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Liability for Insolvency (Bankruptcy) of the Debtor in Russia from the 18th to the 21st Centuries

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Abstract: The article is devoted to the study of legal responsibility in the field of insolvency (bankruptcy) in Russia during the period from the 18th century to the present day. Within the framework of the study, the author has analyzed peculiarities of the legal norms of Tsarist Russia regulating the liability in the sphere of insolvency (bankruptcy) and considered the categories of debtors. The choice of this historical period is determined by the significant complexity of economic relations and the simultaneous improvement of the legislative sphere, that took place at that time. The article describes the procedure and features of the application of each independent type of insolvency. Additionally, the author describes the Soviet period of the legal regulation of the bankruptcy. The features of unfortunate, negligent and malicious insolvency (bankruptcy) are examined in the article. The author studies the current legislation, which differentiates the debtor's liability for insolvency (bankruptcy) into criminal, administrative and civil, and highlights the correlation between these types of liability. In addition, the author has carried out a comparative study of legal liability in the sphere of bankruptcy with the help of historical method, identified causes and gaps of legal regulation of liability issues for debtor's insolvency (bankruptcy).

Keywords: Bankruptcy, Debtor, Insolvency, Vicarious Liability, Criminal Liability, Fraudulent Bankruptcy

1. Introduction

The insolvency (bankruptcy) implies the impossibility of the subject of economic relations to fulfill its obligations to creditors completely. The legal regulation of this institution is a significant direction of the state's activities to stabilize and increase the sustainability of the economy. The initiation of bankruptcy proceedings against a debtor always raises a question about the reasons for the insolvency. Generally, they lie either in the complexities of the economic situation and the wrong management decisions, or in the deliberate actions of the beneficiary owners or the company leader [1].

It should be taken into account that the insolvency of any participant of economic relations negatively affects the entire economic system: the company's employees lose their salaries, the creditors suffer damages, the market loses economic agents. As a result, not only the private interests of creditors suffer but trust in the state is undermined, the procedure for conducting economic activities is violated. Not without reason A. V. Lokhvitsky noted that 'the bankruptcy shakes the trade in general, frequent or significant bankruptcies trigger financial shocks of the whole state, because the trade is based on the credit; merchants and manufacturers are linked to each other, the bankruptcy of one of them often leads to the bankruptcy of many others' [2].

2. Legal Regulation of Bankruptcy in Russia Until the End of the 20th Century

2.1. Tsarist Period

In the history of the Russian state, the legislator's approach to the regulation of the insolvency has changed depending on the legal relations development. Social relations are changing, and the law always adapts to the changing conditions.

The most ancient sources of domestic law comprised the rules governing bankruptcy issues. *Russkaya Pravda* already contained references to bankruptcy. According to them the insolvent debtor was liable for the obligations not only with

his property, but also with his freedom [3, 4].

A new stage in the legal regulation of public relations in the field of bankruptcy falls on the period from the 18th to the 19th centuries. It was a time when a wave of reforms was taking place in the Russian Empire: the economy and the social sphere were developing; the foreign legislation was integrated into the domestic legal field. This historical period is characterized by the adoption of such legislative acts as the Bankruptcy Charter of 1753, the Bankruptcy Charter of 1763, the Bankruptcy Charter of 1768, the Charter of Bankrupts of 1800, the Commercial Insolvency Charter of 1832, the Code of Criminal and Correctional Punishments 1845.

In our opinion, the Charter of Bankrupts of 1800 and the Commercial Insolvency Charter of 1832 were the best examples of the legal regulation in the field of insolvency (bankruptcy). Their provisions remained valid until 1917, and the changes were limited to the improvement of the legal technology.

In accordance with the Charter of 1800, a person or an entity was recognized as 'a bankrupt' if it 'cannot pay off its debts in full' (Section I, clause 1) [4, 12]. The insolvency was based on the non-payment and the inadequacy of the property to cover all the debts [4, 12].

The Charter of Bankrupts of 1800 for the first time identified three types of insolvency: a proper insolvency (originated from the misfortune), a negligent insolvency (originated from the negligence) and a malicious insolvency (originated from the forgeries). The debtor was called a 'fallen', 'negligent' and 'malicious' bankrupt, respectively [4]. The legislator differentiated legal liability both by the type of insolvency and by the category of the debtor declared bankrupt (whether he belonged to a commercial title or not). Only the malicious bankruptcy of a person of a non-commercial rank and the negligent or malicious bankruptcy of a merchant entailed criminal liability. The Charter stated that malicious bankrupts 'were ordered to be brought to the criminal court and punished: persons of non-commercial rank-as for a deceitful act, merchants-as for a public theft' [5].

