ISSN:2528-9705

Örgütsel Davranış Araştırmaları Dergisi

Journal of Organizational Behavior Research

Cilt / Vol. :3

Sayı / Issue :1

Yıl / Year :2018

http://odad.org

Kapak Fotoğrafı / Cover Photo by Andian Lutfi

ÖRGÜTSEL DAVRANIŞ ARAŞTIRMALARI DERGİSİ

THE JOURNAL OF ORGANIZATIONAL BEHAVIOR RESEARCH

Cilt / Volume: 3 Sayı / Issue: 1 Yıl / Year: 2018

Kurucu ve İmtiyaz Sahibi / Founder & Owner

Doç. Dr. Kubilay ÖZYER

Editörler / Editors

Doç. Dr. Kubilay ÖZYER

Dr. Öğr. Üyesi Müslüme AKYÜZ

ISSN: 2528-9705

Yazışma Adresi / Mail Address

Doç. Dr. Kubilay ÖZYER

Örgütsel Davranış Araştırmaları Dergisi

Gaziosmanpaşa Üniversitesi Taşlıçiftlik Yerleşkesi

İktisadi ve İdari Bilimler Fakültesi İşletme Bölümü

60150 TOKAT

Tel: +90 356 252 16 16 – 2363

Fax: +90 356 252 16 73

E-Posta/E-Mail: info@odad.org

Kapak fotoğrafı için Sayın Andian LUTFI'ye teşekkürler…

Special Thanks to Mr. Andian LUTFI for cover photo…

ÖRGÜTSEL DAVRANIŞ
Araştırmaları Dergisi

İNDEKS BİLGİLERİ / INDEX INFORMATION

Örgütsel Davranış Araştırmaları Dergisi aşağıda yer alan indekslerde taranmaktadır.

Journal of Organizational Behavior Studies is cited in the indexes below.

INDEXED IN EMERGING SOURCES CITATION (Web of Science) CLARIVATE ANALYTICS

Clarivate Analytics

Directory of Research Journals Indexing
DRJI

I2OR
International Institute of Organized Research

Akademik Araştırmalar İndeksi
Acarindex.com

asos
academia social science index

SIS Scientific Indexing Services

SCIPIO
SCIENTIFIC PUBLISHING & INFORMATION ONLINE

INDEX COPERNICUS
INTERNATIONAL

CiteFactor
Academic Scientific Journals

ÖRGÜTSEL DAVRANIŞ ARAŞTIRMALARI DERGİSİ (ODAD)

Örgütsel Davranış Araştırmaları Dergisi yılda iki kez yayınlanan hakemli, bilimsel ve uluslararası bir dergidir. Örgütsel davranış, insan kaynakları ve çalışma hayatına ilişkin makalelere yer verilen dergimizin temel amacı, bu alanlarda akademik gelişim ve paylaşıma katkı sağlamaktır. Dergimizde "Türkçe" ve "İngilizce" olmak üzere iki dilde makale yayınlanmaktadır. Dergiye yayınlanmak üzere gönderilen yazılar, belirtilen yazım kurallarına uygun olarak hazırlanmalıdır. Dergiye yayınlanmak üzere gönderilen yazılar, daha önce yayınlanmamış ve yayınlanmak üzere gönderilmemiş olmalıdır. Dergide yayınlanan yazılarda belirtilen görüşler, yazarlara ait olup Örgütsel Davranış Araştırmaları Dergisi'nin görüşlerini yansıtmaz. Örgütsel Davranış Araştırmaları Dergisi'nde yayınlanmış yazıların tüm yayın hakları saklı olup, dergimizin adı belirtilmeden hiçbir alıntı yapılamaz.

JOURNAL OF ORGANIZATIONAL BEHAVIOR RESEARCHES (JOOBR)

The Journal of Organizational Behavior Researches (JOOBR) is an academic, peer-reviewed, scientific and international journal which is being published bianually. JOOBR, with it's articles essentially aims to contribute to academic development and sharing in the fields of organizational behavior, human resources and business envorinment. In JOOBR, Articles are being published both in Turkish and English Languages. Articles which will be sent to JOOBR for publishing, should be preapared according to guideline of JOOBR. Articles which will be sent to JOOBR for publishing, must be not published before or not sent to other journals. The views presented in the JOOBR represent opinions of the respective authors. The views presented do not necessarily reflect the opinion of the JOOBR. Copyrights for all articles published in JOOBR reserved. For quotation, JOOBR must be cited

ÖRGÜTSEL DAVRANIŞ
Araştırmaları Dergisi

Bilim Kurulu
Members of the Science Board

ÖRGÜTSEL DAVRANIŞ
Araştırmaları Dergisi

İçindekiler
Table of Contents

Sayfa No. / Page Num.

