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On Effect of Constitution on Bankruptcy Law

Pursuant to § 3 of the Constitution of the Republic of Estonia, the state authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Pursuant to § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution; such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Pursuant to § 13 of the Constitution, everyone has the right to the protection of the state and of the law. These provisions are an important point of departure for legislative drafting and the practical of application of law in all areas of law.

One of the most complicated areas of law is bankruptcy law, what with the extreme situation of both the debtor and the creditors — the debtor is threatened by loss of property, and also liquidation if the debtor is a legal person, while creditors are threatened by the possibility of unsatisfied claims or a small proportion of satisfaction. A bankruptcy proceeding by nature requires that the rights and freedoms of debtors be restricted, while the rights and freedoms of creditors are also restricted when compared to a situation outside of the bankruptcy proceeding. For example, after bankruptcy is declared, creditors cannot file an action against the debtor or apply for an execution proceeding to secure compulsory execution.

The rights and freedoms of the debtor in a bankruptcy proceeding are, of course, much more restricted than those of creditors. Therefore, the purpose of this article is to address the main restrictions on the debtor's rights and freedoms in the bankruptcy proceeding so as to answer the question of whether these restrictions comply with the Constitution and whether they are necessary in a democratic society. The analysis also helps to clarify whether the laws establishing such restrictions are in conformity with the Constitution. A majority of restrictions on the rights and freedoms of a debtor arise from the Bankruptcy Act¹, but can also be found in various other laws.² Therefore, the article mainly focuses on the Bankruptcy Act and the restrictions on the rights and freedoms of a debtor arising therefrom, as well as the restrictions on the rights and freedoms of creditors to a certain extent. As the Estonian Bankruptcy Act will be renewed in the near future³, the problems are discussed in view of the currently applicable law and the planned amendments.

¹ Pankrotiseadus (Bankruptcy Act). Riigi Teataja (The State Gazette) 1992, 31, 403 (in Estonian); consolidated text – Riigi Teataja (The State Gazette) 1997, 18, 302 (in Estonian).

² *E.g.* Karistusseadustik (Penal Code). – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian).

³ In connection with material renewal of the Estonian legal system, a new wording of the Bankruptcy Act has been prepared, which is based on the Bankruptcy Act of 1992 but contains a number of amendments. The draft is in the legislative proceeding of the *Riigikogu* and should be passed as a law at the end of 2002 or the beginning of 2003. The Bankruptcy Act is hereinafter referred to as BA and the new draft as DBA.

1. Debtor's rights to participate in court and to complain

Pursuant to § 15 of the Constitution, everyone whose rights and freedoms are violated has the right of recourse to the courts, and pursuant to § 24, everyone has the right to be tried in his or her presence and the right of appeal to a higher court against the judgment in his or her case pursuant to the procedure provided by law.

When bankruptcy has been declared, the trustee becomes a legal representative of the debtor. However, the debtor is in a different situation when compared to other principals who have legal representatives. A debtor is basically able to act without a trustee as a legal representative, but the debtor's rights are restricted in the interests of creditors.

If, in a court proceeding commenced before the declaration of bankruptcy, the debtor has a claim against the property of another person which can be included in the bankruptcy estate, the trustee may enter the proceeding as the legal representative of the debtor (BA § 20 (1); § 43 (1)). The rule is justified because the trustee is liable for increasing the bankruptcy estate and has to be able to have control over actions filed by the debtor before the bankruptcy proceeding if the bankruptcy estate is concerned. The trustee is also obliged under the law to ensure the protection of the debtor's rights.

