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DISQUALIFICATION OF COURT-APPOINTED TRUSTEES AS A KIND OF ADMINISTRATIVE RESPONSIBILITY

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In the article is given a critical analysis of the norms of the Code on Administrative Offences of the RF and law-enforcement practice of arbitration courts of the Russian Federation regarding the application kinds of administrative responsibility to a court-appointed trustee. Takes place the comparison of disqualification of court-appointed trustees with the norms of legislation on bankruptcy about court-appointed trustee's suspension from the duties of a winding up, external, administrative manager of a debtor. Considered problematic issues of applying disqualification to a court-appointed trustee.

Keywords: court-appointed trustee, responsibility of a court-appointed trustee, disqualification, administrative responsibility, bankruptcy.

According to paragraph 8 part 1 article 3.2 of the Code on Administrative Offences of the RF [1] (hereinafter – CAO RF) disqualification is a type of administrative penalties imposed for administrative offenses.

The law stipulates that “disqualification shall consist of depriving a natural person of the right to hold leading positions in an executive administrative body, or to participate in a board of directors (supervisory council), or to be engaged in business as the head of a legal entity, as well as to be engaged in management of a legal entity in other cases provided by the legislation of the Russian Federation” (part 1 article 3.11 CAO RF)

Thus, disqualification is a restriction of the right to work and the right to freely use their abilities and property for entrepreneurial activity.

“Court decision on disqualification prohibits exercising:

- organizational-and-managerial or administrative-and-economic functions in a body of a legal entity;
- powers of a Board of Directors member;
- entrepreneurial activity in managing of a legal entity” (part 3 article 3.11 CAO RF)

According to paragraph 1 article 32.11 CAO RF a decision on disqualification after the entry into force must be executed immediately by the person, held administratively responsible, through terminating management of a legal entity

Article 14.13 CAO RF establishes administrative responsibility for unlawful actions in bankruptcy. Sanction of this article provides penalty to a court appointed trustee in the form of an administrative fine in the amount of from 2,500 RUR to 5,000 RUR or disqualification for a period of six months to three years.

In view of the above, the opinion of Yu. V. Kravchenko, [7] that in respect of a court appointed trustee disqualification can be applied by court for a fictitious or intentional bankruptcy, seems to be erroneous (see article 14.12 CAO RF).

In our opinion, court appointed trustee is not a subject of administrative offence under article 14.12 CAO RF, on the basis of the following.

By virtue of paragraph 4 article 20.3 of the Federal Law No. 127-FL from 26.10.2002 “On Insolvency (Bankruptcy)” [2] (hereinafter – the Law on Bankruptcy) in conducting bankruptcy procedures a court-appointed trustee, approved by arbitral court, is obliged to act in good faith and reasonably in the interests of a debtor, creditors and society.

By implication of the Law on Bankruptcy one of the important objectives of a court appointed trustee is to ensure balance between the interests of creditors and debtor, as well as the realization of their legitimate rights [8].

“The main range of the rights and duties of an insolvency practitioner is defined in article 129 of the Law on Bankruptcy. Paragraph 2 of article 20.3 of the Law on Bankruptcy provides that a court-appointed trustee in a bankruptcy case must identify the signs of intentional and fictitious bankruptcy in accordance with the federal standards, and report about them to the persons participating in the bankruptcy case, to the self-regulatory organization whose member is the court-appointed trustee, to creditors’ meeting and authorities responsible for the initiation of cases on administrative offenses and consideration of information about crimes. The given rule of law is general for all court-appointed

trustees. Resolution of the Government of the Russian Federation No. 855 from 27.12.2004 [3] approves the Temporary rules of check by court-appointed trustees the presence of signs of fictitious and intentional bankruptcy (hereinafter - the Rules). Paragraph 14 of the Rules establishes that by the results of the check a court-appointed trustee shall prepare a report on the presence (absence) the signs of a fictitious and intentional bankruptcy, which is represented to the meeting of creditors, arbitration court, and not later than 10 working days after the signing to the body, whose officials, according to CAO RF, are authorized to draw up reports on administrative offenses provided for by article 14.12 CAO RF for taking the decision to initiate proceedings on the case of an administrative offense (paragraph 15 of the Rules). In accordance with paragraph 11 of the Rules detection of the signs of a fictitious bankruptcy is carried out in the event of the commencement of bankruptcy proceedings upon application by debtor" [6].

Thus, as the subject of an offence provided for in article 14.12 CAO RF may act the head of a debtor or the founder (participant) of a legal entity or an individual entrepreneur".

