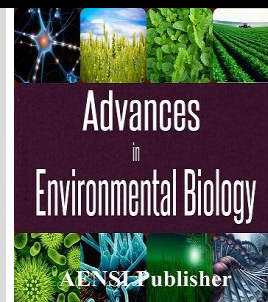




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Studying the Ways of Recovering Debts from a Bankrupt Merchant

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ABSTRACT

Bankruptcy is a situation in which a merchant has become incapable of paying debts. In Iran, before the enactment of the Commercial Code, the provisions relating to insolvency were applied to both merchants and non – merchants; but following the enactment of that code, merchants are subject to the bankruptcy regulations, and non – merchants are subject to the insolvency regulations. As a whole, the common denominator between all regulations of bankruptcy and insolvency is the failure of payment of debts and liabilities having been upon the bankrupt or the insolvent. Request for the insolvency of the cost of proceedings and judgment debt on behalf of the merchant who claims for insolvency is rejected; but, according to the provisions of the Commercial Code, the merchant ought to petition for bankruptcy. Necessary and sufficient Conditions for the announcement of bankruptcy are mentioned in the Commercial Code, the most required of which is that the person has to be a businessman who is incapable of paying debts. Note that, most of the merchants are ignorant of Commercial Code provisions, bankruptcy regulations, and the ways of recovering debts from a bankrupt merchant. In this article, we have tried to introduce the ways of recovering debts of a bankrupt merchant.

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INTRODUCTION

In recent centuries, economic improvements have influenced the relationship between people and have made it difficult to forecast the economic developments. Today, businessmen resort to various kinds of trades and their occupations is mostly based on credit; therefore, as a result of some events or jobberies, a merchant might face failure in obligations, and consequently those who have trusted the merchant would, in return, be affected by his insolvency and would fail to exchange their promises. In the case of private individuals, the merchant's inability to pay debts will not incur great economic consequences, yet that inability would cause serious abstractions in the economic affairs and economic survival of other merchants. Therefore, the principles regarding the liquidation of debts of private individuals and merchants have been legally dealt with separately, and the bankruptcy regulations have been approved for merchants, yet the liquidation of individuals' debts is subject to the provisions of the Civil Code and the provisions of insolvency is applicable. Bankruptcy Law was completed in the Commercial Act enacted on 22 of May, 1932, by which the assignment of the liquidator shall be incumbent upon the court. With regard to the increasing development of commercial trades and the importance of economic affairs, and in order to prevent the abuse of the nominal bankruptcy, an independent organization has been established under the supervision of the Department of Justice, named as the Liquidation Office [1].

Required conditions for the announcement of bankruptcy:

- a. Essential conditions:
- b. nominal conditions:

Bankruptcy occurs when the businessman is incapable of paying debts. The bankruptcy judgment for a merchant who was getting insolvent at the moment of death could be ordered by the court even one year after his death [2].

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a. Essential conditions for the fulfillment of bankruptcy:

1. Being a merchant:

Reviewing how to recognize a merchant

1. Real merchant: As stipulated in Article 2 of the Commercial Code, a real merchant is a person whose usual occupation includes business dealings, performed by his own financial account [2]. Note that, it is not required that a person register his name in the Commercial Registering Office, subject to Article 16 of the Commercial Code, to be called as merchant, and consequently be included in the Bankruptcy Law; even if he has registered his name as a merchant, but he is not really a merchant, he will not be subject to the Bankruptcy Law. Registration is just a presumption and circumstantial evidence of being a merchant [1].

2. Legal merchant: Bankruptcy Law is just applied to commercial companies; and other entities, either included in private law or public law, are not subject to the Bankruptcy [1].

3. Insolvency of payment of debts:

✓ For the announcement of insolvency, it is not a necessary condition that the available assets be less than the debts; and just the failure of paying debts suffices the announcement of insolvency. The number of unpaid debts is not determinative [2].

✓ Commercial or civil debts: According to Article 5 of the Commercial Code, the commercial nature of the debt is not obligatory for the announcement of bankruptcy, and that could be notified regardless of the nature of the creditors' claim.

✓ Dead merchant: two conditions are required for the announcement of the insolvency of a dead merchant: the merchant shall have been insolvent at the moment of death, and not more than a year shall have been passed since his death [3].

Note that: the announcement of bankruptcy of a dead merchant is rarely requested. In Iran, the liquidation of dead merchant's debts, either insolvent or not, is implemented according to the Bankruptcy Law, and no bankruptcy judgment is needed. However, the advantage of a bankruptcy judgment for a dead merchant is that, his creditors or heirs could dismiss some of the transactions made by the dead bankrupt merchant [3].

So, it is inferred that, first: bankruptcy is specifically applied to merchants. Second: the bankrupt merchant is the businessman who is insolvent of paying debts, and the bankruptcy judgment shall be rendered by the court, and as long as the bankruptcy judgment has not been rendered, his bankruptcy is not conclusive, and the commencement of the liquidation is subject to the issuance of the bankruptcy judgment. In Iran, dealing with the bankruptcy claims lies within the jurisdiction of the legal court. The bankruptcy judgment announces a new status for those merchants whose bankruptcy affects the creditors and all the people who are related to that merchant; also the judgment evolves some duties upon the bankruptcy organization, *inter alia* the liquidation is assigned to the Liquidation Office and the merchant is inhibited of intervention in his own affairs [4].

Bankrupt merchant is inhibited of possession of his own property from the date of judgment, even if the properties have been acquired during bankruptcy. The liquidator shall be the legal deputy of the bankrupt in all financial powers and rights, effective on the payment of debts and shall have the right to apply the powers and rights [4].

