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# ПОРЯДОК РЕАЛІЗАЦІЇ МАЙНА В ПРОЦЕДУРІ БАНКРУТСТВА (НЕПЛАТОСПРОМОЖНОСТІ) ВІДПОВІДНО ДО ЗАКОНОДАВСТВА УКРАЇНИ ТА НІМЕЧЧИНИ

**Анотація**. *Стаття являє собою порівняльно-правове дослідження особливостей порядку реалізації майна боржника в процедурі банкрутства за законодавством України та Німеччини, що здійснене шляхом застосування герменевтичного (в межах проведення сутнісного аналізу нормативно-правової бази та судової практики); аксіологічного (при визначенні ціннісної бази) поряд з феноменологічним (та природи досліджуваних явищ); системного (моделювання функціонуючих і перспективних систем) методологічного інструментарію. Автори підкреслюють ключовий характер існуючих правових норм, що регулюють продаж майна боржника, в силу природної близькості наведеної стадії конкурсного процесу до фінансової складової, яка, зі свого боку, неминуче пов'язана з численними можливостями щодо зловживань. Новелою для досліджуваної сфери суспільних відносин в Україні стало введення системи електронних торгів, на яку покладалося багато надій і сподівань. Однак, на думку авторів, наведена система не впоралася з поставленими завданнями, доповнивши існуючий перелік проблем та неоднозначностей новими пунктами. У статті обґрунтовується позиція, що наявність проблемних питань у процедурі реалізації майна банкрута підтверджується, зокрема, судовою практикою. Однак судова практика і сама часто стає джерелом нових проблем і викликів. Особлива увага в статті приділяється дослідженню німецького законодавства, яке встановлює кардинально протилежну українській модель реалізації майна в процедурі банкрутства. Авторами представлено обґрунтовану позицію щодо внесення суттєвих змін і поправок до українського законодавства шляхом імплементації позитивного досвіду Німеччини. В результаті порівняльно-правового аналізу законодавства України та Німеччини автори пропонують принципово нові шляхи вирішення піднятих у статті питань. Реалізація рекомендацій, представлених у рамках даного порівняльно-правового дослідження, має на меті підвищення якості здійснення процедур банкрутства, зменшення можливостей і випадків зловживань з боку арбітражних керуючих, а також забезпечення захисту прав і майнових інтересів кредиторів*

**Ключові слова**: *процедура банкрутства, змагальність процесу, недієздатність, комітет кредиторів, окремі кредитори, аукціон, арбітражний керуючий*

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# THE ORDER OF PROPERTY REALISATION IN BANKRUPTCY (INSOLVENCY) PROCEDURE UNDER THE LAW OF UKRAINE AND GERMANY

**Abstract.** *The article represents a comparative legal study of the specifics of the order of debtor's property realisation in the bankruptcy procedure under the law of Ukraine and Germany through the application of hermeneutic (used in accessing the essence of the legal framework and judicial practice); axiological (in determining the evaluative base) along with phenomenological (and the nature of the phenomena); systematic (modeling of the functioning systems) methodological toolkit. The authors emphasise the importance of legal provisions governing the sale of the debtor's property, due to the natural proximity of this stage of the competitive process to the financial component, which, in turn, is inevitably associated with various abuses. An electronic trading system had been recently introduced in Ukraine, on which therefore many hopes and expectations were relied upon. However, the electronic trading system did not cope with tasks set, and many new problems were added to the old ones. The article states that the existence of problematic issues in the procedure of bankrupt property realisation is confirmed, in particular, by the court practice. However, judicial practice in itself often becomes a source of problems. The article pays special attention to the German legislation, which uses a radically opposite model of property sale in insolvency proceedings. The authors justifiably propose to make certain changes to the Ukrainian legislation, by using the positive experience of Germany. As a result of a comparative legal analysis of the legislation of Ukraine and Germany, the authors provide ways of solving the raised issues in the article. The implementation of the recommendations submitted within this comparative-legal study should improve the quality of bankruptcy proceedings, reduce the number of abuses by insolvency trustees, as well as protect the rights and property interests of competitive creditors and creditors with the right of separate satisfaction*

**Keywords:** *bankruptcy procedure, competitive process, incapacity, creditors' committee, creditors with right of separate satisfaction, auction, insolvency trustee*

## INTRODUCTION

On October 21, 2019, the Code of Ukraine on Bankruptcy Procedures of October 18, 2018 No. 2597-VIII [1] was enacted. The main purpose of adopting this Code was to optimise and update the procedures established by the Law of Ukraine "On Reestablishing Debtor Solvency or Declaring Bankruptcy" [2] (replaced by the top-mentioned document). Clause 4 of the Final and Transitional Provisions of the Code established that "…from the date of entry into force of this Code further proceedings on bankruptcy cases are carried out in accordance with the provisions of the new Code, regardless of the date of opening of bankruptcy proceedings, except for bankruptcy cases, which at the date of entry into force of this Code are at the stage of rehabilitation, proceedings on which are continued in accordance with the Law of Ukraine "On Reestablishing Debtor Solvency or Declaring Bankruptcy" [1].

The entry into force of this codified act and its further amendments have generated increased scientific interest towards the specifics of its practical application, especially in the context of the launched program of Big Privatisation (concerning large state-owned enterprises). In essence, the stage of the sale of the debtor's property is the culmination of the competitive process, as it becomes clear whether there will be enough assets in the liquidation mass to meet the property claims of creditors. It is the onset of the stage of the sale of the debtor's property that creditors have been waiting for so long, gradually going through numerous and long stages of the competitive process. A prominent German lawyer and researcher of the competitive process of the XIX century, Wilhelm Endemann, noted that the distribution of the debtor's property is possible only after the indisputability and type of creditors' claims are finally approved [3, p. 425; 4, p. 543].

