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THE LEGAL TREATMENT OF THE INITIATION AND IMPLEMENTATION OF BANKRUPTCY AGAINST LEGAL ENTITIES IN REPUBLIC OF SERBIA

ABSTRACT: In contemporary conditions of an operation of business entities, the importance and significance of bankruptcy and the bankruptcy procedure are indisputable. The establishment of debtor-creditor relations in business operations of legal entities and individuals may lead to the risk of the debtor in a certain business not being able to meet the obligation he/she has assumed. The roots of bankruptcy as a commercial law institution can be traced as far back as Roman law. The bankruptcy issues in Serbia are governed by the Bankruptcy Law of 2009. According to the importance and essence of the topic of the paper, the subject of the paper analysis refers to the concept and characteristics of bankruptcy as an important commercial law institution. It also includes the aims of bankruptcy and the criteria for its classification, as well as the question of the fundamental assumptions for the implementation of bankruptcy law rules, and the options available to bankruptcy debtors in situations when the causes of bankruptcy are met. The paper focuses in particular on a legal treatment of the initiation and implementation of bankruptcy against legal entities in Republic of Serbia.

Keywords*: bankruptcy, the bankruptcy procedure, legal entities, the Bankruptcy Law, Republic of Serbia.*

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1. Introduction

The establishment of debtor-creditor relations in the business transactions of legal entities and natural persons may lead to the risk of a debtor in a certain business transaction not being able to meet the obligation they have undertaken. It is emphasized in legal theory that in "the modern business conditions, debts have become an inseparable part of economic life and an important source of financing of business activities" (Dragojlović, Milošević & Stamenković, 2019, p. 18).

It goes without saying that a creditor, faced with the situation of debtor insolvency, has as the first option the initiation of a civil procedure, with the aim of enforced collection of their claims from the debtors in an execution procedure. However, as Radović (2017) points out, "a problem arises when it becomes impossible to protect the interests of all the creditors in the execution procedure, as the debtor is in financial difficulties, which jeopardize the settlement of all the creditors" (p. 29).

It is in these situations, when the debtor becomes insolvent, and no other option of settling the creditors' claims is adequate (for instance, it provides the settlement of only one, and not of the other creditors), that the institution of bankruptcy is of great imortance, as it offers the possibility of settling all the debtors' creditors, through a legally stipulated and regulated procedure.

The foundations of bankruptcy, as a commercial-law institution, can be traced as far back as Roman law, through three institutions. The first institution of Roman law is *Missio in bona*, and it assumed that, in case of a debtor's inability to pay their debts to creditors, "the praetor could allow the creditors to enter the debtor's estate (including the debtor's loss of honour and a prison sentence) and sell it to a person (*bonorum emptoru*), who was obliged to pay the creditors in defined percentages" (Opačić, 2012, p. 40). The second institution is *Cessio bonorum*, whereby the debtor "of their own free will (without losing their honour and being sentenced to prison in this case) assigned their estate to their creditors for the purpose of collection of their claims" (Opačić, 2012, p. 40). The third institution is *Distracti bonorum*, which assumed the sale of "only part of the debtor's assets which was sufficient to settle the debts to creditors" (Dragojlović, et al., 2019, p. 18).

In Serbia the bankruptcy institution "was introduced for the first time in 1853 through the Law on Judicial Procedure and Civil Lawsuits for the Principality of Serbia, under provisions of which the purpose of the bankruptcy procedure was for "*the estate of the overindebted that cannot be collected to be converted for settlement following a legal order"* (Stanković & Lazić, 2020,

p. 217). The first Bankruptcy Law in today's Republic of Serbia territory "was passed in 1861, with the following legal provision – *Bankruptcy is a judicial procedure in which the estate of a debtor who is unable to settle their debt is divided between the creditors following a definite legal order"* (Stanković & Lazić, 2020, p. 217).

As opposed to the previous legal solution (Bankruptcy Procedure Act, 2004), which stipulated by its provisions the conduction of bankruptcy procedures against both legal entities and entrepreneurs, the current Bankruptcy Law (2009) stipulates in article 1 that the new legal solutions "regulate the conditions and manner of initiating and implementing bankruptcy" only against legal entities.

