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Management of Solvency Restoration Procedures in Ukraine

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Formulation of the problem. A large number of domestic enterprises became insolvent, unprofitable and financially difficult due to the crisis state of Ukraine's economy, an unstable external environment which are characterized by variability of political, economic, legal and social factors. A significant number of bankruptcy cases and ambiguity of legal practice in this area determines the relevance of theoretical studies of legal phenomena in the area of insolvency or so-called competitive process.

Analysis of recent research and publications. The works of the following domestic and foreign scientists are devoted to the study of the peculiarities of state regulation of bankruptcy and sanation: M. Berest, B. Bakharev, P. Pryguza, A. Pryguza, K. Smolov and others. Scientific works of these scholars has a significant theoretical and practical value, providing further scientific research on regulatory and legal support for organizing and conducting competitive procedures.

Unresolved aspects of a problem. However, the current situation of the Ukrainian economy has put ower the Ukrainian business community, academics and legislator new pressing issues regarding the real withdrawal of a large number of debtor enterprises from the state of insolvency, which leads to the need for further researchin this direction.

Formation of the purposes of the article. The purpose of this article is to consider normative and legal regulation of insolvency in Ukraine.

Material of the research. The problem of state regulation of bankruptcy processes is extremely relevant for Ukraine, as world experience confirms that this institute is one of the most important instruments of market reforms and economic recovery [1]. The issue of subjective relations of insolvency and bankruptcy,

subordination, jurisdiction, conditions and procedure for handling an application for initiating and reviewing bankruptcy cases are regulated by the Law of Ukraine "On restoring the debtor's solvency or recognizing it as a bankrupt" [2], which contains in its composition both norms of material and procedural law. All procedural issues are resolved in accordance with the rules laid down by the Commercial Procedural Code of Ukraine [3]. Under the rules laid down by the Commercial Procedural Code of Ukraine, one should understand the unified procedure of the judicial process, that operates in Ukraine, and which provides to the enterprises, organizations and citizens the right to apply to the Commercial Court in accordance with the established jurisdiction of economic affairs for the protection of their violated or disputed rights and interests protected by law [4].

The Law of Ukraine "On restoring the debtor's solvency or recognizing it as a bankrupt" specifies the conditions under which the procedure for restoring solvency may be applied to the debtor as well as the conditions under which the liquidation procedure is applied to the debtor and establishes the legal procedure for the implementation of the relevant procedures.

The right of insolvency and the right to bankruptcy ensure the effectiveness of economic legal relations in economic relations, since economic activity is activity in the sphere of social production, aimed at the production of products (goods), the execution of works, the provision of services, their (products, goods) distribution and exchange, organization the process of the specified production, distribution, exchange, based on the use of the property of its participants and is aimed at satisfying their needs and interests, as well as the needs and interests of society in a whole.

In accordance with Art. 1 of the Law "On restoring the debtor's solvency or recognizing it as a bankrupt" insolvency is the inability of the business entity to perform monetary obligations to creditors upon the onset of the established time period, not otherwise than through the restoration of its solvency [2].

Analyzing the provisions of the current version of the Bankruptcy Law, Smolov K.V. comes to the following conclusion regarding the legal nature of the

concept of "insolvency": it is a complex legal composition, which is a set of legal facts that are interconnected in a tight interdependence, and therefore should be accumulated in this composition in a strictly defined sequence [5].

The term "insolvency" should be considered from the standpoint of the subject of legal regulation and the actual economic, financial and legal significance of this concept. In view of this, we support the view of P. Priguza and A. Priguza, who believe that insolvency, in accordance with the Law "On restoring the debtor's solvency or recognizing it as a bankrupt", is the legal possibility of an insolvent debtor who does not have enough cash for payment of current monetary claims, in the presence of a real economic opportunities for the continuation of property activities and earning income, to retain the right to manage economic activities and organize the production process of the enterprise in order to work out a debt and preserve the activity (business) by applying court procedures for the disposal of property, sanation, settlement agreement, moratorium and other legal instruments for restoring solvency [4].

