Sesili Kadaria*

Historical Development of the Rehabilitation Process

On April 1, 2021, Law of Georgia "Rehabilitation and the collective satisfaction of creditors claims" came into force, which made the rehabilitation process a priority. In the history of independent Georgia, the process of insolvency has had many legislative barriers, and for a developing country, flexible legislation is of great importance. The aim of the paper is to study the origin of insolvency law, to see it as an institutional development in international and local context. The paper also analyzes the 2019 directive 2019/1023, which offers flexible mechanisms for debt restructuring to member states.

***Keywords**: rehabilitation practitioner, restructuring, bankruptcy, rehabilitation plan, absolute and comparative priority rule ("APR", "RPR"), preventive restructuring and more.*

1. Introduction

The origin of insolvency law is based on the development of trade, which created a mechanism for overcoming financial difficulties. The law of insolvency has its roots in 18th century England, which, in fact, was formed by the liberalization of the bankruptcy regime. The aim of the paper is to study of origin of insolvency law, to see it as an international development in international and local context. The paper reviews the measures to strengthen the rehabilitation process in the EU, which was first reflected in council regulation NO 1346/2000 of 2002. At that time, In Europe, rehabilitation was seen as an aid to liquidation, and there was no real way to save the enterprise. By Directive # 2019/1023 of 2019, the EU offered flexible mechanisms for the restructuring of liabilities to member states. As it is clear from scientific sources, the present version of the directive is a revised version published in 2014, The UNCINTRAL insolvency legislative guide. Therefore, the recommendations of the rehabilitation process are also discussed.

The paper also offers the basis of the insolvency process in Georgia from the 30s of the XX century and an analysis of the laws in force in independent Georgia. Scarce scientific papers have complicated the development of this highly interesting field. I would like to inform you that on April 1, 2021, Law of Georgia "Rehabilitation and the collective satisfaction of creditors claims" was enacted, which named the rehabilitation process as a priority of the law. The new law is based on the principles of this Directive and meets modern insolvency standards. It is interesting to discuss the laws on "bankruptcy proceedings" and "insolvency proceedings" in the context of the fiduciary responsibilities of the rehabilitation practitioner.

In the context of historical analysis, the paper examines the origins of insolvency law, models of its development and liberalization, as well as the previous version of Georgian law on bankruptcy proceedings, Georgian law on insolvency proceedings and court practice.

* PhD Student, Ivane Javakhishvili Tbilisi State University Faculty of Law, Invited Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law, Invited Lecturer at Georgian National University Faculty of Law, Invited Lecturer at Grigol Robakidze University Law School.

2. The Origin of Insolvency Law

2.1. Law of Rome

Bankruptcy is derived from the Latin word "concursus", which means concourse. The origins of bankruptcy law are rooted in Roman law. At the meeting against the debtor, the common creditors would gather and impose a punishment by a joint decision. Roman law did not differrentiate between individual and collective gatherings. This is the period when object of the creditor's execution was the debtor's personality, namely his dignity, freedom, body and even life itself.

Roman law provided variety ways of satisfaction of a creditor's claim: to cut off a part of a debtor's body and divide it in proportion, or sell him as a slave[1]. The property of the debtor as an object of enforcement was seldom mentioned. Thus, person's personal values had to be enforced in favor of the creditors. For example, according to the Table XII (451 BC), the creditors had the right to beat the debtor to death or sell him as a slave. The execution of the person was a rather harsh measure for the debtor. [2]

2.2. The Origin of Bankruptcy Law in England

Insolvency law has arised as a result of bankruptcy reforms. The term "bankruptcy" comes from the Italian words "banca" ("tanco") and "rota" (or "roto"). A direct translation of these words means "a broken chair". This is probably a reference to Italian money-lenders, who ran businesses in Florence on the banks of the Arno River and used small chairs to place paperwork.[3] If the debtor failed to perform his duties, the angry money-lender would break a chair on his head. [4] The term "bankruptcy" first appears in the Anglo-American legal system, namely in the English Act, which is referred to as "An act against such persons as do make bankrupt".[5] This was the first bankruptcy law promulgated in 1542 during the reign of Henry VIII. A legal remedy- designed solely for the benefit of the creditor and directed against artisans and merchants. 34&35 Hen. VIII, P. 4 (1542). Preamble and Part I of the Law of 1542 inform the reader as to whether the object of the request was satisfied. The debtor was not only liable with the property, but it was also possible to arrest him or cut his body. Declaring bankruptcy was a heavy burden for the debtors.[6]

WHERE divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditor, their duties, but at their own wills and pleasures consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living, against

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1 *Shaiman S. L.,* The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law, The American Journal of Legal History Vol. 4, No. 3, Oxford University Press, 1960, 205.

