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## **REGULATIONS ON THE TREASURER IN THE ENFORCEMENT OF DECISIONS ON DECLARATION OF BANKRUPTCY AND SOME LEGAL ISSUES THAT NEED TO BE IMPROVED**

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### **ABSTRACT**

The inclusion of the Trustee in the bankruptcy procedures for enterprises and cooperatives represents a major advancement introduced by the 2014 Bankruptcy Law, aligning Vietnam's bankruptcy law more closely with international practices. However, after 10 years of implementing the Bankruptcy Law, many problems have arisen in practice, requiring continued research to further improve this institution. This article examines legal issues concerning the Administrator institution and challenges in applying the law in the enforcement of the court's decision on bankruptcy declaration, thereby making a number of recommendations to further improve the legal provisions related to this issue.

**KEYWORDS:** Judicial Decisions; administrator; administrator; bankruptcy

### **1. INTRODUCTION**

The Bankruptcy Law 2014 (hereinafter referred to as Bankruptcy Law) has fundamentally changed the entity performing asset management and liquidation in bankruptcy proceedings by assigning the task of managing and liquidating bankrupt assets of bankrupt enterprises and cooperatives to two entities with independent and professional legal status, namely: the Administrator and the asset management and liquidation firm, replacing the previous Asset Management and Liquidation Team. The Bankruptcy Law and Decree No. 22/2015/ND-CP dated February 16, 2015 of the Government detailing the implementation of a number of articles of the Bankruptcy Law on administrators and the practice of asset management and liquidation have provided relatively complete and specific regulations on the rights and obligations of administrators, affirming the important position and role of administrators and asset management and liquidation firms in resolving bankruptcy in Vietnam. However, after 10 years of implementing the Bankruptcy Law, the regulations on the activities of the Administrator have revealed a number of limitations and shortcomings, posing challenges for Trustees in practice, especially in the enforcement of the Court's decision declaring bankruptcy, which partly affects the effectiveness of the organization of the enforcement of judgments.

## **2. The role of the Administrator in the enforcement of the bankruptcy declaration decision**

Unlike the Bankruptcy Law 2004, the composition of the Asset Management and Liquidation Team in the Bankruptcy Law 2004 includes “An enforcement officer of the enforcement agency at the same level as the Team Leader; An officer of the Court; A representative of the creditor; Legal representative of the enterprise or cooperative subject to bankruptcy proceedings; Trade union representative, employee representative, representative of specialized agencies if necessary” [1], the Bankruptcy Law has assigned an entity to undertake the task of managing bankruptcy assets, which is the Administrator and the asset management and liquidation firm.

According to the provisions of the Bankruptcy Law, the entity allowed to practice the management and liquidation of assets of enterprises or cooperatives during the bankruptcy settlement process includes the Administrator and the asset management and liquidation firm. Articles 7 and 8, Clause 4 of the 2014 Bankruptcy Law stipulate: “A trustee is an individual who practices the profession of managing and liquidating assets of insolvent enterprises and cooperatives during the bankruptcy process. An asset management and liquidation firm is an enterprise that practices the profession of managing and liquidating assets of insolvent enterprises and cooperatives during the bankruptcy process” [2]. This definition clarifies the primary role of the trustee is to manage and liquidate assets in the context of bankruptcy, while emphasizing the nature of being appointed by the judiciary. In the United States, the role of an Administrator is similar to that of a 'Trustee' in Chapter 7 bankruptcy cases or a 'Debtor in Possession' in Chapter 11 cases. Article 704 of the U.S. Bankruptcy Code, the trustee is responsible for collecting and preserving the debtor's assets, investigating the debtor's financial situation, and distributing assets to creditors [3]. This concept is quite similar to the administrator in Vietnamese law; however, the US legal system has a clearer distinction between the types of administrators depending on the nature of the bankruptcy case.

In the UK, the concept of "insolvency practitioner" is used to refer to the administrator. According to Section 388 of the Bankruptcy Act 1986, an insolvency practitioner is a person licensed to perform tasks related to bankruptcy, including asset management, enterprise liquidation, and restructuring management. This concept has a broader scope than in Vietnam, including both individuals and organizations licensed to practice.