In order for insolvency to be objective and independent of subjective factors, it is necessary to identify features characterizing this concept. In accordens with the Law "the reason for the starting bankruptcy proceedings is set different in content legal facts, which in legal theory is called the actual composition". Their presence means that the debtor is insolvent, and these facts are signs of the debtor's insolvency. In order to confirm the insolvency of the debtor, the law establishes for the creditor the minimum sufficient evidence about the facts that are certified by the documents on the existence of a civil (economic) legal relationship between the creditor and the debtor (contract, transaction, emergence from it of the claim right) which is indisputable (confirmed by a court decision and executive documents), the term of non-fulfillment of the obligation is not less than that established by the Law (more than three months). For the proof of the fact of insolvency it does not matter whether the value of the property owned by the debtor exceeds the amount of his monetary obligation. At the stage of accepting the creditor's application to initiate bankruptcy proceedings, this issue is not included in the subject of evidence by the applicant, and

therefore the bankruptcy case must be initiated in the presence of the given actual composition [4].

In addition to the indicated signs of insolvency B. Polyakov adds the nature of monetary obligations, the basic amount of monetary obligations and insists that the reality of insolvency should be tested by enforcement proceedings. Reality means that the debtor cannot fulfill his monetary obligations, even with the help of coercive nature [6]. Generalization of insolvency features is presented in Fig. 1

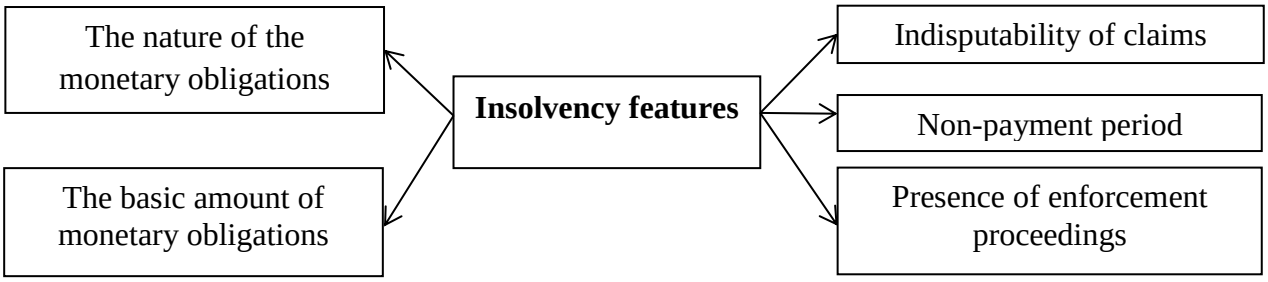

Fig. 1.: Insolvency features [6; 4; 8]

The subjects of insolvency are business entities in which it is possible to apply judicial procedures for restoring solvency - disposal of property, sanitation, settlement agreement.

The settlement agreement in a bankruptcy proceeding is an agreement between the debtor and the creditors regarding the postponement and (or) installment, as well as the forgiveness (cancellation) by the creditors of debtors' debts, which is executed by entering into an agreement between the parties [6]. The settlement agreement can be concluded at any stage of the bankruptcy proceedings. In the procedure for the disposal of the debtor's property, the settlement agreement may be concluded only after the identification of all creditors and approval by the Commercial Court of the register of creditors' claims.

In accordance with p. 1 of Art. 28 of the Law "On restoring the debtor's solvency or recognizing it as a bankrupt", sanation is a system of measures taken in the course of proceedings on bankruptcy in order to prevent the bankruptcy of the debtor and its liquidation, aimed at improving the financial and economic situation of

the debtor, as well as satisfaction in full or in part of the claims of creditors by restructuring the company, debts and assets and/or changes in the organizational and legal and production structure of the debtor.

Depending on the category of the debtor, the type of his activities and the possession of his property, the commercial court applies a general, special or simplified procedure for conducting a bankruptcy proceedings (Fig. 2). According to the content of Article 7 (Part 3, p.1) of the Law, it is provided that the Commercial Court chooses the procedure for conducting a bankruptcy proceeding and applies it to a specific debtor depending on: 1) debtor category; 2) type of activity of the debtor; 3) availability of debtor's property.

