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THE MANAGEMENT OF PROCEDURES FOR RESTORATION OF SOLVENCY IN UKRAINE

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Havrylchenko O. V. The Management of Procedures for Restoration of Solvency in Ukraine

The article is aimed at considering problems of management of procedures for restoration of solvency in Ukraine. Relevance of regulatory activity on the part of the State in terms of organization and carrying out of competitive procedures in Ukraine is substantiated, their essence and content are considered. The legal nature of the concept of «insolvency» is researched, its signs are summarized. It is proved that studying of organization and peculiarities of the State management of bankruptcy and rehabilitation processes will ensure the formation of an effective mechanism for real withdrawal of numerical number of debtor enterprises from the status of insolvency. The main shortcomings of the State management in the sphere of insolvency of business entities are analyzed, their legal consequences are determined. According to the results of researches, the shortcomings of procedural character are reduced to separate groups: balance of interests in favor of the debtor; liquidation of business dominates over the recovery; wide-spreading of fictitious bankruptcy. Prospects for further research are to substantiate the directions to solving the problems identified.

Keywords: *the State management, insolvency, insolvency relations, bankruptcy, rehabilitation, amicable settlement.*
Fig.: *2.* ***Bibl.:*** *10.*

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Гаврильченко О. В. Управління процедурами відновлення платоспроможності в Україні

Метою даної статті є розгляд проблем управління процедурами відновлення платоспроможності в Україні. Обґрунтовано актуальність державної регламентації організації та проведення конкурсних процедур в Україні, розглянуто їх сутність та зміст. Досліджено правову природу поняття «неплатоспроможність», узагальнено її ознаки. Доведено, що вивчення організації та особливостей проведення державного управління процесами банкрутства та санації забезпечить формування дієвого механізму реального виведення чисельної кількості підприємств-боржників зі стану неплатоспроможності. Проаналізовано основні недоліки державного управління у сфері неплатоспроможності суб'єктів підприємництва, визначено їх правові наслідки. За результатами досліджень недоліки процесуального характеру зведено в окремі групи: баланс інтересів на користь боржника; ліквідація бізнесу домінує перед оздоровленням; масове розповсюдження фіктивного банкрутства. Перспективи подальших досліджень полягають в обґрунтуванні напрямків вирішення виявлених проблем.

Ключові слова: *державне управління, неплатоспроможність, відносини неплатоспроможності, банкрутство, санація, мирова угода.*
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Гаврильченко Е. В. Управление процедурами восстановления платежеспособности в Украине

Целью данной статьи является рассмотрение проблем управления процедурами восстановления платежеспособности в Украине. Обоснована актуальность государственной регламентации организации и проведения конкурсных процедур в Украине, рассмотрены их сущность и содержание. Исследована правовая природа понятия «неплатежеспособность», обобщенны ее признаки. Доказано, что изучение организации и особенностей проведения государственного управления процессами банкротства и санации обеспечит формирование действенного механизма реального вывода численного количества предприятий-должников из состояния неплатежеспособности. Проанализированы основные недостатки государственного управления в сфере неплатежеспособности субъектов предпринимательства, определены их правовые последствия. По результатам исследований недостатки процессуального характера сведены в отдельные группы: баланс интересов в пользу должника; ликвидация бизнеса доминирует над оздоровлением; массовое распространение фиктивного банкротства. Перспективы дальнейших исследований заключаются в обосновании направлений решения выявленных проблем.

Ключевые слова: *государственное управление, неплатежеспособность, отношения неплатежеспособности, банкротство, санация, мировое соглашение.*
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A large number of domestic enterprises due to the crisis state of the Ukrainian economy and the unstable external environment characterized by the variability of political, economic, legal and social factors, have become insolvent, unprofitable and are experiencing financial difficulties. A significant number of bankruptcy cases and ambiguity of legislative practice in this sphere determines the relevance of theoretical studies of legal phenomena concerning insolvency or so-called competitive process.

Analysis of recent research and publications. The works of the following domestic and foreign scientists are dedicated to studying peculiarities of state regulation of bankruptcy and sanation: M. Berest, B. Bakharev, P. Pryguza, A. Pryguza, K. Smolov, and others. The achievements of these scientists are of great theoretical and practical value, providing further scientific research on the issues of regulatory and legal support for organizing and conducting competitive procedures.