Under the 2014 Bankruptcy Law, an Administrator may operate independently or within an asset management and liquidation firm, either by establishing one, joining an existing firm, or working under contract. The administrator participates in most stages of the bankruptcy process with the powers and obligations recognized by law. This entity plays an important role in resolving bankruptcy of enterprises and cooperatives in Vietnam.

Regarding the role of the administrator, in the US, the administrator plays a central role in the bankruptcy process under Chapter 7 and Chapter 11 of the US Bankruptcy Code [4]. According to Article 701, the administrator is appointed by the Bankruptcy Court immediately after the petition to

open bankruptcy proceedings [5]. The main task of the administrator is to manage, liquidate the debtor's assets and distribute them to creditors. The administrator has broad powers to investigate the debtor's previous transactions, recover assets and even sue third parties to protect the interests of the bankruptcy estate [6].

A prominent feature of the US model is the active participation of creditors in the process of appointing and supervising the administrator. The creditors' committee has the power to nominate and elect a trustee to replace the temporary trustee initially appointed by the court [7]. This helps to ensure transparency and efficiency in the bankruptcy process.

In the UK, the role of the insolvency practitioner is detailed in the Insolvency Act 1986 and related regulations [8]. Insolvency practitioners in the UK can take on a variety of roles depending on the type of insolvency proceedings, including administrator, liquidator, receiver and supervisor in enterprise voluntary arrangements (CVA) [9]. A distinctive feature of the UK model is the strict requirements on professional qualifications and ethics for administrators. Section 388 of the UK Insolvency Act 1986, administrators must be licensed by recognized professional bodies and comply with strict professional ethics rules [10].

In Vietnam, as the entity managing and liquidating assets, the Administrator participates in most stages of the bankruptcy proceedings. Article 16 of the 2014 Law on Bankruptcy stipulates 06 groups of rights and obligations of the Administrator during the court settlement stage and during the enforcement stage. In the scope of the article, the author focuses on analyzing the role of the Administrator during the enforcement stage of the court's bankruptcy declaration decision. During the enforcement stage of the court's bankruptcy declaration decision, the Administrator plays an important role in liquidating the assets of the bankrupt enterprise. The Administrator performs related tasks such as: Valuation; Auction of assets.

### **3. THE TASKS OF THE ADMINISTRATOR DURING THE ENFORCEMENT OF THE DECISION DECLARING BANKRUPTCY**

According to the provisions of Article 120 of the 2014 Law on Bankruptcy, after the Court issues a decision declaring bankruptcy, the THADS agency is responsible for proactively issuing an enforcement decision and assigning an Enforcement Officer to enforce the decision declaring bankruptcy. However, the Enforcement Officer does not directly handle the assets of enterprises and cooperatives declared bankrupt, but mainly performs the task of supervising the Administrator, the asset management and liquidation firm in handling and liquidating assets and a number of other tasks prescribed in Clause 2, Article 120 of the 2014 Law on Judgment Enforcement. According to the provisions of Article 121 of the 2014 Law on Judgment Enforcement, within 02 working days from the date of receiving the assignment decision of the Head of the civil judgment enforcement agency (CJEA), the Enforcement Officer shall issue a written request to the Administrator, the asset

management and liquidation firm to carry out the liquidation of assets. The administrator, the asset management and liquidation firm must carry out the following procedures and tasks:

**First: Organizing asset valuation:**

To carry out the liquidation of assets of bankrupt enterprises and cooperatives, the first task of the administrator, the asset management and liquidation firm is to organize the valuation of assets for auction because all assets of enterprises and cooperatives after being declared bankrupt must be processed and converted into money to fulfill obligations according to the bankruptcy declaration decision. The asset valuation procedure is specifically regulated in Article 122 of the 2014 Law on Enterprises; Article 9 of Joint Circular No. 07/2018/TTLT-BTP-VKSNDTC-TANDTC [11].

The law also clearly stipulates the reporting responsibility of the administrator, the asset management and liquidation firm to the Enforcement Officer. The administrator, the asset management and liquidation firm shall report to the Enforcement Officer in the following cases: The selection of a valuation organization, an asset auction organization to sign a contract for asset valuation, signing a contract for asset auction; The change of the valuation organization, the asset auction organization; The failure to select a valuation organization, the asset auction organization; The failure to auction the asset. The form of reporting shall comply with the provisions of Clause 2, Article 49 of the 2014 Law on Assets (Direct report, registered letter, regular mail, email, fax, telex) [12].