2 *Migriauli R.,* A Brief History of the Development of Bankruptcy Law, Introduction to Bankruptcy Law, Tbilisi, 2006, 165-166 (in Georgian).

3 *Quilter G.,* The Quality of Mercy-The Merchant of Venice in the Context of the Contemporary Debt and Bankruptcy Law of England, Insolvency Law Journal, Vol. 6, 1998, 43, 49.

4 *Hayek M.,* Principles of Bankruptcy in Australia, University of Queensland Press, 1962, 5.

5 An Act Against Such Persons As Do Make Bankrupt (1542) 34 & 35 Henry VIII, c 4. 1542: 34 & 35 Henry 8 c.4: Statute of Bankrupts.

6 *Demarco R.,* Bankruptcy Laws of England – Elizabethan Era, 2013, History of Bankruptcy, part 6. <https://www.abi.org/feed-item/history-of-bankruptcy-%E2%80%93-part-6> [11/06/2021].

all reason, equity, and good conscience: Be it therefore enacted by the authority of this present parliament, That the Lord Chancellor of England, or Keeper of the Great Seal, the Lord Treasurer, the Lord President, Lord Privy Seal, and other of the King's most honorable Privy Council, the Chief Justices of either Bench for the time being, or three of them at the least, whereof the Lord Chancellor or Keeper of the Great Seal, Lord Treasurer, Lord President, or the Lord Privy Seal,". [7]

The international community unanimously agrees that the term bankruptcy was first used in England to impose a measure of individual liability. Louis Eduard Levinhall, a professor at the Pennsylvania school of law, agrees with this idea. According to his opinion, in complaints and commission bankruptcy, "decoctor" was a word used to refer to the bankruptcy trustee before the act of 1970 of George II. [8]

The act of 1542 itself was not perfect, the act of 1542 did not release the debtor and his future income or purchase from debt enforcement. [9] In an act issued by Elizabeth I in 1671, bankruptcy procures were developed and refined. Although the general practice under the 1542 act was to restrict the use of their property by merchants and artisans, the act of 1570 codified the practice. The act of 1570 differs from the act of 1542 in two very important respects. First, the act of 1570 strengthened the provision on fraudulent transfers. The commissioner will no longer have to turn over fraudulently transferred assets. The commissioner was entitled to double the property damage. 13 Eliz. C. 7, sec. VI (1570). Second, the act of 1570 created permanent bankruptcy property. If there was a liability left after the liquidation of all assets of the bankrupt, not only were these balances not discharged, but the commissioner retained the authority to seize and sell (by any means) the property acquired by the debtor until the creditors were fully satisfied. 13 Eliz. . 7, St. X (1570). [10] After the growth of international trade and commerce in the sixteenth century, the need arose for a better system of administration and overcoming financial difficulties. [11] By the second half of the seventeenth century, attitudes toward bankruptcy and risk had changed in the commercial context. Taxes were not always enough to fund scientific discoveries or war, therefore credit was vital to both the public and private economies. In his statements, Blackstone reflected the widespread and long-held view that "trade is impossible without mutual credit on both sides: a commitment agreement is not only justified but also necessary". [12] This changing attitude has been reflected in the slow liberalization of bankruptcy laws. In 1705, English law first introduced the institution of release of a person and property from continuing liability for past debts. This decision required the consent of 4, 5 creditors. [13]

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7 An Act Against Such Persons as Do Make Bankrupt (1542) 34 & 35 Henry VIII, c 4. 1542: 34 & 35 Henry 8 c.4: Statute of Bankrupts, preamble.

8 *Levinthal L.,* The Early History of English Bankruptcy, University of Pennsylvania Law Review, Published by the University of Pensilvania Law School, Philadelphia, Vol. 67, Number I, 1919, 2.

9 *Jordan CH.,* The Historical Evolution of the Bankruptcy Discharge, 65 Am. Bankr. L. J., 331-2 (1991). P.325.

10 *Demarco R.,*Bankruptcy Laws of England – Elizabethan Era, DATED: July 6, 2013, History of Bankruptcy, part 6. P.1

11 *Allsop J., Dargan L.,* The History of Bankruptcy and Insolvency Law in England and Australia" [2013] ELECD 111; in *Gleeson J.T., Watson J A., Higgins Ruth C. A. (eds.),* Historical Foundations of Australian Law – Vol. II, Commercial Common Law, The Federation Press, 2013, 424.

12 Ibid., 425.

13 *Edelman J., Meehant H., Cheung G.,* The Evolution of Bankruptcy and Insolvency Laws and the Case of the Deed of Company Arrangement, Lloyd's Maritime and Commercial Law Quarterly, Nº 4, 2019, 574.

Despite the lack of regulation, the process of bankruptcy liberalization continued. the debtor's personal claim for bankruptcy procedure ended with the creation of new field of law, that laid groundwork for balancing the bankruptcy and insolvency processes.