At the same time, the trustee must comply with the interests of creditors, but the interests of creditors in a bankruptcy proceeding can be different and also contrary. Where the debtor has filed an action against a creditor, the creditor may influence the trustee to discontinue the action. If discontinuance of the action is not justified, but the trustee still does so, the trustee violates his or her obligation to pursue the common interests of all creditors. An application can be filed for the release of the trustee and a claim for compensation for damage can be filed against the trustee, but this is not common practice, as in the case of discontinuance of an action, it may be difficult to decide in retrospect whether or not the action would have been satisfied. Unjustified discontinuance of an action can, for example, be caused by the fact that the defendant is a creditor with a large number of votes, a conflict with whom may imply for the trustee the approval of lower wages by the general meeting of creditors or even failure of the general meeting to appoint him or her as the trustee.⁴

Besides damage to the interests of other creditors, discontinuance of the debtor's action against a creditor may also imply damage to the debtor's interests, because the debtor's insolvency could perhaps be remedied namely by the satisfaction of the claim in question.

In the case under observation, the debtor should be secured the right to participate in the proceeding as a party thereto in any case. This has not been done as of now and the debtor's participation in the proceeding entirely depends on the trustee's will. The Code of Civil Procedure⁵ should be improved in the first place by setting out the right of the debtor to always participate in the proceeding in the case described above, either together with the trustee or alone if the trustee abandons participation.⁶

The debtor's rights arising from §§ 15 and 24 of the Constitution cannot be restricted merely because the trustee is the legal representative of the debtor. A legal representative (such as a guardian) can exercise the rights of a principal arising from §§ 15 and 24 of the Constitution regardless of the principal's wishes, for example, when the principal is a person with a restricted active legal capacity who is not able to adequately comprehend his or her acts and the consequences thereof. Such a restriction is justified in respect of the debtor in accordance with § 11 of the Constitution only in a form and to an extent that does not enable the debtor to solely decide upon the discontinuance of the action or the waiver of appeal. Discontinuance of action should always require the trustee's consent so that the debtor could not damage the rights of creditors without justification, and, the other way round — the trustee should not be able to discontinue an action without the consent of the debtor.

A similar problem arises when a proprietary claim against the debtor is already being processed by the court and a judgement has been made before the declaration of bankruptcy, but no decision has been made yet about the appeal or appeal in cassation of such claim. Pursuant to BA § 20 (2) and DBA § 43 (5), the trustee

⁴ Pursuant to BA § 30, approval of the trustee appointed by the bankruptcy order shall be decided by the first general meeting of creditors. The resolution is adopted by a simple majority of votes of the creditors present, whereas the number of votes of a creditor depends on the amount of the claim. If the trustee appointed by the bankruptcy order is not approved, the creditors shall elect a new trustee, who shall be appointed by the court. If the court does not approve the trustee elected at the general meeting, it shall by a ruling appoint a new trustee who need not be approved by a general meeting of creditors, but it may not be the same person whom the general meeting of creditors did not approve as a trustee.

⁵ A new draft Code of Civil Procedure is currently in preparation and can still be improved.

⁶ The latter is allowed by BA § 20 (1) also now.

or, with the consent of the trustee, the debtor may appeal the judgment. The author finds that the right of the debtor arising from § 20 of the Constitution has been restricted here more than § 11 of the Constitution allows. If the action is filed by a creditor who has a larger number of votes against the debtor in another claim and although the action has been satisfied, the trustee can discontinue appeal due to the above reasons. In such case, the creditor receives an advantage in the form of such a claim of the creditor, because a claim satisfied by a court judgment that has entered into force must not be defended in the bankruptcy proceeding pursuant to the established procedure at the general meeting of creditors, but the claim is regarded as accepted without defence (BA § 72 (5), DBA § 103 (4)). Hence, other creditors can no longer contest such a claim, neither can the debtor raise any objections. In this case, too, it would be justified to allow the debtor to file an appeal or appeal in cassation regardless of the trustee's permission. But if the trustee has filed a complaint, the debtor should be secured the right to participate in the proceeding as a party thereto either together with the trustee or alone if the trustee abandons participation. If these amendments were made to the Bankruptcy Act and the Code of Civil Procedure, this would ensure the correct application of §§ 15 and 24 of the Constitution to the debtor, taking into account the criteria set out in § 11.

