UK INTEREST IN INVESTMENT IN ALBANIA

An interesting event was organized on the 7th of May by the Albanian Embassy to the UK and Developing Markets Associates Ltd, namely the First UK Albania Investment Forum. Amongst distinguished Members of Albanian Parliament and Government and also high representatives of the prominent business organizations as keynote speakers.

The Managing Partner of Kalo & Associates, was invited to speak on the legal framework of property rights and tourism. Mr Kalo, was invited by the Embassy of the Republic of Albania and Developing Markets Associates Ltd to be a keynote speaker at presentation of the First United Kingdom Albania Investment Forum, on May 7th, 2008.

During his presentation Mr. Kalo focused mostly on the legal framework of property rights and tourism. He highlighted the advantages provided in the current legal and institutional framework in these fields that would be of interest to potential investors. He also emphasized some of the legal and institutional obstacles to the audience, and advised how some of these could be overcome.

One of the key conclusions advanced was that, contrary to some public perception, there is sufficient legal certainty in Albania that supports investments in real estate and tourism in Albania.

PROPERTY REGISTRATION SYSTEM IN ALBANIA

For approximately fifty years the Albanian State retained ownership of all land. Programmes of land tenure reforms in Albania were initiated in the year 1991 to, amongst other things, attract investments. Almost 90% of agricultural land was distributed to farmers, even though this resulted in the fragmentation of land. Such fragmentation reduced the economic value of land in general and its use for development purposes. Most investment in the land development has required a consolidation of land to be reached by agreement between the various owners.

There are conflicts on land title, mostly in urban areas, between ex-owners of land and of buildings, the state, and occupants. Many international organisations comment that a fungible property rights system should be established in Albania by strengthening the legal security of physical ownership rights.

Some obstacles resulting from the current system...

- Immovable Property Registry Office (“IPRO”) does not hold statistics of property-units for which the owners are unknown. Instead the status of ownership for this category of immovable properties is defined as “Unproven Owner” (corresponding acronym in Albanian is “PPV”). This is recorded in the record file (kartela, i.e. extract from land registry). Until the legal owner is identified and proven to be the owner, there can be no transaction or transfer of ‘real rights’. It is worth noting that currently some 15,000 property units are defined as having an “Unproven Owner” that are said to be registered with the Tirana Real Estate Registry Office (data taken from the Rule of Law and Inclusive Market Economy Programme in Albania – Dec 2007)
  - Maps with geographical information on the property units are of poor quality;
  - Lack of updates and upgrade of property information kept electronically (this is not to say however that such information is not available);
  - Lack of access to the property information registered in the Hypotek Book or with the Electronic System. Only the owner or an authorized person (by a Power of Attorney duly issued by the owner) is permitted to obtain information regarding a property-unit registered with IPRO. This information should be made available to the public, thus complying with 1994 Law “On Registration of Immovable Properties” (No 7843), as amended, which entitles...Everybody to access documents registered with real estate registries....”
- Lack of coordination between IPRO and institutions empowered with duty of recognition of ownership rights i.e. Court/Agency for Restitution and Compensation of Properties (Former Commissions included)/Housing National Entity
- There is an estimation of approximately 600,000 urban and around 300,000 rural parcels not yet registered. The registration process has been particularly slow in valuable urban and coastal areas.
- Slow pace of resolution of restitution and compensation claims has undermined the security of property rights and slows down the registration of property rights, especially in

1 Land Administration and Management Project, World Bank in Albania
the high value coastal areas.
- Lack of networking between private and state agencies for the sharing of information.

International experts have recommended to the Government of Albania an overall strategy for the consolidation of a property rights system by introducing each of the following components:
- Completion of the First Registration Process of Immovable Properties;
- Legalization of land and informal buildings;
- Restitution and Compensation of Properties;
- Inventory of State-Owned Properties;
- Territorial and Urban Planning;
- Expropriation.
Each of the above components should be implemented by the relevant and corresponding institution or agency.

