Man In India, 97 (20) : 475-493

ECONOMIC AND LEGAL REVIEW OF PRETRIAL WARNING OF INSOLVENCY IN FOREIGN LEGISLATION

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Abstract: In this paper we analyzed legal nature of pre-trial warning of insolvency of an economic entity, revealed the concept and content of institution of bankruptcy of foreign companies, conducted a study of existing possibilities to prevent negative consequences of insolvency court proceedings in Russian economy. The article analyzes features of the pre-trial warning of insolvency (bankruptcy) of business entities engaged in entrepreneurial activities abroad, analyzes international practice of legal regulation of pre bankruptcy prevention, drawing on foreign experience on legislative level to regulate activities of local entrepreneurs in the area of pre-trial warning insolvency of economic entities.

Keywords: Legal status of a business entity, legal regulation, pre-warning, insolvency (bankruptcy).

INTRODUCTION

Institute of insolvency (bankruptcy) in foreign countries has quite a long history.

Dynamics of changes in applicable foreign legislation of bankruptcy, extensive practice and application of scientific research suggests a significant relevance of insolvency problems for modern Russia.

In recent years, relevance of the problem is increasing due to development of business relations and need to ensure stability of civil turnover.

Insolvency institute is gradually becoming a necessary part of a market economy. At the same time, whole bankruptcy institute society still perceived as extremely negative, destructive. And indeed, despite the fact that insolvency institute has a rehabilitational orientation now, any bankruptcy process has a number of negative consequences, such as mass dismissal of workers, suspension of production, destabilization of market relations in connection with non-payments and liquidation of business entity. Legal procedure often leads to undue delay in payment or non-payment of full wages. If arbitration management is inefficient and breach of the balance of interests is in direction to unscrupulous lenders, destruction of enterprise, its unjustified splitting and disbanding are possible.

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As a consequence, existing relationships in this area significantly and unreasonably change, entity, which takes quite steady position and quite capable of real and productive function, disappears.

Market relations require creation of an effective mechanism to eliminate not profitable for operating entities from economic circulation. In this regard, there is a growing role of insolvency institute, because it seeks to promote resolution of problem of insolvency of individual entities.

Under these conditions, our study on the problems of pre-trial warning of insolvency of an economic entity abroad seems quite in time. It allows us to formulate a number of definitions of basic concepts, to reveal contents and essence of events, procedures for the Russian economy.

METHOD

Following methods were used in the article: analysis of documents, affecting various aspects of the problem being studied; analysis of statistical data; a secondary analysis of data from Russian and foreign scientists engaged in similar research.

RESULTS

1. General-theoretical aspect of pre-trial warning of insolvency of economic entities: The modern period of development of legislation on pre-trial prevention of bankruptcy of economic entities is quite interesting.

Much of the research is dedicated to the general insolvency, bankruptcy essence, status of arbitration manager, insolvency procedures, participation of creditors in bankruptcy court proceedings, their status, position, etc. In accordance to the purpose of the present study, the most interesting are works devoted to general theoretical issues of bankruptcy and essentially definition of key terms, as general situation of insolvency institute is basis for development of legislation on pre-trial prevention of insolvency of an economic entity.

We analyze the opinion of some authors about the place of the institution of bankruptcy in legal system. Steinfeld said: "Bankruptcy is a complex interdisciplinary legal institute, based on standards of civil law, combining elements of legal regulation, both private and public relations. Relations in sphere of bankruptcy are regulated to some extent by civil, arbitration procedure, administrative, financial, budgetary, labor legislation. However, the key regulation is up to the civil law. (Steinfeld R., Steinfeld S, 2014, Radygin A.D., 2005).

R.G. Smirnov adheres to a similar position, specifying and developing the idea: "Insolvency law, as external form of right of expression, suggests that relationships, forming in bankruptcy, have different nature and they are governed by private law (legal relationship between debtor and its creditors) and by norms of public law (for example, a legal relationship between arbitral tribunal and parties involved

in bankruptcy case). Legal relations of insolvency should be considered as a legal relationship, forming between debtor and its creditors, which is a result of a private regulation. As for relationship between arbitral tribunal and parties which are involved in bankruptcy case, it is public (procedural) and legal by its nature". (Smirnov, 2004) We cannot doubt this view.

Legal relations of debtor and creditors are not deprived of a public aspect, especially if we talk about prevention of pre-trial insolvency. Firstly, there is a multiplicity of creditors in these relations, in addition, one of creditors may be the state on behalf of representative body. If tax liabilities are large, there is significant public interest. Secondly, in the case of insolvency, for example, of city-forming enterprise, its collapse will affect interests of entire population. Therefore, in our opinion, public nature of relationship failure is not determined only by participation of arbitral tribunal in it.

The next important aspect is to identify key concepts for institution of bankruptcy. For example, Krashchenko D.A. underlines the need for a different approach in development of scientific and legal model of bankruptcy. "It is necessary to "cut" the concept of "insolvency" and "bankruptcy". Failure must be seen as a failure of a business entity to satisfy claims of creditors on monetary obligations and (or) to fulfill obligation to make compulsory payments. By the concepts of "insolvency" and "bankruptcy" status of the debtor's insolvency is specified, that gets its legislative basis in form of criteria and conditions. Bankruptcy is the last stage of growing process of debtor's insolvency, which should be the subject of an arbitration court." (Krashchenko, 2001) This position is quite remarkable in framework of present work. It is convenient for demarcation of pre-trial relations of insolvency from all other existing in process of bankruptcy.

