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LEGAL ISSUES OF BANKRUPTCY CASE COMMENCEMENT BY THE DEBTOR

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Introduction: *the article is devoted to topical issues of bankruptcy case commencement by the debtor, namely the practice of application of Article 8 of the Federal Law "On Insolvency (Bankruptcy)", and to the prospects of improving the bankruptcy prevention practice at early stages.* ***Purpose:*** *to analyze problematic issues of foreseeing insolvency by the debtor and of commencement of bankruptcy proceedings by the debtor, to identify possible solutions to this problem.* ***Methods:*** *the methodological framework of the research is based on a set of scientific methods, with a leading role of the dialectical one. Moreover, methods of comparative law analysis, synthesis and systematic method are used.* ***Results:*** *the study of the relevant judicial practice has shown that though Article 8 of the bankruptcy law stipulates that the debtor has the right to file for bankruptcy in its foreseeing, the bankruptcy procedure is not introduced in the period of bankruptcy anticipation by the debtor. Late start of bankruptcy proceedings nullifies all existing rehabilitation potential of bankruptcy, as a result in more than 96 % of cases debtors enter liquidation procedure.* ***Conclusions:*** *the author concludes that the rule which obliges the debtor to prove the existence of circumstances testifying the occurrence of insolvency in the future shall be excluded since it hinders the debtors to commence bankruptcy proceedings in its prediction and on time. There is also no need to change Article 94 of the bankruptcy law. Participants of the legal entity shall have the right to approve the introduction of certain rehabilitation measures depending on whether the bankruptcy statement was filed by the debtor.*

Keywords: debtor's bankruptcy statement; bankruptcy prediction; creditor's bankruptcy statement; supervision procedure; financial improvement; fictitious bankruptcy; corporate control

Information in Russian

ПРАВОВЫЕ ВОПРОСЫ ВОЗБУЖДЕНИЯ ДЕЛА О БАНКРОТСТВЕ ПО ИНИЦИАТИВЕ ДОЛЖНИКА

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Введение: *статья посвящена проблемным вопросам возбуждения дела о банкротстве по инициативе должника, а именно практике применения статьи 8 ФЗ «О несостоятельности (банкротстве)», и перспектив совершенствования практики предупреждения банкротства на ранних стадиях.* ***Цель:*** *проанализировать проблемные вопросы предвидения должником своей несостоятельности и возбуждения дела о банкротстве по инициативе должника, выявить возможные пути их решения.* ***Методы:*** *совокупность методов научного познания, среди которых ведущее место занимает диалектический метод. Также использованы методы сравнительного правоведения, анализ, синтез и системный метод.* ***Результаты:*** *изучение релевантной судебной практики показало, что, несмотря на закрепление статьей 8 закона о банкротстве права должника подать заявление о банкротстве в предвидении этого банкротства, процедура банкротства в предвидении должником своего банкротства не вводится. Именно несвоевременное возбуждение дела о банкротстве сводит на нет весь существующий реабилитационный потенциал банкротства, в результате более чем 96 % дел вводится в конкурсное производство.* ***Выводы:*** *нет необходимости закреплять в законе о банкротстве правила об обязанности должника доказывать наличие обстоятельств, свидетельствующих о наступлении неплатежеспособности в будущем, а также изменять статью 94 закона о банкротстве. Следует предоставить участникам юридического лица права требовать введения тех или иных мероприятий в зависимости от того, подал ли заявление сам должник.*

Ключевые слова: заявление должника; предвидение банкротства; заявление кредитора; наблюдение; финансовое оздоровление; фиктивное банкротство; корпоративный контроль

Introduction

Nowadays, scientists and legislator focus much attention to the rehabilitation potential of the insolvency law. Rehabilitation is intended to help the debtor to find a way from a difficult financial situation. In this regard, the moment of bankruptcy case commencement is very important since an early start of rehabilitation procedures can significantly increase the prospects of success.

The untimely beginning of the insolvency process is the one of the main obstacles to the effective usage of rehabilitation procedures. The management of the debtor tries to recover from crisis independently without resorting to the use of rehabilitation measures of the Federal Law «On Insolvency (Bankruptcy)»[1] (hereinafter - the Bankruptcy Law). Such «self-maintained» anti-crisis management gives effect very seldom, therefore the company comes to judicial bankruptcy process without any chances to recovery.

