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BAN ON HOLDING POSTS IN VIETNAMESE LAW ON BANKRUPTCY- SHORTCOMINGS AND RECOMMENDATIONS FOR IMPROVEMENT

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ABSTRACT

Objective: This study aims to improve the provisions of the ban on holding posts in the Vietnamese Law on Bankruptcy. It identifies gaps in the current law, focusing on areas where it is unclear, incomplete, or outdated, and proposes amendments to enhance the law's effectiveness and feasibility.

Methods: The research employs gap analysis, legal review, and comparative law analysis to examine the provisions of the Vietnamese Law on Bankruptcy. Key legal documents such as the Law on Enterprises and Law on Cooperatives were also analyzed. The study compares Vietnamese law with bankruptcy laws in other countries, including France and Belgium, to highlight best practices and potential improvements.

Results: The study reveals significant gaps in the current Vietnamese Law on Bankruptcy, particularly regarding the ban on holding managerial posts after bankruptcy. The provisions are inconsistent with related laws, such as the Law on Enterprises, and lack clarity, making them difficult to implement. The study proposes amendments to Articles 5, 18, 28, 48, 60, and 130 of the Law on Bankruptcy and suggests specific changes to Clause 11 of Article 4 of the Law on Enterprises.

Contribution: This research provides insights into the inadequacies of the Vietnamese Law on Bankruptcy and offers recommendations for improving the law's clarity and applicability. It highlights the need for clearer guidelines on banning individuals from holding managerial positions post-bankruptcy and aligning these provisions with other Vietnamese legal frameworks.

Conclusion: The study concludes that amending the Vietnamese Law on Bankruptcy is crucial for its effective application. By addressing the gaps in the law and aligning it with related legal frameworks, the proposed amendments can improve legal certainty and ensure a more consistent and fair application of bankruptcy laws in Vietnam.

Keywords: Law on Bankruptcy. Declaration of bankruptcy. Ban on holding posts. Enterprises. Cooperatives.

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PROIBIÇÃO DE OCUPAR CARGOS NA LEI VIETNAMITA SOBRE FALÊNCIAS - DEFICIÊNCIAS E RECOMENDAÇÕES PARA MELHORIAS

RESUMO

Objetivo: Este estudo visa melhorar as disposições da proibição de ocupar cargos na Lei de Falências do Vietnã. Ele identifica lacunas na lei atual, focando em áreas onde a lei é confusa, incompleta ou desatualizada, e propõe emendas para aprimorar sua eficácia e viabilidade.

Métodos: A pesquisa utiliza análise de lacunas, revisão jurídica e análise comparativa do direito para examinar as disposições da Lei de Falências do Vietnã. Documentos legais importantes, como a Lei das Empresas e a Lei das Cooperativas, também foram analisados. O estudo compara a lei vietnamita com as leis de falências de outros países, incluindo França e Bélgica, para destacar boas práticas e possíveis melhorias.

Resultados: O estudo revela lacunas significativas na Lei de Falências do Vietnã, particularmente em relação à proibição de ocupar cargos de gestão após a falência. As disposições são inconsistentes com leis relacionadas, como a Lei das Empresas, e carecem de clareza, dificultando sua aplicação. O estudo propõe emendas aos Artigos 5, 18, 28, 48, 60 e 130 da Lei de Falências e sugere alterações específicas na Cláusula 11 do Artigo 4 da Lei das Empresas.

Contribuição: Esta pesquisa oferece insights sobre as deficiências da Lei de Falências do Vietnã e apresenta recomendações para melhorar a clareza e a aplicabilidade da lei. Destaca a necessidade de diretrizes mais claras sobre a proibição de indivíduos ocuparem cargos de gestão após a falência e o alinhamento dessas disposições com outros marcos jurídicos vietnamitas.

Conclusão: O estudo conclui que emendar a Lei de Falências do Vietnã é crucial para sua aplicação eficaz. Ao abordar as lacunas na lei e alinhá-la com outros marcos jurídicos, as emendas propostas podem melhorar a certeza jurídica e garantir uma aplicação mais consistente e justa das leis de falência no Vietnã.

Palavras-chave: Lei de Falências. Proibição de ocupar cargos. Empresas. Cooperativas. Emendas legais.

1. INTRODUCTION

In the period of economic fluctuations due to the impact of the COVID-19 pandemic in recent years, plus the complicated domestic and foreign economic situation, many businesses may fall into bankruptcy (Hung and Binh, 2021; Campbell,

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2023). The Law on Bankruptcy 2014 has been applied, and in fact, the court has declared bankruptcy for many businesses (Kaneko, 2022). Vietnamese Law on Bankruptcy, 2014provides cases of the ban on holding certain managerial posts after enterprises and cooperatives are declared bankrupt. The Law applies to enterprises, cooperatives, and cooperative unions. When these economic organizations are declared bankrupt by the court, the managers or representatives of the capital holding may be considered by the court for a permanent ban on holding posts, establishing or managing enterprises or cooperatives for three years. In particular, unless the enterprise or cooperative goes bankrupt due to force majeure, the following persons are banned from holding posts after the enterprise or cooperative is declared bankrupt:

"1. Any President, General Director, Director, or member of the Board of Directors of a 100% state-owned enterprise declared bankrupt shall not hold such a post in any other state-owned enterprise after such a declaration of bankruptcy; 2. Any representative of the capital holding of the State in a State-invested enterprise that is declared bankrupt shall not hold the managerial post in any other State-invested enterprise; 3. If any manager of the enterprise declared bankrupt intentionally commits violations against Clause 1 Article 18, Clause 5 Article 28, and Clause 1 Article 48 of this Law, the Judge shall consider and give a Decision on banning from establishing any enterprise or cooperative and working as manager of any enterprise or cooperative within three years from the day on which the People's Court issues the Decision on declaration of bankruptcy."

