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SOME PROBLEMATIC ASPECTS OF BANKRUPTCY PROCEEDING IN CURRENT UKRAINIAN LEGISLATION

Bankruptcy proceeding is defined by the Code of Ukraine on Bankruptcy Proceedings (hereinafter – Bankruptcy Code). It seemed like the new codified act would be a solid legal basis for effective recovery of the debtor's solvency or recognition of the debtor as bankrupt and application of liquidation proceeding with the aim of full or partial satisfaction of creditors' claims. However, currently there are the numbers of unsolved legal issues related to both internal and external bankruptcy (cross-border insolvency), the solution of which is the necessary prerequisite for ensuring of stable economic order in this sphere of legal relations.

For instance, there are legal problems that arise while application of some provisions of the only one article – namely, Article 7 of Bankruptcy Code. Thus, the development of procedural forms allowed combining within the scope of single bankruptcy proceeding consideration of disputes and other legal matters that are connected with assets condition of insolvent debtor. As correctly indicated, one of the main principle in the bankruptcy proceedings is the principle of judicial control over the bankruptcy cases that ... could be effectively provided only in case of concentration of all the property disputes about the assets of the bankrupt in the scope of the one bankruptcy proceeding [1, c. 101].

According to the Part 2 of Article 7 of Bankruptcy Code economic court that considers the bankruptcy case, in the scope of this case resolves all the property disputes the party to which is the debtor; disputes with the claims to the debtor and to its assets; the disputes about invalidation of the auction results; disputes about invalidation of any agreements concluded by the debtor; disputes about the return (reclamation) of the debtor's property or reimbursement of its value; disputes about recovery of wages; disputes about reinstatement of the debtor's officials; disputes about other claims against the debtor.

Such formulation of abovementioned Article creates certain practical problems. There is currently a dispute between scholars and practitioners, which approach to implement for interpretation of this norm: narrow (only property disputes could be considered during the bankruptcy proceeding) or wide (both property and non-property disputes could be considered within the scope of bankruptcy case). On the necessity of application of the narrow approach insist such scientists as T.M. Lezhneva, S.V. Chernopyatov [2, c. 146], the possibility of consideration within the bankruptcy proceeding of the non-property disputes as well is emphasized in the surveys of B.M. Polyakov [3], V.YA. Pogrebnyak [4].

Unfortunately, there is no solution of the outlined legal problem in the law enforcement practice. In the Resolution of the Grand Chamber of the Supreme Court (hereinafter – the Supreme Court) of October 23, 2019 in the Case No 752/4361/15 the Court expresses the following opinion on the application of the Article 7 of Bankruptcy Code: «The debtor in the context of the bankruptcy law is the plaintiff in this lawsuit, his claims are not the subject of property valuation and therefore they are non-property claims, the results of consideration of such claims will not

affect the amount of liquidation mass of this legal entity, that is why there are no grounds to stipulate that to the legal demands ... should be applied the provision... about belonging of property legal demands to the debtor, including disputes on invalidation of all the deals (agreements), concluded by the debtor, to the jurisdiction of economic courts».

In it's another Resolution of May 11, 2021 in Case No №759/9008/19 the Grand Chamber of the Supreme Court highlighted, that in Article 7 of the Bankruptcy Code and in Article 20 of Economic Procedural Code of Ukraine is defined the exclusive jurisdiction of economic courts in consideration of the bankruptcy cases and cases in disputes with property and non-property demands to the debtor, in respect of whom the bankruptcy proceeding was opened, and following this all the disputes with the debtor must be considered in the scope of bankruptcy case.

The final solution of this problematic issue had to be made by the Resolution of the Grand Chamber of the Supreme Court of June 15, 2021. However, this Resolution did not resolve the problem of the legal order of resolving of non-property disputes in which the debtor is a party.

