

# Vietnam's Law on persons with rights and obligations to file for commencing bankruptcy procedures: inadequacies and recommendations from other countries' experience

## Lei vietnamita relativa às pessoas com direitos e obrigações de se apresentarem para dar início a um processo de falência: insuficiências e recomendações com base na experiência de outros países

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## Abstract

Vietnamese Law deals with filing for the commencement of bankruptcy procedures for an enterprise or cooperative. However, the regulations on the entities with the right and obligation to file for commencing bankruptcy procedures are still inadequate, incomplete, outdated, or not in line with international development. It leads to many difficulties and problems in practical application that need to be amended and supplemented for improvement.

**Keywords:** Vietnam's law; enterprises; cooperatives; filing for bankruptcy procedures; the entities with the right to file a petition; the entities with the obligation to file a petition.

## Resumo

A legislação vietnamita trata do pedido de início do processo de falência de uma empresa ou cooperativa. No entanto, a regulamentação sobre as entidades com o direito e a obrigação de requerer a abertura de um processo de falência é ainda inadequada, incompleta, desatualizada ou não está em conformidade com o desenvolvimento internacional. Esta situação conduz a muitas dificuldades e problemas na aplicação prática que precisam de ser alterados e complementados para serem melhorados.

**Palavras-chave:** Lei do Vietname; empresas; cooperativas; apresentação de processos de falência; entidades com direito a apresentar um pedido; entidades com obrigação de apresentar um pedido.

## 1 Introduction

The 2014 Bankruptcy Law, passed by the National Assembly on June 19, 2014, took effect on January 1, 2015. The objective of bankruptcy law is to protect the legitimate rights and interests of creditors effectively, the interests of debtors, the interests of workers, and social stability. Also, the Bankruptcy Law is an effective tool to contribute to restructuring the economy. It is considered to be a mechanism to filter and eliminate weak and loss-making enterprises, create a healthy business environment for investors, and contribute to maintaining the existence of effective enterprises. After nearly ten years of implementation, the 2014 Bankruptcy Law has had significant reforms, overcome obstacles and shortcomings of the 2004 Bankruptcy Law, and accelerated the settlement of bankruptcy cases; many previous bankruptcy cases due to legal problems have been resolved; the number of new bankruptcy cases accepted and granted with a decision to declare bankruptcy has increased every year.

However, through the implementation process, the 2014 Law on Bankruptcy has revealed inadequacies and inconsistencies with regulations in related fields. In particular, for the filing of petitions for opening bankruptcy procedures, the 2014 Law on Bankruptcy stipulates that the two groups of subjects filing such petitions are the group with the right to file and the group with the obligation to file. In particular, Article 5 of the Law on Bankruptcy 2014 states that entities with rights and obligations to file a petition for commencement of bankruptcy procedure include:

1. An unsecured creditor or partially secured creditor has the right to file a petition for commencement of bankruptcy procedure upon expiry of three months from the maturity date of a debt which an enterprise or a cooperative failed to perform the obligation to repay.

2. Employees, the grassroots trade union, and the immediately higher grassroots trade union in a place where a grassroots trade union has not been established have the right to file a petition for commencement of bankruptcy procedure upon expiry of three months from the date when the obligation to pay wages and other debts to the employees was due and not performed by the enterprise or cooperative.

3. The legal representative of an enterprise or cooperative has an obligation to file a petition for commencement of bankruptcy procedure when the enterprise or cooperative becomes insolvent.

4. The owner of a private enterprise, chairperson of the board of management of a shareholding company, chairperson of the members' council of a multi-member limited liability company, owner of a one-member limited liability company, or a partner of a partnership company has an obligation to file a petition for commencement of bankruptcy procedure when their enterprise becomes insolvent.

5. A shareholder or a group of shareholders owning 20% or more of ordinary shares for at least six consecutive months has the right to file a petition

for commencement of bankruptcy procedure when their shareholding company becomes insolvent. A shareholder or a group of shareholders owning less than 20% of ordinary shares for at least six consecutive months has the right to file a petition for commencement of bankruptcy procedure when their shareholding company becomes insolvent if it is so stipulated in the charter of the company.

6. A member of a cooperative or the legal representative of a member cooperative of an alliance of cooperatives has the right to file a petition for commencement of bankruptcy procedure when the cooperative or the alliance of cooperatives becomes insolvent.

Compared to the provisions of other legal documents and applicable practices, the above provisions on the rights and obligations of entities to file for opening bankruptcy procedures have been inadequate, unreasonable, and incomplete.