However, the current state of the Ukrainian economy posed before the Ukrainian business environment, scientists and legislators new urgent tasks of ensuring solvency restoration for a large number of debtors, which necessitates further research in this direction.

The *aim* of the article is to consider insolvency regulation in Ukraine.

The problem of state regulation of bankruptcy proceedings is extremely relevant for Ukraine, since the world experience confirms that this institute is one of the most important instruments of market reforms and economic recovery [1]. The issue of subjective relations of insolvency and bankruptcy, subordination, jurisdiction, conditions and procedure for handling an application for initiating and reviewing bankruptcy cases are regulated by the Law of Ukraine "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt" [2], which contains both norms of substantive law and procedural law. All procedural issues are resolved in accordance with the rules laid down by the Commercial Procedural Code of Ukraine [3]. The rules laid down by the Commercial Procedural Code of Ukraine should be understood as the unified procedure of the judicial process, which operates in Ukraine and provides enterprises, organizations and citizens the right to apply to the Commercial Court in accordance with the established jurisdiction over economic cases for the protection of their violated or disputed rights and interests protected by law [4].

The Law of Ukraine "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt" specifies the conditions under which the procedure for restoring solvency may be applied to the debtor as well as the conditions under which the liquidation procedure is applied to the debtor, and establishes the legal procedure for the implementation of the relevant proceedings.

Insolvency law and bankruptcy law ensure the effectiveness of economic legal relations in economic relations, since economic activity is an activity in the sphere of social production, which is aimed at the manufacturing of products (goods); execution of works; provision of services; their (products, goods) distribution and exchange; organization of the process of the specified production, distribution, exchange, based on the use of the property of its participants for the purpose of satisfying their needs and interests as well as the needs and interests of society as a whole.

In accordance with Art. 1 of the Law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt", insolvency is the inability of a business entity to fulfill the monetary obligations to creditors after the prescribed period of payment not otherwise than through the restoration of its solvency [2].

Analyzing the provisions of the current version of the Bankruptcy Law, K. Smolov comes to the following conclusion regarding the legal nature of the concept of "insolvency": it is a complex set of facts that are in a rigid interdependence, and, therefore, should be accumulated in this set in a strictly defined sequence [5].

The term "insolvency" should be considered from the standpoint of the subject of legal regulation and the actual economic, financial and legal significance of this concept. In view of this, we support the opinion of P. Priguza and A. Priguza, who believe that the right to insolvency, in accordance with the Law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt", is the legal possibility of an insolvent debtor, who does not have enough cash for paying the current monetary claims, provided a real economic opportunity for the continuation of property activities and earning income, to retain the right to manage economic activities and organize the production process of the enterprise in order to work out a debt and preserve the business by applying court procedures for the disposal of property, sanation, settlement agreement, moratorium and other legal instruments for restoring solvency [4].

In order for insolvency to be objective and independent of subjective factors, it is necessary to identify features characterizing this concept. In accordans with the Law, the reason for initiating a bankruptcy procedure is an aggregate of different in content legal facts, which in the legal theory is called the set of facts. Their presence means that the debtor is insolvent, and these facts are signs of the debtor's insolvency. In order to confirm the insolvency of the debtor, the Law establishes for the creditor the minimum sufficient evidences on the facts that are certified by the documents on the existence of a civil (economic) legal relationship between the creditor and the debtor (a contract, transaction, emergence from it of the right to claim), which is indisputable (confirmed by a court decision and executive documents), the term of non-fulfillment of the obligation is not less than that established by the Law (more than three months). To prove the fact of insolvency, it does not matter whether the value of the property owned by the debtor exceeds the amount of his monetary obligation. At the stage of accepting the creditor's application to initiate a bankruptcy procedure, this issue is not included in the fact to be proven by the applicant, and, therefore, the bankruptcy case must be initiated given the mentioned set of facts [4].

B. Polyakov adds to the indicated signs of insolvency the nature of monetary obligations, the basic amount of monetary obligations and insists that the fact of insolvency should be tested by enforcement proceedings. The fact is that the debtor cannot fulfill the monetary obligations, even by compulsory means [6]. The generalization of signs insolvency is presented in *Fig. 1*.