Noteworthy in relation of pre-warning of insolvency of an economic entity A. Rubenstein's reasoning about purpose and direction of bankruptcy law. "Institute of insolvency, regardless of legal system has a total useful social purpose – to allow a specific crisis situation in regard to debtor and creditors, consisting in debtor's inability to fully satisfy claims of creditors. Ways to achieve this goal set direction of national legislation, which determines priorities in protecting interests of creditors and debtor, and depend on legal traditions, economic, political and social situation in the country" (Rubinstein A., 1982).

Kravchenko E.A. offers a little bit different view on the purpose of bankruptcy. "At the present stage as a result of evolution of institution of insolvency, important goal of bankruptcy procedures, in addition to satisfaction of creditors' claims, is to restore the solvency of the debtor; in this connection, modern bankruptcy law faces the challenge of maximum protection of interests of the debtor in course of insolvency proceedings". (Kravchenko, 2013) Indeed, there is a change in emphasis towards restoration of solvency. In this case, current practice is that the number

of debtors, who restore solvency in judicial procedures is negligible. It is also a small number of creditors who have achieved full satisfaction of requirements of court in a bankruptcy case. These circumstances make it possible to study the settlement of the problem of non-payment of an economic entity during pre-trial stage. Participants of this process are lenders, independent mediators, experts on crisis management, etc.

Today the situation is that if in respect of economic entity there is a court proceeding in its bankruptcy, it will be eliminated (there are only a few exceptions, when solvency is restored). Obviously, introduction of new rehabilitation procedures, such as financial health, can not influence the situation.

Unfortunately, in practice, the bankruptcy process is initiated by creditors in the case that the debtor already has a multi-million dollar debt and had lost most of his property. In such circumstances, "anti-crisis person" (specialist) is unable to help. According to the author, insolvency can be prevented and overcome just before the trial. This is possible in conditions when debtor traces his financial condition and timely responses to emerging issues, as well as in terms of cooperation with creditors.

The problems of prevention the bankruptcy in researches are becoming more and more popular. A.I. Goncharov in his doctoral dissertation identifies internal and external factors affecting the solvency, formulates criteria of insolvency, concept of restoring solvency, forms complexes of legal remedies of various kinds (reduction accounts payable and receivable, increase incoming and outgoing, cash flow rationalization, etc.). (Goncharov, 2006).

However, existing research on the issue, in fact, only "set the pace" for further work in this direction. Despite the urgency of the problem, it is badly developed. There is no unity of terminology, clear legal structures, legal means to prevent bankruptcies, holistic concept of legal regulation of these relations.

Statements and proposals to improve legal regulation of insolvency are rare today. They were stated but they have not actually been discussed, they are not rated and not perceived by practice.

According to the authors, it is an urgent problem of determining the number of persons in respect of which, warnings about insolency are rare. In order to answer this question, it is necessary to determine, who can now be bankrupted? Who, what subjects today are subdued of the threat of insolvency? It is possible to prevent bankruptcy of only one to whom it threatens. Current bankruptcy law contains legal definition of the debtor. This citizen, including an individual entrepreneur or a legal entity, has been unable to satisfy the claims of creditors on monetary obligations and (or) to fulfill the obligation to make mandatory payments for a period established by this federal law.

In these circumstances, any legal person, a citizen can be declared bankrupt under certain circumstances, including individual entrepreneur.

Without a doubt, each of these entities is in a position to take steps to avoid impartial status of bankruptcy. In this respect, we can speak of pre-trial prevention of insolvency. Yet, at the pre-trial stage it is not quite correct to talk about debtors, because at the moment they cannot have a debt to anyone, but take measures to prevent bankruptcy. For this reason, the term "debtor" does not apply to delineate the range of subjects of pre-trial prevention of insolvency.

In this regard, the range of subjects includes legal entities and individual entrepreneurs. With regard to use of a single term (in accordance with the purpose of scientific research), the authors suggest the use of the term "economic entities". This term primarily handles antitrust law, it is also used in some research. It is used due to the fact that this term more fully outlines the range of subjects for which the prevention of bankruptcy can be taken. We agree with opinion of S. Weiss, who, pointing to the differences of the term "business entities", in particular, said: "They relate to each other in the same way as economic and entrepreneurial business. Economic agents do not always acquire the status of entrepreneurs. For example, non-profit organizations, as a rule, are not engaged in business, although they take part in some business activities" (Weiss L., 1990).

The need for scientific research of pretrial warning of insolvency and their practical implementation is defined by negative perception of insolvency institute in modern Russia. From the point of view of society, it is a tool in hands of speculators and path to destruction, rather than a natural and positive way to solve the problem of non-payment.

The current bankruptcy law contains articles defining principles of bankruptcy or its objectives. In part, therefore, many people believe that bankrupt means to break up and destroy, which is not true. Insolvency institute has another path: keep what it has and try to improve it and optimize it. Porokhov M.G. points out: "The legislation on bankruptcy should not be aimed at punishing dishonest debtor but, at the same time, must rehabilitate honest. Application of bankruptcy law must comply with objectives of bankruptcy (Porohov, 2005).

