

ALBANIA LEGAL NEWSLETTER

MANAGING PARTNER, MR. PERPARIM KALO IS SPEAKER AT IBA CONFERENCE IN COPENHAGEN

The conference was held by the International Bar Association on ‘Cross-border Real Estate Investment’ and Mr Kalo spoke as part of a panel of regional experts on *‘Investing in real estate in south-eastern Europe: opportunities and threats’*, not only regarding Albania but also covering Kosovo. The panel was made up of the firms of other SEE Legal partners. The audience was predominantly made up of law firms in the Nordic and Baltic countries, but also law firms from our region and a number of EU countries such as Austria, Belgium, Germany, United Kingdom, etc. Following the previous invitation to speak on Real Estate at a conference in London, in May this year, there is further indications of the strengthened

interest foreign investors have in the real estate sector of Albania. Given the increasing economic turmoil in the US and encroaching in Western Europe, it would appear that the South East Europe region is becoming an increasingly attractive and safer investment option.

Also on real estate, our **Head of Property Department, Zamira Xhaferri**, has been invited to be a keynote speaker at a conference in Bucharest, on 26th September where *‘South Eastern Europe Real Estate - Emerging market trends in Southeast Europe’* will be a topic for discussion. The focus of her contribution to the panel of investment companies, real estate consultants and financial ser-



Title: Pilgrim

By Ardian Kapo-2003

vices consultants, shall be on the concerns of investors in **Albania**, concentrating on real estate and tourism. For more information please visit the website:

<http://www.realestate.easteuro-link.co.uk/Upcoming.html>

BALKANS LEGAL FORUM to be held in Sofia, Bulgaria 5th – 7th November 2008

The SEE Legal Group (www.see-legal.org) of which Kalo & Associates is one of the founding members shall be sponsoring, one of the major regional events. The Managing Partner, Borislav Boyanov, of our SEE Legal Bulgaria partner will be the Forum Chair opening the session on the 5th November. This event is annual and attracts foreign investors, particularly private equity funds/banks from around the world, and many of which have been represented Kalo & Associates. For registration and other information you can visit the website: www.balkanlegalforum.com.

“PIERCING THE CORPORATE VEIL” IN ALBANIA

The law in Albania was relatively recently updated with the enactment of some new important laws such as the new Company Law, new Tax Procedure Law and amendments to the existing law on Bankruptcy. The new developments in these laws have also introduced the principle of “piercing the corporate veil”. This is a significant step in Albania and important to note, as one can no longer run a business resting upon the principle of “limited liability” as a safety net.

Bankruptcy Law: According to the recent changes to the Bankruptcy Law (*Law No. 9919 dated 19.05.2008*) where members or shareholders of a company, during the exercise of their activities, have been aware of the insolvency of the company and have not submitted any request to the court for the opening of the bankruptcy procedure, within a period of three months starting

from the date of awareness, they shall be considered personally liable. Will the members and directors only be liable for the damage caused to the creditors as a result of merely the delay? Or, can this provision be interpreted to the effect that the ‘corporate veil is pierced’? In the latter interpretation, one may deduce that the mere failure to submit any request to the court for the opening of the bankruptcy procedure after the shareholder(s) become aware of the insolvency is not sufficient to cause the shareholder(s) to be subject of piercing the corporate veil. However, it is not sufficiently clear as to the criteria causing the shareholder(s) to be considered personally liable, and further, this law does not refer to the relevant provisions of the Company Law.