2.3. The Roots of Insolvency Law in England

In the sixteenth century in England, legal merchants gave the insolvent debtor a chance to be released from liability. With the consent of the creditors a provision on the redistribution of liabilities was written with them, which allowed the debtor to make new deals. It was these distribution agreements that were probably the oldest form of rehabilitation, the genesis of ancient trade traditions and practices. It consisted of a clause in the contract between the debtor and the creditors, which included the consent of the creditors to receive less than the amount they were entitled to claim. [14]

Significant reforms were made in 1831 under the leadership of lord Broham, who established the bankruptcy court under the jurisdiction of the former legislative court. [15] Liberalization of the bankruptcy process led to the emergence of insolvency law and its legislative establishment as a process. All of this was reflected in the general English Act of 1861, "amending the bankruptcy and insolvency act in England", which extended the law not only to traders, but also to society as a whole as well. This law led to an increase in the powers of creditors in insolvency proceedings, they were no longer mere observers, as manifested in their initiation of litigation, which had not previously been regulated. With the consent of three-quarters of the creditors, the obligation could be redistributed to the debtor, who would be binding on the minority creditors, and the agreement reached by them would be verified by the bankruptcy court of England. [16] This mechanism was the approved of the rehabilitation plan and it was on the basis of this act that the law of insolvency took on modern significance. [17]

The given act was not perfect, it demanded more involvement from the state, as there were many cases of fraud and concealment of information. Therefore, the amendment of the act 1883 created a new form of regulation called the "official recipient", which was responsible for the investigation and the trustee who was in charge of administering the property.

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[14] *Shaiman S. L.,* The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common LawThe American Journal of Legal History Vol. 4, No. 3, Oxford University Press, 1960, 205.

[15] An Act to establish a Court in Bankruptcy, 1 & 2 Will IV c 56, 1; *Holdsworth W.,* A History of English Law, 7th edn., Methuen & Co, vol. l, 1965, 470-473; Lester M., Victorian Insolvency, Clarendon Press, 1995, 45.

[16] *Allsop J., Dargan L.*, The History of Bankruptcy and Insolvency Law in England and Australia, 2013, ELECD 111, in: *Gleeson J.T., Watson J A., Higgins, Ruth C.A. (eds.),* Historical Foundations of Australian Law – Vol. II: Commercial Common Law, The Federation Press, 2013, 444.

[17] An Act to Amend the Law Relating to Bankruptcy and Insolvency in England, 1861, 24 & 25 Vic, 134.

3. The Origin of Insolvency in EU Law

3.1. Origin of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings

At the end of the 20th century, companies in financial difficulties in many EU countries had very few informal alternatives other than liquidation. [18] Therefore insolvency proceedings were designed primarily for liquidation, with the sale of assets to meet the requirements of creditors by rating. [19] In EU member states, insolvency law still had a punitive function with less focus on debtor rehabilitation and reorganization. The need of new regulations was obvious, which is why the council of the European Union drafted the first insolvency law in council regulation 1346/2000 ("Regulation 1346"), which entered into force on 31 May, 2002. [20] The regulation had a controlling effect on all three pillars of the conflict of law rules: jurisdiction, choice of law and enforcement. [21] According to this regulation, it was possible to file two types of insolvency proceedings-main and territorial (secondary) proceedings. This territorial litigation is conducted through secondary and independent litigation. [22]

The regulation has solved several important problems. The first and most important exception was the power granted to states to institute secondary proceedings, taking into account the debtor's "place of establishment", with a territorial effect and with view to liquidation.[23] Secondary production exclusively obeys the insolvency rules and the priorities of the creditors of such member state. This mechanism is commonly known as "modified universalism" – a pragmatic solution to the main obstacle to universalism, namely, full acceptance of the priorities of creditors of different jurisdictions. [24] Legislative innovation has led to delays in the main case of insolvency in practice, the distribution of assets according to the priority of creditors in different states, was really a dilemma.

In the UK case of Collins & Aikman, [25] holding's administrator, who had subsidiaries in other member states, was obliged to respect the creditors' rights of other states that had contributed to the development of the subsidiaries. This approach has partially neglected the UK's priorities. However, the courts of other member states didn't enjoy a similar degree of flexibility. The European Commission's proposal #5 about the insolvency regulation explicitly codifies the

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18 *Manganelli P.,* The Evolution of the Italian and U.S. Bankruptcy Systems - A Comparative Analysis, 5 J. Bus. & Tech L., 2010, 238.

19 Ibid., 239.

20 Council Regulation 1346/2000, 2000 O.J. (L 160) 1, 13.

21 *Eyal Z. Geva E.Z.*, Implementing the European Insolvency Regulation UK Perspective European Business Organization Law Review, Vol. 8, 2007, 606.