Specifically, the representative organizations of employees at enterprises<sup>1</sup>, social insurance agencies, members of the members' council of limited liability companies, etc., have not been regulated for the right to file a petition to open bankruptcy procedures. In addition, some persons in the business managers have not been required to file for bankruptcy proceedings when their enterprises become insolvent. These inadequacies lead to inconsistent or unfeasible application of the law. Therefore, it is necessary to study the provisions of the law on the subject with rights and obligations to file a petition to open bankruptcy procedures. It is to make some recommendations for the law on bankruptcy in general and the provisions on rights and obligations to file a petition to open bankruptcy procedures in particular. In the process of studying, it is necessary to understand the bankruptcy laws of relevant institutions of some countries to learn their progressive regulations.

## **2 Inadequacies in the provisions for entities with rights and obligations to file petitions for opening bankruptcy procedures and recommendations**

### ***1. For the entities having the right to file for opening bankruptcy procedures First, unsecured creditors and partially secured creditors***

According to Clause 1, Article 5 of the Bankruptcy Law 2014, only unsecured creditors and partially secured creditors have the right to request the opening of bankruptcy procedures for enterprises and cooperatives that they believe are in a state of insolvency.

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1 Here, it only refers to the representative organization of employees in enterprises without trade unions.

However, creditors with the right to apply (unsecured creditors and partially secured creditors) often do not prioritize using this right in practice. This is because, in the majority of cases where the Court declares bankruptcy, until the implementation, the assets remaining after payment of the secured debts are liquidated in the order of payment prescribed by law. There is almost nothing left, so the unsecured creditors are almost unable to recover the debt after the request to declare a bankrupt debtor is accepted. As a result, unsecured creditors often do not choose to exercise their right to file for bankruptcy procedures. Although the law provides for unsecured creditors and partially secured creditors the right to request the court to open bankruptcy procedures for insolvent enterprises and cooperatives, this right is almost not used in practice.

*Second, the right to file a petition for opening bankruptcy procedures of the representative organization of employees*

The 2019 Labor Code stipulates: “Internal representative organization of employees means an internal organization voluntarily established by employees of an employer that protects the employees’ legitimate rights and interests in labor relations through collective bargaining or other methods prescribed by labor laws. Representative organizations of employees include internal trade unions and internal employee organizations.”<sup>2</sup> Meanwhile, Clause 2, Article 5 of the 2014 Law on Bankruptcy stipulates that the persons having the right to file a petition for commencement of bankruptcy procedures include: “Employees, the grassroots trade union, and the immediately higher grassroots trade union in a place where a grassroots trade union has not been established have the right to file a petition for commencement of bankruptcy procedure upon expiry of 3 months from the date when the obligation to pay wages and other debts to the employees was due and not performed by the enterprise or cooperative”.

Thus, the content of Clause 2, Article 5 of the 2014 Law on Bankruptcy does not include an “internal employee organization” in the group having the right to file a petition to open bankruptcy procedures to protect the rights of employees. Therefore, if only based on the provisions of the applicable Bankruptcy Law, the current application will be inadequate. Specifically, if the enterprise has not yet established an “internal trade union” but has established an “internal employee organization”, the “superior trade union” shall have the right to file a petition for opening bankruptcy procedures. This is because the “internal employee organization” has not yet had the right to file. Meanwhile, according to applicable provisions, “internal employee organizations” have equal rights and obligations in protecting the legitimate rights and interests of employees in labor relations. Thus, legally, if based on the 2019 Labor Code, “internal employee organizations” shall exercise the right to represent employees to file for

2 Clause 3, Article 3 of the 2019 Labor Code

bankruptcy procedures.<sup>3</sup> However, the 2014 Law on Bankruptcy does not provide this organization with the right to request the opening of bankruptcy procedures for enterprises and cooperatives. This omission will lead to the situation that some courts accept the employee organization at enterprises without trade unions have the right to file under the Labor Code, and some do not.

Hence, Clause 2, Article 5 of the 2014 Law on Bankruptcy should be amended and supplemented to be compatible with the 2019 Labor Code as follows: “2. Employees, the internal trade union, and the superior trade union at enterprises without trade unions or internal employee organizations have the right to file a petition for the commencement of bankruptcy procedure upon expiry of three months from the date when the obligation to pay wages and other debts to the employees was due and not performed by the enterprise or cooperative.”

### *Third, the right to file a petition to open bankruptcy procedures of the social insurance agencies*

Article 54 of the 2014 Bankruptcy Law stipulates the sequence of redistribution of assets after enterprises and cooperatives go bankrupt as follows: “Salary arrears, severance allowances, social insurance and health insurance for employees, and other benefits under labor contracts and signed collective labor agreements” are prioritized for payment only after bankruptcy costs. Based on this provision, the amount of debt paid for “social insurance and health insurance” is one of the debts prioritized for payment when enterprises and cooperatives go bankrupt. However, the group of people who have the right to file a petition to open bankruptcy procedures in Article 5 above excluded social insurance agencies and health insurance agencies. It leads to two different interpretations and perspectives of the application.

