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REGULATORY AND LEGAL BASIS OF BANKRUPTCY OF THE ENTERPRISE

Abstract*. In a market economy, an enterprise is the main link that creates gross domestic product. However, a significant part of enterprises at a certain stage of the production cycle have to solve the issue of financial insolvency. Based on the fact that the number of unprofitable enterprises as a percentage of the total number of enterprises is constantly growing (respectively, losses before tax are growing, which is especially unacceptable in the conditions of the large-scale war that Russia is waging against Ukraine). So, for the economy of Ukraine, the issue of forming an effective system of monitoring and state regulation of bankrupt enterprises is now very relevant. Thus, given the introduction of the inter-branch principle of inadmissibility of abuse of procedural rights in the Code of Civil Procedure of Ukraine, the lack of scientific works and practice of bringing to justice for abuse of rights in bankruptcy cases, further development of this topic is a promising scientific direction. The legal literature has made valid proposals for solving problems related to improving the legal procedure for bringing to justice for abuse of rights in bankruptcy cases. Further development of this topic is a promising scientific direction. Depending on the severity of the abuse of procedural rights committed by the participants in the bankruptcy case, it is necessary to distinguish between abuses of rights that did not cause serious consequences and those that did cause serious consequences.*

Keywords*: fair business activity, economic policy, unfair competition, principle of justice, unfair business entities, consumer protection policy, political and legal system, consumer rights, consumers, consumer market, sustainable development, policy subject, public means of influence.*

Relevance of the problem. *In a market economy, solving the problem of conducting fair business activities by enterprises is a component of economic policy. At the same time, abuse of rights, unfair competition - violate the principle of justice on the part of unfair business entities. That is why the policy of protecting consumer rights, consumer rights, consumers, consumer market, sustainable development. Therefore, solving the problems of conducting fair business activities should be one of the tasks of the political and legal system of the state. As is known, a significant part of enterprises at a certain stage of the production cycle have to solve the issue of financial insolvency. Based on the fact that the number of unprofitable enterprises as a percentage of the total number of enterprises is constantly growing (respectively, losses before tax are growing, which is especially unacceptable in the conditions of the large-scale war that Russia is waging against Ukraine). Therefore, for the economy of Ukraine, the issue of forming an effective system of monitoring and state regulation of bankrupt enterprises is now very relevant.*

Analysis of research on this topic. Study of the theoretical and methodological foundations of the functioning of the institution of bankruptcy in the conditions of a transformational economy and analysis of its dynamics are devoted to the works of leading foreign and Ukrainian scientists, among whom it is necessary to name M. V. Afanasyev, K. V. Baldin, I. A. Blank, A. S. Vartanov, B. M. Grek, V. I. Klein, scientist-practitioner O. M. Zabrodin and others. However, despite the importance of this problem, the issue of forming a mechanism for state regulation of enterprise bankruptcy has not been sufficiently reflected in the legal literature.

The purpose of the study is to analyze the regulatory and legal framework for enterprise bankruptcy in Ukraine and develop a mechanism for its state regulation on this basis.

Regulatory and legal regulation of enterprise bankruptcy covers a system of legislative acts. In the Commercial Code of Ukraine, among other novelties set out in the procedural codes, this issue deserves special attention for the introduction of a new principle of judicial proceedings - the inadmissibility of abuse of procedural rights - which, given its consolidation in the Code of Civil Procedure of Ukraine, the Code of Civil Procedure of Ukraine, and the Code of Administrative Offenses of Ukraine, can rightly be attributed to the inter-branch principles of judicial proceedings [1]. In the current version of the Code of Civil Procedure of Ukraine (hereinafter referred to as the Code of Civil Procedure), two articles are devoted to this principle: Articles 2, 44 of the Code, as well as Chapter 9 of the Code "Measures of Procedural Coercion" [3, pp. 3, 21-22, 51-52].

According to Part 3 of Article 2 of the Code of Civil Procedure of Ukraine, the inadmissibility of abuse of procedural rights is defined among the basic principles (principles) of commercial judicial proceedings [3, p. 3].

In turn, Article 44 of the Code of Civil Procedure of Ukraine stipulates that participants in the trial and their representatives must exercise procedural rights in good faith; abuse of procedural rights is not allowed (Part 1). Depending on the specific

circumstances, the court may recognize as an abuse of procedural rights actions that contradict the purpose of economic proceedings, in particular:

1) filing a complaint against a court decision that is not subject to appeal, is not valid or whose effect has expired (exhausted), filing a motion (application) to resolve an issue that has already been resolved by the court, in the absence of other grounds or new circumstances, filing a knowingly groundless challenge or committing other similar actions aimed at unjustifiably delaying or obstructing the consideration of the case or the execution of the court decision;

2) filing several claims against the same defendant (defendants) with the same subject matter and on the same grounds, or filing several claims with a similar subject matter and on similar grounds, or committing other actions aimed at manipulating the automated distribution of cases between judges;

3) filing a knowingly unfounded claim, a claim in the absence of the subject of the dispute or in a dispute that is obviously artificial in nature;

4) unfounded or artificial consolidation of claims in order to change the jurisdiction of the case, or knowingly unfounded involvement of a person as a defendant (co-defendant) for the same purpose;

5) conclusion of a settlement agreement aimed at harming the rights of third parties, intentional failure to notify persons who should be involved in the case (part 2). If the filing of a complaint, statement, motion is recognized as an abuse of procedural rights, the court, taking into account the circumstances of the case, has the right to leave the complaint, statement, motion without consideration or return it (part 3). The court is obliged to take measures to prevent abuse of procedural rights. In the event of abuse of procedural rights by a participant in the legal process, the court shall apply to him the measures specified in this Code (Part 4) [3, pp. 21-22].