1. **Cam Tavan Algıları Örgütsel Bağlılığı Etkiler Mi? Öğretmenler Üzerine Bir Araştırma** — 1-15
   Does Glass Ceılıng Perceptıons Affect Organızatıonal Commıtment? A Study On Teachers
   Ufuk ORHAN & Umran ALTAY
2. **Öz-Liderliğin Bireysel Farklılıklar Bağlamında İncelenmesi** — 16-32
   Examınıng Self-Leadershıp In The Context Of Indıvıdual Dıfferences
   Emrah ÖZSOY & Ömer Alperen ONAY & Duygu ALTUN & Sümeyye PEHLİVAN
3. **Örgütsel Sessizlik Bilgi Paylaşımı İlişkisinde Sosyal Sermayenin Rolü** — 33-45
   The Role Of Socıal Capıtal In The Relatıonshıp Between Organızatıonal Sılence And Knowledge Sharıng
   Ercan TURGUT & Memduh BEGENİRBAŞ
4. **Pozitif-Negatif Duyguların, Otomatik Düşüncelerin Ve Bazı Kişisel Değişkenlerin Okul Yöneticilerinin Yenilik Yönetimi Yeterlik İnanç Düzeyleri Üzerindeki Etkisi** — 46-68
   The Effect Of Posıtıve-Negatıve Affect, Automatıc Thoughts And Other Personal Varıables Upon The Innovatıon Management Self-Effıcacy Belıef Levels Of School Admınıstrators
   Serkan MÜRTEZAOĞLU & Fulya YÜKSEL-ŞAHİN
5. **Örgütsel Adalet: Akademisyenler Üzerinde Metaforik Bir Araştırma** — 69-86
   Organızatıonal Justıce: A Metaphorıc Research On Academıcıans
   Tülay Özer & Kubilay Özyer
6. **Duygusal Emek, Tükenmişlik, İşten Ayrılma Niyeti Ve İş Performansı Arasındaki İlişkiler** — 87-103
   The Relatıonshıp Between Emotıonal Labor, Burnout, Turnover Intentıon And Job Performance
   Ferda ALPER AY & Nilifer TÜRKDOĞAN
7. **Sosyal Medya, Akıllı Telefon Ve Örgütlerin Gelecekteki İnsan Kaynağı Profili: Z Kuşağı** — 104-123
   Socıal Medıa, Smart Phone And Future Human Resources Profıle Of Organızatıons: Z Generatıon
   Fikret SÖZBILIR
8. **Legal Basıs Of The Chrıstıan Issue Of Russıan Polıcy In The Caucasus In The Second Half Of Xıx And Early Xx Centurıes** — 124-134

Legal Basıs Of The Chrıstıan Issue Of Russıan Polıcy In The Caucasus In The Second Half Of Xıx And Early Xx Centurıes
Lyubov H. SATUSHIEVA & Alim Z. BOGATYREV & Ruslan M. ZHIROV & Azamat A. ZHUGOV & Marina T. TEKUEVA

9. A Research On The Correlatıon Between Perceıved Corporate Image And Organızatıonal Identıfıcatıon

A Research On The Correlatıon Between Perceıved Corporate Image And Organızatıonal Identıfıcatıon **135-153**
Sabahat BAYRAK KÖK & Mehtap SARIKAYA & Hatice ÇOBAN & Esve MERT

10. The Effect Of Polıtıcal Connectıons On Audıtor Choıce And Related Party Transactıons

The Effect Of Polıtıcal Connectıons On Audıtor Choıce And Related Party Transactıons **154-168**
Saeed BAZRAFSHAN & Hamze HESARI

11. Effects Of Narcıssısm On Organızatıonal Dıssent

Effects Of Narcıssısm On Organızatıonal Dıssent **169-181**
Engin KANBUR

12. Solıdarıty As A Constıtuent Of Socıal Capıtal: Role Of Human Rıghts Organızatıons In Exercızıng The Rıghts Of Young Parents

Solıdarıty As A Constıtuent Of Socıal Capıtal: Role Of Human Rıghts Organızatıons In Exercızıng The Rıghts Of Young Parents **182-196**
Olga N. BEZRUKOVA & Vladimir N. LUKIN & Alexander V. MATVEEV & Tamara V. MUSIENKO

13. Statıstıcal Analysıs Of Vehıcle Drıver Behavıors

Statıstıcal Analysıs Of Vehıcle Drıver Behavıors **197-204**
Sinan Saraçlı & Cengiz Gazeloğlu

14. Legal Modernization Of The Life Of Muslims Of The North Caucasus In The Context Of The Development Of The Russian State In The First Half Of The Nineteenth Century

Legal Modernization Of The Life Of Muslims Of The North Caucasus In The Context Of The Development Of The Russian State In The First Half Of The Nineteenth Century **205-219**
Lyubov H. SATUSHIEVA & Ruzanna N. MAREMKULOVA & Aslan R. ISAKOV & Lyana R. KOKOVA & Marina T. TEKUEVA

15. Organızatıonal Resource & Personal Resource Influencıng Job Satısfactıon: A Medıatıng Role Of Burnout

Organızatıonal Resource & Personal Resource Influencıng Job Satısfactıon: A Medıatıng Role Of Burnout **220-233**
Hina Shahıd & Sara Aslam

16. How Do People Cope With Stress? An Assessment Using Partial Least Squares

How Do People Cope With Stress? An Assessment Using Partial Least Squares **234-246**
Lydia ARBAIZA, Jorge GUILLEN

17. Effect Of Innovation In Relationship Between Inter-Organizational Learning And Performance Of Construction Industry **247-267**

Effect Of Innovation In Relationship Between Inter-Organizational Learning And Performance Of Construction Industry
Tariq RAFIQUE, Najeeb A. KHAN, Haji RAHMAN, Aamir ABBAS, Tahir SAEED

18. How Far Umm Al-Qura University Practices The Strategies Of A Learning Organization Specified In The 'Senge' Model: From The Perspective Of Teaching Staff

How Far Umm Al-Qura University Practices The Strategies Of A Learning Organization Specified In The 'Senge' Model: From The Perspective Of Teaching Staff **268-292**
Elham N. AL RAJHI

19. EFFECTIVENESS OF PSYCHOMETRIC TESTING IN RECRUITMENT PROCESS

EFFECTIVENESS OF PSYCHOMETRIC TESTING IN RECRUITMENT PROCESS **293-306**
Mehreen MEMON, Farhan AHMED, Muhammad Asif QURESHI, Noor Ahmed BROHI

20. SOCIAL ASPECTS OF CHANGE OF ECONOMIC BEHAVIOUR OF THE RUSSIAN YOUTH

SOCIAL ASPECTS OF CHANGE OF ECONOMIC BEHAVIOUR OF THE RUSSIAN YOUTH **307-316**
Gyuldzhan Kamilevna AZAMATOVA, Andemirkan Khachimovich SHIDOV, Albina Olegovna VINDIZHEVA, Azamat Haseynovich LYUEV