First, the Social Insurance Agency believes that they have the right to file a petition for the commencement of bankruptcy procedures and provides many grounds to assert this right. Specifically, Clause 1, Article 5 of the Bankruptcy Law states that the persons with the right and obligation to file a petition for opening bankruptcy procedures, including “an unsecured creditor or partially secured creditor has the right to file a petition for commencement of bankruptcy procedure upon expiry of three months from the maturity date of a debt which an enterprise or a cooperative failed to perform the obligation to repay.”

Clause 3, Article 4 of the Bankruptcy Law stipulates: “An unsecured creditor is an individual, an agency or an organization entitled to request the debtor to pay the debts that are not secured against assets of the debtor or a third party.”

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3 Nguyen Thi Tam, *Law on enterprise and cooperative bankruptcy: inadequacies and solutions*, <https://tapchicongthuong.vn/bai-viet/phap-luat-ve-pha-san-doanh-nghiep-hop-tac-xa-mot-so-bat-cap-va-giai-phap-gop-phan-hoan-thien-98153.htm> (accessed on June 20, 2023)

Point b, Clause 1, Article 54 of the Bankruptcy Law stipulates that “When the judge gives the Decision on the declaration of bankruptcy, the assets of the insolvent entity shall be redistributed in the following sequence: the unpaid salaries, severance pay, social insurance and medical insurance to employees, other benefits according to the labor contracts and collective bargaining agreements.”<sup>4</sup> Therefore, according to this viewpoint, the social insurance agency has the right to file a petition for the commencement of bankruptcy procedures.

However, the second point of view in answer to the Government’s policy is that “the social insurance agency is not entitled to file to the People’s Court for the commencement of bankruptcy procedures after three months from the date of payment evasion, or late payment of social insurance.”<sup>5</sup>

Therefore, in practice, the court does not accept the petition to open bankruptcy filed by the social insurance agency but directs the social insurance agency through the trade union or the employee to file a petition to open bankruptcy procedures<sup>6</sup>. However, in many cases, employees or trade unions are unwilling to exercise the right to request on behalf of the insurance agency because they are afraid of the Court procedures. For employees or trade unions to request the commencement of bankruptcy procedures for enterprises and cooperatives, the insurance agency shall explain to the employees how social insurance and health insurance debt affect their benefits to persuade them to file for the commencement of bankruptcy procedures. It is considered a discussion about negotiation and persuasion, but it is not always a good result.

Therefore, to solve this shortcoming, the 2014 Bankruptcy Law should supplement social insurance agencies to the entities that have the right to file a petition to open bankruptcy procedures. This is because social insurance debt is also a debt that enterprises fail to pay. Hence, the social insurance agency shall be a creditor because it is responsible for collecting social insurance payments from the enterprises.

#### *Fourth, the right to file a petition for opening bankruptcy procedures of members of a multi-member limited liability company and partners of a partnership*

According to the provisions of Article 5 above, members of a multi-member limited liability company and partners of a partnership have no right or obligation to

4 Vietnam Social Security, *Can enterprises with insurance debt request for the commencement of bankruptcy procedures?* <https://baohiemxahoi.gov.vn/hoidap/pages/default.aspx?ItemID=1617> (accessed on June 12, 2023)

5 Vietnam Government Portal, *Can enterprises with social insurance debt request for the commencement of bankruptcy procedures?* <https://chinhsachonline.chinhphu.vn/co-the-yeu-cau-mo-thu-tuc-pha-san-doi-voi-doanh-nghiep-no-tien-bhxh-67779.htm> (accessed on June 12, 2023)

6 Lao Dong, *Are enterprises with social insurance debt considered bankrupt?*, <https://laodong.vn/tu-van-phap-luat/doanh-nghiep-no-bao-hiem-xa-hoi-co-duoc-coi-la-bi-pha-san-1178802.ldo> (accessed on June 12, 2023)

file a petition for opening bankruptcy procedures<sup>7</sup>. This is quite unreasonable because, for a joint-stock company, a shareholder or group of shareholders owning at least 20% of the ordinary shares for a continuous period of at least six months (or a shareholder or group of shareholders owning less than 20% of the ordinary shares for a continuous period of at least six months if the company charter stipulates) has the right to file for opening bankruptcy procedures when the enterprise is insolvent. This provision aims to ensure the rights and interests of shareholders and prevent risks for shareholders or groups of shareholders with a large number of shares in the company when the company is insolvent. So, for members of a multi-member limited liability company and partners of a partnership with a high capital ratio in the company, why are they not entitled to file a petition to open bankruptcy procedures? In fact, when a member or group of members with a dominant capital ratio of the company discovers and has sufficient grounds to assert that the enterprise is insolvent, they are not entitled to file a petition to open bankruptcy procedures. This is somewhat detrimental to such members or groups of members because it may greatly affect their interests if the situation persists<sup>8</sup>.

