

Features of the Commencement of the Bankruptcy Case (The Right to File an Application for a Bankruptcy)

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Abstract: The right to file an application for a bankruptcy is the right to initiate and maintain judicial review of the insolvency of the debtor given in the first instance with a view to its resolution essentially. A civil case is a part of civic process, which is directly aimed at protecting the rights of a particular material. In this case, the right to petition the court to declare the debtor bankrupt has different features, like a number of people and other criterias. In this regard, the problems connected with the excitation of bankruptcy by courts are considered.

Key words: Bankruptcy • Insolvency • Creditor • Debtor • Inability to pay • Financial obligation

INTRODUCTION

The right to petition the court to declare the debtor bankrupt has different features, like a number of people and other criterias. Thus, according to Art. 15 of the Law of the Republic of Kazakhstan on Bankruptcy) the right to apply to the court for a bankruptcy have [1]:

- The debtor, the creditor (creditors) if the grounds specified in Article 4 of the Bankruptcy Law of the RK, the prosecutor in the cases provided for in Article 26 of the Law on Bankruptcy, rehabilitation manager, in the case of Article 53 of the Law on Bankruptcy.
- Tax and other authorized state body in respect of taxes and other obligatory payments to the budget, as well as individuals and legal entities lenders in civil and other obligations.

The following are the reasons for applying for a bankruptcy of the above mentioned entities.

Thus, according to Art. 4 of the Law on Bankruptcy:

- Basis for the application of the lender with a statement to the court for a bankruptcy of the debtor is the insolvency of the debtor.

The debtor is considered to be insolvent if he/she has not fulfilled the obligation, within three months from the due date of its execution.

- Basis for the debtor's application to the court for recognition of his/her bankruptcy is his/her inability to pay without the possibility of its recovery.
- Basis for the application of debtor to the court on the application of the rehabilitation procedure is his inability to pay or the threat of insolvency, when the debtor is unable to meet financial obligations as they fall due in the next twelve months, with a possibility of its recovery.

According to Art. 26 of the Law on Bankruptcy prosecutor may apply to the court declaring the debtor bankrupt:

- When the sign of deliberate bankruptcy is noticed by him;
- In the interest of the lender - the Republic of Kazakhstan, state bodies;
- In the interests of creditors of the missing debtor.

In this case, the reference to Article 53 of the Law on Bankruptcy of the Republic of Kazakhstan, which indicates the base of application about declaring the

debtor bankrupt by rehabilitation manager, is considered to be incorrect. At the same time, in Art. 53 of the Law on Bankruptcy of the Republic of Kazakhstan submission of an application to the court by the rehabilitation administrator of the termination of the rehabilitation procedure is indicated. In this regard, we consider it necessary to bring this part of the regulations of the Law on Bankruptcy into conformity.

Initiation of bankruptcy proceedings at the discretion of other persons by the Law on Bankruptcy of the Republic of Kazakhstan is not provided.

The court, on an application for a bankruptcy can bring an action for bankruptcy only if the applicant has a right to file such an application, as well as compliance by the applicant the procedures of the application of declaring the debtor bankrupt [2, p. 110-111].

The right to file an application declaring the debtor bankrupt is the right to initiate and maintain judicial review of the insolvency of the debtor given the first instance court with a view to its resolution on the merits [3, p. 111].

In science, it is decided to allocate the following premises of the right to apply to the court for the protection of violated or disputed rights and interests protected by law [4, p. 216]:

- general or specific, depending on the range of cases where they are applied; ;

- positive and negative - depending on the presence or absence of conditions specified in them, the law binds the rise to the right to go to court with the appropriate application [5, p. 148- 149].

General Prerequisites Eligible to Apply Declaring the Debtor Bankrupt Are:

- Standing in court person submitting the application;
- Jurisdiction of the case to the arbitral tribunal (Article 24 of the Criminal Procedure Code and Article 8 of the Law on Bankruptcy).
- Absence of previous judgment pronounced a decision on the application identity declaring the debtor bankrupt or lack of determination to dismiss the case.

Conditions provided for in this premise the right to appeal to the court to protect the rights and interests protected by law, must take into account the specifics of bankruptcy cases.

Thus, the lender has the right to appeal to the court for a bankruptcy in following cases:

- In case of absence of the court decision of declaring a particular debtor bankrupt;
- In case of absence of determinations on refusal to declare the debtor bankrupt in proceedings which were originated in an application by the same applicant and for the same reasons.

So, according to Art. 153 of the Civil Procedure Code of the Republic of Kazakhstan judge refuses to accept the claim if:

- The application should not be considered and resolved in civil proceedings;
- There is a court decision which has entered into force, rendered in a dispute between the same parties on the same subject and on the same grounds or a court decision to terminate the proceedings in connection with the refusal of the plaintiff's claim or on the approval of a settlement agreement of the parties or resolution of the dispute in the mediation procedure [6].

