

Review Article

ON THE INVESTIGATION OF A NEW APPROACH TO BANKRUPTCY IN THE COMMERCIAL CODE BILL

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ABSTRACT

In most countries of the world, bankruptcy law is one of the prime issues in the area of commercial code. The paramount importance of bankruptcy laws is due to its momentous task. On the one hand, it is expected that the bankruptcy law with its firm rules guarantee the ownership right of the bankrupt businessman creditors and prevent injustice in the relations of debtors and creditors. On the other hand, bankruptcy law should be implementing to prevent the imposition of the economic and social impacts of the bankruptcy in a society. The correct implementation is not an easy task and often requires that the legislator create a balance between social interests and group benefits of creditors. In the past, bankruptcy law had only one aim, i.e. to clarify the property of a bankrupt businessman in order to supply the group interests of his creditors. Today, observing social interests often take precedence over the interests of the creditors. The bankruptcy law in many countries has witnessed significant reforms in order to adapt to theoretical changes and practical business approaches in these areas; however, in Iran, despite some efforts to change the bankruptcy law of the commercial code in the parliament over recent years, unfortunately, the Guardian Council has not confirmed it and these rights insist on their traditional rules with the locality and centrality of creditors. The study is primarily an attempt to examine the current Commercial Law and then discuss the new draft of the commercial law with regard to its strengths and weaknesses.

Keywords: *Business, Bankruptcy, Trade, New commercial Bill, Businessman, Detention*

INTRODUCTION

It may seem obvious that there must necessarily exist a law for bankruptcy, as today, there can be found no country without a specific law on bankruptcy or insolvency. Therefore, since this issue is the theoretical basis of bankruptcy legislation, one cannot be satisfied with generalities about it, and a clear and overwhelming response should be reached so that the theoretical basis is discovered out of it (Eftekhari, 2000).

It should be noted in this regard that: the business is based on trust and the rules of commercial code also attempts to establish some frameworks in order to realize trust among businessmen so that business transactions are done with speed and ease. The inability of people to pay the debts is one unavoidable reality happening since the beginning of promotion of exchanges among people. But the important questions are whether the relationship between creditors and debtors, is of a private one that should be on their will, and should be viewed as all claims of demand for the payment? Why the government in its broadest sense has intervened in such a relationship, and takes legislative action with regard to it? What is the basis and philosophy of legislation on bankruptcy? How does the state justify its intervention in such a relationship, which is per se is a private relationship? Correct answers to these questions will explain the objectives of the bankruptcy legislation.

The History and the Concept of Bankruptcy

In the past, bankruptcy only meant treating and the division of assets of the debtor among his creditors. The word bankruptcy in Latin is a combination of the words "bench" and "break". Therefore, bankrupt literally means broken bench. Historically, in Roman law, creditors could come together and break off the debtor's bench physically and divide his properties. Breaking the bench was a kind of penalty for a bankrupt debtor as well as a warning to other debtors. Refunding receivables of creditors and punishing a bankrupt debtor were the goals of primary bankruptcy law (AzamiZangane, 1961).

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Bankrupts were deprived of civil rights and even in some countries were subjected to prison and some criminal penalties. For instance, they had to be costumed in order to be easily recognized in the community.

By the beginning of the eighteenth century, social views about how to treat debtors changed. The courts decided to reduce the amount of his debt as a form of encouragement in case debtor cooperated with the court and did not hide his properties. Social view at such bankrupts gradually changed and people understood that punishment, especially imprisonment, did not have any benefits for the creditor. In 1705 AD, in English law, a rule was enacted for the first time according to which the amount of debts of a debtor in case of cooperation with the court decreased. The purpose of this rule was not humanitarian considerations in order to give a second chance to the debtor for a new beginning; it was a policy to stop the debtor's attempt to hide his properties. However, enactment of this rule should be considered as a beginning to gradual development of a change of vision and orientation in bankruptcy law of many countries. Based on this change, the initial bankruptcy law that seeks to punish debtors turned into the present law that mainly aims to give a second chance to a debtor and enable him to access his properties in order to pay the receivables of creditors (Skini, 1999).