Therefore, the 2014 Law on Bankruptcy should supplement the right to file a petition for opening bankruptcy procedures for the above-mentioned subjects. The amendment is that a member or a group of members of a multi-member limited liability company and a partner or a group of partners of a partnership owning at least 20% of charter capital continuously within six months has the right to file a petition for opening bankruptcy procedures when the company is insolvent.

This recommendation can be evidenced by the provisions of the 2020 Enterprise Law that a member/a group of members holding at least 10% of the charter capital or a smaller ratio prescribed by the company's charter has/have the right to: “...*Inspect, access logbooks and monitor transactions, accounting books, and annual financial statements; Inspect, access, and make photocopies of the member register, meeting minutes, resolutions Decree decisions of the Board of Members, and other documents of the company;...*”<sup>9</sup>. While persons holding 10% of the charter capital have been able to understand the financial situation and access the books of the company, the Bankruptcy Law stipulates that persons holding 20% of the charter capital have the right to file a petition to open bankruptcy procedures. It is reasonable in terms of the level of risk protection and the ability of this member/group of members to prove the insolvency of the enterprise.

7 Nguyen Minh Tuan, *Completing corporate bankruptcy law to meet the current practical requirements*, <https://danchuphapluat.vn/hoan-thien-phap-luat-pha-san-doanh-nghiep-dap-ung-yeu-cau-thuc-tien-hien-nay> (accessed on June 29, 2023)

8 Che Van Trung, *Bankruptcy Law: Inadequacies & Solutions*, <https://tapchicongthuong.vn/bai-viet/phap-luat-pha-san-mot-so-bat-cap-va-giai-phap-gop-phan-hoan-thien-75960.htm> (accessed on June 12, 2023)

9 Point b, Clause 2, Article 49 of the 2020 Law on Enterprises



## 2. For the persons obligated to file a petition to open bankruptcy procedures

According to the 2014 Law on Bankruptcy, the persons obligated to file a petition to open bankruptcy procedures are mainly the group who hold managerial positions. These persons include legal representatives of enterprises, cooperatives, and private enterprise owners, 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 owner of a one-member limited liability company, and partners of a partnership<sup>10</sup>.

### *Firstly, for legal representatives of enterprises and cooperatives*

According to Clause 3, Article 5 of the 2014 Law on Bankruptcy, "The legal representative of an enterprise or cooperative is obliged to file a petition for opening bankruptcy procedures when the enterprise or cooperative is insolvent."

Pursuant to the 2020 Law on Enterprises, for limited liability companies and joint-stock companies that "have more than one legal representative, the Charter of the company specifies the rights and obligations of each legal representative. In case the division of rights and obligations of each legal representative is not explicitly defined in the company charter, each legal representative of the company shall be an authorized representative of the enterprise before a third party; all legal representatives shall be jointly liable for damage caused to the enterprise under the civil law and other relevant laws".

The 2023 Law on Cooperatives also stipulates: "A cooperative or cooperative union may have one or several legal representatives. The quantity, position, rights, and obligations of the legal representative; and division of rights and obligations amongst legal representatives (in case there are several legal representatives) shall be specified in the charter of the cooperative or cooperative union."

Thus, in terms of bankruptcy, if the company or cooperative has several legal representatives but the charter does not specify the rights of each legal representative, all legal representatives are obliged to file a petition to open bankruptcy procedures when their company is insolvent. It is because the legal representative must be responsible before the law and may be banned by the court from establishing or managing enterprises or cooperatives within three years from the date the People's Court issues a decision to declare bankruptcy if he/she does not file a petition to open bankruptcy procedures<sup>11</sup>. In case of damage arising after the insolvency of the enterprise due to the failure to file for opening bankruptcy procedures, compensation must be made<sup>12</sup>. In some countries, there are even severe sanctions (including

10 Clauses 2 and 3, Article 5 of the 2014 Law on Bankruptcy

11 Clause 3, Article 130 of the 2014 Law on Bankruptcy

12 Clause 5, Article 128 of the 2014 Law on Bankruptcy

imprisonment, fine, or compensation) for representatives who do not file timely or incorrectly.<sup>13</sup>

However, when one of the legal representatives of the company or cooperative has fulfilled the obligation to file for the commencement of bankruptcy procedures, do the remaining representatives have to perform this obligation? Or must the petition for opening bankruptcy proceedings be signed by all legal representatives of the company?

