

## SUMMARY REPORT

### Some findings after two-year implementation of the Law on Bankruptcy 2014

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*Disclaimers:*

*This study has been conducted based on the information summarized from field surveys by the Central Institute of Economic Management (CIEM) with a number of courts, judgment enforcement agencies, lawyers, and insolvent administrators at some locals as well as based on some reports by the General Department of Judgment Enforcement and surveyed agencies. Some information are also generated from secondary materials collected from various sources, of which full reference has been made in the report. In addition to the information given, the analyses provided in the Report present opinions of the author himself rather than those of the World Bank Group.*

#### **I. IMPLEMENTATION SITUATION AND ACHIEVEMENTS IN PRACTICE**

##### **1. Implementation situation**

After the Law on Bankruptcy was promulgated by the National Assembly on 19/06/2014 and took effect on 01 January 2015, the Government issued Decree No. 22/2015/ND-CP providing guidelines for the Law on Bankruptcy regarding insolvency administrators and asset management and reorganization/liquidation practice. In addition, the Government, the Prime Minister and governmental agencies also issued various legislative documents to detail and guide some specific contents of the Law. So far, the legal normative document system in the field of bankruptcy has been promulgated comprehensively and synchronously, including the following important documents:

- Law on Bankruptcy No. 51/2014/QH13 promulgated by the National Assembly on 19 June 2014;

- Decree No. 22/2015/ND-CP providing guidelines for the Law on Bankruptcy regarding insolvency administrators and asset management and liquidation practice promulgated by the Government on 16 February 2015;
- Decree No. 67/2015/ND-CP providing amendment to Decree No. 110/2013/ND-CP on sanctions for administrative violations in judicial support, judicial administration, marriage and family, enforcement of civil judgments, bankruptcy of enterprises and cooperatives promulgated by the Government on 14 August 2015;
- Circular No. 01/2015/TT-CA providing work regulations of judge groups in settlement of bankruptcy cases issued by the Chief Justice of the Supreme People's Court on 08 October 2015;
- Resolution No. 03/2016/NQ-HDTP providing guidelines for regulations of the Law on Bankruptcy issued by the judge Council of the Supreme People's Court on 26 August 2016;
- Official Letter No. 2573/UBPL13 in 2014 correcting technical errors in the text of the Law on Bankruptcy issued by the Law Committee of Legislature XIII on 23 July 2014;
- Official Letter No. 3089/BTP-TCTHADS in 2016 providing the enforcement of court decisions related to bankruptcy proceedings issued by the Ministry of Justice on 09 September 2016;
- Official Letter No. 672/LDTBXH-LDTL providing the settlement of benefit regimes for laborers in bankrupt enterprises issued by the Ministry of Labor, War Invalids and Social Affairs on 23 July 2014;

## **2. Practical achievements**

### **a. Results according to statistics on business suspension, dissolution and bankruptcy cases**

#### Number of enterprises winding up

In 2016, the total number of enterprises registering for winding up nationwide was 19,917, increasing by 27.3% compared to that of 2015. By locality, the number of winding up enterprises in 2016 increased in 55 out of 63 provinces and cities, as compared to 2015.

Some provinces and cities with decreasing number of enterprises winding up in 2016 (as compared to 2015) include: Hoa Binh Province decreasing by 41.6%,

Lam Dong with 12.1% fall, Kien Giang, Binh Phuoc and Hai Duong with the decline of 10.6%, 9.5%, and 5%, respectively. However, there are also localities where the number of winding-up enterprises highly increased in 2016 compared to 2015, including Son La with the rise of 246.2%, Thua Thien Hue with 167.9%, Ha Tinh and Ben Tre with the same percentage of 133.3% and Bac Lieu with 109.1%. In some other provinces or cities, the proportion of enterprises winding up is quite high such as Ho Chi Minh City with 26.1% increase, Ha Noi with 31.6%, Binh Duong 41.4%, Dong Nai 18.3%, Hai Phong and Da Nang with 7.3% and 84.4%, respectively<sup>1</sup>.

#### Number of enterprises voluntarily dissolved

In 2016, 12,478 enterprises completed voluntarily dissolution procedures, increasing by 31.8% against that of 2015 nationwide. Provinces and cities with high speed of dissolution in 2016 included Lam Dong with 962 enterprises, witnessing 688.5% growth; Hung Yen with 410 enterprises, rising by 540.6%; Binh Phuoc with 229 enterprises, increasing by 205.3%, Son La with 67 enterprises, rising by 191.3%; and Ho Chi Minh City with 3,923 enterprises, going up by 47.9%<sup>2</sup>.

#### Number of enterprises undergoing bankruptcy proceedings

According to the list published on the portal of the Supreme People's Court, as of 08 August 2017, there have been 83 decisions on initiation of bankruptcy proceedings, 55 decisions on bankruptcy declaration, 01 decision on suspension of bankruptcy proceedings operation, 01 decision on suspension of business operation recovery procedures and 01 decision on rejection of the application for reconsideration of the decision on initiation of bankruptcy proceeding<sup>3</sup>. Moreover, the portal also published 25 notifications of lists of creditors (separate notification on the list of creditors), 03 decisions on appointment of insolvency administrators, 02 decisions on settlement of applications for reconsideration of bankruptcy declaration, 06 other notifications related to creditors of insolvent

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<sup>1</sup> Press release on business development index for provinces and centrally run cities in 2016, General Statistics Office of Vietnam, available at <http://www.gso.gov.vn/Default.aspx?tabid=382&ItemID=18371> last accessed on 08/08/2017

<sup>2</sup> Press release on business development index for provinces and centrally run cities in 2016, General Statistics Office of Vietnam, available at <http://www.gso.gov.vn/Default.aspx?tabid=382&ItemID=18371> last accessed on 08/08/2017.

