

Consultation
on bankruptcy proceedings of a legal entity

A special legal act regulating legal relations in the field of bankruptcy proceedings of legal entities is the Law of Ukraine "On Restoring the Solvency of a Debtor or Declaring it Bankrupt" (hereinafter - Law of Ukraine "On Bankruptcy").

It should be noted that the legal regulation of the relevant legal relations will be changed in connection with the implementation of the Ukrainian Bankruptcy Code (hereinafter - BCU) on October 21, 2019.

In Ukraine, there is a fairly steady tendency for the debtor to use bankruptcy litigation to avoid or minimize property liability to creditors.

However, the choice of this way is associated with a significant number of risks that may ultimately lead not to the preservation of the debtor's property, but to its complete loss, especially taking into account the purpose of bankruptcy procedures prescribed by the law satisfying creditors' requirements.

It is possible to come to the corresponding conclusion by analyzing the relevant provisions of the Law of Ukraine On Bankruptcy and BCU.

1. General provisions on bankruptcy proceedings.

To date, in accordance with the Law on Bankruptcy, to open the proceedings, the creditor's undisputed claims against the debtor must be at least 300 minimum wages or 45,823.00 euros, which were not satisfied by the debtor within 3 months after the deadline for their repayment.

Indisputable claims are monetary claims of creditors, confirmed by a court decision that has entered into legal force, and a resolution on the opening of enforcement proceedings, according to which, funds are debited from the accounts of the debtor in accordance with the law.

In turn, BCU does not establish such conditions for the opening of bankruptcy proceedings, allowing its opening on the basis of the presence of debt that the debtor cannot repay.

Bankruptcy proceedings may be initiated by the debtor or creditor by filing a relevant application to the economic court at the location of the debtor.

The economic court accepts or refuses to accept the application within 5 days from the date of its receipt. Then, within 14 or 30 days (according to BCU - 14 or 20 days) from the date of the application, the court decides either to open bankruptcy proceedings or refuses to open it, holds a preparatory meeting at which it makes a decision to open bankruptcy proceedings or to refuse to open it.

In this case, the court may refuse to accept the application or refuse to open the bankruptcy proceeding if there are appropriate grounds provided by law.

In accordance with the Law of Ukraine "On Bankruptcy", bankruptcy court procedures include:

- property disposal;
- amicable agreement (excluded in BCU);
- reorganization (resumption of solvency);
- liquidation of a bankrupt.

Moreover, the types and sequence of relevant procedures are determined by the court at the time of the decision to open the proceedings.

2. Limitations associated with the opening of bankruptcy proceedings.

It should be noted that based on the provisions of the Law of Bankruptcy and BCU after the bankruptcy proceedings have been opened by the court, the authority to manage the assets of the enterprise is distributed between the economic court that is conducting the case, the arbitration manager (property manager, reorganization manager, liquidator) and the creditors' committee.

Since the court makes a decision to open bankruptcy proceedings:

- presentation of claims against the debtor by creditors and their satisfaction can occur only in the manner prescribed by the Law of Ukraine "On Bankruptcy" or BCU, and within bankruptcy proceedings;

- the seizure of the property of the debtor or other restrictions of the debtor to dispose of the property belonging to them may be applied only by the economic court within bankruptcy proceedings;

- the corporate rights of the founders (participants, shareholders) of the debtor are realized only regarding the restrictions established by the Law of Bankruptcy or Bank of Ukraine;

- satisfaction of the requirements of the founder (participant) of the legal entity debtor on the allocation of a share in the debtor's property in connection with their withdrawal from its participants is prohibited;

- The decision on the reorganization or liquidation of the legal entity - debtor is made in the manner determined by the Law of Ukraine "On Bankruptcy" or BCU.

In addition, the court definition of the opening of bankruptcy proceedings (proceedings) indicates measures to ensure the claims of creditors by prohibiting the debtor and the owner of the property (structure authorized to manage the property) of the debtor to make decisions on liquidation, reorganization of the debtor, and also alienate fixed assets and items of collateral.

