

KOSOVA LEGAL NEWSLETTER

LONG-STANDING K&A CLIENT BECHTEL-ENKA JV SIGN CONTRACT TO BUILD KOSOVO MOTORWAY

Bechtel and joint venture (JV) partner Enka signed a contract yesterday with the government of Kosovo for the construction of a 102 kilometre motorway that will serve as a centrepiece of the country's national transportation system. The four-lane motorway will start from the border with Albania at Morine and connect at the north of Pristina, Kosovo's capital.

Kalo & Associates Pristina office (*with the support of the Tirana office*) has advised Bechtel International and Enka from the

initiation of this public procurement project advising on what was one of the first large scale infrastructure projects since the independence of the Republic of Kosovo. The firm is proud to have made some contribution to another successful signing for our clients. We were able to provide quality responsive legal advice to Bechtel International and Enka on all legal matters surrounding the project to successfully facilitate their participation and ultimate success in the public procurement tender.

NEW PROPOSED LAW ON EMPLOYMENT RELATIONS

It has long been known that a new Law on Labour would be introduced, and a draft has been prepared and discussed among the relevant governmental departments and trade unions. The current proposed draft is said to have been done to take into account Conventions of the International Labour Organisation, European Union Legislation and the fundamental principles of free labour market and economy. Once approved and enters into force it shall repeal the existing application of the UNMIK Regulation 2001/27 on Essential Labour and the FRY 1977 Law on Labour Relations (last amended 1984).

Some of the new elements introduced

in this draft law that currently do not exist in the laws regulating employment at present in Kosovo include (i) provisions on change of employer; (ii) on interns; (iii) probationary period; (iv) temporary reassignment of employees; (v) termination provisions on notice period for definite term and indefinite term contracts; (vi) and there are more detailed provisions on working conditions, annual leave, occupational safety and protection. The afore-mentioned is not an exhaustive list of areas to be covered by the current proposed draft law and could be subject to change. However such points ought to be considered now in light of the likely change in the law in this field.

KOSOVO ENERGY STRATEGY 2009 – 2018

The Kosovo Parliament on April 1st, 2010 approved the Kosovo Energy Strategy. The Strategy is prepared in accordance with Law 2004/8 "On Energy", and identifies the most important challenges with which the energy sector is confronted. It orientates the development of appropriate policies for the transformation of this vital sector in Kosovo into a steady and self-financing sector that offers qualitative energy services, resulting economically favourable to Kosovo consumers. The Strategy identifies the

main measures and policies that should be undertaken to enable the progress of sector reforms and thus attracting private investments and faster and more complete integration of Kosovo energy systems into the European and regional systems. The Kosovo Energy Strategy aims at the effective management of existing energy resources and environmental protection. It is focused on the enhancement of energy supply in accordance with European standard, and also on the diversification of energy resources.

PROJECT UPDATES

PRISHTINA AIRPORT

Bid submission date was 15th April and it is reported in the Kosovo news that a decision is expected to be made as early as 28th April. Three consortiums are shortlisted and expected to submit their offers. They are: "Bouygues Batiment Egis Eurokoha – PAIC Consortium", "Fraport IC ICTAC Havalimani Isletme A.S" and "Limak/ Aeroport de Lyon Consortium"

PTK Privatisation

Potential investors were invited to attend an investor's roundtable conference on the 24th March 2010 in Kosovo on private sector participation in Post and Telecommunications of Kosovo JSC (PTK). PTK is the public provider for mobile telephony (Vala 900), landline (Telekom of Kosova - TK) and internet services (Dardaphone) in the territory of the Republic of Kosova. It is expected that control of the company would be put on offer and the Government would retain some 25%. Some of 10 interested foreign telecom companies that attended include Hrvatski Telecom (Croatian), Turkcell, Cable & Wireless, Goldmar Telecommunications Lts and Mobilcom Austria .