Therefore, the necessity of resolving of this problem is vital for the proper resolution of bankruptcy cases. From our side it must be pointed out, that due to literal interpretation of the provisions of Part 2 of Art. 7 of Bankruptcy Code and taking into account the purposes of the bankruptcy proceedings, as well as the general aim of legislator to concentrate the consideration of all the disputes in the scope of bankruptcy case, the provisions of this Article must be applied to the non-property disputes as well. Such possibility of consideration of non-property disputes within the scope of general bankruptcy proceeding will be highly dependent on the justification by the party of the case of the impact of its result on the property status of the debtor.

Another problematic issue of the current bankruptcy proceeding in Ukraine is the legal regulation of the cross-border insolvency. Despite the fact that Bankruptcy Code contains Section VIII «Bankruptcy proceeding, connected with foreign bankruptcy proceeding», in fact this procedure is left beyond the scope of effective legal framework. After all, it is not entirely clear how the principle of the reciprocity in cross-border bankruptcy is implemented, how the arbitration manager is appointed while recognition of foreign bankruptcy proceeding, and in general the subjective composition of such proceedings is unclear, how the priority between proceedings initiated in Ukrainian courts and foreign courts is determined remains also an open question. The current version of Bankruptcy Code does not allow to define clearly all the procedural issues of the recognition of foreign bankruptcy proceeding. This is confirmed by the judicial practice (Resolution of the Supreme Court of June 06, 2015 No. 914/207/15) and by the opinions of scholars and practitioners. For instance, as stated in the Proposals of the Interregional Working Groups of the Regional Judicial Reform Councils on Improving of Bankruptcy Proceeding: «The adoption of legislation on cross-border bankruptcy, in fact, is a positive step. However, it is unfortunate that the relevant provisions do not comply with the European Bankruptcy Regulation or, at least, other international requirements. The absence of such correlation does not allow Ukraine to become an internationally recognized platform for corporate bankruptcies ...» [5]. Therefore, the procedure of cross-border insolvency requires more detailed and effective legal regulation.

Regarding the principle of reciprocity in the procedure of cross-border insolvency, it must be highlighted that such principle is implemented when it is provided by international treaty of Ukraine ratified by Verkhovna Rada of Ukraine. At the same time, Part 2 of Art. 11 of the Law of Ukraine «On Private Law», Part 7 of Art. 2 of Bankruptcy Code establish the presumption of the principle of reciprocity in the application of the law of foreign state. And such an approach of the Law of Ukraine «On International Private Law» is more in line with the nature of traditional understanding of the principle of reciprocity. A similar provision to the Law «On International Private Law» could be found in the Civil Procedural Code of Ukraine in Section IX that defines the procedure for recognition and enforcement of decisions of foreign courts.

Thus, in the absence of international treaties of Ukraine, decisions of foreign courts in bankruptcy cases are recognized on the territory of Ukraine on the principle of reciprocity, unless otherwise provided by the law. Such interpretation of these rules is more in line with current economic and legal trends, provides the higher level of protection of the interests of creditors in the procedures of cross-border insolvency. Moreover, the literal interpretation of the Art. 97 of Bankruptcy Code on the possibility to recognize the foreign bankruptcy proceeding in the presence of a special international bankruptcy agreement will become an absolute obstacle to the possibility of implementing of this procedure in Ukraine.

In order to regulate the cross-border insolvency proceeding at the appropriate level it is essential to systematically update the current provisions of the Bankruptcy Code. As noted in the Comparative Analysis of Bankruptcy Proceedings in Ukraine (July 2019-August 2020): «The legislator actually prescribed only the possibility of recognizing of foreign bankruptcy procedure, stipulating, what could be done by a judge in the bankruptcy case after the recognition of the court proceedings. Without an answer remains the question, what are the procedural rights of the parties of the bankruptcy case, started on the territory of Ukraine. The Law also does not specify what steps need to be taken during the bankruptcy proceedings before its closure and how to formalize such decisions» [6].

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