

ПОВІТРЯНЕ, КОСМІЧНЕ, ЕКОЛОГІЧНЕ ПРАВО

UDC 336.64 (045)

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MEASURES TO PREVENT THE BANKRUPTCY OF THE DEBTOR - AVIATION ENTERPRISE AND EXTRAJUDICIAL PROCEDURES

The results of the market reforms, which took part in Ukraine, have confirmed the necessity of the further changes, especially in the system of the bankruptcy, which is considered below. Herewith, one of the least regulated practical issues is the process of application of the measures to avoid bankruptcy of the aviation companies.

Key words: bankruptcy, debtor, aviation companies, extrajudicial procedures

Formulation of the problem and its relevance.

Conception thesis of the bankruptcy avoiding mechanisms should be realized in the appropriate directions, such as legal, economical and organizationally-informative. Decidedly, in the sphere taken into consideration, the main issue is legal aspect of the aviation companies bankruptcy avoiding.

Indeed, the legislator made the appropriate changes to the Law of Ukraine about «On Restoring Debtor's Solvency or Declaring Bankruptcy» about usage of the means to avoid bankruptcy of the debtor, but the problem of the bankruptcy still remains. But even the perfection of the regulatory acts does not provide the efficiency of their functioning.

Purpose of the article. Analysis of the legal acts of the measures to prevent the bankruptcy of the debtor-aviation enterprise and extrajudicial procedures, examination of the conceptual provisions of the legal mechanism of merger, division and transformation.

The main material. According to the Law of Ukraine «On Restoring Debtor's Solvency or Declaring Bankruptcy» (further the Act) in 2011 version it is said, that the founders (participants, shareholders) of the debtor, the owner of the debtor's property (the authority empowered to manage the property), central executive authorities of the Autonomous Republic of Crimea, local governments within its authority shall take timely measures to prevent the bankruptcy of the debtor [1]. Therefore, aviation companies, determining the absolute or stable insolvency, are required to perform certain actions to prevent bankruptcy.

In case any signs of bankruptcy occur, debtor's head of aviation enterprise is obliged to send information about the evidences of signs of bankruptcy to the founders (participants, shareholders) of the debtor and the owner of the debtor's property (person authorized to administer the estate).

To the founders (participants, shareholders) the debtor, owners of the property (person authorized to administer the estate) of the debtor, the creditors of the debtor and other individuals financial assistance could be provided in order to avoid the bankruptcy in an amount sufficient to repay the money for the debtor's obligations to creditors, including obligations to pay taxes and duties (mandatory payments), insurance contributions to the state pension and other social security and to restore the solvency of the debtor (the debtor's sanation proceedings before the bankruptcy).

In case of providing financial assistance to the debtor, he assumes the corresponding obligations to the people, who provide such assistance, in the manner prescribed by law.

One of the most efficient means to avoid bankruptcy of the debtor – aviation company (further the Debtor) is its sanation to the bankruptcy proceedings. Under the term «sanation to the bankruptcy proceedings» the system of the actions to renew the debtor's solvency is meant, which could be performed by the founder (participant, shareholder) of the debtor, the owner of the debtor's property (the authority empowered to manage the property), a creditor of the debtor and other persons in order to avoid bankruptcy of the debtor by means of taking organizational, management, investment, technical, financial, economic and legal actions accordingly to the regulation to proceedings in bankruptcy.

For instance, under the Article 106 of the Civil Code of Ukraine, merger, accession, division and transformation of the legal entity are made under the decision of its members or legal entity, authorized by the statutory documents, and in the cases provided by law, under the court order or the relevant government authorities. Also, receiving of the consent from the appropriate authorities for liquidation of a legal entity through merger or takeover could be provided by the Law.

In case of a merger of business entities all property rights and obligations of each of them move to the entity, formed by the merger. When connecting one or more entities to another entity, all the property rights and obligations of the associated entities will be acquired by the acceding entity.

In case of division of the entity, all the property rights and obligations are transferred by the separate act (balance) in the relevant shares to each of the new entities, formed as a result of this division.

In case of converting one entity to another entity, all property rights and obligations of the previous entity will be acquired by the new entity.

In case of singling out one or more new entities, rights and obligations of the reorganized entity in the respective fractions of the property move by separate act (balance) to each of them (Article 59 of the Civil Code of Ukraine) [3].

The Legislator in Part 3 of the Art. 29 of the Act implies as the restructuring of the company the implementation of organizational, financial, economic, legal and technical measures, aimed to reorganize the company, in particular including its division by the transfer of debt to an entity, that is not subject to sanation, to changing ownership, management, the legal form to facilitate financial recovery of enterprises, improve efficiency of the production, increasing production of competitive products and a full or partial satisfaction of creditors' claims.