21. REVIEW THE RESPONSIBILITIES OF INTERNATIONAL SHIPPING COMPANIES FOR THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

REVIEW THE RESPONSIBILITIES OF INTERNATIONAL SHIPPING COMPANIES FOR THE INTERNATIONAL CARRIAGE OF GOODS BY SEA **317-329**
Tamerlan S. TSOLOEV, Alim Z. BOGATYREV, Aslan R. ISAKOV, Inara R. NAHUSHEVA

22. REVIEW THE LEGAL VACUUM OF BUSINESS LAW IN BANKRUPTCY OF MERCHANTS AND IMPACT ON THE DEMANDS OF BANK

REVIEW THE LEGAL VACUUM OF BUSINESS LAW IN BANKRUPTCY OF MERCHANTS AND IMPACT ON THE DEMANDS OF BANK **330-342**
Inna B. KARAMURZOVA, Leyla I. KALABEKOVA, Zalina B. HAVZHOKOVA1, Diana A. KOKOVA

2528-9705

Örgütsel Davranış Araştırmaları Dergisi
Journal Of Organizational Behavior Research
Cilt / Vol.: 3, Sayı / Is.: 1, Yıl/Year: 2018, Sayfa/Pages:317-329

REVIEW THE LEGAL VACUUM OF BUSINESS LAW IN BANKRUPTCY OF MERCHANTS AND IMPACT ON THE DEMANDS OF BANKS

Inna B. KARAMURZOVA[1*], Leyla I. KALABEKOVA[2], Zalina B. HAVZHOKOVA[1], Diana A. KOKOVA[3]

[1] Candidate of Law Sciences, associate professor of Civil law and process, Kabardino-Balkarian state university named after H.M. Berbekov, Russia
[2] Candidate of Economic Sciences, associate professor of Economy and finance, Kabardino-Balkarian state university named after H.M. Berbekov, Russia
[3] Candidate of Law Sciences, senior teacher of department of Civil law and process, Kabardino-Balkarian state university named after H.M. Berbekov, Russia

***Corresponding Author:**
Email: karamurzova.i.b@gmail.com

ABSTRACT

In contemporary era, paying attention to commerce and codification of effective and uptodate rules is one of the principles and foundations of the tasks of the legislators. Any country which does not have an up-to-date law in this regard in harmony with other nations and makes no effort to create such a law, will certainly remain economically and commercially underdeveloped. If we conduct a study of the commercial code of the country, we will immediately endorse the outdated and inefficient nature of these rules. On the one hand, banks are the most important and fundamental creditor of the businessmen in the economic system of Iran that if economic problems and bankruptcy of other merchants continue, these banks like other merchants will face hardship in fulfilling their financial obligations. A wide varirty of research has shown that banks have specific and different nature in the economy of various countries from either social or economic or political points of view. This causes the issue of the dangers of bankruptcy of businessmen and economic activists to be considered a totally different one. Then, in some legal systems a special explanation and regulations have been offered of the bankruptcy of banks and particular institutions are in charge. Moreover, some particular institutions are defined in order to intervene in the process of issuance and enforcement of the judgement of bankruptcy. Accordingly, this essay conducts a comparative study of the concept of bankruptcy in some countries as well as the right of banks before the bankrupt businessmen.

Keywords: *Bankruptcy, Approach of Legal Systems, Debt Recovery*

INTRODUCTION

Banks are the most important and fundamental creditor of the businessmen in the economic system of Iran that if economic problems and bankruptcy of other merchants continue, these banks like other merchants will face hardship in fulfilling their financial obligations. A wide varirty of research has shown that banks have specific and different nature in the economy of various countries from either social or economic or political points of view. Economically speaking, function of banks has a direct effect on the major money and financial markets. Furthermore, particularly in governmental or semi-governmental banks, the amount of their revenues and assets are mostly affected by elements from outside of the market like instructions and orders issued by Central Bank as well as the intervention of government in money market. This issue and the role that banks play in the existence of economic consistency

Geliş tarihi/Recieved: 05.12.2017 – Kabul tarihi/Accepted: 16.03.2018 – Yayın tarihi/Published: 30.03.2018

in the economy of countries have caused the banks to have a special political situation in the thought of politicians and in general in government. Then, in some legal systems a special explanation and regulations have been offered of the bankruptcy of banks and particular institutions are in charge. Moreover, some particular institutions are defined in order to intervene in the process of issuance and enforcement of the judgement of bankruptcy. The first point that can be seen in the discussion of bankruptcy in the Commercial Code is the issue of merchant and insolvency. In other words, the legislator in this article has noted two conditions of being a merchant and insolvency (suspension of payment of sums due by someone) as the basis of bankruptcy. However, as to the issue of insolvency due to the lack of a legal theory or definition we are encountered with various definitions and interpretations in this regard (justification of the theory of court – National Supreme Court – cf. Judicial Rules, vol. 4: 108). In recent years, the number of the companies and persons who are indebted to the banks and declaration of insolvency has been growing in an ever-increasing way and continues to grow insofar as for tackling the problems, it is said that in this regard we need to take concrete steps out of thinking and in a completely calculated fashion. Nevertheless, the most simple and temporary solution that seems to be working is the point that the courts must be asked to issue the judgements of bankruptcy after precise reflections so that the debtors of banks not to easily use of this weapon. To put it otherwise, the existing law and regulations must be revised and the penalties and deprivations and opinions issued of bankruptcy have to be heightened and strengthened in order to prevent from the easy spread of this excuse by the bank debtors. This issue in turn causes some people to resort to insolvency declaration to evade the payment of their debts despite their ability to pay. Thus, in recent years the legislators have struggled in various ways to prevent from this abuse and provide some conditions in which only those who really deserve to resote to the insolvency, can take advantage of it. In the field of bankruptcy, Iran's rank has declined from 109 in 2006 to 138 in 2017 and it has even become worse. However, the recovery rate has not changed between the years 2008-2013 and this index has been assessed among 175 countries which have increased now to 189 and the rank of business atmosphere has declined to 156 in 2017. The analysis of statistics shows that Iran has not taken any concrete step in recent years towards the reform of relevant law and improvement of this statistics. Then, an immediate and precise revision of the law and rules of bankruptcy as well as basic reforms seem to be necessary. Of course, this needs to be done in the light of the actions of the successful countries in this field and immediate and better enforcement of the reforms towards reducing the time of assessment of the process of bankruptcy resolution from the perspective of relevant law and rules. In the new bill, the operationalization of these rules in the short term horizon has been reduced to two or three years and in long term to less than two years.