Conditions for Beginning of the Hearing

Debtor must be a businessman or a business company and be unable to pay his debts.

The first words: characteristics of the debtor

Article one: businessman or business company

Article 412 of the commercial law provides: "Bankruptcy of a businessman or business company is resulted from cessation of paying funds he is responsible for".

According to the above article, any businessman or business company that cannot pay his debts in due date is considered bankrupt, and legislator has not developed bankruptcy to non-businessman and even non-business company (Azari, 1956).

Deceased Businessman

The second part of article 412 of the commercial law provides: (a bankruptcy order of a businessman who was about to stop while dying can be issued until a year after his death). It can be seen that a bankruptcy order can be issued against a businessman who was about to stop while dying up to one year from the date of his death. The same order can also be issued against a fugitive businessman in a way that is predicted in French law. Furthermore, article 274 of non-litigious matters act requires that (quittance of deceased's estate, in case the deceased is a businessman, is subject to the quittance provisions of deceased businessman's affairs).

Cessation des Paiements

Iran commercial law does not define Cessation des Paiements, and apparently, insolvabilite is different form Cessation des Paiements because insolvabilite is realized when the debtor's negative asset is more than his positive asset and the imbalance between the two assets is determined precisely after the quittance of properties (Akhundi, 1989).

Competent Court

In order to address a case, determining the competent court is initially required. Before the legal bill of formation of public courts, enacted in 1358, a county court was competent to hear the case of a bankrupt, but after enactment of the aforementioned law, the public court is now the competent authority for investigation and adjudication of bankruptcy. Such cases are usually referred to certain branches judges of which specialized in the business affairs. Competence of a court is subject to the general rules. In other words, a lawsuit against an in debt businessman or business company must be submitted to the court in the bankrupt's residence or the main center of the company (Articles 21 and 22 from Code of Civil Procedure) (Ansari, 2008).

Investigating the Case and Sentencing

At present, the public court has jurisdiction to consider the petition of bankruptcy according to the Code of Civil Procedure. Before the enactment of bill of formation of Public courts (L.q.d.a.), after receipt of the petition dealing with the case was done through exchanging the bills, except for some cases such as

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bankruptcy, and this made possible prolongation of the proceedings, but by enacting the above-mentioned legal bill which provides in article 11 that:

"All lawsuits will be attended in compliance with the rules of summary process enacted in the code of civil procedure. However, matters that were previously dealt without the procedural formalities will be addressed in the same way. Sentences in absence are protestable in the court issuing the sentence." The problem in question has been resolved (Anvari, 1966).

Qualifying the Necessary Conditions for the Beginning of Proceedings

The judge of the court himself must approve whether or not the conditions for proceeding the case in question are provided? These conditions that are referred to in article 412 of the commercial law include being a businessman and inability to pay the debts that a businessman or a business company is responsible for.

The following action under Iranian law before sentencing the bankruptcy order seems to be essential for the court hearing the issue:

Firstly – the court can directly or by another judge and or quitance administrator and finally according to the note of article 11 by director of the office obtain sufficient information from the condition of the businessman (whether natural or legal) to determine whether the aforementioned person is able to continue the business or not? As mentioned earlier, today, the commercial law aims to contribute to the reconstruction of production, industrial, commercial or service units. It happened many times that as a result of the rise and fall of prices or disruption in supply and demand and or sudden or unexpected events such as war, revolution, earthquake, floods and storms, these units have stopped paying their debts, even though their owners have no ill intentions (Bazgir, 1999).

Secondly - the judge dealing with bankruptcy proceedings before sentencing is authorized to invite board of creditors according to article 476 of Iran commercial law for consultation to sign a leniency contract in case he is positive about the businessman continuing his business. However, if the in debt businessman could not pay his debts in due dates, in this case, the court can issue the bankruptcy order and liquidation of the businessman' estate. Thirdly - the court hearing the bankruptcy claim is authorized to sell part of the properties of the bankrupt and divide among the creditors by quitance administrator and by supervision of the creditors themselves without issuing the order, and such an action will be possible if the consent of creditors is obtained (BoroujerdiAbdeh, 1951). Fourthly - A bankruptcy case judge is allowed to arrest and even imprison the in debt businessman who has not become present after the claim, and in addition, to take the necessary security measures to the mentioned person's assets including prohibiting the transfer of assets and paying debts. It is obvious that after the rejection of demand for bankruptcy, all the discussed prohibitions would be canceled.