Therefore, to comply with the provisions on many legal representatives of enterprises and cooperatives, Clause 3, Article 5 of the 2014 Bankruptcy Law stipulates that the obligation to file petitions for opening bankruptcy procedures should be amended and supplemented as follows: “The legal representatives of enterprises and cooperatives are obliged to file petitions for opening bankruptcy procedures when enterprises and cooperatives are insolvent. In case an enterprise or cooperative has several legal representatives but the Charter does not specify which legal representatives are obliged to file a petition for opening bankruptcy procedures, only one legal representative shall perform the obligation to file a petition for opening bankruptcy procedures.” This provision shall ensure that only one of the legal representatives files a petition to open bankruptcy procedures, which will eliminate the filing obligation of the remaining legal representatives.

### *Second, for the other managers of the enterprises*

Clause 4, Article 5 of the 2014 Law on Bankruptcy stipulates: “The owner of a private enterprise, chairperson of the board of management of a shareholding company, chairperson of the members’ council of a multi-member limited liability company, owner of a one-member limited liability company or a partner of a partnership company shall file a petition for commencement of bankruptcy procedure when their enterprise becomes insolvent.”

It is both redundant and deficient compared to the provisions of the 2020 Law on Enterprises. This is because:

First, for private enterprise owners

The 2020 Law on Enterprises stipulates that “The owner of the private enterprise is its legal representative who will represent it during civil proceedings, as the plaintiff, defendant or person with relevant interests and duties before the court and arbitral tribunals, and in performance of other rights and obligations prescribed by law.” Thus, the owner of a private enterprise, as the legal representative of the enterprise, is the person obliged to file a petition to open bankruptcy procedures as prescribed in Clause 3, Article 5 of the 2014 Bankruptcy Law. Therefore, the obligation of the owner of a private enterprise to file a petition for opening bankruptcy procedures in Clause 4 is

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13 Nguyen Ngoc Anh, *Entities involved in bankruptcy legal relations – inadequacies and recommendations*, <https://tapchitoaan.vn/cac-chu-the-tham-gia-quan-he-phap-luat-pha-san-mot-so-bat-cap-va-kien-nghi-hoan-thien> (accessed on June 12, 2023)

repeated and redundant. Therefore, it is necessary to consider reducing the obligation to file a petition for opening bankruptcy procedures of the owner of a private enterprise in Clause 4, Article 5 of the 2014 Bankruptcy Law.

Secondly, for the owner of a one-member limited liability company

According to the provisions of the 2020 Law on Enterprises, the owner of a one-member limited liability company is not a person in the group of organizational structure and management of the company. In other words, as a company owner, the individual or organization that owns the company is not the subject of managing the company according to the provisions on “managers of enterprises” in the 2020 Law on Enterprises. Instead, for a one-member limited liability company, the manager of the company is the Chairperson of the Members’ Council (when a one-member limited liability company owned by the organization selects the management model as “Members’ Council, Director or General Director”) or the President of the company (when a one-member limited liability company owned by the organization selects the management model as “President of the company, Director or General Director” and for a one-member limited liability company owned by an individual) and members of the Members’ Council.

Therefore, in Clause 4, Article 5 of the 2014 Law on Bankruptcy, “owner of a one-member limited liability company” should be amended to “Chairperson of the Members’ Council or President of a one-member limited liability company.”

### *Third, for other managers of the cooperative*

For cooperatives, the 2014 Law on Bankruptcy only stipulates that two entities with the right and obligation to file a petition for opening bankruptcy procedures are the legal representatives of the cooperative (with obligations) and members of the cooperative (with rights). However, compared to the 2023 Law on Cooperatives, this provision needs to be amended and supplemented accordingly. Specifically, according to the 2023 Law on Cooperatives, there are two management models: a) The fully organized management model consists of the GMM, Board of Directors, Director (General Director), and Board of Controllers. b) The simplified management model consists of the GMM, Director, and Controller<sup>14</sup>.

Therefore, to be consistent with the 2023 Law on Cooperatives, the 2020 Bankruptcy Law should be supplemented with a regulation that cooperative managers who are obliged to apply for opening bankruptcy procedures include the Chairman of the Board of Directors, members of the Board of Directors, Director (General Director), or members of the Supervisory Board. It is to ensure the timely opening of bankruptcy procedures or to have a plan to restore the cooperative’s business operations, helping to protect better the interests of the cooperative, its creditors, and its employees.

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14 Clause 1, Article 56 of the 2023 Law on Cooperatives

However, if the persons obligated to declare the enterprise or cooperative bankrupt fail to perform this obligation, what sanctions must be imposed? The Bankruptcy Law of Vietnam has not stipulated clear and specific provisions for the practical implementation.