As a counterargument, one could ask: if the debtor were allowed to file appeals and appeals in cassation and to participate in the action, would this not pose the risk of unjustified expenses on the bankruptcy estate, as the debtor's property has become the bankruptcy estate upon the declaration of bankruptcy. Indeed, the risk exists, and a trustee must observe and restrict such expenses. It should be considered in line with § 11 of the Constitution which is less permissible — a restriction of the debtor's rights that is not necessary in a democratic society and distorts the nature of the rights and freedoms restricted, or the making of further expenses on account of the bankruptcy estate, resulting in a smaller extent of satisfaction of the creditors' claims.

It should first be assessed whether the restriction on the debtor to participate as a party to the proceeding in the hearing of an action filed by or against the debtor, and the restriction on deciding on the discontinuance of a filed claim or on an appeal to the court judgment without the trustee's consent are restrictions contrary to §§ 11, 15 and 20 of the Constitution. It depends on the answer to this question in what manner the rights of the debtor have to be secured in the Bankruptcy Act and in the Code of Civil Procedure. The author finds that in their present form, the restrictions provided in the Estonian Bankruptcy Act do not conform to the requirements of § 11 of the Constitution and that the above-mentioned amendments are necessary.

2. Debtor's right to raise objections

Pursuant to the Bankruptcy Act, creditors are required to file their claims to the trustee after the debtor is declared bankrupt. The claims are defended at a general meeting of creditors called the meeting for the defence of claims. A claim is considered defended if neither the trustee nor the creditors have raised objections to it (DBA § 74 (2)). Once a claim is accepted at the meeting for the defence of claims, it cannot be contested later, unless the procedure for calling or conducting the meeting has been violated or falsified data have been submitted.

But if a creditor's claim is not accepted because of an objection, the creditor may file an action for the acceptance of the claim in a court. If the debtor has objections to the claim, the debtor may lodge these with the trustee or inform the creditors thereof. The debtor has the right to examine all the claims filed, but the debtor's objection is not sufficient grounds for not accepting a claim. A debtor can only solicit the trustee to raise an objection. If the trustee fails to do so, the debtor cannot prevent the acceptance of the claim. It may happen that the debtor is against a claim filed by a creditor, but the claim is still accepted and the debtor has no possibility or right to object to the claim during the bankruptcy proceeding or after it. The Bankruptcy Act thus restricts the right of the debtor to raise objections to the claims filed against the debtor, since the trustee as the legal representative is the person who can decide upon the raising of an objection for the debtor. Granting the debtor the right to raise an objection could significantly impede a quick performance of the bankruptcy proceeding and cause unjustified expenses on the bankruptcy estate, if the debtor objected all or most of the claims and if actions followed such objections. As concerns the bankruptcy proceeding and protection of the rights of creditors, the above regulation seems to be justified.

However, there is the question of the conformity of such a regulation to § 15 of the Constitution, according to which everyone has the right of recourse to the courts if his or her rights and freedoms are violated. For example, if the debtor has an objection against a claim filed against the debtor, but the trustee and none of the creditors raises an objection and the claim is defended, the claim will be satisfied on account of the bankruptcy estate, and the debtor will have to satisfy the unsatisfied part of the claim after the end of the bankruptcy proceeding.⁷

⁷ Pursuant to DBA § 95 (4), such a claim is fulfilled until fully satisfied, but not for a longer period than within 10 years after the end of the bankruptcy proceeding. The new draft Bankruptcy Act provides for the opportunity to relieve a debtor who is a natural person of debts within five years after the end of the bankruptcy proceeding.

This particularly concerns debtors who are natural persons, because many debtors who are legal persons are liquidated in the course of the bankruptcy proceeding.