LITERATURE REVIEW

Comparative Study of Concept of Bankruptcy

Bankruptcy in legal system of Iran is considered to be a legal and damaging event for third persons and at the same time creates liability for the merchant. Then, in addition to the law governing the arbitrary obligations, we will also study the law governing the forcible obligations resulted from the insolvency. Although the nature of bankruptcy is forcible and

legal but the volition related to it is very influential. Here we can refer to the scheme of arrangement and the role of liability insurance in view of its volitional state. We know that the rules stipulated in the commercial code of 1932 have two formal and essential aspects. To put it otherwise, these rules from formal point of view contain a method or instruction under the title of liquidation of the affairs of bankruptcy or insolvency. The debtor can suggest the scheme of arrangement as an alternative solution to liquidation of assests. But from the essential point of view, these rules are intended to provide the ground for the complete and immediate payment of all debts. Accordingly, one can conclude that this system of bankruptcy in the current Commercial Code is based on the honesty of the insolvent person in paying his debts and protection of the creditors due to the existence of an impure and insecure atmosphere before the debtor or precisely speaking, the debtor with bad intention. However, the mentioned cases are necessary but they are not sufficient because there are certain shortcomings in view of the existing economic conditions. We can divide bankruptcy into three pillars and indices: the debtor's being a merchant, insolvency and declaration of bankruptcy. It needs to be mentioned that each one of these elements can be set under a separate law. Although the governing law underlines the debtor's being a merchant inside the country the legislators must also note the possibility of one's being considered to be a merchant outside the country. In the domain of identification, the function of public order is narrow-minded and it seems that the law of the person at issue is better to be considerd. It appears to be better to consider the essential law governing one's being regarded a merchant his legal status because the law of countries are related to this analysis. For example, in France and before the adoption of the law of divorce identification, the courts used to endorse the divorce judgements issued by the courts of foreign countries for the foreigners although it was in conflict with the public order and in some cases with the domestic legal order. As to insolvency, we have to say that this legal institution in our law is very similar to the institution of incapacitation and based on this similarity, we can infer the unity of the criterion and include it among the eligibility measures. Therefore, according to the articles 6 and 7 of Civil Code, the law of origin country of the debtor will be the basis of judgement of him; this is also the case with the issuance of bankruptcy declaration given the close relationship of backruptcy declaration with public commercial order as well as the judicial and administrative procedure of the government. This is also underlined in the articles 971 and 975 of Civil Code. This causes the relevant institutions concerned with the liquidation and bankruptcy affairs to be clear and no obstacle occurs in the course of liquidation. This analysis is based on the mix theory of preliminary and secondary investigation and no conflict is seen in Iranian statutes. There is one exception for this rule and it is related to the issue of immovable properties as stipulated in the article 8 of Civil Code. The collective interests and public order requires these immovable properties to be within the scope of the law of the place of occurrence and no foreign law must be involved in the process of bankruptcy. Then, in recent years, given the procedure of growth of world trade transactions and movement towards integrity, the theory of universality and after it the mixed doctrine particularly in collection and codification of significant treaties to be promoted (Almasi, 2008). Accordingly, in this part, the approach of other countries and important treaties and chosen law are considered and via a study of the rules of legal system of Iran and given the dominant international doctrine it has been attempted to resolve the existing conflict based on the universal principles of Iranian law.

Approach of Legal Systems

The approach of various legal systems to this issue has taken form following the historical process of this doctrine. Accordingly, in the domestic law of countries the doctrine of territoriality has been promoted. However, in recent years given the growth of world commercial transactions and movement towards integrity, the theory of universality and after it the mixed theory has been supported in the codification of significant treaties. Accordingly, the current essay considers the approach of other countries and significant treaties and chosen law. Then it turns to the rules of legal system of Iran as well as the dominant international doctrine and struggles to provide the solution of Iranian conflict based on the general principles of Iranian law for this issue. Comparative studies have shown that in addition to the approach of various legal systems, regional treaties include certain rules and law in this regard although the new approaches have made them invalid or in some cases irrelevant. It seems that the oldest treaty in this regard is Havana Treaty which was ratified in 1928. In this treaty, both the theory of territoriality and theory of universality have been mentioned. According to the article 14 of this treaty, if the merchant has one residence and does not have any branch or agency in any other country, he will have one property and accordingly one bankruptcy. But according to the article 15, if the merchant has independent institutions in several countries, he will be able to have as more bankruptcies as the number of the institutions. After it, the Convention 1933 between Scandinavian countries including Finland, Iceland, Denmark, Norway and Sweden can be mentioned. This convention endorses the theory of universality in its article one. However, in the article 13 this convention stipulates that bankruptcy can be of effect outside the borders when it is declared by the court of residence of the bankrupt. Moreover, one can refer to the following treaties and conventions including International Companies Insolvency Act (I. B. A), *Organisation pour l'harmonisation en Afrique du droit des affaires* [Organisation for the Harmonization of Corporate Law in Africa] (O.H.A.D.A.) adopted in 1999, Convention of European Bank for Insolvency Rules adopted in 2004 and also the NAFTA (North American Free Trade Agreement). However, since these treaties are mostly in regional form and have been received warmly by the countries which are close to each other from geographical and regional points of views though not all countries are among its proponents (Kaiser, 1996).