The Commercial Insolvency Charter of 1832 contained similar provisions regarding the delimitation of bankruptcy into three independent types. However, it extended its effect only to the merchants. Cases of 'non-commercial' insolvency were transferred to the jurisdiction of the provincial government.

Under the Commercial Insolvency Charter of 1832, the type of insolvency had to be established by the general meeting of creditors when considering the bankruptcy report. This decision was sent for the consideration and the approval to a commercial court (§§ 6, 127 and 128). However, the court was not bound by the creditors position and could determine the type of insolvency independently [14].

The insolvency was recognized as an accidental if it occurred not as a result of the guilty actions of the debtor, but due to the circumstances beyond his control: a flood, a fire, natural disasters, etc. It entailed for the debtor only the civil consequences [15].

The insolvency was declared negligent and called 'simple bankruptcy' if it occurred through the fault of the merchant, but without forgery and intent, i.e. the debtor made expenses that clearly did not correspond to his income. For the negligent (simple) bankruptcy the debtor was deprived of the right to engage in trade.

The malicious insolvency entailed criminal liability for merchants-they were punished for forgery. If an insolvent merchant attempted to conceal his property after taking an oath in the court, he was also subjected to punishment for breaking the oath [5].

The issues of the bankrupt crimes liability were further developed in the Code of Criminal and Correctional Punishments of 1845, which referred to the provisions of the Commercial Insolvency Charter of 1832. The Code of 1845 continued the trend of dividing liability into civil and criminal, depending on the category of bankruptcy. At the same time, the type of insolvency (accidental, negligent or malicious) was differentiated according to the provisions of the Commercial Insolvency Charter of 1832. In case of the negligent or malicious insolvency, the case from the commercial court was sent for further proceedings to the criminal court, which decided on the debtor's guilt or innocence [6, 4].

The criminal liability for negligent (simple) and malicious bankruptcy was provided by Articles 1163-1168 of the Chapter XII 'On violation of loan orders' of the Code of 1845.

The bankruptcy was called simple if it happened through the fault of a debtor, but without forgery and intent. The punishment for the simple bankruptcy was reduced to the obligation of each merchant to pay off the debts inflicted by him. The signs of the simple bankruptcy included: a) to hire managers who were unable to organize the work of the enterprise properly; to do business in a way that leads to the decline of trade; b) to start a business on debt or with credit funds, in the absence of the equity; c) the acceptance of an inheritance burdened with debts; d) to lead a luxurious life, clearly inadequate to the income; e) not to keep trade books or to keep them in such a way that it is impossible to determine the state of the property and debts, in the absence of intent and forgery [7, 8].

The Article 1165 of the Code of 1845 provided the criminal liability for the negligent (simple) bankruptcy for persons of the commercial rank. They were subjected to the deprivation of the right to engage in trade. At the request of the creditors, they were imprisoned for periods ranging from eight months to one year and four months.

The malicious bankruptcy was a non-payment combined with an intent or a forgery [8, 13]. It occurs when a debtor, in order to avoid payments, hides his fortune, transfers it to the name of other people, or issues a bill of exchange in order not to pay creditors [2]. Criminal liability was established by the Article 1163 of the Code of 1845. The deprivation of all rights and fortunes and exile to Siberia for settlement was the punishment for this crime [9]. The signs of the malicious bankruptcy were not disclosed in the article, since the type of the insolvency had to be determined by a civil court (on the

basis of the Charter of Commercial Insolvency of 1832). The responsibility for the malicious bankruptcy of persons who do not belong to the commercial class was provided in the Article 1166 of the Code of 1845. Articles 1164 and 1167 of the Code of 1845 provided the liability for accomplices in a malicious bankruptcy. The heirs of the bankrupt, who received the inheritance and did not transfer it to the bankruptcy estate in order to pay off the creditors, were also recognized as accomplices.

The bankruptcy was a serious problem affecting not only the country's economy, but also the social sphere. In the legal literature, much attention was paid to the research of this institution, and numerous studies of such scientists as A. V. Lokhvitsky, N. A. Neklyudov, N. S. Tagantsev, A. N. Trainin, I. Ya. Foinictius, G. F. Shershenevich confirms this.

In our opinion, the division of bankruptcy into categories, and, as a result, the division of the legal liability in the Charter of 1800 and the Charter of Commercial Insolvency of 1832, reflected the existing legal relationship most accurately and was an adequate model of the legal regulation of the debtor's insolvency.

In the 18th-19th centuries, the bankruptcy was a complex legal institution governed by both civil and criminal law. This testifies the comprehensive approach of the legislator to the problem of debtor's liability to the creditors and the state.

