RECENT THREATS OF BANKRUPTCY ACTIONS BY THE TAX AUTHORITIES

It has recently been published in the media that some Albanian companies have already been listed as entities that will potentially be subjected to bankruptcy procedures, initiated by the Tax Authorities. Below we provide some thoughts to help clarify some of the procedural aspects and legal consequences for such companies that may actually be subject to such procedures.

From informal communications our attorneys have had with officers of the tax authorities we have managed to glean that at this stage there are only a series of internal orders of the tax administration and so far no further official step has been taken with regard to the initiation of bankruptcy proceedings (i.e. no petition for the opening of bankruptcy proceedings has been submitted to the court). Such internal orders have not yet been communicated officially to the state authorities but circulated only within the departments of the tax administration. In addition to this, we understand that the corresponding tax offices will conduct further investigations (it seems that a group of inspectors have already been appointed by the director of the GTD into the financial standing of some companies and only then, after having more facts, evidences, etc., shall the relevant tax offices file separate petitions addressed to the court for each of the companies subject to potential bankruptcy.

**What is the legal basis?** In the absence of any official information we can only assume that the tax office has based its action to target such companies as potentially subject to potential bankruptcy.

**ACTIONS BY THE TAX AUTHORITIES**

**Corporate Rescue - Are the tax authorities aware of this overriding principle?** This apparent list is not in official form and any concerned company should wait for an official written request of the tax office on this issue OR for the copy of the petition of the tax office addressed to the court. Only these written requests/petitions would provide the affected taxpayers with official reasons and the criteria of Article 104 specifically relied upon as a basis for the potential initiation of the bankruptcy proceedings. Only then can the taxpayer truly prepare a defence and be prepared for any ensuing legal actions.

In the case that the tax authorities do formally initiate bankruptcy proceedings at court there are legal arguments to oppose such action, particularly where the bankruptcy proceedings are based upon paragraphs (i), (iii), (iv) of Article 104. Certainly for companies having declared losses during their investment period, which not unusually run into a period of three years, there are strong opposing arguments to put forward. Even in the case that the court does decide to open bankruptcy procedures the law provides for other alternatives to liquidation due to bankruptcy.

The Albanian bankruptcy legislation acknowledges the principle of corporate rescue and that this principle prevails over liquidation due to bankruptcy. Note that the implementation of this principle is also supported by the legislation on state aid. **Should the bankruptcy procedure be effective for the tax authorities?** It is important to note that these provisions of the Tax Procedure Law are not meant to be read as stand-alone provisions but in conjunction with the Bankruptcy Law. There is a missing link to the requirement for an insolvent standing of the taxpayer(s). In the case that the taxpayer(s) are not insolvent there are strong legal grounds to oppose the opening of the court bankruptcy proceedings. It appears as if the tax administration is wrongly utilising the basis for this right under Article 104 with the basis for the right to request the opening of the court bankruptcy proceeding in the capacity of a creditor.

It is understandable that in the end the goal of the tax authorities in initiating bankruptcy proceedings would seem to be to have some monetary benefit from the liquidation process. Having due consideration for the relevant pieces of the existing Albanian legislation it is questionable as to whether the tax authorities ever truly considered whether the liquidation resulting from bankruptcy is going to be effective and achieve the end goal they perhaps anticipated. This recent rash action of the tax authorities does not seem to be a visionary move on their side in the attempt to create and maintain a sustainable partnership with the business community. It seems that the tax administration has not considered that bankruptcy proceedings involve huge costs which is in fact the first cost to be extracted from the bankruptcy estate.

It is imperative for the business community, particularly those directly affected, to not only pursue individual action but to also lobby and take group action to oppose Article 104 of the Tax Procedure Law.

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REGISTRATION OF SHARES OF JOINT STOCK COMPANIES – SECURITIES LAW

After a year in force, there is a general accord that the New Company Law (2008) together with other recently enacted laws has further strengthened corporate governance rules with a view to protecting the interest of the shareholders and other stakeholders of a commercial company, e.g. creditors. Within this context, the New Company Law, the Securities Law (2008) and the National Registration Law (2007) have each introduced their own but interrelated rules with respect to the registration of shares and shareholders in joint stock companies (JSC). The New Company Law, even though no longer recognizes bearer shares, has maintained the requirement of the share registry for JSCs with private and public offering. The importance of such a share registry is related to the fact that under the New Company Law (Art. 117 and 119), ownership of shares in a JSC is linked to the registration of the ownership in the JSC’s share registry. Any transfer of title of the shares shall thus only be effective upon the registration in the share registry of the JSC.

Notwithstanding the importance of the share registry as related to the presumption of ownership, there are various other registration requirements that the JSC must comply with, the relevance of which does not seem entirely clear.