Europe:

In European countries, the trend of dealing with a bankrupt businessman is balanced, and easier from the point of view of pure protection from creditors considering their behaviour. In Germany, the rights of creditors are the focus. On the contrary, in USA the bankrupt merchant is under the protection of the law while in France and Britain there is a moderate approach and in one sense both groups of creditors and debtors are supported (Kaiser, 1996). In France the last amendments of the bankruptcy act dates back to 1967 and 1985 (Skini, 2013) and finally the ultimate amendment has been done in 1994 and it seems that in France the theory of territoriality is indeed accepted and every court which is dealing with bankruptcy will be able to investigate bankruptcy within its jurisdiction and based on its law. However, given the international principle according to which immovable properties are part of the jurisdiction of countries, French law has considered the confiscation of immovable properties immune to this principle and views this issue part and subject to the government of the place where the

property lies. This principle can also be considered and enforced in Iranian law (Almasi, 2008).

In Germany, due to the jurisdiction of federal law the codes of bankruptcy are supposed to create unity and harmony between the rules of various states. Accordingly, the bankruptcy act of 1877 was amended once more in 1980 (Skini, 2013). According to this act, there are two types of procedure of investigation of bankruptcy among which one can refer to mixed method and the method of forcible liquidation. This act was reamended in 1994 and as a result it has only presumed the mixed method for investigation of bankruptcy which was put into force in 1999 (Kaiser, 1996). One of the features of bankruptcy in Britain is the fact that despite the unwritten common law, there has always existed a written law in this regard and one can refer to the insolvency act of 1986 and the lattest amendments of the British Company Law of 1985. Accordingly, after the declaration of bankruptcy the administration of company is assigned to an institution called Licensed Insolvency Practitioner. Comparatively speaking, in Belgium the theory of universality is taken as the basis according to which only the competent court of the merchant's residence will be able to investigate the affairs of his bankruptcy and this judgement is applicable to other countries. It needs to be reminded that with the adoption of the European convention of insolvency incapacitation whenever this convention is in conflict with the law of the member states it will have priority over them. The priority of the law of European Union over the national law and the permission of the citizens of the member states to the law of the EU has been frequently underlined in the opinions of the EU Court of Justice as well as the article 89 of Rome Convention of 1980 (Hassanvand, 2012).

United States

Legal system of United States that is based on the legal systems of various states and due to the federal nature of the governing law this system is one of the pioneering systems in the field of rules of dispute resolution. Then, accordingly, the law of each state might have different rules as compared to state law and the law of other states. In the constitution of United States, there is a significant principle according to which the federal law since the date of their adoption are prior to state law and if in the procedure of trial of a case the federal law is adopted, the claim will be investigated based on the state law (Williston, 1909). It should be reminded that the first state law of bankruptcy in US was adopted in 1841. Then before this year the state law and after this year the federal law are governing the bankruptcy. In 1898, the issue of insolvency was added to this law and in 1909 and also in the federal act of 1994 the next amendment was done (Kaiser, 1996). One might dare to say that for the first time in the law of bankruptcy adopted in 1978 instead of the theory of territoriality and theory of universality the mixed theory was used and considered. Moreover, in the US system of bankruptcy after the issuance of the bankruptcy declaration, the properties of the bankrupt are transferred to an institution called Trust. Trust represents an institution in common law in which one person as the founder of trust entrusts some properties to someone called trustee in order to administer them in the interest of one person or some persons. Trust is very popular in the countries which follow the common law system particularly in England insofar as it plays a key role in current common law system. It is said that in some countries which follow Roman-Germanic law and there is no such a concept in the legal system, this institution is accepted under the Hague Trust Convention (1985).

Iranian Law

Given the aforementioned points, it is observed that in Iranian law unfortunately we will be encountered with the lack of principle of dispute resolution in the domain of governing law of bankruptcy both from formal and essential perspectives. The only written legal stuff in which the legislator has referred to the issue of international bankruptcy is the article 16 of the law of Iran's membership in the Aviation Communication Union adopted in 2012: "… Right of membership can be suspended in the following conditions: if a member under any law of bankruptcy struggles to protect himself against his creditors in order to restitute his own prestige or renew his financial organization …". Here no solution is suggested. In the above article as regards membership suspension one of the causes of suspension is considered to be bankruptcy and it is insisted that the bankruptcy of the member is evaluated based on the authorized law. However, authorized law is not specified and there is a huge gap in this regard. Then, based on the general legal principles and comparative study of other legal systems, an effective and functional solution must be offered. Professor Erfani refers to the previously mentioned articles as well as the article 22 of Civil Procedure Law and states that the legislator has accepted the theory of territoriality but has regarded it insufficient in international scene. Thus, he proposes some amendments in the article 402 of Commercial Code and conclusion of treaties for solving the issue of law confusion. This idea can be criticized because the legislator has embarked upon another path and for example in the article 19 of the law of Judicial Cooperation of Iran and Tunisia adopted in 2008 the cooperation as regards bankruptcy has been excluded from this treaty. Moreover, Professor Nasiri has first endorsed the authority of the court of residence of the bankrupt (defendant) in view of the article 35 of Civil Procedure Act. But in international aspect given the shortcomings like the impossibility of the observation of principle of equality among the internal and international creditors, he states that the conflict of international authority in the field of bankruptcy is not tackled merely by adoption of this principle (the criterion of residence) and by neglecting the article 35, without expression of particular legal argument, he refers to the necessity of protection of the rights of creditors following the doctrine of territoriality and gives priority to it (Nasiri, 1991).