The subjects of insolvency proceedings are business entities in which it is possible to apply judicial procedures for restoring solvency – disposal of property, sanitation, settlement agreement.

A settlement agreement in a bankruptcy procedure is an agreement between the debtor and the creditors regarding the postponement and (or) installment, as well as the forgiveness (cancellation) by the creditors of the debtors' debts, which is executed by entering into an agreement between the parties [6]. A settlement agreement can be concluded at any stage of the bankruptcy

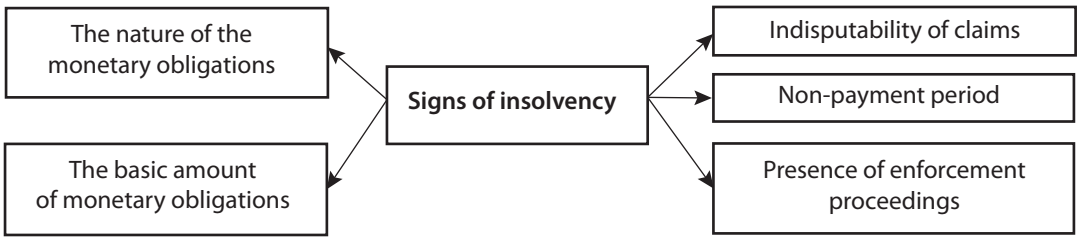

Fig. 1. Signs of insolvency [4; 6; 8]

procedure. In the procedure for the disposal of the debtor's property, the settlement agreement may be concluded only after the identification of all creditors and approval by the Commercial Court of the register of the creditors' claims.

In accordance with Para.1 of Art. 28 of the Law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt", sanation is a system of measures taken in the course of bankruptcy proceedings in order to prevent the bankruptcy of the debtor and its liquidation, aimed at improving the financial and economic situation of the debtor, as well as satisfaction in full or in part of the claims of the creditors by restructuring the company, debts and assets and/or changes in the organizational and legal and production structure of the debtor.

Depending on the category of the debtor, the type of his activities and the possession of his property, the Commercial Court applies a general, special or simplified procedure for conducting bankruptcy proceedings (*Fig. 2*). According to Article 7 (Part 3, paragraph 1) of the Law, it is provided that the Commercial Court chooses a procedure for conducting bankruptcy proceedings and applies it to a specific debtor depending on: 1) the category of the debtor; 2) the type of the debtor's activity; 3) availability of the property of the debtor.

The requirement to establish in the national legislation the specifics of regulation of relations related to bankruptcy of certain categories of enterprises, follows from the provisions of Art. 214 of the Commercial Code of Ukraine, which defines the directions of the state policy on bankruptcy, priorities for preventing bankruptcy, ensuring conditions for implementing procedures for restoration of solvency of business entities or their liquidation as bankrupts are established with regard to state and other enterprises.

Art. 6 of the Law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt" establishes and regulates a new for the insolvency law (bankruptcy law), procedure for the debtor's sanation, which is carried out without initiating by the Commercial Court a bankruptcy procedure but under judicial control. This means carrying out the sanation of a legal entity that only intends to become a debtor or an actual debtor in order to avoid a possible and predictable state of insolvency that is likely to arise in the fulfillment of certain economic obligations. For initiating (undertaking) this form of sanation, only the free will of the parties-participants of the sanation is required. The debtor's sanation may be stipulated by the contract, under which the debtor's monetary obligation arose. The sanation can be initiated by both the debtor (potential debtor) and the creditor.

The object of the sanation without initiating the bankruptcy procedure is the solvency of a juridical entity.

The subjects of a voluntary sanation are: the debtor – a juridical entity, the owner of the property (executive authorities authorized to manage the property) of the debtor; the debtor's creditors; third parties (investors).

In general, the edition of the Law of Ukraine "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt", which has been in effect since July 2015, resolves a number of controversial issues regarding the consideration of bankruptcy procedures, but to date some problems, both of the theoretical and practical nature, remain unresolved.

The Law (Paragraph 5 of Article 11) defines the grounds for the debtor's application to initiate a bankruptcy procedure, in which, in particular, the term of "threat of insolvency" is indicated. In this regard, it is necessary to clarify the term of "threat of insolvency", and to determine the need of the debtor to prove the indisputability of the claims of the creditors (according to the Law) [2].

