

E.D. Suvorov

Russian Insolvency Law



УДК 347.736
ББК 67.404.13
S95
С89

Author

Evgeny Suvorov – Doctor of Law, Professor of the Department of Civil Law at Moscow State Law Academy, attorney (for feedback please send to: edsuvorov@gmail.com) [Евгений Дмитриевич Суворов – доктор юридических наук, профессор кафедры гражданского права МГЮА, адвокат (для обратной связи: edsuvorov@gmail.com)]

Suvorov, Evgeny Dmitrievich.

S95 Russian Insolvency Law. – Moscow : Statut, 2024 – 368 p. [Суворов, Евгений Дмитриевич. Российское банкротное право. – Москва : Статут, 2024. – 368 с. На английском языке]

ISBN 978-5-8354-2012-4 (в пер.)

This monograph presents the concept of bankruptcy (insolvency) law as a mechanism for implementing the principle of equality of creditors. Thus, the monograph reveals the nature and essence of this principle, presents the risk theory that substantiates it, and describes the features of its manifestation in a positive and negative sense. The structure of relations regulated by insolvency law is determined, the dynamics of bankruptcy legal relations are described, and the place of insolvency law in the legal system as an institution of the law of obligations is determined. The mechanism of insolvency law is disclosed through a description of bankruptcy proceedings, features of the fulfillment of obligations in the event of bankruptcy of the debtor, avoidance of the debtor's transactions and the fulfillment of his obligations at the expense of third parties.

The monograph describes the mechanism of insolvency law used in the Russian Federation, using the comparative legal method. For comparison, the insolvency laws of the USA, Great Britain, France, Germany and other countries were used.

The monograph is addressed to lawyers practicing, studying, teaching and creating insolvency (bankruptcy) law.

В настоящей монографии представлена концепция банкротного права как механизма реализации принципа равенства кредиторов. Так, в монографии раскрыта природа и существо указанного принципа, представлена обосновывающая его рискованная теория, описаны особенности его проявления в позитивном и негативном смысле. Определена структура отношений, регулируемых банкротным правом, описана динамика банкротных правоотношений, определено место банкротного права в системе права в качестве института обязательственного права. Механизм банкротного права раскрыт через описание производства по делу о банкротстве, особенностей исполнения обязательств при банкротстве должника, сопоставления сделок должника и исполнения его обязательств за счет третьих лиц.

В монографии описан механизм банкротного права, применяемый в Российской Федерации, при этом использован сравнительно-правовой метод. Для сравнения использовано банкротное право США, Великобритании, Франции, Германии и других стран.

Монография адресована юристам, практикующим, изучающим, преподающим и создающим банкротное право.

УДК 347.736
ББК 67.404.13

ISBN 978-5-8354-2012-4

© Suvorov E. D. [Суворов Е. Д.], 2024
© Макет, художественное оформление.
Издательство «Статут» [Statut Publishing House], 2024

Introduction

This monograph is devoted to such an institution of the law of obligations as bankruptcy law. We are talking about an institution that contains the features of the fulfillment, security and discharge of the obligations of an insolvent debtor. These features are predetermined by the need to implement the principle of equality of creditors (*pari passu*): in case of insufficient funds for settlements with all creditors, it would be correct to distribute the corresponding loss (realized risk of insolvency) among all creditors in a similar position. In general, the corresponding risk is distributed among the creditors of the same queue by means of the rule on the proportional distribution of available funds (*pro rata*); however, prioritization aims to take into consideration the characteristics of creditors that make them subject them to less or more risk of debtor insolvency.

It is precisely this distribution of risk that bankruptcy law deals with: in general, it prohibits individual satisfaction (a moratorium on individual fulfillment of obligations), gathers a team of creditors (by proof of debts and setting claims), hands over the bankruptcy estate to the debtor or insolvency practitioner to restore its volume to a level sufficient for settlements (restoration solvency) or for its sale (sale of the debtor's property), establishes the rules for settlements with the entire team of creditors (priority and proportionality), protects the interests of creditors in the amount of satisfaction or equality in such satisfaction (challenging of the transactions), allows the team of creditors in some cases claim property masses of third parties (vicarious liability).

The description of bankruptcy law, taking into account the foregoing, implies a consistent presentation of the doctrine of the *pari passu* principle, bankruptcy law as a mechanism for its implementation and the elements of such a mechanism. The structure of this monograph is sustained in this logic.

Chapter 1. THE PRINCIPLE OF EQUALITY OF CREDITORS AS A REASON AND PURPOSE OF BANKRUPTCY LAW

§ 1. The essence and legal nature of the *pari passu* principle

The main principle of bankruptcy law is the principle of equality of creditors, also called the principle of *pari passu*, the existence of which is generally recognized in the doctrine¹.

Although the phrase *pari passu* is used not only in bankruptcy law, in general it refers to the idea of equal treatment. So, for example, the named term is given in the Latin translation of the “Order of Her Imperial Majesty Catherine the Second Autocrat of All Russia, given to the Commission on the drafting of a new Code”, namely in paragraphs 38, 308 when translating the phrases “equally”, “are walking side by side.”² The term is similarly covered in Black’s Law Dictionary. According to the definition, it means “equally, alike, without preferences...”³.

