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General features of Ukrainian bankruptcy legislation

The history of development of Ukrainian bankruptcy legislation is investigated. The stages of proceedings in bankruptcy case are analyzed. The shortcomings of current Ukraine bankruptcy legislation are shown.

Keywords: *bankruptcy, insolvency, non-solvency, arbitration manager.*

Загальні риси Українського законодавства про банкрутство

Досліджено історію розвитку українського законодавства про банкрутство. Проаналізовано стадії провадження у справі про банкрутство. Наведено недоліки чинного законодавства України про банкрутство.

Ключові слова: *банкрутство, неспроможність, неплатоспроможність, арбітражний керуючий.*

In Soviet times there was no institution of bankruptcy at all. But after the collapse of the said State, there had formed fifteen independent states, including Ukraine, which moved from command economy to a market. This transition was given to Ukraine very difficult because there was no unified strategy for economic development, market mechanisms were introducing randomly, cash devalued quickly. This situation led to massive defaults in the economy, it was almost impossible to take money from contractors because of the lack of appropriate mechanisms. It was the right moment to think back the bankruptcy institute which existed for a very long and actively was used in Russia to 1917.

This situation led to the adoption of the Law of Ukraine "On Bankruptcy" in 1992. This law introduced a completely new "rules of the game" in the economy. However, it should be noted that the said law was not effective enough, because it was almost conducted exclusively aimed at the liquidation of debtors which doesn't match with the content of failure institute. In connection with the above, in 1999 drastic changes to the Law of Ukraine "On Bankruptcy" have been taken, the said Law was set out in new edition and was called the Law of Ukraine "On Restoring Debtor's Solvency or Declaring a Debtor Bankrupt" (hereinafter – the Bankruptcy

Law)[1]. It should be noted that not only the name has changed, the content of the law has changed radically, which mandated the mechanisms that were used to repay the creditors' claims and saving of the debtor as a business entity.

The next fundamental change of Bankruptcy law took place in 2012, which is reflected in the new edition of the Bankruptcy Law, which is valid from the 19th of January 2013. The new version of the Bankruptcy Law significantly increased the act by volume (134 articles) and the content, which had been a requirement of the time. The main goal of reforming the Bankruptcy Law its developers saw in decreasing of fictitious bankruptcies and prevention abuses by unscrupulous debtors insolvency proceedings, which used it for the purpose of fulfilling their obligations. Also, the developers of the new Bankruptcy Law took into account modern technologies to reduce the human factor in the implementation of bankruptcy. It should be mentioned that in general the new edition of Bankruptcy Law eliminated the gaps existing before, but certain legislative provisions are controversial and actually do not work in real life, what will be discussed below.

Bankruptcy systems in the world usually are divided on the pro-creditor, pro-debtor and neutral. The "golden mean" system is neutral legislation which seeks to accommodate the interests of both the debtor and the creditor. In this case, the law does not provide obvious advantages one party to the detriment of another. The debtor and creditor are approximately in equal position, because the law attempts to take into account their interests at a time[2]. Bankruptcy Law in Ukraine equally protects the interests of creditors and debtors, and therefore the bankruptcy system is neutral.

Bankruptcy case itself is especial order of the satisfaction of creditors' claims, a kind of continuation of the enforcement, which has not brought the desired results. Bankruptcy is a good occurrence for debtors, for whom preferential regime is sanctioned, which has the priority saving the entity. Naturally, protecting the debtor, the legislator slightly "cheated" creditors which are forced to make concessions to get at least any satisfaction of their requirements.

Bankruptcy cases are within the jurisdiction of commercial courts and are reviewed at the location of the debtor. The subjects of bankruptcy in Ukraine are legal entities and individual entrepreneurs. Individuals in Ukraine cannot be recognized bankrupt, although discussion on this possibility lasts for a long time.

The right to appeal to the commercial court with a bankruptcy claim belongs to the debtor (private bankruptcy) and the creditor. Private bankruptcy causes a lot of problems, because it is sometimes used by debtors in order not to fulfill their obligations to creditors. In this regard, the judicial practice of the higher courts (Supreme Economic Court of Ukraine and the Supreme

[1] Law of Ukraine "On Restoring Debtor's Solvency or Declaring a Debtor Bankrupt" // News of the Verkhovna Rada of Ukraine. – 1992. – No 31. – St. 440.

[2] Kovaleva I.V. The ratio of rights and obligations of the participants of the relations regulated by the legislation of the Russian Federation in the field of insolvency (bankruptcy) of legal entities // Problems of Modern Economic. – 2010. –No 4. – P. 125.

Court of Ukraine) is aimed at a thorough checking of private bankruptcies and prevention of unjustified infringement proceedings in cases of laid category.