The subject of analysis in the rest of the paper will be the concept and characteristics of bankruptcy as an important commercial-law institution, the aims of bankruptcy and the criteria for its classification, as well as the question of the fundamental assumptions for the implementation of the rules of bankruptcy law, and the options available to bankruptcy debtors in situations when bankruptcy causes are met. The paper will focus in particular on the legal treatment of initiating and implementing bankruptcy over legal entities in the Republic of Serbia.

2. The concept, aims and classification of bankruptcy

According to Jovanović-Zattila (2003), bankruptcy is "an institution of joint, proportionate and simultaneous settlement of creditors out of the estate of a bankruptcy debtor. It protects the creditors from each other and the debtor from the creditors who try to settle their claims at all costs" (p. 3).

In defining the essence of the conceptual definition of bankruptcy, we can distinguish between the legal and the economic aspect.

From the legal standpoint, "bankruptcy is a procedure in which all the creditors of the bankruptcy debtor are settled" (Radović, 2017, p. 30), namely, it is "the court seizure of the debtor's entire property for the benefit of the joint creditors" (Dragojlović, et al., 2019, p. 20). From the economic point of view, "bankruptcy is the state of the debtor who has suspended payments, or whose property is insufficient to settle the claims of all the creditors whose claims are threatened by the suspension of payments or the overindebtedness of their common debtor" (Čolović & Miljević, 2010, p. 7). As pointed out by Vučković (2014), "bankruptcy is the state which results in the disappearance of a business entity from economic life" (p. 56).

In other words, due to insolvency or overindebtedness, the debtor is unable to meet their due monetary obligations. According to Milosavljević (2016), "insolvency is manifested by the debtor's suspension or cessation of payment of due obligations, while overindebtedness represents a specific financial condition of the debtor in which their entire property is not sufficient to meet their debts. In both the first and the second case the debtor manifests inability to pay" (p. 57).

Kozar and Dukić Mijatović (2015) emphasize that "bankruptcy as an institution should be distinguished from the bankruptcy procedure, which is a set of legal rules which regulate the actions of participants in that procedure" (p. 1).

According to Cvetković (2004), "the bankruptcy procedure represents a legal mechanism for a cumulative settlement of creditors of an enterprise not capable of making payments for its due obligations. The bankruptcy procedure differs from the execution procedure, which is a legal mechanism for individual settlement of creditors. The bankruptcy procedure is conducted by the competent court. This ensures the equality of all the interested parties in the procedure" (p. 2).

In addition, bankruptcy and the bankruptcy procedure should be distinguished from the bankruptcy process relation. The bankruptcy process relation "starts with the initiation of a preliminary bankruptcy procedure and lasts until the conclusion of the bankruptcy procedure. The bankruptcy process relation is regulated by the bankruptcy procedure rules. The bankruptcy process relation is established between the bankruptcy judge and other entities involved in the bankruptcy procedure" (Milosavljević, 2016, p. 58).

The causes of bankruptcy are twofold and may be classified into: objective causes and subjective causes. According to Velimirović et al. (2008), "the causes objective in nature are the economic recession and transition of socialist countries through privatization, while the subjective conditions include bad enterprise marketing, bad administration and bad management" (pp. 28–29).

On the other hand, even though "the property transformation from the beginning of the nineties of the last century led to a reduction in the value of the property of business entities" (Vučković, 2014, p. 57), the bankruptcy procedure is "often incorrectly equated with the privatization procedure, while the procedures in question are essentially different" (Cvetković, 2004, p. 3).

An efficient bankruptcy system "is an essential part of market economy as it provides security to creditors, a recovery of enterprises with financial difficulties and a faster return of blocked assets into use. In a quality bankruptcy procedure everyone wins – the creditors, the employees, and society as a

whole. A bankruptcy procedure results in the recovery of an enterprise and in this way, through an efficient redistribution of the seized assets, it represents a precondition of a faster and more successful recovery of economy as a whole" (Cvetković, 2004, p. 2). The same author also indicates that "a bankruptcy procedure is urgent by definition. The key reason for that is the fact that the assets owned by the enterprise lose their value on a daily basis, which makes it necessary for the bankruptcy procedure to be efficient and limited in time, in order to, by preserving the value of the assets, protect the interests of both the creditors who are paid out of these assets, and the employees who use the assets" (Cvetković, 2004, p. 2).