After all, the provisions of bankruptcy (insolvency) normative acts in both Ukraine and Germany, which regulate the procedure for selling the debtor's property, certainly arouse great interest. The latter is explained by the importance of this stage of the competitive process, in which property assets are converted into monetary assets, which later will be distributed among creditors. However, it is at this stage of the sale of the debtor's property that several abuses occur in practice. The famous French civilian of the XIX century. Edmond Eugène Thaller noted that "the mercantilism of bankruptcy trustees has always been considered by the governments of the Anglo-Saxon nations as a plague of bankruptcy proceedings, as well as an obstacle to the success of all

bankruptcy statutes" [5, p. 182]. Thus, we get an inseparable symbiosis, which becomes a kind of stumbling block in the field of the competition process.

A similar position in this regard is taken by the eminent jurist-scientist Gabriel Shershenevich, citing a brilliant comparison of the already mentioned Edmond Eugène Thaller: "As much as the amicable agreement represents a picture of peace, the distribution of property is similar to a war that devastates the country" [3, p. 428]. Indeed, sometimes the creditors together with the insolvency trustee, in the pursuit of the greatest possible satisfaction of their own monetary claims, ruthlessly devastate the entire property of the debtor. However, the conversion of the debtor's property assets into monetary equivalent is a necessary step because otherwise, the proportional satisfaction of creditors' claims in conditions of the absence of the debtor's assets will be almost impossible.

The theoretical basis of the article is the works of such prominent multinational scholars and lawyers as B. Polyakov [6], G. Shershenevich [3], V. Endemann [4], S. Greif [7], E. E. Taller [5], O. Titova [8], K. Kalachenkova [8], N. Haverkamp [9; 10], and other scientists. At the same time, in the context of the recent reformation of the bankruptcy procedure in Ukraine [11], a comparative legal analysis of the procedure and conditions of sale of the debtor's property under the law of Ukraine and Germany, highlighting problematic aspects of this stage of the bankruptcy process and finding their solutions are very actual.

Given the standardisation of economic activity within states to ensure the stability of the internal market of the European Union, foreign scholars have also developed various aspects related to certain phases of insolvency proceedings. Elements of their research published in highly reputable journals were also drawn into the study of German practices because of the standardised approaches to the above-mentioned problems (and their specific elements) [12-18].

*The purpose of the study* is to conduct a comprehensive comparative legal analysis of Ukrainian and German legislation in the field of regulating the realisation of debtor's property in bankruptcy (insolvency) proceedings, determining the powers of representative bodies of creditors and insolvency trustees at this stage, clarifying the legally established conditions of sale of debtor's property, and also finding the ways to improve the bankruptcy procedure in Ukraine with the possible usage of the German experience.

## 1. MATERIALS AND METHODS

By setting a wide range of relations that arise around the procedure of the realisation of debtor's property in the legal practice of Ukraine and Germany as the object of research, the subject of this article included its elements: bankruptcy procedure, the principle of competitiveness in the process, structural features and characteristics of creditors' committees, mechanics of auctions and guarantors of realisation. The defined object and subject of the study are substantiated not only by the existing problems in terms of their regulation in Ukraine but also by the need for the cautious and incremental introduction of foreign legal models and mechanisms into the legislation and legal practice of our country. Moreover, the comparative-legal orientation of this research in itself already provides value for the domestic legal science because besides the main purpose of scientific search it also enhances the methodological and material framework for further branch and inter-branch investigations for Ukrainian lawyers-theorists and practitioners.

Within the general methodological framework of the given research inevitably was the use of all general methods of scientific cognition used in general science: observation (in conjunction with the other methods), comparison (of the significant common and different features in order to form regularities), abstraction (in the process of capturing phenomena and relations of interest to the researchers). Specifically, when researching the above elements, a variety of special scientific methods were applied: phenomenological (to reveal the nature of the elements), hermeneutic (to discover the essential nature of the texts when working with the legislative framework and judicial practice of Germany and Ukraine), axiological (focused on determining the evaluative base of the phenomena) and systematic (as the foundation) to construct a scientocentric model of interaction of the elements. Furthermore, the prognostic method provided an opportunity to form a series of perspectives and proposals for the reforming of the procedures under study in the national law of Ukraine.

The comparative legal approach and the use of the corresponding method became pivotal for the article. Currently, the interest in comparative law in Ukraine is on the rise. It is necessary to note that having a rather robust methodological basis for comparative studies in the Soviet Union, modern Ukrainian legal science uses a different toolkit. Distinctive features of Soviet comparative legal science were the use of Marxist-Leninist methodology, increased interest in general methodological issues, sharp ideological and political orientation of works of Soviet scientists, who critically evaluated the so-called bourgeois concepts of comparative law. In modern Ukraine, the development of contemporary comparative law has been greatly influenced by using of foreign law in the creation of new national laws and the benchmarking of different legal systems for a more in-depth study of the phenomenon of law. Considering European and Euro-Atlantic courses embodied in the

Constitution of Ukraine, the improvement of legislation, and, accordingly, the introduction of fundamentally new practices and models is carried out considering the norms of foreign law.

The substantive basis of this paper constitutes classical European monographic studies, scientific articles with high credibility, codified legislation of Ukraine and Germany, as well as court practice materials.

## 2. RESULTS AND DISCUSSION

### *2.1. Domestic legislative innovations and court practice*

Returning to the already mentioned statement of Edmond Eugène Thaller, the authors must state that, unfortunately, the "picture of peace" is not provided by the provisions of the Bankruptcy Procedure Code of Ukraine [1] (hereinafter – Bankruptcy Code), and therefore "devastating war" is an inevitable phenomenon, to which, actually, the section V of this codified act is devoted. However, in an incomprehensible way, Art. 63 with the name: "Sale of bankrupt property" appeared outside the mentioned section. In part 1 of Art. 63 of the Bankruptcy Code stipulates that the liquidator sells the bankrupt's property at auction. However, this method of property realisation is not always mandatory, as the legislator provides some exceptions. Thus, the liquidator has the ability to sell perishable goods at a reasonable price, and he is empowered to sell inventories and low-value items, provided that their market value is not more than one minimum wage.