By Av. Zamira Xhaferri
Head of Real Estate

NEW BANK OF ALBANIA REGULATION “ON ELECTRONIC PAYMENT INSTRUMENTS”

Bank of Albania issued on 6th of February 2008 the new Regulation “On electronic payment instruments”. This Regulation substituted and abrogated the previous Regulation of the BoA “On Electronic Payments” of 2000. The intention was to improve the regulatory framework for the issuance and usage of the instruments of electronic payments, particularly in the course of the implementation of the BoA’s role in the supervision of a secure and efficient operation of a system of payments in the Republic of Albania.

The stated purpose of this new Regulation, inter alia, is to ensure transparency for customers in respect of the rules and the procedures of effecting electronic payment. It sets out the types of permitted electronic payment instruments, and the manner of protection and reporting of information in the process of the electronic payments.

The revision of the old Regulation also sought to adopt the best standards in accordance with the European Union Directives and Recommendations, and also according to the best

PROJECT UPDATES

ARMO - The Government of Albania announced a tender for the sale of 85 per cent of shares in the Albanian Refinery and Marketing of Oil (ARMO), where 7 companies expressed interest. The evaluation of offers resulted in the selection of an America-Swiss consortium (Refinery Associates of Texas, Mecuria and Antika Enterprises S.A.) as winner.

KESH (OSSH) - The privatization law for OSSH confirmed that 76% of the shares would be offered to the strategic investor that have the requisite experience in the field of distribution of electrical power. The bid submission is anticipated to be in September and the eventual completion of the sale expected to be completed by the end of the year.

ASHTA - The concession of the design, financing, construction, transfer, operation and maintenance for hydro power plant on the Drin River has been offered and the selection of pre-qualified bidders announced. The opening of bids took place with the announcement of two bids submitted. Evaluation is underway.

EBRD has closed some transactions recently with the 10% share acquisition in Union Bank and near 100 million EUR financing to Albtelecom. The EBRD continues to be very active in the Albanian market lending support to the private commercial sector.

BSTDB (Black Sea Trade and Development Bank), with the legal support of our firm, has just signed a 20 million EUR financing agreement with Kurum International.

Kalo & Associates was recently selected, through a tender procedure, to provide its legal expertise in assisting the Financial Services Authority (FSA) in the drafting of a new Pensions Law and a new Collective Investment Funds Law.

A new law on electronic communications law is now in force as of 25th June 2008 and it is worth noting that it is in much the same form as the draft discussed in our last March 2008 edition. We wish to add that the in-house legal team at Vodafone Albania, led by Ervis Karandrea, were equally instrumental in the discussions and suggestions made during the drafting phase, most of which unfortunately were not taken very much into account by the legislator. One of the worries arising out the new law is that pursuant to Article 138 all the existing decisions and council of ministers decisions pertaining to the old law shall remain in force until replaced by a new set of secondary legislation. Thus such existing secondary legislation is likely to regulate activities and services that have been liberalised under the new law, and may create confusion.
practices of the central banks of the European countries. This revision came at a time when we are seeing an increasing level of use of debit and credit cards in Albania.

The Regulation clearly defines the types of electronic payment instruments, which are classified into two main groups: (i) E-banking; and (ii) instruments of electronic money (e.g. credit and debit card systems).

As opposed to the old Regulation, this new act now regulates the relationship between the Bank (second tier banks) and the shops/traders. For example banks can enter into agreements with a trader to enable customers to purchase goods for which the bank shall pay up front to the shop and the customer pays the bank in instalments.

For the implementation of those agreements between the banks and the international credit card companies, the bank may adopt the role of the issuer (in relation to the credit cardholder), and/or the role of the receiver (in relations with shops/traders as afore-mentioned).

This scheme is designed based on the regulations of the Project SEPA (Single Euro Payment Area) that entered into force in the EU countries on 28 January 2008. The Regulation defines the terms and minimum conditions that a bank must include in contracts entered into with clients, so as to protect the customers and ensure transparency.

The instrument of electronic money is one that is virtually new in the field of services of electronic payment. Whilst it seems that in reality none of the banks in Albania have actually ever issued electronic money, there is now a regulatory framework that aims to support the new service.

By JONA BICA
Acting Head of Banking/Finance

DIRECTORS TO PUT COMPANY’S INTEREST FIRST: Introduction of Fiduciary Duty

A number of weeks ago, the new company Law No. 9901 dated 14.4.2008 “On Entrepreneurs and Commercial Companies” entered into force after the decree of the President. This law was created after numerous roundable discussions with interested stakeholders.