The law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt" has obvious procedural flaws. Thus, the problem of applying the provisions of Part 4 of Art. 10 of the Law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt", which provides for vesting the court handling the bankruptcy case the power to resolve all property disputes with the claims of the debtor (including disputes regarding the invalidation of any legal acts (agreements) concluded by the debtor; wage recovery; reinstatement of officers and employees of the debtor entities), may be the lack of guidance in the Law on the form of a process in which such disputes are ajudicated (as civil proceedings or as part of bankruptcy proceedings). Taking into account that the categories of cases from the above list are the ones that are ajudicated in accordance with the civil proceedings as well, B. Bakharev believes that Part 17 of the Transitional Provisions of the Law should be supplemented by Part 1 of Art. 15 of the Civil Procedural Code of Ukraine, Paragraph 4, which states: "except those to be ajudicated un-

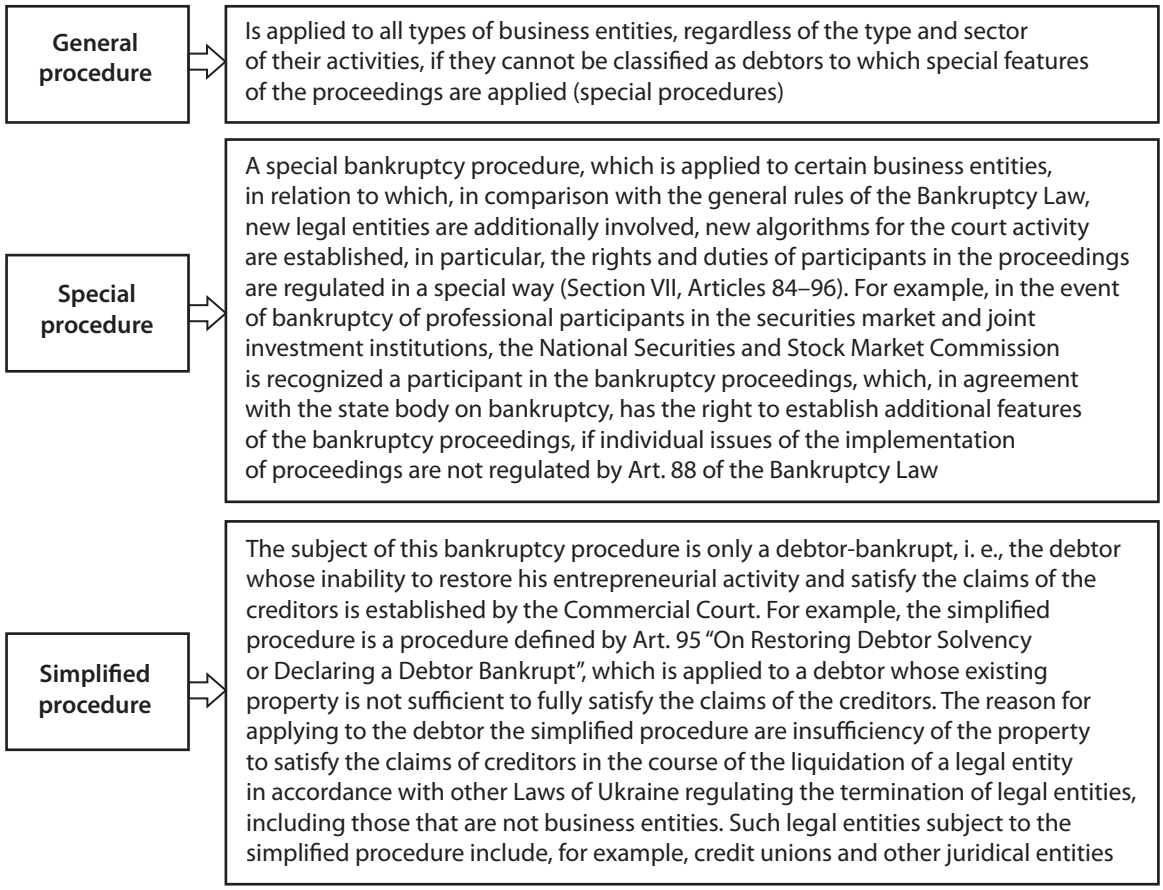

Fig. 2. The bankruptcy procedure

der Commercial Procedure Code", i. e., in the part of the exclusion of the specified category of disputes from the jurisdiction of general courts [9]. In his opinion, the issue of determining the composition of the court for ajudication of these categories of cases also needs to be resolved: the judge in charge of the bankruptcy case, or any commercial court judge, or a bankruptcy judge.