The authors fully support giving to the liquidator the opportunity to sell the property without an auction in cases of its low value, as the public sale may be impractical. O. Titova and K. Kalachenkova take a somewhat similar position, noting that "… it is not very effective to sell low-value items, that do not belong to the category of perishable items, at auction. A possible option, in this case, could be to set a price limit for the property realisation outside the auction" [8]. One should consider that the formulation provided in the mentioned provisions of the Bankruptcy Code is too vague, as there is a possibility of abuse of that rule of law by dividing the property into small parts in order not to exceed the statutory value. This situation is most typical of insolvency proceedings against individuals.

Moreover, we cannot ignore the evaluation concept of "reasonable price". Of course, providing the opportunity to quickly sell perishable goods is vital, however, at this stage, the situation with a "reasonable price" is reminiscent to us the ancient Rome, where, as noted by K. Malyshev, it was impossible to value property at market value, as there wasn't an established price for certain goods [19]. Of course, immediately selling perishable goods at their market value is an extremely difficult and almost impossible task, but the state of affairs described above needs to change. In particular, the authors propose to establish by law a special procedure for the realisation of perishable goods by the liquidator, as well as to clarify what price can be considered "reasonable".

The provisions of part 3 of Art. 63 of the Bankruptcy Code [1] are quite ambiguous since they prohibit the provision of agreements to provide the buyer of the bankrupt's property in installments or deferral of payments. In accordance with part 1 of Art. 85 of the Bankruptcy Code, the buyer is indeed obliged to pay the price of the purchased goods within 10 working days from the date of publication in the electronic trading system (hereinafter – ETS) of the results of the auctions. However, surprisingly, in part 3 of the mentioned article, the legislator provides for the buyer to defer payment of the price for the goods for 10 calendar days if he pays more than 50% within the prescribed period. Thus, despite the prohibition to provide for deferrals at the contractual level, which, of course, is done both to expedite the bankruptcy proceedings and to obtain funds as soon as possible, the legislator decides to provide deferrals on the legal level.

The introduction of the sale of the debtor's property through ETS is one of the most important innovations in the bankruptcy procedure. A. Pidhoretska notes in this regard: "Regulations on the sale of all debtor's property exclusively at electronic auction at the highest price is a novelty of the Code, which aims to create competitive and favorable conditions for organising and conducting auctions for the realisation of debtors' property in bankruptcy cases, promoting expansion circle of potential buyers, increasing the level of repayment of creditors' claims" [20]. Therefore, Art. 68 of the Bankruptcy Code [1] stipulates that "… the sale of the debtor's property at auction takes place in ETS". The procedure for the functioning of the ETS was approved by the Resolution of the Cabinet of Ministers No. 865 of October 2, 2019 [21] (hereinafter – the Procedure). Here it is necessary to note the position of B. Polyakov, who pointed out that the Bankruptcy Code provides a different name of the act, which should regulate the functioning of the ETS [22]. Indeed, in some strange way, instead of the title "Procedure for the functioning of the electronic trading system", we received the "Procedure for organising and conducting auctions for the sale of debtors' property in bankruptcy (insolvency) cases". If at the legislative level there is confusion with the name of the normative act, then, most likely, its provisions will also be far from perfect. No wonder they say: "as you name a ship, so it will sail".

This Procedure clearly demonstrates the effectiveness of mentioned principle, and therefore the authors propose to consider some problematic issues.

In the analysis of the Procedure, the provisions of its paragraph 73, which allow holding an auction with only one buyer, are quite incomprehensible. Therefore, in the case of a bid, only one bidder is presumed to have submitted the highest bid. We fully share the opinion of B. Polyakov, who noted: "In the auction must always be at least 2 participants, otherwise there will be no competitive principle inherent". Complementing the above-mentioned position, the authors note that in this case, between the concepts of "auction" and "sales contract" will be a sign of equality. The completely opposite situation arises in the case of an auction for small-scale privatisation of state property. Clause 49 of the Procedure for Conducting Electronic Auctions for the Sale of Small-Scale Privatisation Objects and Determining Additional Terms of Sale, [23] stipulates that the system automatically detects an auction as "failed" if less than two applications for participation or two bids were received.

Thereby, the legislator differentiates depending on the auction customer. However, it is unclear why the protection of creditors' interests during bankruptcy proceedings is not as high-priority as the protection of state interests during small-scale privatisation. Moreover, it is common for privatisation to occur at a loss. In accordance with part 5 of Art. 12 of the Law of Ukraine "On Privatisation of State and Municipal Property" bankruptcy cases against debtors – state enterprises or business enterprises, more than 50% of the shares of which belong to the state, are not opened if such enterprises are privatised. Bankruptcy proceedings against such enterprises must be terminated, except for liquidation by the decision of the owner [24].

Therefore, the state has the opportunity to "pull" a certain category of debtors out from bankruptcy by "redirecting" them to privatisation and hold a real auction, rather than concluding a regular sales contract with any buyer without any competition. This state of affairs somewhat reminds us of the competitive process of Kievan Rus, where the Knyaz' (prince's) property interests were satisfied primarily. Similarly, the sale of certain state property can take place on the terms of a more secure auction. Moreover, problems with the realisation of the debtor's property do not end. Let's pay attention to paragraphs 75, 76, 78 of the Procedure [21], which provide the legal consequences if holding the auction without determining the winner. Thus, when holding repeated and second repeated auctions, the initial price of the first auction will be reduced by 20%, as well as the initial price of the first repeated auction will be reduced by 25%. Furthermore, there is a possibility of holding the first repeated auction with a price reduction with the consent of the secured creditor or the creditors' committee. At the second repeated auction such consent is not required (p. 3 of Art. 80 of the Bankruptcy Code, paragraph 76 of the Procedure). The authors have to admit that the situation with the procedure in case if the second repeated auction would fail is not regulated by law. Moreover, the law does not exclude such a course of events. In particular, in p. 3 of Art. 81 of the Bankruptcy Code enshrines the right of the secured creditor to apply to the bankruptcy trustee regarding the purchase of collateral property within 20 days from the date of the end of the second repeated auction.