It should be noted in advance that the phrases *pari passu* and *pro rata*, sometimes used as synonyms in bankruptcy law, are not identical. Thus, *pro rata* is translated as “in proportion” and denotes the idea of distributing the bankruptcy estate of an insolvent debtor in proportion to the debt in the total debt, which, in turn, is the implementation of an equal approach. With this approach, *pro rata* is a means to achieve the idea of equality, i.e. means of implementing the principle of *pari passu*. It can thus be said that *pari passu* is achieved through *pro rata*. At the same time our statement is somewhat

¹ See: Shershenevich G.F. Trade law course. T. IV: Trading process. Competitive process. M.: Statute, 2003. P. 449; Karelina S.A. Mechanism of legal regulation of insolvency relations. M.: Wolters Kluwer, 2008 (SPS “ConsultantPlus”); Koraev K.B. Legal status of bankruptcy creditors in a bankruptcy case. M.: Wolters Kluwer, 2010 (SPS “ConsultantPlus”); Shishmareva T.P. Institute of Insolvency in Russia and Germany. M.: Statute, 2015 (SPS “ConsultantPlus”); Goode R. Principles of Corporate Insolvency Law. 4th Ed. Sweet & Maxwell, 2011, pp. 89, 99; McBryde W.W., Flessner A., Kortmann S.C.J.J. Principles of European Insolvency Law // Series Law of Business and Finance. Vol. 4. Deventer, 2003. P. 81.

² For more details, see: Empress Catherine the Second. The order given to the Commission on the drafting of a new Code / ed. and with a preface. V.A. Tomsinova. M.: Mirror, 2008.

³ Black’s Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M.A. St. Paul, Minn. West Publishing Co., 1968. P. 1270.

different from the general approach that identifies the terms *pro rata* and *pari passu*¹.

The bankruptcy law owes its existence to the *pari passu* principle.

So, in essence, bankruptcy implies a specific mode of fulfilling the obligations of an insolvent legal subject, i.e. one that, with a high degree of probability, will not be able to fulfill its obligations in full. The essence of the *pari passu* principle is that all creditors of such a debtor, who are in a similar actual situation, should have equal opportunities in terms of obtaining satisfaction from its bankruptcy estate and the implementation of managerial and informational powers accompanying the named goal. Accordingly, if one of the debtor's creditors receives full satisfaction of his claim, he finds himself in a preferential position in relation to other creditors of the same queue, and even more so in relation to unsatisfied creditors of higher queues. Moreover, he finds himself in such a position **at the expense of other creditors**, if we take into account that the difference between the full satisfaction of his claim and the satisfaction that the mostly satisfied creditor could count on in the proportional distribution of the bankruptcy estate among all creditors, he receives from the bankruptcy estate, the funds of which are due to all creditors, and not only to him.

The debtor's creditors facing insolvency are generally in a similar situation: the very concept of a creditor implies taking on the risk of the debtor's insolvency. In this regard, such an attitude towards creditors of the same queue will be equal, in which they evenly distribute the risk of insolvency, i.e. assume losses in proportion to the volume of their claims (*pro rata*).

Proportional discharge of creditors' claims is possible only after the establishment of all applicants for participation in the distribution of the bankruptcy estate, as well as the formation of the estate itself. Therefore, the insolvency (bankruptcy) legislation introduces an interdiction on individual satisfaction (moratorium), invites creditors to proof and set their claims in a bankruptcy case and ensures settlement with creditors at the same time, taking into account the formed bankruptcy estate. In fact, the content of the mechanism for implementing the *pari passu* principle, namely bankruptcy law, is described here.

The condition of equal distribution is valid within the same queue, which combines the claims of creditors with similar status (a positive manifestation of the *pari passu* principle); on the contrary, with a significant difference in the status of creditors (including due to the nature of their claims), the named

¹ See, for example: Bevzenko R.S. Property security: pledge, retention and title security structures: dis. ... Doctor of Law. M., 2022. P. 26.

principle requires that these differences be taken into account by establishing the order of satisfaction, including subordination of claims, or by providing other privileges, including the right to segregated satisfaction (a negative manifestation of the *pari passu* principle).

Regardless of whether bankruptcy will take place according to the liquidation or rehabilitation scenario, the *pari passu* principle is valid: in all cases, it does not allow obtaining material, managerial or informational advantages of some creditors over others who are in a similar position to the first .

Significance of the *pari passu* principle. In the absence of the principle of equality of creditors, the legislation on enforcement proceedings could well cope with the fulfillment of obligations; unknown to creditors and third parties, by ad hoc methods.

In turn, it is the *pari passu* principle that makes it necessary to fulfill obligations collectively (immediately in relation to all creditors) and evenly, to carry out liquidation publicly according to the rules of bankruptcy legislation to take into account the interests of all involved persons, and the restoration of solvency – under control and with the consent of creditors. In particular, it is the need to implement this principle that caused the provisions on the introduction of a moratorium that does not allow individual satisfaction, on the need to include a claim in the register of creditors' claims in order to obtain satisfaction on a collective basis, on a collective method of settlement, on proportional satisfaction in case of insufficiency of funds, on challenging the preferential satisfaction.

The *pari passu* principle in some cases is also considered as the basis for the orderly liquidation of debtors, this is another, but not the main, role of this principle¹.

Setting forth of the *pari passu* principle in regulations and judicial practice. A.V. Konovalov writes that the setting forth of the principles of law is more typical for countries of continental law². Meanwhile, the principle of equality of creditors in the general provisions of the Russian Bankruptcy Law is not directly enshrined as a principle³, although it can be derived from par. 16 art. 2 of the Bankruptcy Law⁴.

¹ See: Zautrennikov K.S. The problem of challenging payments of third parties as transactions with preference made at the expense of the property of a bankrupt debtor // Arbitration disputes. 2019. No. 3, pp. 85–92.

