

# The legal nature of utility payments in the insolvency (bankruptcy) procedures of debtors in the cross-border regions

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**Abstract.** The article considers the problems arising in law enforcement practice during the insolvency (bankruptcy) procedure of legal entities. Their main activity is the management of apartment buildings. In particular, the article focuses on the lack of uniformity in understanding the legal nature of one of the most liquid assets of such a debtor, which are the public receivables for utility payments.

**Keywords:** payments, insolvency, bankruptcy, law, enforcement practice, debtor

## 1. Introduction

Cross-border regions are equally characterized by the fact that over the past years, the state of payments in the housing and utilities sector has been marked by a negative balance on the part of the population and managing organizations to resource-supplying organizations. Thus, according to the Rosstat, the total amount of debt of the Russians for housing and communal services reaches 1.4 trillion. rub. for the first quarter of 2018 [1]. A significant amount of unfulfilled obligations to utility providers is also noted in the Republic of Kazakhstan [2]. The system of public utilities in the People's Republic of China is built differently. In particular, it presupposes prepayment for the resources supplied [3].

Given the above state of settlements in the field of housing and communal services, we must come with a high degree of confidence to the conclusion that financial difficulties continue for legal entities. The main activity of these legal entities is the management of apartment buildings, with their subsequent liquidation in the manner prescribed by the legislation on insolvency (bankruptcy).

Under such circumstances, consideration of the problems arising in law enforcement practice regarding the legal nature of one of the most liquid assets of such a debtor, the public receivables for utility payments, seems relevant. Due to the collection or sale of this debt, the claims made by creditors are subject to satisfaction.

## 2. Materials and Methods

In the course of the research, the prevailing sources of data and information were (a) the regulatory legal acts and the law enforcement acts based on them and issued by the competent authorities of cross-border regions, as well as (b) fundamental and applied results of scientific activities of authoritative scientists in this field. In the process of real scientific activity, the authors were based on theoretical methods of scientific knowledge. In particular, the authors used the methods of synthesis

and deduction, as well as the methods of empirical knowledge, the method of comparative law. The analytical and informational materials obtained during the preparation of this article are summarized and structured in accordance with the general requirements for the development of scientific and methodological foundations related to the topic of the article.

### **3. Results**

The cross-border regions are characterized by similar legal regulation of legal relations regarding the management of multi-family residential buildings. Thus, several forms of management are provided for choosing the owners of the premises: managing directly by the owners themselves, homeowners' partnership, managing by a special organization (clause 2 of Article 161 of the Housing Code of the Russian Federation [4]; Clause 2 of Article 42 of the Law of the Republic of Kazakhstan of April 16, 1997 No. 94-I "On Housing Relations" [5]; Article 138 of the Housing Code of the Republic of Uzbekistan, approved by the Law of the Republic of Uzbekistan dated December 24, 1998 No. 713-1 as amended by Law No. ZRU-512) [6]).

However, in these cross-border regions, the ratio of the forms of management used is fundamentally different. For example, in Russia, the owners of apartment buildings actively attract management companies, In contrast, in the Republic of Kazakhstan, the form of management by creating a cooperative of premises owners (KSK) is most common [7].

At the same time, the trends of recent years indicate a gradual increase in the number of managing organizations to which the owners transfer the authority to manage an apartment building. Therefore, the study of the rule of law of the states in which this form of real estate management has been used for a long period of time is of interest to neighboring cross-border regions. Legal aspects of initiating insolvency (bankruptcy) proceedings against a managing organization deserve special attention.

One of such aspects is the qualification of money received from the population for the supplied utility resource to the settlement account of the management organization as an asset to be included in the competitive mass.

At the initial emergence of this issue, judicial practice has shaped the approach set forth in the Definition of the Supreme Court of the Russian Federation of December 07, 2015 No. 303-EC15-7918 in case No. A51-19554 / 2014 [8]. According to this approach, if there is a managing organization in an apartment building, this managing organization participates in legal relations for the supply of communal resources to this house as a performer of utilities. Consequently, the subscriber and the person obliged to pay for the supplied utility resource is the managing organization to which consumers pay.

However, later, in a bankruptcy case, when considering separate disputes about challenging public payments in a period of suspicion, law-enforcement practice formed the opposite approach. This approach is set out in the definition of the Supreme Court of the Russian Federation of August 17, 2016 No. 309-KG16-9974 [9], the definition of the Supreme Court of the Russian Federation of June 13, 2017 No. 303-EC17-5967 [10]. It lies in the fact that the utility payments of the population received through the settlement center by resource-supplying organizations cannot be recognized as invalid by the debtor's transactions. Since partially such payments are not the money of the management company.

Strangely enough, in practice, such conclusions in the absence of separate disputes regarding the recognition by the debtor of invalid transactions of the transfer of funds by the population for the payment of utilities did not determine the course of the bankruptcy procedure of the managing organization. The latter means that the arbitration manager took actions to collect public receivables for the consumed utilities, including in part of the management company that manages the apartment building that exceeds the payment for services; to implement it in the manner provided for in paragraphs 3-19 of article 110 and paragraph 3 of article 111 of the Bankruptcy Law [11].

More recently, the Supreme Court of the Russian Federation in the definition of August 6, 2018 No. 304-EC18-10694 in case No. A67-3123 / 2017 [12] repeated the legal arguments that he had

previously set out in 2015. They consist in the fact that since the management company is the performer of the utilities, the consumers of the utilities pay these services to the performer.

Are the conclusions set forth in the definition of the Supreme Court of the Russian Federation of August 17, 2016 N 309-KG16-9974, the definition of the Supreme Court of the Russian Federation of June 13, 2017 N 303-EC17-5967 justified in a sufficient manner? And do they comply with the current legislation?