Thus, Article 44 of the Civil Procedure Code of Ukraine does not establish an exclusive list of actions that may be regarded by the court as an abuse of rights.

In this regard, some experts express concerns about the court's rather loose qualification of the actions of a participant in the proceedings as an abuse of rights [4].

In turn, the Civil Procedure Code of Ukraine in its new edition has left the jurisdiction of economic courts to consider bankruptcy cases.

According to the provisions of Part 5 of Article 13 of the Civil Procedure Code of Ukraine in its new edition, economic courts consider bankruptcy cases in the manner provided for by this Code for claim proceedings, taking into account the features established by the Law of Ukraine "On the Restoration of the Debtor's Solvency or Recognition of Him as Bankrupt" [3, p. 9].

Therefore, based on a systematic analysis of the norms of the new edition of the Code of Civil Procedure of Ukraine and the Law of Ukraine “On the Restoration of the Solvency of the Debtor or Recognition of Him as Bankrupt” [5], it should be concluded that within the framework of bankruptcy proceedings, the court has the right and obligation to apply the norms regarding the inadmissibility of abuse of procedural rights and measures of procedural coercion to the participants in the bankruptcy proceedings. Given that the principle of inadmissibility of abuse of procedural rights is new for commercial, civil and administrative proceedings, at present the theoretical

developments of this topic are quite low, not only during the consideration of bankruptcy cases, but even when considering civil and commercial cases in the procedure of claim proceedings.

Experts propose to form a conceptual apparatus and define the concept of "abuse of law", to determine the criteria for distinguishing abuse of procedural rights from other unfair or improper behavior of participants in commercial proceedings, and to list the types of abuse of procedural rights.

Abuse of procedural rights should be understood as a special form of civil procedural offense, that is, intentional unscrupulous actions of participants in civil proceedings (and in some cases, the court), accompanied by a violation of the conditions for the exercise of subjective procedural rights and carried out only with the appearance of exercising such rights, associated with deception regarding the known circumstances of the case, in order to limit the possibility of exercising or violating the rights of other persons participating in the case, as well as in order to prevent the court from conducting a proper and timely consideration and resolution of a civil case, which entails the use of civil procedural coercion [6, p.57].

The opinion (O. Zabrodin) was also expressed that the legal construct “abuse of rights” implies, first of all, active actions of a participant in the proceedings, which are manifested in the performance of procedural actions or the submission of procedural documents.

The list of procedural rights is defined by Article 43 of the Code of Civil Procedure of Ukraine in the new edition. According to the specified norm, participants cases have the right to familiarize themselves with the case materials, make extracts, copies from them, receive copies of court decisions; submit evidence; participate in court sessions, unless otherwise provided by law; participate in the study of evidence; ask questions of other participants in the case, as well as witnesses, experts, specialists; submit statements and motions, provide explanations to the court, present their arguments, considerations on issues arising during the trial, and object to statements, motions, arguments and considerations of other persons; familiarize themselves with the minutes of the court session, the recording of the court session by technical means, make copies of them, submit written comments regarding their incorrectness or incompleteness; appeal court decisions in cases specified by law; exercise other procedural rights specified by law [3, p. 20].

Therefore, abuse of law, in our opinion, occurs when, under the visible, formal exercise of the rights of a participant in the proceedings, as defined by Article 43 or other norms of the Code of Civil Procedure of Ukraine in the new edition, such a participant in the proceedings intends to realize an unscrupulous goal, to delay the process or to limit the procedural rights of other participants in the proceedings.

That is why scientific research on this topic is necessary, first of all, in order to prevent the court from interpreting the concept of “abuse of law” too freely and hyperbolized, and to provide a reasonable and balanced approach by the judicial authorities to the actions of participants in the proceedings, who naturally defend their rights and legitimate interests. Since, having the legalized opportunity to apply procedural coercion measures to a participant in the proceedings, the court will be more

meticulous about the petitions and other actions of the participants in the proceedings. This will lead to consequences when the participant in the proceedings will be under constant stress from his procedural opponents and the court, since, on the one hand, he is obliged to defend his legitimate rights and interests by all possible means and prove his position with proper and admissible evidence, and on the other hand, to "justify" himself and prove to the court his innocence in the suspicion of abuse of his right.

Such a situation comes into legal conflict with some legislative acts, in particular, the Law of Ukraine "On the Bar and Advocacy", according to paragraph 6 of part 1 of article 23 of which his statements in the case, including those reflecting the client's position, statements in the media, cannot be grounds for holding a lawyer liable, if this does not violate the lawyer's professional duties [3, art. 23].