² See: Konovalov A.V. Principles of civil law. SPb.: LLC “ID “PRAVO””, 2019. P. 92.

³ The law does not mention such a principle precisely as a principle, suggesting only a method for its implementation (priority and proportionality).

⁴ Federal Law of October 26, 2002 No. 127-FZ “On Insolvency (Bankruptcy)” (as amended on December 28, 2022) // SZ RF. 10/28/2002. No. 43. Art. 4190.

Mention of the principle of “equality of creditors of the same queue” is contained in a special rule applied in the event of bankruptcy of credit institutions. So, by virtue of paragraph 14 of Art. 189.89 of the Bankruptcy Law, the transfer of property (assets) and liabilities of a credit institution or part thereof is carried out on the basis of the principles of good faith and reasonableness of the actions of the bankruptcy trustee, the equivalence of the amount of transferred obligations to the value of the transferred property (assets), protection of rights and legally protected interests of creditors, including minimization of their losses in the exercise of their right to receive satisfaction of their legal claims against a credit institution, priority and proportionality of satisfaction of creditors’ claims, equality of creditors of the same priority.

In addition, individual elements (implementation tools) of the principle of equality are contained in the definition of bankruptcy proceedings. By virtue of Art. 2 of the Bankruptcy Law, bankruptcy proceedings are a procedure applied in a bankruptcy case to a debtor who has been declared bankrupt in order to adequately satisfy the claims of creditors. We have already said above that proportionality is a means of achieving equality, but it should not be identified with equality. In particular, the identification of these categories will not allow deriving from the principle of equality the right to equal participation in initiating a bankruptcy case, managing and receiving information.

Fixing the principle at the legislative level is not mandatory, since the principles of law stand above legislative decisions and serve as the basis for their construction. The condition for the obligatory fixing of the principles of law for their application seems to be based on two incorrect assumptions: 1) that the principle of law cannot exist outside the law; 2) that the principle of law is subject to the same application as the rule of law.

The principles of law are guidelines for the legislator, they direct him to such a way of organizing the legal regulation of social relations, which is most adequate for the state structure. This statement is connected with the fact that it is the principles of law that have the closest connection with justice, and therefore are supported by the subjects of relations due to the desire for justice of human nature. A norm that is contrary to the principle of law is an unjust norm that becomes a simple act of management, designed for general public, but loses the name of law. Of course, normative regulation of public relations can also take place, but, not being based on law, it requires significant costs for the administration of management, and it does not allow using the authority of public opinion for its existence. In this sense, the principle of law is not a norm, nor is it subject to application in the same manner as a norm.

Above, we said that the principle of equality of creditors does not need legislative consolidation. This, however, does not mean that the consolidation of the relevant principle cannot be desirable. In particular, such consolidation in the general provisions of the law may be desirable from the point of view of orienting the law enforcer to a means of filling gaps in the law, or in terms of reasons for the legislator to evaluate the proposed solutions for their compliance with a certain principle. In this regard, we agree with the opponent of the normative approach to understanding the principles of law A.V. Konovalov, arguing that “fixing a correctly disclosed and understandable principle of law in the text of a norm of a positive law is an absolute plus for this law and creates significant prerequisites for the proper implementation of the principle in everyday legal practice”¹.

As already mentioned, in the Russian legal order, this principle, although not directly enshrined, is derived, in particular, from par. 16 art. 2 of the Bankruptcy Law.

This principle has been repeatedly recognized by the Constitutional Court of the Russian Federation² and is recognized by the Supreme Court of the Russian Federation.

Thus, the Supreme Court of the Russian Federation recognizes the existence of the general legal principle of equality (paragraph 52 of the Ruling of the Supreme Court of the Russian Federation dated December 21, 2017 No. 53³). In addition, the same court also recognizes the special principle of equality of creditors (see paragraph 18 of the Review of Judicial Practice of the Supreme Court of the Russian Federation No. 2 (2017), approved by the Presidium of the Supreme Court of the Russian Federation on April 26, 2017; Supreme Court ruling of January 19, 2017 No. 301-ES16-16279).

In the bankruptcy case of *Enbima Group*⁴, the Supreme Court of the Russian Federation indicated that the legal relations associated with bankruptcy are based on the principle of equality of creditors whose claims

¹ Konovalov A.V. Principles of civil law. P. 239.

² See, for example: Ruling of the Constitutional Court of the Russian Federation dated March 12, 2001 No. 4-P “In the case of verifying the constitutionality of the second paragraph of paragraph 1 of Article 134 of the Federal Law “On Insolvency (Bankruptcy)” in connection with the complaint of the public joint-stock company “T Plus”” // SPS “ConsultantPlus”.

³ Ruling of the Supreme Court of the Russian Federation dated December 21, 2017 No. 53 “On some issues related to holding persons controlling the debtor liable in bankruptcy” // SPS “ConsultantPlus”.

⁴ See: Ruling of the Supreme Court of the Russian Federation dated February 27, 2017 No. 301-ES16-16279 // ATP “ConsultantPlus”.

belong to the same category of payments (clause 4, article 134 of the Bankruptcy Law).

As follows from the legal position of the Supreme Court of the Russian Federation, expressed in the bankruptcy case of *Vladimir-OPTON*¹, in legal relations in bankruptcy, civil legislation proceeds from the principle of equality of persons (creditors, authorized bodies), whose claims belong to one category of payments (Clause 1, Article 1 of the Civil Code of the Russian Federation², Clause 4, Article 134 of the Bankruptcy Law). This principle must be observed not only in the distribution of the bankruptcy estate of the debtor, but also in relations related to the procedure for presenting claims against the debtor, determining the status of a person participating in a bankruptcy case.

