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EUROPY ŚRODKOWO-WSCHODNIEJ

**SAMORZĄD TERYTORIALNY
W KONSTYTUCJACH
WYBRANYCH PAŃSTW
EUROPY ŚRODKOWO-WSCHODNIEJ**

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Iryna Butyrska

PARTICIPATION OF LOCAL SELF-GOVERNMENT BODIES IN BANKRUPTCY CASES IN UKRAINE

Bodies of local self-government, taking into account the course of Ukraine on decentralization, are active participants of the economic process, including bankruptcy cases. The purpose of participation of representatives of local self-government bodies in economic legal proceedings is to protect the rights and interests of the respective territorial community.

One of the ways to repay the debt the budgets of different levels is the introduction of bankruptcy procedures in debtor companies. Meaning role in improving the efficiency of conducting bankruptcy procedures plays the interaction of the state bodies and local self-government in affairs about the bank and bankruptcy procedures.

Bankruptcy is an extraordinary situation in the field of economic activity, in particular, in the entrepreneurial. The bankruptcy procedure in Ukraine is governed by the Law of Ukraine "On the Restoration of the Debtor's Solvency or Declaring it Bankrupt" No. 2343-XII²⁷⁵ (hereinafter referred to as the Bankruptcy Law). This Law establishes the conditions and procedure for restoration of debtor's solvency or declaring a debtor bankrupt and application of the liquidation procedure, and full or partial satisfaction of creditors' claims.

Bankruptcy cases are characterized by a specific range of participants. Each entity engaging in proceedings on insolvency, endowed with special procedural rights and obligations arising from the nature of relationship failure. The specifics of the cases of bankruptcy is to apply specific methods of protection features of procedures, members, steps and other elements that

²⁷⁵ *Law of Ukraine "On the Restoration of the Debtor's Solvency or Declaring it Bankrupt"* No. 2343-XII by 14.05.1992 [e-resource]. URL: <http://zakon3.rada.gov.ua/laws/show/2343-12> (date of access 28.09.2017).

distinguish it from the lawsuit proceedings²⁷⁶. Such specificity is caused by the public nature of bankruptcy cases, the need for protection and a significant number of conflicting interests of the meaning of the proceedings.

It should agree with V. Radzyvilyuk who is investigating the factors that influence the personality of the main participants legal avoid bankruptcy (insolvency), highlights among these factors is the presence of various members together in their direction and numerous interests, not only common, but most importantly opposite²⁷⁷. Coming into the bankruptcy case, almost every entity strives to protect its own interests, which leads to high conflict level of relations failure. Each creditor is looking for the maximum possible satisfaction of his claims against the debtor. Clash of creditors, the debtor, social and public interest, as it is noted N. Aseeva, generates considerable difficulties in the legal regulation of the legal institution of insolvency (bankruptcy). The purpose of the application of insolvency procedures - is to find a balance between the interests of the creditor, debtor, society and state by applying the debtor various procedures provided by law²⁷⁸.

Participants in the proceedings of bankruptcy case are interested in the results of the process individuals and entities who come on their own or are involved by economic court to the bankruptcy case for comprehensive, complete and objective review of the case and are given in the proceedings by relevant procedural rights and obligations. The bankruptcy law states that the participants of the bankruptcy case are the parties, secured by the lenders, the arbitrator (the property manager, the reorganization manager, the liquidator), the owner of the property (the body authorized to manage the property) of the debtor, the state body on bankruptcy, the State Property Fund of Ukraine, a representative of the local self-government body, a representative of the debtor's employees, an authorized person of the debtor's founders (participants, shareholders), as well as in cases stipulated by this Law, other persons participating in the proceeding in the bankruptcy case.

Analysis of the Bankruptcy Law allows to distinguish three forms of participation of local governments in the bankruptcy case:

- 1) participation as a lender;
- 2) participation as a debtor (bankruptcy of communal companies);

276 Y. G. Riabtseva, *Constituencies judicial bankruptcy procedures*. "Bulletin of economic justice". 2008. No. 6. P. 86.

277 V. Radzyvilyuk, *Prevention bankruptcy (insolvency): economic and legal aspects: monograph*. Nizhyn LLC Publisher "Aspect-Polygraph", 2013. P. 64.

