

PROBLEM ASPECTS OF CHALLENGING PAYMENTS OF RESOURCE SUPPLYING COMPANIES IN INSOLVENCY (BANKRUPTCY) CASES

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Despite the fact that the issues of legal regulation of bankruptcy and legal regulation of public relations in the energy sector as well as mandatory contracts are the subject matter of separate legal studies, there has not yet been performed a separate legal research on issues related to challenging payments of resource supplying companies in insolvency (bankruptcy) cases.

In order to unify court practice, it is proposed to amend the Bankruptcy Law through introduction of a clarifying provision on extraordinary preferential payment of creditors' claims relating to operating payments in the event the debtor or the ultimate consumer of the debtor is referred to socially significant facility in the manner established in the energy laws and restriction of its consumption mode may have negative economic, environmental, and social consequences (including man-caused disasters, environmental catastrophes, and death of people).

Moreover, in order to establish equality between the creditors that have the opportunity to choose counterparties and those, for whom the law provides for a mandatory procedure for conclusion of contracts and fulfillment of obligations, it is proposed to exclude from the Bankruptcy Law cases of invalidation of payments under the contracts, conclusion of which was mandatory for the counterparty of a debtor under the law, made by the debtor in anticipation of bankruptcy or after initiation of a bankruptcy case, regardless of the delay in payment.

Keywords: legal status of energy companies, energy law, delay in payment, transaction challenging, mandatory conclusion of contract, bankruptcy (insolvency), socially significant facility.

Although issues of legal regulation of bankruptcy [1] and public relations in the energy sector [2] as well as mandatory contracts [3] are subject-matters of separate legal research, problems raised in this work has not yet been separately studied.

1. On establishment of possibility of extraordinary payment of the creditors' claims relating to

operating payments in case the debtor is referred to socially significant subject (facility)

Clause 6, Article 129 of Law dated October 26, 2002, No. 127-Φ3 On Insolvency (Bankruptcy) (hereinafter referred to as the Bankruptcy Law) specifies the debtors, termination of activity of which may entail negative consequences (death of people or man-caused disasters and

environmental catastrophes). Those include: educational institutions, including preschool ones; health care facilities; water, heat, gas, and power supply facilities, water disposal facilities, effluent treatment facilities, solid waste treatment, recovery, neutralization, and disposal facilities, and other utility facilities; facilities for illumination of territory in villages and cities as well as the facilities created to improve the territory.

The energy law, for example, in the Appendix to the Rules for the Complete and/or Partial Restriction of the Electricity Consumption Mode approved by Decree of the Government of the Russian Federation dated May 4, 2012, No. 442, describes reductions of electricity consumption, which can lead to economic, environmental, and social consequences. They include: government agencies, including the Federal Security Service of the Russian Federation, the Ministry of Internal Affairs of the Russian Federation, the Federal Guard Service of the Russian Federation, the Foreign Intelligence Service of the Russian Federation, the Chief Directorate for Special Programs of the President of the Russian Federation; health care institutions, state veterinary clinics as well as communication organizations, with regard to in-house networks; operating organizations for the centralized water supply and/or sewerage facilities in settlements; coal and mining enterprises; military units of the Ministry of Defense of the Russian Federation, the Ministry of Internal Affairs of the Russian Federation, the Federal Security Service of the Russian Federation, the Ministry of Emergencies and the Federal Guard Service of the Russian Federation; institutions executing criminal sentences, detention facilities, bodies and enterprises of the criminal enforcement system; Zababakhin All-Russia Research Institute of Technical Physics in Snezhinsk, the Chelyabinsk Region, All-Russia Scientific Research Institute of Experimental Physics in Sarov, the Nizhny Novgorod Region, and other organizations related to nuclear issues; organizations performing defense public contracts while using facilities for continuous production of explosives and armament; rail, water, and air transport entities; and entities involved in the energy sector.

A similar list of social facilities is set in the Appendix to the Rules for Restriction of Gas Supply (Delivery) and Extraction.

In addition to the above, clause 96 of the Rules for Organization of Heat Supply in the Russian Federation indicates the following categories of consumers as socially significant: educational institutions of primary and secondary education; social welfare institutions; underground railway systems; livestock and poultry farms, greenhouses.

A similar list is given in clause 68 of the Rules for Cold Water Supply and Disposal.

Herewith, the notions of “economic, environmental, and social consequences” referred to in the energy laws implicitly include such notions specified in clause 6, Article 129 of the Bankruptcy Law as “man-caused disasters, environmental catastrophes, and death of people”.

Thus, both the bankruptcy law and the energy law use the same legal category “socially significant subject (facility)” meaning a subject (facility), termination of activity (operation) of which is not allowed in order to avoid negative economic, environmental, and social consequences (including man-caused disasters, environmental catastrophes, and death of people”).