The above-mentioned provisions are also included in the list of individuals who are not entitled to establish and manage an enterprise in Vietnam under the Law on Enterprises 2020[1]. However, the aforementioned ban on holding posts and establishing and managing enterprises is no longer suitable for the development of the law of Vietnam, or no detailed guidance document has been promulgated, resulting in many difficulties in their application to practice. However, these provisions show many shortcomings, including the inconsistency between relevant laws and differences in practice, leading to an unfeasible application. Therefore, the current study seeks to amend and supplement the provisions related to the ban on holding posts in the Law on Bankruptcy to aim for consistency in their application among Vietnamese legal documents and feasibility.

[1]Clause 2, Article 153 of the Law on Enterprises 2020

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2. THEORETICAL FRAMEWORK

The Vietnamese Law on Bankruptcy has evolved significantly, particularly through amendments from the 2004 to the 2014 version, aiming to create a more efficient and debtor-friendly framework. The transition reflects a shift from creditor-focused provisions to a more balanced approach that includes debtor protections and greater clarity in insolvency procedures. This theoretical framework draws from comparative legal systems, particularly the French civil law tradition, which has influenced Vietnam's legal structure. The 2014 law incorporates international best practices, such as personal liability for delays and clear provisions regarding the involvement of credit institutions in bankruptcy. However, despite these advancements, gaps remain, especially concerning the ban on holding managerial positions post-bankruptcy. This framework underlines the need to align legal provisions with modern economic realities and proposes amendments based on these identified deficiencies, grounded in socio-legal theory and public policy.

3. METHODOLOGY

The current study adopted a gap analysis approach because it provides a framework for the development and evaluation of complex interventions encountered when reviewing a Law (Skivington et al., 2021). A gap analysis was conducted on the Vietnamese Law on Bankruptcy, focusing on identifying areas where the law is unclear, incomplete, or outdated, hence necessitating amendments. Furthermore, the study incorporated the aspects of legal review, statutory interpretation and law and policy analysis to be able to present a detailed and well-structured proposed amendments for the Law on Bankruptcy. Briefly, the legal review outlined the purpose of proposed amendments. The statutory interpretation analyzed the intent of the Law on Bankruptcy as a basis for the need for bankruptcy. Finally, the law and policy analysis amplified the impact of the Law on Bankruptcy in Vietnamese society, hence the proposition for amendments.

4. DATA COLLECTION PROCEDURES

The study conducted a gap analysis of the entire Vietnamese Law on Bankruptcy and flagged out clauses and articles of the law that fell short of subsequent analyses,

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such as legal review, statutory interpretation, and law and policy review. A general comparison was also made with the French and Belgian laws on Bankruptcy, considering the fact that international influence from France (French civil Law) significantly influenced many aspects of the Vietnamese Law on Bankruptcy. Similarly, a general comparison was made between the law and the other interlinked laws, such as the Vietnamese Law on Enterprises promulgated in 2005 and later amended in 2020. This is because the law of bankruptcy has been influenced by domestic development in Vietnam, especially socialist legal principles in relation to current developments. Finally, arguments proposing amendments were made based on the funding from case studies in published literature not earlier than 2004 since the first Vietnamese Law on Bankruptcy was enacted in 2004.

5. RESULTS AND DISCUSSION

5.1 Gaps on the ban on holding posts in Vietnamese Law on Bankruptcy 2014

The ban on holding posts after enterprises and cooperatives are declared bankrupt under the Law on Bankruptcy 2014 is one of the cases of "*not entitled to establish and manage enterprises in Vietnam*" under the Law on Enterprises 2020. However, compared to the Enterprise Law 2020 and the Law on Cooperatives 2023, the cases of the ban on holding posts in the Law on Bankruptcy 2014 are still inadequate and inconsistent.

4.1.1 Cases of the ban on holding posts when a state-owned or state-invested enterprise is declared bankrupt

First, any manager is banned from holding managerial posts when a 100% state-owned enterprise is declared bankrupt.*Clause 1, Article 130 of the Law on Bankruptcy 2014 stipulates: "Any President, General Director, Director, or member of the Board of Directors of a 100% state-owned enterprise declared bankrupt shall not hold such a post in any other state-owned enterprise after such a declaration of bankruptcy."*

At the time the new Vietnamese Law on Bankruptcy was promulgated in 2014, the Law on Enterprises 2005 was still in effect.[2] Accordingly, in Clause 22, Article 4 of

[2]The Law on Bankruptcy 2014, effective from January 1, 2015; the Law on Enterprises 2014, effective from July 1, 2025.

