IMPORTANT REMINDER FOR COMMERCIAL COMPANIES

Under the Law No. 9901 Company Law enacted in 2008, companies that existed prior to the promulgation of that law (i.e. before 21 May, 2008) must adapt their organization, functioning and operation in accordance with the provisions and requirements of the 2008 Company Law within a transitional period of 3 years from 21 May, 2008. The deadline expires on 21 MAY, 2011, and so this is a reminder for those companies that have not yet conformed to the requirements of this Company Law to take all the necessary measures to make those adjustments to e.g. Articles of Association for approval and filing with the National Registration Centre. It is important to note that companies that fail to act in conformity with this obligation risk being subject to dissolution and removed from the National Registration Centre following liquidation proceedings. For assistance and advice on timely compliance of this obligation please contact our Corporate team.

Anisa Rumbullaku (LLM)
Head of Corporate

USE OF THE SECURITY TRUSTEE IN ALBANIA

The ‘security trustee’ is often used as a means of holding security over assets of a debtor for a number of creditors in, for example, a syndicated loan. This security trustee is the entity that holds the various security interests created on trust for the various creditors, often banks. The benefit of using this structure is that the security does not have to be granted separately to the many creditors which would be costly and impractical (especially where there is a changing pool of creditors).

The concept of a trust is a relationship whereby property (including real, tangible and intangible) is managed by one person for the benefit of another. The trustee is the legal title holder of the property but must hold it for the beneficiary holding what is termed under common law "equitable title" and in doing so owes a fiduciary duty to the beneficiary.

The Security Trustee is responsible for administering the trust on behalf of the creditors; with each of the creditors involved in the transaction having a beneficial financial interest in the trust rather than in individual assets. If all proceeds well in this arrangement and the debtor discharges the debt the trust is dissolved and title to the contents is returned to the debtor and alternatively if it fails the security trustee is empowered to foreclose on the trust, liquidating it and distributing the proceeds to the creditors.

Are Security Trustees effective in Albania? Albania has not ratified the Hague Convention 1985 on the Law Applicable to Trusts and Recognition. As in many civil law jurisdictions there is no recognised concept of ‘trusts’ as there is in the common law system and the secure ring fencing of assets in favour of the creditors is not assured with the use of a Security Trustee in Albania.

The primary problem faced in Albania with this concept, and lack of legal trusts, is that under the present law the creditor must be the named holder of the collateral securing its credit. The most common types of security in syndicated loans in Albania are non-possessor charges, e.g. (i) mortgage over immovable property regulated by the Civil Code; and (ii) pledge/securing charge over shares, receivables or bank accounts etc regulated by the Securing Charge Law (1999).

Can someone other than the creditor enforce and receive the secured collateral? A mortgage under the Albanian Civil Code is defined as a real (legal) right in favour of the creditor to secure the fulfilment of an obligation and does not envisage the creditor merely holding an equitable interest in this mortgage but that this person must be the legal title holder. Furthermore the Civil Code provides that any transfer of ‘real rights over immovable property’ must be done by notarial act and registered, failing which, it is deemed invalid. Thus each and every mortgage (i.e. which is undoubtedly a real right) and transfer thereof must be done before the notary public requiring the creditor as the holder of such real right (to execute the deed for the transfer).

The position as regards to Securing Charges is also clear. One of the elements required for the creation of a securing charge is that the chargee is the creditor (i.e. the charge must have bound itself through a contract with the charger to advance credit or loaned money to the charger or another person or perform any other obligation for or at the request of the charger, or prior to execution of the securing agreement the charge has allowed credit or loaned money to the charger or a third person – Art 5(c)).

Parallel Debt Structure: The enforcement of a parallel debt structure in terms of security has not been tested yet in Albania, but in principle this should overcome the barriers noted above in terms of the Security Trustee actually being the creditor of the secured obligation. However, without that recognized concept of trusts there is still the risk that the secured assets (which are ultimately for the benefit of the creditors) cannot be ring fenced in the event of the bankruptcy of the Security Trustee as the creditors of the Security Trustee shall have recourse to those secured assets. Albanian law does not accept an equitable (beneficial right) as being subject to the right of separation.

By Sophia Darling, Partner
KALO & ASSOCIATES was selected together with international counsel White & Case (Slovakia) to provide legal support to EBRD’s project on Judicial Capacity Building of the Review Commission on Public Procurement in Albania. Utilizing the experience of the lawyers of the firm in public procurement procedures, contentious & litigious matters, administrative and public law, our team led by partner Alban Caushi, will be providing legal support on this project which covers: assessment of training needs, preparation of a first draft of the handbook covering the curriculum content and other training manuals and guides, training of RCPP members, training of trainers and organising a roundtable on the impartiality of the commissioner in the decision-making process.