Violation of the principle of equality served as the basis for the cancellation of judicial acts in the bankruptcy case of *Sudoverfryba*³, and in the bankruptcy case of *Petushinsky Metal Plant*⁴, the principle of equal legal protection of the interests of all creditors was called fundamental.

It should be noted that the principle of equality is manifested not only in the equal distribution of bankruptcy estate funds, but also in the equal granting of the right to manage, as well as in the equality in initiating proceedings and equality in informing. If the first involves the distribution of the bankruptcy estate among all creditors of similar status in proportion to the share of the claim of each of them in the total amount of the claims of the corresponding group, then the second is to grant each of such creditors the right to vote at the meeting of creditors in an amount proportional to the share of the creditor's claim in the total amount of the group's claims. Equality in initiating a case implies the provision of the same opportunities in terms of opening the relevant proceedings, in informing – the same informational powers.

With regard to the equal granting of the right to manage, the following should be noted. In a sense, bankruptcy creditors can be compared to corporate “owners” in relation to the bankruptcy estate. The bankruptcy estate is primarily directed to repay the claims of such creditors, which allows them to be considered its beneficiaries, as well as to grant them management powers. It is traditional in corporate law to give a member of a corporation the

¹ See: Ruling of the Supreme Court of the Russian Federation dated July 5, 2018 No. 301-ES18-114 // ATP “ConsultantPlus”.

² Civil Code of the Russian Federation (part one) dated November 30, 1994 No. 51-FZ (as amended on April 16, 2022) // SZ RF. 05.12.1994. No. 32. Art. 3301.

³ See: Ruling of the Higher Court of the Russian Federation dated August 16, 2018 No. 303-ES15-10589 (2) // ATP “ConsultantPlus”.

⁴ See: Ruling of the Higher Court of the Russian Federation dated December 5, 2016 No. 305-ES16-10852 // ATP “ConsultantPlus”.

right to provide from such a corporation, as well as the right to manage it in an amount proportional to the contribution of a member of the corporation¹. In this sense, the creditor is also vested with the right to receive from the bankruptcy estate and the right to manage the bankruptcy estate in a share corresponding to the share of his “investments”, i.e. the share of the risk of insolvency assumed by the debtor.

All the areas of manifestation of the principle of equality of creditors named above are described in more detail in the following.

Comparative legal analysis. Comparative legal research, as expected, confirms the universality of the principle of equality of creditors for different legal orders.

Thus, the named principle (*le principe d'égalité des créanciers*) is known to French bankruptcy law; for example, a moratorium on payments on pre-bankruptcy claims from the moment the preservation procedure (*sauvegarde*) is opened by virtue of Art. 622-7 of the Commercial Code of France². In addition, the distribution of the amount of the debtor's asset among his creditors in proportion to the debt (*en proportion de montant*) in the course of judicial liquidation (bankruptcy procedure, *liquidation judiciaire*) is provided for by Art. 643.8 of this Code³.

The principle of equality, expressed in the proportional satisfaction of the claims of creditors of the same priority, is derived from § 39 of the German Insolvency Code. With regard to § 1 of the Regulation (*par conditio creditorum*), R. Bork notes that *pari passu* is not only equal, but also the best satisfaction of creditors⁴.

The principle of equality of creditors is directly enshrined in Art. 2741 of the Italian Civil Code⁵.

¹ Of course, taking into account all possible deviations from the general rule.

² Code de commerce. 107 ed. Dalloz, 2011. P. 940–943. On the current state of the principle of equality of creditors in France, see, for example: Delmotte Ph. L'égalité des créanciers dans les procédures collectives. URL: https://www.courdecassation.fr/files/Publications/Rapport%20annuel/rapport-annuel_2003.pdf (accessed 04/06/2023).

³ Art. L. 643-8 CC: Le montant de l'actif, distraction faite des frais et dépens de la liquidation judiciaire, des subsides accordés au chef d'entreprise ou aux dirigeants ou à leur famille et des sommes payées aux créanciers privilégiés, est réparti entre tous les créanciers **au marc le franc** de leurs créances admises (cit by: Code de commerce. 107 ed. P. 1257).

⁴ See: Bork R. Economic analysis of the law of competitive contestation // Bulletin of Economic Justice of the Russian Federation. 2017. No. 8, pp. 150–166.

⁵ “I creditori hanno uguale diritto di essere soddisfatti sui beni del debitore” (Italian: “Creditors have an equal right to satisfaction from the debtor's property”). For more details, see: Guglielmucci L. Diritto Fallimentare. Ottava edizione: a cura di F. Padovini, con la collaborazione di E. Ban. G. Giappichelli Editore. Torino, 2017, pp. 9–10.

This principle is not objectionable in US bankruptcy law either: according to subs. (b) *sect. 726 US Bankruptcy Code*, payments for the claims of each queue must be made *pro rata*¹. The report of the House of Representatives and the Senate notes that we are talking about cases where the available property (*funds*) is not enough to satisfy the requirements of one queue².

Vanessa Finch and David Milman (UK) point out that the *pari passu* principle is often recognized as playing a fundamental role in corporate bankruptcy law, while it is often called a fundamental role in corporate bankruptcy law³. They also refer to the fact that at present the principle is enshrined in Art. 107 of the Insolvency Act 1986 in relation to voluntary winding up and § 14.12 of the Insolvency Rules 2016 in relation to compulsory winding up and administration⁴.