The bankruptcy should not be taken as a measure of punishment. The aim is not to punish the debtor but to normalize relations between insolvent debtor and its creditors".

Awareness of rehabilitative nature of insolvency institute found expression in such procedures as financial rehabilitation and external management. Today it is clear that Court's participation in restoration of solvency is not necessary, and phenomenon of pre-warning of insolvency can be alternative to existing negative practices.

Therefore, one of the leading ideas of all Russian legislation in the field of economics is the idea of avoiding, preventing cases of bankruptcy of enterprises (in the first place commercial organizations).

In these circumstances, it is necessary to supplement legislation of bankruptcy rules, defining goals and objectives of the insolvency institute, because other industries and institutions traditionally have similar means. This will significantly shift the focus towards healing and serve as a push for development of effective legislation in the future.

In scientific studies, such proposals have received support. Mark Howman suggested the following idea: "Insolvency law serve several purposes, the most important of which are the following: orderly resolution of debtor's affairs, rather than complete freedom of action for all; an increase in the refund (including costs of procedures) in the interests of all parties; business solution for (and/or legal entity) a viable business; "Fair" distribution of funds between parties (although what "fair" mean is the subject of disputes); prevention of violations by creating the possibility of spread of illegal transactions entered into prior to bankruptcy, and introduction of other sanctions; promoting restructuring attempts during bankrupt period (or at least they are unobstructive); maintenance of public confidence in asset management process of insolvent debtors and ensure a predictable outcome of procedures; by all of above decrease in prices and increase availability of credit". (Howman, 2011).

Proposals for purposes of declaring bankruptcy and objectives were expressed before the adoption of a new law about insolvency. Further, they were supported by other studies but we did not reflected in current law, unfortunately.

The authors of this study supported the idea of fixing objectives in the law about insolvency and offered their formulation: painless removal from economic circulation of insolvent business entities, aging production technology and manufactured goods; maintaining dynamics of the civil turnover, competition, facilitating introduction of new techniques and management systems; redistribution of ownership of basic means of production to their most efficient use, renewal of fixed assets; commensurate with orders of distribution of proceeds among transactors, including pre-trial procedures; prevention of offenses in business environment, aimed at destabilization of financial condition of economic entity for the purpose of its destruction, hostile takeover, seizure.

Thus, institution of insolvency in modern law is going through the next stage of development. Negative actual practice had no alternative to bankruptcy proceedings which makes us contact rehabilitation orientation of institute and hidden potential of alternative (non-judicial) procedures.

The authors of this study are deeply convinced that pre-trial component of relations within insolvency institute aims to achieve such objectives as preservation

of viable enterprises, business, protection of business entities from hostile takeover, seizure. These relationships will undoubtedly have features that allow to speak about them as a special kind, a group that is specific in comparison with relationship, is the subject of business law, institution of insolvency.

In our opinion, distinctive features of these relations can be identify following way. Firstly, it is public nature of relationship. Their publicity is manifested in parity of all creditors against the debtor (regardless of claimed grounds of its debt, individual creditor's legal status). Lenders in this relationship do not act independently and collectively. Crisis of non-payments for debtor is allowed to them and creditors with the need to meet needs of all, not just of one person.

Secondly, studied relationships are focused on prevention of crisis in the activities of entity and its solvency recovery. All actions of participants (debtor and creditors) pursue the same goal – to resolve payments crisis.

Third, in these relations "third party vote" do not interfere (arbitration managers, regulators, courts). Payments crisis resolution is carried out without regard to debtor's bankruptcy court procedures.

The entity, in this case, overcomes difficulties on their own, without supervision or management. It decides what action it should take, whom to draw for their implementation and who is responsible for the result. Financial difficulties, in this case, become an objective factor that has priority wagging behavior of an economic entity. The main purpose of business – profit – in this situation is no longer a primary. The entity enters into transactions or in order to release funds to pay off debt, or to obtain payments reprieve (Izyumov, Khairullina, 2015).

Activities of prevention of bankruptcy are increasingly becoming a subject of scientific research in the law field. However, statements on the issue have isolated nature. There are points of view which are extremely controversial and rarely sufficiently substantiated. The authors use a variety of terms and wording of studied phenomenon, which often does not have legal character. As a result, today's science does not even universally accept term to describe relations developing implementation of prevention of bankruptcy activities.

Author of the present study proposes the use of the term "pre-warning of insolvency of an economic entity", which, in our opinion, is mostly completely and accurately reflects diversity of content and characterizes essence of phenomenon of legal position.

It is proposed to determine an activity of an economic entity (legal entity or individual entrepreneur), carried out by them on their own or in cooperation with creditors, third parties, aimed at pre-warning or pre-insolvency solvency restoration.

We believe that the use of above-mentioned definitions will determine positive impact on legal regulation of pre-warning of insolvency. For example, focus of this activity becomes apparent. Speaking about prevention of bankruptcy, it will be

possible only within the framework of judicial rehabilitation procedures (external control, financial recovery).

Changing legislative approach at the same time contributes the formation of the unity and uniformity of terminology and legal technique.

Using this position and definitions above, there are formulated a number of conclusions further, which will serve as the basis for further study and will determine its direction.