278 N. V. Aseeva, *Provision of private and public interests in bankruptcy of the enterprise: monograph*. Donetsk. University of Economy and Law. Donetsk: DonUEP, 2013. P. 13.

3) participation as a participant (representative of the local self-government body).

As a creditor, the local self-government body participates in a bankruptcy case if the debtor has an outstanding debt to the municipal budget. In this case the local self-government body acts on a par with other creditors on the case.

Concerning the bankruptcy of communal companies, the following should be noted. Since local self-government bodies are not business entities, and they are prohibited from doing business, the right choice of the organizational and legal form of these bodies of economic entities created by them is essential. According to the Commercial Code of Ukraine, competent local authorities may create communal unitary enterprises, that is, enterprises that are created on the basis of a separate part of communal property and are within the scope of their management. In addition, local governments may form economic partnerships with other partners in the established order and have corporate rights that determine their share in the statutory fund of the established partnerships.

The Constitutional Court of Ukraine, analyzing the provisions of the Bankruptcy Law, emphasizes that communal unitary enterprises are economic entities that provide vital services to the population, and the interests of the territorial community are the basis of their activities. In cases where the main purpose of the business entity in the communal sector of the economy is the receipt of profit, its organizational and legal form should be an economic partnership with an appropriate share of communal property in the authorized fund.

Thus, the Constitutional Court of Ukraine came to the conclusion that the norm of the Bankruptcy Law for communal enterprises applies to communal unitary enterprises and does not apply to economic partnerships with a share of communal property in the authorized capital. This norm is optimally balanced by the rights and legitimate interests of residents of territorial communities to receive vital services from communal unitary enterprises, on the one hand, and the rights and legitimate interests of creditors of these economic entities, on the other.

As usual, to start the procedure of closing a company due to the inability to repay debts, the head must apply with appropriate application to the court dealing with the affairs of legal entities. A lender or an employee of an enterprise who is not paid a salary, that is, in fact, the same creditor, can also go there. In the case of the recognition of a communal entity as a bankrupt,

there is a controversial legislative issue about the possibility of applying to the judicial authorities to the head of the enterprise. This is due to the fact that enterprises of this type have only the possibility of operational property management. Ownership belongs to the city or other municipality. Thus, in fact, the decision to send an application to launch a bankruptcy procedure for a unitary enterprise is taken not by the head, but by the property owners, that is, local authorities²⁷⁹.

More of that, communitary enterprises, unlike other organizational and legal forms of commercial legal entities, have special legal capacity. So, if we are talking about municipal enterprises, most of them function and are created in order to address issues of local importance and social problems of municipalities (housing and communal services, transport, etc.).

It should be noted that the legal regulation of the bankruptcy of communal enterprises at the moment is not fully implemented by Law. So, firstly, the current version of the Bankruptcy Law does not contain provisions that directly concern communal enterprises. Whereas the Bankruptcy Law previously contained a norm, which bodies of local self-government were given the right to decide not to apply bankruptcy procedures to certain legal entities – enterprises that are the objects of the right of communal property. Instead, in art. 85 of the Bankruptcy Law provides for the possibility of applying to local courts of local self-government bodies with a petition for non-application of bankruptcy procedures and termination of proceedings in a bankruptcy case concerning a business entity having a public or other value for the Autonomous Republic of Crimea or a territorial community. Perhaps under the notion of "a subject of entrepreneurial activity that has a social or other value" the legislator understands the enterprises of communal property, but from the text of the Bankruptcy Law there is no mandatory requirement regarding the ownership of such entity. On the other hand, such a legal structure may be the reason for abuses by local authorities, which in this way can "save from bankruptcy" and private enterprises, defining the latter as having a public or other value.

The need to protect enterprises of communal ownership is controversial. So, on the one hand, such enterprises have value for a territorial community, and indeed, protection from the side of local self-government bodies for such objects is important. But, on the other hand, all forms of ownership

279 *Conditions for Recognizing the Bankruptcy of Municipal Unitary Enterprises and the Consequences of Liquidation* [e-resource]. URL: <https://moydolg.com/bankrotstvo/yurlica-1/uslovija-bankrotstva-municipalnogo-unitarnogo-predprijatija.html> (date of access 28.09.2017).

in Ukraine are equal, and additional privileges for communal property are a violation of this principle. The increased protection of the state form of ownership is objectively predetermined and necessary in any case, while the value of communal property objects is not so significant as to provide such local authorities with such broad powers in the area of bankruptcy of communal enterprises²⁸⁰.