Hence, one of the sanation means to bankruptcy proceedings could be the procedure for liquidation of a legal entity by merger, consolidation, division and transformation based on the Civil Code of Ukraine st.107. However, in the part 1 of the Article 59 of the Civil Code of Ukraine is stated, that the liquidation of the entity, carried out through its reorganization or liquidation - to address the owner(owners) or authorized bodies, under the decision of others authorities - the founding entity, or their successors, and in cases, stipulated by law - by court. For example, under the Resolution of the Supreme Economic Court of Ukraine of 15.12.2010 № 8/27 is stated, that the Commercial court liquidates the proceedings in bankruptcy, if the elimination of

the legal entity has occurred before initiation of bankruptcy. As the extract from the Unified State Register says, the debtor was able to cease, and according to a report the Department of Civil Registration of Lviv City Council, dated 09.06.2010 № 2-6600/03/01-1251 (a.s.34) state registration of the liquidation of the debtor was held only on 02.06.2010, scilicet - after the commencement of proceedings in the case of bankruptcy. Thereby, state registration of the liquidation of the debtor after the commencement of proceedings in the case of his bankruptcy was made arbitrarily, disrupting the courts prohibition and current legislation. Therefore, in case about the bankruptcy the court, after finding out the fact of the illegal liquidation of the debtor, have to decide the cancellation of the state registration of the liquidation of a legal entity - the debtor according to the Article 41 of the Law of Ukraine «On state registration of legal entities and natural persons - entrepreneurs» [4].

In our opinion, as the reorganization the new entity should be understood, to which by means of universal succession, all rights and duties or their part, based on the certain legal title (property rights, the right of economic management, the right of operative management) has moved.

A. Cherep notes, that the reorganization (restructuring) might include the following measures: change of the management of the company; partial or full privatization; partial closing; conducting of the bankruptcy proceeding; separation of large enterprises apart; separation of the non-core structural units from the companies; release of the objects of social and cultural significance objects from the companies; sale (or renting) of the part of main company's funds; sale of the excessive equipment, materials, etc.; reduction of the employees quantity of the company.

The main condition to decide on the choice of specific measures of reorganization is the availability of technical and economic substantiation of the expediency of its holding. During the conduction of the restructuring of the company by the means of its unbundling, the availability of the business-plans of the new enterprises is obligatory [5, p.169].

The creditor may require from the entity which stops implementation of the obligations, which are not well-off, liquidation or early performance of obligations or enforcement of the obligation, except as required by law. After the end of the period for filing creditor's claims and granting or rejection of the request, the Liquidation commission of a legal entity issues a transfer certificate (in case of merger, consolidation or conversion) or distribution balance (in the case of separation), which shall contain pro-

visions on succession in respect of all liabilities' obligations of a legal entity, that liquidates in respect of all its creditors and debtors, including obligations disputed by the parties. The Transmitted Act and the Distribution balance are approved by the members of a legal person or person, that made the decision to stop it, except as prescribed by law.

Copies of the transfer act and distributing the balance, signed by the chairman and members of the commission of a legal entity liquidation and approved by members of the legal entity or body that made the decision to liquidate the legal entity are to be transferred to the agency, which issues the state registration of legal entity, which is discontinued, the place of its registration, and to the agency, which issues the registration of the legal entity – successor at the place of registration. Violation of the provisions of paragraphs 2.3 article 107 of Civil Code of Ukraine is the ground to refuse to register in the Unified State Register the record of liquidation of the legal entity and state registration of a legal entity - successors [2].

Legal entity - successor, which has formed as a result of separation bears the subsidiary liability for the obligations of a liquidated legal entity, which moved to another legal entity due to the distribution balance - successor. If there are more than two legal entities – successors, occurred after the separation, such subsidiaries bear the vicarious liability jointly and severally. There are some cases, when there are some successors of the legal entity and it is impossible to define the successor about specific responsibilities of the liquidated legal entities, so the legal entities-successors bear the joint and several liabilities to creditors of the liquidated legal entity. Participants (founders) of the liquidated legal entity, which were responsible for their obligations due to the Law or the statutory documents, will be responsible for the obligations of the successors, which has appeared before the moment of legal entity liquidation in the same amount, in case of the bigger amount of responsibility of the founders, is not stated by the Law or their statutory documents.

Transformation of the legal entity is a change of the legal form. In case of conversion, all assets, rights and obligations of all previous legal entity go to a new legal entity.

Emission is a transition under the distributional balance of the property, rights and obligations of legal entities to create one or more new legal entities. Following the decision to emit members of the legal entity or authority, which decided to emit, the distribution balance should be prepared and approved.

Reorganization of the company, which is subject to a forced separation, is performed by a monopolist in its sole discretion, in case of the liquidation of the monopoly formation in the market. Forced separation could not be applied if: a) impossibility of organizational or territorial branching of the companies departments or structural units; b) existence of close technological communication between companies, divisions (if the share of domestic sales in total gross output of the company is less than 30%) [5, p. 170].