22 *Virgos M., Garcimartin F.,* The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, 157; *Bělohlávek A.J.,* Evropské insolvenční parvo, Bulletin advokacie, No. 11, 2007, 40.

23 *McCormack G.,* Jurisdictional Competition and Forum Shopping in Insolvency Proceedings, Cambridge Law Journal, Vol. 68, 2009, 174-175.

24 *Garrido J.,* No Two Snowflakes the Same: The Distributional Question in International Bankruptcies, Texas International Law Journal, Vol. 46, 2011, 470.

25 *Moss G.,* Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism, Brooklyn Journal of International Law, Vol. 32, 2008, 1017-1018.

rule of given decision, as it allows the liquidators to take into account the claims and contributions of local creditors in the event of the opening of secondary production. [26] This solution is flexible and pragmatic, but there is further limitation to the principle of universality that underscores how member states adhere to their creditors' priorities. [27]

It is true that the given regulation solved the problem of territoriality, but it was difficult to contain the mechanisms of rehabilitation assistance. Until 2019, the European Parliament made a number of amendments to it, but finally with the current directive 2019/1023, its shortcomings were eliminated.

3.2. Restructuring and Insolvency Directive 2019/1023

3.2.1. Purpose and Scope

On 16 July, 2019, the restructuring and insolvency directive (EU) 2019/1023 entitled into force. [28] The next was the result of long and difficult negotiations based on a legislative proposal submitted in 2016. The proposal was preceded by recommendation 2014/135/EU, which addressed substantive insolvency issues. The recommendation addressed two main issues: A)the need for a "second chance" for individual entrepreneurs across the EU, as evidenced by the "entrepreneurship deficit" survey in Europe; and B)framework ideas for restructuring in all member states, outside of formal insolvency proceedings (I.E. in formal and "hybrid" restructuring, combining procedures of informal and formal aspects). [29]

In modern EU law, the term rehabilitation has been replaced by "restructuring", which actually reflects its purpose better. The overall aim of the directive is to reduce the most important barrier to capital flows arising from differences within the framework of restructuring and insolvency of member states and to strengthen a second-chance rescue culture in the EU. The new rules also aim to reduce the amount of inactive loans (NPLs) on banks' balance sheets and prevent the accumulation of such NPLs in the future. The directive thus aims to strike the right balance between the interests of debtors and creditors. [30]

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[26] 5 Reform Proposal, Article 28(a), amending Article 18(1) of the Insolvency Regulation, 2015.

[27] *Mucciarelli F.,* Insolvency Law in the EU and Its Political Dimension, European Business Organization Law Review, Vol. 14, 2013, 187.

[28] Directive EU, 2019/1023 of the European Parliamenrt and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

[29] The European commission has recommended informal or hybrid restructuring for several reasons: first, it was considered at the time that the pursuit of harmonizing formal insolvency proceedings would be extremely difficult and politically impossible. Second, the English arrangement scheme, widely regarded as a tool for hybrid restructuring, was used by companies in other European countries and this created competition with insolvency systems in continental Europe. Third, the crisis in several European countries has shown that the judiciary has not had sufficient capacity to handle large numbers of insolvency cases.

[30] *Gil-Robles J., Sánchez-Navajas P.,* Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 ("Directive on restructuring and insolvency"), 2/07/2019, 6.

One of the critical points of the directive is the introduction of a restricting framework, which is a forced way to approve a restructuring plan for different classes of creditors. This means that even if one of the classes of creditors does not vote for the restructuring plan, the court may still implement it. In order to protect different creditors the directive allows member states to choose which rule of national courts to apply when approving a plan. [31]

The directive introduced the rule of absolute and comparative priority ("APR", "RPR"). The comparative priority rule means that different voting classes are treated at least as positively as other classes of the same rank if a normal ranking of liquidation priorities was used under national law. Absolute class means absolute satisfaction of eligible creditors if lesser class creditors are given the minimum satisfaction. Priority rules are intended to protect different creditors in the event of a class collision. Such protection rules will inevitably become a problem between shareholders, and creditors during restructuring. [32]

In summary, we present the main issues that the Directive names as a priority.:

A) Early warning and access to information to help debtors identify circumstances that could lead to the likelihood of insolvency and indicate to them the need of prompt action.

B) Preventive restructuring frameworks: debtors will have access to a preventive restructuring framework that enables them to implement insolvency and ensure their viability, thus protecting jobs and businesses. These frameworks may also be available upon request from lenders and staff representatives.

C) Facilitate negotiation of preventive restructuring plans, in some cases by appointing a restructuring practitioner to assist in drawing up the plan.

D) Restructuring plans: the new rules include a number of elements that should be part of the plan, including a description of the economic situation, the affected parties and their classes, the terms of the plans, and so on.

