СРАВНИТЕЛЬНОЕ ПРАВО

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Legal means of effective rehabilitation of a debtor or its enterprise in restricting procedures in Russia and Germany

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The article analyzes the legal means of rehabilitation during the extrajudicial procedure for restructuring an enterprise in German law, as well as the provisions of the Russian law draft that introduces a similar judicial procedure. The purpose of this study is to formulate the main provisions of the rehabilitation procedures of insolvency (bankruptcy) in the national Russian legislation on the basis of the normative regulation and doctrinal concepts prevailing in Germany, where both debtor and his enterprise can be rehabilitated. The main research methods used were comparative legal and historical legal methods in combination with the systematic method. The methods of synthesis, interpretation, and the teleological method were also used to assist in selecting the appropriate legal means to achieve the goal of rehabilitating the debtor or his enterprise. The legal nature of the law of the restructuring plan is analyzed as well as its main elements and the procedure for adoption and approval that takes into account creditors' interests of. It is concluded that rehabilitation can be carried out in the form of extrajudicial rehabilitation both within the framework of a special procedure and in a free form on the basis of an agreement between the debtor and his creditors in regard to debt restructuring. The legal means of reorganization of the debtor and his enterprise are highlighted. It is substantiated that the Russian legislation needs to change its concept of rehabilitation procedures. First of all, it is necessary to complement the goal of rehabilitation procedures by translatable rehabilitation if the debtor cannot be rehabilitated and to use appropriate legal means of stabilizing and preserving the debtor's business or part of it to minimize the negative consequences of insolvency.

Keywords: insolvency, inability to pay, restructuring procedure, rehabilitation, replacement of assets, sale of an enterprise, forms of rehabilitation, extrajudicial procedures.

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1. Introduction

The main purpose of the institution of insolvency (bankruptcy) is to ensure the stability and development of the market economy. This legal institute is recognized as the core of the market economy (Wedde 2006, 25). A main trend in the development of this institute is the use of rehabilitation procedures with the main goals of rehabilitating the insolvent debtor or his enterprise. This is precisely the path taken by the legislation of Germany, the reform of which has been continuing for some time in this area. In addition to judicial procedures, extrajudicial procedures have been introduced into the legislation for the stabilization and restructuring of enterprises that are experiencing financial difficulties. The emergence of such procedures creates preconditions for quickly overcoming an enterprise's financial crisis in a free market environment. Financial assistance in the stabilization of an enterprise can also be provided by members of entrepreneurial groups interested in the reorganization that are jointly carrying out entrepreneurial activities.

However, Russian legislation on insolvency does not specify its purpose as rehabilitation of the debtor, and a negative trend has been formed that is reflected in legal practice. Most insolvency procedures end up using liquidation-type legal institutes, although this path of development has been recognized as a dead end. Financial rehabilitation and external management procedures were applied in 2018 in 1,2 % of insolvency (bankruptcy) cases, 1,8 % in 2019, and 1,7 % in 2020[1]. The development of a different concept of law on insolvency is needed. Insolvency procedures of a reorganization type are particularly needed, with the help of which it is possible to improve the financial conditions of a debtor who is in the early stages of the financial crisis. Attempts to regulate the new judicial procedure for restructuring were made by the legislator in the draft law "On Amendments to the Federal Law on Insolvency (Bankruptcy)" and certain legislative acts of the Russian Federation, which was submitted to the State Duma on May 17, 2021[2]. However, the need to regulate extrajudicial reorganization procedures, which is a more effective measure of assistance, has not yet been realized.

2. Basic research

2.1. Legal means of rehabilitation in the German legal system

In German insolvency law, during the reform, the purpose of the insolvency procedure has been defined along with the proportionate satisfaction of the creditors' claims, the debtor's reorganization, as well as the translatable reorganization (reorganization of the debtor's enterprise), which was been established in § 1 Insolvenzordnung (hereinafter InsO)[3]. To achieve this goal, various legal means are used, which are implemented in the

[1] Overview of court statistics for the activities of federal arbitration courts of the Judicial Department of the Supreme Court for year 2020. Accessed August 19, 2021. http://cdep.ru/userimages/sudebnaya_statistika/2020/Obzor_sudebnoy_statistiki_o_deyatelnosti_federalnih_arbitragnih_sudov_v_2019_godu.pdf.