Company Law: Under the new Albanian Company Law (*Law No. 9901 dated 14.4.2008*) one of the explicit ex-

ceptions from the principle of limited liability is the abuse of the legal form set out in *Article 16* of the law. *Article 16 (1) (a)* refers to the act of “abuse”, thus interpreted that it requires an element of fault (under Albanian law fault includes gross negligence or wilful misconduct) on the part of the persons who act or fail to act as required, and therefore it is implied that this fault must be proved. Strangely there is no element of abuse present in the wording of *Article 16 (1) (b)*, thus no link to the requirement of fault. Care should be taken in not applying or enforcing this provision frivolously, and to ensure that it is read in light of the need for the existence of fault, i.e. consequently harming the interests of creditors. The provision of *Article 16 (1) (c)*, also problematic, recognises the principle of a standard of duty of care in introducing such terms as “ought to have known”, i.e. a lower threshold than the concept of “abuse” and is short of the requirement of intent. This provision also mentions that the shareholders “should have acted” so as to ensure that the company has sufficient capital to fulfil the obligations towards third parties, thus, placing a high standard of duty of care upon shareholders.

Tax Procedure Law: The principle of exceptional liability of shareholders is also recognised by *Article 99* of the new Tax Procedure Law (*Law No. 9920 dated 19.05.2008*). This law expressly provides

that after the sale of a seized property and when the tax liabilities of the legal person are not fully paid, the liabilities for the remaining tax liabilities shall be transferred to the shareholder(s) responsible for the payment of the tax liability in conformity with *Article 16* of the Company Law. Further this law states that the director and shareholder(s) are jointly liable for the unpaid tax liabilities of the legal person; and also stipulates that the same rules apply when there are unpaid tax liabilities at the completion of the process of liquidation or bankruptcy of the company.

Having considered the above it is clear that the principle of ‘piercing the corporate veil’ is now recognised in the Albanian legislation. But, what needs further clarification is who is subject to the piercing of the corporate veil and what is the role of the Albanian courts in the interpretation and implementation of this principle in practice? *Article 16 (1)* of Company Law speaks of “members and shareholders ... who act or fail to perform required actions”. The new Tax Procedures Law provides that “...administrator, quotaholder(s) or shareholder(s) are jointly liable for the unpaid tax liabilities...”. However, it remains unclear what the terms “fail to perform required actions”, given that the Company Law does not seem to provide for any specific “required actions” on the part of members or shareholders aside from their general duties deriving from

being a member or shareholder.

It is crucial for the court to play a fundamental role in the implementation of exceptional liability of shareholder(s), especially as the Company Law does not clearly formulate the rule with consistent reference to “abuse”. Further, these new amendments do not expressly require a causative link between the act of the persons referred to in the provisions mentioned above and the consequences and the extent of their liability. The role of the court is also important because this principle can be implemented only in cases when the court decides on the fault of the shareholder or member, and in the declaration of the insolvency of the company due to the abuse of the “limitation of liabilities” principle. Legal amendments mentioned above have not taken into consideration these important elements, thus risking the failure of the legislative guarantees offered even in the case that the business activity fails.

Is this principle constructed according to the standards and true intention? Shall the courts apply the narrowest interpretation of the provisions related to piercing the corporate veil as anticipated by the doctrine? One may conclude at present that whilst the introduction of this principle is a very positive move, there remains a high risk of its misapplication.

By Av. ARDJANA SHEHI
Head of Tax & Employment

PRIVATISATION UPDATES

ARMO - The Government of Albania has signed the Share Purchase Agreement for the sale of 85 per cent of shares in the Albanian Refinery and Marketing of Oil (ARMO) with the winning US-Swiss consortium, namely Refinery Associates Mercuria and Anika Enterprises.

KESH (OSSH) - The privatization of OSSH still on-going, strategic investors have completed their respective due diligence of the company and are preparing to

submit their final bids. This is still to be the most important project for the government this year.

INSIG - 9 regional and internationally recognized insurance companies expressed their interest in the privatization of the state shares in INSIG, and it seems that a shortlist will soon be announced. According to the INSIG privatization law 61% of the shares are being offered to the strategic investor. BNB-Paribas are the international privatization consultants.

UNITED BANK OF ALBANIA

The Albanian State had last month decided to sell 40 per cent of the shares in United Bank of Albania. Now the process has begun and Kalo & Associates have been selected as the transaction advisor. The sale is structured as a direct sale by the Albanian State (represented by the Minister of Finance) to one of the other main shareholders pursuant to a right of pre-emption (structure defined in Law No.9314, 11.11.2004).