Use of the term "economic entity" will successfully circumvent some collisions of terms. We believe that any legal entity may be recognized as the bankrupt according to the current law but not any legal entity can be called, for example, the subject of the business law. So as more acceptable it seems a term that implicitly combine this against commercial and non-profit organizations. The term "economic entity" seems to be universal, which is a collective concept and combines an individual entrepreneurs and legal entities.

The current legislative approach in which the concept of mixed insolvency and bankruptcy and insolvency category is not used is outdated and does not meet today's established practice and level of development of scientific thought.

The legislation is necessary to revise terminology. What, for example, is the term "bankruptcy prevention" mean? Bankrupt debtor is recognized as part of the trial after procedure and establishment of observation of further inappropriate conduct of rehabilitation procedures. In the meaning of the Law within the framework of these procedures and should prevent bankruptcy. But if there is no court procedure, it turns out that there is nothing to prevent.

How should the person determine the position of the debtor on the stage of monitoring procedures, external control, financial recovery? He had not yet been declared bankrupt, and it is not applicable in view of the legislative approach and bankrupt term is inapplicable.

In these circumstances, limitations of existing legislative approach are obvious. Legislation now needs to be more "alive" and flexible. It is necessary not only to distinguish between the terms "bankruptcy" and "insolvency", but to legislate the definition of "nonsolvency". This will significantly expand boundaries of legal regulation and streamline existing relationship on extrajudicial stage of conflict settlement of arrear.

We propose to improve legal regulation of pre-warning of insolvency of an economic entity by following definitions of insolvency, nonsolvency and bankruptcy.

Insolvency is an inability of an economic entity to properly fulfill at the stage of maturity their financial obligations to creditors.

Nonsolvency is failure of an economic entity to fulfill in a proper manner their financial obligations to creditors within three months or more, including framework

of judicial bankruptcy procedures (observation, financial rehabilitation, external management).

Bankruptcy is established by a court inability of an economic entity to repay claims of all creditors.

Thus, at the present stage of development of Russian legal science, this research becomes particularly relevant in the field of pretrial prevent of insolvency. This phenomenon has now been studied in a very limited extent. The spectrum of the issues is being adjudicated quite wide, and that illustrates the lack of a single term to denote the number of persons in respect of which it is possible to prevent insolvency.

Legal norms, dedicated to pre-insolvency proceedings, are now starting to separate in different regulations of various hierarchical level, which indicates imminent need to create in the nearest future full codified act, which will be fully addressed to solve these issues on the level of federal law.

2. Economic and legal characteristics of the pre-warning of insolvency of economic entities in legislation of foreign countries: Insolvency law generally covers fairly wide range of social relations, this is a relationship associated with debts of economic entities. No wonder that worldwide institution of bankruptcy is one of the most popular and its practice is one of the fastest growing. At the same time, in different countries there are different legislative approaches to this phenomenon, its goals, purpose.

In Russian legislation prevention of pre-trial insolvency is still in its infancy. It does exist at the level of separate legal norms in various instruments and it have not took shape yet as an independent unit of legal system and legislation. Science and practice is not sufficient preconditions for its systematization, codification. Under these conditions, particular interest present law of foreign countries about prevention of pre-judicial insolvency of economic entities (Arbitration Court of Tyumen region, 2005-2006).

Science subdivides legal systems for different types of insolvency. Here is the most common and widespread classification:

“Radical procreditor legislation sets the task to meet the lender as a major. Remaining issues in this are actually ignored. This type is the most common and valid in England, Ireland, Israel, India, Pakistan, Bangladesh, Singapore, Hong Kong, Australia, New Zealand, in island states of Pacific, Indian and Caribbean basin.

Moderate procreditor legislation differs from the first type that in addition to interests of creditors to a large extent takes into account interests of other stakeholders. This type of legislation is typical for Germany, Finland, Norway, Sweden, Netherlands, Poland, Japan, South Korea, Taiwan, Indonesia, Canada, South Africa.

Neutral legislation. In a number of cases, related to force majeure, it favors interests of the debtor (usually, this applies to agricultural production). Law operates in Denmark, Italy, Czech Republic, Slovakia, but mostly typically it is represented in the USA.

Moderate insolvency legislation, in a larger number of cases, protects financial interests of the debtor. As a rule, general legal provisions, including procedure for imposing penalties on the property, counterbalance advantage with respect to the debtor and take into account position of the lender. Such laws have been adopted in such countries as Greece, Spain, Portugal, Belgium, Thailand, states of north-western Africa, almost all of the South and Central America.

Radical insolvency legislation. The only example is France. In the middle of 1980s, it has replaced moderate procreditor for almost neutral law on bankruptcy. Defending from "expansion of Asian tigers", French adopted the Law "On judicial reorganization and liquidation" which is strongly oriented to protect interests of debtors. However, only 3% of cases after initiation of bankruptcy proceedings were possible to avoid, and in 97% of cases, result was elimination". (Zaleski, 2010)

The greatest interest shall submit to French law. It is only classified as a radical insolency, but it does not say a lot about the governing rules of pre-bankruptcy warning. This classification means general direction of entire institution, in this case, debtor's interests are protected not before, but as a part of trial process of insolvency, which means insolency legislation is largely focused on ensuring of preservation of existing enterprises, jobs through implementation of trial bankruptcy proceedings. Pretrial warning of failure can take in insolency type of legislation as much space as it is in any other type, the only difference is in the focus of trial proceedings.

