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To keep you up-to-date with the latest economic and financial developments, this bulletin prepared by our team provides information that may affect the operation of your business in Albania.

A Guide on the New Law on Bankruptcy – Creditors Perspective

On 27.10.2016 the Parliament of the Republic of Albania approved law no. 110/2016, "*On Bankruptcy*" (the "Law"), which is published in the Official Gazette no. 226, dated 22.11.2016. The Law entered into force on 22.05.2017 and is applicable to procedures initiated after its entry into force.

The bankruptcy procedure is intended to satisfy collectively the debtor's obligations either through the reorganization or liquidation of the debtor's assets and distribution of proceeds.

This article aims to illustrate some aspects of the bankruptcy procedure from the creditors' perspective.

1. Who is a creditor?

The creditors are divided into *creditors of the bankruptcy procedure* and *bankruptcy creditors*.

The creditor of the bankruptcy procedure is a creditor whose claim has originated after the commencement of the bankruptcy procedure. This creditor is satisfied from the bankruptcy estate in the way and with the limitations provided by the Law.

Bankruptcy creditors include *secured creditors*, *preferred creditors*, *unsecured creditors* and *subordinated creditors*.

The *bankruptcy creditor* - is a creditor whose claim originated before the commencement of the bankruptcy procedure.

The *secured creditor* - is a creditor holding valid rights over the secured assets, by way of a pledge, mortgage or any other security instrument provided by the law.

The *preferred creditor* - is a creditor that has one the following claims:

- claims up to the amount of Leke 500,000 arising from the termination of the employment up to three months before the filing for bankruptcy, including salary and health reimbursement, and maternity leave payments;
- claims for alimony and maintenance arising prior to the commencement of the bankruptcy when the debtor is an individual;
- employee claims for personal health injury that happen while working for the debtor;
- tort claims arisen as a consequence of damage caused by the debtor before the commencement of bankruptcy procedures;

- claims for unpaid taxes arising one year before the filing for bankruptcy.

The *unsecured creditor* - is a creditor that has bankruptcy claims which do not qualify as secured, preferred or subordinated.

The *subordinated creditor* - is a creditor that has one of the following claims:

- penalties for late payment accruing on the claims of the bankruptcy creditors before the commencement of the bankruptcy procedure;
- fines under the Civil Code, administrative law and Criminal Code which are binding on the debtor;
- claims for repayment of loans by persons related to the debtor, if the lender was a related person at the moment of the transaction;
- claims which the creditor and the debtor have agreed to be subordinated.

2. When does a bankruptcy procedure commence?

The opening of bankruptcy procedures may be requested by *the debtor* or *its creditors* in written form and in accordance with the requirements set forth by the Law.

Tax authorities no longer have any specific right to request opening of procedures. They should follow the same rules as other creditors.

In case the bankruptcy procedure is requested by the creditor, the court shall accept such request if the creditor proves that the debtor is insolvent. Additionally, the creditor will need to prove the existence of an outstanding matured debt.

Notwithstanding the above, the insolvency is assumed if the creditor has failed in fulfilling an obligation in a compulsory enforcement procedure during the period of voluntary enforcement (as provided by article 517 of the Code of Civil Procedure). The debtor may, by evidence, rebut such assumption proving that it is solvent and that it does not owe the creditor an outstanding matured debt.

When the creditor request the opening of bankruptcy procedure, the court will notify the debtor of the request within 5 days, attaching a full copy of the creditor's submission and supporting documents.

The debtor will have 10 days to oppose in writing the commencement of bankruptcy procedures, providing all documents necessary to support his arguments. If the debtor does not oppose within the given deadline, the court will declare the commencement of procedures within 3 days.

In case the debtor opposes the commencement of the bankruptcy procedures the bankruptcy court shall within 5 days:

- set the court hearing date, which shall take place within 30 days;
- send notice to the debtor to appear at the court hearing, as well as the creditor who requested the opening of the procedures;
- if any of the parties requests the appointment of an expert, or if the bankruptcy court considers essential to have an expert opinion to decide on the commencement of the bankruptcy process, the court may decide to appoint an expert or temporary administrator to verify if there is a cause to commence the bankruptcy procedure, verify whether the debtor's assets will cover the costs of the bankruptcy procedure, supervise the debtor's operations, and provide an opinion on whether it is necessary to impose provisional measures to secure assets.

