SEE LEGAL

FIFTH YEAR ANNIVERSARY

South East Europe Legal Group (SEE LEGAL) celebrated its 5th anniversary in London. The event took place in Dorcester Hotel in London and was attended primarily by representatives of international law firms, including “magic circle” law firms, other prominent London-based and European-based law firms, legal publishers etc. The SEE LEGAL co-chairs, Mrs. Nina Selih (Selih & Partners, Slovenia) and Mr. Perparim Kalo (Kalo & Associates, Albania), in their speeches, underlined the values of SEE LEGAL group in the regional market and also focused on the challenges in the year to come. Mr Boris Boyanov (Boyanov & Co., Bulgaria) succeeded by Mrs. Patricia Gannon (Karanovic & Nikolic, Serbia), were warmly appreciated for their contribution to the recognition and further organisational consolidation of SEE LEGAL.

Finally, SEE LEGAL introduced Mr. Gus Papamichalopoulos from the leading Greek law firm Kyriakides Georgopoulos & Daniolos Isaias, as the successor to Mr. Kalo to hold the office term for 2009. The representatives of law firms attending the ceremony confirmed their willingness to consider SEE LEGAL as their valuable partner in regional projects.

SEE Legal

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CONCESSION LAW AMENDED

Many more concessions are expected to be awarded in 2009, for small and large projects, within the energy sector, transport and other areas. It has proved to be a successful form of public-private partnership. It is noteworthy that several amendments were introduced to the existing Law “On Concessions” no. 9663, dated 18.12.2006 by the amending Law No. 9995, dated 22.9.2008, published in the Official Gazette no. 156 dated 10 October 2008. Such amendments were brought about to facilitate the ease of the concession process. Changes include, inter alia, the following:

(1) Following the opinion issued by the Concessions Treatment Unit and the execution of the concession agreement, within the existing process the Council of Ministers approval shall no longer be required for those agreements involving investments less than 20 million EUR.

(2) The changes now permit the recognition of step-in rights, thus allowing for the substitution of the selected concessionaire and, in the cases of serious breaches of the obligations on the part of the concessionaire. There shall be no need to instigate new tender procedures. This change provides for the option of the inclusion of such step-in rights in the concession agreement by both parties.

(3) The entry into force of those concession agreements exceeding a term of 35 years shall only be valid upon ratification by the Parliament. This would seem to be so regardless of the value of the project.

Kalo & Associates and other members of the SEE Legal Group are proud contributors to GMB Research, a new online information resource, aimed at facilitating the ‘due diligence’ process in 30+ countries from South East Europe, CIS and the Middle East as well as parts of North Africa and Asia, giving access to a unique database of expert contributors. Access to GMB Research is available by annual subscription, or by pay-as-you-go giving access to country or regional coverage on a daily, weekly or monthly basis.

Kalo & Associates has been the exclusive legal content partner on Albania for over a year. Covering over 12 areas of legal practice, this content will also feature in a forthcoming book, Albania’s Business Environment. Due for publication in February, this is the first authoritative guide to the prospects for business and investment in Albania.

To pre-order your copy of Albania’s Business Environment, please email order@gmbpublishing.com, quoting “Ref: BEALBFeb09” and receive a 15% discount off the cover price.

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BANKS LOOK FOR IMPROVEMENT IN THE PROCEDURES FOR FORECLOSURES

Working with the banking sector it is difficult not to speak of the current global financial crisis. It would seem not to have bypassed the Albanian economy, as some thought it might do. Although not affected here as significantly as elsewhere perhaps, there have been consequences in this market. It is worth noting that the banking market in Albania consists mostly of foreign banks or branches of foreign banks. The relatively and comparatively minimal negative impact on the banking sector in Albania is primarily due to the fact that banks in Albania are in general deposit holding banks that provides adequate liquidity. Furthermore there is not a great dependence on the global capital markets.

As we have seen, this current crisis is intensified by the lack of liquidity of banks and that inevitably has a profound impact in the market. Insufficient liquidity results in less available credit, resulting in fewer investments, thus fewer jobs and less money for future buyers for the basic retail industry. It is noticeable that banks are becoming more cautious and less flexible in their lending facilities. The primary problem facing the commercial banks in Albania at present is that current foreclosure procedures are rather lengthy and often confront various obstacles. Such concern is not necessarily in light of the current crisis but perhaps has been made more acute by it and reflected by the increase in the volume of foreclosures.

The effectiveness of the secured credit transactions legal framework, which covers movable and immovable properties, is generally hampered by the slow enforcement of the law and the problems with the administrative bodies and their performance. The procedures for the foreclosure of the collateral in Albania are regulated by the Civil Procedure Code. The state Bailiff Office is in charge of organizing and implementing the foreclosure procedures. Below we note the procedure of the recovery of debt where collateral is in the form of immovable property.