According to Part 3 of Art. 10 of the current edition of the Bankruptcy Law, a bankruptcy procedure is initiated by the Commercial Court if the indisputable claims of the creditor (creditors) to the debtor together constitute not less than three hundred minimum wages that were not satisfied by the debtor within three months after the deadline set for their repayment, unless otherwise stipulated by the Law. In fact, this provision does not prohibit the debtor to apply to the Commercial Court to become bankrupt if there are signs of his insolvency.

This opinion is also proven by a system analysis of the norms of Art. 11 of the Bankruptcy Law. Thus, according to Part 1 of Art. 11 of the Bankruptcy Law, a bankruptcy application should be submitted in writing by the debtor or the creditor and should include, in particular, description of the circumstances that are the basis for applying to the court. According to Part 2 of Art. 11 of the Bankruptcy Law, a bankruptcy application package, in particular, should include except the application the annexed documents testifying that the amount of indisputable claims of the creditor (creditors) to the debtor together constitute not less than three hundred minimum wages, unless otherwise stipulated by the Law; the document about coming into force of the court decision on satisfying the claims of the creditor; the corresponding decision of the state executive service on the opening of enforcement proceedings to fulfill the creditor's claims, etc. At the same time, this norm does not specify that it is to the creditor's application for initiating a bankruptcy procedure that the indicated proofs of insolvency are added. Part 3 of Art. 11 of the Bankruptcy Act, as a matter of fact, implies that other documents confirming the debtor's insolvency are attached to the debtor's application. Consequently, these, at first glance, harmless shortcomings of the legal technology actually create the basis for possible abuses by unscrupulous debtors and the creation of disruptive judicial practices [5; 10].

CONCLUSIONS

Thus, despite the gradual improvement of procedural rules, the current Law "On Restoring Debtor Solvency or Declaring a Debtor Bankrupt" does not sufficiently meet the purpose of state regulation in the field of insolvency of business entities – the irreversibility of debt recovery by using methods that contribute to the growth of sustainability and efficiency of the economy and do not harm the state interests. All shortcomings of

the procedural nature can be broken down into the following main groups: balance of interests in favor of the debtor; liquidation of a business prevails over its recovery; an increase in the number of fraudulent bankruptcies. The prospects for further research are to justify the directions for solving the identified problems. ■

LITERATURE

1. Берест М. М. Статистичний аналіз процесів банкрутства в Україні. *Бізнес Інформ*. 2012. № 6. С. 89–92.

2. Закон України «Про відновлення платоспроможності боржника або визнання його банкрутом» від 14.05.1992 р. (у редакції від 3 липня 2014 р.) № 2343-XII. URL: http://zakon5.rada.gov.ua/laws/show/2343-12

3. Господарський кодекс України від 16.01.2003 р. № 436-IV (зі змінами і доповненнями). URL: http://zakon0.rada.gov.ua/laws/show/436-15

4. Пригуза П. Д., Пригуза А. П. Науково-практичний коментар до Закону України «Про відновлення платоспроможності боржника або визнання його банкрутом» у редакції від 18 січня 2013 року (доктринальне тлумачення норм права неплатоспроможності та статей 1-21). Херсон : Видавництво «ТДС», 2013. 304 с.

5. Смолов К. В. Загальна характеристика неплатоспроможності як юридичного складу, що обумовлює виникнення відносин неспроможності. *Санація та банкрутство*. 2014. № 2. С. 119–124.

6. Поляков Б. М. Науково-практичний коментар до Закону України «Про відновлення платоспроможності боржника або визнання його банкрутом» в редакції від 22 грудня 2011 р. № 4212-VI. *Санація та банкрутство*. 2012. № 2. С. 148–152.