No country has a bankruptcy law without providing for crimes and penalties related to bankruptcy in the law itself or another law, depending on the model of building the system of legal documents of that country. Vietnam is currently a worrying exception. This means that Vietnam's Bankruptcy Law does not have provisions on crimes and penalties related to bankruptcy. Also, most lawyers in criminal law, commercial law, as well as in other fields of law are not interested in this legal issue.<sup>15</sup>

### 3 Experience of some countries

In most countries, the entities entitled to request the Court to open bankruptcy procedures are the creditors and the indebted enterprises (debtors). Generally, partially secured creditors and other secured creditors have the right to request the Court to consider and decide to open procedures to resolve enterprise bankruptcy. A petition to open bankruptcy procedures of a debtor must be enclosed with a list of creditors and written requests of creditors. In some countries, according to bankruptcy law, if the debtor is an enterprise in operation, it is also necessary to provide other necessary information.<sup>16</sup>

Meanwhile, under the 2014 Vietnam Bankruptcy Law, unsecured creditors and partially secured creditors have the right to file a petition to the Court to open bankruptcy procedures, but other secured creditors do not have this right.

The representative of the indebted enterprise is obliged to file a petition to the Court for consideration and decision on opening bankruptcy procedures for the enterprise. At the same time, bankruptcy laws in some countries also stipulate severe sanctions (including imprisonment, fine, or compensation) for representatives of enterprises who do not file promptly or properly. For example, the applicable Bankruptcy Law of Germany stipulates that if a legal entity is insolvent or its assets are less than the existing debts, the members of the representative body of the legal entity generally must file a petition to open bankruptcy procedures within three weeks after such situation. A person who must perform this obligation without filing a petition to open bankruptcy procedures, filing a petition untimely, or making an improper petition may be sentenced to imprisonment for up to three years or a fine; in case of

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15 Dr. Ngo Huy Cuong, 2014, the legislative research journal "Protection of bankruptcy legal relations by criminal law" published on February 1, 2014

16 Standing Committee of the National Assembly, Legislative Research Institute, Scientific Research Center, Research Topic: Foreign experience in enterprise bankruptcy, Hanoi, October 2013, p. 11.

unintentional violation, he/she shall be sentenced to imprisonment for up to one year or a fine.<sup>17</sup>

Meanwhile, according to the provisions of Clauses 3 and 4, Article 5 of the 2014 Bankruptcy Law, when finding that the enterprise is insolvent, the owner or legal representative of the enterprise must file a petition to open bankruptcy procedures. However, the 2014 Bankruptcy Law of Vietnam did not provide specific sanctions for the performance of this obligation, and the indebted enterprise did not strictly perform the filing obligation. It has affected the enforceability of the Bankruptcy Law.

The settlement of bankruptcy in France is stipulated in the Law dated January 25, 1985 (as amended by the Bankruptcy Law dated October 20, 1994). One of the features of France's applicable bankruptcy law is to encourage the survival of businesses that fall into bankruptcy. The law also clearly distinguishes the rights to request the Court to declare bankruptcy and the priority of creditors' rights for debtors.

The 2014 Bankruptcy Law of Vietnam does not provide specific sanctions for persons obligated to file a petition to open bankruptcy procedures without filing a petition, leading to damage to persons with rights.

Hence, Vietnam should refer to the bankruptcy law experience of France and the United Kingdom. Article 128 of the Bankruptcy Law of France stipulates that the debtor can be convicted of bankruptcy in case of failure to perform the obligation to initiate a lawsuit without a legitimate reason. In the law of the United Kingdom, crimes related to bankruptcy are usually divided into groups according to the entities of the criminal act. Crimes committed by bankrupt people include failure to declare assets, failure to hand over property, concealment of assets, fraudulent transfer of assets, absconding with assets, failure to fulfill reporting obligations, failure to report fictitious debt, failure to transfer documents, preventing the submission of records and documents; concealing or mutilating books and documents; falsely recording in books and papers, documents; fraudulent separation and alteration of documents; making false losses; gambling and speculation cause losses; failure to maintain proper accounting records; guarantees and other similar acts with borrowed assets within the prescribed time related to bankruptcy procedures; using fraudulent tricks to gain creditor's approval; borrow £10 or more without the notice of your default; conducting business without disclosing the identity with which the bankrupt is being discharged.

In addition to the crimes committed by the bankrupt, the acts committed by others are criminalized in the UK as follows: false claims of creditors; receiving improper mortgages from bankrupt people; the bankrupt acts as a director, manager, or custodian of the company's assets without the permission of the court.<sup>18</sup>

17 Standing Committee of the National Assembly, Legislative Research Institute, Scientific Research Center, Research Topic: Foreign experience in enterprise bankruptcy, Hanoi, October 2013, p. 11.

18 Described by Lord Hailsham of St. Marylebone, *Halsbury's Laws of England*, Fourth Edition, Volume 3, Butterworths, London, 1973, pp. 566 – 573.