In our opinion there are two reasons why mechanisms of insolvency prevention as well as rehabilitation procedures are not applied: 1) the debtor's management faces with the risks and difficulties if the insolvency case is commenced voluntarily and in its prediction, and 2) low level of shareholders responsibility.

Let's consider each of the reasons in more detail.

Main content

The prevention of insolvency is a very important rehabilitation instrument as it is much easier to recover the debtor at early stages. The article 8 of the Bankruptcy law provides to the debtor the right of filling a bankruptcy petition in prediction of the insolvency but unfortunately, it does not work as a practical matter.

The debtor's management usually does not use the instruments of the Bankruptcy law for the company's recovery due to the risk that the management will be brought to responsibility for fraudulent bankruptcy. In practice it is very difficult to distinguish when the chief executive officer (hereinafter – CEO) files a bankruptcy petition in prediction of insolvency and when the petition is a knowingly false. The prediction of bankruptcy is evaluation category therefore it is not excluded that the debtor's management can mistake, moreover lack of accurate legal determination of the term "bankruptcy prediction" can entail unfounded bringing to criminal or administrative responsibility [2, 5].

The maximum liability for a crime, stipulated in article 197 of the Criminal Codes of the Russian Federation[2] (further – the Russian

[1] Federal law of 26 October 2002 No. 127-FZ "On insolvency (bankruptcy)" // Legislation bulletin of the Russian Federation. 2002. No. 43. Art. 4190.

[2] The Criminal Code of the Russian Federation of 13.06.1996 No.63-FZ // Legislation bulletin of the Russian Federation. 1996. No. 25. Art. 2954.

Criminal Code) equals six years of imprisonment. Taking into account that major damage for the purposes of article 197 of the Russian Criminal Code is the damage that exceeds the amount of one million five hundred thousand rubles, the risk for the debtor's CEO of being brought to responsibility depends on the number of creditors and on the amount of their claims. Thus, the bigger amount of creditors' claims results more risk of criminal prosecution in case of filling the bankruptcy petition by the debtor its prediction.

Even if there is an absence of the event of crime stipulated in art. 197 of the Russian Criminal Code, there is a risk of administrative prosecution for the debtor's CEO on point 1 of article 14.12 of the Code of Administrative Offences[1], which contains very severe sanction in the form of disqualification.

Evidently, the CEO will refrain from filing the voluntary bankruptcy petition despite the fact that at an early stage of insolvency of chances of debtor's recovery is much more. As a result, a creditor will fill the bankruptcy petition much later when the perfect moment for the debtor's recovery is already missed and there is nothing left except for winding up proceedings.

However, the problem of non-usage of mechanisms specified in article 8 of the Bankruptcy law is based not only on such factor as risk of being brought to responsibility for fraudulent bankruptcy. Even if the debtor's management decided to fill the voluntary petition for bankruptcy in its prediction, the court may refuse to commence the supervision procedure.

The matter is that in order to start voluntary bankruptcy the debtor is obliged to prove the presence of the circumstances which obviously testify that in the nearest future the debtor will be incapable to pay its debts and (or) will not be able to make obligatory payments in the budget and in off-budget funds. The court in turn needs to establish these circumstances as only in case of their presence debtor enjoys a right to file a voluntary bankruptcy petition[2].

Thus, the courts are obliged to invoke bankruptcy proceedings if debtor despite the fact that there are no signs of insolvency proves the circumstances envisaged in article 8.

This rule is established by the law. However in case law the following situation may appear: the debtor files a voluntary bankruptcy petition, but the court refuses to start a supervision procedure on the ground that "*there are no evidence of insolvency as well as there are no the evidence that on the date of the petition the debtor had circumstances that obviously testify his inability to pay debts on scheduled time*"[3]. The debtor produced the evidence but court has recognized them as inadmissible. In less than in a year after the delivery of the appeals judgement regarding the debtor the supervision procedure was started, since one of the creditors has filed an involuntary petition[4].

The following situation can also appear: regarding the debtor several bankruptcy petition were filed and the voluntary petition is allowed to proceed first. The debtor did not manage to prove his insolvency and his petition was left without consideration[5]. However the petition of the creditor that joined to the bankruptcy case later was granted and the supervision procedure was started[6].