One of these obligations stems from the Securities Law, which introduced its own rules on registration of shares and notification of share transfers which, inter alia, intended to support the Financial Supervisory Authority in fulfilling its duties on the supervision of the financial markets. Under the Securities Law (Art. 13) all JSCs must register with a “specialised securities register”, basic information related to their shares such as the type, issue date, information on the issuer, owner of shares with details, number of shares issued and their nominal value and last but not least the date of registration of shares in the “Centre for the Registration of Shares” (CRS).

The CRS was originally created in 1996 as it was intended at that time, as a result of a wave of privatisation of state owned JSCs there would be a need for the registration of those shares which became privately owned. As opposed to the old 1992 Company Law, the New Company Law does not require the registration of JSC shares with specialized registration centres, regardless of the extend of the shareholding or whether the JSC is registered in the securities market.

Nevertheless Article 6 of Securities Law now provides that any type of security (shares of public and private offerings of JSCs being included without exception), must be registered in specialized centres organized in accordance with the Securities Law and licensed by the Financial Supervisory Authority. It is on these grounds that the CRS has recently advised and required several joint stock companies, mostly insurance companies and financial institutions to register their shares and shareholders with its registry.

LIQUIDITY RISK MANAGEMENT - ORGANISATIONAL STRENGTHENING OF BANK

New banking Regulation “On the Core Management Principles of Banks and Branches of Foreign Banks and the Criteria on the Approval of their Administrators” (the “Regulation”) entered into on 10.7.2009.

The scope of the regulation, inter alia, is to set out: (i) the core principles and regulations for a responsible and efficient management of banks and branches of foreign banks; (ii) the requirements for administrators of banks and branches of foreign banks and required supporting documentary evidence; and (iii) the conditions for outsourcing some of its activities.

This Regulation enables banks (without the prior Bank of Albania approval) to contract and enter into agreements with third parties in the area of telephone and market information services such as those provided by Bloomberg, Moody’s, Standard & Poors etc; common infrastructure networks such as VISA, MasterCard, etc. A bank may also, without the prior approval of the Bank of Albania, outsource certain advisory services, provision of legal opinions, independent assessments, etc, and those activities that are generally considered to be of low risk (e.g. mail service, printing, purchase of goods and equipment).

Given the general financial crisis and emphasis on the need for liquidity management the Bank of Albania has provided new competences for the “Steering Council” and the “Directorate”. The key function of these two organs is to ensure banks and/or foreign branches have adequately robust internal organizational structures to manage liquidity risks. Both these organs must be familiarized with the risk profile and ensure that the capital levels of the bank sufficiently cover any risk.

The Steering Council takes a more supervisory role whilst the Directorate has a more hands-on, day-to-day management role. This Steering Council reviews and assesses: (i) the development and maintenance of the bank’s adequate professional expertise in line with the growth and degree of complexity of the bank’s activity; (ii) the financial security and stability of the bank, and the implementation of the applicable legal acts and bylaws; (iii) the prevention and avoidance of potential conflicts of interests in the activity and decision-making of the bank; and (iv) the protection of the interests of customers, investors and any members of the general public who may be affected The Directorate shall, inter alia, organize and continuously manage the bank’s activity.

Changes brought about in this Regulation in relation to the Administrators are mostly focused on their appointment criteria. An example is the appointment of a foreign citizen as an Administrator, for which the evaluation procedure shall now be in two stages. In the first stage, the Bank of Albania evalu-
NEW RULES FOR NON-BANKING FINANCIAL INSTITUTIONS

The Bank of Albania has enacted and put into effect a new Regulation “On the granting of a license to non-bank financial institutions (NBFI)” (brought into legal effect on 27.04.2009, abrogating the previous Regulation adopted by the Decision No. 96, dated 26.11.2003 of the Supervisory Council and amended by decision of the Supervisory Council No.88, dated 16.11.2005). Those subject to this Regulation include NBFIs, agents of the NBFI and microcredit financial institutions. In general this Regulation provides more complete and detailed provisions regarding the requirements and documentation necessary for the applications for such licenses.

The Bank of Albania has, pursuant to Article 126 of the 2006 Law on Banking, enacted this Regulation for the purposes of determining the conditions, requirements etc. for: (i) the granting of a license to a NBFI to carry out one or more of the activities defined in this Regulation (additional specific financial activities noted are that of factoring and exchange activity (the latter of which we must emphasize was not until now an activity specifically and expressly provided for as permitted non-bank financial activities)); (ii) granting of a license to a microcredit financial institution; and (iii) the approval of the agents of NBFIs.