The law allows only for two rounds of auctions to be organized under a foreclosure procedure. If there is no buyer after the second auction, the creditor is invited to take possession of the immovable property but at the price announced in the auction. If the creditor chooses not to take possession of the property, as perhaps the price does not cover the value of the debt, the foreclosure procedure is considered terminated and the creditor has to seek other means of recovering its debt.

Under this procedure, banks are in effect indirectly forced to take possession of the immovable property after the second round of auction as there are no other means of seeking recovery of the debt. In many cases the creditor ends up buying the immovable property at the second auction price that is determined by the law. This second auction is executed 3 months after the first auction and is based on a new price that shall be not less than 20% of the initial auction price, i.e. the market value as determined by the bailiff. Even at the initial auction the bailiff sets the price either by taking the average value using the real estate registry or it appoints a court listed appraiser. There are some concerns that the market value might be prone to subjectivity and not enough reference to objective standards. In the case that the sale price of the collateral is higher than the amount of the debt, the creditor has to pay to the debtor the difference, prior to taking into account the cost related to expenses incurred for the auction procedures (e.g. legal fees).

To improve the situation of the current foreclosure procedures a new law is being considered seeking to liberalize the public enforcement system. (Draft is further described in the next article in this newsletter).

There are other legislative changes proposed by the Ministry of Justice in collaboration with the Associations of Banks, seeking to introduce timed procedures, i.e. to provide that if the debtor fails to pay back his loan taken from the bank, than his property held as collateral will be taken three days after the court decision. The court case is proposed to be concluded within a in a time period of not more than one week from filing of claim. This new draft further affords the banks the right to sell the sequestered property at any price, i.e. at a value it believes to be marketable and to cover the debt and related costs. The new draft further addresses the problem of the manner of the notification of the foreclosure proceedings to the debtor. The bailiff officer has the right, if it is impossible to locate the residence of the debtor, to display the sequestering notification on the court notification board and 30 days after this action he shall have the right to sequestrate the property even if the debtor is not present, but with the testimony of local government’s member.

By such changes being effected not only in the legislation but in the implementing procedures and practices, the recovery is expected to become easier and banks’ costs in foreclosures of mortgages to decrease. These effects ultimately translate into lower costs of bank products and services (e.g. loans), and less reluctance to grant loans because of a more efficient and reliable enforcement system.

Erion Lena (LLM), Associate Banking Department
INTRODUCTION OF PRIVATE ENFORCEMENT AGENTS

In the framework of reform within the judicial system, the revision of legal practices regarding the enforcement of court decisions constitutes a core issue that has drawn the attention of the legal community, senior state officials and political groupings. Several decisions (e.g. Qufaj Co. Shpk v Albania, 18.11.04) rendered by the European Court of Human Rights have penalized the Albanian Government for non-compliance with international obligations with regards to the enforcements of court judgments pertaining to Albanian citizens. The lack of enforcement undermines the fundamental rights deriving from a decision of a court of law. The current monopoly of enforcement held by the State Bailiff’s Office is the main factor that has exacerbated the weakness: lack of accountability and consequently delays or even absence of court decision enforcement.

To address the current inadequacies in the enforcement system a draft law on the private bailiff’s service is being considered. This new piece of legislation intends to introduce an alternative enforcement procedure by allowing private enforcement agencies.

The draft will also discuss the manner of the organization of the private service, the key tasks, fees, liabilities and disciplinary measures. This draft law permits private or public physical or juridical subjects that have as their main activity the execution of enforcement of the court decisions and other executive titles to take up the role of private bailiffs. We would note here that this is one of the very few legislative examples where such an important service can be exercised not only by the legal entities but also by physical persons.

It is believed by experts that the establishment of the private enforcement service, whilst retaining the actual system of public bailiff’s service, should improve the situation.

First and foremost this draft law intends to ensure some independence from any political influence in the enforcement system. The creditors’ legal interests are more protected and more flexibility and control is afforded to them in that they shall be given the choice to consider which service is more responsive to his/her needs both in terms of fees and time.

AMENDMENT OF THE LAW OF SPIACIAL PLANNING LAW

Following the last report of the World Bank, within which the process of obtaining a construction permit was considered to be one of the most bureaucratic, the Council of Ministers was expected very shortly to approve a draft law “On Territorial Planning” that would tackle that problem.

The draft law touches upon some main issues that relate mostly to the application procedures, the application time, the principle of tacit approval, and also the one-stop shop-service.