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the Law on Enterprises 2005, "*State-owned enterprise means an enterprise of which over 50% of charter capital is owned by the State*." Thus, it means, a person holding the posts of President, General Director, Director, or member of the Board of Directors of a 100% state-owned enterprise declared bankrupt shall not hold such a post in any other state-owned enterprise (with more than 50% of its charter capital owned by the State) after such a declaration of bankruptcy.However, under the Law on Enterprises 2014, a state-owned enterprise means an enterprise with 100% capital held by the State. According to Clause 1, Article 130 of the Law on Bankruptcy 2014, any President, General Director, Director, or member of the Board of Directors of a 100% state-owned enterprise declared bankrupt shall not hold such a post in any other 100% state-owned enterprise after such a declaration of bankruptcy.

Meanwhile, state-owned enterprises are specified in the Law on Enterprises 2020. According to Clause 11, Article 4 of the Law on Enterprises 2020, a state-owned enterprise "*means an enterprise more than 50% charter capital or voting shares of which is held by the State as prescribed in Article 88 of this Law*." This provision is based on the Law on Enterprises 2005, which was in effect when the Law on Bankruptcy was promulgated later in 2014 and came into effect. Thus, it should be clarified appropriately if, for state-owned enterprises with more than 50% (less than 100%) charter capital or voting shares held by the State declared bankrupt, the managers are banned from holding such posts in other state-owned enterprises after such a declaration of bankruptcy. Therefore, the Law on Bankruptcy 2014 should be amended and supplemented more specifically.

4.1.2 Any representative of the capital holding of the State in a State-invested enterprise shall not hold the managerial posts in any other State-invested enterprise when the state-invested enterprise is declared bankrupt

Clause 2, Article 130 of the Law on Bankruptcy 2014 stipulates: *"Any representative of the capital holding of the State in a State-invested enterprise that is declared bankrupt shall not hold the managerial post in any other State-invested enterprise."* A state-invested enterprise under the Law on Bankruptcy 2014 is a state-owned enterprise with less than 50% contributed capital or shares held by the State under the Law on Enterprises 2005. However, the Law on Bankruptcy 2014 defines a state-owned enterprise as an enterprise with less than 100% contributed capital or

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shares held by the State. According to the Law on Enterprises 2020, a state-invested enterprise is an enterprise with less than 50% shares or contributed capital held by the State. It can be appropriately understood that Clause 2, Article 130 of the Law on Bankruptcy 2014 refers to a state-invested enterprise as an enterprise with less than 50% shares or contributed capital held by the State. For clarification, this provision should also be specifically amended to avoid different interpretations.

Another shortcoming of this law (Law on Bankruptcy) is that a person acting as a representative of the capital holding of the State in a State-invested enterprise that is declared bankrupt shall not hold the managerial post in any other State-invested enterprise. Should it be assumed that a representative of the capital holding of the State and a person holding a managerial post the same? The main responsibility for bankruptcy lies with the management apparatus. To what extent does the Vietnamese Law on Bankruptcy imply a potential gap by disqualifying a representative from managerial positions in other state-owned enterprises upon bankruptcy, without specifying the level of their involvement in the failing enterprise's management?

A representative of the capital holding is defined in Clause 1, Article 3 of Decree 106/2015/ND-CP as "*A representative means a person who is appointed by a state capital owner to represent partial or entire state capital invested in a group, corporation, or company and performs all or some rights, responsibilities, and obligations of the state shareholder or capital-contributing member in that group, corporation or company under the law*." According to this provision, a representative exhibits different levels of participation in management in certain enterprises and does not necessarily act as a manager. Therefore, the provision that "*Any representative of the capital holding of the State in a State-invested enterprise that is declared bankrupt shall not hold the managerial post in any other State-invested enterprise"* remains subjective, irrelevant , and unfair to a representative as defined in Clause 1, Article 3 of Decree 106/2015/ND-CP. A study by Chu (2023) revealed that despite having major changes on the dynamics of the state-owned enterprises, the public ownership aspect continues to guide the economic development in Vietnam. Having such dynamics as explained by Chu (2023) necessitates the need to amend the Vietnamese Law on Bankruptcy to conform to the economic flexibility.

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5.2 Recommendations for improvement on Vietnamese Law on Bankruptcy 2014

Sufficient amendments to the Vietnamese Lae on Bankruptcy are important because economic balance would be restored, court efficiencies would be enhanced due to clarity and specificity, second chances would be embraced for restoration and crucial concerns from both the public and the international entities would be addressed (Vuving, 2019; Nguyen, 2020; Hai et al., 2022).

4.2.1 Recommendations for improvement on the ban on holding posts in Vietnamese Law on Bankruptcy 2014

Due to the above shortcomings, Vietnamese Law on Bankruptcy should be specifically amended and supplemented. In particular,

- Clarify that a state-owned enterprise is an enterprise with more than 50% shares or contributed capital held by the State, while a state-invested enterprise is an enterprise with less than 50% shares or contributed capital held by the State. These amendments would facilitate consistency in understanding and applying the law to make decisions in any bankruptcy case.