The 2014 Bankruptcy Law of Vietnam stipulates the right to request the opening of bankruptcy procedures of internal trade unions or superior trade unions in places that have not been established upon expiry of three months from the date when the obligation to pay wages and other debts to the employees was due and not performed by the enterprise or cooperative. French Bankruptcy Code gives the Prosecutor the right to request a bankruptcy procedure. The right to file for bankruptcy procedures granted to legal authorities seems to be more effective than to a trade union or representative organization of employees. This is because legal agencies shall understand the law, the order of procedures, and relevant legal regulations on the content. Therefore, it is necessary to refer to this regulation so that the 2014 Bankruptcy Law can be amended and supplemented accordingly and effectively. Also, it should be further specified that if none of the legal representatives performs the obligation to file a petition to open bankruptcy procedures, all the legal representatives shall be jointly liable for the damages incurred after the insolvency of the enterprise.

The Japanese Bankruptcy Law also has significant differences from the 2014 Bankruptcy Law of Vietnam. The issue of bankruptcy in Japan is not regulated in a single document but in many different laws and codes at different times, namely Bankruptcy Law (1922), Commercial Code (1938), Law on Compromise (1922; 2000), Law on Civil Rehabilitation (1999; 2000), and Law on Corporate Reorganization (1952).

In order to solve the situation of a loss-making business, Japanese law regulates asset liquidation and recovery procedures. *Asset liquidation procedures* includes (1) Bankruptcy, (2) Special Liquidation, and (3) Agreement.

In particular, bankruptcy is the liquidation of an enterprise under the supervision of the Court, and a bankruptcy petition is filed when the parties confirm the causes of the existing bankruptcy situation and submit a bankruptcy petition to the debtor. In Japan, it is mainly the debtor who files for bankruptcy. When the debtor files for bankruptcy, the petition is accompanied by a financial balance sheet, an inventory of assets, a list of creditors, and a fee. Bankruptcy is the inability to pay debts due, and the legal entity is insolvent. A legal entity is considered insolvent when the amount owed is greater than the assets of the legal entity. When the indebted enterprise stops paying its debts, the indebted entity is considered financially incapable of repaying the debt, and often, failure to pay or sign a return slip is considered a sign of stopping payment.<sup>19</sup>

The law on bankruptcy in the US stipulates that the person who has the right to file for the opening of legal procedures is a debtor. Generally, a bankruptcy case begins with the debtor filing in bankruptcy court, and only the federal court has the authority to handle bankruptcy cases in the US. A petition may be filed in court by an individual, couple, company, or agency. Petition forms are available at the clerk's office

19 Phan Thi Thu Ha, *Learn about bankruptcy laws around the world*, <http://hvta.toaan.gov.vn/portal/pls/portal/docs/2201255.PDF> P.86, accessed on June 23, 2023

of bankruptcy courts or stationery shops. There is a range of filing fees for bankruptcy, based on which chapter of bankruptcy law the petition proposes.

The court will require the debtor to submit a financial balance sheet listing assets, income, valuable papers, names, and addresses of all creditors with the debt attached. This will prevent foreclosure or the fact that creditors will sue, demand wages, or even call to collect debt. The court clerk will send an announcement to the creditors notifying them that the debtor has filed for bankruptcy. In some bankruptcies, the debtor is allowed to reorganize the business and make a debt repayment plan, while in some cases, the liquidation of the debtor's assets is resolved. There are many bankruptcies where the debtor's real estate is not enough to pay off creditors but just enough to liquidate the assets for individual consumers. As a result, there is less disagreement or dispute, and the debtor is usually helped out of most debts without confrontation. This also means that the debtor no longer has personal credibility to repay the debt.

However, in other bankruptcy cases, disputes arise in the bankruptcy court over whether the debtor has property, how the property is used, and how much the property is worth to pay for a debt; whether the debtor has escaped certain debts, or how much money should be paid to lawyers, accountants, auditors, or other professionals. There will be many different ways to resolve a bankruptcy case, including investigations, pre-procedure, mediation, and first-instance trials, as in civil procedures.<sup>20</sup>

If the entity is a retail trader, he/she will have the right to declare all personal and professional debts. For example, if a couple owns a small trading shop, when they both declare bankruptcy, they will be related to each other and vice versa; if only the husband is filing for bankruptcy as an individual, it will only affect the husband's debts.

Thus, if individuals contribute capital to do business when they want to declare bankruptcy, they must first negotiate with others to officially terminate the common capital contribution. Otherwise, there will be troublesome consequences because other capital contributors may file a lawsuit to the Court to annul the bankruptcy case.