<sup>3</sup> E-portal of Supreme People's Court, <http://www.toaan.gov.vn/portal/page/portal/tandtc/9758900>, last accessed on 08/08/2017.

enterprises. Actually, the number of bankruptcy cases in such period is rather higher (see the table below).

Under the Law on Enforcement of Civil Judgment 2008, amended in 2014 (the ‘Law on Enforcement of Civil Judgments’), the civil judgment enforcement agency shall be responsible for executing decisions of the court handling bankruptcy cases<sup>4</sup>. According to the General Department of Civil Judgment Enforcement, the amount of bankruptcy cases since the effectiveness of the Law on Bankruptcy in 2015 to the first 6 months of 2017 is as follows<sup>5</sup>:

| Year                   | Number of received cases |  | Completed       |  | Incomplete      |  |
|------------------------|--------------------------|--|-----------------|--|-----------------|--|
|                        | Number of cases          | Amount of money (thousand Viet Nam Dong) | Number of cases | Amount of money (thousand Viet Nam Dong) | Number of cases | Amount of money (thousand Viet Nam Dong) |
| 2015                   | 42                       | 305,063,991                              | 11              | 87,601,455                               | 31              | 217,453,537                              |
| 2016                   | 86                       | 289,016,769                              | 39              | 104,888,376                              | 47              | 184,116,937                              |
| First 6 months of 2017 | 147                      | 236,508,222                              | 20              | 26,754,926                               | 127             | 209,741,496                              |

These published figures have partly demonstrated the needs of application of the Law on Bankruptcy 2014 as well as its transparency but it also laid down questions on why few cases have been stepped further in total petitions for bankruptcy proceedings, such as notification of lists of creditors or appointment of insolvency administrators, and so on<sup>6</sup>.

## **b. Development of Insolvency administrators**

<sup>4</sup> Law on Enforcement of Civil Judgment, Article 2, Clause 1, paragraph g

<sup>5</sup> Statistics from the General Department of Civil Judgment Enforcement, which reveal the difficulties, shortcomings in civil judgment enforcement with respect to contractual dispute settlement and bankruptcy

<sup>6</sup> E-portal of Supreme People’s Court, <http://www.toaan.gov.vn/portal/page/portal/tandtc/9758900>, accessed on 08/08/2017.

An Insolvency administrator ('IA') is the person appointed by the Court to manage the assets, monitor and manage business operations in the case of recovery of enterprises or cooperatives required to initiate bankruptcy proceedings and exercise the rights and obligations provided for in the Law on Bankruptcy 2004.

At present, according to the statistics of the Authority of Judicial Support (affiliated to Ministry of Justice), in the whole country, 1156 IAs have been granted with practicing certificates (including those who practice individually and in enterprises providing services of asset liquidation and management), however, there are just 183 individuals and 25 enterprises practicing over 30 cities/provinces as IAs de facto<sup>7</sup>.

**c. Organization of training and seminars on the Law on Bankruptcy for judges, IAs, bailiffs**

In order to ensure the enforcement of the Law on Bankruptcy and legal provisions related to bankruptcy proceedings, the Supreme People's Court, the Ministry of Justice, associations and various law training institutions have held many training sessions, seminars to exchange experience and discuss the entanglements in the application of the Law on Bankruptcy and to train bankruptcy settlement skills for IAs<sup>8</sup>.

**d. Results according to the insolvency evaluation in Doing Business report 2016 and 2017**

According to the World Bank's research named Doing Business 2016, Viet Nam ranks 123 out of 189 economies on the ease of resolving insolvency.<sup>9</sup> The strength of insolvency framework index of the bankruptcy process of Viet Nam is 8/16. Resolving a bankruptcy case in Viet Nam takes 05 years on average. In 2016, much advancement was recognized in bankruptcy settlement in Viet Nam thanks to reforms brought about by the Law on Bankruptcy 2015. However, in the Doing Business Report 2017, Viet Nam's position in bankruptcy index goes

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<sup>7</sup> Authority for Judicial Support, Ministry of Justice, available at <http://btp.moj.gov.vn/qt/tintuc/Pages/quan-tai-vien.aspx> accessed on 08/08/2017

<sup>8</sup> Thoi bao Tai chinh Viet Nam online, available at <http://thoibaotaichinhvietnam.vn/pages/kinh-doanh/2015-10-20/tap-huan-cho-quan-tai-vien-ky-nang-giai-quyet-vu-viec-pha-san-doanh-nghiep-25380.aspx> accessed on 08/08/2017; Insolvency administrators and corporate restructure, available at <http://saigoninsolvency.com/chi-tiet-tin-tuc/quan-tai-vien-va-tai-cau-truc-doanh-nghiep-47.html> accessed on 08/08/2017; Insolvency administrators – new profession in bankruptcy proceedings, available at <https://www.vietbao.org/2016/06/quan-tai-vien-nghe-moi-trong-giai-quyet-pha-san/> accessed on 08/08/2017

<sup>9</sup> <http://www.doingbusiness.org/data/exploreconomies/vietnam#resolving-insolvency>

down. Viet Nam ranks only 125/190 economies. The time to resolve bankruptcy continues to be 05 years, costing 14.5% of the asset value of insolvent enterprises, cooperatives. The strength of insolvency framework index of bankruptcy proceedings is 7.5/16. The rank of Viet Nam continues to step backward in 2018 with the position of 129/190 economies. This declination is attributed to no change in Viet Nam's bankruptcy settlement results over years meanwhile some other countries have had advance reforms in bankruptcy settlement<sup>10</sup>.