Upon the issuance of the judgment, anyone who possesses a claim against the bankrupt merchant, either movable or immovable, shall raise the claim to the liquidator, or prosecute the claim on behalf of him. All enforcement actions shall be subject to the same instruction [4].

When the bankruptcy judgment has entered into force, a transcript shall be sent to the Liquidation Office and then the office shall proceed to settle the debts as soon as the receipt of the transcript [1].

The respite for the conclusion of bankruptcy liquidation is eight months from the date of the receipt of the bankruptcy judgment by the Liquidation Office. If necessary, the Head of the State Court shall extend the respite [1].

b. Nominal conditions:

✓ Competent court: the legal court of first instance located in the bankrupt's residence [4].

✓ The residence of a legal entity has been a very controversial issue, since on one hand, Article 590 of the Commercial Code considers the residence of a legal person as the administration center, and on the other hand, Article 1002 of the Civil Code considers the residence of a legal entity as the operation center, but the dominant view considers the residence of the legal entity as the administration center, due to the preference of Article 590 of the Commercial Code [5].

Request for the bankruptcy judgment:

1. According to the statements made by the merchant.

2. According to the request of one or some of the creditors (not the beneficiaries).

According to the request of the Attorney General [1].

The contents of the bankruptcy judgment

Assigning the liquidator and the supervisory member [4].

Sealing off the possessions [5].

1. Insolvency of the bankrupt [5].

✓ Date of insolvency: the court shall specify the date of insolvency, otherwise, the date of the judgment shall be considered as the date of insolvency [5]. Provisional enforcement of the bankruptcy judgment:

The judgment rendered by the court of first instance of the bankruptcy is enforceable [6]. In this article the scope of provisional enforcement of the bankruptcy judgment is not specified and consequently several disputes have been raised. Some believe that, the judgment of the court of first instance shall be enforced [7]. Others believe that the provisional enforcement of the alleged judgment does not include selling and distributing the property of the bankrupt, and just includes cases necessary for the preservation of the rights of the creditors), hence, it is preferable that the provisional enforcement of the bankruptcy judgment be limited to collecting papers/bills and documents and maintaining the property of the bankrupt, and leave the final steps, including selling and distributing the properties of the bankrupt, contingent upon the final judgment [7].

Objecting, appealing and re – hearing the bankruptcy case:

The rendered judgment of bankruptcy could be objected in the same court, and could be appealed in the state's courts of appeal [5]. According to the Commercial Code, some orders, including the orders rendered for the assignment or substitution of supervisory member or the liquidator could not be appealed or objected [8]. The bankruptcy case is considered as a non – financial case and the appealing authority of this case shall be just the state's court of appeal [9].

Bankruptcy liquidations of the bankrupt merchant are of two types:

1. Summary liquidation: pursuant to the discretion of the Liquidation Office, if the money acquired by selling the property is not sufficient for the payment of bankruptcy expenses, the alleged office proceeds to summary liquidation, and if one or some of the creditors request for normal liquidation and pay for that, the liquidation will be normal, and by the lapse of forty – day respite of the aforementioned paragraph, the liquidation office proceeds to sell the properties and distribute the obtained funds and declare the conclusion of liquidation process [8].

2. Normal liquidation, containing usual ways of liquidation, in which the liquidator delivers a list of the bankrupt's assets, debts suspected or suspended credits paid to the Justice Department Fund, to the Head of the Liquidation Office after the distribution of the fund acquired by selling the properties, and the conclusion of liquidation, so that in case of approval, conclusion and the announcement of bankruptcy, the file will be archived as per the announced notice [6].

3. In normal liquidation, the Liquidation Office announces a notice to the creditors and those who have raised a claim, and asks them to deliver relevant documents within two months. By the expiration of the deadline, the office proceeds to deal with the dues, either to confirm or to reject the claims. After the lapse of document delivery term, the liquidation office will prepare a list of the dues having the right of mortgage or prevalence, within twenty days. The name of the creditors, whose claims have been rejected, are annexed to the list, accompanied by the reason of rejection; then the list will be notified to the creditors through a notice and also will be delivered to anyone who has raised a claim against the insolvent. The rejected creditors will be notified directly. Anyone who has an objection regarding the list can make a claim in the court, having rendered the insolvency judgment, within twenty days. If the objector claims that his credit has been rejected or reduced unreasonably, a case will be claimed against the Liquidation Office; and if the confirmed credit or prevalence right is objected, a case will be claimed against the creditor. If the recent case would be concluded and a credit is rejected by the court's judgment, the share allocated to that creditor, within the limit of the claimant's credit and the cost of procedure, will be allocated to that, and the surplus will be distributed among other creditors. In these cases, summary liquidation is implemented. Delayed delivery documents, in case of excusable reason, will be accepted until the conclusion of bankruptcy, yet the expenses incurred by late delivery are upon the creditor. If the document presented to the office is confirmed, the office corrects the list of creditors and other creditors will be notified through a notice [2].

Conclusion:

In this article we mentioned that it is permitted to claim a case against the bankrupt merchant to recover debts. The bankruptcy judgment shall be of general nature, i.e. it is effective both to the parties of the suit, and to the other people who have not claimed a case. In bankruptcy, the management of the bankrupt's properties is devolved upon the liquidator or the Liquidation Office. The bankrupt is inhibited of possession of his own property. In principle, the case shall be claimed or prosecuted against the Liquidation Office, the liquidator or the bankrupt merchant's deputy.

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