CIVITAS, 2023, 13(2), 157-200
www.civitas.rs

Marija Mijatović[1]
Zoran Vavan[2]
Tamara Gajinov[3]

UDC 347.7-057.16(497.113)
Original Research Article
Received: 15/08/2023
Accepted: 05/09/2023

PROTECTION OF EMPLOYEE RIGHTS IN BANKRUPTCY PROCEEDINGS BEFORE COMMERCIAL COURTS OF THE APV[4]

Abstract: This paper analyzes the practices of commercial courts in the Autonomous Province of Vojvodina (APV) with the aim of understanding the position of employees as creditors in bankruptcy proceedings. Considering the impact of the COVID-19 virus pandemic on global and national economic flows, we deemed it important to examine the number of new bankruptcy cases in courts for each year between 2016 and 2021. This was done to determine whether there was an increase in the number of bankruptcy proceedings caused by pandemic-related events. Furthermore, we provide a critical overview of the positive legal regulations in the Republic of Serbia regarding the scope of rights and claims of employees in bankruptcy proceedings,

[1] Assistant Professor, Faculty of Law and Business Studies Dr Lazar Vrkatić, Bulevar oslobođenja 76, Novi Sad, ORCID: 0000-0001-8160-7397, e-mail: mrksicmarija@gmail.com

[2] Assistant Professor, Faculty of Law and Business Studies Dr Lazar Vrkatić, Bulevar oslobođenja 76, Novi Sad, ORCID: 0000-0003-2965-6532, e-mail: zoran.vavan@yahoo.com

[3] Assistant Professor, Faculty of Law and Business Studies Dr Lazar Vrkatić, Bulevar oslobođenja 76, Novi Sad, ORCID: 0000-0003-4265-9244, e-mail: tamara.gajinov@gmail.com

[4] The paper and data presented resulted from a short-term research project "Judicial protection of employment rights during the COVID pandemic on the territory of the Autonomous Province of Vojvodina – challenges in the process of Serbia's accession to the EU" (Decision no.: 42-451-2027/2022-01/01).

especially considering the existing standards in the European Union. Finally, we offer our perspective on the positive national bankruptcy law concerning the rights of employees.

Key Words: *employee rights, bankruptcy proceedings, bankruptcy, reorganization, judicial protection of employees*

1. Introduction

The coronavirus pandemic, state of emergency, restrictive epidemiological measures – which often involved bans or limitations on movement, gatherings, and business operations – coupled with a large-scale economic crisis, have fundamentally changed the way people live and work (Gajinov, 2022, p. 154). These factors had a major impact on the world of work, which was evident in its partial restructuring and flexibilization (Rajić Ćalić, 2020, pp. 88–89). Furthermore, a considerable number of employees have lost their jobs due to their employers' economic collapse. Consequently, concerns have emerged regarding the protection of the employee rights in legal proceedings, along with considerations about the effectiveness and scope of such protection.

The judicial protection of rights arising from the employment relationship primarily occurs before the courts of general jurisdiction. It can also be pursued before commercial courts, where employees are treated as creditors in bankruptcy proceedings, which is the central focus of interest in this study. It is precisely in the domain of bankruptcy law that labor law and corporate law intersect. Namely, the entire Chapter IX of the Labor Law (titled *Claims of employees in the event of bankruptcy proceedings*) addresses this issue, while several articles of the Law on Bankruptcy further regulate this matter. Undoubtedly, the opening of bankruptcy proceedings brings about a significant level of uncertainty for employees. Therefore, legal systems attempt to augment the protection afforded by Labor Law through bankruptcy laws. In regulating employee protection in bankruptcy proceedings, all factors

justifying a privileged position for employees as a vulnerable group of creditors are considered; in doing so, Serbia has aligned itself with the stance of the majority of European countries that prioritize employees in this manner (Višekruna, Rajić Ćalić, 2019, str. 266). Given that the rights of employees are regulated in more detail in the Law on Bankruptcy, this regulation represents a *lex specialis* in relation to the parent Labour Law, which, in this case, is a *lex generalis*.