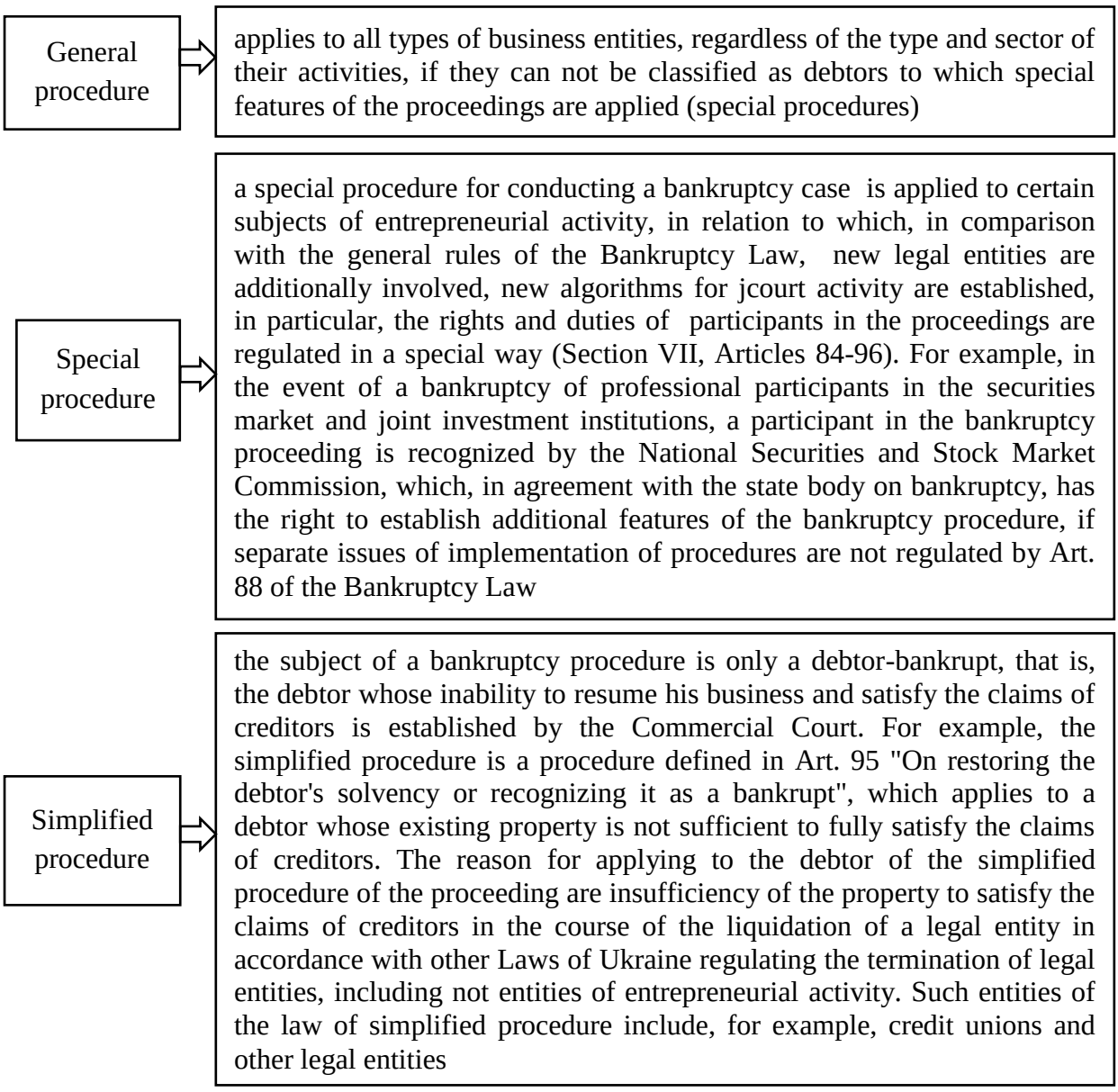

Fig. 2.: The procedure for conducting a bankruptcy deal

The requirement to establish in national legislation the specifics of regulation of relations related to the bankruptcy of certain categories of enterprises, follows from the provisions of Art. 214 of the Commercial Code of Ukraine, which defines the directions of the state policy on bankruptcy, priorities for preventing bankruptcy, ensuring conditions for the implementation of procedures for restoration of the solvency of the business entity or their liquidation as bankruptcies are established with regard to state and other enterprises.

