UDC 347.736
DOI https://doi.org/10.32849/2663-5313/2022.5.02

Rodion Poliakov,
Postgraduate Student, Zaporizhia National University, Zhukovsky street, 66, Zaporizhzhia, Ukraine, postal code 69600, rodion.pol@ukr.net
***ORCID**: orcid.org/0000-0001-5266-224X*

Poliakov, Rodion (2022). Grounds for closing proceedings in the bankruptcy (insolvency) case of a legal entity under the Ukrainian and German legislation. *Entrepreneurship, Economy and Law*, 5, 12–18, doi: https://doi.org/10.32849/2663-5313/2022.5.02

GROUNDS FOR CLOSING PROCEEDINGS IN THE BANKRUPTCY (INSOLVENCY) CASE OF A LEGAL ENTITY UNDER THE UKRAINIAN AND GERMAN LEGISLATION

Abstract. ***The purpose*** *of the article* is to reveal the particularities of the application of grounds for closing proceedings in the case of bankruptcy (insolvency) of a legal entity under the laws of Ukraine and Germany.

Research methodology. During the research, dialectical, formal-logical, comparative-legal and logical-legal methods of cognition were used.

The results. The grounds for closing proceedings in the case of bankruptcy of a legal entity were analyzed and characterized, and their differentiation into two groups was carried out. Collisions in the legislation on bankruptcy in the part of closing proceedings in relation to a legal entity were identified, and ways of improving the legislation in this part were suggested. The grounds for closing insolvency proceedings under German law are described.

Conclusions. It was proposed to divide the grounds for closing the bankruptcy proceedings, which are enshrined in Art. 90 of the Bankruptcy Code of Ukraine, into two groups. Those groups are the following: 1) the grounds that counteract the progress of the bankruptcy case; 2) the grounds that are a result of a resolution of the debtor's insolvency.

It has been proven that the appliance of such grounds for closing proceedings as «in other cases provided by law» leads to a contradictory judicial practice and complicates the work of both law enforcement bodies and participants of the legal relations. In this regard, it is proposed that «such cases» should not be scattered in different laws, but conversely, should be found directly in the Bankruptcy Code of Ukraine, for instance, in its Final and Transitional Provisions. For this purpose, it is proposed to change Clause 9, Part 1 of Art. 90 of the Bankruptcy Code of Ukraine.

It was established that, unlike the Ukrainian legislation, in German legislation, the closure of insolvency proceedings does not release the debtor from all monetary claims of creditors. In this aspect, German insolvency law is mostly similar to the competitive process of the Ancient Rome, since in these two cases, the debtor's debts were not forgiven.

Key words: bankruptcy, debtor, closure of proceedings, creditors, insolvency.

1. Introduction

Changes in the legal regulation of the insolvency relations are a natural phenomenon, since the development of social relations objectively requires revision of the procedures and mechanisms laid down in the legislation. Ukraine is not an exception, having obtained the first codified bankruptcy act - the Code of Ukraine on Bankruptcy Procedures (hereinafter the Bankruptcy Code of Ukraine, The Code), which entered into force in 2019. Domestic scientists rightly note: «The dynamism of the development of Bankruptcy legislation is inherent not only in the national legislation of Ukraine. It serves as a characteristic feature of the genesis of national legislation of the dominant majority of countries in the world, including the European legal area» (Patsuriia, Radzyviliuk, Reznikova, Kravets & Orlova, 2018, p. 242).

The closure of bankruptcy (insolvency) proceedings is the final stage of the competitive process. The Bankruptcy Code of Ukraine devote the entire chapter VI of the Book Three, which solely consists of one article – 90, to the issue of closing proceedings in the case of bankruptcy of legal entities (Verkhovna Rada

of Ukraine, 2019). Along with this, the legislator divided the grounds into those on which the proceedings could be closed at all stages (before and after the debtor is declared bankrupt), could be closed only before the debtor is declared bankrupt, and could be closed only after the debtor is declared bankrupt. However, as the practice of applying the provisions of this article shows, there are currently inaccuracies in the legal constructions established by the legislator.

In this part, the insolvency legislation of Germany sparks a scientific interest since, in comparison with the Ukrainian legislation, it seems possible to identify more effective provisions for the further development of the normative regulation of insolvency relations in Ukraine.

With the due regard of the above-mentioned, the grounds for closing proceedings in the case of bankruptcy (insolvency) of a legal entity require thorough analysis and characterization.