## **II. SOME CHALLENGES AND CONFLICTS IN IMPLEMENTATION OF THE LAW ON BANKRUPTCY<sup>11</sup>**

### **1. Challenges in implementation of the Law on Bankruptcy**

As mentioned above, bankruptcy settlement procedures under the Law on Bankruptcy 2014 are definitely clearer and more convenient than the one provided by the Law on Bankruptcy 1994 and Law on Bankruptcy 2004. The provisions of Law on Bankruptcy 2014 has made bankruptcy proceedings easier than it was previously; however, under this Law, there are still certain entanglements that makes the bankruptcy process prolonged and costly for businesses (see the Diagram of Bankruptcy settlement attached). The below are certain entanglements which affects the resolution of bankruptcy cases:

#### **a. Publishing information related to bankruptcy cases**

According to Law on Bankruptcy 2014, the People Court's decisions on initiation of bankruptcy proceedings and the list of creditors shall be published on the National Business Registration Portal (NBRP) and the Portal of the People's Court<sup>12</sup>. However, at present, this information is only published on the Portal of the People's Court without connection to the NBRP, which makes it difficult to cross-check information related to the operation of enterprises on the NBRP. Furthermore, many local courts do not have an electronic portal, which is an obstacle for speeding up the bankruptcy proceedings.

In addition, disaggregated statistics are currently not available, which makes it difficult to assess which procedures take longer and provide bottlenecks for the

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<sup>10</sup> See further Doing Business Report of 2016, 2017, 2018 at [www.doingbusiness.org](http://www.doingbusiness.org)

<sup>11</sup> Some contents for reference in WorldBank Group Report (Finance and Markets) on *The Law on Bankruptcy 2014 analyzed from the comprehensive approach of related legal areas*

<sup>12</sup> Law on Bankruptcy 2014, Article 43 and 67

speedy resolution of the proceeding. For example, there are not statistics on how long it takes to appoint an insolvency administrator for each case, whether conciliation has been requested by the debtor and when it has been granted, how long it takes to conduct conciliation, how long it takes to finalize the list of creditors, etc. In the absence of such disaggregated data, it is difficult to analyze the specific reasons for the Doing Business reported time of 05 years to complete a liquidation proceeding in Vietnam. Statistics are also lacking as in how many of the cases there has been a proposed restructuring plan, how many plans have been approved by the court, in how many cases the business was sold as going concerns and how many piecemeal liquidations.

**b. Inadequate published information about IAs**

At present, more than 800 IAs have been granted with practising certificates<sup>13</sup>. The list of IAs is published on the Portal of Authority for Judicial Support – Ministry of Justice and the NBRP – Ministry of Planning and Investment. However, the published list only shows certain information of IAs, including name, year of birth, permanent residence address and telephone number, etc. without information on their specialty or experience, which is necessary to choose the appropriate IAs for specific bankruptcy cases. For instance, the IAs having experience in sea vessel area will be chosen to resolve bankruptcy cases involving shipbuilding business, or the IAs who are experts on finance-banking will be appointed in bankruptcy settlement or business reorganization of financial enterprises.

Therefore, it will be also advisable that state bodies (such as the MOJ/Supreme People’s Court) collect statistics on IA appointments in reality. This will inform the MOJ on the experience of IAs in the case of future re-evaluation of practising certificates in accordance with a more transparent and accountable method.

**c. Entanglement in appointing IAs**

Law on Bankruptcy 2014 has not specified the number of IAs that judges need to appoint in each case. Similarly, in the case where the judge appoints an enterprise of asset management and liquidation (EAML), it is not clear how many IAs that the EAML can appoint to resolve the bankruptcy case. Moreover, if the judge appoints more than more than one IA or EAML, it is not clear how to assign the duties, power and responsibilities of each IA/EAML participating in the bankruptcy case. This issue is currently confusing the courts, especially in large-

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<sup>13</sup> According to the statistics of the Authority for Judicial Support (Ministry of Justice)

scale cases or cases involving several localities. Similarly, the question related to the ability of IAs to use assistants in their day-to-day operations is not resolved, and if such are used by IAs, it is not clear how they will be bound by the same fiduciary duties as the appointed IAs.

**d. Lack of guidance on professional issues and professional quality improvement of IAs**

Law on Bankruptcy 2014 and Decree 22 do not provide details of required expertise and procedures for granting and retaining IA practicing certificates (such as an entry exam, specific hours of continuous training, minimum appointments per year to retain certificate), conditions for practising, which may affect the quality of IAs' activities. For instance, the procedure for managing and liquidating assets, the cooperation between IAs and judges or bailiffs, or the method of supervising liability offset have not been stipulated in details. Similarly, it is unclear to determine the specific time for IAs to request judges to enforce secured debts or declare transactions null and void. Additionally, method of making the list of creditors/debtors, cases qualified for granting of preliminary injunctive relief, development and supervision of business operation recovery plan, handling of assets arising after issue of the decision on bankruptcy declaration, or responsibilities on handing over and filing documents, etc. are not prescribed specifically either. The lack of these detailed guidance have resulted in difficulties for judges, IAs and other relevant persons involved in bankruptcy proceedings<sup>14</sup>.

