Enforcement of the right to a bond of arrest in insolvency proceedings in Russia and Germany

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Abstract: Creditors whose claims are secured by the debtor’s property have a privileged position in the insolvency proceedings. The legal status of depositors and the manner in which their claims are met are the subject of close research. However, the problem of bail is little studied in Russian doctrine. The purpose of the present study is to formulate, on the basis of regulation and doctrinal thinking in Germany, where the right to a bond of arrest has been successfully applied, a framework for the exercise of the right of a bond of arrest in insolvency proceedings (bankruptcy) for Russian legislation. The main methods of the study are: Comparative law, which allows the study of the theoretical provisions of the right to bail and the proposal of appropriate legislative designs; as well as the historical-legal method combined with the systematic method of analysis of the problem under investigation. Synthesis, interpretation and teleological methods are also used. Since the study of property rights in Germany has had a significant impact on the Russian doctrine, the German experience of the legal regulation of a creditor whose claims are secured by the seizure of property has been used in the analysis of the problems of a bond of arrest. The legal nature of the right to bail, which is the subject of debate in the doctrine of Germany and Russia, has been analysed. It has been concluded that the right to an arrest bond is a special right of bail, together with a contractual and legal bond. It is substantiated that there is a gap in Russian law regarding the legal position of a creditor in insolvency proceedings (bankruptcy) in the event of securing his claims by seizure of the debtor’s property. The preferential right of tax authorities to obtain satisfaction in insolvency proceedings in the attachment of taxpayer property, qualified as a legal security, introduced in Russian tax legislation, it is considered to be a breach of the balance between public and private interests. It is justified that the right to a bond of arrest is subject to the law of procedural law and proposals have been made to regulate the legal position of creditors entitled to a bond of arrest in insolvency proceedings (bankruptcy).

1 Introduction

Collateralized creditors have a privileged status in insolvency proceedings (bankruptcy). Insolvency proceedings (bankruptcy) satisfy the claims of the insolvent creditors in a small amount. Thus, the amount granted to creditors’ claims was 5.2 per cent in 2019 and

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4.4 per cent in 2020. However, the status of the collateral lender significantly increases the quota, as these lenders have a separate status and their claims are satisfied at the cost of the collateral. Under Russian law, bail is known as a means of enforcing a civil-law obligation, which is regulated by the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of the Russian Federation). Bail may be used to secure the performance of duties in public law relations. In this case, the rules of the Civil Code of the Russian Federation apply to the legal bond.

It should be noted that Russian legislation does not regulate the status of creditors of private law relations whose claims are secured by the seizure of property in the course of the proceedings or in the enforcement proceedings.

However, the competent authorities are required to acquire the status of mortgager, both on private legal grounds, when entering into a pledge contract and when failing to enforce a decision to recover the debt secured by the seizure of the taxpayer’s property, as well as a tax audit decision enforced by a ban on the alienation of property by a taxpayer in accordance with Art. 2.1. 73 Tax Code of the Russian Federation (hereinafter referred to as NK of the Russian Federation). However, article 2. 73 In the Russian Federation, collateral relationships arising from the seizure or prohibition of expropriation of property are regarded as the right of a legal bond. In public law, the emergence of rules of private law is acceptable. There is no doubt as to the private law nature of collateral when a pledge contract is concluded between the taxpayer and the tax authority. The conclusion of a pledge contract affects the status of an authorized body in an insolvency proceeding (bankruptcy). Under art. 18 of the Federal Law of 26.10.2002. 127-F3 «On Insolvency (Bankruptcy)>> (hereinafter - F3 «On Insolvency (Bankruptcy)>>) it is allowed to acquire the status of a pledger exclusively by a bankrupt creditor, but it is permissible in our opinion, apply the analogy of the law in this case.

However, when a taxpayer’s property is seized, the legal relationship is different. It requires analysis, both in terms of its origins and of its legal regulation.

Metohogs. The methodological basis of the study was the following methods of scientific knowledge: Comparative and Historical-Legal Methods combined with a systematic method of analysis of the problem under study. Synthesis, interpretation and teleological methods are also used.