The purpose of the article is to reveal the particularities of the application of grounds for closing proceedings in the case of bankruptcy (insolvency) of a legal entity under the laws of Ukraine and Germany.

Research methodology. During the research, dialectical, formal-logical, comparative-legal and logical-legal methods of cognition were used.

2. The groups of grounds for closing proceedings in the case of bankruptcy of a legal entity

The grounds for closing the bankruptcy proceedings, which are enshrined in Art. 90 of the Bankruptcy Code of Ukraine, can be differentiated into two groups. The first group includes the grounds that counteract the case progress and, thus, do not allow the debtor to apply the sanitation and liquidation procedure:

– the debtor is not entered in the Consolidated Register of Legal Entities, Individual Entrepreneurs and Public Organizations;

– the debtor ceased its activities in accordance with the procedure established by law;

– there is a bankruptcy case of the same debtor in the proceedings of the commercial court;

– the case is not subject to consideration in the commercial courts of Ukraine;

– the commercial court has not established the signs of the debtor's insolvency;

– in other cases provided by law.

It should be noted that the decision of the commercial court issued on these grounds will also apply to judicial acts that counteract the case progress. We come to such a conclusion by supporting the position of I. V. Andronov, who, distinguishing the types of decisions as judicial acts, points out those that prevent the emergence and progress of the case, among which he names final ones, that is, those that terminate the case consideration (Andronov, 2018, p. 247). Moreover, the scientist notes: «The court ruling has exclusively procedural significance and does not directly affect the material legal relations of the parties. A court ruling is not an act of justice» (Andronov, 2018, p. 239).

It is possible to attribute those grounds that are the outcome of resolving the debtor's insolvency to the second group:

– the debtor's solvency has been restored, or all creditors' claims have been repaid in accordance to the register of creditors' claims;

– the report of the sanitation trustee or liquidator is approved in compliance with the procedure provided by this Code;

– no demands have been made against the debtor after the official publication of the announcement of the opening of proceedings in the case of his bankruptcy.

3. Grounds for closure of bankruptcy proceedings counteracting the case progress

In the first group, only two grounds for closing bankruptcy proceedings present challenges in their application.

For example, it is about when the commercial court has not established signs of the debtor's insolvency. This ground remained from the Law of Ukraine «On restoring the debtor's solvency or declaring him bankrupt» as amended on January 19, 2013 (hereinafter the Bankruptcy Law, the Law) (Verkhovna Rada of Ukraine, 2013). At that time, the Law provided for initiating a bankruptcy case subject to such conditions as: the presence of undisputed monetary claims in the amount of 300 minimum wages, which were not satisfied within 3 months in the enforcement proceedings. And if, for example, in the property disposal procedure, the debtor partially repaid the creditors' claims and the balance of the debt was less than 300 minimum wages, then the court closed proceedings in accordance with Clause 11, Part 1, Art. 83 of the Bankruptcy Law due to the lack of signs of the debtor's insolvency.

According to the Bankruptcy Code of Ukraine, neither the incontestability or debt's size, nor its non-payment in enforcement proceedings are required to initiate proceedings in the case of bankruptcy of a legal entity. Only the monetary nature of the demands remained. The question arises: in what cases can the before-mentioned ground be applied?

Another reason for closing proceedings in the case of bankruptcy under Clause 7 Part 1 of Art. 90 of the Bankruptcy Code of Ukraine

(the case is not subject to consideration in the commercial courts of Ukraine) began to be applied by judicial practice based on Clause 7 Part 2 of Chapter III «Final and Transitional Provisions» of the Law of Ukraine «On Recognizing as Having Lost the Validity of the Law of Ukraine «On the List of state property rights that are not subject to privatization» dated from October 2, 2019 No. 145-IX (hereinafter - Law No. 145-IX) (Verkhovna Rada of Ukraine, 2019). The specified norm introduced a three-year moratorium on the application of sanitation and liquidation procedures for state-owned enterprises and enterprises in which the share of state ownership exceeds 50 percent of the share capital.

Initially, the Supreme Court interpreted this norm as a basis for closing bankruptcy cases that had been already initiated towards the specified subjects. Moreover, it is clear from the title of Law No. 145-IX that it is only about the fate of the legal entities that were on the list of the objects of state ownership that are not subject to privatization. According to the view of the Supreme Court, if the legislator established a three-year prohibition on the introduction of sanitation or liquidation, then old cases, where these procedures were introduced, cannot now progress and, therefore, are subject to closure (Supreme Court, 2020).