Bankruptcy proceedings can be conducted through liquidation (bankruptcy in the narrower sense) or through reorganization. The act of bankruptcy involves the settlement process whereby creditors receive payment through the sale of the debtor's entire asset value. Reorganization entails the satisfaction of creditors in accordance with the adopted reorganization plan (Article 1 of the Law on Bankruptcy, hereinafter: LB), provided that it ensures a more favorable settlement option for creditors compared to compulsory liquidation (Article 155, LB). In the case of bankruptcy, the employee's work contract is terminated, whereas in the case of reorganization, it may or may not constitute one of the proposed measures, which is why reorganization is considered a more preferable option from the employee's perspective. In the Serbian legal system, if any of the requirements for bankruptcy are present (Article 11, LB), bankruptcy is instituted in the majority of cases.

2. Bankruptcy and the legal status of employees in the Republic of Serbia

In the event of bankruptcy, there is no automatic termination of employment, which is a departure from the historical norm in regulating this matter; instead, bankruptcy is legally regulated as grounds for terminating the employment contracts between the bankrupt debtor and employees (Article 77, LB). When this occurs, the collection of salaries and other earnings can be considered within the rights arising from the employment relationship. The Law on Bankruptcy stipulates that unpaid net salaries of both current and former employees comprise the first rank of claims. The salaries are calculated based on the level of minimum wage from the year preceding the opening of bankruptcy proceedings, with interest accruing from the maturity date

until the institution of bankruptcy proceedings. Additionally, unpaid contributions to employees' pension fund and disability insurance for two years prior the initiation of bankruptcy proceedings are covered and are based on the minimum monthly contribution base. This provision also encompasses claims arising from contracts with companies and the scope of such contracts involves outstanding obligations for contributions to employees' pension fund and disability insurance for two years preceding the initiation of bankruptcy proceedings (Article 54, LB). According to Višekruna, despite these formulations (with limitations imposed by the amount as well as the time of the claim's occurrence), numerous European legal systems have implemented specific protective mechanisms – guarantee institutions that undertake the payment of claims that employees cannot recover from the employer. These claims are set at a level considered the minimum necessary for a decent and dignified life (Višekruna, 2016). Similarly, a hybrid mechanism for employee protection has been implemented in Serbian regulations stipulating that alongside the preferred settlement of claims during bankruptcy proceedings, there should be an additional layer of protection through reimbursement from the Solidarity Fund acting as a guarantee institution. This issue, which extends beyond the scope of this paper, is governed by the Labor Law and, in theory, there are opinions emphasizing the lack of sufficient coordination between this regulation and the Law on Bankruptcy (Višekruna & Rajić Ćalić, 2019, p. 266).

2.1. Analysis of the practices of commercial courts in the APV

Data was collected from commercial courts in Novi Sad, Subotica, Zrenjanin, and Sremska Mitrovica. An overview has been provided for each of the years under review (starting from 2016 and conclusive with 2021) separately for bankruptcy and reorganization proceedings. Levels of settlement of employees' claims were documented in categories of complete, partial settlement, and proceedings in which the claims were not settled at all. Gathering this category of data proved challenging since the official records on levels of settlement with creditors are not kept by the courts when the process involves liquidating the assets of the bankrupt debtor. Furthermore, the instances where resolutions were

achieved through the adoption of a reorganization plan, along with the occurrences of employee dismissals as part of the reorganization strategy were highlighted. The anticipated levels of settlement for employee creditors were also emphasized. Nevertheless, it is important to consider these data as approximations.[5]