As the authors write, *pari passu* provides an orderly means of dealing with unsecured creditors. In their opinion, the named principle, among other things, leads to lower costs and lower delays. It is indicated that the collective model of dealing with unsecured creditors is associated with the *pari passu* principle, which meets the problem of efficiency, since it allows avoiding the costs of individual proceedings⁵. The authors also note that the *pari passu* principle is fair both in a procedural and substantive sense, since it prevents individual claims from winning in strength and speed and assumes an equal (equivalent) treatment for all unsecured creditors⁶. Roy Good, Christine van Zwieten (*Great Britain*) emphasize that “the most fundamental principle of bankruptcy law is the distribution of *pari passu*, all creditors participate in the common pool in proportion to the size of their recognized claims”⁷.

Discussion regarding the existence of the principle of equality of creditors. It is also necessary to appreciate alternative points of view, according to

¹ “Payments on claims of a kind specified in paragraph (1), (2)... shall be made *pro rata* among claims of the kind specified in each such particular paragraph”. See: Norton W.L. Jr., Norton W.L. III. *Norton Bankruptcy Law and Practice*, 2d. *Bankruptcy Code and related Legislation, Legislative History, Editorial Commentary, Case Annotations*. 2007–2008 Ed., pp. 987, 990–991.

² See: *Ibid.* P. 990.

³ See: Finch V., Milman D. *Corporate insolvency law: perspectives and principles*. 3d ed. Cambridge University Press, 2017. P. 511; see also on the issue: *Zwieten K. Goode on Principles of Corporate Insolvency Law*. 5th Student Ed. Sweet & Maxwell. 2019, pp. 121–123, 291; Goode R. *Op. cit.* P. 235.

⁴ See: Finch V., Milman D. *Op. cit.* P. 511.

⁵ See: *Ibid.* P. 513.

⁶ See: *Ibid.*

⁷ See: *Zwieten K. Op. cit.*, pp. 121–123, 291; Goode R. *Op. cit.* P. 235.

which such a principle simply does not exist. A prominent proponent of this approach is Rizwan Mokal, who published a paper titled *Priority as Pathology: The Pari Passu Myth*¹.

We wrote above that the collective form of settlement with creditors is a means of equal distribution of risk in pursuance of the principle of equality of creditors. Mokal, on the contrary, sees in the collectivity of the procedure, as opposed to the individual penalty, not a means, but the goal (essence) of bankruptcy procedures; queues and privileges are secondary issues after collectivity. In addition, the author writes that attempts by creditors to secure immunity from the collective procedure are suppressed by bankruptcy law. Apparently, this is an objection to the fact that the existence of the principle of equality is confirmed by the recognized possibility to challenge pre-bankruptcy transactions². The author writes that *pari passu* puts together similar creditors. But further, he notes, it is the sequence, and not *pari passu*, that ensures the absence of destructive competitions between creditors.

Thus, according to Mokal, the essence of bankrupt regimes lies in collective production, which streamlines and prevents damage to the general mass. Mokal discovers another advantage of the collective procedure over the individual one: he believes that when the debtor's property as a whole is sold as a "business on the go" (as a going concern), such property can be worth more than if it is sold in parts³. As a consequence, Mokal believes that the priority and collective nature of the procedure is ensured not by the principle of equality of creditors, but by the above goal. Therefore, bankruptcy law and collectivity are not about equality, but about consistency in order to increase the price of the sale of the debtor's property, the author believes.

Our disagreement with this position can be expressed as follows. First of all, the order in which creditors' claims are satisfied is in itself the principle of equality of creditors. It can be seen that Mokal does not take into account the negative manifestation of the principle of equality of creditors when he gives an example of the impossibility of challenging on the basis of the provision of preferential satisfaction based on the principle of equality of creditors in the case of the same receipt of debt by creditors of different queues⁴.

¹ See: Mokal R.J. *Priority as Pathology: the Pari Passu Myth* // Cambridge Law Journal. 2001. Vol. 60. Part 3.

² See: *Ibid.*

³ See: *Ibid.* P. 592.

⁴ See: *Ibid.* P. 11.

The collectivity itself, to which the author draws attention, does not yet give rise to the obligation to act together¹. Collectivity is necessary for equal distribution, and coordinated actions follow from the principle of cooperation, since the interests of others depend on the actions of each.

Mokal, while justifying the goal of bankruptcy solely by replacing the individual actions of creditors with a collective procedure, which should reduce costs and increase the price of selling a business on the go, comes to a natural conclusion for himself: the question of priority within the collective procedure does not matter; it is enough that it be collective². It is difficult to agree with such a statement, bearing in mind that the decision on the order is based on the requirement of equality, which, in turn, follows from justice.

Mokal sees the negation of the principle of equality of creditors in the fact that bankruptcy law itself creates exceptions in the form of privileges³. But after all, this is a confirmation of the principle: they talk about exceptions only in the context of the rules. The question that the basic solution is precisely equality is not discussed, we are talking about legislative exceptions. The law is needed precisely in order to legitimize such exceptions. In addition, Mokal correctly points out that among preferred creditors the division is also proportional, i.e. equal⁴. Although he disputes the connection with the principle of equality, it seems that this is another confirmation of this principle: equal to equal, unequal to unequal; those who are unequal can be equal to themselves, and that is where the proportion appears. It must be admitted that the proportionality of distribution is already a consequence of the principle of equality and acts only as an instrument within a positive manifestation. Within the negative manifestation, proportionality must be eliminated, this is also a manifestation of the principle of equality. The very “restrictions” to the principle of equality, by virtue of their multitude, blur the idea of equality – this seems to be how Mokal understands the problem when he gives negative manifestations with a reference to Roy Good in the form of secured creditors, suppliers of goods under reservation of title (ROT) clauses, of creditors for whom the debtor “holds” assets by virtue of a trust⁵. But looking at this issue as a negative manifestation of the principle of equality allows us to see in these situations its confirmation, not denial. The approach is interesting: on the example of

¹ See: Mokal R.J. Priority as Pathology: the Pari Passu Myth // Cambridge Law Journal. 2001. Vol. 60. Part 3. P. 592.