Unfortunately in case law such situations are frequent[7]. And in this concern the following

[1] Code of the Russian Federation on Administrative offences of 30.12.2001 No. 195-FZ // Legislation bulletin of the Russian Federation. 2002. No. 1 (part 1). Art. 1.

[2] The resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 23.07.2009 No.60 "On some issues relating to the adoption of the Federal Law of 30.12.2008 №296-FZ "On Amendments to the Federal Law "On Insolvency (Bankruptcy)" // Bulletin of the Supreme Arbitration Court of the Russian Federation. 2009. No. 9.

[3] The resolution of the Seventh Appeal Court of 29.10.2012 №07AP-7229/12 in the case №A67-3781/2012. The document has not been published. Access from the legal reference system Consultant Plus.

[4] The determination of the Arbitration Court of the Tomsk region of 04.09.2013 in the case №A67-3575 / 2013. The document has not been published. Access from the legal reference system Consultant Plus.

[5] The resolution of the Arbitration Court of the Moscow District of 19.03.2015 №10AP-14324/2014 in the case №A41-34695/2014. The document has not been published. Access from the legal reference system Consultant Plus.

[6] The determination of the Arbitration Court of Moscow region of 28.05.2015 in the case №A41-34695/2014. The document has not been published. Access from the legal reference system Consultant Plus.

[7] The resolution of the Tenth Arbitration Appeal Court of 08.11.2014 in the case №A41-33596/11. The resolution of the Fifth Appellate Court of 18.07.2015 №05AP-4451/15. The documents were not published. Access from the legal reference system Consultant Plus.

question arises: why the voluntary bankruptcy petition that is filed in insolvency prediction is not granted while the involuntary petition that is filed slightly later is granted?

Starting answering this question is necessary with the fact that neither the law nor the case law define which circumstances can obviously testify the debtor's inability to pay its debts in future. The above described case law allows to draw a following conclusion that the debtor cannot prove the existence of circumstances that can testify its inability to pay the debts in future despite the fact that these circumstances exist in fact.

It would be wrong to consider that courts delivered illegal judgements as the law was applied by them in its literal interpretation. It allows us to draw a conclusion that the problem of non-usage of article 8 resides in the terms of the Bankruptcy law.

The debtor is interested in the recovery and as it has financial difficulties every possible assistance in recovery is needed to be rendered. In our opinion that is the basic sense of filing the voluntary bankruptcy petition in the insolvency prediction. According to M. G. Porokhov the aim of article 8 of the Bankruptcy law is a protection of an established order of insolvency procedure implementation which is a necessary condition of economy rehabilitation. That aim was pursued by the legislator [5]. However the above mentioned circumstances resist achieving this purpose.

The matter is that success of the debtor's recovery as well as availability of the circumstances that testify the inability to pay the debts in future directly depend on time before the onset of the company's insolvency. There are more chances that solvency will be recovered if the debtor's management predicts the approaching insolvency earlier. And at the same there are less impartial circumstances that testify the inability to pay debts on scheduled time if the debtor's management predicts the approaching insolvency earlier. It turns to the conclusion that if debtor files the voluntary bankruptcy petition earlier then there are high chances for debtor's recovery as well as there are low chances that the bankruptcy proceedings would be invoked.

The question arises: is there a need to connect insolvency prediction with the existence of the circumstances specified in article 8 of the Bankruptcy law or the assistance to the debtor in the form of insolvency proceedings initiation is much better without the examination of presence of such circumstances as in Russia such practice nullifies all potential of insolvency prediction?

To answer this question, we consider necessary to study foreign practice of voluntary initiation of insolvency in its prediction.

In the USA, there is no need to provide any evidence of approaching insolvency in order to start insolvency proceeding by a voluntary petition. This rule works for any procedure that the debtor wants to invoke as of winding up and rehabilitation oriented. By the general rule for insolvency proceedings initiation the debtor needs to provide only a certain package of documents together with the voluntary bankruptcy petition and after that the case would be commenced [6, p. 503].

Generally, the US insolvency model is built in such a way that for the protection provided by the Bankruptcy Code may apply to any person. Very often the voluntary bankruptcy petition is filed by the solvent company, thus company is not needed to prove its insolvency.