LLAMKOS LLC IN VUSHTRRIA

PRISHTINA – Privatization Agency of Kosovo (PAK) today officially announced tender for privatization of property of Enterprise Llamkos LLC in Vushtrria through ordinary Spin-Off. After the meeting of Board of Directors held on February PAK notified the SOE's management and the respective Municipality that this enterprise will be privatized and has made the announcement for tender in its webpage www.pak-ks.org and in all local newspapers. This New Co will be privatized through Ordinary Spin-Off. Deadline for qualification will be Wednesday, 5 May 2010. Submission day for bidding will be on 12 May 2010.

KOSOVA E RE LIGNITE PROJECT

Further to the short listing of the pre-qualified bidders, the new Energy Strategy for 2009 – 2018 has been subject to parliamentary discussions and it seems that Kosovo B plant shall be given as part of the package for sale in this Kosovo e Re project. It is still however expected that the Government shall retain some ownership and not all shares shall be sold/transferred. The Request for Proposal has yet to be issued yet.



ALBANIA LEGAL NEWSLETTER

NEW LAW ON TAKEOVER OF COMPANIES WITH PUBLIC OFFER

Public takeover bids for Albanian companies are not common at all. This is largely due to the fact that there are almost no public companies i.e. joint stock companies with shares offered and issued to the public and the regulated capital markets in Albania, though existing i.e. Tirana Stock Exchange, are for various reasons not active. The legislator has just recently adopted the Law on Takeovers of Public Companies (February 2010), supposedly in anticipation of the need for regulation in the near future and as part of Albania's gradual move to bring its laws into compliance with laws applicable in EU member states. This law, together with the rather recent laws on Entrepreneurs and Commercial Companies (2008) and on Securities (2008) harmoniously pave the way for the regulation of public takeovers that the Albanian market may expect in the future.

Application: The Takeovers Law is applicable to acquisition of securities issued by a company with public offers and registered office in Albania which is listed for trade in an Albanian duly licensed stock exchange and in the case that such acquisition triggers control of the purchaser in the target company. The control threshold is 30% and seems to be in line with the "equity control" as defined in the Law on Entrepreneurs and Commercial Companies.

Approval: The offer for the takeover of a public company before being published must be approved by the Albanian Financial Supervisory Authority (FSA) and which shall be deemed to be tacitly granted in the case that the FSA does not revert with a response within 10 days from the submission of an offer.

Principles: The whole takeover process must be guided by the principles founded in the EU Directive 2004/25/EC on takeover bids such as: equal treatment of shareholders of target company, shareholders of target company to be provided timely and adequate information for evaluation of the public offer, management i.e. board of directors of the target company to act in the best interest of the company as a whole in line with the fiduciary duties embodied in the Law on Entrepreneurs and Commercial Companies, public offer to be notified only if payment of all offered compensation is guaranteed, the activity of the target company not to be hindered by the takeover process etc. Most importantly minority shareholders of a target company where the purchaser has purchased 90% of the voting rights resulting from the public bid are entitled to the sell their shares to that purchaser at the same price offered in the initial purchase through the public bid.

Bid Term: The offer must remain open from 3 to 10 weeks from the date of the

Banded woman, by Gazmend Leka



publication of the public offer. Ten weeks is applicable when the management of the target company convenes the shareholders assembly to deliberate on the offer. Competitive offers during the bid term are allowed.

Bid Price: The price offered for the shares must not be lower than the higher value of either: **(i)** the fair price of the shares calculated using widely recognized evaluation methods; **(ii)** the average weighted market price of the shares of the previous 3 months; **(iii)** the higher price per share paid by the offeror during 12 months prior to the date of publication of offer. It must be paid in cash or marketable shares with sufficient liquidity. A competitive offer is deemed as more favourable if the price offered is at least 5% higher.

Anisa Rrumbullaku, LLM - Head of Corporate & Business Licensing

VAT ON EXPORTED SERVICES

Parliament has approved an amendment to the existing Value-Added Tax (VAT) Law (7928, April 27 1995, as amended) abolishing the legal provisions related to the export of services.