Also, the court has the right, at the request of the arbitration manager or creditor:

- to prohibit the debtor to conclude transactions (contracts) without the consent of the arbitration manager (property manager);

- to oblige the debtor to transfer securities, property, other valuables for storage to third parties;

- to commit or abstain from certain actions in order to preserve assets;

- to take appropriate measures to save the property of the debtor (including in the way of depriving the debtor of the right to dispose of his real estate without the consent of the administrator of the property or the court considering the bankruptcy case, seizing the specific movable property of the debtor), which is determined by the court ruling;

- to accept transactions concluded after the opening of bankruptcy proceedings or within 1 year (3 years in accordance with BCU) before its opening;

- to dismiss the chairman from office in case his actions show signs of impediment to the bankruptcy proceedings, the execution of the powers of an arbitration manager and the rights of creditors.

3. Disposal of property, reorganization, liquidation.

Attention should be paid to the 3 main procedures in bankruptcy cases mentioned earlier:

- disposal of property;
- reorganization;
- liquidation.

The procedure for disposing of property is introduced at the moment of opening bankruptcy proceedings for 115 days with the possibility of extension for no more than 2 months (170 days without the possibility of extension in accordance with BCU).

Property disposition means a system of measures to supervise and control the management and disposal of the property of the debtor in order to ensure the preservation, effective use of the property assets of the debtor, analyze its financial situation, and determine the following optimal procedure (rehabilitation or liquidation) to satisfy creditors' claims in full or partially.

A distinctive feature of this procedure is that the most part of transactions related to the disposal of property cannot be carried out by the governing bodies of a legal entity without the consent of the property manager appointed by the court.

The reorganization procedure can be introduced by the court after the procedure for disposing of property for 6 months with the possibility of extending this period by no more than 12 months (in accordance with BCU the reorganization period is established by the reorganization plan).

Reorganization is understood as a system of measures taken during bankruptcy proceedings to prevent the debtor from being declared bankrupt and liquidating it, aimed at improving the financial and economic situation of the debtor, as well as satisfying in full or in part the claims of creditors by restructuring the enterprise, debts and assets and / or changes in the legal and production structure of the debtor.

At this stage, the powers of the governing bodies are transferred in full to the head of the reorganization, appointed by the court, who receives the authority to sell the property of the enterprise, as well as receive loans and credits for the implementation of the reorganization plan.

If, based on the results of the reorganization, the solvency of the enterprise has not been restored or the reorganization procedure has not been introduced, the court decides to declare the legal entity bankrupt and starts the liquidation procedure for a period of 12 months.

At this stage, the court appoints a liquidator or a liquidation commission, to which all the powers of the enterprise's governing bodies are transferred, the same as in the reorganization procedure.

The only purpose of this procedure is the sale of property of the enterprise to meet the requirements of creditors in the manner established by the Law of Ukraine "On Bankruptcy" and BCU.

Upon liquidation of the enterprise, the bankrupt must pay wage arrears to working and laid-off bankrupt employees, cash compensation for all unused days of annual leave and additional leave to employees with children, other funds owed to employees in connection with a paid absence from work, as well as a day off benefits owed to employees in connection with the termination of employment and insurance premiums calculated on these amounts for a compulsory state pension insurance and other social insurance, including credit consideration received for these purposes.

Based on the foregoing, the total term of all bankruptcy proceedings may be more than 2 years.

Also, we draw your attention to the fact that in accordance with Art. 219 of the Criminal Code of Ukraine criminal liability is provided for the actions of a citizen - founder (participant) or official of a business entity, made intentionally, from selfish motives, other personal interest or in the interests of third parties, that led to sustainable financial insolvency of the business entity, if it caused large material damage to the state or creditor.

Thus, taking into account that, in accordance with the current legislation of Ukraine, bankruptcy procedures for a legal entity imply restriction or deprivation of the rights of the governing bodies of an enterprise to manage and dispose of its

property, we highly recommend not initiating bankruptcy proceedings in order to preserve company assets.