² See: Ibid. P. 593.

³ See: Ibid. P. 583.

⁴ See: Ibid.

⁵ See: Ibid. P. 585.

small and medium-sized businesses, statistics are given on their debts (secured creditors, shareholders, finance lease) – all this should, according to the author, show that in order to apply the *pari passu* principle about becomes small¹. Our thesis is unchanged: all this testifies to the manifestation of the principle of equality of creditors in a negative sense.

Interestingly, Mokal also comes to the need to “reprove” exceptions to the principle of equality. It seems that this confirms the recognition by the author of the negative manifestations of the principle of equality². The principle of equality of creditors is not a myth, just because any exception to it needs to be justified. It is the presence of this principle that serves as the basis for the introduction of individual exceptions. Otherwise (if it were a myth), there would be no concept of exception, as well as the need to justify each of them.

Finally, it does not exclude, but, on the contrary, confirms the existence of the principle of equality of creditors, the right to segregated satisfaction of claims from secured creditors. The priority of creditors secured in the debtor’s property needs to be justified by a principle opposed to the principle of equal treatment, since the idea of a right to a part of the mass is in conflict with the idea of general equality. In this regard, all creditors whose claims are guaranteed by one or another part of the bankruptcy estate (objects of pledge, things with title security) receive satisfaction in contradiction to the principle of equality. The idea opposed to the principle of equality of creditors is the idea of property rights in that part of the bankruptcy estate that serves the interest of the secured creditor. Here, the principal thing is that the person does not bear the risk of the debtor’s insolvency, allocating (segregating) for himself a part of the constantly changing mass; in this approach it cannot be countered by risk taking.

All possible variants of true and imaginary segregation of assets will be discussed below: pledge, title security, security deposit, set-off, special accounts, etc. Strictly speaking, in the case where segregation is true, the principle of equality of creditors does not apply to the satisfaction of the thing. If segregation is imaginary (sham), we can talk either about the lack of the right to segregation (offset), or about the negative manifestation of the principle of equality of creditors (deposits of a notary in the event of a bank failure).

Alternatives to the principle of equality of creditors. The method of distributing insufficient bankruptcy estate among the debtor’s creditors in

¹ See: Mokal R.J. Priority as Pathology: the *Pari Passu* Myth // Cambridge Law Journal. 2001. Vol. 60. Part 3. P. 587–588.

² See: *Ibid.* P. 590.

accordance with the principle of equality of creditors is not the only possible way. For example, V. Finch and D. Milman, as alternatives to the principle of equality of creditors, rank debts according to chronology (*debts ranked chronologically*), for ethical reasons (*debts ranked ethically*), by size (*debts ranked on size*), for political reasons (*debts paid on policy grounds*)¹.

It should be stipulated in advance that the alternative to the principle of equality of creditors should be delimited (1) from the negative manifestation of this principle and (2) from deviations from it. The alternative assumes an initial change in the principle of distribution in full. The negative manifestation of the principle confirms the general rule – the equality of creditors. Finally, we call a deviation from the principle of equality of creditors opportunistic changes in the distribution of the bankruptcy estate, as if there were no such principle, which, in contrast to the negative manifestation, do not have a political and legal justification based on the need to protect those who differ from all subjects or interests.

It seems that the satisfaction of claims according to the chronology of their occurrence does not have a solid legal basis: it is not clear why the creditor, whose claim arose earlier, should receive an advantage over the one who invested in the bankruptcy estate of the debtor later. The same should be said about the provision of an advantage of size (whether in ascending or descending order): in the end, the current state of the bankruptcy estate is the result of the total investments of all creditors (both large and small investments). In this regard, the privilege of granting an increased queue of satisfaction cannot be based on the size of the debt, and creditors cannot line up on the principle of “who has the most debt.”

Close to the chronological privilege is the situation in which it is not the date of occurrence of the debt that is taken into account, but the date of the beginning of the enforcement of the obligation. Classically, this approach is implemented within the framework of ordinary enforcement proceedings, to which bankruptcy law is traditionally opposed, “informing” about the need to implement the principle of equality. It seems that this is enough to recognize the absence of any principles of equal treatment in this approach. Nevertheless, we add: random factors in the form of the date of commencement of the forced collection of debt cannot be taken as the basis of the principle (any principle cannot base its content on the incident), and the so-called quickness of creditors, firstly, cannot serve as a proportionate basis for the indicated consequences, secondly, it does not take into account the situation when the subsequent creditors, in principle, had neither the

¹ See: Finch V., Milman D. Op. cit., pp. 572–573, 574, 575.

grounds nor the possibility of taking measures to obtain the fulfillment of the obligation.

With regard to ethical considerations and political grounds, they seem to be concentrated in the formation of negative manifestations of the principle of equality of creditors. It is ethics, being related to justice, that will be able to justify the need for a different attitude towards individual creditors or claims (employees, claims for compensation for harm caused to life and health, etc.).