Secondly, the inconsistency of the general norms of the Commercial Code of Ukraine and the special legislation on bankruptcy manifests itself in the fact that the issue of application of the Bankruptcy Law to communal non-commercial enterprises, which, according to the norms of the Commercial Code of Ukraine, are not subjects of entrepreneurial activity, are not resolved. On this basis, utility non-profit enterprises that are not subjects of entrepreneurial activity should not be recognized as subjects of bankruptcy²⁸¹.

A representative of the local self-government body has the right to participate in an advisory vote in the work of the committee of creditors.

According to art. 42 of the Bankruptcy Law, the types of property assets (property and property rights) of a bankrupt, owned by him on the right of ownership or full economic jurisdiction on the date of the opening of the liquidation procedure and found during the liquidation procedure, are included in the liquidation mass, except for cash held on the bank account of conditional storage (escrow) of the bankrupt, objects of housing stock, including dormitories, preschool establishments and objects of communal infrastructure, which, in the event of bankruptcy of the enterprise transferred in accordance with the procedure established by the legislation, to the communal property of the respective territorial communities without additional conditions and are financed in accordance with the established procedure. Based on the system analysis of art. 42 of the Bankruptcy Law, the provisions of the Law of Ukraine "On Local Self-Government in Ukraine"²⁸², communal infrastructure facilities can only be determined by the local government of the respective territorial community, taking into account those services provided by communal enterprises to residents of territorial communities. That is, the local self-government body decides on the list

280 I. A. Butyrska, *The legal status of the debtor in bankruptcy case*. "Scientific Bulletin of Yuriy Fedkovych Chernivtsi National University: collection of scientific works". Chernivtsi: ChNU, 2013. Vol. 682: Jurisprudence. P. 67.

281 P. O. Povar, *Topical issues of legal regulation of liquidation of business entities related to the updating of bankruptcy law*. "Bulletin of the High Council of Justice". 2012. No. 2 (10). P. 135.

282 *Law of Ukraine "On Local Self-Government in Ukraine"* No. 280/97-BP by 21.05.1997 [e-resource]. URL: <http://zakon5.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80> (date of access 25.09.2017).

of objects of communal infrastructure that are the property of a bankrupt, and such objects are transferred free of charge to the local self-government body. In other words, in the event that the local government is interested in obtaining property in municipal ownership, it can legitimately recognize it as socially significant (of course, if it has anything to do with this area) and receive this property.

The determining factor in the classification of property as socially significant is its special significance for the livelihood of the population, economic or production value. Having investigated the evidence presented in the case materials, including the technical documentation, the court found that the disputed objects have production and economic purpose (workshops, warehouses, offices, garages), the use of which is not provided for the purposes of providing for the needs of the municipal formation, and therefore refused in the recognition of tenders as invalid and the transfer of property to municipal property²⁸³.

Socially important objects are recognized as objects of property of the debtor that are used for the operation of pre-school educational institutions and other educational institutions, health care facilities, facilities used for the organization of pre-hospital care, emergency and urgent outpatient, inpatient care, municipal infrastructure facilities related to the life support systems, including water, heat, gas and power supply facilities, water disposal, sewage treatment, processing and disposal (burial) of domestic waste, facilities designed to illuminate the territories of urban and rural settlements, facilities intended for the improvement of territories.

Thus, local self-government bodies take part in bankruptcy cases in Ukraine in cases of bankruptcy of communal enterprises, as well as enterprises with a public or other value, as well as a creditor – if the debtor has an indebtedness to the communal budget.

283 Yu. V. Zhdanov, *Special powers of local governments in the bankruptcy case: characteristics and practice on the implementation of the materials of the Urals district* / "Municipality: Economics and Management". 2014. No. 4. [e-resource]. URL: <http://municipal.uapa.ru/en/issue/2014/04/04/> (date of access 27.09.2017).