The court, which decided on separation, has to determine the member of legal entity or the Supreme body of the legal entity (owner) in his decision, which is obliged to prepare and approve the distribution balance.

However, the legal entity, formed as a result of separation, bears the subsidiary liability for the obligations of a legal entity, which has committed emission, which did not go to the legal entity, formed as a result of the separation according to the separation balance sheet.

The legal entity, which has committed emission, bears subsidiary liability for obligations under the separation balance sheet moved to the legal entity, formed as a result of the separation. If there is two or more entities, formed as a result of separation, than they bear subsidiary liability in association with legal entity, which committed emission, jointly and severally.

In case it is impossible to determine after emission the responsibilities of individuals for certain obligations, which existed at legal entity before emission, the legal entity, from which the emission was committed, and the legal entities, which were made as a result of emission, bear jointly and severally the responsibility to the creditor for such obligations (article.109 Civil Code of Ukraine).

Liquidation of the legal entity is one of the extreme means to avoid bankruptcy. The legal entity liquidates: 1) after the decision of its members or legal entity's agency, authorized with the constitute documents, including the expiry of the term, for which the legal entity was created, reaching the goal for which it was created, and other cases, provided by the statute documents; 2) after the decision of the court on liquidation of the legal entity due to the violations, caused during its creation, which cannot be removed, and other cases, provided by the statute documents.

The requirement to liquidate the legal entity due to the reasons, mentioned at Point 2 Part 1 of Article 110 of Civil Code of Ukraine, could be presented to the court by the agency, which execute the state registration, by the member of the legal entity, and

the appropriate agency of the government in cases, established by law. By the decision of the court on liquidation of the legal entity by the head of the legal entity, its executive agency or the plaintiff may be appointed be the liquidator or be included to the Commission on legal entity liquidation.

If the value of the property of a legal entity is insufficient to satisfy creditors' claims, the legal entity shall take all reasonable steps, established by the Law of Ukraine «On Restoring solvency or bankruptcy» (Article 110 CC of Ukraine).

The order of legal entity liquidation is conducted in the following way. From the date of registration record of the decision of founders (participants) of a legal person into the Unified State Register of legal entities and natural persons-entrepreneurs, court or agency authorized by them in relation to the liquidation of the legal entity liquidation commission (liquidator) shall take all appropriate measures for legal entity debt collection, which is being liquidated, and notify each debtor on legal entity liquidation, established in terms defined by Part 2 of Article 60 of the Civil Code of Ukraine - two months, what is common, although the Law establishes a special time - twelve months in bankruptcy proceedings.

Liquidation commission (liquidator) claims the demands and proceedings to recover the debt from the debtor legal entity. It is obliged to inform the members of the legal entity, court or the agency, which decided on the legal entity liquidation, about its participation in another legal entities and/or to give information about the business associations or subsidiaries, created by this legal entity.

During the measures of legal entity liquidation, before the end of the presentation of creditors' claims, the liquidation commission (liquidator) closes the accounts, opened by financial institutions except the account, which is being used to make payments to creditors during the liquidation of the legal entity. The liquidation commission (liquidator) has to undertake an inventory of the legal entity property that is liquidated, and the property of its branches and representative offices, subsidiaries, companies, and property, which confirm the corporate rights at other legal entities, to detect and to take measures to return the property, which is at third persons.

In cases, established by the Law of Ukraine «On Restoring solvency or bankruptcy», liquidation commission (liquidator) provides the conducting of the independent evaluation of the legal entity property. Also, it takes actions to close the separate divisions of a legal entity (branches, representations) and in accordance with the Labor legislation, pro-

vides the exemption of employees of a liquidating legal entity.

Licenses, permits, and other documents, together with the stamps and signets, which are to be returned to the agencies of the government or local authorities, sure returned to them by the liquidation commission (liquidator).

To conduct the checking and to determine the presence or absence of arrears for taxes, duties, fees for obligatory state social insurance, the insurance money to the Pension Fund of Ukraine, the social insurance funds, liquidation commission (liquidator) ensure timely provision to the Tax Authorities and the Pension Fund of Ukraine social security funds documents of a legal entity (its subsidiaries, representative offices), including primary documents, accounting and tax accounting.

Until the moment of approval of the liquidation balance, liquidation commission (liquidator) prepares and gives to the State tax service, the Pension Fund of Ukraine and social security funds the reports for the last reporting period. After the expiration of terms for showing the demands by the creditors, liquidation commission (liquidator) prepares the interim liquidation balance, which includes the information about the property of the liquidating legal entity, the list of the demands claimed by the creditors, and the result of their examination. The interim liquidation balance is confirmed by the members of the legal entity, court or the agency, which decided to liquidate the legal entity.