Background: Before the recent amendment came into force, the VAT Law provided that the export of services is subject to VAT at a rate of 0%. In addition, the list of the VAT-exempt supplies did not include the supply of services performed out of Albania by Albanian taxpayers - thus, such services were not VAT exempt. This legal provision was used by Albanian taxpayers (e.g. companies and small entrepreneurs) as a legal basis to charge a 0% VAT on the

value of the exported services. However, in many cases the tax authorities requested the taxpayers to charge VAT at a rate of 20% on the value of the exported services. The requirements for charging either 0% or 20% VAT were not made clear in the relevant legislation. The only clarification offered by the tax authorities related to consultancy services providing that in order to charge the 0% VAT rate the Albanian supplier of services should provide documentary evidence that the service receiver is located outside Albania (i.e. is tax resident in another country). Otherwise, the service supplier was obliged to charge VAT at a rate of 20% for any service received by a

foreign taxpayer. The legislation and the tax authorities provided no clarification related to the export of any other type of service. Therefore, in many cases, Albanian taxpayers that did not charge 20% VAT on the value of the exported services were subject to reassessment by the tax authorities and unjust VAT tax liabilities.

Amendment: The recent amendment provides that services performed out of Albania by Albanian taxpayers are considered to be international services and are therefore VAT exempt - that is, the amendment includes international services in the list of VAT-exempt supplies. In

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In addition the amendment has also abrogated the provision stating that the export of services is subject to 0% VAT. The VAT Law, as amended, no longer contains any provision specifically related to the export of services. Therefore, where an Albanian taxpayer carries out in Albania a service for a non-Albanian entity, the Albanian taxpayer should charge VAT on the service at a rate of 20%. Albanian taxpayers no longer have legal grounds to charge 0% VAT on the value of exported services.

DATA PROTECTION OBLIGATIONS – NOT TO BE IGNORED

For quite some time now the Law No.9887, dated 10 March 2008 “On data protection” has been in force and applicable. It had marked an important step concerning the insertion of the “information society” into the Albanian legal framework. The enactment was a necessity for the purposes of reconciliation of the digital era with human rights. The Council of Ministers Decision No. 211, dated 11 September 2008 “On the designation of the Data Protection Commissioner”, appointed Mrs. Flora Cabej Pogaçe as the Albanian Commissioner for the Protection of personal Data.

It did however take some time following the enactment for the relevant forms for notification to be in place (published on the website from Jan 2010), and now companies should take heed of their obligations regarding data protection. International firms operating in the region including Albania and who are already aware of the need to comply with data protection rules in other countries in Europe have already taken steps to ensure due notification with the Commission this year – our firm has assisted several large companies in this respect this year.

Essentially under the law, any controller in

The amendment will have some consequences for Albanian companies (and foreign companies that operate in Albania) which are subject to corporate profit tax, particularly those companies whose core business is the export of services. Since February 27, 2010, these companies must charge VAT at the rate of 20% on exported services unless that service constitutes an international service (i.e. is performed outside Albania).

Ardjana Shehi, MBA
Partner - Head of Tax & Employment

the Republic of Albania or exercising its activity through the use of any device located in the Republic of Albania, must inform the Commissioner of its intention to process personal data using a prescribed notification form and must also obtain authorization in the case of international transfer of personal data to countries which do not offer a sufficient level of protection of personal data. There is a Council of Ministers Decision that already provides a list of countries that guarantee an adequate level of protection of personal data.

The notification required by the Commissioner’s Office can be completed online and must be done so in the Albanian language through the website of the Data Protection Commissioner.

We understand that companies in Albania are now receiving notification letters from the Commissioner’s Office reminding them of their obligations of notification under the Data Protection Law. We note that failure to effect the relevant notification where required to do so under the law would result in penalties being exacted.

Eni Kalo (LLM - CEIPI), Associate,
IP & Commercial Contracts

PROJECT UPDATES

As part of the recently announced intention of the government to begin a wave of privatisation efforts are being made to privatise the sale of shares of the remaining two large government holdings in the energy and insurance sector.