The Court will require debtors to submit certain documents to the Court, including a financial balance sheet, list of assets, list of income and valuable papers, and personal information (name and address of all creditors with attached debts).<sup>21</sup>

In addition, in many countries, there are regulations on bankruptcy for individuals and households, which Vietnam's bankruptcy law has not mentioned. Typically, in Germany, hired workers, state employees, pensioners, and unemployed people who are no longer able to pay their debts can register for bankruptcy at any

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20 Tong Quang Minh, *United States: Bankruptcy is the jurisdiction of the federal courts*, <http://www.hcmcbar.org/NewsDetail.aspx?CatPK=4&NewsPK=92> Portal of Ho Chi Minh City Bar Association, accessed on June 24, 2023

21 Tong Quang Minh, *United States: Bankruptcy is the jurisdiction of the federal courts*, <http://www.hcmcbar.org/NewsDetail.aspx?CatPK=4&NewsPK=92> Portal of Ho Chi Minh City Bar Association, accessed on June 24, 2023

time, regardless of the number of creditors. To register for personal bankruptcy, it is necessary first to summarize all documents on income, existing assets, debts, and creditors. The next step is going to the Court to open a debt payment procedure. After that, the debtor only retains the minimum living standard guarantee amount, and the rest belongs to the creditor after deducting court costs. During the six years, the debtor is not allowed to borrow more credit. If he/she changes his/her residence or job or receives an inheritance, he/she must report it to the trustee. The debtor will be cleared of the remaining debts after the prescribed time limit.

Singapore's bankruptcy regime also allows individuals to file for bankruptcy. The name used in place of "claim for bankruptcy" is "bankruptcy protection".

In Singapore, an individual may apply for bankruptcy protection if he or she owes an insolvent amount of at least S \$10,000 (SGD), equivalent to VND 165 million. The Court will evaluate these conditions, and this person can declare bankruptcy within 4-6 weeks after filing. The bank will then likely proceed with foreclosure and enforce judgments after the trial. However, the debtor can negotiate with the creditor the amount that needs to be paid, and if the amount of debt is not more than S \$100,000, it can be cleared by the Court after three years.

Currently, the Singapore government has become more and more interested in helping bankrupt people overcome difficulties. For example, individuals who are indebted to no more than S \$100,000 and have a stable job can participate in a five-year repayment program before being considered for sentence remission. In particular, decisions in the Courts of Singapore will have a cross-border effect, i.e., an order issued by a Singapore court shall be applied globally. This has long been in the US Bankruptcy Law. Hence, many international companies tend to come to the US for protection, but now Singapore also has a bankruptcy protection law, which is effective even across borders.<sup>22</sup>

It can be seen that the opening of bankruptcy procedures in some countries 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.

At the same time, the bankruptcy laws of many countries prioritize creating opportunities for businesses to resume business operations rather than declaring bankruptcy. After all, saving a business will bring more benefits to the parties than declaring it bankrupt.

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22 Do Thu Huong, *Bankruptcy protection according to international and Vietnamese laws*, <https://tapchicongthuong.vn/bai-viet/bao-ho-pha-san-theo-quy-dinh-phap-luat-quoc-te-va-phap-luat-vietnam-48370.htm> Vietnam Trade and Industry Review, accessed on June 24, 2023.



The regulations on bankruptcy protection for individuals have been prescribed and enforced, while in Vietnam, individuals and households have not been protected from bankruptcy. Therefore, in the coming time, it is necessary to focus on and consider including in the law on bankruptcy in Vietnam the right to request the opening of bankruptcy procedures for individuals and households with insolvency. This is not only in line with the general trend of the laws of countries worldwide but also creates conditions for individuals to return to normal life after the period of “tightening their belts” to repay debts under the supervision of competent authorities.

## 4 Conclusion

With the development of Vietnam’s economy, many legal documents in the economic field have been newly promulgated or amended and supplemented, such as the 2019 Labor Code, the 2020 Law on Enterprises, the 2023 Law on Cooperatives, etc. Therefore, the 2014 Bankruptcy Law, after nearly ten years of implementation, has many inappropriate or outdated regulations compared to the provisions in the relevant legal documents mentioned above. Therefore, the Bankruptcy Law of Vietnam should be amended and supplemented as supplementing the right to file for commencement of bankruptcy procedures of the following entities: Representative organizations of employees at enterprises, cooperatives, members or groups of members of limited liability companies or partnerships with a high percentage of the total charter capital of the company. The group of persons obliged to file a petition for commencement of bankruptcy procedures should include those holding business management positions, and this obligation is only exempted if the enterprise or cooperative already has one of the other managers to file for commencement of bankruptcy procedures when the enterprise or cooperative is insolvent. Also, those who are not managers of enterprises or cooperatives are excluded from entities obliged to file a petition for commencement of bankruptcy procedures.

The regulation of restoring the operation of insolvent enterprises and cooperatives needs to be given more attention commensurate with its meaning to society. The individual’s right to claim bankruptcy should be added to the provisions of the Bankruptcy Law so that the individual can regain financial balance after failures.

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