Furthermore, it is necessary that IAs buy professional liability insurance to limit risks in professional practising, but such is not required under the current legislation, which poses serious concerns in the case of mishandling of assets on the part of IAs.

**e. Entanglement in selling assets to ensure cost of bankruptcy**

According to Article 23.3 of Law on Bankruptcy 2014, *'The People's Court shall appoint IAs or EAML to sell a number of assets of an insolvent enterprise or cooperative in order to ensure the cost of bankruptcy. The valuation, re-valuation and sale of assets shall comply with Articles 122, 123 and 124 of this Law'*. However, this Article does not specify the particular time, types of assets or

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<sup>14</sup> This inference derives from opinions of judges working in Commercial Court – The People's Court in Ha Noi and opinions of IAs in Ho Chi Minh city

method of selling assets (such as direct sale or by auction) when Courts assign IAs or enterprises liquidating assets to sell some assets of insolvent enterprises, co-operatives for ensuring bankruptcy expenses. Such unclear provision has caused confusion in judges' application, which prolongs the duration for handling bankruptcy cases<sup>15</sup>.

**f. Entanglement in opening and managing bank accounts for cash management and use in bankruptcy proceedings**

According to Article 16 of Law on Bankruptcy 2014, IAs, EAML '*send the proceeds gained to the bank accounts held by the competent People's Court or civil judgment enforcement agency*'. According to the judges and IAs, who are consulted about the problem in practice is that whether this account is a specific account for a particular bankruptcy case or a common account of the People's Court or civil judgment enforcement agency. At some Courts, the proceeds are assigned to transfer to the common account of the Court, but at some other Courts, it is transferred to a separate account opened by the Court for the same case<sup>16</sup>.

The judges also requested to clarify whether the account of the People's Court under Article 16 of Law on Bankruptcy 2014 is the same with the one for the bankruptcy proceedings petitioner to pay the advanced bankruptcy cost as required by Article 38 of this Law. Will the judge in charge of the bankruptcy case or the Presiding Judge of the People's Court be the account holder? If the account holder is the Presiding judge, may the principle of 'independent adjudication' be affected? These problems have also influence the time for bankruptcy proceedings<sup>17</sup>.

**g. Entanglement in determining payment for IAs or EAML**

Some Courts had to prolong the time for appointment of IAs, EAML assets due to the confusion in determining the amount to pay them in the case that the insolvent enterprise or co-operative has no agreement or contract with IAs. According to Article 24 of Law on Bankruptcy 2014, '*1. The payment for IAs or EAML shall be calculated depending on their time, effort and result, 2. The Government shall regulate the payment for IAs or EAML*'. Until now, the Government has not

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<sup>15</sup> This inference derives from opinions of judges working in Commercial Court – The People's Court in Ha Noi and The People's Court in Da Nang, and opinions of IAs in Ho Chi Minh city

<sup>16</sup> This inference derives from opinions of judges working in Commercial Court – The People's Court in Ha Noi and The People's Court in Da Nang, and opinions of IAs in Ho Chi Minh city.

<sup>17</sup> Kiểm tra lại

specified this issue yet, which leads to difficulty in determining this expense since each IA/EAML often proposes different rates.

#### **h. Entanglements in the time of inventory and determination of asset value**

According to judges, the time for asset inventory and valuation under Article 65.1, Law on Bankruptcy 2014 is rather short. Accordingly, within 30 days from the date of receiving the decision on initiation of bankruptcy proceedings, the insolvent enterprises/cooperatives must conduct asset inventory and valuation; in necessary cases, they must submit a written proposal to the judge for extension, yet the extension must not be made more than twice, the extended time in each case shall not exceed 30 days. Therefore, the total time for such inventory and valuation of assets shall not exceed 90 days. This duration is even longer when it requires to inventory and value assets in different locals or the involved enterprises have overseas assets.

The time is not yet specified for inventory, re-valuation of assets under the Courts' decision according to Article 65.4, which leads to difficulties in holding Creditors' Meeting since the Meeting is normally convened within 20 days from the date of completing asset inventory under Article 75.1, Law on Bankruptcy 2014. If asset inventory and re-valuation are prolonged in several days, it shall considerably influence the organization of the Creditors' Meeting, which is one of the biggest problems in terms of settlement time.

#### **i. Some entanglements in asset valuation and auction**

Applicable laws are leaving a gap in asset re-valuation when assets are degraded or impaired due to multiple auctions yet lack of buyers. In addition, the valuation and auction of enterprises' overseas assets has not yet been addressed either. Some judgment enforcement agencies or auction centers have found troubles in such situation due to violating the period set forth by the Law on Bankruptcy, which is: '*10 working days from the date of the decision on bankruptcy declaration*<sup>18</sup>' and the time limit for asset auction of 30 days with respect to movable properties and 45 days with respect to immovable properties, which is calculated from the date of signing the auction contract<sup>19</sup>. Such time limits are solely appropriate when applied to assets located within Viet Nam, not to those located in foreign countries. Thus, there should be regulations on valuation and auction of overseas assets.

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<sup>18</sup> Law on Bankruptcy 2014, Article 122, Clause 1.

<sup>19</sup> Law on Bankruptcy 2014, Article 124, Clause 3.

Some bailiffs face difficulties in the first auction of liquidated assets of bankrupt enterprises when the liquidated assets may not be sold out. Pursuant to the Law on Bankruptcy, bailiffs shall undertake the plan of allocating assets based on the decision on bankruptcy declaration after receiving reports on asset liquidation result by IAs and enterprises liquidating assets. Assets allocation shall be done upon the report on assets liquidation<sup>20</sup>. This fact causes difficulties for IAs on whether they should draft the report when assets have been sold out or when each auction finishes. Furthermore, it is unclear how to allocate the money gained from the auction. This problem also results in the delay in distribution of enterprises' assets after bankruptcy declaration.