In the bankruptcy procedure, it is possible to classify types of abuse of procedural law.

1. According to specific points of Part 2 of Article 44 of the Code of Civil Procedure of Ukraine in the new edition (according to the methods of committing such abuses).

1) filing a complaint against a court decision that is not subject to appeal, is not valid or whose effect has expired (exhausted), filing a motion (application) to resolve an issue that has already been resolved by the court, in the absence of other grounds or new circumstances, filing a knowingly groundless challenge or committing other similar actions aimed at unjustified delay or obstruction of the consideration of the case or the execution of the court decision. For example, a participant in the bankruptcy proceedings filed a complaint against the actions of the arbitration manager in this case. The court of first instance refuses to satisfy such a complaint, and the court of appeal leaves such a decision in force. The complainant appeals previously adopted judicial acts to the court of cassation in order to delay the consideration of the bankruptcy case in the court of first instance or to put psychological pressure on the arbitration manager. In such a situation, the court of cassation should refuse to accept the cassation appeal, and the actions of the complainant should be regarded as an abuse of procedural law, since according to the provisions of Part 3 of Article 8 of the Law of Ukraine "On the Restoration of the Debtor's Solvency or Recognition of Him as Bankrupt", only decisions on the dismissal (removal, termination of powers) of the arbitration manager can be appealed in cassation, and not decisions on the refusal to satisfy the complaint about his actions.

Another example. In order to delay the consideration of the case in the court of first instance, a creditor at the stage of the liquidation procedure appeals in the appeal procedure the court's decision on the introduction of the rehabilitation procedure, although such a decision has exhausted its effect. Such actions may also be considered by the court as an abuse of law;

2) filing several applications for the initiation of bankruptcy proceedings against the same debtor from the same creditor, the purpose of which is to manipulate the automated distribution of cases between judges;

3) filing a knowingly unfounded claim, a claim in the absence of a subject of dispute or in a dispute that is obviously artificial in nature.

Such cases include filing a claim from one business entity to another in order to "obtain" a decision to collect a fictitious debt and present the order issued under this decision for execution, after which, on the basis of these documents, file an application with the debtor to initiate proceedings in the case of bankruptcy. However, to qualify such actions as abuse of law, a court verdict in criminal proceedings or a resolution in cases of administrative offenses is required, which would establish the guilt of these persons in a knowingly false notification of bankruptcy and (or) forgery of documents;

4) knowingly unfounded submission of an application for the initiation of proceedings in a bankruptcy case, for example, in the case of repayment of the debt by the debtor in full;

5) conclusion of a settlement agreement aimed at harming the rights of third parties, intentional failure to notify the persons who should be involved in the case.

Such an example may be the conclusion of a settlement agreement between creditors and the debtor, the terms of which provide for the exchange of creditor claims for the debtor's property, which in fact does not belong to the debtor, but belongs to third parties, and regarding the ownership of which the debtor misled other participants.

In this case, the settlement agreement is concluded both to the detriment of the rights of third parties and without proper notification of the rights to the property of third parties transferred under such a settlement agreement.

According to experts, the application of paragraph 5 of part 1 of article 44 of the Civil Procedure Code of Ukraine in the new edition regarding the intentional failure to notify the persons who should be involved in the case is incomprehensible. If the logic of the legislator was that the intentional failure to notify the interested persons takes place during the conclusion of the settlement agreement, such actions should be regarded as an abuse of law, since signing and submitting the settlement agreement to the court for approval is a procedural right and an active action of the party. However, if the legislator defined as an abuse of law only the fact of intentional failure to notify the court about the rights and interests of other persons, in our opinion opinion, such actions cannot be attributed to abuse of rights, since in this case there is another legal fact - inaction. In addition, the final circle of participants in the proceedings is determined exclusively by the court. In this case, other adverse consequences for the party arise: a court decision in the absence of the involvement of the person whose rights and interests are violated must be canceled as one that was made in violation of the norms of procedural law.

In general, as noted above, each party and participant in the proceedings have procedural rights and obligations defined by law. The objective manifestation of the exercise of rights finds its manifestation exclusively in active actions. In turn, the fact of abuse of rights occurs only in the case of such a participant committing procedurally significant actions. Inaction or evasion from the performance of duties imposed on the participant by a court decision cannot be recognized as abuse of rights.

Depending on the circle of participants in the bankruptcy proceedings, it is necessary to distinguish abuse of rights by the debtor, creditors, the arbitration manager, the owner of the debtor's property or the body authorized to manage the debtor's property, the state body on bankruptcy issues, etc.

In the legal literature (O. Zabrodin) valid proposals were made. Depending on the severity of the abuse of procedural rights committed by the participants in the bankruptcy case, it is necessary to distinguish such abuses of rights that did not cause serious consequences, as well as those that caused serious consequences.

Thus, given the introduction of the inter-branch principle of inadmissibility of abuse of procedural rights in the Code of Civil Procedure of Ukraine, the lack of scientific works and the practice of bringing to justice for abuse of rights in cases on bankruptcy further development of this topic is a promising scientific direction.

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