

ON THE PRECONDITION OF THE ESTABLISHMENT OF THE CURRENT MODEL OF THE AMERICAN BANKRUPTCY

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В современном Российском обществе назрело время серьезных перемен. Законодатель озабочен преобладающим количеством ликвидационных процедур, применяемых арбитражными судами в отношении несостоятельных хозяйствующих субъектов, что существенно повлияло на положение Российской Федерации в рейтинге Всемирного банка Doing Business по показателю «Разрешение неплатежеспособности». Указанные обстоятельства напрямую зависят от эффективности правового регулирования несостоятельности.

Для повышения рейтинга России по показателю Всемирного банка Правительством РФ утвержден План мероприятий «дорожная карта» «Совершенствование процедур несостоятельности (банкротства)», одной из целей которой является обеспечение сбалансированного подхода при применении к должникам реабилитационных и ликвидационных процедур в рамках дела о банкротстве.

Механизм функционирования Федерального закона «О несостоятельности (банкротстве)» 2002 г. иллюстрирует воплощение в нем «прокредиторской» модели несостоятельности: значительный вес при принятии решений о ходе процедур принадлежит собранию кредиторов. Если законодатель планирует изменить подход к применению процедур несостоятельности и сделать его сбалансированным, полагаем, будет диаметрально изменен и подход к механизму функционирования несостоятельности в целом: смена положения на «продолжниковую» модель, которая, как известно, успешно функционирует в США.

Целью настоящей статьи является, в-первую очередь, вскрытие оснований построения современной модели банкротства США – ее исторические предпосылки, что видим необходимым для проведения будущего подробного анализа правового регулирования банкротства Америки и исследования процедур реабилитации и ликвидации.

At the present stage of the development of the Russian legal system, Russian Government sees the need to improve the economic performance of insolvency (bankruptcy) proceedings to achieve improvement in “Resolving insolvency” of the Russian Federation in the World Bank’s rating system Doing Business.

In this respect, Russian Government approved the Plan of measures, “road map”, “Improvement of the procedures of insolvency (bankruptcy)”¹. The implementation of the action plan, approved in the “road map”, is aimed at:

¹ Совершенствование процедур несостоятельности (банкротства): план мероприятий («дорожная карта»). Утв. распоряжением Правительства Российской Федерации от 24 июля 2014 г. № 1385-п. <<http://government.ru/docs/13999/>>.

- reducing the time and costs of the procedures applied in bankruptcy proceedings;
- increasing their effectiveness and increasing the size of claims discharge;
- ensuring a balanced approach in the application to the debtor rehabilitation and liquidation proceedings under the bankruptcy cases;
- preserving the estate and maximizing the value of the debtor's assets;
- increasing efficiency of protection of the rights of the social categories of creditors;
- improving the legal regulation of the system of self-regulating organizations of insolvency officers.

According to the analysis of the statistics of arbitration courts of the Russian Federation², the vast majority is bankruptcy proceedings (96,6 %), and less than 0.2 percent of cases finished in restoring debtor's solvency. The implementation of the "road map" is planned to radically change the current situation regarding the lack of demand for rehabilitation procedures. To this end, the legislator will have to make a choice, it seems, will have to conceptually change the approach to the procedures applied in the insolvency of the debtor.

Analysis of the "road map", as well as comments by the representatives of the legislative power, allow to draw a conclusion about the direction of the change in favor of "pro-debtor" model of insolvency, which is successfully operating in America.

Today, more of a "pro-creditor" model operates in Russia to ensure the functioning of which many a year has been spent, and explanations on its application in total constitute a volume comparable to that of Federal Insolvency Law. If the legislator plans to diametrically change the approach to the nature of insolvency, we believe it is necessary to consider the history of the "pro-debtor" model of insolvency operating in the United States.

We take a look at four bankruptcy laws of 19th century – the temporary Bankruptcy Acts of 1800, 1841, 1867 and 1898. Why were they so short-lived, why were they only temporary, why exactly those years – what was the economic and political situation like?

In the course of 19th century, four bankruptcy laws were passed in the United States. All of them were introduced in response to dismal financial conditions of the times³. The first ever Bankruptcy Act was passed in 1800 after the Panic of 1791–1797, the severe recession after a real estate bubble had burst, and many prominent and moneyed men found themselves in dire financial circumstances, most notably former Superintendent of Finance Robert Morris, who was once the wealthiest man in the new United States. The Pennsylvania bankruptcy law of 1785, borrowed from English custom, which offered a discharge of unpaid bills to commercial debtors and expired in 1793, is worth mentioning.

The financial crisis of the decade preceding the Act was activated by the collapse of speculation schemes and the failure of land ventures. "The resulting economic distress far surpassed any that had occurred before"⁴. The uniform law was long due as debtors and creditors living in different states were subject to insolvency and bankruptcy rules of those states.