The authors are convinced that the above-described problem is unacceptable because at the legislative level there are provisions that allow holding an auction at incredibly low prices. The Northern Economic Court of Appeal rightly stated in the resolution in case No. 925/1500/17: "The repeated and second repeated auction are provided in the Law to prevent situations when the property cannot be sold due to its inflated initial value" [24]. However, unfortunately, the provisions on repeated auctions are currently used by arbitration trustees to achieve the exact opposite goal. The mentioned decision concerned the fact that the bankruptcy trustee tried to sell the debtor's property (right of claim) at the second repeated auction with the initial price of 600,000 UAH, with the number of reduction steps reaching 99 and the size of 1 step – 1%. All this provided that the right of claim is 719,968.00 UAH.

B. Polyakov noted that "… during the sale of property assets of the debtor creditors receive 50 times less than their book value" [6, p. 382], and, as further substantiated by this study, nothing has changed significantly in 10 years. Regarding this, the authors firmly believe that this situation requires some changes, the justification of which will be given below. For now, it is worth paying attention to the cases when the auction ended without determining the winner. According to paragraph 75 of the Procedure [21], such cases are the absence of participants of an auction, non-receipt of the price offer from any participant of the auction, non-performance by any of the participants of the auction at any step of auction. If the auction ends without determining the winner, it is considered "failed". In addition, the auction is recognised as "failed", in case of refusal or delay by the winner to make payment for the full amount for the goods (paragraph 90 of the Procedure), as well as in case of failure to sign a protocol or act of acquisition at the auction.

It should be noted that under certain conditions, the legislator provides some negative consequences for the auction participants or the winner of the auction if the auction is recognised as "failed". Thus, in p. 3 of Art. 84 of the Bankruptcy Code [1] stated that guarantee fees are not refundable in case if the auction is

completed without determining the winner, as well as in case of non-payment or late payment by the winner of the auction of the appropriate amount for the property. This legal regulation can be explained by the fact that, first, the legislator encourages auction participants to submit price proposals because if none is received, all participants will lose their guarantee fee. Secondly, the legislator tries to prevent all kinds of illegal manipulations by auction participants, which are committed to purchasing property at the lowest possible price.

*2.2. Procedural problems in the implementation of key innovative mechanisms*

However, these measures are not enough because even if the guarantee fee is lost, the unscrupulous participant still gets the opportunity to buy property at a low price. To realise this possibility, it is necessary that the first and the repeated auctions would be recognised as not having taken place. And this can be achieved either by not submitting a price offer to any of the participants or, if one of the participants has submitted it, submitting a higher price offer. In both cases, the unscrupulous bidder loses the guarantee fee but later comes the long-awaited auction with a much lower starting price, and the possibility of its reduction. To prevent such situations, the authors propose the following changes.

Firstly, in addition to depriving participants of the guarantee fee in the cases provided for in Art. 84 of the Bankruptcy Code [1], it is also necessary to limit their right to participate in subsequently repeated auctions. This can be justified by the fact that the participant is aware of the price of the property when making a guarantee fee, since this is a mandatory condition of sale (Article 75 of the Bankruptcy Code), and such information must be contained in the auction announcement (Article 77 of the Bankruptcy Code). If it is an auction with a price reduction, the bidder knows that the price is reduced by a maximum of 99 steps (the exception is only when the creditors' committee or secured creditor set a minimum price, but in this case, it is necessary to legally establish the obligation of the organiser to inform participants about the number of steps). Thus, the person who becomes a participant in the auction is aware of the initial price of the product, which is the minimum, and in the case of an auction with the price reduction – provides a potentially minimum price, and therefore agrees to the conditions. Therefore, the only reason for not receiving a price offer from any participant is to commit illegal acts in order to seize property at a meager price. Secondly, the authors consider it is necessary to increase the guarantee fee by auction participants to 50%.

The essence of the auction is that the winner pays the necessary funds for the debtor's property as soon as possible to let the debtor repay his debts. Therefore, it is illogical to leave the obligation to pay the full proper amount by the winner, as well as to prevent the auction from being declared “failed”, in case of non-payment or incomplete payment by the winner. In this case, the payment of the proper amount by the winner possibly may be delayed, so, the bankruptcy procedure also will possibly be delayed. However, on the other hand, it is possible to ensure payment of at least a slightly larger part of the proper amount for the property by increasing the guarantee fee to 50%. At the same time, it will be at least unprofitable for the winner of the auction to refuse to fully pay the proper amount because a significant amount of money will be lost. Moreover, persons who do not intend or don’t have the opportunity to purchase property at public auction will not participate in them. The authors also note that the guaranty fee does not provide any obligations for participants on purchasing the goods, and in case of their proper action, that fee is totally refundable.

Without any doubt, with such provided changes, the number of potential participants of auctions will decrease but will decrease only due to the refusal of unscrupulous participants, while those with bona fide will remain. In addition to the above-mentioned, the situation with the recognition of a transaction, made at an auction, as invalid in case of violation of the established procedure for preparing or conducting an auction, which prevented or could prevent the sale of the property at the highest price, is quite problematic. Article 73 of the Bankruptcy Code is devoted to this situation. In analysing the regulations of Art. 73 of Bankruptcy Code, B. Polyakov made some following important conclusions:

– to appeal the result of the auction, it is necessary to prove the fact of violation, the fact of obstruction or potential obstruction of the property realisation at the highest price, as well as the causal relationship between them;

– “… The drafters of the code did not consider that any agreement must meet the requirements of the law. Therefore, the agreement concluded at the auction can be appealed not only on special grounds, which are provided for in Art. 73, and in Art. 42 of the Bankruptcy Code (as a loss-making agreement for creditors), as well as on the general grounds, which are provided in the Civil Code” [22].