As clear, the judgements of courts are valuable when they are executed and respected; otherwise, issuance of such opinions will be a source of weakness of national legal system and our judiciary. The investigation of the public courts of the claims even the irrelevant ones are inspired by the concepts of Roman-Germanic legal system and are foreign to our law. It seems that this method leads to an extensive extra-territorial jurisdiction for Iranian court which is accompanied with an unnecessary obligation for the legal system. It is for this reason that European Union has accepted the shortcoming of this issue within the framework of Brussels Instruction and in USA this shortcoming is accepted based on the doctrine of international courtesy (Maqsudi, 2012). On the other hand, acceptance of this idea leads to the relegation of determination of court to the claimant and very likely the latter's abuse of this power which is completely in conflict with the rules of our criminal procedure. The existence of shortcomings in the theory of territoriality and the impossibility of using it in the current international arena have caused some to propose the use of new combined theories based on the legal doctrine. Although this idea has paved the ground for movement towards unification of rules and predictability, we need still to take it into earnest account that in our legal system the doctrine

is not considered as an independent legal source and mere following of doctrine without the existence of support of legal document with a solid judicial procedure will not be possible. On the other hand, if the goal is the use of international commercial law as the governing procedure among the countries this will be a matter of general international law and does not have anything to do with our issue and if it refers to trans-national law the existence of such a law is hugely disputed (Juneidi, 2011).

In order to be free from the aforementioned shortcomings, we have to neglect the theory of territoriality as well as the basic and dogmatic analysis and taking advantage of legal analysis, we can state that the significant element of the debate of bankruptcy, i.e. insolvency, is an institution which is very similar to the institution of incapacitation in our legal system. In both cases the bankrupt is not allowed to have access to properties and assets and this is why some have considered insolvency to be the judicial incapacitation. This similarity causes these two categories of insolvency and bankruptcy to be put under the class of eligibility in order to be able to use the rules of dispute resolution as stipulated in the articles 6 and 7 of Civil Code. Accordingly, the bankruptcy of the foreign merchant will be investigated based on the essential law of his origin country. This is also the case with Iranian merchant no matter where he is working. This issue has two major shortcomings. First, the issue of bankruptcy is one of the issues related to public commercial order of every country and has been adopted for protection of the rights of creditors and one cannot enforce the foreign law despite the existence of the obstacle of public order (article 975 of civil code). The principle is the enforcement of public rules in the domain of internal system and these rules require to be enforced in an unconditional way (Juneidi, 2012). Moreover, from structural and formal point of view, bankruptcy and liquidation shape their own particular administrative institutions and organizations which might be unenforceable in the country and this would make the enforcement of the foreign law hard; for example, in the so called judicial recovery act of 1985 in France or in the legal systems of Canada and USA the so called institution of Trust.

Finally, one needs to conclude that the principle of conflict resolution must be a synthesis of the necessities of the national jurisdiction and public order on the one hand, and provision of needs of the society and time, on the other hand. This will be impossible unless we make simultaneous use of fundamental and legal analyses. Then, to this end, we need to know two prerequisites. First, the rules of international private law suggest that for finding the rule of conflict resolution we use two dogmatic/fundamental and legal methods. In dogmatic method, the issue is evaluated merely based on political and social concerns and the authorized court and law are chosen accordingly. But on the contrary, in legal method the proper law is decided based on scientific and theoretical considerations. Thus, the judge might be forced to enforce the foreign law (Almasi, 2010). Therefore, as a rule one can state that the use of each one of these theories is not correct and the scientific method requires us to refer to dogmatic analysis where we are concerned with such issues as nationaltity or political emergencies and public order. Likewise in more technical and legal cases we must refer to legal method. Therefore, one can conclude that when the public order is at risk the foreign law cannto be enforced because the internal law does not allow the enforcement of such a law.

The Rights of Banks before the Bankrupt Merchants

1. Rights of Creditors

One of the ways through which the bank or the creditor in general can make sure of the recovery of debts is the reception of warranty or bonds from the debtor. This is what the banks ask from the clients in return of payment of credit. Thus, the clients are forced to provide immovable properties as bonds for receiving the credit in order to guarantee that if the debts are not recovered, the banks can reach its debts from the bonds (Qaem Maqam Farahani, 2012).

A. Maturity of Debts

Among the effects of declaration of bankruptcy for the creditors, one can refer to the maturity of on demand debts and prohibition of payment of damages for the delay of payments. Bankruptcy causes the deferred debts to turn mature. On the other hand, if the properties of the bankrupt merchant are distributed among the creditors, the latter will not reach their debts (Qaem Maqam Farahani, 2012). In the new commercial code and its points as regards the insolvency, there is no indication of the maturity of the debts. Of course, maturity of debts in the period of insolvency seems logical from the perspective of the priorities of the bankruptcy law. However, in the discussion of the effects of the declaration of insolvency in the article 1077 of new bill of commercial code it is noted that: "As soon as a person is adjudged bankrupt, debts due by him which have not yet matured become payable, but an allowance by way of discount will be made for the period the debt has to mature". This is in one sense a repetition of the article 421 of the commercial code.

B. Prohibition of Payment of Damages for Delay in Payment

There is no rule in the commercial code of Iran that would suggest the prohibition of the payment of interests for the debts by the debtor and this is why the courts are issuing different verdicts as regards the debts of the bankrupt merchant (Qaem Maqam Farahani, 2012).