According to L. Zweigert, H. Ketz, the method of comparative law can be used in two ways: a) The use of foreign law in the creation of new national laws (legislative comparison); b) as a comparison of different legal orders with a view to a deeper knowledge of the law (scientific and theoretical comparison) [K. Zweigert, H. Kötz, 1996. S. 49]. Both manifestations of the method of comparative jurisprudence found expression in the study undertaken, since its use allowed for a more in-depth study of the legal nature of the right to remand in custody and also proposed measures to improve Russian legislation, in which a gap has been identified in the legal regulation of the law on bail.

The use of systems analysis has made it possible to analyse the balance between the interests of private and public creditors involved in insolvency proceedings (bankruptcy) and to identify shortcomings in Russian law and judicial practice in this area.

Teleological interpretation identifies the purpose and purpose of a bond of arrest in insolvency proceedings.

The methods of deduction, synthesis and interpretation used served as a starting point for determining the content of the right of a remand bond, the grounds on which it arose and its relationship to other types of bail.

The study draws on Russian and German legislation and notes on insolvency law. The doctrine is based on the works of Russian and German lawyers, including: on insolvency (bankruptcy) - A.V.Yegorov (2016), S.A.Karelin and I.V.Frolov (2017), T.P. Shishmarev

2 Results

As a result of the study, the right of an arrested person is singled out as a special type of right of bail, which arises as a measure of enforcement. It is recognized that claims by a creditor secured by a seizure of the debtor’s property are privileged, as are claims by a pledgee, at the expense of the value of the seized property.

3 Discussion

Court practice does not recognize a privileged position in the insolvency proceedings of creditors who have secured their claims by seizing the debtor’s property. A ruling of the Supreme Court of the Russian Federation, dated 27.02.2017, 301-EC16-16279, in case A11-9381/2015, did not confirm the creditor’s right of priority in the event of attachment to the debtor’s property in insolvency proceedings (bankruptcy). The Supreme Court of the Russian Federation interprets art. 5. 334 Civil Code of the Russian Federation, in such a way that the right of a pledge arises for the creditor not in connection with the attachment of the debtor’s property, but only in the event of its wrongful disposition to a third person, and the possibility of enforcing the seized property as a means of protecting the rights of the creditor is rightly linked to the good faith of the purchaser. The judgements of the Supreme Court of the Russian Federation are based on the provisions of the Code of Civil Procedure of the Russian Federation and on the interrelationship between articles 334, art. 5, and article 1741 of the Code of Civil Procedure of the Russian Federation. In the absence of regulation of the right to remand in custody and its features, it is difficult to imagine a different interpretation.

The arguments of the Supreme Court of the Russian Federation against the existence of a priority right of such a creditor can be quite disproved, the doctrine makes relevant arguments [V.V. Baybak, R.S. Bevzenko, S.L. Budylin, i dr.; otv. red. A.G. Karapetov, 2018].

We believe that it is necessary first of all to address the nature of the right to remand in custody and the possibility of applying the rules of the Code of Criminal Procedure to these legal relations.

We note that there is no concept of «arrest bail», however from p. 5 of the Criminal Code of the Russian Federation. The Code of Civil Procedure of the Russian Federation provides rules on the establishment of a legal bond when a prohibition on the disposal of property is imposed by the Code of Criminal Procedure, 1,741 Civil Code of the Russian Federation, which quite formally covers the seizure of property in the case of an unlawful transaction involving seized property.

The concept of a «arrest bond» (Pfändungspfandrecht) is known by German law, where it is contained in €804 Zivilprozessorgnung (hereinafter - ZPO), ~930 ZPO, ~459 Strafprozessordnung (hereinafter - StPO).

The right of arrest bail to movable objects, as well as to claims and rights is regulated by ~804 ZPO in execution proceedings, in which arrest, in our opinion, is applied as a measure of enforcement of a court decision. The right to a bail may also arise by the execution of the arrest by virtue of ~930 ZPO, and its validity requires the handing over of the object or the right of possession to the claimant in accordance with ~808 ZPO, or a decision on the enumeration as the beginning of the arrest procedure according to ~829 ZPO.
In the opinion of G. Prütting, there must be procedural and material preconditions for the creation of the right to a bond of arrest, namely, the right of the debtor to the subject matter of the enforcement and the validity of the claim on which the enforcement is based [Bruno M. Kübler, Prof. Dr. Hanns Prütting, Prof. Dr. Reinhard Bork. Band 1].