In line with provision of article 1 of the Bankruptcy Law (2009), "bankruptcy is carried out through liquidation or reorganization. Liquidation implies the settlement of creditors out of the value of the entire property of the bankruptcy debtor, or the bankruptcy debtor as a legal entity. Reorganization implies the settlement of creditors according to an adopted reorganization plan, i.e. by redefining the debtor-creditor relations, status changes in the debtor or in another way stipulated by the reorganization plan". In view of the principle of protection of bankruptcy creditors, stipulated by article 3 of the Bankruptcy Law (2009), "bankruptcy enables collective and proportionate settlement of bankruptcy creditors, in compliance with this law". At this point, Salma (2008) emphasizes, as an important characteristic of the legal framework of bankruptcy in Serbia, the fact that "this mixed solution in our law favours the debtor's fraudulous acts, i.e. favours the creation of a situation of "artificial overindebtedness", so that bankruptcy may serve to evade collection of the creditors' claims as a whole, through the institution of proportionate (i.e. reduced) settlement of creditors. Namely, the debtor may, by means of free or fictitious disposals (in bookkeeping) create a state of overindebtedness, even though there is no overindebtedness in reality" (p. 506).

Analyzing the aims of bankruptcy, Jovanović Zattila (2003) points out that "there exist two primary aims of conducting a bankruptcy procedure. The first aim is the protection of the creditors' interests, and the second is the removal from legal transactions of the entity which is unable to meet their financial obligations" (p. 49). Article 2 of the Bankruptcy Law (2009) stipulates that the aim of bankruptcy is "the most favourable collective settlement of bankruptcy creditors by realizing the highest possible value of the bankruptcy debtor, i.e. their property".

Finally, and in line with the aforesaid, "the main indicators of bankruptcy procedure efficiency are the extent of settlement, and the bankruptcy procedure duration and expenses" (Zimmermann, Obućina & Milovanović, 2015, p. 11).

There are in legal theory different "bankruptcy classification criteria" (Dukić Mijatović, 2013, p. 7). According to Dragojlović et al. (2019), "a civil bankruptcy includes all legal entities and natural persons. A division into civil and commercial bankruptcy is accepted in Anglo-Saxon law. The general bankruptcy rules are applied to the conduction of bankruptcy procedures against a majority of business entities. When more than one bankruptcy procedure is conducted against the same bankruptcy debtor, one is primary, while the others are secondary". In addition, "the theory of bankruptcy law also differentiates between bankruptcy in the material, and bankruptcy in the formal sense. Material bankruptcy is the debtor's unfavourable material situation which is manifested by their inability to meet obligations when due. Formal bankruptcy is a court procedure initiated after establishing that a debtor is in a financial problem. Formal bankruptcy exists as a result of the material" (p. 21).

3. Preconditions for the application of bankruptcy law rules

Contemporary legal theory underlines that the application of specific bankruptcy-law rules requires "two fundamental preconditions: a plural of creditors and financial difficulties of the debtor" (Radović, 2017, p. 30).

According to the first fundamental precondition, "bankruptcy is reasonable and justified only when the debtor has more than one creditor. What follows from this characteristic are two key bankruptcy principles: the principle of collective settlement of creditors and the principle of equal creditor treatment. This condition is almost always met when it comes to business entities, it being hard to imagine a business company not having two creditors at least" (Radović, 2017, p. 30).

According to the second precondition, "bankruptcy law is only applied in relation to bankruptcy debtors who are in major financial problems. As a result, this branch of law narrows down its scope of application in two ways: firstly, by defining the entities in relation to which a bankruptcy procedure may be conducted, and secondly, by defining the debtor's unfavourable economic situation which justifies the initiation of this kind of procedure" (Radović, 2017, p. 30).

In a situation when, in the business practice of companies, both fundamental preconditions are met, the essential substantive-law preconditions for initiating bankruptcy are deemed to exist. Whether the bankruptcy procedure will be initiated depends on the debtor's attitude.