First Paragraph: Privileged Rights of the Creditors

The creditors have the right of priority or right of privilege or superiority in the field of debts recovery. Of course, the creditors who have received warranty from the debtor do have the priority over other creditors in the debts rectovery through the property. In the article 58 of the law of administration of liquidation of the affairs of bankruptcy the following classification has been offered of the classes of creditors and their priorities:

First class:

a) Salaries of the house servants for the one year period of activity before the insolvency;
b) Salaries of the staff of the bankrupt company for six months before the insolvency;
c) Wages of the workers who were paid daily or weekly for three months before the insolvency;

Second class: All the persons whose properties had been under the control of the bankrupt depending on the scope of control of the bankrupt …

Fifth class: Other creditors

Upon our reflection on the article 1116 of the new bill of the commercial code, we will find out that this classification and the right priority have undergone through numerous changes. We will just mention some of these points:

These changes comprise inclusion of the sixth class in the new bill of the commercial code and the rearrengemetn of the clases, e.g. putting the allowance of the woman in the first class

instead of the fourth class. The new class includes the cash of persons in banks and financial institutions as well as the stock exchange agencies and insurance up to 800 dollars. It is noteworthy that if the second part has been included by the legislator due to its importance we would see it in a positive viewpoint; otherwise, it will have an insignificant effect.

Second Paragraph: Share of Creditors of the Main Debt

The creditors with bonds or warranty include those individuals who have received a property in return of their debt from the bankrupt merchant and this type of creditors based on the article 1116 of the new bill of commercial code have priority over other creditors in selling the property at issue and its distribution among the creditors. In other words, after selling the property first the debts of the creditors with warranty are balanced and then if there remains any surplus the debts of other creditors will be balanced. As we mentioned in previous paragraph, the article 1116 of new bill of commercial code suggests that the creditor with bonds is prior to other ordinary creditors in balancing his debts through selling the property but if the debts are not balanced in this way he will be one of the ordinary creditors for balancing the remaining debts. These debts have been outlined in the commercial code based on their priority as follows:

- First class: The wife's allowance;
- Second class: The cash of individuals in banks, financial institutions, and the stock exchange agencies and other factors up to 600 dollars;
- Third class: The salaries of all servants of the bankrupt merchant for six months before the bankruptcy 25% of their benefits for being fired;
- Fourth class: The debts of the persons whose property has been under the control of the bankrupt as the guardian. This debt is of priority if the insolvency of the merchant during his guardianship has been announced after one year since its expiration.
- Fifth class: The dowry of the woman up to 800 dollars provided the marriage has dated back at least to five years before the insolvency of the merchant. The surplus of this amount of dowry will be calculated like the other debts.
- Sixth class: Other creditors

Except the creditors with the bonds and privileged creditors, other creditors have ordinary priority. This latter group of creditors can balance their own debts after the full payment of the debts of the two aforementioned groups. As we noticed earlier, in the new bill of commercial code like the law of admistration of liquidation of the bankruptcy affairs (other creditors) lies in the last class. It is needless to say that the debts of the banks if there is a warranty can be balanced via selling the warranty. The gap exists when the bank has received the bonds in the form of guarantee of a third party like the promissory note. Here the bank will be among the sixth class. It is evident that in this case we are encountered with certain ambiguities. Of course, the warranties of the debtor could be possessed by other parties who have priority over bank. This gap must be filled by the revision of law.

2. Bank's Right of Bond

Moreover, in such conditions the debtor might mortgage other person's property as the surety in addition to his own property. In other words, mortgage of property does not exclusively belong to the credit receiver and the mortgage of the property of a third party is valid.

3. Bank's Right under the Supposition of Lack of Surety

One of the major problems is recovery of the delayed debts of the bank due to such events as the death of debtor or mortgagor or the warrantor. In this case, the bank is forced to find the inheritors and their documents and names. For in most cases after the death of the debtor, mortgagor or warrantor, the inheritors do not proceed to probate. Even if they take any step in this regard in order to postpone the actions of the bank for maturing the debt and selling the immovable properties, they refuse to provide the significant organizations which exchange data with the banks with the probate. For the notaries before issuing the required documents for the enforcement of the legal actions against the inheritors force the banks to provide a copy of the probate. It is needless to say that in most cases providing the probate is not possible. Fortunately, the new bill of the commercial code has broken the silence in this regard. In the second clause of article 3 the obligee or his legal representative is only required to introduce the inheritors and has clearly stated that in this case there is no need for the provision of the probate. Moreover, "if the obligee cannot introduce the inheritors the notary will not have any responsibility".

Then, in order to prevent from further difficulties, the bank authorities ask the clients who need credit to provide a full copy of their all identity documents including the pages where the names of the children and their identities are written. The authorities seek to have access to more information in this regard in order to make sure that in case the required data will be available. In recent years certain instructions and rules have been notified to banks and financial institutions in this regard. It is evident that this action will not guarantee the enforcement of contract as regards the inheritors because the number of inheritors can change. Thus, it seems that the banks need to have direct relations with certain organizations in charge of identity documents. By the way, article 19 of the new bill of commercial code stipulates that the bank decree must be notified to the inheritor in his residence. If this is not possible the decree will be published in the newspapers. Although the new instruction has solved the problem of providing the probate for starting the enforcement the acquisition of the names of all inheritors in the megacities is not easy and proves hard.

- **Legal Procedure of Recovery of Debts**

In the reports and statistics related to business released by World Bank, one can see that the index of overcoming the inability of payment of debts has been analyzed as the index of business. This will also serve as a measure for action and documentable cases in this statistics. In this way the rank of countries is studied in view four factors of time, cost, recovery rate in the event of bankruptcy and power of law.