In our opinion, these conclusions are absolutely reasonable from an economic point of view. Such a position is justified aimed at protecting the legitimate interests of resource-supplying organizations, to whom there is a significant amount of unfulfilled monetary obligations for the resources supplied, taking into account common cases of unfair behavior of managing organizations.

At the same time, the above definitions of the Supreme Court of the Russian Federation were made in contradiction with the current legislation. Under the law, payment for utilities by owners of residential premises is paid directly to the managing organization (Clause 7 of Article 155 of the Housing Code of the Russian Federation).

Following the logic of the Supreme Court of the Russian Federation, in law enforcement practice, an absolutely paradoxical situation is formed: in resolving disputes arising in the energy supply, arbitration courts collect the arrears to the supplier of the communal resource from the management organization. However, incoming payments from the public to the account of the managing organization as payment for the supplied utility resource do not belong to the debtor in part exceeding the maintenance fee for the dwelling. That is, the managing organization, being a debtor under the obligation to pay money for the supplied municipal resource, does not have the right to receive payments from the public.

At the same time, it is the managing organization that is the debtor in the legal relationship with the resource supplying organization. And the requirement to collect debts for provided utilities in apartment buildings (in the absence of direct contracts) will be presented directly to the managing organization, and not to final consumers, who are the owners of residential premises.

If a bankruptcy procedure is introduced against a debtor, the resource-supplying organization is included in the register of creditors' claims of such a debtor with a debt for payment of utility bills. At the same time, it is impossible to dispute the actions of the debtor in transferring utility payments on the grounds provided for in Chapter III.1 of the Bankruptcy Law. Since such actions were committed not at the expense of the debtor.

In support of the impossibility of challenging the actions of the debtor to transfer utility payments on the grounds provided for in Chapter III.1 of the Bankruptcy Law, the Supreme Court also points to the "targeted" nature of such funds.

In our opinion, this concept, involving the direction of funds for specific purposes, and their belonging must be distinguished. The fact that the money received from consumers is of a targeted nature does not mean that the money received from consumers does not belong to the management company. A systematic interpretation of the provisions of paragraph 6.2, 7 of Article 155 of the Housing Code of the Russian Federation, paragraph 63 of the Resolution of the Government of the Russian Federation dated 06 May 2011 No. 354 "On the provision of public services to owners and users of premises in apartment buildings and residential houses" [13] will lead to the opposite conclusion.

The court's conclusions about the non-ownership of funds from consumers to the management company are also contrary to judicial practice. It includes in the taxable base of the management company, when calculating the income tax, the entire amount of money received from the sale by the owners of residential premises of utilities.

Thus, in the Definition of the Supreme Court of the Russian Federation of October 16, 2018 N 308-KG18-17356 in case No. A53-15795 / 2017 [14], the Definition of the Supreme Court of the Russian Federation from June 18, 2018 N 308-KG18-7090 in case No. A53-15797 / 2017 [15] indicates that the company's activity is the activity of a management company that provides property owners with

management, maintenance, and repair of common property in an apartment building, including utilities.

The Supreme Court noted that in controversial legal relations, the society acts as an independent entity in relation to the owners of the premises of an apartment building, its legal status corresponds to the legal status of the contractor, including utilities, and not the agent (intermediary).

#### 4. Discussion

Thus, in the law enforcement practice, there is no uniform approach to the qualification of public receivables to an insolvency (bankruptcy) management company. This, in turn, raises many other issues that impede the normal course of the procedure. In particular, the question remains open about the obligation of an arbitration manager to collect accounts receivable of the population for consumed utility resources without the goal of including in the bankrupt mass of incoming funds in part exceeding the payment for the services of the management company to manage the apartment building.

First of all, it should be noted that the current legislation on insolvency (bankruptcy) does not classify management organizations as legal entities for which features of the bankruptcy procedure are established. Consequently, the general provisions of the Bankruptcy Law are subject to the bankruptcy of managing organizations.

Based on the systemic interpretation of the provisions governing controversial legal relations in the management of an apartment building by the managing organization, there are no grounds for the right of the resource supplying organization to collect payments for communal resources from the owners of residential premises of the apartment building. The circumstances of the absence of contractual relations or a change in the procedure for payment of utilities (transfer of utility fees by residents directly to resource-supplying organizations) do not cancel this conclusion.

Summing up, we note that the currently prevailing approach in court practice is indeed justified from an economic point of view. Since it is aimed at protecting the legitimate rights and interests of bona fide participants in the economic turnover (population, resource-supply organizations). However, in our opinion, the resolution of the issue of ownership of a virtually single liquid asset (receivables) of a management organization falls within the competence of the legislative authorities. They are empowered to adopt regulations. Given the lack of prejudicial importance of judicial acts in the legal orders of both Russia and cross-border regions, the contradictory conclusions formulated in them lead to destabilization, lack of legal certainty for the persons involved in the insolvency (bankruptcy) case. This inevitably leads to a violation of the rights of the debtor and bankruptcy creditors.

#### 5. Conclusion

Cross-border regions are generally characterized by the same trends in the development of legal regulation, including legal relations arising in the housing and utilities sector. Taking this into account, there is a need for a sound solution to this problem. Uniformity in the qualification of the receivables of the population to the management company in insolvency (bankruptcy) will contribute to the effective development of economic relations in the territory of cross-border regions.

In addition, the experience of the People's Republic of China, which provides for the supply of a communal resource on the terms of its prior payment by the subscriber, looks promising. Such a settlement system can fundamentally solve the problem of accruing the debt to resource-supplying organizations over the past years.

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