Contemporary legal and bankruptcy theory state that the substantive-law conditions for initiating a bankruptcy procedure include:

- "the existence of a bankruptcy debtor – as the debtor is the person over whose property bankruptcy is initiated. A bankruptcy procedure is conducted against a bankruptcy debtor. If there is no bankruptcy debtor, there is no bankruptcy either" (Milosavljević, 2016, p. 77);
- the existence of a bankruptcy cause – article 11 of the Bankruptcy Law (2009) stipulates that "a bankruptcy procedure is initiated after establishing the existence of at least one bankruptcy cause, which includes: a lasting inability to pay, a threatening inability to pay, overindebtedness and failure to comply with the adopted reorganization plan, and if the reorganization plan was realized in a fraudulent or illegal manner. In addition, a lasting inability to pay exists if the bankruptcy debtor: cannot meet their monetary obligations within 45 days of the obligation due date, or if they totally suspend all payments over an uninterrupted 30-day period";
- the existence of more than one bankruptcy creditor – because in case of existence of only one bankruptcy creditor, our law does not stipulate the possibility of conduction of a bankruptcy procedure as a procedure of collective settlement of bankruptcy creditors as the conditions for their proportionate collective settlement do not exist, but one bankruptcy creditor is settled individually through the procedure of enforcement on the entire property of the bankruptcy debtor" (Milosavljević, 2016, p. 101);
- "the existence of a bankruptcy debtor's property – as the property of a bankruptcy debtor constitutes the bankruptcy estate. However, for the bankruptcy procedure to be conducted, the existence of the bankruptcy debtor's property is not sufficient, it is also required to be greater in value than the costs of the bankruptcy procedure, i.e. that the bankruptcy debtor's property is not negligible in value" (Milosavljević, 2016, p. 106).

At this point Radović (2017) states that "there are three basic options" (p. 31) available to bankruptcy debtors in the situation of fulfilment of the substantive-law preconditions for initiating bankruptcy:

- According to the first option, "a bankruptcy debtor may try to overcome the financial difficulties on their own. They can do so in different ways, by applying one or more measures, which are as a rule related to their status (e.g. change in the company policies or status changes), liquidity (e.g. real estate sales) and/or business (e.g. closing down unprofitable operations or redundant staff lay-off)" (Radović, 2017, p. 31);

– In the second option, "a bankruptcy debtor may, in an informal out-of-court procedure, try to redefine debtor-creditor relations with a few of their major creditors, with a view to preventing the occurrence or elimination of the bankruptcy cause" (Radović, 2017, p. 31);
– In the third option, the debtor and their creditors have at their disposal the initiation of a bankruptcy procedure.

4. On the legal treatment of the initiation and implementation of bankruptcy against legal entities in the Republic of Serbia

According to the currently influential legal theory views, the Bankruptcy Law which is adopted and has been in use since 2009, has created "for indebted business entities, and creditors alike, better conditions for a timely initiation of bankruptcy procedures, in order to redefine their debtor-creditor relations and preserve their business activities, or when that is not possible – preserve the business operations and property of their company and bring them within a short period of time back into use, not allowing them to become technologically outdated and significantly fall in value" (Zimmermann, Obućina & Milovanović, 2015, p. 11).

Considering the main bankruptcy procedure efficiency indicators discussed above, the Bankruptcy Law, at the time of its enactment, "was aimed at improving the quality of the bankruptcy procedure in the Republic of Serbia, through a higher extent of settlement of creditors, lower bankruptcy procedure expenses and a reduction of the bankruptcy procedure duration, as well as through introducing additional incentives for creditors, and debtors in particular, to initiate the bankruptcy procedure in a timely manner in order to try to overcome the financial difficulties and maintain their business" (Zimmermann, et al., 2015, p. 11).

The Bankruptcy Law (2009), besides the provisions mentioned above, stipulates in articles 3-10 the bankruptcy principles, which include: "the principle of protection of bankruptcy creditors, the equal treatment and equality principle, the cost effectiveness principle, the principle of judicial conduct of the procedure, the imperative and preclusive principle, the urgency principle, the two-instance principle, the publicity and information principle".

Articles 15 and 16 of the Law govern the competence, and articles 17-42 the bankruptcy procedure authorities. According to article 17, "the bankruptcy procedure authorities are the bankruptcy judge, the bankruptcy trustee, the assembly of creditors and the board of creditors."