The law has reflected portions of both common and civil law with great influence from UK, German and Italian law. In contrast to the old company law, the new law embodies a set of principles mostly found in common law jurisdictions and doctrines, particularly in respect of directors of a commercial company.

Given the improvements, significant I would argue, to the law regulating the directors’ duties, it is important that directors become very familiar with such changes prior to accepting the challenging job of representing a commercial company.

As hinted above, the premise for this article is the body of principles laid down in Chapter IV of the law, otherwise known as “fiduciary duties”.

Company’s Interest First

Article 14 of the law lays down the foundation of the principle that a director is obliged to exercise his powers for the benefit of the company and not for his own benefit. This means that where there is a conflict of interest between a director’s personal interests and those of the company, those of the company must prevail. This new adopted foreign doctrine stipulates that in the case of a conflict of interest a director must not use any corporate opportunity for his/her own personal advantage: E.g. when a director negotiates a contract in the company’s name but then enters into the contract in his own name.

Personal liability

The principle of personal liability of directors is set out in Article 16, as shall apply in situations where he/she, inter alia, treats the assets of the company in a manner as if they were their own and most significantly when they fail to ensure that the company has sufficient capital at a time when they know or ought to have known that the company would not be able to meet its obligations towards third parties. The latter described, in common law, pertains to wrongful or fraudulent trading and may involve the case of directors who, while knowing that the company is deteriorating and not able to pay its debts, undertake further obligations with third parties.

Non-competition: A further change is that there is now a statutory non-compete provision, impeding a director from working in another company of the same profile (during the term of his/her employment with that company). In accepting the position the director has automatically accepted this non-compete restriction whether or not stated in the employment or service contract. This restriction can, however, be waived by shareholders of the company. Breach of this principle, without the proper waiver, entitles the company to seek damages. Directors shall also be personally liable for unlawful disclosure of business secrets to which they are privy to as a result of their role and duties in the company.

Duty to Creditors: In addition to the duties a director owes to the company and its members and/or shareholders, the director shall now play a role with an important responsibility in protecting the creditors of the company. The new law has introduced the requirement for the issue of a solvency certificate, which basically means that before distributing profit to the members/shareholders of the company, a director must issue a solvency certificate, and shall be personally responsible for the accuracy of such. This certificate shall certify that the company’s assets will fully cover its liabilities, and that the company will have sufficient liquid assets to cover such liabilities as they fall due in the subsequent twelve months. It is clear this article places great pressure on the directors, and particularly so in balancing the needs of the sometimes demanding shareholders with the need to adhere to the above rule. Although this is somewhat relaxed as some accountability is also placed on the members/shareholders of the company who accept dividends where no solvency certificate has been issued, or who knew that the
company did not satisfy the solvency conditions or, in view of evident circumstances, must have been aware of it.

The afore-mentioned provisions clearly indicate that the intention of the new law was to instil significant elements of corporate governance in placing responsibility and accountability in the hands of the director. It also aims to secure the trust of shareholders/members in the company management. This newly introduced principle is reinforced by the fact that other articles of the new law specific to joint stock of limited liability companies provide that directors must also perform their duties established by law or statute in good faith in the best interests of the company as a whole including the environmental sustainability of its operations while giving adequate consideration to matters to be decided and avoiding actual and potential conflicts between personal interests and those of the company. Interestingly enough, the law introduces the common law "duty of care and skill" principle where a director must exercise reasonable care and skill in the performance of his functions in the company. Common law doctrine explains that under this principle a director would not be liable for mere errors of judgment but on the other hand the duty of care and skill is fulfilled if directors act within their powers with such care as can be reasonably expected of them, taking account their knowledge and experience. The standard is flexible and it remains to be seen if how, if ever, it will be developed in Albanian legal practice, and indeed how the term 'reasonable' might be interpreted.

By Av. Anisa Rrumbullaku
Head of Corporate/Business Licensing

Now with the NEW OFFICE in PRISTINA

The office Kalo & Associates in Pristina, through the two well-established lawyers, partners of Kalo & Associates, namely Ahmed Hasolli and Gazmend Nushi, starts providing services to big clients, including a world leader for telecommunications supplier. The office in Pristina is committed to providing equally quality services.

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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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