France has just two full normative acts dealing directly with pre-insolvency proceedings "Act No. 84-148 dated 1 March 1984 about prevention and friedly settlement of difficulties in enterprises ("relative à la pryvention et. au riglement amiable des difficultys des enterprises"); Decree No. 85-295 dated 1 March 1985; Act number 85-88 dated 25 January 1985 in relation to rehabilitation and trial liquidation (*"relative au redressement et. a la liquidation judiciaire des enterprises"); Decree No. 85-1388 dated December 27, 1985;* Decree number 88- 430 dated 21 April 1988" (Kravchenko, 2013).

The first of these acts contains a list of measures to facilitate timely detection of adverse events of enterprise and pre-trial settlement of the debt. There are seven such measures, "having a certain ;improvement in importance of financial statements and financial information (in particular estimates) of legal entities; improvement of stockholder control over managers through development of written questions; expanding the scope of competence; approved creation of groups to take preventive measures: these groups are approved by the state representative in the region. They

may have any form of civil legal entity, and, as a rule, they include accounting organizations, chambers of commerce or professional bodies. Members of the group cannot be natural persons, they must be legal entities. Their main task is to analyze, on a confidential basis, any financial statements or financial information communicated by their members.

Procedures of alert, which can be carried out by: auditors in respect of commercial companies, groups with common economic interests, legal persons carrying out economic activity, if auditor during his mission discovers facts that may affect on developing of the activity.

A special procedure is provided by the law of joint stock companies (4 stages); a joint-stock company having an opportunity to ask chairman of board written questions; the last must give an answer within one month and submit a copy of questions and answers to the auditor; or members of limited liability companies, which have the right to ask managing director only direct questions; organizations representing workers; chairman of commercial court, authorized to investigate.

Providing a special mandate: chairman of commercial court may appoint a special agent to assist the director of the company which is in difficult situation.

Application of procedures of settlement agreement: this procedure allows the debtor to negotiate its main creditors under the supervision of a mediator appointed by the chief justice. This procedure is not compulsory and can, if desired, be confidential".

Additionally, we examine some measures. Thus, the provision of a specific mandate, appointment of the chief justice special agent to assist the head of the enterprise, is somewhat similar to the well-known Russian law procedure of monitoring or external control, but the difference should be conducted depending on the degree of participation of creditors in this procedure. Creditors' meeting or committee always present with external control as subject of competitive relations, endowed with certain powers. In this case, apparently, there are no insolvency proceedings in the court, and lenders do not participate in such a procedure. Role of the court is interesting in this case, because attracting of specialists to assist director is possible without participation of judicial organs from the standpoint of prevention of insolvency and pre voluntary debt settlement.

Settlement proceedings in French law have interesting features. V.V. Stepanov describes in detail the process of negotiations between debtor and creditors, "A feature of the French system of regulation is that representatives of the court seek to initiate negotiations with a potential debtor's creditors at the first sign of impending insolvency. In order to adequately assess current financial condition of enterprises it was established scheme of constant reporting to regional boards of directors and court. When the nature of information clearly indicates imminent solvency problems, president of commercial tribunal invites head of the company

to court for a conversation and invites him to begin negotiations with creditors. If a potential debtor agrees, chairman of commercial court may designate a person to negotiate with creditors. Negotiations should be completed within 3 months. Confidentiality of negotiations is guaranteed by the criminal law. At the request of a special person, the court may impose a moratorium on actions of individual creditors against debtor's property potential, despite the fact that formal insolvency proceedings have not yet been started." (Stepanov, 2009).

At the first glance, there is a similarity with the Russian legislation, which regulates in detail the procedure to conclude settlement agreement in the framework of bankruptcy court case and you can draw an analogy of mediator appointed by a French court with court-appointed manager. On the other hand, again, there is no bankruptcy proceedings instituted in French version, and only mediator assists parties to negotiate, on this his role, and thus the role of the court is limited in this process. With this approach, settlement agreement as a way to prevent pre-insolvency in French law can be compared to procedure of mediation, which although is not known in Russian legislation but actively discusses and increasingly finds its application in practice. The main characteristics of this procedure still inevitably will be reflected in framework of this study, meantime, we need only to note that mediation does not involve participation of judiciary, in France participation of court in settlement proceedings is only slight but it is inevitable.

Another point on which there is focus is improving monitoring by shareholders for control, according to the French legislator it is a measure that can effectively deal with deteriorating financial condition of the enterprise.

Turning to the modern practice of domestic bankruptcy, it is not difficult to conclude that fragmentation and imbalance of interests among managements and founders (owners) of the legal entity is one of the main factors causing a potentially lucrative and successfully developing company into bankruptcy. This fact is an obvious evidence of uniformity of financial failure practice in Russia and France.

DISCUSSION

In addition to the above, there are other rules which, although, not directly regulate pre-warning of insolvency, however, indirectly create additional obstacles to destabilization and deterioration in financial condition of economic entities in French legislation. First of all, norms, establishing participation of state bodies in prevention of pre-trial insolvency of companies, already experience some financial difficulties and delays in payments by financial and tax aid.