[2] Official site of the State Duma of the Russian Federation. Accessed August 19, 2021. https://sozd.duma.gov.ru/bill/1172553-7.

[3] Insolvenzordnung (InsO) vom 5. Oktober 1994 (BGBl. I. S. 2866). Zuletzt geändert durch Gesetz vom 22.12.2020 (BGBl. I. S. 3328) mWv. 12.31.2020. Accessed August 19, 2021. https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5B@attr_id=%27bgbl120s3328.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl120s3328.pdf%27%5D__1629404383171.

framework of rehabilitation-type insolvency procedure, which is introduced during the unified insolvency procedure (Insolvenzverfahren).

For the purposes of rehabilitation, rehabilitation plans are used as legal means, in which the legal relationship between the debtor and his creditors is regulated. It is important to note that method of deregulation is used here, i. e., participants in legal relations of insolvency have the right to resolve the arisen legal conflict by any legal means. For the rehabilitation of the enterprise, the debtor uses such legal means as the establishment of a replacement company for transmission of his property, which allows for the uninterrupted operation of the enterprise, maintaining jobs, as well as sustaining a competitive environment.

The idea of preserving the debtor's existing enterprise was developed in the 2011 Law on Facilitating the Reorganization of Enterprises[4]. InsO were amended under the aforementioned act to facilitate the rehabilitation of viable businesses, the legislator used the following remedies: a) expansion of creditors autonomy for choosing a court-appointed administrator; b) increasing the importance of the creditors' meeting, convening in the introductory procedure — a temporary creditors' meeting for companies with a balance sheet of at least 4,84 million euros, a turnover of at least 9,68 million euros and with at least 50 employees in accordance with § 21 paragraph… 2 sentence 1a InsO; c) improving the efficiency of the rehabilitation procedure by using legal means to prevent creditors from approving the recovery plan, namely: converting the creditors' claims into participation in the debtor's enterprise against the will of the previous founders (participants), the so-called "Debt Egity Swab" in accordance with § 225 a InsO; d) incentives for self-government and approval of an interim administrator (Sachwalter) according to § 270 b InsO instead of an interim administrator at the request of the debtor when the debtor has to develop a rehabilitation plan within 3 months, which has received the designation Schutzschirmverfahren in the German legal doctrine.

German legislation has undergone significant changes in the context of the pandemic. Along with the judicial process of readjustment from 1 January 2021 onward, an extrajudicial rehabilitation procedure was established as the procedure of restructuring and procedures of rehabilitation moderation in accordance with the provisions of the Law on the Stabilization and Restructuring of Enterprises[5] (hereinafter StaRUG), which was adopted on the basis of a Directive of the European Union dated 20.06.2019 No.2019/1023[6]. Before the amendments were made to the legislation, there were essentially two forms of reorganization: a) extrajudicial, free, agreed reorganization and b) reorganization within the framework of the judicial procedure (Ringelspacher, Ruch 2020, 636).

The key norm, according to D. Skauradszun, is the norm § 2 StaRUG which has changed the paradigm of the preparatory phase since the onset of insolvency and threatening up to 24 months prior to the identification of the insolvency of the legal entity or an entity that has been recognized as a legal entity is obliged to protect the interests of creditors (Skauradszun 2020, 627).

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[4] Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (ESUG) vom 7.12.2011 (BGBl. I. 2011. S. 2582). Accessed August 19, 2021. https://dejure.org/BGBl/2011/BGBl._I_S._2582.

[5] Gesetz über den Stabilisierungs — und Restrukturierungsrahmen für Unternehmen (Unternehmensstabilisierungs- und restrukturierungsgesetz, StaRUG) vom 12.22.2020 No. 66 (BGBl. I. S. 3256). Accessed August 19, 2021. https://www.gesetze-im-internet.de/starug/BJNR325610020.html.

[6] Directive of the European Union dated 20.06.2019 No. 2019/1023. Accessed August 19, 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023.

Paragraph 30 StaRUG introduced the notion of the debtor's ability to restructure, which is understood as the ability of any subject that can enter into insolvency procedures and possess an enterprise to be restructured. The legislator specifically denotes the reorganization of the debtor's enterprise, regardless of who owns it. The law takes into account the possibility of introducing a restructuring procedure for a participant that is part of a concern, i. e., the restructuring of the companies of a group is permitted upon application of a declaration by one of its members (§ 37 StaRUG).