In Great Britain it is also possible to invoke the administration procedure (an analog of external management, further – administration) regarding companies that are solvent, but in future can become insolvent [7, p. 673]. Moreover, it should be noted that such rehabilitation procedure as administration could be invoked without court order.

In accordance with Article 27 of the Insolvency act Annex B1, if the administration is invoked voluntarily, there are no provisions that oblige debtor to prove the presence of insolvency signs or circumstances that testify insolvency in future. In order to start a procedure the company's management shall make an official statement in which it is stated that the company will not be able to pay its debts in the next 12 months[1].

Thus, in Great Britain for starting insolvency proceedings the company shall be considered

[1] Insolvency act 1986 [Electronic resource] // National archive of the Government of HM [Off. Website]. 20.04.2015 of URL: http://www.legislation.gov.uk/ukpga/1986/45/contents (date of the address 20.04.2015).

insolvent or close to insolvency. Insolvency or a condition close to it will be considered proved if the company's management made the above-mentioned statement [8, p. 390]. It is not necessary to prove availability of any other circumstances about future insolvency.

It is worth noting that the presence of this provision in Britain legislation, which is clearly procreditor, is a clear illustration of a strong orientation on debtor's recovery.

Thus, we come to a conclusion that if the debtor's management is confident that the company would be incapable to pay its debts in the future, then the voluntary bankruptcy petition shall be granted by court without regard to the presence of circumstances that confirming the fact of future insolvency. In case of filling a voluntary bankruptcy petition the debtor has an intention either to prevent its failure, that will reduce expenses of creditors, or to enter into bankruptcy aiming a subsequent winding up, that will also reduce expenses of creditors.

In this regard it is necessary to mention a standpoint of E. Sh. Ageeva according to which if the debtor intends to be recovered then the petition for financial recovery should be filed instead of bankruptcy petition. As a result, in relation to the debtor financial recovery will be invoked bypassing the supervision procedure [1] that, certainly, will have good influence on the prospects of rehabilitation. Moreover, we think that in this case would be solved the problem of bringing management to responsibility for fraudulent bankruptcy. Filing the petition for financial recovery the debtor's management will not fill a knowingly false petition it would be more correctly to state that the management declares that the company needs a recovery measures to be applied in order to prevent insolvency.

Lawmaking experience of the Republic of Kazakhstan is interesting in this connection. The law "On rehabilitation and bankruptcy"[1] provides possibility of application of accelerated rehabilitation procedure. This procedure can be approved if the debtor at the time of petition filing is solvent, but there is a high probability that the debtor will not be capable to pay its debts in the next twelve months.

It should be noted that a similar opportunity is provided in the draftlaw developed by the Ministry of Economic Development[2] (further – the draftlaw). The debtor will enjoy a right to fill either a bankruptcy petition or financial recovery petition. However, the obligation to prove "the circumstances that obviously testify the fact that the debtor will not be able to fulfill monetary obligations and (or) an obligation on payment of obligatory payments at the scheduled time" all is also kept, moreover it is also extended to cases when the debtor fills a petition for financial recovery. Also as a shortcoming of the draftlaw it is possible to specify the absence of period during which the debtor will become insolvent.

Despite the fact that the draftlaw do not solve the problem on filing a voluntary bankruptcy petition in its prediction, it should be assessed positively, including due to other highly promising innovations in the field of rehabilitation. However, the draftlaw is under consideration by the Ministry of Economic Development since 2009 which is very eloquently about the interest of the legislator in solving this problem.

Another incentive for the debtor to fill a voluntary bankruptcy petition can be a possibility that corporate bodies of debtor could be deprived from its powers to decide whether to apply certain rehabilitation measures or not. Such measures as the replacement of the debtor's assets, the increase in share capital by placing additional common shares and the other measures listed in paragraph 2 of article 94 of the Bankruptcy law are very effective, but the possibility of their use is determined by the debtor's corporate bodies. It is worth noting that the measures listed in paragraph 2 of article 94 of the Bankruptcy law can directly affect the corporate control of shareholder or the ability to operate business.

[1] Law of the Republic of Kazakhstan from March 7, 2014 №176-V ZRK "On rehabilitation and bankruptcy" // Bulletin of the Parliament of the Republic of Kazakhstan. 2014. №4-5. Art. 23.