The Regulation provides definitions for two previously undefined terms:

- “Microcredit” - defined as a loan not exceeding Leke 600,000 or (its equivalent in a foreign currency); and
- “Microcredit Financial Institution” as an NBFI whose lending and advisory services on the lending activity are the sole object of its activity, the average value of a loan extended to a borrower is not higher than the value of the microcredit, and at least 50% of the credit portfolio is composed of microcredits.

The Regulation introduces changes to the minimum capital requirements of NBFIs, not only those newly specified activities but also for the existing mentioned activities (e.g. leasing). The minimum required for a MFI is 1.5 mln Leke, the required capital is 100 mln Leke for all other lending activities of NBFIs. For foreign exchange business the minimum capital required is 1.5 mln Leke, and for the financial activity of money transfer as an agent of a NBFI is 1 mln Leke. The Regulation requires payment of the minimum capital to only be in the Albanian currency.

An existing licensed NBFI meeting the requirements of the MFI under this Regulation may apply to be licensed as an MFI and if successful the Bank of Albania shall, in granting the license as an MFI, revoke the license as the NBFI.

This Regulation consolidates the role of the Bank of Albania in its supervisory position over NBFIs and MFIs, and clearly provides that neither may not, without the prior approval of the Bank of Albania: (i) carry out financial activities not included in the licensed licences; (ii) reduce the capital; (iii) appoint one or more administrators; or (iv) transfer ownership of a shareholder with qualifying holding or a controlling stake.

Whilst prior approval is not required, the Regulation does oblige NBFIs and MFIs to notify the Bank of Albania of various listed matters/changes, and they must do so (i) immediately when, inter alia, for eg. the risk positions reach maximum allowed exposure limits as defined in the by-laws of the Bank of Albania; and (ii) within 30 days when, inter alia, for eg. there is a change in the statutes or change in organization structure or increase in capital.

“Agent” of NBFI now regulated: An ‘agent’ in this sense is defined as a legal person vested with the rights and obligations to exercise the financial activity of money transfer set out in the respective Agency Agreement with NBFI. The Regulation incorporates criteria for approval, necessary documents required to meet the criteria, the decision of the Bank of Albania and also circumstances in which this approval can be revoked.

Transitional Provisions Include: Those NBFIs licensed by the Bank of Albania prior to the entrance into force of this Regulation shall be considered as licensed in accordance with the requirements as set out in this Regulation, in accordance with the financial activities set out in their existing licence. However, notwithstanding this provision, the Bank of Albania may request submission of additional information if it deems that the information presented during the process of the granted license is not in compliance with the requirements of this Regulation.

Those subjects previously carrying out money transfer activity on behalf of a NBFI must seek the Bank of Albania’s approval as an Agent as defined under this new Regulation within 12 months from the date this Regulation enters into force.

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KOSOVO NEWS

WORK PERMIT RULES

On 10.07.2009 the Assembly of the Republic of Kosovo approved Law No. 03/L-136 “On granting permits for work and employment of foreign citizens in the Republic of Kosovo”, promulgated by Decree of the President (17.07.2009). According to this law, the Government of the Republic of Kosovo in line with its policies on migration, leave to remain and labour market mobility sets out the number of employment permits to be afforded to foreigners at the end of each year for the following year (at the latest by 15th December of each year). Aside from various general provisions contained in this Law, in order to secure legal employment in the Republic of Kosovo a foreign citizen should fulfill a specific condition which is “to possess a permit for residence in the Republic of Kosovo”. This residence permit should conform to the Law on Foreign Citizens.

The law provides that foreigners, when intending to work for more than three (3) months in Kosovo must seek a work permit to be issued by the Ministry of Labour and Social Welfare (MLSW). The MLSW should issue such permit or refuse the request within thirty (30) days from the time the complete required set of application and documents are submitted. However, under this law not all foreigners are required to apply for a work permit. According to this law some are exempted from the obligation (e.g. representatives of non-governmental and non-profitable organizations; executive directors and important employees of foreign companies who operate or aim to operate in the Republic of Kosovo; and employees of a foreign company seeking to work in its Kosovo branch).

There are different types of the work permit ranging from limited periods of 6 months to a period of 5 years. If the work permit expires the foreigner should make a request for its renewal. The Request for renewal of work permit, except seasonal work permits, is to be submitted one month prior to expiry of the existing permit.

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PROJECT UPDATES

• PRISHTINA AIRPORT
Four bidders, namely (i) “FRAPORT - IC”; (ii) “BOUYGUES-EGIS; (iii) “LIMAC-AIRPORTS DE LYON”; and (iv) “RIVIERA - LR Group Israel”, submitted their bids for qualification on the 16th of October for the Pristina International Airport Concession. The PPP for PIA is envisaged to a 20 year agreement for a Design-Construct-Finance-Operation-Transfer (DBFOT) format to include construction of a new terminal three time size of the current one, 25 000m square. Other investments are foreseen to be construction of a new control tower of air traffic and additional facilities like, new parking platform for airplanes including 9 additional units, water recycling plant etc.