The bankruptcy case is initiated by the commercial court if the creditor's (creditors') undisputed claims to the debtor collectively make up at least three hundred minimum wages (365400.00 UAH., which is equivalent to 14,900.00 Euro) that have not been satisfied by the debtor within three months set for the maturity period, unless otherwise stipulated in this Law. Undisputed claims of creditors – cash claims of creditors, confirmed by a court decision that has come into force, and the act of the enforcement proceedings, under which according to the legislation write-off from accounts of the debtor is taking place. The forfeit (fine, penalty) and other financial sanctions are not included to the structure of these requirements, including the payment of taxes, duties (mandatory payments).

The request for a proceeding in bankruptcy court fee is payable at a rate ten times the minimum wage (1218 UAH 0.00., Equivalent to about 5 Euro 00.00). This ante is significant, that in combination with rigid rules for initiating proceedings, significantly influenced on the number of bankruptcy cases – there are no many bankruptcy cases now.

An important innovation is the fact that after the application for bankruptcy proceedings at first is taken decision about receipting of an application to review and considering the appointment of this application in the preparatory court. Therefore, the question of opening the bankruptcy case is not decided immediately, but in court, with challenge the parties, on the basis of competition. Such innovation is positive, because in accordance to the old version of Bankruptcy Law bankruptcy has been opening first with all its consequences, and then could be ignoramused. Such situations had been using by unscrupulous debtors who have initiated bankruptcy case themselves and were in a procedure for years.

Bankruptcy Law provides four judicial procedures that can be applied to the debtor: disposal of the debtor's property, settlement agreement, rehabilitation (restoration of solvency) of the debtor and liquidation.

Disposal of the property is a mandatory procedure (with few exceptions) and is introduced immediately after the initiation of proceedings for a period of one hundred and fifteen days. In order to identify all the creditors and those who wish to take part in the rehabilitation of the debtor, an official publication of the announcement of the bankruptcy proceedings on the official website of the Supreme Economic Court of Ukraine on the Internet is made. This rule is an innovation also, as previously such ads were published in the Official Gazette (the media) that were not read by all the creditors, and non-lodgment claims by creditors led to the termination of obligations between the debtor and those creditors.

Competitive creditors in accordance with the claims emerged prior to the day of proceedings in the bankruptcy case, within thirty days after official publication of the notice of proceedings in the bankruptcy case must submit in writing to the commercial court the claims to the debtor, and supporting documents. The deadline for declaration monetary claims of

creditors against the debtor starts from the day of official publication of the announcement of a proceeding in the bankruptcy. The said term is limit and is not subject to renewal.

Moratorium on the satisfaction of creditor claims is put together with the delivery of the court ruling on opening of proceedings in the bankruptcy case. Moratorium is defined as a stay of execution debtor's monetary obligations and obligations to pay taxes and duties (mandatory payments), the deadline of which came until the day of moratorium, and suspension of measures to ensure that these commitments and obligations to pay taxes and duties (mandatory payments) applied to day of moratorium. Moratorium on satisfaction of creditors' claims is introduced simultaneously with the proceedings in the bankruptcy case, as noted in the ruling of commercial court. The ruling is a ground for suspension of enforcement. The property manager informs state executive service at the location (residence) of the debtor his property about establishment the moratorium. During the moratorium on satisfaction of creditor claims:

- it is prohibited to collect on the basis of administrative and other documents which suggest levying through court or out of court procedure according to the law, except when the enforcement proceeding is at the stage of allocation of funds charged from the debtor (including proceeds from the sale of the debtor's property) and the property being in the process of sale since the publication of information on sales;
- it is prohibited to satisfy the claims covered by the moratorium;
- a forfeit (fine, penalty) is not charged and so are other sanctions for failure or improper performance by the debtor of obligations to satisfy the claims covered by the moratorium;
- the progress of limitation stops on the period of the moratorium;
- inflation rate for the whole period of delay implementation of the liability, three per cent per annum on the overdue amount and more are not applied.

Disposal of property is essentially a preparatory procedure before the next judicial procedure during which the debtor continues operations, but with considerable limitation of personality. Also during the disposal of property strict supervision over the preservation of the debtor's property is carried out and its inventory of debtor's property is held. These actions are carried out by the arbitration manager (property manager), appointed by the court.

Arbitration manager – a physical person appointed by the commercial court in the established order in bankruptcy case as property manager, rehabilitation manager or liquidator from among the persons who received a certificate and are included in the Unified Register of arbitration managers (property managers, rehabilitation managers and liquidators) of Ukraine. That is, the trustee in bankruptcy, depending on the procedure, acts as property manager, rehabilitation manager or liquidator. The candidacy of arbitration manager (property manager, rehabilitation manager and liquidator) for exercising the powers of property manager is determined by the court on their own using an automated system from among persons entered in the Unified Register of arbitration managers (property managers, rehabilitation managers and liquidators) of

Ukraine. Selection of candidates of arbitration manager using the automated system is a novel of Bankruptcy Law, because earlier court appointed arbitration manager at the request of the initiating creditor that sometimes led to negative consequences, because property manager acted in the interests of the creditor, not the debtor. As noted B. Polyakov, it was a situation where each major creditor had few his "own pocket" arbitration managers. Despite the formal non-interest of arbitration manager, in fact he was "manageable" because realistically represented and acted on behalf of a group of creditors[3].

