The Bankruptcy according the Albanian law

Effects of practice and legal framework in setting up a structured system of Bankruptcy administration

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Abstract

The aim of this article is to present the concept of bankruptcy as a legal judicial procedure to be followed in case that the legal or natural person becomes insolvent. The paper is focused on the meaning of bankruptcy, the subjects of bankruptcy proceedings, causes for the opening of this proceeding, the competent court and its decision according to the law no.8901, dated 23.05.2002 "On bankruptcy" published in official Journal nr.31/2002. These article deals also with the organs of bankruptcy proceedings, administrator, meeting of creditors and methods of the conclusion of bankruptcy proceedings. A brief description of debtor's possibilities during bankruptcy proceedings is given also in article. It deals with debtor's closeout, rehabilitation/ reorganization of the company and debtor's liquidation. However, it should be noted that the bankruptcy procedure is a procedure not very widespread in our country, that due to the small number of cases before our courts. It also has to do with the fact that subjects rarely addressed the court.

Keywords: bankruptcy administrator, insolvent, debtor, creditor, reorganization of the company, debtor's liquidation

Introduction

The aim of this paper is to present the concept of bankruptcy as a legal judicial procedure to be followed in case that the legal or natural person becomes insolvent. The paper is divided in two parts in which are treated: in the first one, the meaning of bankruptcy, the subjects of bankruptcy proceedings, causes for the opening of the proceedings, the competent court and its decision, while in the second one the organs of bankruptcy proceedings, administrator, meeting of creditors and methods of the conclusion of bankruptcy proceedings. The aim of this paper is to present a brief description of the bankruptcy law, passed on 23.05.2002, facing also the challenge of case law lacking in this direction, which however is expected to develope significantly in the future.

The meaning of Bankruptcy

Bankruptcy is the legal situation when a person becomes unable to pay his debts although the repayment time or maturity date have expired, meaning the person enters the stage of insolvency, a dangerous situation this for him and the creditors. A way of getting out of such situation would be acquiring other debts, which he still would be unable to pay; the situation would get more serious, while the creditors would find themselves in a situation of probably losing their loans.

Bankruptcy is regulated by law no.8901, dated 23.05.2002 "On bankruptcy". The aim of this law is to determine a set of obligatory rules, uniform and equal on payment/ liquidation of debtor's obligations during bankruptcy. It also tends to: relieve an honest debtor incapable of paying his debts, with the intention of giving him the possibility of a fresh start, and give the court the authority to control debtor's estate for a proper and equal share among creditors.

Bankruptcy is a collective procedure for the recovery of obligations towards creditors[1]. Bankruptcy procedure itself aims to achieve repayment, collectively, of debtor's obligations through the liquidation of all of his estate and income distribution, or, in case of a reorganization plan, to reach an agreement with third parties (creditor etc.) with the main aim of allowing the continuation and rehabilitation of debtor's activity/ business.

The law provides that the bankruptcy procedure can extend to the all assets of any natural or legal person and property of simple societies.

The law excludes the state or its organs from bankruptcy procedures. It also excludes certain strategic state sectors, local governments and their organs, but does not exclude from such procedures trade companies where the state is a shareholder.

The causes of opening a bankruptcy procedure are the following

- The state of insolvency. The debtor is considered insolvent if it is unable to pay the obligations on the maturity date. Insolvency is presumed to exist if the debtor does not pay his obligations.
- Insolvency in the near future. The debtor is in a situation of insolvency in the near future, when he is unable to pay or liquidate its obligations on maturity date. The above mentioned constitutes ground if asked by the debtor himself.
- Overload of debts. The debtor is in such a situation when is proved/verified that his estate assets do not cover his financial obligations to third parties and, under the circumstances, after evaluation of debtor's assets/estate, he is no longer able to run the business.

[1] Torremans, P., Tegu, F., Shehi, A. (2005). Bankruptcy in comparative aspect, Tirana, Kristalina –KH Publishing House pg. 8.

Bankruptcy proceedings can start only at the request of the debtor or the creditors and, in the case of legal persons, bankruptcy proceedings can also start at the request of tax authorities, when a 3 year period balance results in loss. The right to request the start of bankruptcy proceedings for the property of a legal person can be exercised not only by the creditor, but also by the members of a governing body or any simple partner or liquidator, in the case of simple legal entities/companies.

When such request has been presented, the directors, office employees, partners or shareholders of the company that opened bankruptcy procedures, along with the request for opening such procedures or immediately after its delivery, must submit:

- the list of assets and income, accompanied by a statement indicating the value of each item and whether the item is used or is supposed to be used as lien.
- the list of names and addresses of creditors, together with the respective amounts of obligations towards them.