According to Art. 247 of the Civil Procedure Code of the Republic of Kazakhstan, the grounds for termination of the proceedings are

- If the case is not subject to civil proceedings;
- There is a court decision which has entered into force, rendered in a dispute between the same parties on the same subject and on the same grounds or a court decision to terminate the proceedings in connection with the refusal of the plaintiff's claim or the settlement agreement of the parties, the parties' agreement of the resolution of the dispute in the mediation procedure;
- The claimant has refused the claim and the refusal has been adopted by the court;
- The parties has entered into a settlement agreement and it has been approved by the court;
- The parties has entered into a settlement agreement in the order of mediation and it has been approved by the court;
- After the death of a citizen who is a party to the case, the disputed legal relationship does not allow for the succession;
- The organization which is a party in the case, has been eliminated with the termination of its activities and the lack of successors.

These rules of civil procedure legislation do not allow the applicant to re-apply to the court against the same defendant, on the same subject and on the same grounds.

However, with the specifications established by the legislation on bankruptcy, court's refusal to declare the debtor bankrupt or termination of the bankruptcy proceedings on the grounds established by law (except for the termination of the proceedings in connection with the liquidation of the debtor), is not a ground for refusal of subsequent statements on the recognition of the same debtor bankrupt.

Any creditor, including lenders, who has been refused to declare the debtor bankrupt, has the right to re-apply to the court for recognition of the debtor insolvent (bankrupt) due to changed circumstances (increase undisputed obligations of the applicant, changes of the financial and economic situation of the debtor, changes in the legislation, etc.) [7].

Thus, the law allows the applicant, in case of refusal to accept an application for a bankruptcy by the court, to take advantage of this right once again, thereby providing him with a wider range of rights.

Special Prerequisites of Right to File an Application for a Bankruptcy: Are used along with common prerequisites of right and they are set by the Law on Bankruptcy of the Republic of Kazakhstan, for example.

- According to paragraph 4 Art. 3 of the Law on Bankruptcy, size of the creditor's claim on taxes and other obligatory payments to the budget for the tax debt, including arrears of branches and representative offices of the debtor must be worth at least a hundred and fifty MCI (monthly calculated index) established by the law on the national budget for the financial year.

The size of requirements of other creditors against the debtor in the aggregate amount shall be not less than three hundred MCI established by the law on the national budget - for individual entrepreneurs, not less than one thousand MCI established by the law on the national budget - for legal entities.

When submitting an application for recognition of a missing debtor bankrupt the size of requirements or accounts payable are not taken into account. For example, in paragraph 1 of Art. 94 of the Law on Bankruptcy, bankruptcy proceedings specified in respect of the absent debtor may be initiated by the court at the request of the

creditor, the prosecutor. The rules established by paragraph 4 of Article 3 of the Law on Bankruptcy with respect to missing debtors, are not applied.

2) if the cost of the property of a legal entity in respect of whom the decision on liquidation has been accepted, according to the paragraph 1 of Article 49 of the Civil Code of the Republic of Kazakhstan, is insufficient to satisfy the claims of creditors, such entity shall be dissolved by court order under the rules established by this Law etc.

It should be noted that according to the resolution of the Supreme Court of the Republic of Kazakhstan "On some issues of application of regulations on bankruptcy by the courts of the Republic of Kazakhstan," the application of a person in bankruptcy can be filed by a creditor of the debtor, if the debtor's total debt to creditors, based on the non-fulfillment of a monetary obligation, should be based on contract or tort.

But in the Law on Bankruptcy of the Republic of Kazakhstan, the given rule is absent, it only specifies that the tax and other authorized state body have the right to submit an application to the court for a creditor to declare the debtor bankrupt, in respect of taxes and other obligatory payments to the budget, as well as individuals or legal entities – the creditors in civil and other obligations.

Under the monetary obligation, the obligation of the debtor to pay the cost of goods (works, services), assigned (transferred) by creditors, to return the loan amount on interest payments (interest) for its use, as well as to make payments on other requirements related to money, is understood.

Thus, when applying for a bankruptcy, it is necessary to have a clear idea of the "cash commitments" as the basis of insolvency. The obligation of the debtor to the creditor may not be only payment of money, but the transference of goods, services providing, work performance and return of property from illegal possession, the return of property obtained by an invalid transaction. Such obligations are not referred to "monetary" and lenders on non-monetary obligations can not apply to the court for a bankruptcy [8, p. 108].