As a general principle, the commencement of bankruptcy procedures does not impact the continuance of the contracts that have not been fully executed by the debtor or the counterparty, unless otherwise provided by the Law.

3. What happens in the period between the filing for bankruptcy and decision of the court?

Creditors may be concerned that during this period the debtor undertakes actions that may harm their interests. Therefore they may ask the bankruptcy court to issue injunction orders.

The court may also ex officio issue such orders.

Especially the court may appoint a temporary administrator supervising or substituting the debtor in the management of the activity, decide to prohibit the debtor to dispose of the property in any manner that exceeds the normal activity of the debtor, or order other measures that are deemed necessary for avoiding harms to the financial and economical situation of the debtor to the detriment of the creditors.

The injunction orders shall be valid for a period of 30 days up to a maximum of an additional 30 days period. Upon expiry of the maximum deadline, these orders are no longer valid.

4. Can experts be appointed?

In case the bankruptcy administrator does not have the required skills to observe or clarify certain facts, the court may appoint experts, upon request of the parties or ex officio, at any time during the procedure.

5. How are the creditors organized?

5.1. Temporary creditors' committee

When the court finds that the request for the commencement of the bankruptcy procedures is in compliance with the provisions of the Law, issues its decision which inter alia shall provide for the appointment of a temporary creditors' committee. The court will appoint 3 members, including the 2 largest unsecured creditors and the largest preferred creditor. If one of the categories is not available or if the creditors refuse to join the creditors' committee, the court will choose the following largest amount in any of the categories, except subordinated creditors.

5.2. Permanent creditors' committee

After the appointment of the temporary creditors' committee, the creditors' meeting can replace or appoint a new creditors' committee at any time. The creditors' committee shall be composed of a minimum of 3 (three) and a maximum of 5 (five) members with voting rights. Each member has one vote, irrespective of the amount of its claim.

The creditors' committee shall be the representative of the bankruptcy creditors, excluding subordinated creditors.

Secured creditors may be appointed in the committee, so long as they do not form a majority of votes in the committee. If the debtor has at least 20 employees, one employee representative will be entitled to participate in the creditors' committee. The representative of the employees shall have no right to vote on matters being considered by the creditors' committee, unless the employee is a creditor of the debtor and there are other creditors of the same kind.

5.3 Creditors' meeting

The creditors' meeting shall be convened by the bankruptcy court or by the bankruptcy administrator. The administrator may convene whenever it deems necessary for the good functioning of the bankruptcy procedure. The creditors' meeting shall be chaired by the bankruptcy administrator and will be duly constituted with the presence of at least 50% of the total claims in the first call, and 35% in the second.

- Voting rights

The voting right is determined on the basis of the list of creditors. In all meetings held before the formation of the list of creditors, voting rights will correspond to the claims filed by bankruptcy creditors that are not disputed by the bankruptcy administrator or by any creditor with a voting right. Subordinated creditors shall have no voting rights. Creditors with disputed claims shall have a voting right only to the extent the bankruptcy court decides so, after hearing the administrator and any other person the court deems reasonable.

- Decisions of the creditors' meeting

A decision of the creditors' meeting shall be valid if a majority in value of the claims of bankruptcy creditors with voting rights and present in person or by proxy votes in favor of such decision.

- Opposing the decision

The bankruptcy administrator and bankruptcy creditors, except for subordinated creditors, have the right to challenge a decision of the creditors' meeting within five days from the public notice of the decision.

The decision can be challenged before the bankruptcy court only due to a breach of the formalities included in the Law for the convening of the assembly, as well as in case of a breach of the rules concerning the adoption of the decision.

- Right to be informed

The creditors' meeting may require the bankruptcy administrator to provide specific information and report on the progress of the bankruptcy procedure and on the management of the bankruptcy estate.