Another interesting phenomenon is "doubtful period". "Doubtful period is the period between moment of termination of payments by the debtor and adoption of a trial decision on the opening of the procedure. During this period, debtor may have committed fraud. Legislative bodies have set themselves the task of ensuring equality

between creditors and therefore taking a number of actions aimed at cancellation of certain transactions". (Alferov, 2016). In this case, transactions concluded during the dubious period, in the future, after introduction of bankruptcy proceedings can be annulled, invalidated by a court under a simplified procedure. Such rule, at first glance, does not apply to pre-trial prevent insolvency. However, let us turn to the domestic practice of bankruptcies.

It is obvious that since the cessation of payments (usually it is the termination of payment of taxes), organs of an economic entity management, whose financial situation starts to deteriorate, forces seek to bring assets of the company (to sell at a minimum price legal entities founded by themselves, and etc.) as a result, debtor's property base disappears. Apparently, French legislator has also encountered similar problems, and as a consequence questionable period appears. The presence of the rule of law always make careless head of the company (potential debtor) to think well, and, as a result, it may stop him. But when proprietary database maintained, chances to meet demands of creditors, possibly even without liquidation of the debtor, are much higher. Thus, questionable period has some preventive properties, helps to prevent commission of unfair and sometimes illegal actions as part of the debtor's management, which is one of the most common factors which lead company to bankruptcy.

It should be noted that such institution exists not only in France. These standards are contained in legislation of other countries too (for example in the UK). "Invalidity of transactions of insolvent debtor is an inherent part of a modern bankruptcy law. Invalidation of transactions made by the debtor within the specified period of suspicion, makes it possible to create favorable conditions for restoration of debtor's solvency. Therefore, the main goal of the institute deals invalidation, in addition to equality of creditors (even at the stage when a formal bankruptcy procedure has not yet started), is to ensure the rehabilitation of the debtor's business."

Legislation of some developed countries (UK, Germany, USA, France) contains rules for invalidation of transactions, which are made during the dubious period (France) or in suspicion period (United Kingdom). The practice of bankruptcy, for example, in our region, suggests that competitive managers after the moment when debtor is declared as a bankrupt have to apply to arbitration court for invalidation of debtor transactions concluded during the period of up to one year before applying to arbitration court for bankruptcy. This institute now is in demand in Russia. Dissipating of assets in pre-bankruptcy period is comprehensive today.

We can underline following conditions for invalidity of transactions concluded during questionable period: insolvency procedure must be started against the company; transaction should decrease property of the debtor, or one of the creditors should receive priority over others; deal should be concluded during the suspicion period.

Establishing the duration of the period of suspicion is caused by the practice. Most transactions on the alienation of the property are made by the debtor within prior two years from the adoption before arbitral tribunal do statement in which it declares the debtor as a bankrupt.

French law contains provisions on "committee of the enterprise." The essence of phenomenon in creation of an enterprise of a collegial body consisting of representatives of the company owners, managers and employees, whose purpose is to control financial condition of organization and timely adoption of measures to strengthen financial condition. Domestic business practices use something like anti-crisis headquarters of the target company – collegial body, made to resist aggression of the Raiders in implementation of business capture.

An interesting role belongs to the court of insolvency institute in France. As you can see, it is quite significant. The courts do not only consider direct insolvency proceedings, but also constantly monitor financial condition of economic entities. French companies regularly report to court and, in case of the last obvious signs of the crisis, the debtor's management is invited to the court.

Such provisions of French law look strange from the point of view of the Russian lawyer, after all, even insolvency cases itself in arbitral trial are still ambiguously perceived by science and practice (Bergman Y., Callen J., 1991), and only monitoring from the point of view of Court of entrepreneur activity looks completely contrary to the essence of judiciary function. Nevertheless, it is quite normal for France. In addition, state executive authorities in France are also involved in arising difficulties from enterprises in terms of prevention through provision of financial and tax assistance. Clearly, ensuring a stable financial condition of economic entities is one of the manifestations of the general social nature of the state, because it prevents a lot of negative social phenomena. In France, all branches of government involve in performance of this function.

Made analysis of French legislation about prevention of pre-trial insolvency lets us talk about it much more high degree of developed elaboration in comparison with Russia. And it looks quite natural, because at the time when the Russian Insolvency Institute was buried, our history contains two such periods, it developed quite naturally and dynamically in France, as an essential phenomenon of a normal market economy. On the other hand, it is clear that domestic business practices, its development is well ahead of legislation, uses a number of events already known to French law, and therefore, appearance of many new legal provisions such as foreign is likely emergence (in this case French counterparts) in Russia .

We should not forget restore statistics of solvency of enterprises in France. Obviously, French law itself also is not perfect, and many of its provisions are certainly contestable.

Thus, "for example, at a workshop on insolvency, jointly organized by the Europeaid project "Efficiency of bankruptcy procedures", by the Ministry of Economic Development and Trade Ministry, Ministry of Justice, Federal Service of Russia for Financial Recovery and Bankruptcy and Supreme Arbitration Court of Russian Federation, dated 22 – 23 of April 2004 in Moscow, were presented statistics illustrating results of pre-trial procedures used in Western Europe towards problem debtors, economic and financial conditions which concern their leaders and government agencies, appealed to keep records and control of activities of registered legal persons. As a rule, 75% of such enterprises can derive candidates from bankrupts. Only 15% of cases turned out to be in courts. And, as a rule, these 15% have criminal character of bankruptcy" (Sviridenko, 2004).