7. Науково-практичний коментар Закону України «Про відновлення платоспроможності боржника або визнання його банкрутом» / Д. В. Журавльов, С. В. Пєтков, Ю. В. Скакун та ін. К. : Центр учбовоїлітератури, 2017. 352 с.

8. Проніна В. Поняття та ознаки банкрутства. *Вісник податкової служби України*. 2009. № 37-38. С. 24–26.

9. Бахарєв Б. О. Деякі проблеми практики застосування Закону України «Про відновлення платоспроможності боржника або визнання його банкрутом». *Санація та банкрутство*. 2014. № 1. С. 116–117.

10. Брінь В. С. Підвищення обґрунтованості нормативних термінів провадження санаційної та ліквідаційної процедур банкрутства підприємств. *Санація та банкрутство*. 2014. № 1. С. 136–141.

REFERENCES

Bakhariev, B. O. "Deiaki problemy praktyky zastosuvannia Zakonu Ukrainy «Pro vidnovlennia platospromozhnosti borzhnyka abo vyznannia ioho bankrutom»" [Some problems of the practice of applying the Law of Ukraine "On restoring the debtor's solvency or recognizing it as a bankrupt"]. *Sanatsiia ta bankrutstvo*, no. 1 (2014): 116-117.

Berest, M. M. "Statystychnyi analiz protsesiv bankrutstva v Ukraini" [Statistical analysis of bankruptcy processes in Ukraine]. *Biznes Inform,* no. 6 (2012): 89-92.

Brin, V. S. "Pidvyshchennia obgruntovanosti normatyvnykh terminiv provadzhennia sanatsiinoi ta likvidatsiinoi protsedur bankrutstva pidpryiemstv" [Increasing the validity of normative terms for the conduct of sanation and liquidation procedures of bankruptcy of enterprises]. *Sanatsiia ta bankrutstvo*, no. 1 (2014): 136-141.

[Legal Act of Ukraine] (1992). http://zakon5.rada.gov.ua/laws/show/2343-12

[Legal Act of Ukraine] (2003). http://zakon0.rada.gov.ua/laws/show/436-15

Poliakov, B. M. "Naukovo-praktychnyi komentar do Zakonu Ukrainy «Pro vidnovlennia platospromozhnosti borzhnyka abo vyznannia ioho bankrutom» v redaktsii vid 22 hrudnia 2011 r. no. 4212-VI" [Scientific and Practical Commentary to the Law of Ukraine "On the Restoration of the Debtor's Solvency or Recognition as a Bankrupt" in the wording of December 22, 2011 no. 4212-VI]. *Sanatsiia ta bankrutstvo,* no. 2 (2012): 148-152.

Pronina, V. "Poniattia ta oznaky bankrutstva" [Concepts and signs of bankruptcy]. *Visnyk podatkovoi sluzhby Ukrainy*, no. 37-38 (2009): 24-26.

Pryhuza, P. D., and Pryhuza, A. P. *Naukovo-praktychnyi komentar do Zakonu Ukrainy «Pro vidnovlennia platospromozhnosti borzhnyka abo vyznannia ioho bankrutom» u redaktsii vid 18 sichnia 2013 roku (doktrynalne tlumachennia norm prava neplatospromozhnosti ta statei 1-21)* [Scientific and practical commentary on the Law of Ukraine "On the Restoration of the Debtor's Solvency or Recognition as a Bankrupt" in the wording of January 18, 2013 (doctrinal interpretation of the rules of insolvency law and Articles 1-21)]. Kherson: Vyd-vo «TDS», 2013.

Smolov, K. V. "Zahalna kharakterystyka neplatospromozhnosti yak iurydychnoho skladu, shcho obumovliuie vynyknennia vidnosyn nespromozhnosti" [General characteristics of insolvency as a legal structure, which causes the emergence of relations of insolvency]. *Sanatsiia ta bankrutstvo*, no. 2 (2014): 119-124.

Zhuravlyov, D. V. et al. *Naukovo-praktychnyi komentar Zakonu Ukrainy «Pro vidnovlennia platospromozhnosti borzhnyka abo vyznannia ioho bankrutom»* [Scientific and practical commentary on the Law of Ukraine "On restoring the debtor's solvency or recognizing it as a bankrupt"]. Kyiv: Tsentr uchbovoi literatury, 2017.