2.2. Legal Norms of the Soviet Period

By the beginning of the 30s during the period of the Soviet economy with the socialization of industry and agriculture (the collectivization and the industrialization) the insolvency (bankruptcy) rules lost their relevance. The institution of insolvency, as a phenomenon generated exclusively by the market relations, could not exist within the framework of a command-administrative system. Therefore, after the end of the New Economic Policy, the institution of the insolvency lost its purpose [10]. The Soviet legislation did not provide a criminal liability for the bankruptcy crimes, since a socialist enterprise in the USSR could not go bankrupt [11].

3. Legal Liability for Bankruptcy Under the Modern Law

Currently, the Federal Law No. 127-FZ 'On Insolvency (Bankruptcy)' regulates the institute of insolvency (bankruptcy). In accordance with the Article 2 of this law, the 'bankruptcy' means the debtor's inability to fully satisfy the creditors' claims for monetary obligations, for the payment of severance pay and (or) for the remuneration of employees who work or worked under a labor contract, and (or) to fulfill the obligation to pay mandatory payments. The inability to provide these payments must be recognized by the arbitration court or occur because of the completion of the extrajudicial bankruptcy procedure of a citizen.

The current legislation establishes administrative, criminal and civil liability for the unlawful actions of the persons guilty of the debtor's bankruptcy. The modern Russian legislator has abandoned the 'categorization' of bankruptcy, establishing different types of legal liability for unlawful acts depending on their nature and social danger instead.

The Code of Administrative Offenses of the Russian Federation establishes administrative responsibility for the following offenses: 'Fictitious or deliberate bankruptcy' (Article 14.12), 'Misconduct in course of Bankruptcy' (Article 14.13) and 'Obstruction of a transitional administration committed by officials of a credit or other financial organization' (Article 14.14).

Criminal liability for bankrupt crimes in its modern form was formulated in the Criminal Code of the Russian Federation of 1996 (hereinafter referred to as the Criminal Code of the Russian Federation), which contains the following offenses: 'Misconduct in course of Bankruptcy' (Article 195), 'Intentional bankruptcy' (Article 196), 'Fictitious bankruptcy' (Article 197), 'Falsification of organization's financial books or reporting documents' (Article 172.1).

It should be noted that in the 19th and the 20th centuries, a distinctive feature of the criminal legislation was that bankruptcy crimes belonged to the formal type of the crimes (conduct crimes). The consequences in the form of 'an important damage to the treasury, a significant harm, a disruption of the credit institution, a ruin of many persons' formed the qualified types of these crimes. The current Criminal Code of the Russian Federation, on the contrary, classifies all bankruptcy crimes as material ones (result crimes), the exception is the crime under the Article 172.1 of the Criminal Code of the Russian Federation.

Now the civil liability is the main way to influence the offenders. It is presented in the modern legislation in the form of the vicarious liability. The changes that have taken place in connection with the adoption of the Federal Law of July 29, 2017 No. 266-FZ 'On Amendments to the Federal Law 'On Insolvency (Bankruptcy)' and the Code of Administrative Offenses of the Russian Federation' deserve particular attention. This Federal Law introduce the new Chapter III. 2 'Liability of the head of the debtor and other persons in the bankruptcy case' instead of the Article 10 of the Federal Law 'On Insolvency (Bankruptcy)'. The new Chapter includes 13 articles, which regulate in detail the procedure for bringing the head of the debtor (or a beneficiary owner) to responsibility in a bankruptcy case.

The legislator has expanded the concept of a person who controls the activities of a company. This allows the court to bring the beneficiary owner to the civil liability. Because of the changes made, it became possible to bring the perpetrator to the vicarious liability not only in the course of the bankruptcy case, but also after its termination due to the lack of funds to conduct bankruptcy procedures. This gives creditors an additional opportunity to prosecute managers or beneficiary owners of the debtor (Article 61.19 of the Federal Law 'On Insolvency (Bankruptcy)') [3].

First of all, the expansion of the possibilities to bring these persons to justice is aimed at ensuring the interests of creditors and recovering losses. The new rules for bringing

the beneficiary owner to the vicarious liability correspond to one of the basic principles on which, in our opinion, the bankruptcy legislation should be based-the fullest satisfaction of creditors' claims.

Today, the vicarious liability is one of the most important instruments for achievinga fair balance of interests between legal entities and their participants, on the one hand, and their creditors, on the other.

4. Conclusion

In the light of the foregoing, we conclude that the legal norms on liability for the insolvency (bankruptcy) provided in the current legislation are devoid of a genetic relationship with the legislation of the Russian Empire of the 18th-19th centuries. The legislator abandoned an integrated approach to the regulation of insolvency (bankruptcy), when legal liability was an inalienable part of the bankruptcy process itself, and the category of the debtor had a prejudicial nature.

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