In this regard, we have already expressed the following opinion: «In procedural terms, this approach cannot be considered effective. Firstly, if sanitation and liquidation cannot be applied, then the property disposal procedure remains in reserve. Secondly, if the enterprise was in the sanitation procedure, the bankruptcy law continues to apply there. Therefore, another procedure takes place - an amicably agreement. Third, how can Law No. 145-IX be extended to the old bankruptcy cases if that is not mentioned in this law?! Finally, fourthly, there is no direct indication in Law No. 145-IX on the necessity to close old bankruptcy cases where the debtor is a subject to the sanitation and liquidation procedures» (Polyakov, Polyakov, 2021).

It should be noted that only a year later, the Supreme Court partially changed its position on a temporary basis, considering that the provisions of the Law No. 145-IX still cannot be applied to bankruptcy cases of those state-owned enterprises, for which the procedures of sanitation and liquidation were introduced prior to the entry into force of the specified law (Supreme Court, 2021). On the other hand, the Supreme Court considered that the provisions of Clause 2 of the Chapter III «Final and Transitional Provisions» of Law No. 145-IX are special in relation to the provisions of Art. 96 of the Bankruptcy Code of Ukraine, which are general (Clause 9.7) (Supreme Court, 2021).

This conclusion of the Supreme Court cannot be regarded as relevant. If we take such a position, then any law regulating the economic activity of a particular subject could be considered as special, and the Bankruptcy Code of Ukraine itself - as general. As a result, the need for the Bankruptcy Code of Ukraine as a special normative legal act that regulates bankruptcy relations will disappear.

The Clauses 1-1–1-5 of the Final and Transitional Provisions of the Bankruptcy Code of Ukraine, which contains all the restrictions not only regarding the opening of bankruptcy proceedings but also the application of court procedures in relation to some legal entities could be interpreted as a confirmation of a provided example of the correlation of the general and special in bankruptcy legal relations. The provisions of these norms are special in relation to the Art. 96 of the Bankruptcy Code of Ukraine, where the latter has a general nature. Concerning the provisions of Clause 2 of Chapter III «Final and Transitional Provisions» of Law No. 145-IX, in our opinion, until they are enshrined in the Bankruptcy Code of Ukraine, they should not be applied at all. Otherwise, we are dealing with a conflict of norms, the priority of which should be given to the Bankruptcy Code of Ukraine as a special normative legal act regulating the bankruptcy procedure.

Another ground that is enshrined in the Clause 9 Part 1 of Art. 90 of the Bankruptcy Code of Ukraine refers to cases provided by law. Consequently, a logical question arises: what are these cases? Foremost, this applies to the cases provided by the Code of Commercial Procedure of Ukraine, in particular, Art. 231. However, in analyzing the content of this norm, it is possible to settle that the conclusion of an amicable agreement by the parties is the only ground that can be applied to the bankruptcy cases of legal entities (Clause 7, Part 1, Article 231 of the Code of Commercial Procedure of Ukraine). Some of the grounds for closing proceedings in the case prescribed in the Art. 231 of the Code of Commercial Procedure of Ukraine are already covered by Art. 90 of the Bankruptcy Code of Ukraine, for example, the termination of the activity of a legal entity or when the case is not subject to consideration in the economic proceedings.

Another ground for closing bankruptcy proceedings is contained in Part 5 of Article 12 of the Law of Ukraine «On Privatization of State and Communal Property» (Verkhovna Rada of Ukraine, 2018). In accordance with the specified norm, bankruptcy cases of state-owned enterprises or economic entities,

where the share of state ownership is more than 50 percent and in respect of which a decision on privatization was made, are subject to termination, except for those, that are liquidated by the owner.

Concerning the judicial practice on the application of the above-mentioned norm, in the resolution as of November 12, 2019, in case № 10/1106, the Supreme Court indicated that commercial courts must take into account the mandatory requirement of the legislator and apply the imperative requirements of Part 5 of Art. 12 of the Law of Ukraine «On the Privatization of State and Communal Property» (separately or together with the norm of Clause 4-3 of Chapter X «Final and Transitional Provisions» of the Bankruptcy Law) regarding the termination (closing) of proceedings in such cases in the event that the competent body makes a decision on privatization of a state-owned enterprise (the debtor) at any stage of the proceedings in the case, regardless of which bankruptcy court procedure is applied to the debtor and at which stages of consideration this bankruptcy case is (disposal of property, sanitation, liquidation) (Supreme Court, 2019).