[2] Draft Federal Law "On Amendments to the Federal Law" On Insolvency (Bankruptcy) "and Certain Legislative Acts of the Russian Federation with regard to regulation of the use of supervision and financial recovery procedures" [Electronic resource] // Federal portal draft regulations [off. site]. 04.20.2016. URL: http://regulation.gov.ru/projects#npa=22241 (date of the address 20.04.2016).

Is it reasonable to grant to debtor's shareholders such a right if the bankruptcy petition was filed by the creditor? In our opinion the fact that the bankruptcy petition was filled by creditor testifies either that debtor's management or owners acted in bad faith or that they are no able to rule the firm. If creditors are interested in rehabilitation the decision on whether to apply recovery measures or not shall be made by creditors even if this measures directly affect the rights and interests of shareholders. Therefore, approval of recovery measures from company owners is excessive as they already brought the company to insolvency, it is necessary to work without the need for their approvals, especially if it concerns such effective actions. Salvation of the company including from inept managers and owners will be a priority in this case. Businessmen shall realize that bringing the company to bankruptcy, they lose not only their property, but also do harm and to other participants of a commercial turnover therefore they shall not be guided only by their interests.

Only in the case where a bankruptcy petition (in future the financial recovery petition) is filled by the debtor, then the rights of the shareholders shall be protected and measures listed in paragraph 2 of article 94 of the Bankruptcy law should be applied only with the consent of shareholders. Filling a voluntary bankruptcy petition the debtor expresses its intention to rehabilitation and demonstrates its owners and management acted in good faith.

Securing such a rule in the law will increase level of responsibility of shareholders since it will affect them directly. That also will change the perception of the business community that the Bankruptcy law is a "one-way ticket". If the debtor's management fills a voluntary bankruptcy petition by order of the owner then there would be higher probability of a successful outcome of rehabilitation.

These actions should not be regarded as an opportunity for hostile takeover since not shareholders but a company itself is a subject to protection during a bankruptcy process. The company and those who own it are unidentified: they are different persons and they have different purposes. Moreover, the owner of the company always retains the right to pay off the debts of the bankrupt company and remain corporate control over it, if the asset is particularly valuable for him. If the owner due to the objective reasons cannot do it, then he cannot prohibit other persons to invest in the problem company. As it was already stated above, the purpose of the rehabilitation procedure, including external management is recovery of solvency of the debtor, but not reservation of corporate control over the company.

It should be noted that this issue had already been in the attention of the legislator who wanted to amend the Bankruptcy law, taking as a model chapter 11 of the US Bankruptcy code [3, 4]. The procedure could look as follows: according to court decision, the company is transferred from shareholders to temporary administrator who operates it and searches an investor; the former shareholders remain with nothing. This scheme is more relevant in relation to such a measure as replacement of the debtor's assets, but at the same time, it could be also applied when placing additional common shares of the debtor. This principle already applied in banks insolvency: the transferring to the Agency of Deposit Insurance and then to a new owner.

The author considers that these actions should not be perceived as "withdrawals" of the company from its shareholders. Firstly, not the company, but powers to choose rehabilitation measures (including those ones that can directly affect shareholders rights) which influence on legal destiny of the company shall be withdrawn. If for the recovery purposes it is necessary to apply such action as placement of additional common shares of the debtor, but the owner opposes it because his share will be diluted, his interests need to be neglected since interests of the company in this situation have a primacy over the interests of shareholder. Secondly, powers to choose rehabilitation measures shall pass to creditors only when the bankruptcy petition is involuntary.

Conclusion

Therefore, the author concludes that the rule about an obligation of the debtor to prove availability of the circumstances

that testify approaching insolvency in future is useless. We believe that for the purposes of increasing the rehabilitation potential of Bankruptcy law, this rule should be applied to cases when the bankruptcy petition (in the future the financial recovery petition) is voluntary, as the case law negates the potential for bankruptcy prediction.

It also concerns the need of change of article 94 of the Bankruptcy law. Shareholder shall enjoy the right to approve application of these or those recovery measures depending on if the bankruptcy is voluntary.

In case of solution of the above described problems efficiency of rehabilitation procedures will increase. Certainly, it is possible to call some of them very radical; however it is necessary to remember that during the crisis period special attention needs to be paid to those areas of the legislation which enhancement can influence improvement of an economic situation.

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