LEGAL UPDATES

Law on Foreigners

According to the Ministry of Labour the number of foreigners working in Albania is in the region of 5000, mainly in sectors such as construction, mining, and the banking system. The increase in the number of foreigners has positively affected the economy but in the meantime has also necessitated the drafting of a more advanced legislation relating to the entry, stay and treatment of foreigners in the Republic of Albania. Parliament approved the new **Law on Foreigners No. 9959, dated 17.7.2008** that will replace the existing law no. 8492, **dated 27.5.1999**. This new law shall only come into force on 01.12.2008.

The new Law on foreigners has provided for new types of entry visas resident permit and work permit. These requirements for permits for entering, staying and working for foreigners in Albania are clearly stated and we hope that they will avoid problems that have been a concern not only for the foreigners resident in Albania but even for the respective authorities responsible for issuing the above-mentioned permits.

It has to be mentioned the fact that the new law, has not resolved the current problem of the duration of resi-

dence allowed by the relevant permit, which has always caused confusion and has resulted in penalties varying from 60.000 to 90.000 ALL. The problem is that all the residence permits are valid for a period less than one month than the actual time they are issued for. Pursuant to the law the application for the renewal of the residence permit must be submitted one month before the termination of the existing permit and during this period of time the applicant is provided with a temporary residence permit (i.e. acknowledgment that a renewal application has been made) in place of a full residence permit.

Some notable changes are that there shall no longer be residence permits for duration of 5 years and the age of minors has been changed from under 16s to under 18s. Under this new law there shall be no extension of the granted visas but rather a grant of a further visa for a period of up to 15 days for emergency purposes. This transition period shall serve as a period of time for the enactment of supplementary secondary legislation so as to complete the clear legal framework for all foreigners that choose to live and work in Albania.

Expanding the Scope of the Law on Money Laundering

With the new Law "On the Prevention of Money Laundering and Financing of Terrorism" No. 9917, which has been approved by the Albanian parliament on 19th May, 2008, finally we can affirm that the Republic of Albania fulfils (at least theoretically) the 10 strategies recommended by the FBI for the Fight against Money Laundering which are required to be followed by the countries and regions so to achieve the universal standards already adopted by the international community in respect of regarding this field. Albania has already ratified all the International Conventions related to money laundering prevention and financing of terrorism.

The new law aims to prevent money laundering and the products that derive from criminal actions and further the prevention of the financing of terrorism. This law fulfils international standards and creates not only an armoury of protection against this phenomenon but furthermore provides a capacity of discovery and prevention of this financial criminality. This law approximates to the EU legislation by fulfilling the requirements of Articles 4, 70 and 82 of the Stabilization Association Agreement (SAA) and of the EU Directive no. 2005/60 of October 2005.

OPENING OF BANKRUPTCY PROCEDURES UNDER TAX PROCEDURE LAW

According to Article 104 of the Law No.9920, dated 19.05.2008 "On the tax procedures in the Republic of Albania"; the tax authorities are entitled to require the commencement of the bankruptcy procedure in the case where the entities meet certain criteria. The more problematic criteria are clauses a), c) and ç).

Clause a) provides that procedures can be initiated if a business is declared as having a 'passive status' with the NRC (National Registration Centre). Such declared passive status can be due to many reasons, and should not legitimate the right of tax authorities to require the starting of bankruptcy procedures. According to the legislation of

other countries, this is not considered to be a valid cause for the submission of the request for the starting of a bankruptcy procedure.

In clause c) bankruptcy can be initiated if a company declares losses in its capital for three consecutive years. Even if losses have been declared for 3 years, the company still has means of recouping such losses, e.g. a subsidiary can be assisted by its parent company. Thus, for as long as such a company does not incur in any loss so as to bear liability toward the creditors (including the tax authorities), the tax authorities should not be entitled to start the bankruptcy procedure. Again this is not considered



Title: **Three Valiant**
By: **Zef Shoshi -1999**

to be a cause for the starting of a bankruptcy procedure in other legislations.