Nevertheless, it is worth noting that this norm is already «outdated» and has come into conflict with some provisions of the Bankruptcy Code of Ukraine, hence its application is undoubtedly questionable. Firstly, the bankruptcy of enterprises at the initiative of the owner is no longer provided by the Bankruptcy Code of Ukraine. Secondly, the Bankruptcy Code of Ukraine, from the moment of initiating the bankruptcy proceedings, contains restrictions on the exercise of the corporate rights of the founders (participants, shareholders), as well as on the reorganization and liquidation of the debtor - a legal entity. At the same time, the procedure for the exercise of these powers is established exclusively by the Bankruptcy Code of Ukraine itself (Part 14 of Article 39 of the Bankruptcy Code of Ukraine).

Thirdly, Art. 96 of the Bankruptcy Code of Ukraine, which establishes the peculiarity of bankruptcy of the state-owned enterprises and enterprises in which the share of state ownership exceeds 50 percent of the share capital, provides not only an exception for the exercise of the corporate rights of the state but also the possibility of closing the bankruptcy proceedings in cases where a decision on the privatization of the debtor is made.

Fourthly, in the contrary to the Bankruptcy Law, where Clauses 4-3 of the Final and Transitional Provisions provided the termination of the bankruptcy cases of the specified enterprises, there is no such provision at all in the Bankruptcy Code of Ukraine.

Fifthly, the Bankruptcy Code of Ukraine has a priority as a special normative legal act in the field of bankruptcy and as an act issued after the final version of Part 5 of Art. 12 of the Law of Ukraine «On Privatization of State and Communal Property» (Ministry of Justice of Ukraine, 2008).

Therefore, it is worth recognizing that the application of such ground for closing proceedings in a case as «in other cases provided by law» leads to a contradictory judicial practice and complicates the work of both law enforcement bodies and participants of the legal relations. In this regard, it is proposed that «such cases» should not be scattered in different laws, but vice versa should be found directly in the Bankruptcy Code of Ukraine, for example, in its Final and Transitional Provisions. For this purpose, in the Clause 9, Part 1 of Article 90 of the Bankruptcy Code of Ukraine, the words «by law» should be replaced by the words «by this Code».

4. Grounds for closing the bankruptcy proceedings which are the outcome of resolving the debtor's insolvency

The second group of grounds for closing the bankruptcy proceedings, which, as previously indicated, are the result of solving the debtor's insolvency problems, is related to the stage of their application.

Thereby, in accordance with Part 2 of Art. 90 of the Bankruptcy Code of Ukraine, the closure of bankruptcy proceedings in connection with the court approval of the report of the sanitation trustee and the liquidator can take place at all stages of the bankruptcy procedure, and in connection with the non-application of creditors - only after the debtor is recognized as a bankrupt. At the same time, the approval of the sanitation trustee's report can appear only after the introduction of the sanitation procedure, which has place after the final hearing in the property disposal procedure (Part 3 of Article 50 of the Bankruptcy Code of Ukraine).

The same can be said about the approval of the liquidator's report, which is possible no earlier than the final court hearing in the property disposal procedure (Part 3 of Article 49 of the Bankruptcy Code of Ukraine) or the sanitation procedure as an unsatisfactory result of a financial recovery (Part 3, 6, 11 Article 57 of the Bankruptcy Code of Ukraine) and only in the case if the debtor would be declared bankrupt.

Regarding the closure of proceedings in connection with the non-appearance of the creditors in the procedure, such a situation is possible in the property disposal procedure at the stage of the final court hearing (Part 3 of Article 49 of the Bankruptcy Code

of Ukraine). All the above proves that there is a mistake made by the legislator or a substantive conflict.

It should be noted that the closure of bankruptcy proceedings due to the first group of grounds does not entail any legal consequences for the debtor.