Articles 43-54 regulate issues with regard to the main procedural provisions, parties and participants in the procedure.

The Law also regulates the issues of initiating a bankruptcy procedure and a preliminary bankruptcy procedure (articles 55–67), starting the bankruptcy procedure (articles 68-100), the bankruptcy estate (articles 101–110), and the establishment of claims (articles 111–118).

The issues relating to refuting the legal actions of the bankruptcy debtor, the conclusion of the bankruptcy procedure, reorganization and international bankruptcy, are regulated in the part from article 119 to the transitional and final provisions of article 207.

According to article 55, a bankruptcy procedure is "initiated on the proposal of a creditor, debtor or liquidation trustee", which is, in line with article 56, "submitted to the competent court".

The bankruptcy judge (in line with provisions of article 60) within "three days of the day of delivery of the petition for initiating a bankruptcy procedure, makes the decision on initiating a preliminary bankruptcy procedure. The preliminary bankruptcy procedure is initiated with a view to establishing the reasons for initiating the bankruptcy procedure". The bankruptcy judge will (article 62), "ex officio or on the request of the bankruptcy petitioner, by the decision to initiate a preliminary bankruptcy procedure, define security measures with the aim of preventing any changes to the bankruptcy debtor's property status, or destruction of the business documentation, if there is the risk of the bankruptcy debtor alienating their property or destroying the documentation prior to starting the bankruptcy procedure". A person meeting the conditions for a bankruptcy trustee may be appointed interim bankruptcy trustee in the preliminary bankruptcy procedure (article 65).

If a preliminary bankruptcy procedure is initiated, "the bankruptcy judge schedules a hearing for discussing the existence of a bankruptcy cause for starting the bankruptcy procedure no later than 30 days from the day of receipt of the petition for initiating the bankruptcy procedure" (article 68). In accordance with provisions of article 69, "the bankruptcy judge initiates the bankruptcy procedure by issuing the bankruptcy procedure initiation order, thereby adopting the petition to initiate the bankruptcy procedure". On the basis of the bankruptcy procedure initiation order, the bankruptcy judge "schedules a hearing for claim examination and the first hearing with the creditors" (article 72).

As of the day of starting the bankruptcy procedure, and according to article 74, "the agency and management rights of directors, agents and proxies, as well as of management and supervisory authorities of the bankruptcy debtor

shall expire, and be transferred to the bankruptcy trustee. The legal business of disposal of objects and rights that make up the bankruptcy estate, which the bankruptcy debtor concluded after initiating the bankruptcy procedure, does not produce legal effect, except in cases of disposal subject to the general rules of reliance on public books, while the other party is entitled to seek the repayment of the consideration out of the bankruptcy estate as a bankruptcy creditor. The powers of attorney granted by the bankruptcy debtor, which refer to the property included in the bankruptcy estate, expire by initiating the bankruptcy procedure".

According to the current legal solutions, "bankruptcy creditors realize their claims against a bankruptcy debtor only in the bankruptcy procedure" (article 80), and file their proofs of claim to the competent court in writing" (article 111). A creditor with title over property files a claim to exclude from bankruptcy an asset which does not belong in the bankruptcy estate, according to provisions of article 112.

In line with article 113, "after the expiry of the claim filing deadline, the bankruptcy judge submits all the proofs of claim to the bankruptcy trustee. The bankruptcy trustee determines the acceptability, scope and order of payment of each individual claim and prepares a list of approved and refuted claims, as well as the order of settlement of secured and lien creditors". The final list with all the proofs of claim is prepared at the examination hearing (article 114).

According to provisions of article 116, a claim is deemed "established if it is not refuted by the bankruptcy trustee, or by the creditors until the conclusion of the examination hearing".

Under provisions of article 131, the bankruptcy judge issues a bankruptcy order if: "it is voted for at the first creditors' hearing by a corresponding number of bankruptcy creditors; no reorganization plan was submitted in the stipulated timeframe; no reorganization plan was adopted at the hearing for reorganization plan consideration". Following the passage of the bankruptcy order, "the bankruptcy trustee initiates and conducts the sale of the entire property, property unit or individual property of the bankruptcy debtor, or the sale of the bankruptcy debtor as a legal entity (a way of conversion into cash), in line with this law and the national standards of bankruptcy estate management" (article 132).