It also requires clear provision on re-use or recognition of valuation and verification results of enterprises' assets in litigation proceedings. When bailiffs have, in organization of judgment enforcement, conducted asset inventory and valuation of insolvent enterprises/cooperatives in another case, whether IAs and EAMLs could use such reports for the case or they have to conduct re-valuation? Re-evaluation means that the cost for asset valuation must be paid twice for the same content of determining asset value. According to an IA, this problem is often found in some bankruptcy cases and it is a reason to prolong the time and increase the cost of bankruptcy.

**j. Responsibility of supporting and providing documents, evidences of persons involved in bankruptcy proceedings and related individuals and organizations**

As reflected by IAs and judges, IAs usually have difficulties in collecting evidences and materials for bankruptcy procedures, which prolongs the time to resolve bankruptcy cases. Although the responsibility to provide relevant documents or evidence has been addressed in Law on Bankruptcy 2014, the law has not yet provided any sanction for persons who have evidence but refuse submission; for instance, the case when tax agencies or auditors refuse to supply financial materials of enterprises; local authorities or labor, social insurance agency refuse to supply salary scale, details, and list of employees of the involved enterprises; etc.

**k. Enforcement of assets owned by secured creditors**

In the case that a judgment enforcement agency is executing Courts' judgments or decisions on secured assets of insolvent enterprises or cooperatives, the execution

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<sup>20</sup> Law on Bankruptcy 2014, paragraph d, Clause 2, Article 120.

must be suspended and the file of bankruptcy case shall be transferred to the Court where bankruptcy proceedings are performed for settlement. Thus, enforcement of secured assets shall be suspended until the Court has issued the decision on bankruptcy declaration (except for cases in which secured assets are at risk of being destroyed or significantly impaired, then IAs or EAMLs shall propose the judge to immediately handle such secured assets). Any delay in settlement of secured assets will influence creditors' debt recovery, especially when creditors are credit institutions. Moreover, the secured assets might be deducted if the cost for bankruptcy settlement is taken from enterprises' assets, which include secured assets.

**l. Entanglements in respect of regulations on documents attached with Requests for initiation of bankruptcy proceedings**

Pursuant to regulations on dossiers requesting for initiation of bankruptcy proceedings in Article 26 and Article 27, Law on Bankruptcy 2014, along with the written request, applicants have to attach other related documents and materials. In fact, some special enterprises cannot lodge the request for bankruptcy due to the failure to provide full documents as required by law, for instance, some enterprises must submit audited financial statements (foreign-invested enterprises, insurance enterprises, etc.<sup>21</sup>) to prove the insolvent statement. Such requirements for additional papers when they are no longer available at the bankruptcy enterprises result in complicating procedures of receiving bankruptcy cases and prolonging the period of bankruptcy proceedings.

**m. Issues relating to foreign elements in bankruptcy proceedings**

Under regulations of Law on Bankruptcy 2014, Courts, IAs, EAMLs shall send the documents on bankruptcy case to creditors or debtors and relevant persons and vice versa. When being sent overseas, documents must be consularly authenticated (regarding cases that foreign individuals or organizations send documents back to Viet Nam) and consularly certificated (regarding cases that Courts, IAs, EAMLs send documents overseas<sup>22</sup>). The consular certification/authentication shall be rather time costing even though Viet Nam has signed the Agreement on Judicial Support in field of civil law with 18 countries over the

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<sup>21</sup> Entities required to submit financial statement as prescribed in Article 37 of the Law on Independent Audit 2011

<sup>22</sup> Article 4 and Article 9, Decree No. 111/2011/ND-CP dated 05 December 2011 of the Government on consular certification and authentication, accordingly, documents related to bankruptcy settlement are not subject to exemption from consular certification and authentication

world, which prolongs the duration of bankruptcy settlement. Given that this is already creating problems in practice, it is necessary for the legislator to consider adopting the UNCITRAL Model Law on Cross-Border Insolvency.

Furthermore, applicable laws have not prescribed measures to protect the rights of creditors living overseas or creditors having difficulties in geographical distance or creditors, who has not been yet accessing information on enterprises' bankruptcy owing to some objective reasons.

## **2. Some conflicts between regulations of the Law on Bankruptcy 2014 and the Law on Enforcement of Civil Judgments**

In the course of implementation, some regulations of the Law on Bankruptcy 2014 reveal a number of shortcomings related to the enforcement of decision on bankruptcy declaration, as follows:

### **a. Competence to organize enforcement of decisions on bankruptcy declaration**

The Law on Bankruptcy and Law on Enforcement of Civil Judgments stipulate that the competence to organize enforcement of the Court's decision on bankruptcy declaration is subject to civil judgment enforcement agency. Article 36.2 of the Law on Enforcement of Civil Judgments stipulates that the time limit for issuing a judgment execution decision against a bankruptcy decision is three (03) working days from the date of receipt of the decision. However, Article 120.1 of the Law on Bankruptcy 2014 provides that the civil judgment enforcement agency shall issue the Decision on implementation and assign the bailiff to implement the Decision on bankruptcy declaration within five (05) working days from the issuance of this decision. Thus, the time limit for civil judgment enforcement agency to issue a decision to enforce the bankruptcy decision in the Law on Enforcement of Civil Judgments and the Law on Bankruptcy 2014 is inconsistent.