The state of affairs regarding the grounds of the second group is entirely different. It is worth noting that according to the Clause 6 of the first part of Article 90 of the Bankruptcy Code of Ukraine, the closure of bankruptcy (insolvency) case is vital important, since it entails the debtor receiving benefits in the form of repayment of the creditors' claims who did not appear in the case (part 4 of Article 90 of the Bankruptcy Code of Ukraine), which does not happen as a result of closing the case due to the absence of signs of the debtor's insolvency (Clause 8 of the first part of Article 90 of the Bankruptcy Code of Ukraine) (Polyakov, 2021, p. 27). In addition, pursuant to part 4 of Art. 90 of the Bankruptcy Code of Ukraine, there is a prescribed repayment of the claims of competitive creditors who submitted their applications, but their claims were rejected by the court. At the same time, in the case of closing proceedings due to the approval of the liquidator's report, the claims of creditors caused by the insufficiency of the debtor's property are also repaid (Part 7 of Article 64 of the Bankruptcy Code of Ukraine).

5. Closure of insolvency proceedings under German legislation

As far as German law is concerned, insolvency proceedings are covered by a special legal act – the Insolvenzordnung (hereinafter the Statute) (Deutscher Bundestag, 1994), in which Division 3 of a Part 5 of the Statute is devoted to the issue of a discontinuation of solvency proceedings. § 207 of the Statute states that if the debtor's assets are found to be insufficient to cover court costs, insolvency proceedings must be closed. An exception can only be as the granting of a postponement, which is prescribed in § 4 of the Statute, as well as the advance payment by the debtor of the required amount.

Besides the grounds for closing insolvency proceedings described above, the Statute provides another ground related to a lack of assets. Thus, in § 211 of the Statute could be found the necessity of closing the proceedings in case of receipt of a notification, which is provided for in § 209 of the Statute, namely: notification of the court by trustee about that the insufficiency of the debtor's assets to cover all the creditors' claims is established. In such case, an insolvency plan established in § 210a of the Statute will be drawn up.

§ 212 of the Statute provides another ground for closing proceedings in the case of insolvency - it is the closure of proceedings due to the lack of grounds for opening them. From the analysis of the specified norm, it can be seen that such closure of proceedings is possible only at the initiative of the debtor and in the case of its opening only due to non-payment (excess of liabilities over assets). Moreover, the debtor must prove that the state of insolvency, deferred insolvency or non-payment will not arise in the future (Deutscher Bundestag, 1994). It should be noted that such a provision confirms B. M. Polyakov's thesis that insolvency is a presumption of a non-payment: «... Ukraine has already had an imperfect law that equated insolvency with non-payment, i.e., presumption with reality» (Polyakov, 2011, p. 141). We explain our position by the fact that the German legislator provides for the possibility to close proceedings in the case of insolvency in the event of its opening due to non-payment, if the debtor provides evidence of his solvency. Thereby, it is the debtor who will be able to prove his solvency, since he, like no one else, knows his financial condition.

Another ground for closing insolvency proceedings could be found in § 213 of the Statute, namely: the consent of all the debtor's creditors. In this case, the debtor's statement is necessary again, as well as the consent of all insolvency creditors. At the same time, the issue concerning the creditors whose claims are disputed and creditors with the right to separate satisfaction of their claims is decided by the court. The court decides the question of their consent and whether they need any security for their claims (Deutscher Bundestag, 1994).

In the event of occurrence of the above-described reasons provided in §§ 212 and 213 of the Statute, the court must publish a notice about this (Clause 1 of § 214 of the Statute), listen to the applicant, the trustee the committee of creditors, as well as the creditor who has objections in this regard (Clause 2 of § 214 of the Charter).

Clause 3 of § 214 of the Charter stipulates the necessity for the trustee to settle any existing claims regarding the insolvency mass, to which there were no objections, and for disputed claims – to provide security for their further fulfillment.

It should be noted that in accordance with the provisions of Clause 1 of § 200 of the Statute, proceedings in the insolvency case may be closed after the final distribution of the assets that were obtained as a result of the realization of the debtor's property.

The decision to close insolvency proceedings must be published in accordance with the provisions of Closure 2 of § 200 and Closure

1 of § 215 of the Statute (on the grounds provided for in §§ 207, 212 and 213 of the Statute).

In the case of closure of insolvency proceedings on the grounds that were set out in §§ 207, 212 and 213 of the Statute, in accordance with Clause 1 of § 216 of the Statute, the creditor may file an immediate appeal against such court decision, while the debtor has the right challenge the closure only on the grounds provided in § 207 of the Statute - for objective reasons. At the same time, Clause 2 of § 216 of the Statute gives the debtor the right to appeal the refusal to close insolvency proceedings on the grounds set forth in §§ 212 and 213 of the Charter.

After insolvency proceedings had been closed, the consequences specified in §§ 201 and 202 of the Statute will follow.