Given the impact of the pandemic on global and national economic trends, the paper presupposes that, to create a coherent analysis framework, it is first necessary to establish whether there has been an increase in the number of bankruptcy proceedings since 2020 compared to the years before the pandemic. The findings indicate that the pandemic conditions did not result in a higher number of new bankruptcy cases. Furthermore, in 2020, which was the first year of the pandemic, the Commercial Court in Subotica recorded a notable decrease in new bankruptcy cases (a total of 47) compared to the previous year, 2019, which was, in this context, the "busiest" with 76 new cases during the observed period. A similar situation was observed in the Commercial Court in Sremska Mitrovica where 39 new bankruptcy cases were registered in 2018, while in 2020 and 2021, there were 28 and 30 new cases, respectively. When it comes to the Commercial Court in Zrenjanin, the highest number of new bankruptcy cases was recorded in 2016 (20), with 10 and 16 new cases in 2020 and 2021, respectively. Notably, only the Commercial Court in Novi Sad recorded the highest number of new bankruptcy cases in 2020, compared to other years in the observed period (162 new cases). Yet, in the very next year, 2021, the number of new bankruptcy cases was lower (126) than in the next peak year, 2018, with 145 new cases. Taking a broader perspective and considering the reports from all four examined commercial courts in the APV, the peak for new bankruptcy cases occurred in 2019 with 252 cases, followed by 2018 (248), 2020 (247), and 2021 (227). In contrast, the lowest numbers were observed in 2017 and 2016, with 187 and 180 new bankruptcy cases, respectively. One can certainly conclude that the overall number of bankruptcy cases saw a significant increase compared

[5] Data from the commercial courts in Novi Sad, Subotica, and Sremska Mitrovica were obtained in a relatively consistent manner, whereas the data from the Commercial Court in Zrenjanin were limited to the number of bankruptcy and reorganization proceedings.

to the beginning of the observed period. However, this upturn is unrelated to the impacts arising from the pandemic considering that the peak was reached in the year preceding it (2019). These data align with analyses conducted in countries like Switzerland, where there was also no substantial wave of bankruptcies, which was feared due to the COVID-19 pandemic crisis and was most likely avoided thanks to various forms of urgent financial aid provided by the government (Rodriguez, Ulli, 2023, p. 275).

Moreover, with employment contracts being terminated and subsequent negative repercussions for employees, the possibility for employees to recover their claims, as stipulated by the Law on Bankruptcy, along with designating employees as preferential creditors is crucial. However, in numerous instances, even after the priority payments from the insolvent estate have been completed (such as the costs associated with the bankruptcy proceedings), employees are often unable to fully, and sometimes even partially, settle their claims. A significant portion of theoretical papers on this topic revolves around assessing the effectiveness of achieving the primary goal of the Law, which is the successful settlement of creditors' claims, including those of employees (Bilbija, 2012, p. 42). In this context, the most representative data have been derived from the Commercial Court in Novi Sad. Out of the 150 analyzed bankruptcy cases spanning from the beginning of 2016 to the end of 2021, employees achieved complete settlement of all claims in 19.33% of cases, partial settlement in 26.67% of bankruptcy proceedings, and, notably, in 54% of cases, employees were unable to settle their claims. The inability to meet employees' claims frequently occurs when a company's assets are insufficient to cover the procedural costs or have minimal value when the procedure is instituted without delay, which later leads to the removal of the debtor from the register of economic entities.

These statistics urge a more socially responsible mindset and course of action. In other words, bankruptcy does not occur suddenly and unexpectedly; rather, there is a gradual progression of financial challenges that ultimately lead to it. In times of crisis, employees are the first to bear the brunt as they are typically denied a fundamental right derived from the employment relationship – the right to earn income

(Kovačević, 2022, p. 349). We advocate for stricter criteria for initiating bankruptcy proceedings in relation to positive legal regulations to ensure that bankruptcy is initiated when settling creditors' claims is more feasible, i.e., in a timely manner. In this way, the fundamental principle of bankruptcy proceedings – achieving the most favorable collective settlement for creditors by maximizing the value of the debtor's assets, and consequently, providing the greatest possible settlement for the employees – would be realized to a higher extent. This type of regulatory action would also align with the legislative efforts of the EU and its member states in terms of improving the field of bankruptcy law, both following the 2008 financial crisis and during the ongoing post-pandemic period (Coutinho, Kappeler, Turrini, 2023, p. 17). In this regard, particular emphasis is placed on the new institutes introduced in the bankruptcy law of the Federal Republic of Germany (Đurić, Jovanović, 2023).