If the initiation of bankruptcy procedures has been required by the tax authorities, they must present to the court the following acts:

- The request for opening of bankruptcy procedures;
- Company's documentation (the statute, company's act, the number of INTP);
- balance-sheet accompanied by the financial statements of the company against which the start of bankruptcy procedures was required;

The court accepts the request of the creditor if he has a legitimate interest in the debtor's estate assets and the reason to start/open is presumed to exist if the debtor has not paid the obligation toward the creditor three months after the maturity date.

The competent courts to review the request are the bankruptcy court, which by law are commercial sections of the district court. Such requests are reviewed by the court standing with only one judge and the court itself, during such procedures, takes on an active role.

In terms of territorial jurisdiction, the competent court is the one where the legal person has a permanent bureau/establishment, while in the case of a natural person where the latter resides.

Bankruptcy procedure is applied on the debtor's estate assets, that the law calls the bankruptcy mass, which includes all estate assets owned by the debtor, his personal and objective estate rights, the estate assets that the debtor may gain/acquire during bankruptcy by exercise of his economic activity or because of the earnings generated in the ways provided in the Civil Code or in special laws regarding acquire of estate; third party obligations to the debtor; other estate assets he owns, that he enjoys and possesses, but that he does not possess at the time of opening of bankruptcy

procedures (estate or real estate that he rents out). The bankruptcy mass does not include items which according to Article 529 of the Code of Civil Procedure are excluded from mandatory execution: his and his family's items of personal use, food and fuel for 3 months, honors, titles, etc., professional books, old age pension, disability, scholarships, unripe natural fruits, books, musical instruments, art tools needed for debtor's or his family's scientific or artistic activities, etc.

When a request is presented to the court for opening of bankruptcy procedures, the bankruptcy court may appoint a temporary bankruptcy administrator, assigning him tasks such as: verification whether the reason for the opening of bankruptcy procedures is real, if the debtor's assets cover the expenses of bankruptcy procedures; if necessary, take steps to secure the property or, if possible, to continue debtor's activity.

It can be said that such cases have to do, more or less, with the appointment of an expert, who will give the court (the bankruptcy judge) an insight on the cases presented to him. The temporary administrator, unlike the expert, the court may decide to entrust him with the administration of the bankruptcy mass if the debtor is deprived of such right (Article 22/1). In such case the temporary administrator, in addition to the above, must secure and safeguard debtor's estate assets, continue running debtor's daily activity until the commercial section of the district court will decide on the opening of bankruptcy procedures, unless this section approves the closure of the activity to avoid further and significant loss of debtor's assets, as well as to exercise, as a specialist, the duties set out in Article 18 of this law.

Article 21 of the law also provides that, while reviewing the case, the commercial section of the district court can also decide on security measures on debtor's estate assets.

Such cases must be decided by the district court as soon as possible, and in any case, not later than 30 days from presentation of the request to open bankruptcy procedures. In total, for preliminary bankruptcy procedures the law provides a 60 day time limit.

Regarding the procedures followed by the court, when a request is presented for judicial review, it (the court) investigates the circumstances provided by law that led to the opening of bankruptcy procedures. First the court analyses if the case is within its jurisdiction, and second whether or not the person presenting the case to the court is legitimate. After the judicial review of the request, district court's commercial section holds/decides: a) not to accept it as it misses legal reasons for opening bankruptcy procedures; b) not to accept it because debtor's estate assets are insufficient to cover expenses of bankruptcy procedures; or, c) to accepted and start/ open bankruptcy procedures. Against such decision of the court special complaint is

permitted, complaint that must be filed within 5 days. In any case, such procedure before the court is interrupted at the request of the debtor, if the later proves to the court that the causes/motives of bankruptcy no longer exist, or that he is no longer in insolvency (if this was the reason for opening bankruptcy procedures).

When the court decides to open bankruptcy procedures, with its decision it (the court) also appoints the bankruptcy administrator's.

Apart from this, the law recognizes the right of creditors to appoint, in their first meeting, another qualified person to replace the administrator appointed by the court. Such appointment can be challenged by filling a request with the court. If the court decides against such appointment and to discharge the bankruptcy administrator, the discharge must specify/ motivate the reasons.

After the opening of bankruptcy procedures the activity of the bankruptcy's administrator can be summoned as follows:

He immediately takes possession and administration of all estate assets that constitute the bankruptcy mass and requires compulsory execution the of the decision for opening the bankruptcy procedures against debtor if he refuse to give assets in its possession.