To prevent negative consequences as a result of termination of activity (operation) of the specified subjects-debtors (facilities):

– in the energy law, the resource supplying organizations (hereinafter referred to as the RSO) are prohibited to restrict consumption by these subjects (facilities) of electricity and heat, gas and cold water (clause 7, Article 38 of the Federal Law *On the Electric Power Industry* dated July 29, 2018, No. 35-Φ3; clause 1, Article 22 of the Federal Law *On Heat Supply* dated July 27, 2010, No. 190-Φ3, Article 8 of the Federal Law *On Gas Supply in the Russian Federation* dated March 31, 1999, No. 69; Part 9, Article 21 of the Federal Law *On Water Supply and Disposal* dated December 7, 2011 No. 416-Φ3).

– the Bankruptcy Law:

1) sets a ban for meetings of creditors to make decisions on termination of the economic activities of the specified debtors (clause 6, Article 129 of the Bankruptcy Law);

2) sets a condition related extraordinary preferential payment with regard to any other claims of the creditors of the expenses for implementation of measures to prevent occurrence of the above negative consequences (clause 1, Article 134 of the Bankruptcy Law).

According to the position of the Presidium of the Armed Forces of the Russian Federation, operating payments (utility bills, payments under power supply contracts and other similar payments) within the meaning of clause 2, Article 134 of the Bankruptcy Law shall be deemed the expenses for preserving the debtor's property and maintaining it in proper condition until the date of sale (clause 18 of the Court Practice Review on Issues Related to Participation of Authorized Bodies in Bankruptcy Cases and Bankruptcy Procedures Applied in These Cases approved by the Presidium of the Armed Forces on December 20, 2016) [4].

In short, the bankruptcy laws already provide for extraordinary payment of operating expenses in case it is necessary for preserving the property of such a debtor, termination of whose activity may entail negative economic, environmental, and social consequences (including man-caused disasters, environmental catastrophes, and death of people).

The court practice also confirms the foregoing: Decree of the Plenum of the Supreme Commercial Court of the Russian Federation dated July 23, 2009, No. 60 On Certain Issues Related to Adoption of Federal Law dated December 30, 2008, No. 296-Φ3 On Amendments to the Federal Law *On Insolvency (Bankruptcy)* [5]; Decree of the Commercial Court of the West-Siberian District dated December 30, 2014, in case No. A27-6017/2007 (Zenkovskaya Mine, LLC); Support Order of the Thirteenth Commercial Court of Appeal dated June 21, 2017, No. 13АП-9453/2017 in case No. A26-5331/2015 (State Unitary Enterprise of the Republic of Karelia Most); Decree of the Eighteenth Commercial Court of Appeal dated October 11, 2017 No. 18АП-10643/2017 in case No. A34-5543/2012 (Municipal Unitary Enterprise Remzhil'servis), Decree of the Commercial Court of the North-Western District dated January 16, 2018, No. Φ07-12792/2017

in case No. A26-4396/2011 (Kem Municipal Unitary Enterprise Vodokanal) [6].

However, since the Bankruptcy Law does not expressly specify the possibility of extraordinary payment of operating expenses if this is necessary for preserving the property of the socially significant subject (facility), there is an absolutely opposite court practice: Decree of the Commercial Court of the Volga-Vyatka District dated June 5, 2018, No. Φ01-1787/2018 in case No. A29-10948/2014 [7]; Decree of the Seventeenth Commercial Court of Appeal dated May 22, 2018 No. 17АП-2448/2015-AK in case No. A60-22905/2014 (Glazov, the Udmurtian Republic) [8]; Decree of the First Commercial Court of Appeal dated March 22, 2018 No. 01АП-6015/2017 in case No. A79-1916/2016 (Chuvash Power Sales Company, JSC) [9].

Thus, in this case, payments for electricity do not relate to the expenses for implementation of measures to prevent occurrence of man-caused disasters, environmental catastrophes, and death of people, and are not subject to satisfaction extraordinary according to the rules of the second paragraph of clause 1, Article 134 of the Bankruptcy Law, these payments shall be deemed current to be made in the fifth turn.

Based on the above, taking into account the unity of the above legal category "socially significant subject (facility)" in the bankruptcy law and in the energy law, and to establish uniformity of law-enforcement practice, we suggest introducing into the bankruptcy law a clarifying condition on extraordinary preferential payment of the creditors' claims with regard to operating payments in case the debtor or the ultimate consumer of the debtor, in accordance with the established procedure, is referred to the consumer of energy resource, restriction of the energy consumption mode of which can lead to negative economic, environmental, and social consequences (including the man-caused disasters, environmental catastrophes, and death of people).

Thus, we propose to word clause 1, Article 134 of the Bankruptcy Law as follows:

"1. The creditors' claims with regard to current payments shall be paid subject to priority using the bankruptcy assets to the creditors, whose

claims arose prior to acceptance of the bankruptcy petition.

If termination of the debtor's activities may entail negative economic, environmental, and social consequences (including man-caused disasters and/or environmental catastrophes, death of people), the following shall be also paid subject to priority, prior to any other claims of the creditors with regard to the current payments:

expenses for implementation of measures to prevent occurrence of the specified consequences;

creditors' claims with regard to operating payments (utility bills, payments under power supply contracts, and other similar payments), given the debtor or the ultimate consumer of the debtor, in accordance with the procedure established by the laws of the Russian Federation, is referred to the consumer of the energy resource, restriction of energy consumption mode of which may lead to negative economic, environmental, and social consequences".