6. How are the claims determined?

6.1 Submission of claims

Everyone who claims to be a bankruptcy creditor must submit in writing its claims (and the supporting documents) to the bankruptcy administrator within the period established in the court decision on commencement of the bankruptcy procedures. Such filing will be accompanied by copies of any documents evidencing the claim.

The claims may also be submitted via electronic means, provided that the consent or authorization of the administrator has been obtained. However, the administrator has the right to request the original documents. With the consent or authorization of the bankruptcy or monitoring administrator, claims may be filed by electronic means. In such a case, the originals of the documents evidencing the claim shall be subsequently filed upon request of the administrator.

For the purpose of proving their claims, creditors' claims for obligations that have not yet matured due to the bankruptcy procedure shall be deemed mature. The submission shall contain the source of the claim, the claimed amount and whether the creditor is secured or preferred.

Claims from bankruptcy creditors that were included in the list by the administrator and were not objected by the debtor or any other creditor shall be recognized and considered verified by the bankruptcy court.

6.2 Opposing the claims

The claims included in the list of creditors may be challenged by the debtor or bankruptcy creditors within 10 days from the publication of the list.

6.3 Delayed submission of claims

Claims submitted after the period provided in the court decision on the commencement of the bankruptcy procedures will be considered delayed. Late evidence of claims will in any case not be considered, if it takes place after one year from the commencement of bankruptcy procedures. Delayed claims will loose the right to participate in any decision-making process or to obtain any distribution that took place in the procedures before the claim was filed.

Claims whose existence in the period of filing was made dependent on an investigation that was being conducted by the public administration will also be regarded as delayed claims unless the relevant public administration files a claim as contingent. If there are any extra costs due to the delayed claim, the delayed creditor shall be responsible for them.

7. Reorganization or Liquidation?

7.1. Reporting meeting

The reporting meeting of the creditors shall be presided by the bankruptcy court and its main objective is to decide whether the bankruptcy procedure will continue by reorganization or liquidation. The meeting will take its decision in accordance with article 108 of the Law which stipulates that as a general rule, accepting the plan by the creditors requires that in each class of creditors, a majority in value of claims (present or represented by means of a power of attorney) vote in favor of such plan.

Should the plan provide for the reduction of more than 50% of claims or their re-payment for more than 5 years; the affected class must approve such plan with the favorable vote of at least 65% of the claims. If the plan provides that one group of creditors within the same class will be treated differently, those considered as privileged will have to accept upon majority through a separate vote.

The bankruptcy administrator shall report on the financial situation of the debtor and the factors that caused the insolvency. The administrator shall submit the report in writing with the bankruptcy court at least 10 days before the reporting meeting, and the report shall be available for all parties.

7.2. Reorganization decision

Should the reporting meeting decide to proceed with the reorganization, the administrator will be required to draw up a reorganization plan that must be filed with the bankruptcy court and made public no later than one month before the date of the meeting concerning the deliberation and voting of the plan. The date of the meeting is set by the bankruptcy court and shall take place within 60 days from the reporting meeting.

7.3 Accelerated reorganization

The accelerated reorganization is another option which provides the debtor with the possibility to overcome a situation of imminent insolvency by reaching an agreement between the debtor and its creditors stipulated out of the bankruptcy court (which is however, subject to the court's approval) through a faster procedure.

A debtor is deemed to be in a situation of imminent insolvency when it is objectively foreseeable that will not be able to satisfy its debts as they fall due in a period of 6 months or less. If the debtor considers itself in a situation of imminent insolvency may request the commencement of accelerated reorganization procedure in accordance with the provisions of the Law.

7.4. Liquidation decision

In case the reporting meeting decides to proceed with the liquidation; the bankruptcy court shall request the bankruptcy administrator to draw up a plan for the liquidation of the debtor's assets in accordance with the Law. To the extent possible, the liquidation plan will include the sale of the business or one or more business units by preserving their continuance.

8. How are secured creditors satisfied?

The bankruptcy administrator or the debtor with the authorization of the monitoring administrator has the right to dispose of any property which is subject to a secured right, if the value of the collateral is larger than the amount owed to the secured creditor including the expenses incurred for the enforcement.