Legislation of majority of foreign countries, as it can be seen from the above classification, does not pay a lot of attention to the interests of the debtor's bankruptcy law. Thus, "the main purpose of English insolvency procedure is not salvation of company and business. Managing (receiver), which is prescribed by creditor banks, often operates company sells as a single complex. Court usually is not involved in these activities. Proceeds from the sale of a going concern, as a rule, are significantly higher than the sale of individual assets, however, such measures are beneficial, and creditors, as it provides, better results than in bankruptcy proceedings. Also in England it is applied the so-called "London Approach", aimed at saving companies prior to formal insolvency procedures. Banks (as the main sources of credit for commercial organizations) in order to prevent the initiation of bankruptcy proceedings, and to find a way out of an unfavorable situation for borrower, together and tend to reach an optimum outcome in the trial. "This fact is doubly remarkable given the fact that the UK legislation of insolvency is classified as radical procreditor and, in general, in competitive process, giving unconditional priority to the interests of creditors, it creates a real opportunity to save the company. German law is traditionally classified as moderately procreditor, with German Institute of insolvency inherent traits such as, for example, a clear focus on preservation of legal entities, seeking to faithfully fulfill their obligations to creditors. Regarding other characteristics, F.F. Konev indicates that the "competitive process under the act establishes priority of German recovery conscientious debtor to the liability for obligations. (Konev, 2015). At the same time, however, insolvency procedure is not allocated, as opposed to the Federal Law, the individual monitoring procedures and financial recovery. In Germany, insolvency procedure consists of two stages: a preliminary procedure and bankruptcy proceedings.

At the preliminary stage, the focus is directed to preservation of debtor's property. German law is based on the fact that from the moment of filing an application for initiation of insolvency proceedings and court decisions on initiation of proceedings, normally takes considerable time which is needed for preparation and examination of documents (estimated at three weeks), and it is the most favorable

time for abuse by the debtor and for the "withdrawal to the side" concealment of property of debtor. Therefore, legal measures aimed at preservation of estate should be taken immediately, as appropriate court takes shape as soon as possible. "As you can see, there is a reason to spent a certain analogy with previously considered by French law. German legislator also does not ignore the problem of asset stripping to introduce judicial processes and, although anything like "doubtful period" is not here, it may be due to the different types of legislation of two countries. German law contains a list of specific restrictive measures to ensure safety of the property in order to save interests of creditors. Direct pre-warning of insolvency of economic entities in the German legislation is much less developed. So, Shelenkova N.B. notes that " preservation of existing enterprises was not considered by a German legal doctrine as a separate objective in creating legislation on bankruptcy, which establishes legal framework for possible reorganization of the debtor." (Shelenkova, 2008). In this sphere of legal regulation provisions in German law, apparently, can be comparable with norms of Russian Federal Law "Concerning Insolvency (Bankruptcy)", where, in fact, pre-failure warning is hardly mentioned.

However, Shelenkova N.B., when performing comparison of Russian and German standards, makes a conclusion that "German law know concept of "extrajudicial reconciliation", which means extrajudicial, usually pre-trial, debtor's reorganization. But it is not equal to pre-trial rehabilitation in the sense of Federal Law of Russian Federation. Russian law provides known mandatory rules, involves an agreement with the debtor as one of the possible options, puts the focus on legal persons and involves provision of financial assistance to pay off existing creditors' claims". As this statements are related to the Federal Law "Concerning Insolvency (Bankruptcy)", it is necessary to clarify that rules are not suffered on prevention of pre-trial warning of insolvency of economic entities of significant changes to adoption of a new act, and there are Regulations of 1994 in Germany, so given comparisons are correct and relevant even currently.

Some interest are a brief description of legislation on prevention of pre-judicial insolvency of Czech Republic. "Under current Czech law on bankruptcy it is difficult to restructure company's business, which has become bankrupt. Changes aimed at protecting rights of creditors, greatly hampered possibility of dialogue between debtor and creditors. For example, in accordance with the current law assume that number of decisions must have unanimous opinion. Some people believe that this formulation helps to protect the rights of creditors. If creditor has not participated in the vote, it is believed that he had voted against adoption of this decision. Thus, in accordance with Czech bankruptcy law creditor can impose a veto over a decision, just ignore it". This provision of the law is quite interesting. Czech legislation is classified as neutral, but the creditor's "veto right" substantially limits a debtor's chance to restore solvency.

Noteworthy is research on Slovak legislation on bankruptcy. "New Slovak Bankruptcy Act gives to the debtor, as well as to the creditor the right to request arbitration manager to analyze the possibility of restructuring debtor. Under the restructuring of independent non-judicial procedure it should be understood in Slovak legislation, under which the debtor and all its creditors on the basis of their free will, in the course of negotiations, decide on establishment of common terms and conditions of repayment of debtor debts to each creditor with provision of a single time period for settlements and further restore solvency. The result is expressed in conclusion as a restructuring agreement between the debtor and its creditors.