O. Büchler claims that the right to bail arises from: a) by means of an existing title-based inventory under €804 Abs. I ZPO; b) by means of the arrest list according to €930 ZPO; c) fine according to €459 StPO [Dr. Achim Ahrendt, Dr. Gideon BohmPeter-Alexander Borschardt, Dr. Olaf Büchler, Joachim Büttner, Dirk Decker, Sylvia Fiebig, Frank Frind, Christoph Ningsmeier 2009].

Looking at the arrest bond in German law, it should be noted that it acquires the qualities of a security right as a measure of enforcement, since attachment of movable property, claims and rights guarantees, As in the case of a contractual and legal pledge, the enforcement of the debtor’s property. That’s what arrest and bail look like.

In our view, arrest does not have such qualities as an interim measure in judicial proceedings, since it is applied until the time of the court’s decision. Moreover, in insolvency proceedings, only claims of creditors that have already been resolved in separate proceedings are established in Germany. Therefore, if an arrest is used as an interim measure, which is applied in the course of the proceedings, the seized property may not be recovered until a court decision has been issued, i.e. until the material conditions have been met.

Thus, creditors who have taken steps to secure their claims in proceedings that are still pending are not eligible to acquire the status of liens. It would appear that the German legislator has justifiably given rights to mortgagees of creditors who have used the arrest in the execution proceedings.

By distinguishing between the right to a bail (Pfändungspfandrecht), a contractual bond (geschäftliche Pfandrecht), a legal bail (gesetzliche Pfandrecht), we will highlight several basic criteria.

First, the subject of the arrest bond in Germany are movable things, demands and rights [Dr. Achim Ahrendt, Dr. Gideon BohmPeter-Alexander Borschardt, Dr. Olaf Büchler, Joachim Büttner, Dirk Fieker, Sylvia Big, Frank Frind, Christoph Henningsmeier 2009].

Immovable property is also the subject of a contractual and legal bond.

Second, the types of collateral analysed can be distinguished according to their origin. For the arrest bond, such grounds are the court decision on seizure of property and the act of bailiff, for the contractual bond, the bond agreement concluded under the rules set out in Bürgerliches Gesetzbuch (hereinafter BGB) for the legal bail - the circumstances, statutory.

Third, the time period for the creation of the right of a bond of arrest B § 88 Insolvenzordnung (hereinafter - InsO) is established that interim measures of protection, which are introduced one month before the creditor applies for a declaration of insolvency or after the declaration of the property is made, of the insolvency estate shall be void.

The exercise of the right to a bond of arrest is also provided for in the insolvency procedure. A creditor whose claims are secured by the attachment of the debtor’s property is granted the status of a pledgee according to €50 InsO. Note that the legislator in € 50 InsO specifies the types of bail right on the grounds that it arises: a) a contractual bond; b) a legal bond; c) a bond of arrest. In this way, the right of bail is separate from other types of security and is presented as a special type of right of bail due to the characteristics of its creation.

Thus, in the Notes to InsO, different types of collateral rights are singled out, applying in addition to the basis of the creation of the right of pledge and the subject of pledge, which in the law on property rights determines the peculiarities of the collateral. Thus, in the Munich Commentary to InsO the right of arrest bail is allocated in a circle of separate
rights according to § 49 - 51 together with the legal bail with a reference to § 50 InsO [Hans-Peter Kirschof, Dr. Hans. - Jürgen Lwowski, Dr. Rolf Stürner, 2007].

In German doctrine, there are theories of the legal nature of the bond, among which are private law theory, public law theory and mixed theory [Lackmann R, 2010]. The dominant theory in the doctrine is, after all, the public-law theory. Legislator in abz. 2 § 804 ZPO provides that, in the case of seizure, there is a right of bail similar to that under the bond contract.

The concept of «arrest bond» is not known to Russian law. However, after the introduction of changes to the article. The 334 Civil Code of the Russian Federation, in doctrine, was created and used to denote the special status of a creditor who secured his claims by attachment of property.

The Russian procedural law and the legislation on execution also regulate arrest as an interim measure, but the Russian procedural law does not regulate bail.