Analysis of the provisions of the law on stabilization and restructuring allows us to conclude that the focus on reorganization of the enterprise continues. According to E. Ringelshpahel and AK Rukh, in contrast to the judicial process in the procedure of restructuring, the debtor decides for himself which creditors may be involved in the process and what improved rehabilitation means should be involved (Ringelspacher, Ruch 2020, 636). The restructuring procedure is used as legal means for the reorganization of enterprises if the debtor is in risk of insolvency, the signs of which are established in the InsO.

During the restructuring procedure, the obligation of the debtor to apply to the court for recognition of insolvency if there are signs of inability to pay or lack of assets are made apparent is suspended, however, mandatory notification of any such indication exists, in case criminal liability is possible (§ 42 StaRUG).

The main legal means of overcoming the crisis, as in the case of judicial reorganization, is the plan for restructuring (Restrukturierungsplan), which consists of two parts: a) the ascertaining part; b) the transforming part. In accordance with § 5 StaRUG, the plan is supplemented with statutory annexes. The ascertaining part contains all information regarding getting the enterprise out of the crisis. This part of the plan should contain a comparative calculation of satisfaction of creditors' claims when using the plan, and in the absence of a plan for restructuring. When collateral is provided by an affiliated company, the plan also includes provisions for satisfying its claims. The plan should reflect all financial calculations associated with overcoming the risk of insolvency.

The transformative part of the plan reflects the legal means with which it is supposed to bring the enterprise out of the crisis: reducing debt, delaying the fulfillment of obligations and ensuring the satisfaction of claims by a third party, converting debt into shares or shares in the authorized capital with the consent of creditors. The legislator allows the use of any legal means provided by corporate law, as well as in InsO.

As with the use of the judicial rehabilitation plan, creditors are divided into separate groups depending on their economic interests, which should be reflected in the plan. The creditors of each group are granted equal rights, and the agreements between the debtor and the individual creditor are invalidated in accordance with par. 3 § 10 StaRUG. At the same time, it is quite permissible, with the consent of all members of the group, to establish privileges for the individual creditor of the group. The debtor meets the creditors' claims in the amount established by the plan for restructuring. During the procedure, the debtor has the right to conclude loan and credit agreements in order to finance the stabilization of the enterprise.

The plan for restructuring requires approval of the plan by at least 75 % of the creditors of each group (§ 25 StaRUG).

Control over execution of the plan for restructuring is entrusted in accordance with § 72 StaRUG to a restructuring officer (Restrukturierungsbeauftragter), who is compulsorily appointed by the restructuring court if the procedure is introduced against the will

of the creditors. The appointment may or may not be made if this is not necessary in accordance with § 72 StaRUG. The law also provides for the appointment of an optional restructuring officer at the request of the debtor or creditors with more than 25 % of the vote to negotiate between the parties to the insolvency relationship. The restructuring officer's goals are defined in § 76 StaRUG.

In accordance with the law, the restructuring officer must act in good faith and can be held liable for damage caused by him within the statute of limitations provided for by civil law.

If it is impossible to restore the debtor's solvency and satisfy the creditors' claims, he must immediately notify the restructuring court about this.

The restructuring court also supervises the execution of the plan and has the right to cancel the plan after the creditors' claims are satisfied or if assurance of the latter is provided. The restructuring court can also cancel it at a noted date three years after approval of the plan.

It should be recognized that the restructuring plan serves as the main legal means of reorganizing the debtor's enterprise; its importance can hardly be overestimated. According to S. Madausa, the basic principle of legal regulation of the restructuring plan is its cogency, with the exception of challenging the provisions of the approved plan, as well as legal acts performed in the course of its execution (Madaus 2021, 35).

Along with the procedure of restructuring since January 2021, StaRUG introduced a new procedure for rehabilitation moderation. The procedure is based on a special plan — rehabilitation settlement (Sanierungsvergleich). The rehabilitation moderation procedure can be introduced for subjects with the ability to restructure, i. e., for legal entities, non-legal entities and citizens who own an enterprise. The purpose of the procedure is to overcome the enterprise's financial and economic difficulties. The procedure cannot be introduced if the debtor shows signs of insolvency. The term of the procedure is three months and, if necessary, it can be extended for an additional three months.

R. Riggert notes that German legislators did not agree to the recommended term of stabilization measures for 12 months by the EU Directive and limited itself to a 3-month period. They believed that too long a period will cause property damage to creditors (Riggert 2021, 40).