### **b. Asset revaluation**

As regulated in Article 123.1, Law on Bankruptcy 2014: *'In case of any serious violation against Article 122 of this Law leading to inaccurate results in asset valuation, the assets shall be revalued'*. Meanwhile, Article 17.2 of Decree No. 22/2015/ND-CP stipulates that: *'If it is detected that an IA or EAML violates legal provisions on bankruptcy or asset valuation which results in the erroneous results of asset valuation, the bailiff shall request the IA or EAML to carry out asset re-valuation, except for cases when the IA or EAML is replaced under Clause 1 and*

2 Article 18 hereof'. Thus, the Law on Bankruptcy 2014 has narrowed down revaluation cases in comparison with the Law on Enforcement of Civil Judgments, which means that creditors (beneficiaries) are not entitled to request for revaluation as provided for in Article 99, Law on Enforcement of Civil Judgments, which possibly affect legitimate rights and interests of the beneficiaries.

**c. Procedures when bailiff conducts asset liquidation**

Article 121.4 of the Law on Bankruptcy 2014 stipulates: *'If the IA or EAML fails to conduct asset liquidation within 02 years from receipt of the written request of the bailiff as prescribed in Clause 2 hereof, the IA or EAML must end the asset liquidation and transfer the documents and assets of the insolvent enterprises or cooperatives to the civil judgment enforcement agency for consideration under legal provisions'*. Thus, after two (02) years from the date of receipt of the bailiff's request, if the assets have not been liquidated, the liquidation of assets shall be returned to the bailiff. However, Law on Bankruptcy 2014 only stipulates that *'the civil judgment enforcement agency will settle and liquidate assets under regulations of laws'*. This provision has caused difficulty to civil judgment enforcement agency in organizing the implementation of asset liquidation. bailiffs shall find it difficult to decide whether to apply regulations of the bankruptcy law or the Law on Enforcement of Civil Judgments to continue organizing the liquidation of assets. For example, in the case where bailiffs liquidate assets of insolvent enterprises, cooperatives, whether they shall make decisions on distraintment pursuant to the Law on Enforcement of Civil Judgments or they only need to conduct asset revaluation as stipulated in Article 123.2 of the Law on Bankruptcy 2014?

**d. Asset auction**

Upon asset auction, Article 17.2 of Decree 22/2015/ND-CP stipulates: *'Within 03 working days from receipt of the report by Ias or EAMLs under Point d Clause 1 of this Article (which provides that Ias, EAMLs must report to the bailiff in case of unsuccessful asset auction), the bailiff will decide the asset liquidation'*. However, the Law on Bankruptcy 2014 and documents guiding this law do not indicate which procedures to be performed by bailiffs when deciding the liquidation of assets (issuing a decision to reduce the price or to continue selling assets...) and this leads to difficulties in determining whether to continue auctioning the asset.

### **3. Some conflicts in regulations of the Law on Bankruptcy 2014 and the Law on Land 2013**

Land and assets attached to land are special assets of great value in the total assets of enterprises. Thus, in bankruptcy settlement, this type of asset attracts the prime concern in the process of asset management liquidation to pay for debts to creditors and bankruptcy costs. The new Law on Bankruptcy 2014, despite many amendments to overcome the limitations of the former law, still has many problems with the provisions of laws on land, making it difficult for people involved in bankruptcy proceedings. In particular, the shortcomings in terms of land for enterprises upon bankruptcy are summarized as follows:

#### **a. Procedures for liquidation and management of assets attached with land use right**

Article 65.1(a) of the Land Law 2013 states that the State shall recover land in the following cases: *‘Organizations with the land allocated by the State without land use levy, or organizations with the land is allocated by the State with land use levy and this land use levy is originated from the state budget, are dissolved, go bankrupt, move to another place, or have lower or no land use demand; persons using land leased from the State with annual rent payment are dissolved, go bankrupt, move to another place, or have lower or no land use demand’.*

In addition, as regards land use right of cooperatives upon dissolution or bankruptcy, Article 177.2(a) of the Land Law 2013 provides that *‘The State would revoke the land allocated by the State without land use levy or allocated with land use levy, leased by the State, or obtained through buying assets attached on land or obtained through lawful transfer of land use right from others for which the land use levy, land rent, amount for buying assets attached to land, or the transfer amount of land use rights originating from the state budget’.*

Thus, with respect to enterprises or cooperatives allocated with land by the State for constructing workshops and offices, upon bankruptcy proceedings, the State will recover the allocated land. However, what should be done to the assets attached to land such as the system of workshops, works on enterprises’ land allocated by the State? In fact, IAs or EAMLs can not transfer or auction these assets when the land with attached work buildings will be recovered by the State under the Law on Land as mentioned above. State enterprises usually encounter this problem upon insolvency since they are allocated with land by the State or they use the land originated from the state capital. Regulations of the Law on

Land 2013 on the state's recovery of allocated lands have made it impossible to liquidate enterprises' assets attached on land, consequently, it causes damage to the enterprises themselves and their creditors.

Provisions of the Law on Land 2013 also put a threat to enterprises that buy back workshops from bankrupt enterprises or cooperative through auctioning for asset liquidation. Accordingly, functional authorities may request them to dismantle the entire headquarters or equipment built on land to return the land to the State since the competent authority may have issued a decision to revoke the land immediately upon initiation of bankruptcy proceedings. Thus, regulations of the Law on Land 2013 on recovery of land allocated to enterprises when they go bankrupt have raised several difficulties in liquidation of the assets on land and significantly affected the recovery of assets for creditors as well as the implementation effectiveness of the Law on Bankruptcy 2014.

