Impact Factor:	ISRA (India) = 1.344	SIS (USA) = 0.912	ICV (Poland) = 6.630
	ISI (Dubai, UAE) = 0.829	РИНЦ (Russia) = 0.234	PIF (India) = 1.940
	GIF (Australia) = 0.564	ESJI (KZ) = 1.042	IBI (India) = 4.260
	JIF = 1.500	SJIF (Morocco) = 2.031	

SOI: 1.1/TAS DOI: 10.15863/TAS

International Scientific Journal

Theoretical & Applied Science

p-ISSN: 2308-4944 (print) **e-ISSN:** 2409-0085 (online)

Year: 2017 **Issue:** 01 **Volume:** 45

Published: 30.01.2017 **http://T-Science.org**

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SECTION 32. Jurisprudence.

CONTEMPORARY TENDENCIES IN THE EVOLUTION OF INSOLVENCY LAW

Abstract: *This article is intended to study the tendencies in the evolution of the insolvency law based on the reforms that have been effected in the legislation of the European countries. The relevance of this issue is premised on the adjustment of the insolvency laws to the changing world. This issue has become significant in economics, even more so after 2008 with the onset of world recession. In an effort to fight through the negative consequences of the bankruptcy of the enterprises the countries faced the need to change their policies and create new concepts and legislative approaches. In the context of the foregoing is the purpose of this article, i.e.: to draw the main contemporary tendencies relative to the evolution of the insolvency law in the European countries on the basis of a normative analysis and comparative law research.*

Key words: *insolvency, law, legislation, creditor, debtor, country.*

Language: *English*

Citation: Bachvarova M (2017) CONTEMPORARY TENDENCIES IN THE EVOLUTION OF INSOLVENCY LAW. ISJ Theoretical & Applied Science, 01 (45): 67-71.

Soi: http://s-o-i.org/1.1/TAS-01-45-12 ***Doi***: crossref https://dx.doi.org/10.15863/TAS.2017.01.45.12

JEL K 200, 330, K 33

Introduction

The insolvency laws have a long history. The processes relative to their evolution are underpinned by the type of the legal system: the common law [1, p.234] or the civil law [2, p. 284].

Depending on what approach is being applied to the insolvent debtor some authors distinguish between the following stages of formation: a) a period of the debtor's personal liability; b) a period of the debtor's property liability; c) contemporary stage of development of the institution [2, p.5].

Historical data for the creation of rules connected with the settlement of the relations between a creditor and a debtor who is unable to discharge his liabilities is contained in the Code of Hammurabi, the laws of Manu, XII Tables [3,p.2]. At this initial stage the main emphasis is placed on the debtor's personal non-property liability accompanied by a physical punishment. The period of development of the Roman law is marked by a significant progress. The viewpoints on liability smoothly evolved to come down from personal liability to property liability and to the idea of the actual debt collection. An insolvency pre-image creation process as a legal institution began to form.

The insolvency-related standards gradually became an integral part of the objective law. It is against this background that, due to the specific character of the public relations it governs, it was formed as an independent legal institution. The major purpose of the standards is connected with the creation of legal mechanisms which aim at arranging the relations between the debtor and his creditor, such as: a) the creditors' entry into possession of the whole of the debtor's property («missiones in possessionem») and sale of the property («venditio bonorum»). These Roman law-created mechanisms are characterized by sustainability and historical succession, and some elements of them are applied nowadays as well.

The mechanisms to overcome insolvency which were developed in the Republic of Venice in the 13th century, such as: a) the legal winding-up in France; b) the moratorium in Italy; c) the voluntary bankruptcy in Germany; and d) the Deeds of Arrangement in England, are considered to be the analogues of today's rehabilitation procedures.

At the present stage of development, the insolvency law is influenced by the international development of the commercial relations, the foundation of economic alliances within the European Union, as well as the interaction among the separate legal systems on the basis of particular principles and policies.

Methodology

The research is based on: a) studies in the specialized literature [5]; b) analysis of the statutory instruments [6, p.2] of economically developed countries with traditions and practices in this area [7, p.967]; c) Directives of the European Commission.[8]

Results

Due to historical reasons related to the origin and development of the legal systems, there is no common terminology reflecting the trader's actual status of inability to pay his debts. Illustrative of the Anglo-Saxon law is that the terms insolvency and bankruptcy are regarded as equal in meaning. Alternatively, in the civil law countries both terms are considered to have a different subject and content. The term bankruptcy refers to the state of a fraudulent bankruptcy or a similar legal act (offense). When the debtor is in a state of being unable to pay his debts due to management errors, assumed economic risks, etc., that is when there is no intention involved, then the terms bankruptcy (France) and insolvency (Germany) are used.