- Consider the term of the ban on holding posts. Clause 1, Article 130 of the Law on Bankruptcy 2014 stipulates that the person "*shall not hold such a post in any other state-owned enterprise after such a declaration of bankruptcy*" without mentioning the term of the ban. As a result, such a provision may be construed as a permanent ban. However, it seems extremely strict to permanently ban a President, General Director, Director, or member of the Board of Management of an enterprise declared bankrupt from holding such a post. A person may not exhibit leadership and management at a certain time, but he or she can completely change and show more effective leadership and management by learning from mistakes and failures.

- There is need for a detailed legislative review of the provision that "*Any representative of the capital holding of the State in a State-invested enterprise that is declared bankrupt shall not hold the managerial post in any other State-invested enterprise*." The purpose of the review ought to specify the recommended duration of the ban of the representative. In particular, Article 130 of the 2014 Law on Bankruptcy could be amended and supplemented as follows:

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"1. *Any President, General Director, Director, or member of the Board of Directors of a state-owned enterprise declared bankrupt shall not hold such a post in any other state-owned enterprise for 3–10 years after such a declaration of bankruptcy*.

2. *Any representative of the capital holding of the State in a State-invested enterprise that is declared bankrupt shall not be such a representative in any other State-invested enterprise for 3–10 years after such a declaration of bankruptcy*."

The above proposed amendments provides insight on the specification of the term of the ban due to bankruptcy which sets clear expectations during bankruptcy cases in Vietnam.

5.2.1. Cases of the ban on establishing and managing enterprises because the managers violate some provisions of the Law on Bankruptcy

Clause 3 Article 130 of the Vietnamese Law on Bankruptcy 2014 provides that "*If any manager of the enterprise declared bankrupt intentionally commits violations against Clause 1 Article 18, Clause 5 Article 28, and Clause 1 Article 48 of this Law,* [3]*the Judge shall consider and give a Decision on banning from establishing any enterprise or cooperative and working as the manager of any enterprise or cooperative within three years from the day on which the People's Court issues the Decision on declaration of bankruptcy*." According to the Law on Enterprises 2020, the manager of an enterprise means *"the manager of a sole proprietorship and the manager of a company, including the owner of a sole proprietorship, a general partner of a partnership, the President or member of the Members' Council, the President of a company, the President or member of the Board of Directors, the Director, the General*

[3]Clause 1, Article 18 of the Law on Law on Bankruptcy 2014: Comply with the requests of the Judge, the asset management officers, the asset management and liquidation enterprises and civil execution authorities under the Law on Bankruptcy.
Clause 5, Article 28: If the entities prescribed in Clause 3 and Clause 4, Article 5 of this Law do not file a request for the initiation of the bankruptcy process in the event of the insolvency of the enterprise or the cooperative, they shall take the liability before the Law. Compensation shall be paid if there is any damage caused by the failure to request the initiation of the bankruptcy process after the insolvency of the enterprise or the cooperative.
Clause 1, Article 48: After the Decision on the initiation of bankruptcy is made, the insolvent entity is prohibited from: a) Dispersing and hiding assets; b) Paying the unsecured debts, except the unsecured debts incurred after the initiation of the bankruptcy process and the employees' salaries prescribed in Point c Clause 1 Article 49 of this Law. c) Renouncing the right over debt claim; d) Making an unsecured debt into a secured or partly-secured debt with assets of the entity.

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Director, or a person holding other managerial posts prescribed in the Company's Charter." The Law on Cooperatives 2023 does not define a manager of a cooperative.

With the above-mentioned provisions, the application of the law faces difficulties and inadequacies. Specifically, three violations committed by managers cause them to be banned from establishing and managing enterprises and cooperatives for three years.

4.1.5 The first violation: Managers of enterprises or cooperatives violate the provisions of Clause 1 of Article 18 of the Law on Bankruptcy

Clause 1 of Article 18 of the Law on Bankruptcy stipulates the rights and obligations of participants in bankruptcy procedures. Accordingly, participants in bankruptcy procedures are obliged to *"comply with the requirements of the Judges, the Liquidators, the enterprises managing and liquidating assets, and the civil judgment enforcement agencies under the law on bankruptcy"*. Specifically, Article 18 above stipulates that participants in bankruptcy procedures must comply with the following requirements of the Judges, liquidators, enterprises managing and liquidating assets, and civil judgment enforcement agencies: a) Must be present at the request of the liquidators, enterprises managing and liquidating assets, subpoenas of the People's Courts and abide by the decisions of the People's Courts in the bankruptcy settlement; b) Participate in the management and liquidation of assets at the request of the Judges, civil judgment enforcement agencies, Liquidators, enterprises managing and liquidating assets.

However, the Law on Bankruptcy 2014 lists participants in bankruptcy procedures, including: *"Creditors; employees; insolvent enterprises and cooperatives; shareholders, groups of shareholders; members of cooperatives or member cooperatives of the cooperative union; debtors of enterprises, cooperatives, and others with related interests and obligations in the process of bankruptcy settlement"*[4].

Thus, the managers of the enterprises and cooperatives are not the participants in bankruptcy procedures but are only the legal representatives of the participants in bankruptcy procedures (representing insolvent enterprises or cooperatives). In other words, if the managers of enterprises or cooperatives violate the provisions of Clause 1 of Article 18 of the Law on Bankruptcy, they violate the obligation to represent an enterprise or cooperative in case of not being present or not participating in the above-

[4] Clause 10, Article 4 of the Law on Bankruptcy 2014

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mentioned bankruptcy procedures at the request of the Judge, Liquidator, enterprise managing and liquidating assets, and civil judgment enforcement agency.