ALBPETROL SHA

An Albanian joint stock company wholly owned by the Albanian Government, in the business of exploitation and trade of oil and gas, is up for sale again. At this stage the government is tendering for consultancy services to offer the government transaction advice on the privatisation process. The privatisation itself is aimed to be completed within the year; currently the deadline for tenders for consultancy services is 26th April.

INSIG SHA

Following the failure of the first attempt to sell a majority stake last year Albania plans to offer 100% for sale of insurance company INSIG to foreign and domestic investors this time around. After the exercise of the IFC’s and EBRD’s put option for 39% of the shares 100% is now freely available for foreign and domestic investors in INSIG shares. The law No 10168, dated 22.10.2009, has confirmed the form and structure of the sale.

NATIONAL LOTTERY

There has also been some news that the proposed Albanian National Lottery shall be made available for privatisation though no concrete decision of the Ministry of Finance (who has been empowered by a decision of the council of ministers to initiate ‘competitive procedures’ on this).

GENERAL ELECTRIC WINS ARBITRATION CASE AGAINST REPUBLIC OF ALBANIA

On 16th March 2010 G.E. TRANSPORT S.P.A. and ATHENA S.A. (Petitioners) brought a civil action against the Republic of Albania (Respondent) before the United States District Court, District of Columbia, in order to have an arbitral award confirmed.

The history is that the petitioners entered into a contract with Albania to modernize the Tirana-Durres railway but Parliament failed to ratify the financing agreements thus putting into question the legal effect of the contract. The petitioners commenced an arbitration proceeding against the respondent in Italy, in the Internation-

al Chamber of Commerce, International Court of Arbitration (ICA), pursuant to an arbitration clause in the underlying Contract Agreement. At the conclusion of those proceedings an ICA arbitral tribunal concluded that Albania had failed to fulfil its obligations under the Contract and issued an arbitral award in excess of \$20 million in favour of the petitioners.

The Republic of Albania sought to have this arbitral award declared null and void, a matter that was pending before the Court of Appeal in Italy. The petitioners filed a motion requesting the District Court to issue a default judgment and confirmation of the

arbitral award rendered against the respondent pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. Despite the pending claim to have the arbitral award set aside in the Court of Appeal in Italy, the District Court, carefully considering its discretion to defer the confirmation until the Court of Appeal in Italy made a final decision, granted the request for a default judgment and confirmed the Arbitral Award to be in the amount of \$20,664,933.30.

The petitioners will now have to seek enforcement of such judgement pursuant to the Albanian Civil Procedure Code.



Power sector - renewable energy provisions:

Recent amendments to Law no.9072, dated 22.5.2003 "On Power Sector" on renewable sources of energy was introduced at the end of 2009. Prior to such change only those energy generators having an installed capacity higher than 100 MW were required to use renewable resources. This 100 MW limit has changed to 50 MW.

The minimum percentage of energy required to be generated using renewable resources has also been increased; and further provisions introduced for escalating the increase in minimum usage during 2010-2012.

The changes in this law also provide two long awaited and until now missing definitions for (i) "Green Certificates" (i.e. certificate as evidence of renewable power sources or combinations including renewable sources) and (ii) "Origin Guarantee Certificate" (i.e. a transferable official certificate confirming amount of power from renewable sources generated etc), which shall prove to be essential as the energy trading market begins to pick up pace.

Olti Skrame, Associate
Infrastructure & Natural Resources

LEGAL UPDATES

Legislative developments in connection with the registration of the Concession Contracts:

The Albanian parliament has recently passed a new law no. 10240 dated 25.2.2010 amending and supplementing the construction Inspection law no. 9780/2007 establishing new functions for the National Urban Planning Inspectorate (NUPI) relating to government concession contracts.

New provisions have been introduced to strengthen the role of the NUPI in relation to all types of construction activities in Albanian territory. The new amendment reiterates the site permit holder obligation, as a concessionaire, to allow NUPI officials to perform inspections in compliance with the provisions of such law.