A debtor cannot raise an objection before the claims are defended, nor can the debtor contest any accepted claims after the end of the bankruptcy proceeding. Hence, a debtor cannot refer to a court to protect their rights even when the debtor finds that their rights have been violated by the filing of an unjustified claim and the claim is being satisfied on account of the debtor's property. The new draft Bankruptcy Act attempts to solve this problem. Pursuant to DBA § 104, the debtor may also raise an objection against a claim at the meeting for the defence of claims. The debtor's objection will not prevent the acceptance of the claim, but insofar as the debtor objected to the claim, it cannot be satisfied in respect of the debtor after the end of the bankruptcy proceeding under the list of accepted claims. If the creditor wishes that the claim could be satisfied, the creditor has to file an action against the debtor for the acceptance of the claim. This rule secures the debtor's right of defence better — if the creditor wishes to enforce a claim objected by the debtor after the end of the bankruptcy proceeding, the creditor has to refer to a court, which in turn gives the debtor the opportunity to protect their rights in court. In this part, the right of recourse to the courts as set out in § 15 of the Constitution is essentially secured — the creditor is forced to refer to a court due to the debtor's objection, and through this, the exercise of a fundamental right of the debtor is secured and the debtor's violations are judged by the court. However, the problem that remains is that in the bankruptcy proceeding, it is possible to satisfy a claim on account of the debtor's property without the debtor being able to demand that the matter be heard in court, because the debtor's objection does not prevent the acceptance of the claim even under DBA § 104.

Such a restriction should be agreed to because of the reasons stated above; within the framework of a bankruptcy proceeding, the restriction should be regarded as a restriction necessary in a democratic society within the meaning of § 11 of the Constitution. The restriction is necessary in a bankruptcy proceeding to protect the interests of creditors, while the extension of the restriction outside of the bankruptcy proceeding is not justified or necessary. Section 104 of the DBA enables a debtor to prevent such extension; this is particularly important in the case of debtors who are natural persons, because as said, legal persons are usually liquidated in the course of the bankruptcy proceeding and the opportunity set out in § 104 has no meaning to them. However, besides debtors who are natural persons, those debtors who are legal persons and remain to exist after the end of the bankruptcy proceeding may count on this provision.

3. Is deprivation of liberty of the debtor contrary to § 20 of the Constitution?

The Estonian legal system proceeds from the firm principle that punishments involving deprivation of liberty are set out in the Penal Code and not in any other laws. Section 20 of the Constitution sets out the bases on which a person may be deprived of liberty. Particularly this may be done in order to execute a judgment of conviction, but also in other cases, an exhaustive list of which is provided in § 20 of the Constitution (such as to prevent offences during preliminary investigation; to detain a person suffering from an infectious disease, a person of unsound mind, an alcoholic or a drug addict, if such person is dangerous to himself or herself or to others; to ensure the fulfilment of a duty provided by law, *etc.*). Section 20 of the Constitution also provides that no one shall be deprived of his or her liberty merely on the ground of inability to fulfil a contractual obligation.

Pursuant to BA § 39, upon non-compliance with a direction of the court or in order to ensure performance of duties provided by law, the court may apply compelled attendance or custody on the debtor. The first Estonian Bankruptcy Act⁸ only provided for the compelled attendance of the debtor if the debtor failed to perform the duty to attend a general meeting of creditors or a court session when ordered by the court or trustee, or to participate in an act of the bankruptcy proceeding if this was necessary. In 1996 the Bankruptcy Act was complemented by the possibility of holding the debtor in custody for up to three months, particularly if the debtor fails to perform the duty to provide information and to attend, refuses to take an oath, violates the prohibition from departing from his or her residence or the prohibition from disposal of the bankruptcy estate (BA § 39).

It is important to stress that the failure of the debtor to perform their proprietary obligations to creditors cannot serve as the reason for taking the debtor into custody under BA § 39. If the debtor has voluntarily

⁸ The first Estonian Bankruptcy Act entered into force on 1 September 1992; there were no bankruptcy proceedings during the Soviet period. The former laws of Tsarist Russia were applied to bankruptcy proceedings before 1940. On the development of bankruptcy law in Estonia see: P. Varul. On the Development of Bankruptcy Law in Estonia. – *Juridica International*, No. 4, 1999, pp. 172–173.

caused their insolvency, the debtor may be brought to justice and a custodial sentence may be applied under § 384 of the Penal Code which sets out the necessary elements of and punishment for a bankruptcy offence. But the debtor cannot be taken into custody for this under BA § 39 (DBA § 89).