E) Suspension of individual enforcement actions: debtors can take advantage of the suspension of individual enforcement actions to support restructuring plan negotiations within a preventive restructuring framework. The initial duration of the suspension of individual enforcement actions is limited to a maximum of four months.

F) Debt settlement: over-indebted entrepreneurs will have access to at least one procedure that can result in their debt being repaid in full, maximum within 3 years, under the terms of the directive.

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[31] DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Article 55

[32] *Goncharov N.,* Priority Rules Under the Directive (EU) 2019/1023 and the Shareholder-Creditor Agency Problem - A Comparative Legal Research, 2019, 4.

3.2.2. Simplify Process Access for the Debtor

Member states should ensure that debtors have access to a preventive restructuring frame work or procedure. [33] The framework aims to enable them to restructure to prevent insolvency and ensure debtors viability. The result is job protection and business continuity. Member states may introduce a viability test, but this test is for the sole purpose of assessing viability and the test should not have a detrimental effect on the debtor's assets.

The general rule under the directive is to make preventive restructuring available only on the basis of the debtor's application. [34] Member states may also provide referrals from creditors and associates. Member states may also go in the opposite direction and restrict the debtor's requirement to reach an agreement in cases where the debtors are small and medium-sized enterprises-micro, small and medium-sized enterprises.

3.2.3. Debtor in the Possesion (DIP)

The directive has a norm- debtor in the process of governance, which is a general principle according to which the assets and day-to-day operations of the company remain under the control of the debtor. This principle is acceptable to the member states, since the mandatory appointment of a practitioner in each case would have a negative impact on the day-to-day operations of the company, the appointment of a practitioner should be based on an independent, objective reason, and the directive includes a mandatory appointment of a practitioner, [35] If enforcement is initiated by state authorities, the debtor himself submits a claim or a majority of creditors request the appointment of a practitioner, in such case the management and representation authority, according to the directive, will be exercised by a licensed practitioner.[36]

3.2.4. Powers of the Restructuring Practitioner

A restructuring practitioner is a state-licensed entity with special knowledge and experience in company's management . The practitioner is the main subject of the rehabilitation process, whose mandatory appointment, as we have already seen, is no longer carried out under the new directive 2019/1023. If mandatory appointment is provided, the restructuring practitioner is

[33] Directive (EU) 2019/1023 of the European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), article 4.

[34] Directive (EU) 2019/1023 of the European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Article 4 (1).

[35] *Eidenmüller H.,* The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union, European Business Organization Law Review, Vol. 20, 2019, 547, 559-600.

[36] Directive (EU) 2019/1023 of The European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Article 5.

limited to assist the debtor and creditors to negotiate and develop a restructuring plan. According to the general provision of the directive, the practitioner supervises the activities of the debtor during the mandatory appointments, submits reports to the court and during working, partially controls it. [37] Therefore, there is no single concept of restructuring. It is up to the member states to determine the powers of the practitioner, who may be a manager or a supervisor. [38]

The directive also does not provide a direct record of whether practitioner can change management staff , where the scope of his or her decision extends and what he or she needs the consent of the court. All these issues are subject to the free regulation of the member states. The analysis of individual cases of debt management and restructuring planning will be possible in the process of implementation of the Directive by the Member State. Thus, it cannot be explored in the present study.

3.2.5. Attracting New Finance in the Process of Restructuring

The European Parliament has very clearly and emphatically banned member states from imposing any barriers to attracting new funding for restructuring process. A clear example of this is the transfer of liability of the financing creditor (new creditor) in a civil, administrative manner if the debtor is unable to fulfill the obligation during the restructuring process. Member states may determine that, in the event of further insolvency the new creditors shall have priority over other creditors which shall be reflected in the overriding satisfaction of the demand or in any other matter which is to be settled by states. [39] This provision is the standard for the protection of new, which is provided for in the restructuring plan itself. The goal is obvious- attracting new finances is a source to save business. As we have seen, the latest EU directive includes bold texts, which turns the national legislative framework of the member states upside down and calls on the states to be more courageous, to take effective steps to save enterprises. It is interesting to look at the American model, whose source is UNCINTRAL rule itself.[40] Most of the text of the directive is based on it.

4. UNCINTRAL - Insolvency Legislative Leader in Rehabilitation Process

UNCINTRAL is the branch of the United Nations (UN) that has produced the most comprehensive text-the 2014 legislative guide on insolvency. The purpose of the legislative framework is to set international standards for insolvency and restructuring and to assist states in

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[37] Directive (EU) 2019/1023 of The European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Article 2 (1) (12).

[38] *Goncharov N.,* Priority Rules Under the Directive (EU) 2019/1023 and the Shareholder-Creditor Agency Problem- A Comparative Legal Research, 2019, 6.

[39] Directive (EU) 2019/1023 OF The European Parliament and of The Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Article 17 (4).