**Second: Sale of assets:**

According to Article 124 of the 2014 Law on Assets, the sale of assets shall be carried out in two forms: sale through auction and sale without auction procedures. The auction shall be carried out for assets that are movable assets with a value of over VND 10,000,000 and real estate. The order and procedures for auction are carried out in accordance with the provisions of law on asset auction (Law on Asset Auction 2016). The administrator, asset management and liquidation firm has the right to reach an agreement with the auction organization within no more than 05 working days from the date of valuation. The administrator, asset management and liquidation firm shall sign an asset auction service contract with the auction organization. In case the administrator, asset management and liquidation firm cannot reach an agreement, the Enforcement Officer shall select an auction organization to sign an asset auction service contract. The signing of the asset auction service contract shall be carried out within 10 days from the date of valuation. The auction of movable property must be carried out within 30 days, and of real estate within 45 days from the date of signing the asset auction service contract. In the case where the province or centrally-run city where the property is located has no auction organization or there is an auction organization but the auction organization refuses to sign the contract for auction service; The value of the property is from VND 2,000,000 to VND 10,000,000, the property will be auctioned by the Administrator or the enterprise managing and liquidating the property, the auction period is similar to the case of a professional auction organization. In addition, there are some cases where the Administrator or the enterprise managing and liquidating the property is sold without going through the auction procedure. Specifically, in the case of property

valued at less than VND 2,000,000 or property at risk of being destroyed or significantly reduced in value, the Administrator or the enterprise managing and liquidating the property will determine the value of the property and liquidate it in accordance with the provisions of law. The sale of assets must be carried out within no more than 05 working days from the date of issuance of the decision to enforce the Decision to declare bankruptcy or the Decision to sell assets.

Third: Recovering assets in case of violations:

In the process of liquidating assets, if it is discovered that a transaction of an insolvent enterprise or cooperative conducted within 06 months before the date the People's Court issues the Decision to open bankruptcy proceedings is considered invalid if it falls under one of the cases specified in Article 59 of the 2014 Law on Enterprises, the Administrator, the enterprise managing and liquidating assets, and the Enforcement Officer shall request the People's Court to issue a Decision to recover the assets of the enterprise or cooperative due to the invalid civil transaction. The recovery of assets is carried out in accordance with the provisions of law [13].

Fourth: Handling of assets of enterprises and cooperatives arising after the decision to declare bankruptcy [14].

After the Decision to declare the enterprise or cooperative bankrupt, if it is discovered that a civil transaction is invalid according to the provisions of Article 59 of the 2014 Law on Enterprises, the Administrator and the enterprise managing and liquidating assets have the right to request the People's Court to declare the transaction invalid, handle the consequences of the invalid transaction and divide the assets of the enterprise or cooperative according to the provisions of Article 54 of the 2014 Law on Enterprises. After the Decision to declare the enterprise or cooperative bankrupt, if it is discovered that the assets of the enterprise or cooperative have not been divided, the People's Court that declared bankruptcy shall consider and decide to divide the assets according to the provisions of Article 54 of the 2014 Law on Enterprises.

Thus, it can be seen that the core task of the Administrator, the enterprise managing and liquidating assets in the process of implementing the decision to declare bankruptcy is to handle the remaining assets of the bankrupt enterprise or cooperative through the following procedures: price appraisal; auction; request the People's Court to issue a decision to recover and handle the assets of the enterprise or cooperative due to invalid civil transactions. These tasks are supervised by the Enforcement Officer for up to two years from the date the request is received, as stipulated in Clause 2, Article 121 of the 2014 Bankruptcy Law.