Art. 28 of the Law "On restoring the debtor's solvency or recognizing it as a bankrupt" establishes of the debtor's solvency or recognition of bankruptcy and establishes and regulates a new procedure for the debtor's reorganization (insolvency law and bankruptcy law) which is carried out without any violation by the Commercial Court of proceedings in bankruptcy proceedings, but under judicial control. This means carrying out of sanation of a legal entity that only intends to become a debtor or an actual debtor in order to avoid a possible and predictable state of insolvency that is likely to arise in the performance of certain economic obligations. For the beginning (starting) of this form of sanation only the free expression of the parties - participants of the sanation is required [7]. The debtor's sanation may be stipulated in the contract, on the basis of which the debtor's monetary obligation arose. The initiative of sanation can come from both the debtor (potential debtor) and the creditor.

Object of the sanation without initiation of proceedings in bankruptcy is the solvency of a legal entity.

The subjects of voluntary sanation are: the debtor - a legal entity, the owner of the property (executive authorities authorized to manage the property) of the debtor; debtor's creditors; third parties (investors).

In general, the wording of the Law of Ukraine "On restoring the debtor's solvency or recognizing it as a bankrupt", effective from July 2015 resolves a number of controversial issues regarding the consideration of bankruptcy procedures, but to date, some problems, both theoretical and practical, remain undefined.

The Law (paragraph 5 of Article 11) defines the grounds for the debtor's application to initiate a bankruptcy procedure, in which, in particular, the term "threat of insolvency" is indicated. In this regard, it is necessary to clarify the term of "threat of insolvency", and also it is necessary to determine in the need of the debtor to prove the indisputability requirements of creditors (according to the Law) [2].

The law "On restoring the debtor's solvency or recognizing it as a bankrupt" has obvious procedural flaws. So, the problem of applying the provisions of Part 4 of Art. 10 of the Law "On restoring the debtor's solvency or recognition of it as a bankrupt", which provides that the court, in whose proceedings the bankruptcy procedure is located, powers to resolve all property disputes with claims to the debtor (including disputes regarding the invalidation of any legal acts (agreements), concluded by the debtor, recovery of wages, the renewal of the work of officials officials and servants of the debtor), may be the lack of indication in the Law of the form of the process, within which such disputes (action proceedings oras part of bankruptcy procedure) are considered. Taking into account that the categories of cases from the above list are procederes that are considered in accordance with the procedure and civil proceedings, Bahariev B. O. believes that Part 17 of the Transitional Provisions of the Law should be supplemented to the Part 1 of Art. 15 of the Civil Procedural Code of Ukraine, p. 4, with the following contents: "except those to be considered in the context of Commercial justice", that is, in the part of the exclusion from the jurisdiction of the general courts of the specified category of disputes [9]. In his opinion, the issue of determining the composition of the court for consideration of these categories of cases also needs to be resolved: the judge in charge of the bankruptcy case,, or any commercial court judge, or a judge specializing in bankruptcy proceedings.

In part 3 of Art. 10 of the current version of the Bankruptcy Law, according to which a bankruptcy procedure is initiated by an commercial court, if the indisputable claims of the creditor (creditors) to the debtor together constitute not less than three hundred minimum wages, which were not satisfied by the debtor within three months after the deadline set for their repayment , unless otherwise provided by the Law. In

fact, this provision does not prohibit the debtor to apply to the Commercial Court with a statement on the initiation of proceedings in the bankruptcy case in the presence of signs of its insolvency.