The Content of the Judgment under the Commercial Code

Bankruptcy judgment is a declaratory judgment, meaning: the judgment, is not limited to the parties, but is valid to all people. Moreover, the bankruptcy judgment based on article 417 of the commercial code is temporarily executed and because the judgment is not final executive operations are usually limited to securing measures (Khomeini, 2011).

According to article 1 of the law of liquidation office for bankruptcy affairs which provides that: "In every area of the county court that the Ministry of Justice deems appropriate, establishes a liquidation office to deal with bankruptcy affairs and in these cases, an observer member will not be determined".

With regard to the opposite concept of the aforementioned article, if in every area of the public court a liquidation office to deal with the bankruptcy affairs has not been established, the court is obliged to determine an observer (Skini, 2006).

CONCLUSION

With regard to the effect of the declaration of bankruptcy on the businessman's transactions in the current law of Iran the following results can be obtained:

- With respect to legal actions of the bankrupt businessman before the period of suspension it should be mentioned that essentially there are no prohibitions, and they are correct, unless the legislator has made

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some exceptions. According to article 424 of the Commercial Code, transactions that the businessman does to evade the debt or to do harm to the creditors, will be revocable by the creditors, provided that the termination claim is presented within two years from the date of performing the aforementioned transactions. Article 218 of the Civil Code that considers transactions to evade debts invalid only if they are superficial cannot revoke article 424 of the Commercial Code, even if it is enacted after the aforesaid law.

About legal acts of a bankrupt businessman during the suspension, the legislator in article 423 of the Commercial Code has considered certain acts invalid, but the fact is that they should not be considered invalid. Because invalidity means that no action has been undertaken at all, so it cannot be confirmed in the future.

When a businessman after the date of cessation performs the following transactions, they will be rejectable by the creditors:

According to the issued regulations, when the recognized transactions in article 423 of the Commercial Code are revoked before issuing the bankruptcy judgment, these transactions will be canceled after the issuing the bankruptcy judgment the same as before. Harmful transactions other than those recognized in article 423, will be revocable by the creditors, but, the transactions that do not harm the creditors or even benefit them, must be considered as correct.

REFERENCES

- Akhundi Mahmoud (1989).** *Criminal Procedure Law*, first edition. The Ministry of Culture and Islamic Guidance, Tehran 2.
- Ansari Moein Parviz (2008).** *International Commercial Code*, first edition (Mizan publication).
- Anvari Pour Mohsen (1966).** *The Bankruptcy in the Law of Iran*, doctoral dissertation, Faculty of Law and Political Sciences of Tehran University.
- AzamiZangane Abdolhamid (1961).** Commercial rights, to the efforts of SohrabAminian.
- Azari Azarkeyvan (1956).** Cessation in paying debts. *Journal of the Faculty of Law and Political Science* (19).
- Bazgir Yadollah (1999).** *Regulations of Commercial Code in the Opinions of Supreme Court of the Country*, first edition (Ganjedanesh library) Tehran.
- BoroujerdiAbdeh Muhammad (1951).** *The Principles of Legal Justice*, the second part, the Supreme Court of the country.
- Eftekhari Javad (2000).** *Bankruptcy and Liquidation of Bankruptcy Affairs* (Phoenix Publication).
- Khomeini Ruhollah (2011).** *Tahrir al-Wasilah* (Institute of Islamic Publishing) Qom, A.H. 2.
- Skini Rabya (1999).** *Commercial Code: Bill, Promissory Notes, Storage Bill, Documents on Bearer Basis, and Check*, fourth edition (Samt publication) Tehran.
- Skini Rabya (2006).** *Commercial Code, Bankruptcy and Liquidation of the Bankrupt's Affairs*, ninth edition (Samt publication) Tehran.
- Skini Rabya (2007).** *Commercial Code: Business Corporations*, eleventh edition (Samt publication) Tehran 5.