

NEWSLETTER

January 2016

The Supreme Court on the admissibility of exclusion from the bankruptcy estate assets belonging to third parties

We would like to inform you about the Supreme Court ruling, which is important, especially from the point of view of the entities in the consortium. Well, in one of the recently issued rulings, the Supreme Court leaned over the issue of the possibility of exclusion from the bankruptcy estate assets belonging to third parties, and located on the escrow account, so-called escrow, whose formal owner was a 'bankrupt' leader of the consortium.

I. Commented ruling was issued after a dispute led by one of the consortium members with a trustee in bankruptcy.

II. In connection with the implementation of major investment several contractors entered into a consortium contract. It was found that the leader of the consortium will be one of the performers. Due to the practice of contracting authorities requiring to indicate one bank account for payments to all members of the consortium so-called escrow account was founded (escrow).

III. Escrow account was established for the leader of the consortium. It was to serve for settlements of the consortium. Although in an escrow account other consortium members can protect their own interests - if they are party to a contract with the bank, they have provided insight into account status, and transfers require the mutual agreement of all members of the consortium, formally the account holder remains the leader of the consortium.

IV. The use of this solution is not free from defects. It may cause to 'collapse' of the financial leader of the consortium and, consequently, announcement for bankruptcy of this entity. Then there is a problem with the escrow account, and specifically the problem of members of the consortium to recover amounts due to them that are in escrow.

V. It is often assumed that since formally a bank account belongs to the bankrupt leader of the consortium, but also funds held in this account belong to him and the obligation to account for these amounts is one of the debts of the bankrupt which is a subject to the satisfaction in the bankruptcy proceedings.

VI. Negative implications for other members of the consortium are connected to this matter. They will be treated as ordinary creditors of the bankrupt, and consequently

usually receive only a part of their remuneration (or even at all). The funds accumulated in the escrow account will be used for repayment of all creditors of the bankrupt.

VII. On the basis of the case occurred a member of the consortium filed to a court commissioner running insolvency proceedings for an exemption from the bankruptcy estate funds in the escrow account and the associated with the consortium member. Due to the rejection of the application, consortium member filed a law suit.

VIII. In accordance with Art. 70 Bankruptcy Law, there is a possibility to switch off from the bankruptcy estate of items of property, if they do not belong to the assets of the bankrupt.

IX. In its ruling, the Supreme Court pointed out that there can be switched off from the bankruptcy estate assets belonging to members of the consortium, and located in an escrow account belonging to the bankrupt.

X. The Court pointed out that the legal assessment of the request to be excluded from the bankruptcy estate of cash and issuing them to another person, should be based on legal titles provided for in the Civil Code on the content of the contract and supplementary the provisions of the Civil Code. Also cash owed to another person, which affected the bank account may be issued to that person, if it remains in the bankruptcy estate and it is possible to separate it from the bankruptcy estate.

XI. Thus, the ability to disable any of the components in bankruptcy estate occurs, if it were established that: a) the ingredient does not belong to the bankrupt and b) the person to whom has shut down, had a right to this component that may result from property law or with contractual relations.

XII. Member of the consortium will have to demonstrate so that a given amount in the escrow account belongs to him, not the fallen leader of the consortium. In addition, it will be important to demonstrate the potential for separation of this amount from the bankruptcy estate (necessary to determine which payment on account were for the consortium member and which outflows charged to him).

XIII. Commented judgment will be of great practical importance. It will have impact on 'comfort' members of consortium who will no longer have to worry about that in case that leader of the consortium goes bankrupt, amounts accumulated in an escrow account will be included in the bankruptcy estate without the possibility of their separation.