Furthermore, we believe that the protection of employees in bankruptcy proceedings should evolve towards including a broader but realistically achievable range of employee claims against the debtor. As a result, Serbian legislation would move closer to the more contemporary legal systems of EU member states with legislation oriented towards protecting the interests of employees. Certainly, merely embracing EU legal frameworks without conducting feasibility studies and ensuring alignment with practical application is not an ideal to strive for in the context of legal reception (Mijatović, 2019, p. 91). However, some theoretical viewpoints (Višekruna, Rajić Čalić, 2019, p. 266) suggest that Serbia's current legal landscape is not entirely aligned with the conventions of the International Labour Organization; thus, it is imperative to contemplate necessary changes. Although certain employee claims are prioritized, the limitations inherent in this protection render it unsatisfactory and call for revisions. Expanding employees' rights to ensure they have a preferential position in bankruptcy proceedings is crucial. In this context, the provisions outlined in the Labour Law, which specify the rights employees can claim before the guarantee institution, could be used as a starting point.

In conclusion, after conducting the research and facing the challenges of consolidating data from various bankruptcy departments in commercial courts of the APV region, it appears fitting to propose that standardized official records documenting levels of settlement of creditors' claims be kept. Such records would undoubtedly enhance our understanding of the inner workings and ultimate outcomes, i.e., the effectiveness of bankruptcy proceedings both in the APV region and Serbia as a whole.

3. Reorganization and the legal status of employees through the analysis of commercial courts' practices in the APV region

In terms of reorganization and the status of employees, the data present a more optimistic outlook for reorganization compared to bankruptcy. Of course, the core concept behind the institution of reorganization is to offer businesses facing bankruptcy an opportunity to "stay afloat" by implementing an efficient plan and thereby preventing the cessation of the business. Therefore, even though dismissal is a legally viable option (Article 157, paragraph 12 of the LB), it still might not be part of the reorganization plan or it might impact only a relatively small number of employees. The reorganization plan can also play a significant role as an enforceable document in case of enforcement performance, hence its significance is manifold (Vavan, 2023, p. 4). The data from the commercial courts in the APV region prove particularly favorable in that regard. Among the relatively few reorganization cases (37) handled across all four commercial courts surveyed from 2016 to 2021, none of the reorganization plans implemented included measures of dismissal; instead, each plan aimed at complete settlement of all employees' claims.

However, in the majority of cases analyzed, the requirements for bankruptcy and the institution of bankruptcy proceedings lead to a preference for handling these cases through bankruptcy/liquidation rather than reorganization. For instance, before the Commercial Court in Subotica in 2020, 45 bankruptcy cases were settled through bankruptcy and none through reorganization. A similar pattern was observed before the Commercial Court in Zrenjanin in 2020 and 2021 where 35 bankruptcy cases were settled through bankruptcy and none

through reorganization. Before the Commercial Court in Sremska Mitrovica, out of 60 bankruptcy cases, only three were settled through reorganization. Meanwhile, the ratio before the Commercial Court in Novi Sad was 575 bankruptcies to 28 reorganizations. The highest number of reorganizations in Novi Sad was recorded in 2016 and 2017 (eight and nine, respectively), followed by a steady decline from 2018 (five), 2019 (three), to only three reorganization cases in the years of the pandemic (2020 and 2021). This data underscores the importance of raising awareness about the benefits that more substantial adherence to this concept can yield for the company itself, its employees, and the broader economy of the entire country.

4. Conclusion

Employe status in bankruptcy proceedings is governed by the Labor Law, although employees, as a vulnerable group of creditors in the bankruptcy process, are afforded more extensive protection under bankruptcy legislation. Consequently, employees' claims are also granted the first rank in the payment hierarchy, as regulated by the Law on Bankruptcy. Nevertheless, we believe that the scope of claims guaranteed by the positive regulations of the Republic of Serbia is too narrowly defined. Namely, the findings from this research call for the implementation of a more socially responsible dimension within this aspect of bankruptcy law. The statistics from the commercial courts in the APV indicate that the COVID-19 pandemic did not result in an increase in bankruptcy cases. However, levels of settlement of employees' claims remain alarmingly low, with many instances where employees received no compensation at all. Hence, we believe that bankruptcy requirements should be stricter to ensure the initiation of this process at an earlier stage, i.e., in a timely manner. Moreover, although the reorganization process, which is a more humane alternative to bankruptcy from employees' perspective, is an existing option in bankruptcy proceedings, this research indicates its underutilization. In this regard, we suggest taking more proactive measures to enhance awareness among commercial entities about the benefits provided by this institute of bankruptcy law.