**b. Shortcomings in the regulations on insolvent enterprises, cooperatives' return of land use right received as secured assets to individuals and organizations**

Law on Bankruptcy 2014 stipulates that: *'Insolvent enterprises, cooperatives shall only return secured assets to the individuals and/or organizations that have given such assets to the enterprises, cooperatives for assurance of their obligations to the enterprises, cooperatives before the People's Court initiates bankruptcy proceedings if such individuals and/or organizations have fulfilled their obligations to the enterprises, cooperatives'*<sup>23</sup>. In fact, several individuals and organizations guarantee the fulfillment of their obligations to enterprises, cooperatives by land use rights. According to this regulation, insolvent enterprises or cooperatives shall return such secured assets only when these individuals and organizations have fulfilled their obligations to the enterprises, cooperatives. Then, if such individuals or organizations have not yet fulfilled their obligations to the enterprises or cooperatives (which may not be yet due), how shall the land use right be treated? Will such land use right be included into the total assets of the enterprises in implementation of bankruptcy proceedings?

In fact, when dealing with debts that other individuals or organizations owe to a bankrupt enterprise, the IA or EAML will divide and distinguish claimable debts and bad debts. In the case where it is impossible to recover a party's debt, the assets used to secure its obligations shall be disposed in two ways: (i) secured

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<sup>23</sup> Law on Bankruptcy 2014, Article 57

assets will be accounted to the assets of the enterprise upon liquidation, or (ii) secured assets will not be included in the assets of the enterprise upon liquidation. If option (i) is chosen, the actual implementation will cause many obstacles to the IA and bailiff if the secured asset is the debtor's land use right (especially residential land). Under option (ii), if the debt secured by such land use right is not included in the liquidated assets, this will be a great loss to the creditor and the bankrupt enterprise itself. It is a normal and regular transaction of enterprises, especially credit institution to receive land use right for obligation assurance. But this issue has not yet been clearly stipulated in laws. Therefore, documents guiding the Law on Bankruptcy should provide detailed guidelines for this issue for smooth implementation of the Law.

**c. Shortcomings in the regulations on distraining procedures when liquidating bankrupt enterprises, cooperatives' land with the assets attached on land not subject to ownership of such enterprises, cooperatives**

When liquidating assets being land use right of bankrupt enterprises, cooperatives, there have been many cases in which buildings, solid construction works on land of enterprises, cooperatives are not subject to the ownership of such enterprises, cooperatives. The applicable Law on Enforcement of Civil Judgments only stipulates to distraint the land use right attached to dwelling houses upon distraining dwelling houses, or in the cases where dwelling houses are attached to the land use right of another person, to distraint only when it is consented by the person holding the land use right. However, the applicable law does not address the distraintment and settlement of land use right when the assets and works on such land belong to other people. For instance, in forestry cooperatives, several houses, buildings are built on the land of the cooperatives but they are owned by the officials and employees of the cooperatives. It is similar to enterprises that allow officials and employees to make their house on the land of the enterprises. Pursuant to the Law on Land 2013, it is difficult to liquidate the land area on which located the assets of other people. Similarly, it is difficult to liquidate the surrounding land area substracting the land area on which located the architecture works subject to other persons' ownership. This is a shortcoming which causes difficulty and prolong the time for settlement of such land areas of bankrupt enterprises, cooperatives.

**4. Some conflicts between regulations of Law on Bankruptcy 2014 with labor laws**

**a. Shortcomings in provision of documents and evidences when employees apply for initiation of bankruptcy proceedings for enterprises**

Law on Bankruptcy 2014 stipulates the contents of the request for initiation of bankruptcy proceedings by employees, Trade Union's representatives as follows:

*'1. When requesting the People's Court to initiate bankruptcy proceedings, the employees, the Trade Union's representative as stipulated in Clause 2 Article 5 of this Law must make a request for initiation of bankruptcy proceedings.*

*2. A request for initiation of bankruptcy proceedings shall include the major contents as follows:*

*a) Date, month, year;*

*b) Name of the People's Court being competent of bankruptcy settlement;*

*c) Name and address of the petitioner;*

*d) Name and address of the enterprise, the cooperative requested to initiate bankruptcy proceedings;*

*dd) Total amount of salaries and other due debts that the enterprises, cooperatives have not paid employees.*

*The request must be attached with evidence to prove the employees' salaries and other due debts.*

*3. In the case that the petitioners propose appointment of IAs, EAMLs, the request for initiation of bankruptcy proceedings shall specify the name and address of the relevant IAs, EAMLs.*

*4. From the date of request submission, the employees, the Trade Union's representatives shall have the rights and obligations as creditors' under provisions of this Law<sup>24</sup>.'*

The request for the attachment of evidences to prove the salaries and other due debts when employees, Trade Union's representatives submit a request for initiation of bankruptcy proceedings may be a barrier to the exercise of the right to request for initiation of bankruptcy proceedings since the employees usually encounter difficulties to prove the salary debt as mentioned above. Therefore, it is necessary to supplement the provision requiring the Court to support employees

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<sup>24</sup> Law on Bankruptcy, Article 27

and the Trade Union in collecting evidences for attachment with the request for initiation of bankruptcy proceedings.