KALO & ASSOCIATES prepared a number of legal guides for 2011 for publication in the International Comparative Legal Guide (ICLG), a reputable international publisher of legal guides. Topics included:

MERGERS & ACQUISITIONS: Containing information ranging from general regulation of M&A, mechanics of an acquisition, approval and decision-making process, shareholder rights etc.

GAS REGULATION: Providing information ranging from the basic requirements for investment in gas activities, rights to be acquired and restrictions to such rights, permits required, legislative rules pertaining to gas storage, transportation and sales etc.

Environmental Protection: Towards the end of 2010 the Ministry of Environment, Forest and Water Administration (“MoEFWA”) shared with the public three draft laws, on: (a) Environmental Protection; (b) Environmental Impact Assessment; and (c) Environmental Permitting.

Features of this new draft law on Environmental Protection include the development and elaboration of existing, and addition of some new, environmental protection principles such as: the principle of sustainable development, prevention and precautionary principle(s), preservation of natural assets, substitution and/or compensation principle, integrated approach principle, joint responsibility principle, polluter pays principle, and access to information and public participation, etc. This new draft law also provides for certain instruments and tools of environmental protection policy including, inter alia, eco-labelling, eco-awards and eco-taxes.

The draft law on Environmental Impact Assessment imports the relevant applicable EC Directives in their entirety.

The third draft law is on Environmental Permitting which is an area that requires more legal certainty at present. This change would introduce a much needed law dealing solely with permits, criteria for issuance and required documentation etc, as currently such important matters are only covered in a few provisions under the Law on Environmental Protection supplemented with some ministerial instructions. The purpose of this draft law is to establish certain directives for permitting the operation of certain groups of polluting activities, measures that are designed to prevent or reduce emissions into the air, water and land from such activities, including measures concerning waste. Currently there exist three types of environmental permits: a Simple Environmental Permit, Environmental Permit, and Integrated Environmental Permit. Now under this draft law it shall be very clear that the required permit is to be strongly linked to the level of expected pollution resulting from the applicant’s commercial activities.

These changes are welcomed and hopefully shall offer a greater level of legal certainty for investors and businesses. To fully achieve this it is crucial that the implementation and application of the new rules should be consistent across the board and applied equally by all administrative levels within the institutions dealing with environmental protection within Albania.

Dorian Kashuri, Associate Infrastructure & Natural Resources

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Law on Games of Chance: Presumably in view of the impending initiation of the open tender procedure for the award of the national lottery licence there has been some changes introduced into the Law regulating this matter (Amendment Law no.10351 dated 11.11.2010).

Some of the key relevant changes include: (i) Licence for the National Lottery shall now become effective only after approval by the Parliament; (ii) the National Lottery licence holder can operate on-line games through the internet; (iii) The amendment allows the entity licensed to carry out the national lottery to produce advertising material with regard to games of chance offered by the national lottery and to draft and distribute informative leaflets as well as to sponsor advertisements in the mass media; and (iv) Applicant of a national lottery licence may now be a commercial company, entrepreneur or consortium of companies.

Convention on Human Rights and Biomedicine (in effect on 18th December 2010 (Law No.10339, dated 28.10.2010): Ratification of this Convention is a big step towards the enhancement of the Albanian legislation supporting swift advances in medicine and biomedical research development of which has a direct impact on the protection of human rights. The law lays down a series of principles and prohibitions concerning bioethics, medical
LEGAL TAX UPDATES

Amendment to VAT Threshold: A Council of Ministers Decision amending the VAT threshold for the liberal professions has been approved by the Council of Ministers on 12th January 2011. According to this Decision taxpayers providing services in economic activities as lawyers, notary public, auditors, architects, doctors, etc., but also hotels, will be considered to be subject to VAT regardless of their annual turnover. This Decision will be effective as from 1st February 2011.


One of the most important changes introduced is related to employer contributions for life and health insurance of the employee. According to this amendment these contributions are exempted from the personal income tax of the employee and are considered as deductible expenses for the employer.

The amendment also provides that profits and dividends distributed by foreign entities, subject to profit tax, shall be considered to be excluded from the taxable profit of the Albanian resident that is the beneficiary of such distributed dividends/profits.

Four More Double Taxation Treaties (DTT-s) - effective 01.01.2011: Four further Treaties for the Avoidance of Double Taxation entered into force in Albania as of 1st January 2011. DTTs are now in place between Albania and Ireland, Germany, Estonia and Kuwait. The Treaties had been duly ratified by the Albanian Parliament during the year 2010. VAT is imposed on Medical and Health services.

An amendment of the Law on VAT has been approved by the Parliament on 16th December 2010 coming into force as from 30th January 2011. According to this amendment the supply of drugs and health services will be subject to VAT at a reduced rate of 10%.

Eni Kalo, Associate (LLM)

PROJECT UPDATES

ALBPETROL SHA
Following the engagement of Patton Boggs as transaction advisor the process is underway and advisors undergoing what would be expected to be the due diligence of the company in order to recommend optimal strategic options for the structure of the transaction.