According to the Art. 282 of the Civil Code of the Republic of Kazakhstan by a monetary obligation, one person (the debtor) is obliged to pay money to another person (the creditor) and the creditor is entitled to claim from the debtor pursuant to its obligation to pay money (money loan and other liabilities). The rules of the monetary obligation are used in regard to a compensatory

contract liabilities for damages and the payment of liquidated damages, as well as obligations arising from the injury or unjust enrichment, unless otherwise provided by in this Code, by the legislative acts of the Republic of Kazakhstan or follows from the obligation.

Thus, when applying for declaring the debtor bankrupt, it is necessary for the creditor to change his requirements into monetary obligation.

In this regard, the court verifies the presence or absence of the preconditions of the right to file an application declaring the debtor bankrupt. In this case, if the court finds the applicant's lack of the right to file an application declaring the debtor bankrupt, the court:

- Refuses to accept the application, according to the Article. 153, of the Civil Procedure Code of the Republic of Kazakhstan:
 - The application shall not be considered and resolved in civil proceedings;
 - There is a court decision which has entered into force, rendered in a dispute between the same parties on the same subject and on the same grounds or a court decision to terminate the proceedings in connection with the refusal of the plaintiff's claim or the settlement agreement of the parties, the parties' agreement of the resolution of the dispute in the mediation procedure;
- Or returns an application in accordance with the Art. 154 of the Civil Procedure Code of the Republic of Kazakhstan, as well as Art. 21 of the Law on Bankruptcy on the following grounds:
- If the order of pretrial dispute resolution, established by the laws for this type of cases is not kept by the plaintiff and the possibility of this order is not lost;
- The case is outside the jurisdiction of the given court
- The application is filed by an incapable person;
- The application is signed by a person not authorized to sign it;
- In the production of the same or another court, there is a case on a dispute between

The same parties on the same subject and on the same grounds;

- The body authorized to manage municipal property, applied to the court for recognition of communal ownership of an immovable until the expiration of one

year from the date of adoption of this thing on the account by the authority carrying out the state registration of rights to immovable property;

- It was declared by the plaintiff.

We also believe, that the Law on Bankruptcy of the Republic of Kazakhstan should be supplemented with the following article, *"The court rejects the application for a bankruptcy if the requirements of paragraph 4 of Art. 3 of the Law on Bankruptcy are not complied by the creditor. "*

For example, in paragraph 4 of Art. 3 of the Law on Bankruptcy, the amount of the claim which is the basis for an application for a bankruptcy, is specified:

- For the lender, for taxes and other obligatory payments to the budget for the tax debt, including arrears of branches and representative offices of the debtor, amounts to the sum of not less than one hundred and fifty MCI established by the law on the national budget for the financial year;
- Other creditors of the debtor in the aggregate amount to the sum of not less than three hundred MCI established by the law on the state budget - for individual entrepreneurs, not less than one thousand MCI established by the law on the state budget - for legal entities.

In this case, the special cases where the judge rejects the application for a bankruptcy will be provided by the the Law on Bankruptcy of the Republic of Kazakhstan.

By introducing provisions for the mandatory establishment of requirements of the applicant when applying to the court, declaring the debtor bankrupt the legislator seeks to prevent abuse of the applicant, who are pursuing a different objective, apply to the court to declare the debtor bankrupt.

So, M. Houman (M. Хоуман) pointed out that assessing the concerns of the legislator connected with the misuse of creditors, who seek, by using bankruptcy law, to implement the redistribution of property, that a sufficient remedy against illegal desire of lenders to establish control over the company, is the provision of a real opportunity to the debtor to reply to the statement of the lender [9. p. 39].

In this regard, we believe, that there is no need to complicate the application process and the initiation of bankruptcy proceedings, to pose a threat of concealment of the debtor property and reducing the possibility of getting their demands.

The right to appeal to the court for a bankruptcy is the right to appeal to the court for judicial protection.

The right to appeal to the court should be distinguished from the right for judicial protection. Since the right for judicial protection means the right to meet the stated requirements.

When a person applies to the court to declare the debtor, the judge should first check only if he/she has a right to appeal to the court for judicial protection and do not address the issue of declaring the debtor bankrupt. The issue of a bankruptcy should be decided only by a court decision.

So, in fact, there are still some cases where a judge instead of setting presence or absence of the right to petition the court for judicial protection, upon acceptance of an application for a bankruptcy, sets the right itself to judicial protection and therefore does not address issues of a procedural nature and material.

CONCLUSION

The right to appeal to the court for a bankruptcy is determined by a number of special prerequisites. The development of bankruptcy law is reflected in particular, on the maintenance of specific prerequisites. Some of them are formulated more successfully than the previous legislation. Others have a new content.

In general, the right to petition the court to declare the debtor bankrupt, is aimed primarily at creating guarantees for the rights of the debtor from the actions of unscrupulous lenders.

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