The restructuring court appoints a rehabilitation moderator (Sanierungsmoderator). The moderator is an individual who must be independent from both the debtor and the creditors. The duties of the moderator are to promote the debtor and its creditors in the conclusion and the global transaction. It is the duty of the moderator to inform the court about the debtor's insolvency (§ 96 StaRUG). The legislator does not allow the procedure to be carried out without the participation of the restructuring court. The moderator is heard before the court's decisions are made (§ 96 StaRUG). The reorganization moderator is under the supervision of the restructuring court and he can be recalled on the grounds provided for in § 99 StaRUG.

The debtor and his creditors are the participants in the rehabilitation settlement procedure. According to the law, third parties have the right to take part in it. At the request of the debtor, the rehabilitated amicable deal may be approved by the restructuring court.

German law provides ample opportunities for debtors in crisis to overcome financial instability. Reorganization forms can be both extrajudicial and judicial.

2.2. Legal means of restructuring in the Russian legal system

The debt restructuring procedure as a judicial rehabilitation procedure is proposed in the draft law "On Amendments to the Federal Law "On Insolvency (Bankruptcy)" and Other Legislative Acts of the Russian Federation". The judicial procedure for debt restructuring is supposed to replace ineffective procedures for financial recovery and external management. The legal remedies in this procedure can be analyzed in more detail.

As the main legal means, as in the procedures that are applied today, debt restructuring is supposed to use the rehabilitation plan, designated as the plan for restructuring. The plan for restructuring is introduced with the aim of restoring the debtor's solvency, preserving his enterprise and the possibility of making settlements with creditors. Meanwhile, not all debtors can restore their solvency and settle accounts with creditors. Setting out the goal of translatable rehabilitation makes it possible to transfer the operating enterprise or part of it to another owner and thereby reduce the negative consequences of insolvency.

However, the draft law does not indicate translatable rehabilitation as a goal if the debtor is not capable of being rehabilitated, although it is proposed to use such legal means as the sale of the debtor's enterprise, the replacement of assets, and reorganization. With the help of these funds, it is precisely the measures of translatable rehabilitation that are being carried out. If the purpose of translatable rehabilitation is not specified, then the insolvency officers are not guided by it in their activities.

To check a debtor's ability to be rehabilitated, a mandatory analysis of the assessment of the financial condition of the debtor is introduced. The application of the debtor to the arbitral tribunal now shall be accompanied by a report on the financial status of the debtor, prepared by him and containing a list of information about the financial condition of the debtor referred to in Art. 38.1 of the draft law.

However, the accuracy of information provided by the debtor raises reasonable doubts, on the basis of which decisions must be made on the approval of the plan for restructuring, even though an insolvency officer is also obliged to carry out the analysis of the financial condition of the debtor. The draft does not indicate the obligation to confirm the debtor's ability to be rehabilitated by the decision of the debtor's creditors. In the draft law, the content of the plan is regulated in a more detailed manner in comparison with the current law.

The legal nature of the plan for restructuring is not directly determined in the law, but it is possible to express an opinion on its contractual nature, since its terms must be agreed upon by the debtor and third-priority creditors, who approve the plan at their meeting. It should be noted that the plan is not subject to agreement with the insolvency officer (clause 11 of Art. 70, Art. 72 of the draft). The plan is subject to approval by the arbitration court (Art. 73 of the draft), which serves as the basis for evaluating the plan as a special type of contract requiring the participation of the court in this contract.

The restructuring plan must contain the following elements: 1) substantiation of the restoration of the debtor's or the debtor's enterprise's solvency and satisfaction of creditors' claims according to the plan; 2) measures to restore solvency; 3) information about the debtor's obligations; 4) preliminary calculation of the amount of satisfaction of claims of third priority creditors at liquidation value without using the plan; 5) information on the liquidation value of the pledged item.

An analysis of the standards for the preparation and approval of the plan allows us to conclude that the legislator included among developers of the plan entities that have no real economic interest in this. In particular, we are talking about a representative of the debtor's employees who are not involved in the adoption of the plan for restructuring and its implementation.

Among the measures aimed at restoring solvency, the conversion of debts into capital for business entities, reorganization, substituted agreement, compensation for release from obligation, which had not been previously used by the legislator, are quite justifiably indicated.