INSIG SHA
The intention is still to privatise this company and in the meantime steps have been taken to engage a reputable company to assist in the early stages of the privatisation process of building institutional capacity.

NATIONAL LOTTERY
This licence is still intended to be offered and no changes have since occurred in terms of the initiation of the tender procedures. However as noted above in the Legal Updates section changes have been introduced into the Law on Games of Chance presumably, among other reasons, to make the licence opportunity more attractive to investors.

HPPs operated by Albanian Power Corporation (KESH)
IFC has already initiated tender procedures to contract sub-consultants, having issued the request for expression of interest for expertise assistance with the preparation of the tender procedures for the transfer of such HPPs, all of which nearly totalling a value of 82mln Euro.

SKAVICA
The Government is still considering re-opening the tender for the SKAVICA HPP, but it is expected this time that the HPP will be kept under the control of the Albanian Government and will not be transferred through a concession to private investor.

TIRANA-ELBASAN MOTOR WAY
A tender for this motor way (including a 2-3 km tunnel) was opened last month and now is in the phase of prequalification, with some 25 companies already having expressed interest.

MILOT-MORINE MOTORWAY
IFC PPP Transaction Advisory has been retained by the Government of Albania, Ministry of Transport and Public Works to act as a lead advisor to assist in introducing public-private partnerships (PPPs) for the operation and maintenance of Milot-Morine Highway IFC has already initiated the tender process for contracting specialised legal and technical consultants.

By Genc Pertoneti

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KOSOVO NEWS

We would not ordinarily speak of politics in this newsletter confining coverage to legal matters, but as politics, in this region at least, does very much affect our clients’ business and attraction of potential investors, we offer a very short assessment on the status quo.

Following the breakdown of the ruling coalition PDK and LDK last year in October elections have taken place and only on 1st February 2011 was it announced that PDK had won 32% of the votes (or 34 seats in the Parliament) but to form a government it needs to form a coalition. They shall have 15 days to form a government and once sworn in it is expected that business shall resume and parliament shall function and pending projects such as PTK privatisation shall also hopefully resume.

MERGER CONTROL RULES IN PLACE

Law no. 03/L-229 “On Protection of Competition” recently came into force in Kosovo on 10th January 2011 and one of the most important innovations was merger control rules and regulation for the preservation of competition in view of concentration of undertakings.

Concentration of enterprises is created by installing permanent control by which is acquired: (i) merging of two or more independent enterprises or parts of these enterprises; (ii) direct or indirect control or influence on the dominating position of one or more enterprises or parts of enterprises (by taking over majority or part of shares, or over majority voting rights).

Threshold for requirements of filing a notification with the Kosovo Competition Commission is: (a) determined incomes of all participating enterprises together, in the international market, to exceed one 100 million Euros based on financial reports of the financial year preceding the concentration year and if at least one of the participants is located in the Republic of Kosovo; OR (b) if general incomes of at least 2 participants in concentration in the Kosovo domestic market, exceeds 3 million Euros based on financial reports preceding the year of concentration.

Rather problematically there are no transitory provisions given that there is to date no secondary legislation in place to enable implementation and application of the rules (e.g. no specific list of required documents, no standard form for notification). Another issue left unaddressed is the specific timing of when a notification must be filed. The law does provide that secondary legislation shall be brought into effect within 6 months but even until then the mandatory requirement to notify if thresholds are met remains in force.

INTRODUCTION OF LABOUR LAW

Although the Labour Law (Law no. 2010/03 – L – 212 dated 18.11.2011 “On Labour”) was completed some time ago, due to disruptions in the government and parliament, it is only this month that it has come into force (January 2011) in Kosovo. This new law supersedes UNMIK Regulation no. 2001/27.

This new law confers more favourable rights for employees compared to the previous UNMIK regulation especially in relation to maternity leave (extended from 6 months to 12 months). This new law also applies to foreign citizenship employees and persons without citizenship who are employed by employers within the territory of Kosovo. However, provisions of this Law shall not be applicable to employment relationships within international missions, diplomatic and consular missions of foreign states international governmental organisations or to any International Military presence established in the Republic of Kosovo under the Comprehensive Proposal for the Status Settlement.

Changes include the reduction of overtime from 40 hours per month to 32 hours. Employees are now entitled to at least 20 days annual leave per year as opposed to the previously granted 18 days and are now entitled to full pay sick leave for a period of 20 days in any given year. For more information on the changes brought into force in the Labour law please contact our offices.

Atde Dika, Associate

Disclaimer: The contents of this newsletter is for information-purposes only and are not intended in any way as legal or other professional advice. It is advised that professional advice should be sought prior to any action being undertaken based on any of the contents of this newsletter.

CONTACT
info@kalo-attorneys.com