Based on the above-mentioned provisions, the managers cannot directly violate Clause 1 of Article 18 of the Law on Bankruptcy. They can only violate the obligation to legally represent the participants in bankruptcy procedures as insolvent enterprises or cooperatives. Moreover, they only intentionally violate the legal representative obligation of the enterprise or cooperative in performing the obligations of the participants in bankruptcy procedures. However, the law bans them from being a member or founding shareholder of a new enterprise or cooperative, even if they do not hold a managerial post in the new enterprise or cooperative. It is necessary to consider this violation whether it leads to any consequences or not. For example, does the failure to *"fulfill the request of the Judge, liquidator, enterprise managing and liquidating assets, and the civil judgment enforcement agency under the law on bankruptcy"* lead to the inability of the Judge to resolve the bankruptcy case or not? Can liquidators and enterprises managing and liquidating assets not perform asset management responsibilities? Or can the civil judgment enforcement agency not enforce the decision on bankruptcy? It is important to admit the issue more lightly, that their absence is a waiver of their rights and obligations related to the procedures performed by the judge, liquidator, enterprises managing and liquidating assets, or judgment enforcement agencies. In the procedures of settlement of civil, administrative, or labor matters, it is only determined that if the involved parties do not comply with the request of the procedure-conducting agency, they waive their rights and accept the opinions of the other party but do not have sanctions for these acts.

The denial of these people the right to establish enterprises and cooperatives and act as managers of enterprises and cooperatives within three years from the date the People's Court issues a decision to declare bankruptcy also affects the economy, limiting their investment to the economy. Meanwhile, there are still milder and more effective forms of sanctions.

5.2.2 Recommendations for improvement on ban on establishing and managing enterprises because the managers violate some provisions of the Law on Bankruptcy 2014.

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In the laws of some countries, enterprise managers are only banned from managing and operating enterprises, but not the right to establish enterprises. For example, neither French law nor Belgian law bans the establishment of an enterprise. Depending on the severity of the violation, it will ban the holding of managerial posts in different extension durations. Therefore, the Vietnamese Law on Bankruptcy should not ban the establishment of enterprises or cooperatives for a person who only violates their management obligations. In other words, people who violate obligations as managers should only be banned from holding managerial posts in new enterprises and cooperatives, not from being members or founding shareholders if they do not hold managerial posts in new enterprises and cooperatives. For example, if they only participate in founding a new enterprise as a limited partner in a partnership or a common shareholder in a joint-stock company without participating in the managerial post of the company, they should not be banned from it.

Specifically, Clause 3 of Article 130 of the Law on Bankruptcy 2014 should separate violations of managers of enterprises and cooperatives to suit the content and nature of the violation, serving as a basis for banning the holding of posts in other enterprises and cooperatives. They should only be banned from holding managerial posts within a certain term when they violate the obligations of a manager in the process of carrying out bankruptcy procedures for the enterprise under their management.

From the above discussion, it is found that Clause 3 of Article 130 of the Law on Bankruptcy 2014 should specify as follows:

"If the manager of the enterprise or cooperative declared bankrupt intentionally violates the obligation to represent the enterprise or cooperative, causing the enterprise or cooperative to fail to perform the obligations of the participant in bankruptcy procedures under the provisions of this Law, the Judge shall consider and give a Decision on the ban on working as a manager of any enterprise or cooperative within three years from the day on which People's Court issues the Decision on declaration of bankruptcy".

*4.1.6 The second violation: The manager of the enterprise or cooperative violates the provisions of Clause 5 of Article 28 of the Law on Bankruptcy*Clause 5 of Article 28 of the Law on Bankruptcy 2014 stipulates: *"If people prescribed in Clauses 3 and 4 of Article 5 of the Law do not file the request for initiation of bankruptcy procedures on*

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the situation of insolvency of the enterprise or the cooperative, they shall take the liability before the Law. If any damage arises after the insolvency of an enterprise or cooperative due to the failure to file the request for initiation of bankruptcy procedures on the situation of insolvency of the enterprise or the cooperative, compensation must be made. " Thus, managers of enterprises or cooperatives who intentionally violate Clause 5 of Article 28 are those who are obliged to file the request for initiation of bankruptcy procedures but deliberately fail to fulfill their obligations.

Specifically, when an enterprise or cooperative fails to fulfill its obligation to pay a debt within 3 months from the due date, the enterprise or cooperative is considered insolvent[5]. This is the basis for giving rise to the obligation to file the request for initiation of bankruptcy procedures of the representative under Clause 3 of Article 5 of the Law on Bankruptcy 2014 and other managerial posts of enterprises and cooperatives under Clause 4 of Article 5 of the Law on Bankruptcy 2014. Those who fail to fulfill their obligations to file a request for initiation of bankruptcy procedures shall be banned from establishing or managing enterprises or cooperatives within three years from the date the People's Court issues a decision to declare bankruptcy. This obligation is synonymous with the nature of compulsory bankruptcy for enterprises and cooperatives rather than voluntary bankruptcy, according to the viewpoints of Phuc and Duong (2023).Therefore, it is very important to determine whether there is a violation of the obligation to file a request for initiation of bankruptcy procedures or not to ban them from establishing and managing an enterprise under current provisions.