(i) Application

The existing system provides that all applications for construction pass through two separate phases, the first for the site permit and second for the building/construction permit. The proposed amendments aim to shorten this procedure, replacing it with a one phase application for a ‘development permit’ that shall encompass both the site and the building permit. However the draft suggests that there shall still be some in cases whereby a two phase application procedure will still be applied (albeit perhaps in a different manner).

(ii) Application Time

The World Bank “Doing Business in Albania” report also noted that currently the actual average time period it can take to obtain both the site and the construction permit to enable the commencement of construction works is approximately 365 days. The amendments for the time for approval propose that it be divided into the following phases:

(i) 5 days for the acknowledgement of receipt of complete application; (ii) 55 days for examining the permit; (iii) 5 days for issue of permit document.
(iii) Tacit Approval

This principle of tacit approval has been recognized and is used in other licensing procedures by the State Authorities. Basically a permit shall be considered to be approved and granted by the authority if no reply is given to the applicant within the defined time period in the law. There needs to be an instrument guaranteeing that the time period provided for in the draft law is adhered to and can be relied upon by applicants. Thus it is for this reason, that changes are introduced to provide that if the application is not examined and a decision issued within a 55 day term then it shall be deemed to have been approved. Such tacit approval shall also apply to the initial 5 day period for the acceptance of a complete application.

The consultation process with the interested stakeholders has continued, and it is said that this draft law is expected to go before Parliament for final approval early this year.

Oltjan Hoxholli
Property Department

CHECKING ELIGIBILITY FOR FISCAL AMNESTY?

The recently enacted Law Fiscal Amnesty (No.9986 dated 11.9.2008) which was effective as of 7th October 2008 provides for potential amnesty of customs and tax liabilities, unpaid liabilities for mandatory social security contributions and health insurance as well as of the corresponding fines and interests. Pursuant to this law an Instruction of the Minister of Finance was issued which provided for further details concerning its implementation. Together, the Law and the Instruction provide for the categories of liabilities, fines and interests that are waived if certain requirements are met. In addition, these provisions provide the categories of taxpayers who shall not benefit from the fiscal amnesty.

The fiscal amnesty provisions do not however provide for a procedure to be followed by the taxpayer(s) who according to the law are eligible for consideration to benefit from the fiscal amnesty. Having considered the Order of the General Director of the General Tax Directorate issued for the implementation of the Fiscal Amnesty Law it is implied that the procedure for the determination of who benefits from the amnesty shall be executed by the tax authorities only. This Order directs that a Special Commission shall be created for this purpose in every regional tax office and that they shall notify taxpayers if they benefit from the amnesty.

It perhaps would have been more prudent to provide for the taxpayers participation in this process, e.g. a procedure expressly permitting taxpayers to make written requests for the tax authority to consider their right to benefit from the amnesty and be in a position to provide as much information as possible to enable the Special Commission(s) to make an informed decision. It may be the case that the Special Commission(s) do not have all the relevant information at hand to enable a complete and informed decision to be made. A key issue is that there is no time period established for when the Special Commission(s) must notify those tax payers that they benefit and to what extent they benefit from the fiscal amnesty. In light of the afore-mentioned, it may be advisable to take advantage of other pieces of legislation that can be used as a basis for taxpayers to participate in the confirmation that they benefit from the fiscal amnesty (such as Administrative Procedure Code, Tax Procedure Law, FOIA, etc). In this situation, should taxpayers want to be active in the confirmation of their eligibility for the fiscal amnesty it would be prudent to first seek the advice of a tax lawyer.

Oltjan Hoxholli
Property Department

UPDATE ON SOME PRIVATISATION PROJECTS

ARMO - Minister of Economy, Trade and Energy, Genie Ruli, on behalf of the Albanian State, signed the contract, on 27th November 2008, for the sale of the 85% stake in this oil refinery and distributor to AMRA Oil, for 128.75 million EUR.

INSIG - Minister of Finance, on behalf of the Albanian State, named on the 9th of December 2008, American Reserve Life Insurance the winning bidder in the tender for the sale of a 61% stake in insurer INSIG for 25 million EUR.

UNITED BANK OF ALBANIA - The Albanian State, represented by the Minister of Finance, is in the process for the sale of the state-owned shares (40 per cent) in the United Bank of Albania to one of the existing shareholders, namely to Islamic Development Bank.

HPP ON DEVOLL - After considerable negotiations the Minister of Economy, Trade and Energy, on behalf of the Government of Albania signed a concession agreement with Austria’s EVN and Norway’s Statkraft to build, operate and transfer three hydroelectric plants, an investment of 950 million Euros on the Devoll River.

SKAVICA HPP - A tender procedure for another important HPP, Skavica (on the Drini River), has been recently opened and some 6 reputable companies have been shortlisted following the expression of interest procedure.

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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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