The identical position can be seen in the Resolution of the Supreme Court in the Judicial Chamber for bankruptcy proceedings of the Economic Court of Cassation of October 2, 2019, in case No. 5006/5/396/2012, where it was stated that “… the legal nature of the property sale by auction gives grounds for recognising (if there are any grounds) the results of such auctions invalid under the rules of invalidation of transactions, and under the civil law regulations” [26].

It is also worth paying attention to the fact that under the p. 4 of Art. 656 of the Civil Code of Ukraine [27] to the contract of sale, which is concluded at auction, the general provisions of the contract of sale are applicable unless otherwise provided by law governing the procedure for concluding these contracts or does not follow from their essence. Consequently, the provisions of Art. 203 and 215 of the Civil Code of Ukraine are applicable. Therefore, it would seem, that a transaction entered into at an auction, which was held in violation of applicable law, should be declared invalid without the need to prove the fact of obstruction or potential obstruction to the sale of the property at the highest price and causal relationship between them. A somewhat similar position can be found in the Resolution of the Supreme Court of Ukraine of June 29, 2016, in the case No 6-370цс16, where it is stated that "… the legal nature of the sale of property by a public auction provides grounds, which are based on the norms of civil legislation (Articles 203, 215 of the Civil Code of Ukraine) on the invalidity of the transaction as not meeting the requirements of the law, in case of non-compliance with the procedure, bidding procedure provided by the Provisional Regulations on the procedure of public sale of seized property, approved by the order of the Ministry of Justice of Ukraine No. 68/5 of October 27, 1999…" [28].

However, the authors draw attention to the fact that since p. 4 of Art. 656 of the Civil Code of Ukraine [27] provides a certain exception and the provisions of Art. 73 of the Bankruptcy Code just fall under it, in which case it is necessary to apply a special rule of the Bankruptcy Code instead of the general rule of the Civil Code. Given the above-mentioned, it can be concluded that it is not necessary to recognise the transaction concluded at the auction as invalid in case of violation of the auction procedure if such violation did not affect the sale price. Moreover, confirmation of this position is found in Art. 74 of the Bankruptcy Code, which indicates the legal consequences in case of violation of the conditions of the auction, which prevented the person to participate in a public sale of the property. The authors note that among the specified legal consequences, the possibility of recognition of the transaction as invalid in this norm isn't provided. Probably, in this case, the legislator aimed to ensure the receipt of the funds in the maximum possible amount through the sale of the debtor's property, but at the same time in compliance with the condition of ephemeral bankruptcy proceedings.

However, despite all this, it must be stated that the fact that currently the provisions of the Bankruptcy Code do not sufficiently protect the inviolability of the agreement concluded at the auction. After all, as already noted, now there is an opportunity to recognise the transaction, made at auction, invalid also on the general basis which are provided in the Civil Code of Ukraine. Therefore, the authors consider it appropriate to introduce an additional article to the Bankruptcy Code, which would indicate an exhaustive list of subjects of appeal and the conditions under which the transaction made at auction for the sale of the debtor's property in bankruptcy proceedings may be declared invalid.

In addition, in this new article, it would be appropriate to provide a limited, non-renewable period for appeals by auction participants and participants in the bankruptcy procedure on the result of public auction. An example from the case law can serve as an illustration of the real need to introduce such novelty. As can be seen from the resolution of the Economic Court of Cassation in the Supreme Court of March 5, 2020, in case No. 14/325 "b", in 2013 an auction was held for the sale of the debtor's property, in its result, there also was a payment of the proper funds by the buyer and the conclusion of a contract of sale between the buyer and arbitration trustee. In 2014, the buyer alienated the property he had purchased at auction. In 2018, the arbitration trustee was replaced by a new one, who, in turn, 5 months later decided to apply to the court to declare the results of the auction as invalid [29].

The first thing that comes to mind is the general limitation period of actions, which is established by Art. 257 of the Civil Code of Ukraine and is three years. Indeed, three years have passed, and it appears that no delays in the bankruptcy proceedings are planned. Of course, this statement is correct, but as it is already known, the case reached the court of cassation, and only in March 2020, namely almost 7 years after the auction, should reach its logical end. However, it didn't. In the mentioned resolution the court concluded that the buyer's application for the limitation period was not sealed with an electronic digital signature, as a result of which the case was sent for a new trial to the first instance [29].

This approach cannot be considered successful, as 7 years have passed since the auction, and the issue of declaring its result invalid has not been resolved because the court of cassation "decided to put a comma instead of a dot". And most importantly: what exactly was the reason for sending the case for a retrial? Formality in the absence of an electronic digital signature in the application, the applicant of which does not challenge its validity. Maybe next time the court will remand the case for a retrial due to the absence of a punctuation mark or a spelling mistake in the application? However, the strangest thing in this situation is that the bankruptcy procedure was paralysed for such a long time due to only one proceeding.

To prevent such situations, the authors propose to set at the legislative level a monthly non-renewable period for appealing the results of the auction, given that:

– firstly, according to the Bankruptcy Code, the liquidation procedure itself should last no more than 12 months. Based on this, the one-month deadline for appeal is not so short. Moreover, in this case, there can be no question of the application of the general limitation period of three years;

– secondly, in the described dispute there is a limited subject composition. As the court noted in the above-mentioned resolution, "… the parties to the dispute over the recognition of the auction and its results as invalid are the seller, the winner of the auction and the organiser of this auction" [29]. Thus, it can be noted that, given the limited subject composition, the one-month time limit for appeal is sufficient. Furthermore, do not forget about such a possible course of events as the further alienation of the property by the winner of the auction. In the mentioned case, the bona fide purchaser was lucky that the winner of the auction announced the expiration of the limitation period, but what would have happened if he had not done so? Or, for example, let's simulate a situation where the property has been sold several times… Then what method of legal protection should the current owner of the property use, and how to further establish the whole "chain" of owners? Moreover, if the winner of the auction was liquidated, the bankruptcy trustee will be able to file a lawsuit in court without any restrictions on the limitation period. Do not forget that the application on the expiration of the limitation period is a right and not an obligation of the party. Considering the following circumstances, it can be said that the court of cassation has unreliably established the subjective composition of the parties to the dispute on the invalidation of the auction and its results. In the authors' opinion, in this case, the court must have also indicated the current owner of the property if the limitation period could be applied to such a dispute.