In turn, political grounds based on ethical differences will merge with them. Other political grounds must have as their basis a socially recognized difference, which can also be created by prior announcement of a priority known in advance to potential creditors (before entering into relations with the debtor). If there are no such grounds, then ultimately politically motivated priorities may be perceived as an arbitrary decision that is not a right.

Separately, it is necessary to analyze alternatives to the proportional (pro rata) distribution of funds from insufficient bankruptcy estate among creditors, bearing in mind that such a proportional distribution can be thought of as one of the possible ways to implement the principle of equal treatment.

In general terms, the proportionality of the distribution implies that each of the single creditors receives a share of property corresponding to the share of its claim in the total mass of the debt.

At the same time, a potential alternative to proportionality can be an equal (in equal shares) division of the bankruptcy estate: until the creditor is satisfied. There is a mistake in such a representation: the creditor has the right not to the debtor's property and its division, but, first of all, to satisfaction of his claim. Equality here means equality in the share of the claim satisfied, but not in the total value of the claim received. This can be seen even more clearly if we use the risk theory of bankruptcy, which will be discussed below. Under this theory, creditors bear an equal risk of insolvency and therefore take on an equal share of unsatisfied claim. In this regard, it should be recognized that the equal division of the debtor's property is not an alternative way to implement the principle of equal treatment of creditors¹.

The priority of claims and the principle of equality of creditors. It is also worth determining how the priority of satisfying the claims of creditors relates to the principle of equality of creditors, whether this phenomenon constitutes confirmation or refutation of the principle of equality of creditors.

¹ On the problem, see also: Malyshev K.I. Historical outline of the competitive process // Selected works on the competitive process and other institutions of trade law. M.: Statute, 2007. P. 109.

In itself, the sequence of satisfaction of creditors' claims not only does not deny, but also confirms the principle of equality of creditors. In essence, these are the very exceptions to the general rule that confirm it and, as will be shown below, are a negative manifestation of the principle of equality.

For the relevant exceptions, there are political and legal prerequisites, which consist in such a position of the respective claim holders, which differs from the general one. For example, satisfaction in the first place of claims for compensation for harm caused to life and health (Article 135 of the Bankruptcy Law) is dictated by social care for the victims, claims for payment of wages (Article 136 of the Bankruptcy Law) – care about the interests of those for whom wages are the source of existence.

It is significant that V. Finch divides *pari passu* versions into strong and weak. The latter differs in that it also implies a certain order (ranking) when meeting the requirements established by law¹. Thus, in itself, the sequence of satisfaction of creditors' claims is adjacent to the principle of equality of creditors, setting the limits of the positive manifestation of the principle and predetermining its negative manifestation. It should also be noted here that even the privilege is implemented on the basis of the principle of equality: if there is not enough funds to satisfy the requirements of the privileged queue, satisfaction is carried out in proportion to the amounts of claims included in the register of creditors' claims (clause 3, article 142 of the Bankruptcy Law).

Varieties of manifestation of the principle of equality of creditors. The principle of equality of creditors follows from the general legal principle of equality and implies an equal distribution of the risk of insolvency of the debtor among all creditors in a similar position.

In turn, the general principle of equality can be described by the formula “equal to equal”². At the same time, any legal principle is not a thing in itself and can be justified one way or another. Equal legal opportunities for persons in a similar position are a consequence of the notion of justice.

With this view of the principle of equality, one should also agree with the conclusion of a negative thesis from it: unequal treatment of persons in a similar position is just as unfair as equal treatment of persons in a different position.

In other words, the principle of equality of creditors is manifested not only in an equal attitude towards equals, but also in a *different attitude towards*

¹ See: Finch V., Milman D. Op. cit. P. 511.

² See: Basic provisions of civil law: Article-by-article commentary to articles 1–16.1 of the Civil Code of the Russian Federation / A.V. Asoskov, V.V. Baybak, R.S. Bevzenko [and others]; resp. ed. A.G. Karapetov. M.: Statute, 2020. P. 50.

different ones. As Philip Delmothe points out, true equality involves treating unequal things unequally (*egalite veritable a traiter inegalement des choses inegales*)¹. Here Delmot is essentially quoting Aristotle².

It also seems appropriate to us the thesis that the principle of equality can only be understood in the context of exceptions to it³, which we consider correct to call a negative manifestation of the principle of equality of creditors. It also seems that this is its purpose: to serve as a motive for substantiating certain negative manifestations.

It seems that two manifestations of the principle of equality (positive – equal to equal, negative – unequal to unequal) in this case can be compared with two aspects of justice in the sense in which V.D. Zorkin discuss them. So, he points out that there are two types (aspects) of justice. Firstly, it is equalizing justice (“arithmetic”), i.e. equality of all before the law and the courts. Secondly, it is distributive justice, or proportional (“geometric”). It is expressed in equivalent exchange and retribution through proportionality (“equal for equal”, “to each his own”, “to each according to his deeds”, “each will be rewarded with such a measure as he measures to others”)⁴.

The idea itself, with a division into positive and negative manifestations of the principle of equality, confirms that both the requirement of equal treatment and the assumption of differences are compatible in the principle of equality, which means that such a principle is global, universal and does not depend on the time and place of its existing or potential implementation. In turn, the ratio of positive and negative manifestations refers to issues of balance that are below the principle, while the very idea of “equal equal” and “unequal unequal” is universal and unchanging.

