts does not exceed 75 000 CAD and the person is a bankrupt for the first time. The procedure of the common consumer bankruptcy is used when the debt sum exceeds 75 000 CAD and the person is a repeat bankrupt. The application of the consumer rehabilitation of the debtor, i.e. the restoration of his paying capacity, is possible when the debt sum does not exceed 75 000 CAD excluding debts associated with buying the personal apartment and when the debtor has reasons to suppose that he will be able to settle with creditors.

The procedure of the consumer rehabilitation is mainly aimed at the restoration of the debtor paying capacity.

It is necessary to mention that for this procedure application a special role is given to the bankruptcy manager (hereinafter referred as the manager) who is licensed by the bankruptcy superintendent.

The manager helps the debtor to develop a plan of his rehabilitation, which is actually the agreement of lawsuit with the list of actions for modifying the consumer behavior of the debtor [21]. The rehabilitation plan and the report on the status of things is forwarded by the manager to the regional division of the superintendent's

service for registration and the corresponding certificate is issued. From this moment, the procedure of the consumer rehabilitation is considered to be started.

If the creditors approve the rehabilitation plan (in case it was demanded by the court), the debtor starts to follow the plan conditions within the period of time defined in the plan. There is no legally defined time limit for the rehabilitation plan fulfillment.

Analyzing the procedures proposed in the bankruptcy and insolvency law of Canada and applied to the debtor, we need to emphasize that the private person (but not individual entrepreneurs) bankruptcy sphere is well-developed. This is true concerning both the creation of the optimal legal conditions for using the main principles of the public access of the creditors to the partial seizure of the property and future revenues and the efficiency of the chosen legal mechanism of the bankruptcy regulation.

Variants of Implementing the Idea of the Public Creditor Access to the Partial Property and Future Revenue Seizure as per the Russian Legislation: As of today, the Russian legislation provides for two variants of implementing the idea of the public creditor access to the partial property and future revenue of the debtor. This is, first of all, Article 204 of Federal Law dd 26.10.2002 # 127-ФЗ FZ "On insolvency (bankruptcy)" [22] (hereinafter referred as the bankruptcy law). Secondly-Articles 16-28 of the draft Federal Law "On the rehabilitation Procedures Applied to the Private Person the Debtor" [23].

The plan of paying the debts off (hereinafter referred as the plan) defined in Article 204 of the bankruptcy law, is a document containing a scheme of payments between the debtor and the creditors. The plan is developed by the debtor himself and includes the period of time for paying the debt to the creditors, the amounts left monthly for the debtor and his family members for living, amounts for satisfying the claims of the creditors, other conditions. The plan is approved by the arbitration court in case the creditors do not object.

In case the debtor follows the plan conditions and fully satisfies the claims of the creditors, the arbitration court stops the bankruptcy procedure.

In our opinion, the debt relieving plan in the current legislation should be modified into the consumer procedure that allows to escape from bankruptcy by using the mechanism of the public creditor access to the partial debtor property and income seizure. The list of procedures for the modern bankruptcy legal regulation systems operation is rather long.

Ihering was right to say that “the life of the population is not in isolated existence as well as the life of the individuals; it is the communication, the system of common areas and the influence of hostile and amiable factors; it is the system of mutual messages and borrowings, for short-it is the exchanging process including all the spheres of the human being” [24]. It is important to use this universality of connections in the modern world for improving the Russian legal system including the bankruptcy (insolvency) legislation.

One example of the kind is draft project of the Federal law developed by the Ministry for Economic Development of the Russian Federation “On the rehabilitation Procedures Applied to the Private Person the Debtor” (hereinafter referred as the draft law) and it particular-Articles 16 to 28 of the draft law [25].

The draft law proposes to introduce the consumer bankruptcy institution into the current law, with the possibility to reschedule the debts of the private person, including a person acting as an individual entrepreneur.

The debt rescheduling is a separate (independent) procedure within the framework of the bankruptcy case. The principal purpose of the debt rescheduling is the fulfillment of the debt rescheduling plan and as a result-meeting the claims of the creditors and the authorized bodies included into the claim register.

During the bankruptcy procedures the debtor has the right to submit a debt rescheduling plan to the court; the plan should contain the regulations on the order, period of time and size of the payments meant for meeting the claims of all the creditors. The plan is subject to approval by the majority of the creditors and approved by the arbitration court after that.

Starting with the date of the debt reschedule plan approval by the arbitration court, a new procedure used in the private person bankruptcy case is introduced-the debt rescheduling procedure.

To protect the rights and the legitimate interests of both the debtor and the creditors, the draft law provides for a limited list of reasons for refusal in the debt rescheduling plan approval by the arbitration court or for cancelling of the already approved plan.

The debt rescheduling plan realization period is limited to 5 years and this is enough for the successful clearing out the debts. The defined 5-year period fully complies with the world’s practice of the solving the issues associated with the consumer debts.

At the request of the creditors, a financial manager is appointed for the whole period of the rescheduling or for other period, who performs his functions during the debt

rescheduling. With this, the expenditures for paying the remuneration to the arbitration bankruptcy manager are paid by the creditor (creditors) who insisted on introducing the manager into the process.

In case the debt rescheduling plan is fulfilled, the person is relieved from his debts. If the private person was not able to meet the creditor claims, the court decides to cancel the debt rescheduling plan and starts the bankruptcy procedure during which the debtor’s assets included into the bankruptcy assets are distributed between the creditors proportionally to the sum of each claim.

CONCLUSION

On the basis of the foreign experience and taking into account the specific Russian features, we deem it practical to: differentiate between the debtors in accordance with the income earned and the debt size; to introduce a procedure of a “mandatory plan for a debtor-citizen”; from the moment of accepting the bankruptcy application form, to appoint a manager for defining the opportunity and practicability of creating the mandatory plan for the debtor; to define a prolonged period for the execution of the debt paying-off plan.

The advantage of the procedure proposed is seemed to be the following. It allows the debtors to submit plans developed and calculated by the bankruptcy specialists, which give an opportunity to avoid declaring bankrupt; the procedure also authorizes the arbitration courts to approve the plans with no creditors’ consent (with the exception for the secured creditors’ consent); makes the debtors who finish their payments as per the plan, free from the negative consequences of declaring bankrupt; sets limits for releasing from debts for those debtors who have a potential financial possibility to pay the debts off but are not willing to pay.

Thus, having considered the foreign states experience, we need to note that the modern systems have a tendency of different schemes application for the insolvency regulation depending on the size of the debtor’s income and the size of the debt.

Based on the stated above, we propose to improve the debt payment plan norms by legislative establishing of the plan as a procedure allowing the debtor to change the conditions of the debt payments (as opposed to the bankruptcy procedures) at the expense of the future revenue during several years, with the possible partial property sale, under the guidance of the arbitration manager and controlled by the arbitration court.

By diversifying the procedures applied to the debtors-consumers, the legislators aim at-firstly-simplifying the normative regulation and secondly-protecting the debtor not only from the property devastation but from the psychological shock, thus making the social and economic infrastructure stronger.

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