Clause 3 of Article 130 of the Law on Bankruptcy 2014 only allows the Court to issue a decision on the ban on establishing and working as a manager of any enterprise or cooperative when two conditions are met: The first condition is when enterprises and cooperatives are declared bankrupt. The second one is that the above-mentioned managers violate the obligation to file a request for initiation of bankruptcy procedures. Thus, the problem is that if enterprises and cooperatives are not declared bankrupt because creditors or other persons with rights and obligations do not file a request for bankruptcy procedures, enterprise, and cooperative managers will never be banned from establishing and managing enterprises and cooperatives, even though they have violated the obligation to file a request for initiation of procedures when their enterprises and cooperatives have been insolvent.

[5] Clause 10, Article 4 of the Law on Bankruptcy 2014

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The determination of whether each person holding a managerial post in an enterprise or cooperative intentionally violates the obligation to file a request for initiation of procedures has not yet issued detailed written instructions. According to the provisions of the Law on Enterprises and the Law on Cooperatives, the application for initiation of procedures for enterprises and cooperatives must normally be passed through resolutions or decisions of senior management agencies of enterprises and cooperatives. For example, the Law on Enterprises 2020 assigns the authority to decide the bankruptcy of the company to the Members' Council of a limited liability company with two or more members[6], the Owner of a one-member limited liability company[7], the Board of Directors of a joint-stock company[8], and the Members' Council of a partnership[9]. The Law on Cooperatives 2023 assigns the authority to decide on cooperative bankruptcy to the General Meeting of Members of the cooperative[10]. Therefore, managers in Vietnamese economic organizations have a legal obligation to initiate bankruptcy proceedings when their organization becomes insolvent. This implies that if those who hold managerial posts in these economic organizations do not fulfill the obligation to file a request for initiation of procedures when their economic organization is insolvent, it is understood that they themselves do not actively perform the filing obligation. On the other hand, it could be assumed that they were irresponsible enough not file obligation after having a resolution or decision on the management agency of their economic organization as mentioned in the Law on Cooperatives 2023. One major question that stands out would be if these management agencies do not decide to bankrupt their enterprises and cooperatives, are those who hold the above-mentioned managerial posts required to perform the filing obligation on their own?

For legal representatives, the viewpoint of the authors in the current study is that they must proactively file a request for initiation of bankruptcy procedures when knowing that their economic organizations have become insolvent without waiting for resolutions and decisions of their economic organizations' management agencies. Thus, if the legal representative does not perform this obligation, the court may consider banning the enterprise management for a proposed period of three years. For

[6] Clause 2, Article 55 of the Law on Enterprises 2020.
[7] Clause 2, Article 76 of the Law on Enterprises 2020.
[8] Clause 2, Article 153 of the Law on Enterprises 2020
[9]Clause 3, Article 182 of the Law on Enterprises 2020
[10] Clause 6, Article 64 and Clause 6, Article 70 of the Law on Cooperatives 2023

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other managers who are heads of management agencies of enterprises and cooperatives, it is only a violation of the obligation to file a request for initiation of procedures when they deliberately fail to file a request after having resolutions or decisions on the bankruptcy of enterprises and cooperatives that they managed. By inference, when the management agencies of types of enterprises and cooperatives decide to bankrupt their enterprises and cooperatives under the Law on Enterprises, the heads of those management agencies must sign and file a request for initiation of procedures for their enterprises and cooperatives under Clause 4 of Article 5 of the Law on Bankruptcy.

For cooperatives, the Law on Bankruptcy does not specify the obligations of any manager in filing a request for initiation of bankruptcy procedures for cooperatives when the General Meeting of Members makes a decision. Therefore, Clause 4 of Article 5 of the Law on Bankruptcy also needs to supplement the obligations of the manager of the cooperative in filing a request for initiation of bankruptcy procedures as a basis for determining violations to apply the ban on the establishment of enterprises and cooperatives within three years as currently prescribed. Meanwhile, according to the Law on Cooperatives 2023, cooperatives can organize the management in the full structure (with a Board of Directors) or in the simplified management structure (without a Board of Directors). In other words, if the cooperative is organized in a simplified structure, it only includes the General Meeting of Members, Directors, and Supervisors. Thus, when the cooperative is organized in a simplified structure, and the General Meeting of Members decides to bankrupt the cooperative, who will be obligated to sign and submit a petition to the court to request the initiation of bankruptcy procedures? The Law on Cooperatives 2023 does not require the Chairman of the Board of Management or the director of the cooperative to be the legal representative. In other words, if the legal representative of the cooperative is not the Chairperson of the Board of Management (according to the full management structure) or is not the Director (according to the simplified structure), the obligation to file a request for initiation of bankruptcy procedures upon the decision of the General Meeting of Members shall belong to the legal representative.