Notwithstanding the differences in the economic development, a characteristic feature of the approaches the countries use to regulate the institute is that they reflect the leading policies on the problems of insolvency. At the very core of the US legislation lies the concept of the *„fresh start"* [9, p.71-74]. It is intended to discharge the debtor from his personal liability and allow him to start a new business project by avoiding the judgment in bankruptcy. In the Continental European countries the policy within the period from 2011 through 2014 was based on the *second chance* idea. It suggests reestablishment of the debtor's solvency after closed insolvency proceedings and reintroduction into the economic turnover.

In the context of the studied range of problems a particular significance is attributed to the theoretical models which were approved in the doctrine for explaining the essence and nature of insolvency as a complex phenomenon. What is specific about it is that there is a convergence of both private (debtor's, creditors', employees') and public law interests (country, society). In this reference the *Normative theory* is substantiated and also noted as a procedure theory [10, p. 938] and a Contract Theory Approach to Business Bankruptcy [11, p.1822]

The legislative approaches are also tightly linked with the goals and outcomes the countries establish in the implementation of the insolvency proceedings. On this basis, according to the legally protected interest, two extreme systems are differentiated: pro-creditor (England, Germany) and pro-debtor (USA, France).

The US legislation (the Bankruptcy Code) gives priority to the debtor's (consumer) interest, which in theory affords grounds to support the thesis for the presence of an American model. It is directed to a business recovery by the use of rehabilitation procedures. Substantial place within the system of regulations is given to the reorganization proceedings in pursuance of Chapter 11 of the Bankruptcy Code. The procedure is applicable to companies which possess assets, where the professional management is expected to be able to redeem their debts within a certain period of time. A significant factor here is that the management is kept by the debtor, who is in possession of his assets. His activities are strictly controlled by the court, the creditors and a special body engaged in the monitoring of the insolvency proceedings. The debtor is in a dual position, termed debtor-in-possession. It is believed that the officers of the company are better aware of the specifics of both production and market requirements as compared to an implied external management. The court's involvement is usually required when things are done the value whereof exceeds the usual volume of business. When an objection is filed by the creditors, then an appointment of external managers (trustee) is likely to occur.

In Europe, the French legislation (Code de commerce) refers to the system which is radically thought to be directed towards protection of the debtor's interests. Priority is given to the continuity of personnel and maintenance of the enterprise current status. In England and Germany preference is given to the creditor's interests, where the debtor's assets are subject to the satisfaction of their receivables.

After 2011-2013 the differentiation of the countries in terms of the legally protected interest may be taken as conventional due to the reforms carried out in the national legislations in Europe. At the core of the changes that have been introduced lies the implemented second chance policy which suggests creation of legal measures for resumption of the insolvent debtor's activities, and clear distinction between the loyal entrepreneurs and the fraudulent bankruptcy. Consequently, the European Commission suggests optimization of the legal practice and creation of legislative measures to allow opportunities for recovery of the enterprises after their winding-up [12, p.3-5]. Nowadays, the insolvency-related problems are treated comprehensively, and insolvency is regarded as a social phenomenon which not only directly touches

on the interests of the debtor and his creditors but also makes an overall impact on the social rights of the employees and the condition of the economy in general. The main trend is to keep laws current so that a balance could be established in the related parties' interests in the outcome of the proceedings: debtor, creditors, employees, country, and society.

Following certain recommendations of the European Commission a tendency has been formed after 2012 towards harmonization of certain areas in insolvency in Europe. The individual countries implemented recovery procedures directed towards preservation of the feasibility of the enterprises notwithstanding the presence of financial difficulties. On this basis specific quasi-team and/or hybrid productions depending on the characteristic features and specifics have been established, driven by the particular economic conditions. An essential characteristic feature of the quasi-team production is that the debtor is supervised by the court or an administrative body, which affords him the opportunity to perform reorganization at a stage preceding the opening of the formal judicial procedure. In hybrid productions the debtor remains in control of the business and management of his enterprise, but is still under the supervision of a court or other administrative supervisory authority. In this direction have occurred reforms in the legislations of France, Germany, Romania, Austria, Belgium, Greece, Italy, Malta, Poland, etc. [13, p. 5-7]. There is a great variety of mechanisms, but what brings them together is their goal and intended purpose: to allow opportunities for restructuring and reorganization at a stage preceding the insolvency proceedings.