#### **4. SOME DIFFICULTIES AND PROBLEMS FROM THE PRACTICAL MANAGEMENT AND LIQUIDATION OF ASSETS BY THE ADMINISTRATOR**

First: Some legal regulations are still inadequate

Some legal regulations on the duties and powers of the Administrator and the Enforcement Officer do not have a clear and appropriate division of powers. According to Clause 4, Article 121 of the 2014

Law on Judgment Enforcement, if the Administrator or the asset management and liquidation firm fails to liquidate the assets after 02 years from the date of receipt of the request from the Enforcement Officer as prescribed in Clause 2, Article 121 of the 2014 Law on Judgment Enforcement, the Administrator or the asset management and liquidation firm must terminate the liquidation of the assets and hand over all documents and assets of the bankrupt enterprise or cooperative to the bankruptcy agency for handling and liquidation of the assets in accordance with the provisions of law. This provision can easily lead to a situation where, during the process of liquidating assets according to the bankruptcy decision, the Administrator, the asset management and liquidation firm will only liquidate assets that are easy to handle and have a large value, while assets with small value and are difficult to handle will not be liquidated and handed over to the Enforcement Officer. Because, although the liquidation of assets by the Administrator, the asset management and liquidation firm is carried out under the supervision of the Enforcement Officer. However, the Enforcement Officer does not have the authority to request the Administrator, the asset management and liquidation firm to handle which assets first and which assets later. Moreover, the main financial source of the Administrator, the asset management and liquidation firm depend largely on remuneration and other expenses. On the other hand, the regulation of many subjects participating in the handling and liquidation of assets in the enforcement of the bankruptcy declaration decision will easily lead to overlapping of authority, difficulty in determining responsibilities, and conflicts in coordination work. In the case of assets that have not been liquidated, the law only provides in general: "The enforcement officer shall carry out the valuation and sale of assets of bankrupt enterprises and cooperatives according to the provisions of the law on bankruptcy"[15] without specific guidance on procedures and methods for handling these assets, leading to confusion in the application of the law. For assets that have not been handled by the administrator, the enterprise managing and liquidating the assets, shall the enforcement officer continue to handle them according to the procedures that the administrator, the enterprise managing and liquidating the assets have handled or must they be resolved from the beginning? ... These are issues that need more specific guidance. Sanctions against the Administrator when there are violations during the asset liquidation process are still limited, although Clause 2, Article 17 of Decree No. 22/2015/ND-CP and Article 11 of Circular No. 07/2018/TTLT-BTP-VKSNDTC-TANDTC stipulate sanctions in case the Administrator violates the asset liquidation process of bankrupt enterprises and cooperatives, specifically: The enforcement officer has a document requesting the Administrator, the asset management and liquidation firm to comply with regulations or has a document proposing the Court to change the Administrator, the asset management and liquidation firm. However, this sanction has not been effective in practice, because there is no mechanism to bind the Administrator's responsibility for the work performed, on the other hand, changing the Administrator also leads to a delay in the implementation of the Decision declaring bankruptcy. Another issue that is also being raised is whether it is really appropriate to give the right to supervise the asset management and liquidation activities of the Administrator to the Enforcement Officer, when not all Enforcement Officers have knowledge related to this issue. To ensure that the Administrator and the asset management and liquidation firm operate effectively, it is thought that it is possible to consider regulating the responsibilities and powers of the Administrator and the asset management and

liquidation firm to participate in resolving, handling and liquidating assets from the time they are appointed by the Court until the end of bankruptcy, and at the same time build a legal framework to ensure that the Administrator and the asset management and liquidation firm operate independently, flexibly, proactively, and take responsibility for their activities. The administrator, the asset management and liquidation firm is the person who is primarily and consistently responsible for the entire process of managing and supervising the activities of the insolvent enterprise or cooperative, handling the assets of the enterprise or cooperative when the Court opens bankruptcy proceedings and handles and liquidates the assets after the Court issues a decision declaring bankruptcy until the assets are completely handled and the bankruptcy is terminated. This will create unity, initiative, continuity and self-responsibility for all activities carried out by the administrator, the asset management and liquidation firm.

Currently, the application of law in the enforcement of bankruptcy declaration decisions is applied simultaneously to the provisions of the law on bankruptcy and bankruptcy law. This leads to confusion for administrators and enforcement officers when applying. Therefore, it is necessary to consider the provisions of unifying the law applied to the entire process of enforcing bankruptcy declaration decisions. These legal provisions should be specific and appropriate.