[40] UNCINTRAL Legislative Guide on Insolvency Law, United Nations, 2005, 2.

integrating into the international financial system. Such laws and institutions should facilitate the restructuring of viable businesses and the closure of failed businesses. [41]

Legislative guide uses sophisticated and flexible repertoire from state bankruptcy code. [42] The guide, which now comes in four parts, consists of more than 200 recommendations, is divided into more than 20 topics, as well as detailed comments. The commentary offers a comparative analysis of situations where there is significant variability in a particular topic, the presentation, discussion of alternative approaches, and the evaluation of such achievements. The commentary also serves an important function of validation, namely recording the fact on which the different opinions of the delegates are presented.

The role of the legislative guide in the restructuring- rehabilitation process is crucial. The flexibility of the UNCITRAL guideline is demonstrated in leaving the debtor free to manage and bringing in a rehabilitation practitioner. The guide states that different approaches to this issue may be selected, including:

1)Maintaining full control by the debtor, i.e. appropriate guarantees of leaving the debtor in possession.

2)Execution of limited authority by the director, where the debtor conducts business under the supervision of an insolvency representative, which involves the division of responsibilities between them

3)Complete replacement of the director by an insolvency representative. [43] It should be noted that in the comments, leaving the debtor in the management of rehabilitation process, are not supported.

The recommendations in the guide can be grouped from a wide range to narrow specifies that are ready for implementation. Detailed explanation problems of alleged use in practice even help the business model to function better. [44] Recommendations can be substantive, practical or really conditional. Conditional recommendations are based on a specific procedure and specify that if anyone has this provision, that should have a specific content. For example, according to recommendation 151, where the insolvency act does not require the approval of a plan by all classes, it should indicate the actions taken to those classes who do not vote to approve the plan. Conditional recommendations enable UNCINTRAL to recognize local regulations within the relevant legal framework. [45]

In the end, the UNCINTRAL guidelines have played a huge role in supporting the insolvency reform and rehabilitation process worldwide. The EU directive has also been developed based on it and continues to refine the norms.

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41 UNCINTRAL Legislative Guide on Insolvency Law, United Nations, 2005, 10.

42 *Block-Lieb S., Halliday Terece.,* Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, 42 Texas Int'l LJ., 2007, 475.

43 United Nations Commission on International Trade Law, Legislative Guide on Insolvency, United Nations Publication, 2005, Sales No. E.05.V.10 ISBN 92-1-133736-4 Law article 112, 173.

44 *Block-Lieb S., Terece H.,* Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, Texas Int'l LJ, Vol. 42, 2007, 475.

45 United Nations Commission on International Trade Law, Legislative Guide on Insolvency, United Nations Publication, Sales No. E.05.V.10 ISBN 92-1-133736-4 Law article 112, 2005, 503.

5. Establishment of Insolvency System in Georgia

5.1. History

Bankruptcy law in Georgia and pre-revolutionary Russia has its own development history and roots. Bankruptcy law in Georgia was founded in the 30s of the XX century, namely in 1931 in the civil procedure code of the Georgian Soviet Union, we see the codification of bankruptcy as an institution. The second appendix to the code provided for the "rules on the disability physical and juridical persons", which included 7 sections and 46 articles. In its legal content, "incapacity" was completely comparative with today's bankruptcy, so it can be said that the introduction of bankruptcy law in Georgia law was based on the introduction of the institution "incapacity". [46]

20th century juridical procedure in bankruptcy law is very similar to the current system for example, if several cases were brought in different courts to recognize a person as "incapable", all cases would be transferred to the court that first opened the case and recognized the debtor as "incapable". Cases were heard only the people's courts, and the circle of persons authorized to open proceedings was limited, in particular a creditor with a writ of execution, a debtor, the state and a prosecutor could request the opening of a case.

The court used to declare the person "incapable" according to its ruling. The decree was to be published in a newspaper and sent to the appropriate state registration authority. The basis of "incapability" was the impossibility to repay the debt and its external evidence was the debtor's termination of payment of debts. [47] After declaring the debtor "incapable" the court applied only to the state body with a proposal to appoint one or more liquidators, who would be given the right to dispose of the debtor's property. The court would determine the liquidation period, which was mainly 1 year. The court appealed to the same institution to appoint a "special person" to protect the property of the enterprise before the liquidators took up their duties. [48]

The code is largely devoted to the consideration of liquidation procedures. Since the subject of our research is the development of the rehabilitation process, the code does not address these issues. Therefore, we move on to the law of Georgia on bankruptcy proceedings, created during the period of independent Georgia.

5.2. Institutional Development of Rehabilitation Practitioner in 1996-2018 Years

The first law in the history of independent Georgia that defined the significance of the rehabilitation process was the law of Georgia on bankruptcy. [49] The same law wrote down the powers of the ruler, his fiduciary duties and boundaries. This law covered the responsibilities and activities of the practitioner in more detail than the law of Georgia on insolvency proceedings

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46 *Rukhadze A.,* A Historical Review of the Development of Bankruptcy Law, Review of Georgian Law, 7/2004-4, 784 (in Georgian).