• PTK
The MFE as a procurement authority had on 13th Oct awarded to Telco AG & Wolf Theiss the contract for the provision of transaction advisory services for the Kosovo Government on the privatization process of PTK (the privatisation to be worth an estimate EUR 700-800 mln).

Similarly to other sectors of the privatization in Kosovo, the government has established an Inter Ministerial Steering Commision which shall, upon the recommendations of the transaction advisors, decide on the form and steps (initially only with VALA subsidiary) for the PTK privatization.

• MOTORWAY

MGAR-MORINE
According to public statement by the Seven companies are already prequalified and, upon the request of several bidders the bid submission date has now been extended to 01.12.2009. However the Government of Kosovo in particularly the Ministry of Transport is very firm that they will be able to announce the winning company very soon after the submission deadline and sign the contract before December 31st so that the remainder of the budget allocation for 2009 is utilised.

• KEK
MFE announced on 8th Oct. 2009 the cancellation of the procurement for transaction advisory services (some 9 tenders were received and less than three qualified as responsive). The company is currently in the process of unbundling.

• KOSOVA C
The scheme to build a 2,000MW plant on the outskirts of Pristina, project Kosova C, is losing investment interest with only two of the four consortia’s still expressing an interest. German utility EnBW firm and its US-based partner WGI pulled out, with RWE having pulled out some time ago.

KOSOVO ADOPTS MUCH NEEDED PPP AND CONCESSION LEGAL FRAMEWORK

The Kosovar Assembly has approved the “Law on Public-Private-Partnerships and Concessions in Infrastructure and the Procedures for Their Award” (dated 15.07.2009).

It has been recognized over years that the use of public-private partnerships (PPPs) has progressed significantly as public and private sectors work together in the development and modernisation of much-needed infrastructure.

Below are brief highlights of key points of interest for investors considering a PPP in Kosovo.

International Best Practice: Drafted with the support of USAID the law has been prepared in accordance with international best practice, adopting international norms such as the UNCITRAL model, EBRD Core Principles for Modern Concession law and European Commission guidelines for successful PPPs (2003). The “PPP” is broadly defined as any form of cooperation between public authorities (which can be central, regional, municipal or other executive authority, public body etc) and the private sector which involve risk sharing and aim to provide the financing, construction, renovation, management, operation and/or maintenance of an infrastructure and/or the provision of a service. PPP shall refer to concessions, greenfield projects, and/or any of these combinations.

Lender Security: This law has taken into consideration the necessity of the protectability of a project for any potential bidder/investor. Importantly the Private Partner and shareholders are free to create pledges or other security interests over their shares in the project. However if such pledging is to potentially result, upon perfection, in the transfer of a controlling interest in the Private Partner approval of the Contract Authority shall be required. Whether such approval is required prior to foreclosure or prior the actual pledging is questionable.

As is often vital to lenders, it may be agreed upon for the PPP/Concession agreement to permit financiers to substitute the Private Partner with a newly qualified entry to perform the duties under the existing agreement in the case that the Private Partner is in serious breach. There is no express ‘step-in’ right for the financiers to manage the project company for the period of time from default until the new Private Partner is selected.

The Private Partner may assign its rights and obligations but only upon consent of the Contracting Authority and the agreement shall determine the conditions governing when such can happen, including conditions of the acceptance of a new Private Partner; any new Private Partner must meet the technical and financial capability necessary for providing the service subject of the PPP project.

Key Features of the Agreement: The duration of a Concession or PPP shall be determined in the corresponding agreement but should not exceed a term of 40 years, though this may be extended for an additional period of no more than 1/4 of the initial stated duration.

The law provides for the freedom to negotiate concession agreements though this is dependent on what aspects, if any, of the draft agreement as part of the tender package the Contracting Authority permits to be negotiable. Any term of the draft agreement that is declared to be non-negotiable shall not be subject to negotiation and considered to be acceptable by any bidder once any tender is submitted.

Investors frequently appear to be concerned about the applicable governing law, particularly in new jurisdictions with an undeveloped legal framework and lack of practice of application of such and not uncommonly the domestic law shall be the governing law of the agreement. However international arbitration may be decided upon by parties for dispute resolution. Of further importance and reassurance is that the law itself expressly provides for a ‘change in law’ compensation for ‘substantial loss’ resulting thereof.

Only time will what kind of results the application of this law produces, and it would seem rather sooner than later with the tender process for the offer and award of the PPP of Pristina International Airport currently underway.

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