The current version of the Law on Bankruptcy provides that "a court-appointed trustee is a subject of professional activity and exercises the regulated by this law professional activity by engaging in private practice" (see paragraph 1 article 20 of the Law on Bankruptcy).

The provisions of part 3 of article 14.13 CAO RF establishing responsibility for offenses in the field of entrepreneurial activity are focused on providing the established procedure of bankruptcy, which is an essential condition for economic recovery, as well as for the protection of rights and legitimate interests of owners of organizations, debtors and creditors.

According to part 1 article 3.1 CAO RF "administrative penalty is an established by the state punitive measure for committing an administrative offence, and it shall be applied for the purpose of preventing the commitment of new offences either by the offender himself, or by other persons".

Meanwhile, application of disqualification to court-appointed trustees is not always justified. This is due to the presence in the bankruptcy legislation the institute of removal court-appointed trustees from execution the duties of bankruptcy, external, administrative manager of a debtor.

Grounds for removal a court-appointed trustee from the duties of implementation bankruptcy proceedings are stipulated by article 145 of the Law on Bankruptcy.

According to paragraph 1 article 145 of the Law on Bankruptcy a court-appointed trustee “may be dismissed by the court of arbitration from the duties of a bankruptcy trustee:

1) at the request of the creditors’ meeting (creditors’ committee) in the case of non-performance or improper performance of duties of a bankruptcy trustee;

2) due to satisfaction by the arbitration court of a complaint of a person involved in the bankruptcy case against non-performance or improper performance of bankruptcy trustee duties, provided that such non-performance or improper performance of duties has violated the rights or interests of the complainant, as well as has involved or could result in the losses of a debtor or its creditors;

3) in the case of revealing the circumstances that prevent the approval of a person as bankruptcy trustee, and if such circumstances arise after the approval of a person as bankruptcy trustee”.

Removal of a bankruptcy trustee from its duties is carried out by the arbitration court.

According to the explanations given in paragraph 56 of the Resolution of the Plenum of the Higher Arbitration Court of the Russian Federation No. 35 from 22.06.2012 “On Some Procedural Matters Related to the Bankruptcy Proceedings Consideration” [4], “the removal of a court-appointed trustee at the request of creditors’ meeting or a party participating in a bankruptcy case is due to the fact that the court-appointed trustee is approved for the implementation of bankruptcy procedures and obliged in their conduct to act in good faith and reasonably in the interests of debtor, creditors and society (article 2 and paragraph 4 article 20.3 of the Law on Bankruptcy), but non-performance or improper performance of court-appointed trustee’s duties, expressed in violation of the law when exercising its powers, leads to a reasonable doubt about the ability of this trustee to the proper conduct of bankruptcy proceedings. Taking into account exclusivity of the above measure, the inadmissibility of the actual imposition of ban on the profession and the need to limit in time the risk of responsibility for violations, the court should also take into account that trustee’s violations committed by negligence, minor violations, violations that have not caused significant damage, as well as violations that took place a considerable time (several years or more) ago cannot serve as the reason for suspension”.

Bankruptcy trustee cannot be dismissed due to violations that are not significant. Dismissal of a bankruptcy trustee should be used to the extent when it allows restoring violated rights or eliminating the threat of their infringement [5].

Under the losses, inflicted to a debtor and its creditors, is meant any reduction or loss of the possibility of increasing bankruptcy estate, which occur as a result of unlawful actions (inaction) of a bankruptcy trustee, at that, the rights of the debtor and the bankruptcy creditors shall be considered violated whenever the damage is inflicted [5].

Thus, in case if a court determines the fact of possible infliction of creditor losses as a result of recognized by the court actions (inaction) of a bankruptcy trustee that do not meet the requirements of the Law on Bankruptcy and violate the rights and legitimate interests of a creditor, the bankruptcy trustee pursuant to paragraph 1 article 145 of the Law on Bankruptcy shall be subject to suspension from the performance of its duties during conducting the procedure of bankruptcy proceedings regarding the debtor.