Therefore, the authors consider the establishment of a one-month non-renewable period for appealing the result of the auction in the bankruptcy procedure to be justified and necessary. The problematic issues related to the legal regulation of the sale of property in bankruptcy proceedings do not end there. Let's take a look at the situation with the realisation of the debtor's collateral property. Thus, from the system analysis of p. 6, 9 of Art. 41, p. 6 of Art. 64, p. 3-7 of Art. 75 and Art. 81 of the Bankruptcy Code, we can conclude that the sale of the collateral property is carried out by the bankruptcy trustee, and such property needs to be included in the liquidation estate. However, the creditor, whose claims were secured, will receive separate satisfaction at the expense of the realised collateral. In the second paragraph of p. 2 of Art. 45 of the Bankruptcy Code [1] it is stated that: "If the value of the collateral is insufficient to cover the entire claim, the creditor should be considered as secured only in part of the value of the collateral. The rest of the claims are considered unsecured". It would seem that this legal norm is clearly formulated and totally understandable, however, the Judicial Chamber for Bankruptcy Cases of the Economic Court of Cassation of the Supreme Court will disagree with this statement, which in its resolution of February 4, 2021, in the case No. 904/1360/19 [30] comes to a rather unexpected decision. In paragraph 85 of this resolution, the court provides three approaches to understanding the number of claims of creditors with the right of separate satisfaction:

– "Approach I – the creditor's claims, unless otherwise stipulated in the contract, are recognised as secured only in the amount of the value of the collateral (mortgage), determined between the creditor and the debtor (property guarantor who is not a debtor in the principal obligation) in the pledge agreement (mortgage), which subsequently in practice results in cases of re-application of the creditor to the court with a statement of recognition of his claims secured in case of sale of the collateral (mortgage) at a price higher than that agreed in the pledge agreement…;

– Approach II – the creditor's claims, unless otherwise stipulated in the contract, are recognised as secured only in the amount of the collateral (mortgage) agreed between the creditor and the debtor (property guarantor who is not a debtor in the principal obligation) in the pledge agreement (mortgage), and in the other part, the claims are unsecured and are repaid in the order determined by the Bankruptcy Code. In this case, the creditor will be both secured and competitive and will have not only the right to participate in the creditors' assembly with a casting vote but also to obtain satisfaction of other unsecured claims at the expense of other property of the debtor, which is not subject to security…;

– Approach III – the creditor's claims, unless otherwise provided by the contract, are recognised as secured in the amount of the total number of claims against the debtor (property guarantor who is not the debtor in the principal obligation)" [30].

In paragraphs 110 and 111 the court concludes that the first and second approaches are erroneous, moreover, in paragraph 112 stated that "… these approaches are inconsistent with the purpose and principles of the competitive process, which include, in particular, the prohibition of individual satisfaction of creditors' claims; satisfaction of creditors' claims in order of priority; satisfaction of requirements of each line after full satisfaction of requirements of creditors of the previous line; satisfaction of creditors' claims in case of insufficiency of the debtor's funds to satisfy creditors' claims of one line proportionally to the amounts of their claims. Observance of this order is aimed at preventing the overwhelming satisfaction of the claims of some creditors to the detriment of others" [30]. Based on the analysis of the above-provided paragraph of this

resolution, it appears that the court erroneously applies to secured creditors the principles of the competitive process, which apply only to competitive creditors. Currently, the current provisions of the Bankruptcy Code do not provide any order of priority of secured creditors' satisfaction. In addition, a separate and extraordinary satisfaction of the claims of secured creditors is clearly spelled out in p. 6 of Art. 64 of the Bankruptcy Code, and therefore, for a secured creditor, the privileged position compared to competitive creditors is established by law.

On the other hand, if the collateral is not enough to fully satisfy the claims of the secured creditor, the latter will be able to finally satisfy them in the status of a competitive creditor in the established order of priority. This position, in particular, is confirmed by the scientific opinion of the members of the Scientific Advisory Board of the Supreme Council Doctor of Law Professor. O. Belyanevych and Ph.D. in Law V. Belyanevych, who noted in it: "If the debtor is a mortgagor, the claim for the value of the collateral (mortgage) is considered secured, the rest of the claim must be entered in the register of creditors' claims as unsecured" [30]. However, in the end, the court concludes that the creditor is considered secured by the entire claim, regardless of the assessment of the collateral. Given the fact that the collateral property is sold by the bankruptcy trustee, the secured creditors are currently in a rather difficult situation. Previously, such creditors were not particularly interested in the amount of money that will be received from the sale of collateral because the difference with their claim will be included in the register of creditors' claims. At present, secured creditors have been deprived of such a prerogative.

If the amount of satisfaction of secured creditors' claims is directly proportional to the sale of the debtor's collateral property, would it not be appropriate for those creditors to sell this property on their own or to transfer it to their ownership immediately? Why then does the legislator provide for a special procedure for the sale of the property to a secured creditor? In the end, we have a question: if the collateral covers the entire monetary claim of the creditor, regardless of its value, then why do the parties provide for the value of the collateral (mortgaged property) in the contract? Overall, the conclusion is that the sale of the debtor's property under Ukrainian law is quite problematic, and ETS, which was designed to eliminate the problematic issues, instead creates new ones, which, of course, needs to be corrected.

### *2.3. Findings of a comparative review of German legislation on improving the situation in Ukraine*

A completely different legal regulation of these issues can be seen in Germany. The authors propose to proceed to the analysis of German legislation. Thus, § 159 of Insolvenzordnung [31] (hereinafter – Statute) stipulates that the insolvency trustee must immediately liquidate the property constituting the bankruptcy estate after the report review meeting unless this is contrary to the decision of the creditors' assembly. We note that the German legislator does not stipulate the obligation of the insolvency trustee to sell the property from the bankruptcy estate through a public auction. It is also worth mentioning the position of D. Lasser, who noted that the insolvency trustee "has a choice between initiating an auction or selling property in a private way" [32]. Moreover, this lawyer argues that the sale of property through an auction is mostly inappropriate and unprofitable [32]. N. Haverkamp takes a similar position, noting that the auction for the sale of property "is a long-term bureaucratic process, which often results in a lower purchase price than when sold privately" [9].