The next stage is a preliminary session in which the Commercial Court examines all the claims of creditors, including in respect of which were objections debtor and have not been made manager of the property in the register of creditors' claims and those recognized by the debtor and made the manager of the property to the registry requirements creditors and decide on its approval. The register of creditors' claims is the basis for determining the number of votes belonging to each bankruptcy creditor when deciding at the meeting (committee) of creditors. The competence of the meeting of creditors include the adoption of a decision on:

- Determination of quantitative composition and election of the members of the committee of creditors;
- Dissolution of the creditors' committee or its individual members;
- Approval of the rehabilitation plan of the debtor in the procedure for disposal of property and so on.

During the bankruptcy proceedings the interests of all creditors' committee represents the creditors and decide what are the key issues of bankruptcy proceedings, in particular:

- Appeal to the Commercial Court to the opening rehabilitation procedures, bankruptcy and the liquidation procedure in cases provided by the Law on Bankruptcy;
- Appeal to the Commercial Court demanding the recognition of contracts (agreements) on the debtor invalidate any stage of bankruptcy;
- Appeal to the Commercial Court with a petition for the appointment of liquidator (managers and liquidators), termination of office of liquidator (managers and liquidators) and the appointment of another liquidator (managers and liquidators);
- The preparation and signing of the settlement agreement;
- Approval of the rehabilitation plan of the debtor, changes and additions to it in cases stipulated by this law and others.

Property disposal procedures with a transition to rehabilitation procedures – reorganization or settlement agreement. Remediation is a system of measures taken during the proceedings in the bankruptcy case to prevent bankruptcy and liquidation, aimed at improving financial and economic situation of the debtor, and satisfaction in full or in part, the claims of creditors by enterprise restructuring, debts and assets and / or changes in the legal and production structure of the debtor. Bankruptcy Law also provides for the introduction of rehabilitation debtor

[3] Polyakov B. M. Insolvency (bankruptcy) Law. – Kyiv: Publishing House "In jure", 2003. – P. 166.

to initiate bankruptcy proceedings (story), which refers to a system of measures to restore the solvency of the debtor that can perform founder (participant, shareholder) of the debtor, owner of property (body authorized to administer the estate) of the debtor, the creditor the debtor and other persons to prevent the bankruptcy of the debtor by taking organizational, economic, managerial, investment, technical, financial, economic, legal action in accordance with the legislation to institute proceedings in the bankruptcy case. Initiate rehabilitation proceedings to the debtor in bankruptcy are eligible debtor or creditor. The agreement between the debtor and creditor (creditors) to conduct rehabilitation proceedings to the debtor in bankruptcy can be achieved both before and after the onset of the debt the debtor. Remediation proceedings to the debtor in bankruptcy may provide transaction (agreement) on the basis of which came bond debtor. The settlement agreement – is an agreement between the debtor and creditors regarding postponement and / or installments, and forgiveness (cancellation) creditors of the debtor's debt, which is issued by agreement between the parties.

If creditors are not agreed rehabilitation procedures the liquidation procedure is entered. Liquidation is a judicial bankruptcy procedure applicable to the insolvent debtor, recognized by the economic court bankrupt, by the initiative of creditors or other specified by law persons, if statutory grounds of conduct aimed at satisfaction of creditors by selling the bankrupt's property, which is the part of the liquidation weight; release the bankrupt from debts and usually cease its activities that directly provide special part in the proceedings of the bankruptcy liquidator or liquidator and the liquidation committee within the statutory time period[4]. The liquidation procedure is introduced for a period of twelve months.

However, the bankruptcy law in Ukraine has certain disadvantages. This fact, primarily due to the fact that the said law developed by various working groups (judges of the Supreme Economic Court of Ukraine and the Ministry of Justice of Ukraine), and edits and comments to the law prepared without these working groups, as a result, there are conflicting rules. There is hard-realizing practice standards. In particular, the term liquidation procedure shall not exceed twelve months without the possibility of extension of this period. It should be noted that this term can only be bankrupt, in which no property. If the company is operating, it does have assets, then the mentioned term is too small.

In summary, we come to the following conclusions. The system of bankruptcy in Ukraine is neutral with respect to the debtor and creditors, that does not give a clear advantage to any of them. Amendments to the Law on Bankruptcy is a good thing, because included most of the shortcomings of the previous law and included new technologies (the widespread use of the Internet, automated system for the selection of the arbitration manager, etc.). However, there are shortcomings and contradictions in the law on bankruptcy, which require urgent changes and refinements.

[4] Radzyvilyuk V. V. Concept and characteristic features of liquidation as bankruptcy judicial procedure // Reorganization and bankruptcy. – 2005. – No 2. – P. 89-90.