“In accordance with the third subparagraph of paragraph 3 article 65, subparagraph eight of paragraph 5 article 83, subparagraph four of paragraph 1 article 98 and subparagraph four of paragraph 1 article 145 of the Law on Bankruptcy court may remove a court-appointed trustee from performing its duties in case of revealing circumstances that prevent approval of a person to the position of court-appointed trustee (paragraph 2 article 20.2 of the Law), and if such circumstances arose after the approval of the person to the position of court-appointed trustee. In those exceptional cases where the commission by a court-appointed trustee of repeated willful gross violations in this or in other bankruptcy cases, confirmed by entered into legal force judicial acts (for example, on its dismissal, on the recognition of its actions illegal or recognition expenses incurred by him unreasonable), leads to a substantial and reasonable doubts on the presence of proper court-appointed trustee’s competence, honesty or independence, court may on its own initiative or at the request of the parties to a case to refuse approval such trustee or remove it. This issue is considered by the court in hearings about which is notified the debtor, applicant (in approval or dismissal of a temporary administrator), court-appointed trustee or a person whose candidature is proposed for the approval to such position, as well as its self-regulatory organization of court-appointed trustees, representative of creditors’ meeting (committee), representative of the owner of debtor property – an unitary enterprise or a representative of the founders (participants) of debtor, control (supervision) authority. In the ruling on the appointment of court hearing the persons involved in a case (arbitration process on a case) are invited to share their views on the issue that are to be accounted for at taking court decision, and to make available their information on cases of violations of legislation by a court-appointed trustee” [4].

As indicated above, the person to who is applied such a penalty as disqualification is not entitled to perform the duties of court-appointed trustee in all bankruptcy proceedings.

Accordingly, there may be a situation where the disqualification of a court-appointed trustee in connection with bringing to administrative responsibility for irregularities in the implementation of a certain bankruptcy procedure leads to the fact that the person cannot perform its duties for all the procedures, in which it is approved as a court-appointed trustee.

However, this may impair the interests of debtors and creditors. In particular, if a court-appointed trustee is acting properly in all other procedures or procedure is nearing completion, and in connection with the disqualification of the trustee it is necessary to appoint a new bankruptcy trustee, what ultimately leads to delays in the bankruptcy proceedings, and as a consequence, violation of creditors interests (including property interests).

As indicated above, the bankruptcy legislation provides for an effective mechanism for the removal of a court-appointed trustee, which allows to take into account the views of all stakeholders, particularly the creditors of a debtor.

As practice shows, disqualification is applied as a punishment not so often. For example, the Arbitration Court of the Omsk region in 2009 imposed penalty in the form of disqualification in five cases, in 2010 - in two [9].

Disqualification is generally applied to persons previously brought to administrative responsibility, and, seems to be conditioned by an insignificant fine.

For example, if a person has repeatedly been brought to administrative responsibility in the form of a fine of 5,000 RUR, respectively, it is reasonable to impose a more severe punishment at the next violation of the Law on Bankruptcy, since the sanction of part 3 article 14.13 CAO RF provides punishment for a court-appointed trustee in the form of an administrative fine in the amount of from 2,500 RUR to 5,000 RUR or disqualification for a period of six months to three years.

Accordingly, a penalty in the form of disqualification takes place.

It is necessary to take into account that each of the disqualified is appointed as a court-appointed trustee simultaneously, as a rule, in 10-15 bankruptcy procedures of different debtors.

Accordingly, the question arises, if a court-appointed trustee commits violations in one of several procedures, in which it is approved as a bankruptcy trustee, whether is it in the interest of creditors to remove it from its duties in other procedures?

Of course, unscrupulous persons or persons with doubtful professionalism should not be allowed to undertake such an important function as implementation of bankruptcy. Obviously, if a court-appointed trustee makes serious violations during one of the procedures, it is possible to question the proper performance of duties during other procedures.

It is proposed to increase the amount of administrative penalty for misconducts in bankruptcy proceedings, to differentiate punishment depending on consequences (the presence of infliction property damage to creditors). Currently an administrative offense, the responsibility for which is provided by part 3 article 14.13 CAO RF, is formal, that is, for bringing a person to administrative responsibility for the offense any negative consequences of the failure to perform bankruptcy trustee duties established by the Law on Bankruptcy have no significance and it is not required to prove the damage inflicted by the offense.

Disqualification of a court-appointed trustee shall be the ground for denial of approval as a court-appointed trustee for the future, the issue of the removal from other procedures must be decided by creditors meeting.

In addition, in view of the possibility of dismissal and release of a court-appointed trustee from its duties based on the results of a review of relevant statements within the framework of insolvency (bankruptcy) cases, it seems appropriate to set different penalties for administrative offences in the field of implementation of bankruptcy.

Moreover, the very approval procedure of a court-appointed trustee provides for the considering the views of creditors, so if the court-appointed trustee fails to perform its duties, it is clear that part of the responsibility for this lies with the lenders.

In this case, to protect the rights of creditors and other parties involved in a bankruptcy case, it is necessary to make information about the availability of satisfied complaints and applications on bringing a court-appointed trustee to administrative responsibility more open, so that lenders could more reasonably offer this or that candidacy of a court-appointed trustee for approval in a case on bankruptcy.

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