Thus, the principle of equality of creditors cannot be absolute; this is its main characteristic. Therefore, it should be defined as follows: those creditors are equal among whom there are no distinctions deserving special treatment. The answer to the question of what these differences are is the task of determining the holding the principle of equality of creditors, its boundaries and prerequisites.

The significance of this issue is predetermined by the fact that any exception to the positive manifestation of the principle of equality in the

¹ See: Delmotte Ph. Op. cit.

² See: Aristotle. Politics / trans. from ancient Greek S.A. Zhebeleva. M.: AST, 2020. P. 121; Kashnikov B.N. Aristotle’s concept of general justice: Experience of reconstruction // Ethical thought. Vol. 2. M.: IF RAS, 2001.

³ See: Delmotte Ph. Op. cit.

⁴ See: Zorkin V.D. Axiological aspects of the Russian Constitution // Comparative constitutional review. 2008. No. 4.

form of providing an advantage (priority queue, allocated asset (segregation or separation), etc.) (hereinafter referred to as priority exceptions), in fact, is a withdrawal by individual creditors of a part of the bankruptcy estate in its own favor over other creditors. Consequently, in essence, priority exceptions to the principle of equality of creditors are always carried out at the expense of other creditors.

The mechanism for implementing the principle of equality of creditors. From the point of view of the mechanism for ensuring the principle of equality of creditors, it can be called the reason for a moratorium, collective settlements with creditors, challenging transactions with preference¹; all this is provided by the bankruptcy legislation.

The principle of equality of creditors, by its very nature, cannot manifest itself outside the competition of creditors: provision to all must be equalized, taking into account the idea of distributing the risk of insolvency of the debtor. If so, this principle has no place outside the bankruptcy of the debtor. Although there may be exceptions (for example, bringing the debtor to vicarious liability outside the bankruptcy case, consolidated enforcement proceedings), they are all explained by the connection with bankruptcy and therefore have the beginnings of the principle of equality (at least the procedural conditions for ensuring – measures to attract all interested creditors in relation to vicarious liability, proportional distribution in the summary enforcement proceedings).

Thus, the implementation of the principle of equality of creditors is carried out through the legislation on insolvency, which is one of the sources of bankruptcy law, therefore, bankruptcy law is the mechanism for implementing the principle of equality of creditors.

Legal nature of the principle of equality of creditors. Clarification of the legal nature of the principle of equality of creditors is necessary to further determine its limits, methods of protection, content.

The principle of equality of creditors itself follows from the general constitutional principle of the equality of all before the law and the court (Article 19 of the Constitution of the Russian Federation²). According to the legal position of the Constitutional Court of the Russian Federation, the principle of equality means the inadmissibility of introducing restrictions

¹ A violation would be receiving satisfaction from the debtor's bankruptcy estate in an amount greater than would be due if it were distributed among all creditors in proportion to the amount of debt in the total amount of obligations.

² Adopted by popular vote on December 12, 1993, with amendments approved during the all-Russian vote on July 1, 2020 // pravo.gov.ru. 10/06/2022.

that do not have an objective and reasonable justification on the rights of persons belonging to the same category, i.e. prohibition of different treatment of persons in the same or similar situations¹.

In turn, the requirement of equal treatment of equals (positive manifestation of the principle of equality) and unequal treatment of unequals (negative manifestation of the principle of equality) follows from the idea of justice, i.e. represents the law of human community, recognized in society. In this regard, the deviation from such equality is considered as an attack on justice to the extent that society does not see differences that require increased protection of some and restrictions on the rights of others, or, on the contrary, identifies them and considers them incompatible with equal rights. On the whole, it seems correct to say that the very idea of right is in equal relation to anyone who is in a similar position. This idea is confirmed by the fact that law is normative, i.e. it is calculated in advance for an indefinite circle of persons meeting certain conditions. As V.N. Kartashov, “the essence of the principle of legal equality was quite clearly expressed by Roman lawyers: “The law speaks to everyone the same” (*lex uno re omnes allogitur*)”².

The connection between the principle of equality of creditors and the constitutional principle of equality is derived, for example, from the Ruling of the Constitutional Court of the Russian Federation of March 12, 2001 № 4-P, according to which the establishment by the Bankruptcy Law of a special regime of claims against the debtor, which does not allow the satisfaction of these claims on an individual basis, makes possible to ensure the certainty of the volume of his property throughout the bankruptcy procedure, creating the necessary conditions both for taking measures to overcome the debtor’s insolvency and for the fullest possible satisfaction of the claims of all creditors, which, in essence, It is aimed at providing them **with equal legal opportunities** in the realization of economic interests, including in the case of, when the debtor’s property is insufficient for its fair distribution among creditors. In the event of a collision of legitimate interests of creditors in the process of bankruptcy proceedings, the problem of proportional distribution of the bankruptcy estate among creditors is solved. In the latter case, we see an indication of the means of ensuring the equality of the creditor – proportionality (*pro rata*).

¹ See: Ruling of the Constitutional Court of the Russian Federation dated May 24, 2001 No. 8-P, dated June 3, 2004 No. 11-P, dated June 15, 2006 No. 6-P, dated June 16, 2006 No. 7-P, dated April 5, 2007 No. 5-P, dated 03/25/2008 No. 6-P, dated 02/26/2010 No. 4-P and dated 07/14/2011 No. 16-P // SPS “ConsultantPlus”.

² General theory of state and law: Academic course in 3 volumes. T. 2 / rep. ed. prof. M.N. Marchenko. 2nd ed., revised. and additional M.: IKD “Zertsalo-M”, 2001. P. 84.