**b. Payment order in the obligations to employees**

Article 47.4 of Labor Code 2012 provides: *‘In the event that an enterprise, a cooperative has its operation terminated, is dissolved, or goes bankrupt, the payment of wages, severance allowances, social insurance, health insurance, unemployment insurance and other benefits of its employees according to the collective labor agreement and signed labor contracts shall be prioritized’*. The Labor Code stipulates that enterprises and cooperatives have the obligation to prioritize the payment of wages, allowances, social insurance, health insurance... for employees at the enterprises, cooperatives upon bankruptcy.

However, at the present, Decree 94/2005/ND-CP dated 15 July 2005 (‘Decree 94’) on settlement of employees’ rights at bankrupt enterprises and cooperatives is still considered effective while this Decree is based on Law on Bankruptcy 2004, Labor Code 1994 and revised in 2002. Pursuant to the Law on Promulgation of Legal Normative Documents 2015, Decree 94 will expire when the legal documents detailed by this Decree expire<sup>25</sup>. However, no clear instruction is available on this issue; consequently, the involved persons find difficulties in practical bankruptcy proceedings when the provisions of Decree 94 are different from those of the Law on Bankruptcy 2014.

### **III. CONCLUSIONS AND RECOMMENDATIONS**

By examining the practical implementation of the Law on Bankruptcy in some localities and studying legal regulations, the Research Team found that there are still many obstacles to the effective implementation of Law on Bankruptcy 2014 in practice, such as the regulations of the Law on Bankruptcy are incompatible with some other legal norms (such as the Law on Enforcement of Civil Judgements, the Law on Land, etc.), are still incomplete, unclear and remain different interpretations; there are regulations that have not yet guaranteed the legitimate rights and interests of the person requesting for initiation of bankruptcy proceedings as well as the enterprises and cooperatives requested to declare bankruptcy. Therefore, some recommendations below are intended to improve the

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<sup>25</sup> Law on Promulgation of Legal Normative Documents 2015, Article 154, Clause 4.

legal provisions in guiding and organizing the implementation of the Law on Bankruptcy:

**1. Guiding the implementation of the Law on Bankruptcy on the basis of consolidating the roles and responsibilities of the parties involved in settlement of bankruptcy cases**

The competent authorities should continue to study for amendment and supplementation of some related regulations by reducing the time and costs for implementation of bankruptcy proceedings for enterprises, people and related state agencies. Some issues below should be clarified:

- Responsibilities and mechanisms for providing information, publishing information on bankruptcy cases, list of creditors at the People's Court's Portal and the NBRP;
- Responsibilities of civil judgment enforcement agencies and IAs in implementing the decision on bankruptcy declaration of enterprises;
- Conditions for publicizing the information on IAs' expertise, procedures and conditions for the practice of IAs to ensure good quality of this activity and ensure promptness and effective time of settlement;
- Professional liability insurance of IAs, EAMLs in their practice to limit risks;
- The number of IAs to be designated in each bankruptcy case;
- Some professional issues of IAs in cases with secured debts, invalid transactions, supervision of clearing obligations under contracts, methods for making the list of creditors and debtors, application of preliminary injunctive relief, formulation and supervision of business recovery plans, handling of assets arising after issue of the decision on bankruptcy declaration, responsibility for hand over and record keeping, etc.;
- Methods to determine payments for IAs, EAMLs in handling bankruptcy cases. The Government has the responsibility to provide this requirement in details in accordance with Article 24 of Law on Bankruptcy 2014.;
- Duration for inventory and re-determination of assets under Article 65.4;
- Procedures for auctioning liquidated assets in case of unsuccessful auction, such as responsibilities of related parties, auctioning methods until the assets are sold, competence to conduct auctioning methods in the cases

where no one registers to buy the liquidated assets, etc. to speed up the time of auctioning while objectivity, transparency and rights of the parties related to the auctioned assets are still assured;

- Valuation of assets in the cases of asset degradation or impairment for reason of no buyer after repeated auctions in order to resolve the shortcomings in the provisions on duration in Article 122 of the Law on Bankruptcy;
- Opening of bank accounts by the Court and the entity holding that account;
- Bankruptcy proceedings involving foreign elements.

## **2. Guiding the implementation of the Law on Bankruptcy and related laws on the basis of ensuring consistency in the application of laws**

- Providing specific guidance for the time to implement decisions on bankruptcy declaration which is currently in conflict between Law on Bankruptcy 2014 and the Law on Enforcement of Civil Judgements;
- Providing specific guidance for cases of handling assets attached on land in bankruptcy proceedings, including handling land use right of the land rented by enterprises or allocated by the State;
- Supplementing the provision requiring the Court to support employees and trade unions in collecting evidences to attach to the request for initiation of bankruptcy proceedings;
- Confirming that Decree No. 94/2005/ND-CP dated 15 July 2005 is no longer valid. The contents of Decree No. 94/2005/ND-CP related to the benefit settlement of employees in bankrupt enterprises, cooperatives can be presented in a guiding document to be promulgated.

## **3. Developing the collection of statistics about bankruptcy, publicizing sufficient information about Insolvent Administrators to support policy study and planning and implementation of enterprise bankruptcy**

- The SPC, MOJ, MPI need to accelerate the collection of statistics about enterprise bankruptcy, dissolution, business suspension to find out reasons and problems in procedures of resolving enterprise bankruptcy, dissolution, and business suspension in order to accelerate the resolution process as well as summarize the reasons for difficult situation in business operations.

- The MOJ and SPC should collect statistical figures about practical appointment of IAs and publicize information about IAs' profession and specialty. This information will help the MOJ and Courts to assess IAs' practice as well as facilitate the assignment of IAs towards more transparent and accountable procedures.