The bankruptcy administrator prepares an inventory of all assets that constitute the bankruptcy mass. The debtor can also cooperate to draw such inventory, when such cooperation does not create harmful delays. The value of each item must be specified and if the value of the item/asset relies on the fact whether debtor's activity will continue or close, respective alternative values must be presented. On determining the value of items whose evaluation presents difficulties, a specialist can be assigned.

Upon a justified request of the bankruptcy administrator, district court's commercial section may not request to carry out the inventory. If the creditors committee is appointed, the bankruptcy administrator can file the request only at the approval of this committee.

The bankruptcy administrator prepares the list of each one of debtor's creditors that result on debtor's books and documents, that the debtor reports as such (creditors), at creditors' request or in any other way. A list of items that constitute the bankruptcy mass, creditors' list and the table of assets are deposited in the National Registration Center.

The law also recognizes the right of the bankruptcy administrator to restart trials in favor of the bankruptcy mass (Articles 71 p.1, 72, 73) as well as the right to possess such assets, etc...

From the formal point of view the decision to open bankruptcy proceedings includes:

- Debtor's name, surname and residence, in case of a natural person, or name, type of activity and bureau's address in case of a legal person;
- Name, surname and address of bankruptcy's administrator;
- The precise time when bankruptcy procedures started;
- Information provided in Articles 27 and 29 of this Law.
- The order to publish court's decision on the official website, on National Registration Centre's website and on that of the relevant tax authority.

In this decision, creditors are required to submit their claims to the bankruptcy administrator, within the specified period (no less than 15 days, no more than 90 days)[2]. By this decision creditors are required to immediately inform the bankruptcy administrator regarding observations/claims and liens they have over debtor's assets. Notice of such observations/claims must contain detailed information on the item over which liens (ensured rights) are claimed, the nature and cause that originated such liens (ensured rights). Creditors that miss to provide the required information/data, or provide them with delay, are responsible for the consequences arising from the damages caused.

The decision for opening bankruptcy proceedings must also provide and determined the persons that have obligations towards the debtor, these obligations must be pay to the bankruptcy administrator.

The decision to open bankruptcy procedures is, without delay, publicly announced by district court's commercial section, and copies of the decision is sent out to each of the creditors, the debtor and debtor's debtors.[3]

When the debtor is a natural person, with the decision to open bankruptcy procedures, he is given the right and the chance to be discharged from the remaining obligations (debts).[4]

On the decision for bankruptcy the court also provides the deadlines regarding:

- The creditor's meeting that should be held, within 45 days and, in any case, no later than 90 days from the date of announcement of court's decision. In these meeting the creditors must decide on further continuation of bankruptcy proceedings based on the report prepared by the bankruptcy administrator,
- The meeting of creditors for verification, which should be held not earlier than 10 days and no later than 60 days, starting from the last day of admissibility of the claims, and which should examine and verify the claims filed. If the creditors find it reasonable, the meeting to report and verify can be held at the same time.

[2] Article 141 of the Albanian Law No.8901 dated 23.5.2002 "For bankruptcy" Tirana, official Journal nr 31/2002, pg. 989

[3] Article 9 (idem), pg. 957

[4] Article 249 (idem), pg.1012

Consequences of bankruptcy

The bankruptcy brings procedural and substantial consequences for both the debtor and the creditor.

The bankruptcy consequences have an impact on the debtor and his assets. The consequences to his assets regard the right to administer and possess the assets part of the bankruptcy mass. The debtor remains the owner of his assets, but has no right regarding the administration and possession, actions that are performed by the bankruptcy administrator. The latter manages and owns the estate assets that the debtor may gain/acquire during bankruptcy proceedings.

Bankruptcy proceedings result in the suspension of the judicial judgment of all civil actions where the debtor is a party, plaintiff or defendant. The purpose of such suspension is to preserve the bankruptcy mass, but the bankruptcy administrator can reopen judicial cases where the debtor is a plaintiff.

Lawsuits against the debtor restart at the request of the bankruptcy administrator or the plaintiff if they are related to a) separating of an item from the bankruptcy mass, b) special repayment; c) the obligation towards the bankruptcy mass. If the bankruptcy administrator immediately recognizes such claims, the plaintiff may seek reimbursement of expenses related to such claims but only as a bankruptcy creditor[5].

The law also provides the cases when execution of the obligations towards the bankruptcy mass is suspended.

Regarding the bankruptcy consequences with a personal character, they concern some restrictions on the exercise of debtor's civil rights obligation not to leave the domicile premises or the residency[6], control of correspondence,[7] etc.).