References

Bilbija, V. (2012). Radnopravni položaj zaposlenih kod stečajnog dužnika i potraživanje zaposlenih u slučaju stečajnog postupka nad poslodavcem, zakonske odredbe i stvarnost, *Pravo – teorija i praksa*, 4–6, 41–59.

Coutinho, L., Kappeler, A. & Turrini, A. (2023). Insolvency Frameworks across the EU:Challenges after COVID-19, European Economy - Discussion Papers 2015 – 182, Directorate General Economic and Financial Affairs (DG ECFIN), European Commission.

Đurić, Đ. & Jovanović, V. (2023). Novi instituti u nemačkom stečajnom pravu, *Strani pravni* život, 67(1), 55–74. doi: 10.56461/SPZ_23104KJ.

Gajinov, T. (2022). Ograničenje prava svojine i njene funkcije u uslovima pandemije Covid- 19, *Civitas*, 2, 154–177.

Kovačević, T. (2022). Delotvornost domaćeg sistema zaštite potraživanja zaposlenih u slučaju stečaja poslodavca, *Glasnik Advokatske komore Vojvodine*, 2, 324–352, https://scindeks-clanci.ceon.rs/data/pdf/0017-0933/2022/0017-09332202324K.pdf

Mijatović, M. (2019). Izazovi recepcije prava Evropske unije–primer korporativnog prava u Srbiji, *Strani pravni* život, 63, 91–102, http://scindeks-clanci.ceon.rs/data/pdf/0039-2138/2019/0039-21381901091M.pdf

Rajić Ćalić, J. (2020). Fleksibilizacija radnih odnosa sa posebnim osvrtom na rad sa nepunim radnim vremenom, *Strani pravni* život, 1, 87–97.

Rodriguez, R. & Ulli, J. (2023). Governmental Measures in Switzerland Against Mass Bankruptcies During the Covid-19 Pandemic. *European Business Organization Law Review,* 24, 267–276. https://doi.org/10.1007/s40804-023-00280-8

Vavan, Z. (2023). Izvršne isprave u postupcima izvršenja odluka iz radnih sporova, Zbornik radova: *Aktuelna pitanja u oblasti procesnog, imovinskog i radnog prava*, ur. Milan Žamac, red. Predrag Trifunović, str. 256–272, Glosarijum, Beograd 2023. ISBN:978-86-6297-050-3.

Višekruna, A. (2016). Radni odnosi u stečaju, Godišnjak Fakulteta pravnih nauka, 6, 194–208, https://doisrpska.nub.rs/index.php/gfpn/article/view/2558/2463

Višekruna, A., Rajić Ćalić, J. (2019). Zaposleni kao privilegovani poverioci u stečajnom postupku – istorijskopravni pregled, Vek i po regulisanja stečaja u Srbiji, 253–269, https://www.researchgate.net/publication/346682477_ZAPOSLENI_KAO_PRIVILEGOVANI_POVERIOCI_U_STECAJNOM_POSTUPKU_-istorijskopravni_pogled

Zakon o radu („*Sl. glasnik RS*“, br. 24/05, 61/05, 54/09 i 32/13, 75/14, 13/17-Odluka US, 112/17 i 95/18-autentično tumačenje). https://www.paragraf.rs/propisi/zakon_o_radu.html

Zakon o stečaju („*Sl. glasnik RS*“, br. 104/2009, 99/2011 – dr. zakon, 71/2012 – odluka US, 83/2014, 113/2017, 44/2018 i 95/2018)

https://www.paragraf.rs/propisi/zakon_o_stecaju.html