According to provisions of the Bankruptcy Law (2009), in addition to conversion of the bankruptcy estate into cash, distribution is also possible. The bankruptcy estate to be divided among bankruptcy creditors (the distribution estate) consists of "the financial assets of the bankruptcy debtor on the day of opening the bankruptcy procedure, the financial assets obtained from continuation of started business operations and the financial assets realized

by conversion of the bankruptcy debtor's objects and rights into cash, as well as the bankruptcy debtor's claims collected in the course of the bankruptcy procedure. The distribution of the assets for the purpose of settlement of the bankruptcy creditors is conducted before or after the main division, in line with the dynamics of the bankruptcy debtor's cash assets inflow" (article 138).

Finally, in line with article 148, "the bankruptcy judge issues the order of conclusion of the bankruptcy procedure at the final hearing. If all the property of the bankruptcy debtor is converted into cash, and there are lawsuits pending, the bankruptcy judge may, on the proposal of the bankruptcy trustee, issue an order of conclusion of the bankruptcy procedure, but not before issuing an order on the main division".

5. Conclusion

In the contemporary conditions of operation of business entities, the importance and significance of bankruptcy and the bankruptcy procedure are indisputable. Changes in the economic trends are a norm which points to the fact that we should focus attention not only on the incentives for starting businesses, but also on the appropriate legal and practical solutions when closing down companies.

The transition period was not the only key determinant in the domain of application and practical realization of a large number of bankruptcy procedures. As a matter of fact, bankruptcy as a commercial-law institution should not be associated with the privatization of socially-owned enterprises and transition in a large number of countries, including our country. The economic crisis of 2008 shed light on the fact that solutions in the field of bankruptcy and timely reactions when enterprises are closed down should be continuously updated and maintained, as periods of economic and business destabilization are not a historical category, but reality which requires commitment and awareness of scientific and professional public alike.

In addition, economic movements and certain factors of destabilization of national and world economy caused by the Covid-19 virus indicate how important it is to have a powerful system of reorganization for sustainable firms capable of overcoming financial distress, and a powerful liquidation system to immediately close down the firms incapable of survival. It even appears that in the modern conditions of living and operating businesses, it is more than ever before vital to have adequate solutions for an efficient restructuring and way out of the crisis which affects or is certain to affect the business of certain companies.

In line with the importance of the topic and the aforesaid, the subject of analysis of the paper have been the concept and characteristics of bankruptcy as an important commercial-law institution, then the bankruptcy aims and its classification criteria, as well as the issue of the fundamental preconditions for the application of bankruptcy law rules. The paper is particularly focused on the legal treatment of the initiation and implementation of bankruptcy over legal entities in the Republic of Serbia.

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ZAKONSKI TRETMAN POKRETANJA I SPROVOĐENJA STEČAJA NAD PRAVNIM LICIMA U REPUBLICI SRBIJI

REZIME: U savremenim uslovima poslovanja privrednih subjekata, nesumnjivo se ističe značaj i važnost stečaja i stečajnog postupka. Uspostavljanje dužničko-poverilačkih odnosa prilikom poslovanja pravnih i fizičkih lica može dovesti do rizika da dužnik u određenom poslu neće biti u mogućnosti da realizuje obavezu na koju se obavezao. Stečaj kao privrednopravni institut svoje temelje pronalazi još u Rimskom pravu. U Srbiji je materija stečaja uređena Zakonom o stečaju iz 2009. godine. Shodno značaju i suštini teme rada, predmet analize u radu jesu pojam i karakteristike stečaja kao značajnog privrednopravnog instituta, zatim, ciljevi stečaja i krterijumi za njegovu podelu, kao i pitanje fundamentalnih pretpostavki za primenu pravila stečajnog prava, kao i opcije koje stečajni dužnici imaju u situacijama kada su ispunjeni stečajni razlozi. Naročita pažnja u radu posvećena je zakonskom tretmanu pokretanja i sprovođenja stečaja nad pravnim licima u Republici Srbiji.

Ključne reči: *stečaj*, *stečajni postupak, pravna lica, Zakon o stečaju, Republika Srbija.*

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