47 *Migriauli R.,* Introduction to Bankruptcy and Insolvency Law, Tbilisi, 2017, 276 (in Georgian).

48 United Nations Commission on International Trade Law, Legislative Guide on Insolvency, United Nations Publication, 2005, Sales No. E.05.V.10 ISBN 92-1-133736-4 Law article 112, 503, 290.

49 Law of Georgia on Bankruptcy Proceedings, date of promulgation: 25/061996; Source of promulgation, date: Parliament Herald, 19-20, 30/07/1996.

adopted in 2007. [50] The rehabilitation practitioner represents the debtor from the moment of the start of the rehabilitation regime with the specificity that he/she already has fiduciary duties towards the debtor's creditors, instead of the debtor's partners. [51]

Under both laws, the rehabilitation practitioner could have been both a physical and a juridical person. Both laws prohibited the appointment of a personal rehabilitation practitioner to perform similar activities. It is interesting that, under the 1996 act, creditors are nominated by the debtor to be elected to the rehabilitation practitioner during the rehabilitation process, while creditors are selected by the creditors through a competition in a bankruptcy settlement. [52] This approach was changed by the 2007 law and left the choice/approval of the practitioner entirely to creditors. [53] In addition, the creditors' meeting could elect a rehabilitation practitioner within 2 weeks of being invited. If the rehabilitation practitioner was not elected within that period, he/she would be appointed by the court. [54]

Bankruptcy law gave the rehabilitation practitioner immeasurable authority to act at his own discretion, with the rehabilitation plan and the rule of law acting to save the enterprise. In addition, the law contained a restrictive provision, according to which the practitioner has the authority to enter into a contact negotiation only with the consent of the creditors' committee, which provides for a 20% increase in the debtor's liabilities after the opening of the rehabilitation process.[55] The practitioner was responsible for submitting a report on his actions to the creditors once a month. This provision was amended by a law passed in 2007, removing the restrictive norm for creditors to a decision made by a practitioner that required their consent. Moreover, the practitioner's accountability became mandatory only to creditors. If, in the previous law, the breach of the fiduciary obligation of the practitioner was in breach of the interests of both the debtor and the creditors, the new law only made the interests of the creditors a priority. It is obvious that in the process of rehabilitation, the circle of powers of the rehabilitation practitioner and the director of the enterprise was also determined by the creditors' meeting. [56]

According to the prevailing view, breach of fiduciary duties of the practitioner leads to a review or termination of the rehabilitation process by the debtor/creditors. If the ruler has violated the rights of either party his activities will be terminated. The 2007 law does not say anything about this issue. In the end, both pieces of legislation were very general, containing complex norms that actually constituted a barrier to the conduct of the rehabilitation process. In 2014 (GIZ) the existing insolvency system was assessed with the support of international experts. According to this assessment, the law included ambiguities and contradictions. The rule of setting priorities is

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[50] Law of Georgia on Insolvency Proceedings, date of promulgation: 28/03/2007; Source of promulgation, date: SSM, 9, 31/03/2007.

[51] Explanatory Card on the Draft law of Georgia on Rehabilitation and Collective Satisfaction of Creditors Claim, <https://info.parliament.ge/file/1/BillReviewContent/245931> [05.03.2022].

[52] Law of Georgia on Bankruptcy Proceedings, date of promulgatiom: 25/061996; Source of promulgation, date: Parliament of Herald, 19-20, 30/07/1996, Article 25^4.

[53] Law of Georgia on Insolvency Proceedings, date of promulgation: 28/03/2007; Source of promulgation, date: SSM, 9, 31/03/2007, article 44 (2).

[54] Ibid., Article 3, (3^2).

[55] Law of Georgia on Bankruptcy Proceedings, date of promulgation: 25/061996; Source of promulgation, date: Parliament Herald, 19-20, 30/07/1996, article 25^5 (3).

[56] Law of Georgia on Bankruptcy Proceedings, date of promulgation: 25/061996; Source of promulgation, date: Parliament Herald, 19-20, 30/07/1996, article 44 (4).

controversial namely the pursuit of the interests of creditors and the debtor in the rehabilitation process and the definition of the powers of the practitioner, which is so problematic. In 2015, at the request of the Ministry of Justice, the Georgian insolvency system was assessed by the United States Agency for international development (USAID) "governance for development" project. The study found that the Georgian law on insolvency proceedings in Georgia is not often used to solve financial problems, which is generally caused by the stigma that still haunts the institution of insolvency. [57] The country needed a flexible legislation in line with EU standards that would clearly set the priorities for the rehabilitation process. On April 21, 2021, Law of Georgia " Rehabilitation and the Collective Satisfaction of Creditors Claims" came into force, which in essence requires a detailed analysis of the rehabilitation process. Ongoing processes about amendment of New legilisation still continues. Consequently, there is no relevant case law for this stage. Therefore, the analysis of the new law will not be presented in this study. We hope that very soon the Law of Georgia on "Rehabilitation and Collective Satisfaction of of creditors claims" will be finalized.