Clause ç) provides for a similar reason for starting these procedures as clause a), and that is bankruptcy can be initiated where a business has not carried

out business activities for at least 2 years from the date of effectiveness of this law. Needless to say this an insufficient reason as many companies are established and left dormant for numerous reasons, even if in some cases to retain a specific company name until the activi-

ties can be begun.

Some of the criteria in Article 104 are of course legitimate, clause b) and d) are reasons that the tax authorities can use in the quality of the creditor. It is difficult to understand the rationale behind placing such criteria,

and even more so why in this Law as opposed to the Law on Bankruptcy. Nevertheless we need to bear in mind that this Article 104 of the Tax Procedure Law should be read together with the relevant existing provisions of the bankruptcy law.

OUR KOSOVO OFFICE REPORTS INCREASE IN FOREIGN INVESTMENT ACTIVITY

One of the main concerns of foreign investors wishing to enter the Kosovar market, quite understandably, is the risks associated with the change of laws. With Kosovo's recent change in status many changes are anticipated in unifying its own laws and this is a concern for investors who hope to gain some certainty in the protection of their potential long-term investments.

There is however protection afforded by the legislation in Kosovo. The Foreign Investment Law in Kosovo "Stability of Investment Regime" (Art.6) states that no law, regulation or other normative act shall have retroactive force or be applied retroactively to the detriment of a foreign investor or the investment of a foreign investor. If (i) a foreign investor has made an investment in Kosovo, and (ii) within the five year period immediately following the date such investment is made, any provision of the preset law is changed or repealed, or if the value of any provision of the present law is affected by the subsequent promulgation of another normative act or an amendment to another normative act, and (iii) this has a detrimental impact on the foreign investor or the investment, then the foreign investor shall have a right to compensation from the government of Kosovo in accordance with article 8.4 for losses and expenses incurred as a consequence of such change, repeal or promulgation. This right shall be vested in and irrevoc-

cably acquired by a foreign investor at the moment the foreign investor makes an investment in Kosovo.

Other key elements of the Foreign Investment Legislation are much the same as in Albania:

- Foreign investments will be governed by the principle of national treatment, meaning that they will be treated no less favourably than similar domestic enterprises. Also foreign investments will be protected against unreasonable expropriations.
- Income from foreign investment may be freely transferred abroad and otherwise used in an unrestricted manner.
- Foreign investors are able to employ foreign nationals;

For Investment Guarantees, Kosovo has:

- The Multilateral Investment Guarantee Agency MIGA (a member of the World Bank Group) guarantees investments in Kosovo to the value of 20m Euro.
- The US Overseas Private Investment Corporation (OPIC) also provides political risk insurance for foreign investors in Kosovo.
- For investment and credit guarantees from Austria there is the Austrian Kontrollbank (OeKB) and for Germany the Euler Hermes Kreditversicherung.

According to the Business Registry data for 2007 there were 2,012 companies of foreign and mixed ownership that had already used the opportunity to

invest in Kosovo. The large number of foreign companies operating in Kosovo is a living proof of the opportunities and benefits that the country offers and also shows a base of quality products and a self-sufficient service providing community. This number has surely increased over the last year, to date, and this is reflected by the many prominent clients who have already approached our Prishtina office for legal services.

Political Will: The Kosovar Government presented its strategic projects at the Donor Conference held in Brussels in July this year. The overall goal of this conference was that the Kosovar government was to have the opportunity to present its plans for the period of the next three years focusing mainly in the Energy sector, infrastructure, and democratisation and enforcement of the rule of law.

The further purpose of this event was to attract foreign investors to the current investment climate and environment in Kosovo. The Kosovar Government is taking such initiatives seriously and making steps towards the reorganisation of the POE (publicly owned entities) in Kosovo, primarily in the field of the energy sector, telecommunication and eventually road construction.

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