In favor of this opinion is also evidenced by a systematic analysis of the norms of Art. 11 of the Bankruptcy Law. Thus, according to Part 1 of Art. 11 of the Bankruptcy Law, an application to initiate a bankruptcy proceeding should be submitted in writing by the debtor or the creditor and should contain, in particular, description of circumstances, which is the basis for a court appeal. According to Part 2 of Art. 11 of the Bankruptcy Law to the application for bankruptcy proceedings, in particular,should be included evidence that the amount indisputable claims of the creditor (creditors) to the debtor together constitute not less than three hundred minimum wages, unless otherwise provided by the Law; court decision on satisfaction of claims of the creditor, which came into force; corresponding decision of the state executive service on the opening of enforcement proceedings for the fulfillment of the creditor's requirements, etc. At the same time, in this norm it is not specified that it is to the creditor's application for initiating the bankruptcy procedure that the indicated proofs of insolvency are added. Part 3 of Art. 11 of the Bankruptcy Act in general implies that other documents confirming insolvency of the debtor are attached to the debtor's application. Consequently, these, at first glance, harmless shortcomings of legal technology actually create the basis for possible abuses by unscrupulous debtors and the creation of disruptive judicial practices [5; 10].

Conclusions and suggestions. Thus, despite the gradual improvement of procedural rules, the current Law "On restoring the debtor's solvency or recognizing it as a bankrupt" does not sufficiently pursue the goal of state regulation in the field of insolvency of business entities - the irreversibility of debt recovery by using methods that contribute to the growth of the sustainability and efficiency of the economy and do not harm the country's interests. All shortcomings of the procedural nature can be reduced to the following main groups: balance of interests in favor of the debtor; business liquidation prevails before healing; the massive spread of

fictitious bankruptcy. The prospects for further research are to justify the directions of solving the identified problems.

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Анотації

Гаврильченко О.В.

Управління процедурами відновлення платоспроможності в Україні

Метою даної статті є розгляд проблем управління процедурами відновлення платоспроможності в Україні.

Обґрунтовано актуальність державної регламентації організації та проведення конкурсних процедур в Україні, розглянуто їх сутність та зміст. Досліджено правову природу поняття неплатоспроможність, узагальнено ознаки неплатоспроможності. Доведено, що вивчення організації та особливостей проведення державного управління процесами банкрутства та санації забезпечить формування дієвого механізму реального виведення чисельної кількості підприємств-боржників зі стану неплатоспроможності.

Проаналізовано основні недоліки державного управління у сфері неплатоспроможності суб’єктів підприємництва, визначено їх правові наслідки. За результатами досліджень недоліки процесуального характеру зведено у окремі групи: баланс інтересів на користь боржника; ліквідація бізнесу домінує перед оздоровленням; масове розповсюдження фіктивного банкрутства. Перспективи подальших досліджень полягають в обґрунтуванні напрямків вирішення виявлених проблем.

Ключові слова: державне управління, неплатоспроможність, відносини неплатоспроможності, банкрутство, санація, мирова угода.

Гаврильченко Е.В.

Управление процедурами восстановления платежеспособности в Украине

Целью данной статьи является рассмотрение проблем управления процедурами восстановления платежеспособности в Украине.

Обоснована актуальность государственной регламентации организации и проведения конкурсных процедур в Украине, рассмотрены их сущность и содержание. Исследована правовая природа понятия неплатежеспособности, обобщенны признаки неплатежеспособности. Доказано, что изучение организации и особенностей проведения государственного управления процессами банкротства и санации обеспечит формирование действенного механизма реального вывода численного количества предприятий-должников из состояния неплатежеспособности.

Проанализированы основные недостатки государственного управления в сфере неплатежеспособности субъектов предпринимательства, определены их правовые последствия. По результатам исследований недостатки процессуального характера сведены в отдельные группы: баланс интересов в пользу должника; ликвидация бизнеса доминирует над оздоровлением; массовое распространение фиктивного банкротства. Перспективы дальнейших исследований заключаются в обосновании направлений решения выявленных проблем.

Ключевые слова: государственное управление, неплатежеспособность, отношения неплатежеспособности, банкротство, санация, мировое соглашение.