The main conclusion is that the new approach in the European countries includes improvement of the statutory regulation by implementing mechanisms for early prevention of insolvency at a stage preceding the formal litigation proceedings. This allows differentiation of the following *stages within* which the enterprises in financial difficulties may take advantage of: a) application of early prevention mechanisms; b) entering into out-of-court agreements; c) judicial procedure; d) resumption of activities;

In view of the time they were undertaken, they could be divided into the following two main groups: *out-of-court* and *judicial procedures* for overcoming bankruptcy. A key importance is given to the out-of-court agreement, the parties thereto being the debtor and his creditors. This agreement may be concluded without the need for litigation, as well as within the insolvency proceedings. The conclusion of such an agreement as a recovery measure has been used in England since 1869 and in the USA since 1874, whereby the debtor used to pay off his debts by installments, thus preventing his property from being sold. [14, p. 3]

The American law exerts a significant impact on the improvement of the European legislations. A typical cross-impact example is the Italian legislation, where the concordato preventive institute has been implemented since 2012. It allows the debtor to not only file an application, but also propose a plan for debt reconstruction, where the absence thereof is taken by the court as grounds for rejection. When satisfied, the debtor remains in possession, and the court appoints a judge commissioner to monitor the implementation of the plan.[15, p. 1-2]

In Spain, following the amendment of the legislation in 2011, the restructured agreement was introduced, which is based on the American preliminary agreement (prepackaged out-of-court agreement) as per Section 11 of the US Code. A similar procedure has also influenced the amendments passed in the French legislation with the newly introduced procedures: a) defense, and b) conciliation procedure. The defense procedure in the French law includes a period of monitoring under the control of the insolvency court for a period of 6 months subject to the existence of satisfactory evidence of financial difficulties which may subsequently cause suspension of payments. A characteristic feature from its participants' point of view is that a motion for institution of these proceedings is admissible only on part of the debtor. The protection of the employees' and officers' interests is exercised by a specially formed committee which is a body for protection of their interests. The creditors are not parties to the proceedings. The defense procedure may be officially transformed into insolvency proceedings when the debtor's insolvency is being established in the course of the proceedings.

In the conciliation procedure the term within which it must be done is 4 months only if the suspension of the payments by the debtor does not exceed 45 days. The court appoints a special person, called conciliator, who is expected to assist in the conclusion of an agreement with the creditors. The said agreement is subject to approval by the court, whereby it becomes enforceable and leads to termination of proceedings. The court decision is not appealable.

A gain in the international law is the UNCITRAL Model Law on the cross-border insolvency adopted by the United Nations Commission in 1997. It has been implemented by Great Britain, Poland, Slovenia, Romania, USA and Japan in their domestic legislations. Its implementation facilitates the cooperation between the courts and the appropriate authorities.

After 2015 the modernization of the European legislation started to follow the new approach to bankruptcy and insolvency of enterprises. [16, pp.7-16] The main purpose is to guarantee, regardless of

where a certain enterprise is located within the European Union, access to the national legal framework which will afford opportunities for reconstruction at an early stage in order to derive the highest possible benefits for creditors, employees, owners and the economy in general.

Conclusion

Based on the performed research, the following inferences and conclusions have been drawn.

In the area of the insolvency law there is a worldwide legal framework modernization intended to a) change the approach used to determine the goals and aims of the legal framework; b) develop the enterprise recovery institutes; c) regulate the out-of-court procedures for the purpose of preventing the debtor from being declared insolvent;

In view of the dynamics of the public, political and economic relations, the contemporary law undergoes modernization as well. It reflects *two probable tendencies*:

a) harmonization of the European national legislations on substantial insolvency matters, and

b) convergence of two main legal systems: the common law and the civil law. [17, p.23]

At present, with the adoption of Regulation 2015/848, the main approach has expanded towards hybrid, i.e. pre-insolvency procedures at an early stage, in the presence of a probable insolvency. Therefore, prevalence is given to the tendency towards harmonization of the European national legislations.

In view of the foregoing, a new point in insolvency as a type of civil procedure is the presence of a period of monitoring within which the recovery procedures are performed. There is a change in the legislative model that governs the insolvency proceedings. After a motion is filed with the relevant authority, they progress as a two-phase proceeding. The first phase includes the application of rehabilitation procedures depending on the national legislations, where the grounds therefor are the presence of an endangering insolvency. They may either lead to termination of the proceedings subject to the existence of an agreement, respectively adoption of a plan with the creditors, or to a judgment for commencement of insolvency proceedings. In order to make distinction between the two phases it is possible to bring in the term non-substantive proceedings which combines specific hybrid and quasi-team productions intended to move beyond the formal judicial procedure and restore the debtor's solvency. In this sense they represent a required element in the overall production.

In conclusion, the similarity in the separate legal systems (common law and civil law) is based not on the identity in the legal regulation, but on the common approach to the global problem of insolvency. As can be seen from the foregoing, the insolvency law philosophy is undergoing changes as well, which in terms of the liquidation of the insolvent enterprises is focused upon their recovery and protection.

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