Clause 1 of Art. 71 of the draft law provides for a decrease in the authorized capital of business entities to the value of its net assets. If the assets are negative, a write-off is made to one ruble, and then the plan provides for additional capitalization of the company, in which bankruptcy creditors who approved the restructuring plan are entitled to participate, which significantly increases their interest in the plan's approval.

The draft law retained the legal means of reorganization, which were previously used in the procedures of financial recovery and external management: sale of an enterprise, replacement of assets, fulfillment of obligations and obligations by third parties.

However, it should be noted that new means are also used that will make it possible to motivate creditors to more actively participate in rehabilitation and thus more efficiently reorganize the debtor or his enterprise.

The drawbacks of the project should also be noted: 1) voting by groups of creditors with different interests has not been proposed; 2) no measures have been identified to overcome creditors' resistance to the adoption of the plan.

The reorganization of the debtor should be especially highlighted as a means of debtor's rehabilitation. It seems that to solve the financial problems of the debtor, reorganization in the form of merger and acquisition can be used, which results in the termination of the debtor's activities and the transfer of his debt in the order of universal legal succession to the legal successor. Other forms of reorganization do not appear to be suitable legal means of rehabilitation due to the state of insolvency persisting after the reorganization procedures are complete.

One of the main problems in the use of this means of rehabilitation is the interest of the potential successor in repayment of the debt. The assignee, being the debtor's counterparty, may be interested in preserving the enterprise as a property complex for the production of the products it needs. It seems that reorganization is a completely market-based way of solving the problems of an insolvent debtor. Utilizing this allows for losses to be reimbursed by the legal successor.

There is no doubt that the legal successor needs some preferences, for which the appropriate changes can be made to the legislation. The successor may be provided with tax incentives for a three-year period, loans on favorable terms to overcome the negative consequences of the reorganization. Reorganization can be used on the basis of a recovery plan; in which it is possible to provide for the assignment of part of the losses to the debtor's creditors. Russian legislation lacks legal regulation of extrajudicial reorganization procedures for legal entities that are not financial organizations, although the need for this is long overdue. Extrajudicial reorganization is carried out, as before in Germany, on the basis of a freely made agreement on debt restructuring between the debtor and his creditors. Perhaps, it is precisely due to this form of rehabilitation that there was no sig-

nificant increase in corporate bankruptcies in 2021. However, it also requires that special procedures be regulated for extrajudicial rehabilitation, since legal relations of insolvency are implemented in insolvency procedures. Special procedures can assist with the debtor's balance of interests and ensure his creditors.

3. Conclusion

The performed comparative legal analysis of the reorganization procedures in Russia and Germany allows us to make the following conclusions.

It is necessary to distinguish between the legal means used for the rehabilitation of the debtor and his enterprise, since in these cases different goals are pursued and, accordingly, non-identical legal means are used. The legal means intended for the debtor's rehabilitation should, in our opinion, help to reduce the debts of the subject of rehabilitation and impose part of the losses on the creditors. For this, legal means can be used in the form of the fulfillment of obligations of the debtor by a third party, compensation, and conversion of debt into shares. To attract investments, additional issuance of shares, sale of shares, sale of shares in the authorized capital, provision of a rehabilitation loan, etc. can be used, which will allow the debtor to restore solvency and continue paying its creditors.

The experience of Germany should be taken into account when preparing a rehabilitation plan so that the ability to reorganize both the debtor and his enterprise is confirmed, and both the enterprise and its part can be reorganized. Legislative norms on reorganization are being revised in order to increase the efficiency of legal regulation. In Germany, the term "rehabilitation loan" is used, which is needed by insolvent debtors. Particularly noteworthy are the legislative provisions on the coordination of the resolution plan by parties to the legal relationship of insolvency, providing them freedom of action to resolve the legal conflict. In Russia, the content of the plan is overly regulated, which may be an obstacle to resolving the conflict. In Germany, the termination of court proceedings on the topic of the approval of the plan does not entail the termination of control and monitoring of the property status of the debtor by the court. In addition, after the approval of the plan, the debtor is given the opportunity to independently manage his affairs, fulfilling the instructions of the rehabilitation plan.

We propose to change the legal regulation of plans for restoring a debtor's solvency or rehabilitation of his enterprise, giving the participants of legal relations the right to determine the methods of reorganization at their own discretion, which will contribute to the withdrawal of the debtor from insolvency, help ease changes in corporate control and management, and increase the debtor's chances of obtaining investments.

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