If the value of the collateral is lower than or equal to the aggregate of the value of the amount claimed by the secured creditor and the costs incurred for the enforcement, the bankruptcy administrator or the monitoring administrator, as the case may be, shall decide whether to allow the secured creditor to exercise the right to segregate the object according to the Law.

Before the bankruptcy administrator sells an asset in his/her possession to a third party, he/she shall notify the secured creditor of the proposed sale, who is entitled to have at least 1 week to propose a more favorable alternative of selling the asset.

Subject to the above, following the 6-months suspension period provided by the Law, the secured creditor may begin or continue the execution of the security. However, if the collateral is not necessary for the continuance of the business or professional activity of the debtor, the secured creditor may request the enforcement of the security. If the administrator does not start the enforcement within 15 days from the request, the bankruptcy court may dismiss the administrator or impose a sanction on him/her.

If, following the suspension period, the secured creditor begins or continues the enforcement of the security, the bankruptcy or monitoring administrator may request that the asset, subject to the security right, is held with the aim of selling it later or it is preserved for the continuance of the business activity. In such case, the administrator will pay the secured creditor the amount of the asset calculated in the inventory minus the foreseeable enforcement costs.

When an asset subject to a security right has been sold due to the said security right, the proceeds of sale minus the costs incurred in selling the asset shall be used without delay to satisfy the secured creditor. If the bankruptcy administrator transfers to the secured creditor an asset which the administrator has the right to sell with the intent that the asset will be sold by the secured creditor, the latter shall prepay to the bankruptcy administrator the estimated costs of sale as well as the taxes, if any, to be paid from the proceeds of sale of the asset.

9. How is the rank of claims determined?

In case of a liquidation, the administrator shall satisfy the claims of the creditors in the following order:

- secured claims up to the value of the asset serving as collateral;
- claims of preferential creditors;
- claims of unsecured creditors;
- claims of subordinated creditors;
- claims of the partners of partnerships and shareholders of commercial companies.

The payment of creditors of the bankruptcy procedure will take place after their maturity. Payment of bankruptcy creditors will be made taking into consideration the need to pay first the creditors of bankruptcy procedures. In case of doubt, the bankruptcy administrator will set aside an amount before commencing the payment of the creditors included in the previous section of this article.

10. Can transactions stipulated before the commencement of the procedure be challenged?

As a general rule, all actions of the debtor executed in a period of two (2) years before the commencement of bankruptcy procedures can be challenged if they caused a patrimonial damage to the debtor or have granted an unjustified preference to a creditor.

The bankruptcy or monitoring administrator will be primarily competent to start challenging actions in bankruptcy procedures.

Creditors, who identify an act of the debtor that may be challengeable, can communicate it to the bankruptcy or monitoring administrator. If the administrator does not start the challenging action within a period of two (2) months from the communication, that creditor has the right to file the action at his own expense and risk.

If the creditor files the claims, the administrator must be notified.

Challenging actions may be initiated only within the first 3 (three) years following the commencement of the bankruptcy procedure, unless it was objectively unforeseeable earlier that a given transaction could be subject to challenge. The action must be started against the debtor and the other parties in the challenged act or transaction.

If the asset, object of the transaction has been transferred to a third party, the action must also be addressed against the third party so long as the plaintiff challenges the right of the third party to keep possession or property of the asset.

The bankruptcy court shall be competent to decide on the claims regarding the challenging case pursuant to the general procedural rules.

11. When is the bankruptcy procedure closed?

After the completion of the final distribution, the bankruptcy court orders the closing of the bankruptcy procedure. Full payment to all bankruptcy creditors at any stage of the procedure is also a cause for closing the procedure. Such order and the reasons for closing shall be publicly announced.

In case of legal entities, and unless all creditors have been fully satisfied, the full distribution of proceeds following the liquidation of assets will entail the dissolution of the legal entity. The bankruptcy administrator shall file the order of the bankruptcy court with the relevant register in order to remove the debtor from the said registry.

If you wish to know more on issues highlighted in this newsletter, you may approach your usual contact at our firm or the following:

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Boga & Associates

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