§ 160 of the Statute is devoted to significant transactions, for which the insolvency trustee must obtain the consent of the creditors' committee, and in its absence, respectively – the assembly of creditors. Moreover, this rule provides for cases where the consent of the representative body of creditors is required, namely: 1) privately sale of the enterprise, plant, or part of real estate in, sale of the debtor's share in another enterprise if such shares are intended to create permanent ownership to the enterprise or obtaining the right to periodic profit; 2) if the transaction consists in concluding a loan agreement with a significant encumbrance for the insolvency property; 3) if the insolvency trustee intends to perform certain procedural actions relating to a lawsuit with a significant price (application, accession, refusal, or avoidance of such actions). Also, quite interesting are the provisions of this norm on the quorum of creditors' assembly. Thus, it is not required for a decision at a creditors' assembly, and creditors must be notified of this in the invitation to such a meeting of creditors' assembly. Therefore, we conclude that the provisions of the Statute are mostly aimed at the ephemerality of the insolvency procedure, rather than compliance with certain legislative formalities. Indeed, if the creditor is interested in voting against the transaction, he must be present, otherwise, it is presumed that there are no objections.

Approaching the question of the ephemerality of the insolvency procedure and the focus on any profit-making, the authors cannot mention the provisions of § 164 of the Statute. This norm indicates the validity of the transactions of the insolvency trustee if they are committed in violation of §§ 160-163 of the Statute. Of course, something similar can be seen in the Bankruptcy Code, in particular in Art. 73, the analysis of which was carried out above. But this similarity is very tiny since § 160 is devoted to significant transactions, § 161 – a

temporary prohibition of significant transactions, § 162 – the sale of the company to particularly interested persons, and § 163 – the alienation of the company at a reduced price. Thereby, these provisions of the Statute are aimed primarily at stimulating the ephemerality of the competition process, for which the German legislator is ready to make various sacrifices, even so-called "illegal law". After all, such provisions at least contradict the established practice of contractual relations, and at most – open the way to various kinds of abuse by the insolvency trustee. N. Haverkamp notes that the insolvency trustee often sells property at a below-market value because in this way he manages to reduce his time costs. However, in this case, he can be prosecuted [10].

The authors do not deny in any means the possibility of bringing the bankruptcy trustee to prosecution, but in authors' opinion, such a task is not easy, as it is necessary to prove in court the commission of illegal actions, the consequences of such actions, and the causation. In general, this state of affairs can be explained by the fact that, unlike Ukraine in Germany, the debtor is not released from its obligations if the size of the bankruptcy estate was not sufficient to cover all creditors' claims. Therefore, the question of the most efficient sale of the debtor's property should for the most part concern the debtor himself, when the creditors are concerned indirectly. In fact, it is precise because of this circumstance that issues related to the validity of the property sale agreement in Germany have a completely different substantive regulation, and for Ukraine, it is currently unattainable and, frankly, unlikely to be attractive.

As already was mentioned, § 161 of the Statute provides for the possibility of a temporary prohibition of the transaction. It stipulates the obligation of the insolvency trustee to notify the debtor of the decisions of creditors' self-government bodies relating to transactions falling under § 160. If the participants in the creditors' assembly do not give their consent, the court may, at the request of the debtor or the qualified majority of creditors provided for in paragraph 3, part 1 of § 75, temporarily prohibit the insolvency trustee from making transactions and convene creditors' assembly to resolve the issue. After all, the provisions of this rule of law indicate that the procedure for a transaction by an insolvency trustee is much simpler than postponing its commission. Therefore, by its essence, this norm is mostly declarative and almost does not create obstacles.

§ 162 of the Statute is devoted to the sale of the enterprise to particularly interested persons. Thus, for this transaction is obligatory the consent of the assembly of creditors, if the buyer of the enterprise or a person who owns 1/5 of the capital of the enterprise, are:

1) an interested person within the meaning of § 138, including a person who is an enterprise and has a share in the buyer's capital or is dependent on the buyer or a third party acting at the expense of the buyer or at the expense of the enterprise dependent on the buyer;

2) a non-competitive creditor or a competitive creditor with claims of not lower rank, whose rights to separate satisfaction, according to the court, are at least 1/5 of the sum of all claims with separate satisfaction and the number of claims of competitive creditors with claims of not lower level.

§ 163 is devoted to the sale of the debtor's enterprise at a lower price. This regulation allows the debtor or a qualified majority of creditors (paragraph 3, part 1, § 75) to apply to the court to state that there is another buyer and sale to him would be more profitable. In this case, the court may require the trustee to obtain the consent of the creditors' assembly.

Section 3 of the Statute is devoted to the sale of the property to which there is a right to separate satisfaction. Thus, § 165 of the Statute provides for the right of the insolvency trustee to hold an auction for the sale of real estate, in respect of which there is a right to separate satisfaction. Indeed, § 166 of the Statute is devoted to the sale of movable property. Accordingly, the insolvency trustee has the right to such realisation, if the property is at his disposal. At once there is a question with a way of sale in such case, after all unlike realisation of real estate the German legislator does not make a specification here. Therefore, it is worth paying attention to the provisions of § 1235 of the German Civil Code [33]. This regulation stipulates that the collateral must be sold at a public auction.