The decision of restructuring was accepted and restructuring procedure itself was carried out jointly by the debtor, its creditors and stockholders. Restructuring plan has form of a contract, which defines responsibilities of parties. At the same time, previous commitments can be changed or even canceled altogether. Restructuring plan is subject that needs approval of the creditors' meeting, and then decision of the court, which is also a decision about the beginning of implementation of restructuring procedures. Court can be appointed as an observer by the number of arbitration managers, whose purpose is to monitor implementation of restructuring plan. "These provisions of Slovak's law about bankruptcy are very similar to well-known domestic legislation, judicial procedure of external management. In general, restructuring is a main interest of this study, and provisions of the Slovak legislation deserve special attention in this regard.

CONCLUSION

In summary, after reviewing foreign legislation about prevention of pre-judicial insolvency, we can note following conclusions.

Legal norms, which are dedicated to regulate pre-trial warning of insolvency, are presented in legislation in most of foreign states regardless of their orientation in provision in the first place of interests of creditors or debtor during bankruptcy process.

Legal provisions are much less numerous and far less developed compared to prevention of pre-trial insolvency. Codification does not exist (exception is France, where normative act is entirely dedicated to pre-trial settlement of arrears).

Laws of most foreign countries have legal provisions, which prevent pre-trial insolvency (bankruptcy) of economic entities, which means that they are part of the insolvency institute and do not form an independent unit.

Various means provide pre-failure warning in most foreign countries. One of the most effective and popular is institution of suspect period. This is the period preceding introduction of judicial proceedings against debtor and it equals from 6 to 12 months. Settlement may be invalidated during simplified procedure under the claim of arbitration manager during the period by the debtor of transaction.

Current situation in Russian practice about withdrawal of debtor's assets during pre-bankruptcy period, allows us to consider the possibility of some foreign borrowings by domestic law. According to the authors, provisions of French law, concerning questionable period of transaction, are able to resist this practice more effectively than current provisions of "Insolvency (Bankruptcy)" law.

French legislative provisions, concerning establishment and functioning of "Enterprise Committee", in our opinion, are able to help domestic legislator in addressing the need to strengthen control of participants of economic company, stockholders, for activities of management of an economic entity.

References

Arbitration Court of Tyumen region. (2005-2006). Arbitration Court of Tyumen region. Archive. Case No. A-70-6470/3-2003. Arbitration Court of Tyumen region. Archive. Case No. A-70-3251/3-2006. Arbitration Court of Tyumen region. Archive. Case No. A-70-8141/3-2005.

Goncharov, A.I. (2006). Prevention of bankruptcy of a commercial organization in Russian Federation legislation: methodology and implementation mechanisms: Dis. ... Doc. jurid. Sciences. North-Caucasus Academy of Public Administration, Rostov-on-Don, pp. 297.

Zaleski, V.V. (2010). Basic institutions of civil law of foreign countries. Comparative Legal Survey. Moscow: Norma, pp. 117.

Izyumov I.V. and Khairullin N.G. (2015). Legal basis for state and municipal government. Lecture course. Tyumen TSOGU, pp. 426.

Konev, F.F. (2015). Some aspects of insolvency law in Russia and Germany. Lawyer, 9, 49-51.

Kravchenko, E.A. (2013). Problems of protection and rehabilitation of the debtor in insolvency (bankruptcy) in the UK, Germany, USA, France, Russia (comparative legal analysis): Dis. ... Cand. jurid. Sciences. Moscow State University named M.V. Lomonosova, Moscow, pp. 166.

Krashchenko, D.A. (2001). Bankruptcy of business entities in Russian Federation: problems of legal regulation: dis. ... Cand. jurid. Sciences. Volgograd State University, Volgograd, pp. 178.

Porohov, M.G. (2005). Basic Principles for reform of bankruptcy law on the example of Eastern Europe. Lawyer. 12, 73-77.

Sviridenko, O.M. (2004). Bankruptcy. Tactics and strategy. Litigation and Arbitration of the Moscow region. Enforcement matter, 3, 17-18.

Smirnov, R.G. (2004). Nature of legal relationship of insolvency (bankruptcy) [Text]: Author. Dis. ... Cand. jurid. sciences. St. Petersburg State University, St.Petersburg, pp. 187.

Stepanov, V.V. (2009). (bankruptcy) in Russia, France, Britain and Germany. Moscow. Norma, pp 254.

Shelenkova, N.B. (2008). Russia and Germany: the new bankruptcy law. The comparative legal analysis. Legislation, 7, 12-23.

Howman, M. (2011). The role of the insolvency regime to a market economy. SAC Bulletin (a special edition), 3, 3-12.

Alferov, V.N. (2016). Improving the mechanisms of pre-trial financial recovery of debtors under the control of creditors . Effective Crisis Management, 4 (97), 18.

Radygin, A.D. (2005). The institution of bankruptcy: development, problems, areas of reforming. Moscow: IET, pp. 281.

Bergman, Y. and J. Callen (1991). Opportunistic Behavior in Debt Renegotiations and an Interior Optimal Capital Structure of the Firm Without Dead weight Costs. Journal of Financial Economics, 28, 109–123.

Rubinstein, A. (1982). Perfect Equilibrium in a Bargaining Model. Econometrica, 50, 99.

Steinfeld, R. and Steinfeld, S. (2014) The Family Lawyer's Guide to Bankruptcy: Forms, Tips, and Strategies. ABA Book Publishing, 106, 227.

Weiss, L. (1990). Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims. Journal of Financial Economics, 27, 295.