This amendment also obliges the competent state authorities (relevant ministries) to file with the NUPI, within 1 month from the entry into force, complete copies of the concession contracts and detailed references of the designated sites over which the concessionaire shall perform its activities. Currently there are legal obligations for a concession agreement to be registered with the Office of Immovable Property as such agreement

does typically offer rights of use over land.

One of the most important features brought about in this amendment is the introduction of the Data Register of all types of existing and future constructions developed including those to be developed as a consequence of Concession Contracts, to be effective from six months from the entry into force of this amendment.

This register is not to be confused with that of the Immovable Properties Register as their functions are quite different. The function of the Data Register is to create a detailed database of all constructions developed, *inter alia*, in connection with concession procedures from their initial phases up to completion of the entire project. Furthermore on this register all inspections performed by NUPI officials, fines and penalties imposed on the defaulting parties, technical parameters of the constructions, etc will be recorded.

Such changes it would seem were introduced to assist the Contracting Authority in tracking the Concessionaire's compliance with its obligations under the Concession Contract).

Dorian Kashuri, Associate
Infrastructure & Natural Resources

WHEN DOES TRANSFER OF REAL RIGHT OVER IMMOVEABLE PROPERTY TAKE PLACE?

The Albanian Supreme Court issued a unified (i.e. binding) decision number 1 dated 06.01.2009 (the "Decision") that was quite dramatic in nature transforming the legal tradition of Albania jurisprudence with regard to the legal effect of transfer of legal title of ownership over immovable property. The implementation of this unified decision by lower courts will inevitably unsettle the sense of stability of ownership rights in Albania and has already instigated much debate among legal scholars, practitioners and judges.

The Decision essentially ruled that a sale contract for the sale of immovable property may guarantee legal transfer of the ownership title (i.e. the real rights) prior to the registration of that sale/transfer with the Land Registry.

The essence of the Decision was centred on (i) the legal interpretation of Article 83 of the Albanian Civil Code that states that "the legal deed for the transfer of ownership and other real rights over immovable properties must be drafted as a Notary act and duly registered" failing which the transfer shall be invalid; and (ii) whether under the law the act of the registration of the notarial deed with the Land Registry is an indispensable condition for

acquiring a valid legal title over an immovable good. For the avoidance of any doubt the registration should take place at the Office of Immovable Property, i.e. Land Registry.

The Justices gave consideration to the nature of the legal form and effect of the 'sale contract' required for the sale of immovable property under the Civil Code, i.e.: (i) mutual consent of the parties to the contract; (ii) the legal cause of action; (iii) the legality of the subject matter of the sale contract; (iv) the form of contract.

The fourth element was subject to much discussion. Essentially, the Justices for this case interpreted the requirement of the registration not to be a 'form' so to speak (thus not subject to invalidity if not concluded) and simply as an element stated to be needed for the purpose of making the existence of the notarial deed public to third parties, and not as a prerequisite for the legal transfer of ownership title. They qualified the act of registering the sale contract (as a notarial deed) not as creating or passing the real right over the property but merely mirroring the legal right already confirmed in the sale contract. They did however state that the purchaser of immovable property

pursuant to the contract of sale drafted as a notarial deed could not further sell or transfer that property without first registering it with the Land Registry (the law provides a 30 day time window for such registration).

So what does this mean for purchasers of real estate in Albania? If X sells immovable property pursuant to a sale contract as a notarial deed to Y against a payment, and if Y does not register the sale at the Land Registry until that point X has the opportunity to sell that same property (*showing evidence of his still registered ownership to a notary public*) to B, and maybe also to further buyers in succession all against some payment. The legal impact of this Decision in this scenario is that even if the latest purchaser, who purchased the property in good faith, then proceeds to register the sale and transfer of that property, Y (the very first purchaser), according to the interpretation in this Decision, shall be the legal rightful owner with real rights over the property and all other purchasers remain only with personal rights over the property (i.e. they can only seek monetary damages through court action again X claiming X's breach of contract).

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The information contained in this newsletter does not constitute or should in no circumstance be seen to be, or relied upon as any legal advice or opinion.

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