The provision of p. 1 of § 1238 of the German Civil Code [33] attracts attention in terms of improving Ukrainian legislation since it stipulates that the sale of a mortgaged property can take place only if the buyer pays the full amount for the goods in cash, otherwise his rights are lost. Of course, the Ukrainian legislation also states something similar, but we have already described that there is a statutory delay in the payment of the full proper amount for the purchased goods. In addition, the Statute states that the insolvency trustee must provide information to the creditor regarding the property in case of its sale in accordance with § 166. The authors emphasise the provision of § 168, which states that before the sale, the insolvency trustee warns the creditor about the sale of a property. A creditor has the right within a week to determine another method of sale that would be more profitable for him. Thus, the authors conclude that the sale of a property is possible in any way in consultation with a non-competitive creditor.

It should be noted that in case of non-application of § 166 in accordance with the provisions of § 173, the non-competitive creditor has the right to independently sell the property belonging to him. However, Part 2 of this rule provides for the right of the court to set time limits for a non-competitive creditor and, in case of non-compliance, to oblige the insolvency trustee to sell the property. The authors also agree with the position of S. Greif, who noted that: "A creditor who has the right to a separate satisfaction may declare that the object does not belong to the bankruptcy estate, and demand its return, referring to the right seen from the legislation provisions outside the Statute" [7]. Therefore, it can be assumed that despite the obligation imposed by the German legislature on the insolvency trustee to sell the property of creditors with the right to separate satisfaction, in the latter for the most part there is the possibility for those creditors to perform self-realisation.

Summarising all the above-mentioned, the authors conclude that in Germany, the insolvency trustee is endowed with greater discretion, which, in turn, leaves room for all sorts of abuses. In the authors' opinion, such an experience is inappropriate for Ukraine, as we currently tend for the legislator to try to restrict the bankruptcy trustee as much as possible in the freedom of choice. Moreover, despite such restrictions, abuses by bankruptcy trustees remain possible. Therefore, it is even scary to imagine the consequences of using similar procedures with the German competitive process. On the other hand, the provisions of German law, which provide for a greater role of creditors' representative bodies in the sale of the debtor's property, are noteworthy because in this way the powers of the insolvency trustee are reduced. Therefore, in addition to the above-provided proposals, the authors consider it is necessary to make the following changes in domestic legislation.

Firstly, there is a need to move away from selling property at an auction. No, of course, such a type of sale must exist, but it cannot be non-alternative. Therefore, the authors propose to provide an opportunity for the secured creditor to sell the mortgaged property of the debtor independently out of competition. Such innovation will be especially relevant given the existing case law. In turn, the creditors' committee or assembly must be authorised to sell the debtor's property privately. However, despite this, the authors believe that the bankruptcy trustee should continue to sell the property at public auction with the help of a modified ETS. The authors would like to highlight that this approach is not a novelty, since it existed in the days of the Russian Empire, which, in particular, was noted by G. Shershenevich, who pointed out that the law gives to creditors' assembly the right to choose the method of property realisation [3, p. 428]. Secondly, it is necessary to remove from the Ukrainian legislation the provisions on the second repeated auction because its existence only contributes to the sale of property for a pittance. Instead of a second repeated auction, a meeting of the creditors' assembly or committee should be initiated, at which creditors should decide whether to sell the property privately or to hold the auction again. However, the price and conditions of such an auction should be determined by creditors themselves.

Legislative provisions on the functioning of the ETS also need to be improved. First of all, it is necessary to recognise the need for participation in the bidding of at least two buyers because with the participation of only one such bidding cannot be considered public. In addition, it is necessary to remove Part 3 of Art. 85 of the Bankruptcy Code. The authors are confident that with the introduction of these changes in the procedure of the realisation of bankrupt property, the bankruptcy procedure in Ukraine will become much more productive.

## CONCLUSIONS

In this research, a theoretical and practical generalisation was made and the ways of solving the mentioned problems of legal regulation of the order were proposed, as well as the method of sale of the debtor's property in the bankruptcy (insolvency) procedure under the law of Ukraine and Germany. As a result of the study, the authors came to the following conclusions:

1. The provisions of the Bankruptcy Code regulating the sale of bankrupt property contain many problematic issues that complicate the work of law enforcement agencies, and therefore need an immediate resolution.

2. Notwithstanding the high hopes and expectations placed on the ETS, currently the electronic trading system does not cope with the set task.

3. Unlike Ukraine, in Germany the sale of the debtor's property at auction is considered an unprofitable and unjustifiably long procedure.

4. In Germany, the insolvency trustee privately sells the debtor's property, according to which the discretion of his powers is much wider than his prototype in Ukraine, and therefore, the German insolvency trustee has room for various abuses.

5. For Ukraine, Germany's experience in the sale of the debtor's property is not entirely relevant. At the same time, there is a possibility of its partial borrowing.

6. Ukraine should move away from the mandatory sale of bankrupt property at auction and authorise the representative bodies of creditors to sell property privately.

7. It is argued that due to the existing case law, secured creditors in Ukraine are currently in a rather difficult situation, and therefore it is necessary to authorise them at the legislative level to independently sell the mortgaged property of the debtor.

8. It is proposed to increase the guarantee fees of auction participants to 50%, as well as in case of their illegal behavior to apply restrictions to such participants in the right to further participation in the repeated auction.

9. Legislation on the application of the second repeated auction should be removed, as its existence only facilitates the sale of property for a pittance.

10. It is stated that bidding cannot be considered public if there is only one participant, and therefore it is necessary to recognise the mandatory participation of at least two buyers.

11. It is noted about the urgency of providing in the Bankruptcy Code an exhaustive list of conditions under which the transaction made at the auction for the sale of the debtor's property in bankruptcy proceedings may be declared invalid. Furthermore, it will also be appropriate to indicate the list of subjects of appeal and set a one-month non-renewable period for appealing its results in order to ensure the transiency of the bankruptcy procedure, compliance with the deadlines for liquidation, and protect the rights of future bona fide owners of the property, which was sold at auction.

12. It is argued that p. 3 of Art. 85 of the Bankruptcy Code on deferral of payment by the buyer of the due second part for the goods must be removed in connection with the existence of a legal prohibition in establishing deferrals at the contractual level (p. 3 of Article 63 of the Bankruptcy Code).

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