At the same time, insolvent enterprises or cooperatives should be considered and issued a decision or resolution by the enterprise management agency. In that case, one of the managers shall exercise the right to file a request for initiation of bankruptcy

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procedures. However, suppose what would happen if no manager convenes a meeting of the management board or request to hold a meeting of the management board to decide whether to file a request for initiation of bankruptcy procedures. In that case, all managers ought to bear the judgment of the ban on holding managerial posts when the enterprise or cooperative is declared bankrupt. Those who can prove that they convened or requested to convene a meeting of the management board of enterprises or cooperatives to decide this issue but fail or are not accepted shall be excluded from liability due to failure to file a request for initiation of procedures when the Court declares bankruptcy of the enterprise they manage.

The opening of bankruptcy procedures in countries like, The United States of America (US), France and Japan places a heavy burden on the owners and managers of insolvent enterprises rather than the obligations of the right holders. Failure to fulfill the obligation to declare bankruptcy puts the business owners and managers in a situation where they shall face serious legal consequences, including criminal liability. However, in case the petitioner is a creditor, and the court does not accept the request to declare bankruptcy for the enterprise or cooperative, it is necessary to exclude the responsibility of the manager who is obliged to file. It is because, in this case, the enterprise obviously does not really need to be declared bankrupt. In fact, the Law on Bankruptcy's of the US, France, and Japan all prioritize restoring operations for the business rather than declaring bankruptcy. Therefore, the determination of the deadline for late payment of obligations due in 3 months for the managers to file for the opening of bankruptcy procedures is too short. In fact, many enterprises and cooperatives are late in payment. They are even sued by the competent party to request payment of debts when it is not possible to determine their bankruptcy. Therefore, it is necessary to remove this bottleneck for the business managers who are responsible for filing a petition to open a bankruptcy proceeding by extending the payment delay.

5.2.3 Recommendations for improvement on provisions of Clause 5 of Article 28 of the Law on Bankruptcy 2014

For clarity in determining the obligation to file petitions for opening bankruptcy procedures of managers and the development of a basis for the sanction application

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against the establishment and management of enterprises and cooperatives, Clauses 3 and 4, Article 5 of the Law on Bankruptcy should be amended and supplemented specifically and clearly as follows: When enterprises or cooperatives are insolvent, the following persons are obliged to file petitions for opening bankruptcy procedures:

" 3. Legal representatives of enterprises and cooperatives are obliged to file petitions for opening bankruptcy procedures unless it is under the obligations of other managers in accordance with Clause 4 of this Article.

4. The Chairperson of the Board of Directors of a joint-stock company, the Chairperson of the Members' Council of a multi-member limited liability company, the Chairperson of the Company or the Chairperson of the Members' Council of a one-member limited liability company, the Chairperson of the Members' Council of a partnership, the Chairperson of the Board of Directors of a cooperative under the full governance model, the Director of a cooperative under the simplified governance model shall be obliged to file a petition for the opening of bankruptcy procedures when the management agencies of the enterprise or cooperative decide on the bankruptcy of the enterprise or cooperative as prescribed by the Law on Enterprises and the Law on Cooperatives."

If there is a clear delineation of the obligation to file a petition for the opening of a bankruptcy proceeding, it will be clearer to determine the violation of the filing obligation for each manager. As a result, the court will easily apply the applicable sanction of a ban on holding posts as prescribed.

In addition, as per the above recommendation, when a manager violates the obligation to file a petition for opening bankruptcy procedures, such violation is made by the manager of an enterprise or cooperative. Therefore, as well as the laws of countries like France and Belgium as explained by an article published by Easyactes, the Vietnamese Law on Bankruptcy should only ban such a person from managing enterprises and cooperatives instead of establishing enterprises and cooperatives. Due to the ban on the establishment of enterprises and cooperatives, such persons may not voluntarily file and cooperate in the process of resolving bankruptcy procedures in case of insolvency, causing negative impacts on the economy (Quynh, 2013).

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Therefore, Clause 3, Article 130 of the Law on Bankruptcy 2014 should also be amended and supplemented in more detail for violations by managers of enterprises and cooperatives in filing petitions to open bankruptcy procedures. In particular, it is:

"Those who violate the obligation to file a petition for opening bankruptcy procedures as prescribed in Clauses 3 and 4, Article 5 of this Law shall be considered and decided by the Judge not to be entitled to be the manager of enterprises or cooperatives within three years from the date the People's Court issues a decision to declare bankruptcy."

Also, Clause 1, Article 4 of the Law on Bankruptcy should be amended and supplemented by extending the deadline for late payment of due obligations to six months, specifically as follows:

"*An insolvent enterprise or insolvent cooperative is an enterprise or a cooperative having failed to meet the debt liability for six months from the deadline for repayment.*"

This amendment aims to facilitate the resumption and operation stability of enterprises and cooperatives. When enterprises and cooperatives that are late in fulfilling their payment obligations are still forced by the Court to compensate for damage or pay late interest to creditors, they do not easily benefit from the extension of this application deadline. In fact, enterprises and cooperatives delay in fulfilling their payment obligations for many different reasons, not due to insolvency. Therefore, a three-month period is too short to require the enterprise that is late in repayment to open bankruptcy procedures.

At the same time, it is also necessary to consider the value of the late payment obligation. This obligation must have a certain amount of value, and not all late payment obligations are deemed insolvent. The value of the late payment obligation must be considered based on the value of the enterprise or cooperative at the corresponding time, not imposed according to the subjective will of the legislator. This is because the value may be significant in one reference frame but small in another one. Accordingly, when enterprises and cooperatives are insolvent for the obligations under consideration, i.e., the entity is unable to maintain its operation, this is a condition to determine that the entity is in bankruptcy.