The possibility to take the debtor into custody provided in BA § 39 is in conformity with § 24 of the Constitution insofar as this takes place in the cases and pursuant to the procedure provided by law in order to secure the fulfilment of a duty set out by law.

Taking the debtor into custody primarily serves a practical purpose — if the debtor fulfils the duty for the non-fulfilment of which the debtor was taken into custody, the debtor will be released after the obligation is fulfilled. This particularly relates to the duty to provide information and take an oath. But if the debtor is taken into custody because of violation of the duty to attend or the prohibition from departing from his or her residence or the prohibition from disposing of the bankruptcy estate, the court will release the debtor only if there is reason to believe that release of the debtor will not impede the further bankruptcy proceeding.

4. Prohibition on debtor from departing from his or her residence

Pursuant to § 34 of the Constitution, everyone who is legally in Estonia has the right to freedom of movement. This right may be restricted in the cases and pursuant to the procedure provided by law to protect the rights and freedoms of other persons. Pursuant to § 35 of the Constitution, everyone has the right to leave Estonia. This right may be restricted by law to ensure the administration of court or pre-trial procedure and to execute a court judgment.

The Bankruptcy Act provides for the possibility to restrict the debtor's freedom of movement and departure from Estonia. The debtor shall not travel abroad without the permission of the court after the declaration of bankruptcy of the debtor and before taking an oath (BA § 38 (1)). If there is reason to believe that the debtor is avoiding the fulfilment of their duties, the court may, on the proposal of the trustee or on its own initiative, prohibit the debtor from departing from his or her residence against the signature of the debtor (BA § 38 (2)). The same principles will remain in force in the new Bankruptcy Act.

The purpose of the prohibition from departure from the debtor's residence is to secure the availability of the debtor and his or her necessary attendance at the bankruptcy proceeding — at court sessions, general meetings of creditors, meetings of the bankruptcy committee or acts of the bankruptcy proceeding in which the debtor's participation is necessary. The prohibition from departing from residence may be applied immediately after the commencement of the bankruptcy proceeding when bankruptcy has not yet been declared.⁹ Repeated attention has been drawn in judicial practice to the fact that the prohibition from departing from residence may be applied only when there is reason to believe that the debtor would otherwise not perform the duty of attendance (particularly when the debtor has previously violated this duty). As the personal presence of the debtor is vital to the successful and quick conduct of the bankruptcy proceeding in many cases because the debtor is often the sole person in possession of certain information, the provision for the restriction on the debtor's right of movement arising from § 34 of the Constitution in the Bankruptcy Act is justified. The restriction is provided to protect the rights of creditors, as the bankruptcy proceeding takes place in their interests in the first place. As stated above, it is important that the restriction be applied only when there is reason to believe that the debtor will not perform his or her duty of attendance in the required manner.

Matters are more complicated in respect of § 35 of the Constitution, which allows for the restriction of the right to leave Estonia only to ensure the administration of court or pre-trial procedure or to execute a court judgment. Section 38 of the Bankruptcy Act, which provides for the debtor's prohibition from leaving for abroad without the permission of the court, is in conformity with the Constitution, because the prohibition arising from law applies from the declaration of bankruptcy until the taking of an oath. The purpose of this prohibition is to secure the presence of the debtor in order to take an oath, but the oath is taken in court. The restriction has thus been established in accordance with § 35 of the Constitution to ensure the administration of court procedure. The implication of § 34 in conjunction with § 35 of the Constitution has to be taken into account. If there is reason to restrict the debtor's freedom of movement under § 34 of the Constitution, this

⁹ Pursuant to the Bankruptcy Act of Estonia, a court shall institute a bankruptcy proceeding on the basis of the bankruptcy petition of the debtor or of a creditor without having decided the matter of declaration of bankruptcy. Only after the proprietary situation of the debtor has been established with the assistance of the interim trustee, the court will decide on whether or not to declare bankruptcy.

also implies a restriction on leaving Estonia. Section 35 of the Constitution will be applied when the bases provided for in § 34 are missing.^{*10}

5. Confidentiality of correspondence

Pursuant to § 43 of the Constitution, everyone has the right to confidentiality of messages sent or received by him or her by post, telegraph, telephone or other commonly used means. Exceptions may be made by court authorisation to combat a criminal offence, or to ascertain the truth in a criminal procedure, in the cases and pursuant to the procedure provided by law.