The rate of recovery is a function of time in which also the cost and rate of loaning and the scope and probability of continuation of the activity of company and business are involved. In fact, the shorter is the time of the investigation of the claims of bankruptcy and its liquidation, the higher will be the rank of a country in the resolution of the problems resulted from the bankruptcy. It needs to be mentioned that this is an important issue in the developed countries where the possibility of rehabilitation of the bankrupt unit has been taken into account as one of the factors of businesses. The time of resolution of bankruptcy in the report of business of World Bank is calculated based on the rate of recovery and the costs. In other words, in those countries where the possibility of rehabilitation of the businesses is taken into consideration the amount of this measure is taken to be a number between zero to a hundred. In calculation of

cost of time of resolution of bankruptcy of economic business, one can refer to preliminary actions, management of the properties and assets of the debtors, participation of the creditors in rehabilitation and returning of the merchant.

CONCLUSION:

We found out that in our country's commercial code, there is no proper and clear rules and law as regards bankruptcy. In some cases, the ambiguous obligations are resulted in contradictory issues. It needs to mentioned that given the general changes in rules of bankruptcy of the merchants as well as the innovations of the new bill of the commercial code, the rules and regulations concerned with bankruptcy and liquidation of the affairs of the bankrupt including the commercial code of 1928 with next amendments, the instruction of the administration of the liquidation of the affairs of bankruptcy adopted in 1939, instruction of the fund A and B adopted in 1940 and memorandum of bankruptcy affairs adopted in 1964 as well as the law of registeration of companies are abrogated.

The new bill of the commercial code by changing the article one as follows: "merchant is a person who is involved on his own in the following affairs …" and enumeration of more than 11 classes of jobs and also given the elimination of aticle 3 of the act of 1928, suggests that the legislator has intended to bring nearer the definition of merchant to a thematic, tangible, new and uptodated system and this is an important item in determination of bankruptcy.

In the new bill, in addition to the institution of bankruptcy which has retained its previous structural mode despite certain changes the newly emerged institution of insolvency is predicted aiming at the support of merchants and creditors. In other words, in the new bill the legislator has struggled to solve the existing problems of inefficiency of previous regulations regarding the investigation of the affairs of merchants.

The supervisions of the institution of insolvency have been designed for prevention from the issuance of numerous bankruptcy judgements. Thus two major members of this institution under the titles of supervising judge and the trustee under the supervision of prosecutor and the relevant court try to liquidate the affairs during the period of insolvency. Since the institution of insolvency is a new institution and the legislator has created one new position called trustee in the issue of bankruptcy, then one can regard the trustee as the liquidator of the institution of bankruptcy. Of course, he has his own specific features. The appointment of the insolvent merchant who has a good will as trustee during the period of insolvency is one of the innovations of the bankruptcy law in the country because the merchant himself is involved in the administration of the properties since the moment of insolvency onward.

It can be concluded that this institution is intended to preserve the ownership of the merchant over his firm and prevention from its transfer to another person. This also prevents from the issuance of bankruptcy declaration and promotes the economic flourishing.

In the new bill the legislator has considered irrelevant the three days period determined by the commercial code of 1928 for bankruptcy declaration and increased it to 30 days and this seems to be more consistent with the social conditions. Moreover, when one of the creditors fill a suit against the merchant the court gives a 10 days opportunity to the merchant to either pay the debt or provide a property for sale. Accordingly, the deadline has turned more logical and the extra time given to the merchant by the court is more supportive.

As we see, in order to keep the balance between the protection of the rights of merchant and creditors, in the new bill of the commercial code wide jurisdiction has been endowed upon the creditors among which one can refer to the creditors' right to collectively decide to mature their debts or make other decisions.

For fundamental resolution of the issues of bankruptcy, one can refer to the reform of the articles of commercial code as well as the insistence of such issues as the necessity of reform of banking system of claims regarding bankruptcy before the issuance of a judgement and creation of an opportunity for revision in addition to the deadline given for protesting against the issued judgements for banks, official information circulation of the judgements of bankruptcy in authorized newspapers, revision and precision in announcement of date of insolvency of companies in the time of issuance of sentence, and the necessity of presence of prosecutor's representative in court sessions. Through studying the law of various countries, we found out that bankruptcy has specific rules and regulations across the world. Deprivation from commercial activity at least for five to seven years is one of these rules while in Iran one person declares himself a bankrupt and after a short period he establishes a new company and continues his commercial and economic activities.

References

Almasi, Nijad Ali, 2008, Governing Law in Semi-Contract in Law Conflict, Journal of Mofid, no. 70, pp. 3-20.

Almasi, Nijad Ali, 2010, Private International Law, Ninth Edition, Tehran, Mizan, 54.

Hassanvand, Mohasi, 2012: Law Conflict in European Union and Its Resolution, Festschrift of Dr. Almasi, first edition, Sherkat Sahami Enteshar, pp. 13-113.

Juneidi, Laya, 2011, Theory of Transnational Law, Journal of Law, University of Tehran, Year 41, no. 1, pp. 127-148.

Juneidi, Laya, 2012, Explanation of Concept of Public Order in International Relations focusing on Imperatives in Public Law, Festschrift of Dr. Almasi.

Justification of the Court Theory – National Supreme Court – cf. Juridicial Procedure, vol. 4, p. 108.

Kaiser, Kevin m.j., 1996, European Corporate Finance, Financial Management, vol. 25, no. 37, www.jstor.org, pp.67-85.

Maqsudi, Reza, 2012, Obstacles of Implementation of Competency in Private International Law, Journal of Private Law, Year Nine, no. 1, pp. 97-126.

Nasiri, Mortiza, 1991, Multinational Law, first edition, Tehran, Daneshe Emruz, 255.

Qaem Maqam Farahani, Mohammad Hossein (2012): Bankruptcy and Liquidation, Seventh Edition, Mizan, Tehran.

Skini, Rabia, 2013, Commercial Law (Bankruptcy and Liquidation), Sixteenth Edition, Tehran, SAMT, p. 3.

Williston, Samuel, 1909, The Effect of a National Bankruptcy Law Upon State Law, Harvard Law Review Association, vol. 22, no. 8, www.jstor.org, pp. 547- 563.