Closure 1 of § 201 of the Charter draws attention, according to which creditors who were participants in the insolvency procedure and whose claims were not fully repaid, will have the opportunity to apply to the debtor for the purpose of their fulfillment.

It is possible to state that in opposite to the Ukrainian legislation, in German, the closure of insolvency proceedings does not release the debtor from the full settlement with creditors.

We conclude that in Germany insolvency legislation is mostly similar to the competitive process of the Ancient Rome, since just as in ancient times, the debtor's debts are not forgiven.

6. Conclusions

According to the results of the conducted research, it is appropriate to indicate the following conclusions:

1. It was proposed to differentiate into two groups the grounds for closing the bankruptcy proceedings which are enshrined in Art. 90 of the Bankruptcy Code of Ukraine. Those groups are the following: 1) the grounds that counteract the movement of the bankruptcy; 2) the grounds that form a result of a resolution of the debtor's insolvency.

2. It has been proven that the appliance of such grounds for closing proceedings as «in other cases provided by law» leads to a contradictory judicial practice and complicates the work of both law enforcement bodies and participants of the legal relations. In this regard, it is put forward that «such cases» should not be scattered in different laws, but conversely, should be found directly in the Bankruptcy Code of Ukraine, for instance, in its Final and Transitional Provisions. For this purpose, it is expedient to change Clause 9, Part 1 of Art. 90 of the Bankruptcy Code of Ukraine.

3. It was established that, unlike the Ukrainian legislation, in German legislation, the closure of insolvency proceedings does not release the debtor from all monetary claims of creditors. In this aspect, German insolvency law is mostly similar to the competitive process of the Ancient Rome, since in these two cases, the debtor's debts were not forgiven.

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Поляков Родіон,
аспірант, Запорізький національний університет, вул. Жуковського, 66, м. Запоріжжя, Україна, 69600, rodion.pol@ukr.net
***ORCID**: orcid.org/0000-0001-5266-224X*

ПІДСТАВИ ЗАКРИТТЯ ПРОВАДЖЕННЯ У СПРАВІ ПРО БАНКРУТСТВО (НЕСПРОМОЖНІСТЬ) ЮРИДИЧНОЇ ОСОБИ ЗА ЗАКОНОДАВСТВОМ УКРАЇНИ ТА НІМЕЧЧИНИ

Анотація. ***Метою статті*** є розкриття особливостей застосування підстав для закриття провадження у справі про банкрутство (неспроможність) юридичної особи за законодавством України та Німеччини.

Методологія дослідження. Під час дослідження використано діалектичний, формально-логічний, порівняльно-правовий та логіко-юридичний методи пізнання.

Результати. Проаналізовано та надано характеристику підставам для закриття провадження у справі про банкрутство юридичної особи, а також здійснено їх диференціацію на дві групи. Виявлено колізії у законодавстві про банкрутство в частині закриття провадження у справі щодо юридичної особи та запропоновано шляхи удосконалення законодавства в цій частині. Охарактеризовано підстави для закриття провадження у справі про неспроможність за німецьким законодавством.

Висновки. Запропоновано підстави для закриття провадження у справі про банкрутство, закріплені у ст. 90 КзПБ, диференціювати на дві групи: 1) підстави, які перешкоджають руху справи про банкрутство; 2) підстави, які є результатом розв'язання проблем неплатоспроможності боржника.

Доведено, що застосування такої підстави для закриття провадження, як «в інших випадках, передбачених законом», призводить до суперечливої судової практики та ускладнює роботу як правозастосовним органам, так і учасникам правовідносин. У зв'язку із цим пропонується, щоб «такі випадки» були не розосереджені в різних законах, а знаходились безпосередньо у КзПБ, наприклад, у його Прикінцевих та перехідних положеннях. Для цього пропонується змінити п. 9 ч. 1 ст. 90 КзПБ.

Встановлено, що, на відміну від українського, в німецькому законодавстві саме по собі закриття провадження у справі про неспроможність не звільняє боржника від усіх грошових вимог кредиторів. У зазначеному аспекті німецьке конкурсне законодавство здебільшого є подібним до конкурсного процесу Стародавнього Риму, адже в цих двох випадках борги боржнику не пробачались.

Ключові слова: банкрутство, боржник, закриття провадження, кредитор, неспроможність.

The article was submitted 20.07.2022
The article was revised 10.08.2022
The article was accepted 30.08.2022