It was thoroughly considered upon preparation of the new wording of the Bankruptcy Act whether or not to provide further rules as exemplified by other states^{*11}, under which a court could entitle the trustee to examine the correspondence addressed to the debtor. The goal would be to identify and prevent any damaging activities of the debtor. With a view to the protection of creditors' rights, as well as to a successful conduct of the bankruptcy proceeding, such a restriction on the debtor's rights might be reasonable, and it could also contribute to the establishment of the reasons for the debtor's insolvency. If one proceeded solely from § 11 of the Constitution, one could argue that these restrictions would be necessary. While pursuant to § 11, fundamental rights may be restricted only in accordance with the Constitution, § 43 of the Constitution suggests that restriction of the debtor's confidentiality of correspondence in a bankruptcy proceeding would be contrary to the Constitution. As mentioned, restrictions may be imposed with the court's permission only in order to prevent an offence or to establish the truth. Hence, this may not be done in a bankruptcy proceeding. However, this conclusion only regards debtors who are natural persons. If the debtor is a legal person, the rights of a board member which are not contrary to the objective of the bankruptcy proceeding are transferred to the trustee (BA § 55 (2)). The trustee will thus be able to examine the correspondence of the legal person anyway as a member of the management board, while the personal correspondence of members of the management board of a legal person is protected by the Constitution.

6. Prohibition on business

Pursuant to § 31 of the Constitution, persons have the right to engage in enterprise and to form commercial undertakings and unions.

Section 35 of the Bankruptcy Act provides for a prohibition on business, pursuant to which a person prohibited from business may not be a sole proprietor or a member of the management board of a legal person. The prohibition on business applies to debtors who are natural persons automatically upon the declaration of bankruptcy; the court may decide when and to what extent the prohibition on business is not to be applied. In the case of a debtor who is a legal person the court will decide on which members of the management or supervisory body the prohibition on business is to be applied. The prohibition on business is applied during the bankruptcy proceeding. As an exception and at the proposal of the trustee, the court may apply the prohibition on business also within three years after the end of the bankruptcy proceeding, but only when the person to whom the prohibition is applied has deliberately caused insolvency (committed a bankruptcy offence), as well as when the person has destroyed, concealed or squandered his or her property, made grave errors in management or performed other acts resulting in his or her insolvency.

The prohibition on business has both a preventive and punishing implication. At the same time, for the person to whom prohibition on business is applied it is a substantial restriction of a fundamental right. During the bankruptcy proceeding when the debtor already has a "special status" as he or she has to fulfil the duties and observe the prohibitions arising from the Bankruptcy Act, application of the prohibition on

¹⁰ The argument holds true for restricting the debtor's freedom of movement and right to leave Estonia in a bankruptcy proceeding, but in other situations it is possible that a person's freedom of movement in Estonia is restricted, but this does not necessarily imply a prohibition from leaving Estonia. For example, movement may be restricted in a specific area of Estonia in relation to the protection needs of the natural environment, which cannot be related to a prohibition from leaving Estonia.