Clause 2, Article 134 of the Bankruptcy Law shall read as follows:

2. The creditors' claims with regard to current payments shall be satisfied in the following order:

the claims with regard to operating payments (utility bills, payments under power supply contracts, and other similar payments, except for the claims with regard to operating payments specified in paragraph 4, clause 1 of this article) shall be satisfied in the fourth place.

2. The exclusion from the bankruptcy law of cases of invalidation of payments under contracts, the conclusion of which was mandatory.

The Civil Code of the Russian Federation (Articles 445 and 426) (hereinafter referred to as the CC of the RF) provides for mandatory conclusion of contracts (hereinafter referred to as the mandatory contracts, mandatory transactions) in cases provided for by the CC of the RF and other laws. The power supply contract is a public one in accordance with the CC of the RF.

If the party, for which, in accordance with the law, conclusion of a contract is mandatory, evades its conclusion, the other party shall be entitled to apply to court with the requirement to force to conclude the contract.

Herewith, it should be borne in mind that in the overwhelming majority of cases, the public

contract will be the contract of accession at the same time [10].

The laws of the Russian Federation provide for the mandatory conclusion of contracts, for example, in the following areas: electric power industry (clause 2, Article 37 of Federal Law *On the Electric Power Industry* dated July 29, 2003, No. 35-Φ3), heat supply (Parts 3 and 7, Article 15 of Federal Law *On Heat Supply* dated July 27, 2010, No. 190-Φ3), water supply and disposal (Part 3, Article 13, Part 3, Article 14 of Federal Law *On Water Supply and Disposal* dated December 7, 2011, No. 416-Φ3).

Decree of the Plenum of the Supreme Court of the Russian Federation dated December 25, 2018, No. 49 On Certain Issues of Application of General Provisions of the Civil Code of the Russian Federation on Conclusion and Interpretation of the Contract directly refers the water supply contract to the public contracts [11].

Herewith, the laws on resource supply limit its resource-supplying organizations (hereinafter referred to as the RSO) not only in terms of the obligation to conclude contracts, but also in terms of their termination (for example, clause 70 of Decree of the Government of the Russian Federation dated July 29, 2013, No. 644 On Approval of the Rules for Cold Water Supply and Disposal and On Introduction of Amendments into Certain Acts of the Government of the Russian Federation).

This situation puts the RSOs and similar organizations in unequal conditions as compared to other parties to the civil transactions, who are entitled to choose their counterparties, check their solvency, good faith, and also provide for special terms and conditions for termination of the contracts with the counterparties.

In accordance with clause 14 of the Decree of the Plenum of the Supreme Commercial Court of the Russian Federation dated December 23, 2010 No. 63 On Some Issues Related to Application of Chapter III.1 of the Federal Law *On Insolvency (Bankruptcy)* [12], payments under continuing liabilities, including payment of utility bills, pertain to the debtor's transactions settled in the normal course of business, except for payments made with a significant delay or in an amount exceeding 1% of value of the debtor's assets.

Therefore, payments received under mandatory transactions from the debtors with low payment discipline at the stage of consideration of validity of the bankruptcy petitions and settled by the debtor with a significant delay, shall fall into the category of transactions contestable on the grounds provided for by the Bankruptcy Law.

As R.K. Lotfullin correctly notes [13], in practice, the argument of the payee that during the entire period of cooperation, the debtor fulfilled its obligations with violation of the deadlines specified in the contract, does not affect the court's conclusion that the disputed payment goes beyond the normal course of business (see, for example, Slavyanka case, Decree of the Commercial Court of the Moscow District dated May 7, 2018, No. Φ 05-3932/2016 in case No. A40-209505/14) [14].

Taking into account that the bankruptcy law does not take into account the above limitations of the rights of the RSO and similar organizations as related to conclusion and termination of the contracts, in practice, conditions under which these organizations incur losses related to the need to return funds received from the debtor to the bankruptcy assets, are created.

To solve this problem, it is proposed to recognize the debtor's transactions related to the fulfillment of monetary obligations arising from the contracts, conclusion of which was mandatory for the debtor's counterparty in accordance with the law, whether or not there is a delay in payment and regardless of its duration, as the transactions not subject to dispute under Article 61.3. of the Bankruptcy Law.

Therefore, it is suggested to add the following paragraph to Article 61.4 of the Bankruptcy Law:

"2.1. The debtor's transactions related to fulfillment of the monetary obligations arising from the contracts, conclusion of which was mandatory for the debtor's counterparty in accordance with the law, and settled in the normal course of business cannot be contested on the basis of Article 61.3 of this Federal Law, whether or not there is a delay in payment and regardless of its duration."

The amendment will make it possible to provide for legal mechanisms for establishment of equality between the creditors having the opportunity to choose the counterparties and those, for whom the law provides for a different procedure for conclusion of the contracts and fulfillment of the obligations. ■

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