Without referring to interim measures that may be used in the course of the proceedings, as in Germany, in insolvency proceedings (bankruptcy), Creditors are unable to establish their claims for inclusion in the creditor registry for participation in insolvency (bankruptcy) proceedings pending resolution of the law dispute or legal dispute. However, unlike Germany’s insolvency law, such disputes concerning the right of insolvency creditors, authorized authorities with the debtor, are resolved in the claims determination procedure under the rules of art. 71, 100 F3 Insolvency (bankruptcy) in insolvency proceedings. If creditors initiate insolvency proceedings, their disputes should be resolved in separate proceedings before applying to an arbitral tribunal for insolvency (bankruptcy).

On that basis, creditors who resolve disputes with the debtor are not entitled to acquire the status of creditors participating in insolvency proceedings (bankruptcy). Consequently, the status of a mortgagee in connection with the seizure of property is permissible only for creditors who have received court orders and have used the seizure for its execution.

M.A. Kulikov singles out in the commentary to the article. 80 F3 «On enforcement proceedings» arrest as a security act in the execution of the enforcement document and at the same time as an independent enforcement measure of the enforcement document, issued by the Court for the purpose of taking protective measures [M.A. Kulikova, 2014].

Of particular importance for the study of the right to bail is the qualification of arrest as a measure of enforcement of a judicial decision. It is in this case that the relationship that the doctrine qualifies as the legal relationship of a bond of arrest may arise.

It appears that the concepts of enforcement of obligations under the rules of the Civil Code of the Russian Federation and enforcement of a judicial decision under the Code of Arbitration and Procedure of the Russian Federation (hereinafter referred to as the Code of Arbitration) and the Code of Civil Procedure of the Russian Federation (hereinafter referred to as the Code of Civil Procedure) are of a different legal nature, Interim measures of protection under the Civil Code of the Russian Federation are private law, and interim measures of attachment to the debtor’s property in enforcement proceedings are public law.

Collateral relationships, whether contractual or statutory, are of a private nature, providing for the performance of the obligation to recover the property pledged by the debtor. At the same time, arrest as an interim measure applied in judicial and enforcement proceedings is, by its very nature, a measure of a public nature. Arrest in enforcement proceedings as a measure of enforcement of a judgement is very similar to bail in that it allows for the recovery of the property seized if the debtor fails to comply voluntarily with a valid judgement. In both cases, the property is to be sold at a public auction, and the proceeds are to be paid to the creditor (requester).

It follows that creditors on whose behalf the debtor’s property is seized, whether they are insolvency creditors or authorized bodies, should have the privilege of other unsecured creditors, However, there is a need to properly address the creditor’s preponderant right to
satisfaction of claims in insolvency proceedings (bankruptcy), and to make a legal
assessment of their relationship to legal and contractual security. Since a bond of arrest is
essentially a different type of bond, a rule to that effect should be included in the procedural
law.

In the draft Law «On Introduction of Amendments to the Federal Law «On Insolvency
(Bankruptcy)» and some legislative acts of the Russian Federation», satisfaction of claims
of creditors ensuring their attachment on the property of the debtor is resolved.

Art. 138 F3 «On Insolvency (Bankruptcy)», which regulates the order and rules of
satisfaction of the pledgee’s claims, it is intended to introduce changes, the essence of
which is the following. A pledge creditor is given a privileged status by those creditors
whose interests have been protected under art. 2. 1741 BC RF, art. 5. The Code of Civil
Procedure of the Russian Federation, as well as in the cases provided for by public
legislation, in which a prohibition on the disposal of property is also imposed or in which
property is seized in accordance with article 21, para. 21. 73, art. 77, art. 88, para. 51, art.
89, para. 141, and art. 101, para. 10, of the Criminal Code of the Russian Federation. The
claims of such creditors are secured by a bond in the creditor registry and are satisfied by
the value of the assets that have been frozen or seized.

The legislator thus gives priority to a sufficiently wide range of creditors whose status
varies widely.

The Russian legislator, unlike the German legislator, does not take into account the
various circumstances that significantly affect the content of this priority. At the same time
the concept of «arrest bail» is still not used in the draft law.

First of all, any creditors who have exercised the right to restrain the disposition of
property are given preferential creditor status. It appears that they do not always have the
material preconditions for recovery of the debtor’s property. The German legislator is quite
reasonable when it uses the right of arrest bail as a measure of enforcement of an
enforceable judgement. The Russian legislator’s decision grants unwarranted privileges to a
number of creditors. Let us note that it will be very difficult to implement them.