¹¹ For example, pursuant to article 99 of the Insolvency Act of Germany, a court may order by a reasoned decision that certain or all of the correspondence received by the debtor be forwarded to the trustee. Such a decision is justified insofar as it is necessary to identify or prevent any activities that may damage the creditors. As a general rule, the debtor has to be heard before such a decision is made. The trustee may open the correspondence addressed to the debtor. Correspondence the content of which does not concern the bankruptcy estate shall be forwarded to the debtor without delay; the debtor may examine any other correspondence. Pursuant to article 101 (1) of the Insolvency Act of Germany, the same applies to members of the management and supervisory bodies of a legal person and any members of the debtor who have the right of representation and who bear personal liability.

business can be justified namely by such a status. The debtor's rights in a bankruptcy proceeding are restricted in respect of the bankruptcy estate, the causes of insolvency and whether the debtor is liable for causing insolvency are being established. In such a situation the application of the prohibition on business and hence restriction on the freedom of enterprise of the person are presumably justified. Using § 11 of the Constitution as the criterion, one may conclude that in such a case, application of the prohibition on business is presumably necessary in a democratic society in order to guarantee the security of other members of society. As long as the bankruptcy proceeding is under way, one has to be cautious in enabling the debtor to launch or continue business in other areas. The debtor has to be interested and willing to cooperate so as to quickly finalise the bankruptcy proceeding, he or she has to be focused on it. But if the debtor engages in other enterprise, the bankruptcy proceeding might not be of interest to him or her. Of course, there can always be exceptions to the above conclusion.

The question of the necessity and justification of applying the prohibition on business after the end of the bankruptcy proceeding is more complicated. The Bankruptcy Act provides further criteria for the application of the prohibition on business after the end of the bankruptcy proceeding, under which the possibility to apply the prohibition is more limited than during the proceeding. However, it is still a substantial restriction of a fundamental right, considering that a majority of the grounds for applying the prohibition on business in the bankruptcy proceeding do not exist here. If one analysed the circumstances set out in BA § 35 (3) which allow for the application of the prohibition on business after the end of the bankruptcy proceeding, one could conclude that the list is too broad. The application of the prohibition on business after the end of the bankruptcy proceeding is not in the interests of creditors, hence not needed by creditors. To avoid a potential conflict between §§ 11 and 31 of the Constitution and § 35 (3) of the Bankruptcy Act, the new wording of the Bankruptcy Act contains appropriate corrections: under § 91 of the Bankruptcy Act in its new wording, the prohibition on business can be applied after the end of the bankruptcy proceeding only when a debtor who is a natural person or a member of the management or supervisory body of a debtor who is a legal person has been convicted of a bankruptcy offence or an executive proceeding offence or a tax offence by court judgment. Therefore, the possibilities of applying a prohibition on business are much more limited and as such, conform to §§ 11 and 31 of the Constitution. If a person has been convicted of any of the said offences, a greater restriction of his or her freedom of enterprise is important to the society and hence reasonably justified. In this case, too, the basis for applying the prohibition on business in clearer and more transparent — a judgment of conviction in one of the above offences that has entered into force. It is necessary and justified to prevent a person's activities as a "bankruptcy maker" in a democratic society. The new wording of the Bankruptcy Act will thus remove the provision that may be regarded as contrary to §§ 11 and 31 of the Constitution.

7. Compensation of creditor for damage caused during bankruptcy proceeding

A creditor may file a claim in the bankruptcy proceeding that arose before the declaration of bankruptcy (BA § 64 (1)). If a claim has arisen from a transaction performed by or accepted for performance by the trustee after the declaration of bankruptcy, also in connection with the continuation of the debtor's operations, the claim will be satisfied first on account of the bankruptcy estate. Such claims are treated separately from claims existing at the moment when bankruptcy is declared. These claims correspond to the "debts of the bankruptcy estate" referred to in BA § 85 (1) 1).

A problem arises when the debtor has caused damage to a third party after the declaration of bankruptcy. To which category does the claim for compensation for damage belong? The claim did not exist before bankruptcy was declared, hence it cannot be filed according to the general procedure on the basis of BA § 64. Can the claim be regarded as a debt of the bankruptcy estate under BA § 85 (1) 1)? This is highly questionable, because BA § 85 (1) 1) deals with claims arising from transactions and payments relating to the continuation of operations. If such a claim for compensation for damage does not belong to either of these categories, it remains open how, when and against whom the claim can be filed.