After much deliberation whether the nation required this law or not in a largely agrarian society (T. Jefferson), whether committee to draft a bill should be appointed, committees reporting and ignoring bills, reproaches that England had a bankruptcy law and America did not, J. Adams signed the bill into law on April 4, 1800. It was lauded as "the Godlike Act" by many as it drew "the line

² <https://zakon.ru/blog/2015/11/30/26_noyabrya_2015_v_tpp_rf_sostoyalas_iv_mezhdunarodnaya_konferenciya_antikrizisnoe_upravlenie_v_sovr>.

³ See: BERGLOF, E. *Power Rejected: Congress and Bankruptcy in the Early Republic*. URL: <http://users.ox.ac.uk/~ofrcinfo/file_links/ofr_symposium2005/howard%20rosenthal%20Power%20Rejected7.pdf>; HANSEN, B. *Bankruptcy Law in the United States*. URL: <<http://eh.net/encyclopedia/bankruptcy-law-in-the-united-states/>>.

⁴ MANN, B. H. *Republic of Debtors: Bankruptcy in the Age of American Independence*. Cambridge, Massachusetts; London, England, 2009, p. 191.

between the honest and fraudulent debtor”⁵. The act favoured creditors over debtors, although it was debtor friendly, and applied only to the “second class”, the wealthier citizens, that is to those who “get their living by thinking, not by labour”⁶, the first class being labourers, farmers and the like, who could never fail, just grew poorer, it did not apply to lawyers or judges either. Furthermore, the Act only provided for involuntary bankruptcy. Those who owed a minimum of \$ 1000 and committed at least one of the acts of bankruptcy listed in the statute could be subjects to bankruptcy. A creditor owed at least \$ 1000 issued a commission of bankruptcy against the debtor. After the creditor proved the debt, the judge appointed two or three commissioners who over saw the process. The debtor had to submit to at least three examinations within forty-two days to get a discharge. Creditors could attend examinations, ask questions disagree with the ruling of the commissioners and ask the judge for a jury trial. Likewise, a debtor could contest the commissioners’ findings. Finally, if two-thirds of the creditors with debts of at least \$ 50 were satisfied, they signed a document consenting debtor’s discharge. If the commissioners decided that the debtor had met the terms of the Act, they signed a certificate of conformity, addressed to the judge who then issued a certificate of discharge relieving the debtor of all liability for all unsecured debts acquired before bankruptcy. However, the proceedings did not stop there. Then a notice was published for the creditors to meet to prove their debts and elect assignees of the bankrupt’s estate. They were to collect all bankrupt’s debts and property, had rights to liquidate the estate thus maximizing the amount distributed among the creditors and to render an account. The first distribution took place within five to thirteen months after the commission issued, the second eighteen months after that date. Discharge and distribution obviously were separate events.

The Act differed very little from its English counterpart on the surface, although in application the two contrasted. The American Act could be exercised by debtors and many filings were cooperative. However, it was costly to implement as it was hard for many to travel to federal courts and offered opportunities for fraud. It was repealed after three years instead of initially intended five.

It is worth noting that all bankruptcy laws in America were triggered by economic turmoil and introduced by Federalist governments and repealed shortly after by the Republicans or, in the case of the 1841 Act, by the defectors from the party line. After the Panic of 1819, The Republicans, who enjoyed about 40 years of power, applied a bailout of private debt, taxpayers footing the bill.

The Bankruptcy Act of 1841 was triggered by the Panic of 1837. Again, its opponents feared that it would harm farmers, again, it was the Whig legislation, who secured their election victory promising the law, again, the Act discharged the debts of many a debtor. However, in addition, there was something original – it offered voluntary as well as involuntary bankruptcy and it included all individual debtors although it failed to provide for corporations, mainly banks at the time. Nonetheless, after the death of President Harrison, its enthusiast, his successor Tyler signed its repeal in 1843.

As 19th century wore on, the demand for bankruptcy legislation grew with financial downturns and decreased as they passed, thus consideration of the next act did not resurface until the Panic of 1857 and the subsequent onset of the Civil War, which inflicted financial distress on Northern merchants. Likewise, southern debtors lost much of their assets and labourers and sought relief. However, the Act was unpopular with both debtors and creditors. Debtors believed the law made them victims while creditors felt the legislation gave room for debtors to abuse it⁷. Involuntary bankruptcies for individuals, not just merchants, were permitted under this Act. The 1867 Act lasted longer than its forerunners and was amended in its course of 11 years⁸.

⁵ Op. cit., p. 1.

⁶ Op. cit.

⁷ FRIMET, R. *The Birth of Bankruptcy in the United States*. *Commercial Law Journal*, 1991, p. 186.