5.3. Court Practice

It is noteworthy that within the framework of the enactment of the Georgian law on bankruptcy, the opening of the rehabilitation process did not actually take place in Georgia. Moreover, it took the public a long time to see the benefits of this process and to assimilate legislative innovations. The rehabilitation process, not only due to the legislation, but also due to the long procedural deadlines, introduces distrust in legal community. Under the 2007 legislation, full authority to approve the rehabilitation plan passed into the hands of creditors.

The process of rehabilitation of "Orion" Ltd is interesting which was carried out by the current legislation of 2012. [58] It is noteworthy that the debtor was not involved in the procedure for approving the rehabilitation plan. The creditors' meeting was fully competent to approve the rehabilitation plan. This circumstance, of course, undermined the essence of rehabilitation. The debtor did not participate in the appointment of the rehabilitation practitioner either. It is interesting, the case of "Black sea invest" Ltd, where the issue of appointing a rehabilitation practitioner was not even formally considered by the court. [59] The study of his competence, education and experience was entrusted to the creditors' assembly, which did not involve the debtor in this process. As it is clear from the practice, all this did not serve to overcome the financial difficulties of the debtor, on the contrary, it was aimed at destroying the property. The rehabilitation case that started in 2011 could not be completed even in 2018, due to the change in the rehabilitation plan and a number of actions, the case continued again. [60]

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[57] Explanatory card on the draft law of Georgia on Rehabilitation and Collective Satisfaction of Creditors Claim, (in Georgian), <https://info.parliament.ge/file/1/BillReviewContent/245931> [05.03.2022].

[58] Ruling of Tbilisi City Court of October 26, 2012 on the approval of the rehabilitation plan of "Orion" Ltd, 2/12584-11.

[59] Ruling of Kutaisi City Court of September 28, 2011 on the appointment of Vladimer Saladze as the Rehabilitation practitioner of "Black Sea invest" Ltd and the Approval of the Creditors' Secision on the Seadline for Preparation of the Rehabilitation Plan, 2/647-11.

[60] Ruling of Kutaisi City Court of July 25, 2018 on Extending the Term of Preparation of the Draft Rehabilitation Plan of "Black Sea invest" Ltd, case #2/61.

An exceptional case is the case of the rehabilitation of "Caucasus digital network" Ltd, where it is noteworthy that the debtor, together with the rehabilitation practitioner, actively uses procedural rights, including monitoring the implementation of the rehabilitation plan. [61] The problem of delayed hearings is also appeared in this case, were in 2013 opened rehabilitation process is not still finished in 2022.

Legislative difficulties, complete exclusion from the debtor's rehabilitation process, incomplete court proceeding necessitated the creation of new legislation. In 2022, the number of rehabilitated companies is very small in Georgia. Historical analysis has shown that previous legislation was not aimed at the survival of the company. The difficulty of opening the rehabilitation process, the delayed deadlines, the limited powers of the practitioner created a difficult barrier to the development of insolvency law. Democratic state must have transparent legislation for opening, closing and business restructuring procedures.

6. Conclusion

As we have seen from the paper, the liberalization of the debtor's bankruptcy regime led to the introduction of "insolvency" systems in England. Beginning with the personal execution ending with the liquidation of the debtor's property, we saw the need to introduce a legal mechanism that precluded the death of the debtor's property, The inability of the debtor to set up a new enterprise.

With the adoption of EU Regulation 1346/2000, a mechanism for overcoming the financial difficulties of the enterprise was proposed, which started the process of development. The roots of the regulation can be seen in Directive 2019/1023, which made the rehabilitation process even more accessible to Member States. At present, member states can introduce a number of innovations in the insolvency system, including "debtor in possesion", "ease of approval of the rehabilitation plan" and other circumstances, which are reflected in directive 2019/1023.

As we have seen, the 1996 and 2007 legislation contained obstacles to the rehabilitation process, including the ability of creditors to approve the rehabilitation plan themselves, to determine the manager, and to make individual decisions about the rehabilitation process. The case law has clearly shown the problem of procedural deadlines, which ultimately led to distrust of the insolvency system.

The historical study of Georgian law presented the perspective of legislative perfection. The simplicity of starting the rehabilitation process, increasing the powers of the practitioners, leading the process in a reasonable time and attracting new assets ensure the rapid development of the rehabilitation process. By overcoming the existing challenges, real support mechanisms for the companies will be introduced.

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