To a certain extent, the situation is solved by BA § 95 (2), pursuant to which a claim arising against the debtor after the declaration of bankruptcy may be filed as an action after the end of the bankruptcy proceeding. In such case, the limitation period starts from the end of the bankruptcy proceeding. This provision is particularly applicable to debtors who are natural persons. If a debtor who is a natural person causes damage after his or her bankruptcy is declared, the injured party can file a claim for compensation for damage against the debtor under BA § 35 (2) after the end of the bankruptcy proceeding in an action. A legal person only has this opportunity when the legal person is not liquidated in the bankruptcy proceeding. However, the main problem is that debtors usually are liquidated in the course of the bankruptcy proceeding. If the legal person has caused damage after the declaration of bankruptcy, the injured party cannot file a claim

against the debtor after the end of the bankruptcy proceeding under BA § 85 (1) 1), because the legal person no longer exists. At the same time, § 25 of the Constitution provides that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. In a situation where the injured party has been damaged by a legal person who was liquidated by the end of the bankruptcy proceeding, the injured party will not be able to exercise his or her constitutional right to be compensated for damage, as the injured party cannot file a claim for compensation for damage during the bankruptcy proceeding, and after the proceeding, there will be no one left to file it against.

In reaching such a conclusion, one has to admit that in this respect, the Bankruptcy Act is not in conformity with the Constitution and a constitutional right of the injured party has been violated.

One of the possible solutions to the above problems would be to regard the obligation of a legal person arising from causing damage after the declaration of bankruptcy as a debt of the bankruptcy estate within the meaning of BA § 85 (1) 1). In such case, the contradiction with the Constitution would be removed and the injured party could file a claim which would very likely be satisfied, because payments under BA § 85 (1) 1) are made before the costs of the bankruptcy proceeding are paid and the claims of creditors are satisfied. The argument that the trustee acts in the role of a management board member of the legal person and administers the property of the debtor would justify such an approach. If an employee of a legal person causes damage to a third party upon performing his or her duties, the legal person itself will be regarded as having caused damage, and because of the role of the trustee in managing the legal person, the claim for compensation for damage could be regarded as a claim against the bankruptcy estate under BA § 85 (1) 1). Such a conclusion is undoubtedly the most favourable for the injured party.

At the same time, such a treatment is out of line with the substance and meaning of BA § 85 (1) 1), according to which the basis for the creation of a claim against the bankruptcy estate should be acts based on the trustee's expression of will, which in turn can be controlled and influenced by the general meeting of creditors and the bankruptcy committee. The likelihood of causing damage may be taken to a minimum as the result of the trustee's good management, but the trustee is not in a position to prevent any and all damage. It would not be justified if accidental loss brought about a claim against the bankruptcy estate. This would imply granting the injured party too great an advantage when compared to creditors.

A thinkable solution would be to grant the injured party the right to file a claim pursuant to the general procedure as an ordinary creditor similarly to the claims created before the declaration of bankruptcy. If damage was caused before the meeting for the defence of claims¹², such a solution could be suitable. However, the problem is not solved if damage was caused later and the claims can no longer be defended, for example because of the distribution proposal¹³ having been approved already. The new wording of the Bankruptcy Act has also failed to provide a solution to this problem. As the new draft is currently in the legislative proceeding of the parliament, there is still time to make amendments to remove the present contrariness to § 25 of the Constitution.

¹² Pursuant to BA §§ 70 and 72, claims shall be defended at a general meeting of creditors. A claim and its priority shall be deemed to be accepted if at the meeting for the defence of claims neither any creditor nor the trustee objects thereto. If a claim or its priority is not accepted at a meeting for the defence of claims, the court shall decide on acceptance on the basis of a statement of claim of the creditor. A claim previously satisfied by the judgment of a court or court of arbitration which has entered into force shall be deemed to be accepted without defence.

¹³ Pursuant to BA § 81, after the last meeting for the defence of claims, the trustee shall prepare a distribution proposal which shall set out the accepted claims and their priorities. Money shall be paid to satisfy the claims on the basis of the distribution proposal.