⁸ HILLIARD, F. A *Treatise on the Law of Bankruptcy and Insolvency*. The Lawbook Exchange, 2003, p. 511;

It was not until 1898 when a permanent bankruptcy act was passed after much lobbying spanning almost two decades from The National Convention of Representatives of Commercial Bodies. The permanent act was long overdue as collections laws varied from state to state, they tended to be biased against foreigners and the creditor who came to court first had the prerogative to claim all the assets necessary to pay his debts. Also by the end of the 19th century there was a rise of local and national business and commercial organisations, therefore it was easier to lobby for a bankruptcy bill. The 1898 Bankruptcy Act was designed to aid creditors in liquidation of debtor's assets. The cost was of major importance since administrative costs of previous acts were excessive and the majority of cases needed only a judge and a trustee. The Republican (again the political right) control of power and the emerging of the bankruptcy bar and the need for more bankruptcy lawyers made it impossible to repeal it⁹.

This Act had lasted and been amended numerous times up to 1978. The Supreme Court prescribed rules of bankruptcy procedure for the district courts pursuant to section 2075 of Title 28, United States Code. Pursuant to that section, the Supreme Court transmitted to Congress (not later than May 1 of the year in which the rule is to become effective) a copy of the proposed rule. The rule took effect no earlier than December 1 of the year in which the rule was transmitted unless otherwise provided by law¹⁰.

The Bankruptcy Reform Act of 1978¹¹ codified and enacted the law relating to bankruptcy as Title 11 of the United States Code, entitled "Bankruptcy". Section 405(d) provided that the rules prescribed under section 2075 of title 28 of the United States Code and taken legal effect on September 30, 1979, applied to cases under title 11, to the extent not inconsistent with the amendments made by that Act, or with that Act, until such rules were repealed or superseded by rules prescribed and effective under such section, as amended by section 248 [247] of that Act¹².

To imagine the way the procedures of insolvency (bankruptcy) will look like in Russia, in case of the "road map" implementation, is possible only by detailed analysis of the procedure rules of reorganization and liquidation in modern day America.

LAWS AND REGULATIONS

1. The Bankruptcy Reform Act of 1978. *Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2549.*

2. Federal Rules of Bankruptcy Procedure. <<http://search.uscourts.gov/search?affiliate=uscourts.gov&locale=en&query=rules%20of%20bankruptcy%20procedure>>.

3. Совершенствование процедур несостоятельности (банкротства): план мероприятий («дорожная карта»). Утв. распоряжением Правительства Российской Федерации от 24 июля 2014 г. № 1385-р. <<http://government.ru/docs/13999/>>.

4. О несостоятельности (банкротстве): Ф3 РФ от 26 октября 2002 г. № 127-ФЗ. *СЗ РФ*, 2002, № 43, Ст. 4190 (с последующими изменениями).

THOMPSON, E. L. *The Reconstruction of Southern Debtors: Bankruptcy after the Civil War.* Athens: University of Georgia Press, 2004, p. 199.

⁹ SKEEL, D. A., Jr. Bankruptcy Lawyers and the Shape of American Bankruptcy Law. *Fordham Law Review*, 1998, Vol. 67, No. 2, p. 497-522.

¹⁰ See: Federal Rules of Bankruptcy Procedure. <<http://search.uscourts.gov/search?affiliate=uscourts.gov&locale=en&query=rules%20of%20bankruptcy%20procedure>>.

¹¹ The Bankruptcy Reform Act of 1978. *Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2549.*

¹² See: Federal Rules of Bankruptcy Procedure. <<http://search.uscourts.gov/search?affiliate=uscourts.gov&locale=en&query=rules%20of%20bankruptcy%20procedure>>.

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9. MANN, B. H. *Republic of Debtors: Bankruptcy in the Age of American Independence*. Cambridge, Massachusetts; London, England, 2009. 358 p.
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О ПРЕДПОСЫЛКАХ ВОЗНИКНОВЕНИЯ СОВРЕМЕННОЙ МОДЕЛИ АМЕРИКАНСКОГО БАНКРОТСТВА

Елизавета Юрьевна Алексеева

Р е з ю м е

В условиях отсутствия законопроекта и представлений о ближайших будущих изменениях правового регулирования процедур несостоятельности в России, вопрос об истории возникновения «продолжниковой» модели несостоятельности, функционирующей много лет в США, видится актуальным.

Анализируя историю становления современной модели американского банкротства, мы рассмотрели четыре закона о несостоятельности 19 века, которые были недолговечными по причине смены экономической и политической ситуации в стране. Первоначально законодательство США характеризовалось дружелюбностью кредиторами, а институт банкротства применялся лишь принудительно к должникам «второго сорта». Законодательные акты 1800 г., 1841 г., 1867 г., 1898 г. характеризовались постепенным развитием продолжниковой концепции, которая восторжествовала в Акте о реформе законодательства о банкротства 1978 года.

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