Second: The coordination relationship between the Enforcement Officer, the Administrator, and the asset management and liquidation firm

According to the provisions of current law, it can be seen that the coordination relationship between the Enforcement Officer and the Administrator, the asset management and liquidation firm in the management and handling of assets in each bankruptcy case is very frequent and quite close. However, the current regulations have not yet clearly stated the mechanism, responsibility for supervision, coordination as well as sanctions of the parties in this relationship. Therefore, the legal binding between the parties is not high. Practice shows that the supervision of the Enforcement Officer over the activities of the Administrator, the asset management and liquidation firm in the process of handling and liquidating assets of bankrupt enterprises and cooperatives is only a formality. Because the Enforcement Officer does not directly participate in the handling but only supervises through reports, it is not possible to closely follow the content of the case, so it is very difficult to detect violations and errors. Furthermore, the Enforcement Officer has the main task of organizing the enforcement of other judgments and decisions, so he does not have time to closely monitor the activities of the Administrator, the asset management and liquidation firm. On the other hand, the Administrator having to make reports and wait for the Enforcement Officer's opinion also takes up more time and effort of the Administrator, the asset management and liquidation firm, reducing the flexibility of the Administrator, the asset management and liquidation firm. This also significantly affects the results of handling and liquidating assets of bankrupt enterprises and cooperatives. Therefore, it is necessary to strengthen the coordination relationship with relevant agencies in general and with the Enforcement Officer, the THADS agency in particular. In addition to having a synchronous, clear and feasible legal system, there must also be coordination and support from relevant

agencies. For example, when handling real estate assets, there must be coordination and support from local authorities, valuation organizations, auction organizations, etc. Especially the coordination relationship with the Enforcement Officer and the THADS agency, because they are both the entities supervising the activities of the Administrator and the person supporting the Administrator in difficult cases according to the provisions of law. In which, it is necessary to build a more effective coordination mechanism with clearer legal binding. At the same time, there must be sanctions to enhance the responsibility of the parties, ensuring that these relationships take place in accordance with regulations.

### Third: Number and quality of Administrators

The number of Administrators has increased significantly in recent years. If by April 2020, the whole country had only 270 Administrators practicing as individuals; More than 40 asset management and liquidation firms are operating [16], by October 2023, in Ho Chi Minh City alone, the number of administrators practicing as individuals is 123 and 43 asset management and liquidation firms[17]. This number in Hanoi as of June 2023, according to the announcement of the Department of Justice, is 76 administrators practicing as individuals [18] and 9 asset management and liquidation firms as of July 2021[19]. As of April 2024, the number of administrators in Vietnam is more than 2,000 people [20]. The profession of Administrator in Vietnam is still newly formed, so the number and quality of Administrators in our country is still limited. However, in the future, the team of administrators will need to continue to develop to better meet the needs and demands of society. In addition, the awareness of agencies, organizations, and the business community, especially those directly related to the activities of the Administrator such as the Court, the Civil Judgment Enforcement Agency, and bankrupt enterprises, is still inadequate and not comprehensive, so the coordination between the Administrator and relevant agencies in practice is still difficult. On the other hand, the legal regulations on standards and conditions for becoming an Administrator have not ensured balance and harmony. The team of Administrators has not been trained in a systematic and formal manner, so the capacity of the Administrators is not uniform in terms of professional expertise. In order to improve the efficiency of handling cases in general and the process of organizing the handling and liquidation of remaining assets of bankrupt enterprises and cooperatives in particular, it is necessary to focus on improving the professional expertise of the team of Administrators. Currently, the law stipulates the standard conditions, especially the professional qualifications to be granted a practice certificate and the conditions for practicing as a Administrator are quite easy [21]. Administrators do not need to undergo any courses on the expertise and profession of an Administrator before being granted an Administrator certificate. The handling of assets in bankruptcy requires Administrators to have basic knowledge of related fields such as business administration, THADS, valuation, auction, etc. Therefore, in-depth training on professional skills for Administrator is very important and necessary.

## 5. CONCLUSION

Through the study and analysis of the institution of Administrator in the current bankruptcy law of Vietnam, it can be seen that the role of the Administrator in the process of enforcing the decision to declare bankruptcy needs to continue to be studied and improved. The above recommendations for



improvement are not only aimed at improving the institution of Administrators but also aim at improving the effectiveness of the entire bankruptcy settlement process. This will contribute to protecting the rights of the parties involved, enhancing trust in the legal system and promoting a healthy business environment in Vietnam./.

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