In addition, it should be noted that the draft law does not restrict the granting of a
privileged position in respect of the period of entitlement to bail. It was reasonable, as was
done in Germany, to limit the attachment to property three months prior to the introduction
of the insolvency procedure when the traders became aware of the debtor’s financial
difficulties. If creditors wish to exercise their right to seize the debtor’s property in the
period immediately preceding the application for insolvency, the simultaneous acquisition
of mortgagee status by a multitude of creditors of the debtor does not effectively confer
special privileges on them. It may still be the position of individual creditors.

Para. 2.1, art. The Russian Criminal Code provides that provisional measures in the
form of a prohibition on the disposal or seizure of property may be applied in the event of
non-payment of arrears in taxes, fees and insurance contributions within one month. The
emergence of such a rule guarantees the status of a pledgee in insolvency proceedings
(bankruptcy), as opposed to insolvency creditors, who must endeavour to conclude a pledge
contract unless it arises on grounds statutory.

However, such efforts by insolvency creditors do not guarantee them the status of
pledgees, since a bond agreement concluded one month before the application is accepted
can be challenged as a preferential transaction under the Art. 613 F3 «On Insolvency
(Bankruptcy)». And there are good grounds for such a challenge: 1) The creditor that has
entered into the pledge contract is given the preferred conditions to satisfy the claim; 2) The
period of preference is: a) One month; b) Six months; 3) Bad faith of the counterparty to
the transaction, If the transaction is concluded within a period of six months prior to the
declaration of insolvency. It should be noted that, for a one-month period, the legal position
of the Supreme Court of the Russian Federation is that there is an irrefutable presumption
of bad faith on the part of the counterparty to the transaction in question (objective presumed knowledge of the debtor’s insolvency).

If you look at the legal bail and the right to bail, which is classified as a Statute. 73 NK of the Russian Federation as a legal pledge, then mortgagees are in equal position. Thus, the competitive creditors and the authorized bodies are that cannot be exercised by the competing creditors. clearly not on an equal footing, and the competent authorities have been granted privileges

4 Conclusions

A new classification of the pledge (pledge relations) on the basis of the origin: contractual, legal, arrest. Application of the provisions of Art. 73 The RF NC grants unauthorized privileges to authorized bodies in insolvency (bankruptcy) proceedings over competitive creditors for whom such interim measures are not applied by judicial practice.

Thus, the advent of art. 2.1. 73 The Tax Code of the Russian Federation has disturbed the balance of private and public interests in insolvency (bankruptcy) proceedings and this imbalance needs to be corrected by giving all creditors equal rights in securing their claims against the debtor by seizure of their property, The Committee notes with concern that the State party has not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The legislator may be advised to take into account the timing of the creation of the power of arrest in order to ensure that the debtor’s assets are not seized on a massive scale in anticipation of insolvency.

![Diagram](image_url)

**Fig. 1.** Rationale for legalization of the notion of Bail Russian Federation and German legislation.

The following conclusions can be drawn from the above material:
Table 1. Conclusions on article.

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<th>Conclusions</th>
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<td>1</td>
<td>The right to bail is a special right of bail, along with a contractual and legal bond.</td>
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<td>2</td>
<td>There is a lacuna in Russian law in the legal position of the creditor in insolvency (bankruptcy) proceedings in the case of securing its claims by seizure on the property of the debtor.</td>
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<td>3</td>
<td>Introduced into the tax legislation of the Russian Federation (art. 73 NC of the Russian Federation) the preferential right of tax authorities to obtain satisfaction in insolvency proceedings when seizing the taxpayer’s property, qualified as a legal pledge, distorts the balance of public and private interests.</td>
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<td>4</td>
<td>The right to arrest bail is subject to procedural legislation</td>
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<td>5</td>
<td>All creditors are encouraged to give equal rights in securing their claims against the debtor by seizing its property.</td>
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<tr>
<td>6</td>
<td>It is proposed that the application of bail should be limited to the enforcement of an enforceable judgement, following the example of German law.</td>
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<td>7</td>
<td>The legislator is encouraged to take into account the duration of the right to lien in order to avoid mass seizure of the debtor’s property in anticipation of its insolvency.</td>
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