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5.2.4. The third violation: The manager of the enterprise or cooperative violates Clause 1, Article 48 of the Law on Bankruptcy

Clause 1, Article 48 of the 2014 Law on Bankruptcy stipulates: *"After the Decision on the initiation of bankruptcy is made, the insolvent entity is prohibited from: a) Hiding, dispersing, or donating to property; b) Paying unsecured debts, except for unsecured debts incurred after the opening of bankruptcy procedures, and the employees' salaries prescribed in Point c, Clause 1, Article 49 of this Law; c) Renouncing the right over debt claim; d) Transferring unsecured debts into secured or partially secured by assets of the entity."*

The above-mentioned provision prohibits the entity from carrying out activities of an asset dispersal nature after the Court issues a decision to open bankruptcy procedures not manager to carry out these activities. However, Article 130 of the Vietnamese Law on Bankruptcy 2014 identifies the above-mentioned activities for dispersing assets as violations of managers of enterprises and cooperatives as a basis for prohibiting the establishment and management of enterprises. Indeed, it would be difficult for the Court to determine the violation of managers in case the entity violates the above-mentioned prohibited activities. Sometimes, the above-banned activities are carried out due to the decisions of the whole collective (Board of Members, General Meeting of Shareholders, Board of Management, etc.), not an individual decision of the manager.

It is also necessary to discuss more on the time to determine the act of dispersing assets after the opening of bankruptcy procedures by the Court. According to Clause 2, Article 48 of the Law on Bankruptcy, transactions falling under Clause 1 of this Article[11] shall be declared invalid under Article 60 of this Law. However, it is pretty complicated to determine what transactions arise after the Court opens bankruptcy procedures. Many transactions have different signing and effective dates, which complicates the court processes and sets wrong expectations in case of bankruptcy.

[11]Transactions under Clause 1, Article 48 of the Law on Bankruptcy include hiding, dispersing, or donating to property; paying unsecured debts, except for unsecured debts incurred after the opening of bankruptcy procedures, and the employees' salaries prescribed in Point c, Clause 1, Article 49 of this Law; renouncing the right over debt claim; transferring unsecured debts into secured or partially secured by assets of the entity.

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4.2.4 Recommendations for improvement on Clause 1, Article 48 of the Law on Bankruptcy 2014

When provisions on the ban on the establishment and management of the entity are applied in cases where they perform acts prohibited in the Law on Bankruptcy, in principle, the court must base on the role of the manager in decisions for the entity to carry out prohibited activities. For example, French law directly regulates the behavior of individual managers in carrying out activities related to the dispersal of assets as a basis for banning this person's business management (Zapha, 2023).

Therefore, Clause 3, Article 130 of the Law on Bankruptcy 2014 should be amended and supplemented as follows:

"If the holder of an enterprise or cooperative management post is prohibited from holding an enterprise or cooperative management post when he/she violates management obligations in making decisions or directly acts with management power to influence the enterprise or cooperative to carry out activities for the purpose of dispersing prohibited assets as prescribed in Clause 1, Article 48 of this Law, the Judge shall consider and issue a decision not to allow the enterprise or cooperative management post to be held within three years from the date of the decision declaring the enterprise or cooperative bankrupt".

Suppose a person intentionally violates his/her obligations as a manager. In that case, the Law on Bankruptcy should only prohibit him/her from holding managerial posts for a certain term instead of the right to establish (be a member/founding shareholder). The recommendation will be closer to the laws of the countries because the laws of some countries even create an opportunity for the manager of an enterprise with legal entity status that is declared bankrupt to be able to establish a private enterprise even if they previously violated the management obligations leading to the bankruptcy of such enterprise(Zapha, 2023).

Clause 2, Article 48 of the Law on Bankruptcy needs to be amended and supplemented as follows:

"2. Transactions specified in Clause 1 of this Article are invalid and handled according to Article 60 of this Law. The time when a transaction is determined before or after the opening of bankruptcy procedures is determined as the time when the transaction is established.

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6. CONCLUSION

In conclusion, the provisions on the ban on holding posts after the entity is declared bankrupt have not been applied due to inadequacy and vagueness. The provisions on violations of managers as a basis for the court to issue a ban on holding posts are vague. This is because the legal basis cited is that the violations of the insolvent entity are not the violations of the managers in such an entity. In addition, Article 130 of the Law on Bankruptcy 2014 is titled "*The ban on holding posts after entities are declared bankrupt*." Still, the content mainly bans establishing and managing enterprises and cooperatives. The violation of obligations is made under the role of representing or managing the entity. Hence, it is unreasonable to ban the right to establish an enterprise as a member or founding shareholder who does not hold a management post after the bankruptcy. Therefore, Article 130 of the Law on Bankruptcy 2014 should only prohibit enterprise management in accordance with the content of the law, which is "*prohibiting holding posts*", not even the right to establish enterprises of such persons. In addition, the violations of the manager are different in levels and contents, so Clause 3, Article 130 should specify provisions and details of each violation of the manager to serve as a basis for more accurate and reasonable application.

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