As above mentioned, with the court's decision to open bankruptcy procedures, creditors are required to present to the bankruptcy administrator their written observations, within a time limit not shorter than 15 days and not longer than 90. Creditors' deposited observations are verified at a meeting, in the presence of the bankruptcy administrator, the debtor and the creditors; meeting called by the court and that should be held no sooner than 10 days and no later than 60 days from day of termination of the date to deposit the observations. Such observation will be estimated proven if they're not challenged by the bankruptcy administrator or the creditors. If the observations won't be accepted, then regarding their authenticity, the articles of Code of Civil Procedures are to be applied. The decision of bankruptcy's court regarding authenticity of such observations is final.

[5] Article 73 (idem), pg. 973

[6] Article 82/2 (idem), pg. 975

[7] Article 83 (idem), pg. 975

Debtor's possibilities during bankruptcy proceedings are:

- Debtor's closeout;
- Rehabilitation/Reorganization of the company;
- Debtor's liquidation;

Debtor's closeout is the alternative that offers the quickest solution for the creditors of the company in insolvency. Such alternative may be exhausted long before the efforts to save the company commence, but as an alternative can be taken into consideration and decided upon at any procedural faze during bankruptcy. In any case is the court who decides on debtor's company and the best alternative.

The court decides the closeout if the debtor and the creditors prove that this is the best alternative for the estate assets of the bankruptcy mass. The law on bankruptcy does not provide the ways to execute the closeout, but in case the court applies such alternative for closure of bankruptcy procedures, the best alternative would be auctioning or stock-marketing.

The second alternative for closing bankruptcy procedures, company's rehabilitation, is one of the alternatives that can be used during bankruptcy procedures, to give the debtor's the possibility of a fresh start. In the previous bankruptcy law, the opening and the termination of bankruptcy proceedings was considered as a instrument to satisfy the creditors of the debtor. Today tendency in other legislation is that to meet the interests of creditors but also of the other parties to the proceedings, should be made all efforts to save the debtor. This alternative should be considered before going in the stage of liquidation bankruptcy mass and partial repayment of obligations.

The law provides the presentation of a reorganization plan for debtor by introducing a new culture, the salvation of the debtor and a fresh start for him.

Regarding the third alternative, debtor's liquidation, the law has many provisions on the distribution of bankruptcy's estate assets, but no special provisions concerning liquidation for bankruptcy reasons. That's why, if found on a situation of liquidation because of bankruptcy, articles on liquidation of commercial companies, provided by the law on "Merchants and commercial companies", will apply.

Even in such cases, is the court that decides whether the company will be subject to liquidation due to bankruptcy and, after such decision of the court, procedures on liquidation due to bankruptcy may be applied.

The purpose of the procedure is the conversion of the bankruptcy mass, assets and real estate, into money. After such conversion the distribution of all liquidity created by the conversion in money of the bankruptcy mass begins. This distribution is made by the bankruptcy administrator, with the consent of the creditors' committee.

The final distribution is made only with bankruptcy's court approval and, with the execution of the final distribution of assets; the bankruptcy court decides to close bankruptcy proceedings.

Creditors participate in the distribution of the bankruptcy mass, in accordance with the value of their respective loans.

Based on the provisions of law, the preferential order would be: court costs, followed by compensation and expenses of the temporary bankruptcy administrator and creditors' committee members. Further, it's followed by the obligations arising from bankruptcy's administrator activity, but that are not part of bankruptcy proceedings costs and charges for the refund of the money in case of *undue profit* of the bankruptcy mass and the obligations that arise as a result of the temporary bankruptcy's administrator activity, if he, with the approval of district's court commercial section, gave them priority on repayment. Then it is bankruptcy's creditors turn.

It starts with the ensured creditors who, according to article 35 of the law, have set lien on the item, etc. After the ensured creditors is the turn of the uninsured bankruptcy creditors (the calculation criteria are set forth in Article 40 of the Act), and after them, as provided by article 42 of the law, the lower rank creditors will be paid.

Conclusions

The above presentation of the law shows that the legislator has regulated, in detail the procedure of bankruptcy by providing that the consequences of such a procedure to be as easy as possible not only for the debtor but also for the creditors and especially employees in the case of commercial entities. Currently, bankruptcy proceedings are not anymore seen as a procedure in the interest of creditors, but the legislator has considered a wide range of interests. The tendency of the current legislation is to be made all the efforts to save the debtor. Albanian law on bankruptcy has made his own this tendency when foresees the reorganization of the society. However, it should be noted that bankruptcy proceedings are not a very widespread procedure in our country. This is due to the small number of cases judged by courts and the fact that these subjects rarely address to the court.

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