The payout to creditors of the liquidated legal entity, including taxes, fee to the compulsory state social insurance and other funds, shall be paid to the state or local budget of the Pension Fund of Ukraine, the social insurance funds shall be made in the order of priority, established by Article 112 of Civil Code of Ukraine [2]. In case of insufficiency of funds of the liquidating legal entity to meet the claims of creditors, the liquidation commission (liquidator) is to organize the sale of the legal entity property. Before the approval of the liquidation balance, liquidation commission (liquidator) prepares and submits the report for the last reporting period to the State tax service, the Pension Fund of Ukraine and social security statements.

After the conclusion of the payments to the creditors, liquidation commission (liquidator) prepares the liquidation balance, ensures its approval by the members of the legal entity, court or agency, which decided on the liquidation of the legal entity, and ensures the filing to the State tax authority.

The property of the legal entity, which has left after satisfaction of the creditors demands, (together

with taxes, compulsory fee to the State social insurance and other funds shall be paid to the state or local budget of the Pension Fund of Ukraine, the Social security funds), is to be transferred to the members of the legal entity, if other is not stated in the statute documents of the legal entity of the Law. The documents which are subject to compulsory preservation are to be transferred in the appropriate by the Law manner to the appropriate archival institutions. Liquidation commission (liquidator) ensures the filing of the documents provided by the Law of Ukraine «On State Registration of Legal Entities and Individual Entrepreneurs» for the state registration of the termination of a legal entity within the prescribed statutory period (Article 111 of Civil Code of Ukraine).

In case of liquidation of the solvent legal entity, the claims of the creditors will be satisfied in the following priority: 1) first, the claims to refund the losses, caused by mutilation, any other damage to the health or death will be satisfied, and also the demands of the creditors, ensured by the mortgage or in another way; 2) second, the claims of the workers, connected with the labor relations will be satisfied, also the demands of the authors for the usage of the results of the intellectual and creative activities; 3) third, the claims of taxes, fees and other mandatory payments will be satisfied; 4) fourth, other claims will be satisfied. Requirements of one stage satisfy in proportion to the amount, owned by each creditor of the queue.

Note, that the sequence of the creditor's demands satisfaction under the insurance contracts is stated in the Law of Ukraine «On Restoring Debtor's Solvency or bankruptcy». In case the liquidation commission will deny the satisfaction of the creditor's claims or refrain from their examination, the creditor has the right to appeal to the court with the claim to the liquidation commission during one month starting from the moment he was aware or should have

References

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been warned about such denial. Under the decision of the court the creditor's claims could be satisfied for the property, which left after the liquidation of the legal entity.

Creditor's claims, which were filed after the expiry of the time limit, fixed by the liquidation commission for the presentation, are to be satisfied from the assets of the liquidated legal entity remaining property after satisfaction of creditors claimed in time. However, claims of creditors that are not recognized by the liquidation committee, if the creditor did not apply to the court within one month after receipt of the notice of complete or partial failure to recognize its requirements, they are to satisfy them by the denied claims, and the requirements which are not satisfied due to the lack of assets of the liquidated legal entity are meant to be satisfied.

The peculiarity of the sanation of the State companies to bankruptcy proceedings is that it could be provided with the help of the State budget, State companies and other sources of financing. Funds for sanation of public enterprises from the State Budget of Ukraine are established annually by the State Budget of Ukraine. Conditions and procedure for the sanation of the property are approved by the procedure established by the Cabinet of Ministers of Ukraine. Note, that the sanation of the State companies to bankruptcy proceedings is held in accordance to the Article 6 of the Law of Ukraine «On restoring the debtor's solvency or bankruptcy».

Thus, we can consider the means to avoid bankruptcy of the aviation company and the extrajudicial procedures of the bankruptcy as such kind of bankruptcy-preventing tool. The primary objective of measures to prevent the bankruptcy of the aviation company is the approval of principles and objectives that should be achieved after the operation of machinery.

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Заходи щодо попередження банкрутства боржника-авіапідприємства та позасудові процедури.

В статті розглядаються заходи щодо запобігання банкрутства боржника – авіаційного підприємства, концептуальні положення правового механізму злиття, поділу, перетворення, що здійснюється в позасудових процедурах.

Ключові слова: банкрутство, боржник, авіаційне підприємство, позасудові процедури.

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Меры по предупреждению банкротства должника-авиапредприятия и внесудебные процедуры.

В статье рассматриваются меры по предотвращению банкротства должника – авиационного предприятия, концептуальные положения правового механизма слияния, разделения, преобразования, осуществляемые во внесудебных процедурах.

Ключевые слова: банкротство, должник, авиационное предприятие, внесудебные процедуры.