

HARMONIZATION AND STANDARDIZATION OF LEGISLATION ON BANKRUPTCY AS AN IMPORTANT SEGMENT TO EU INTEGRATION FOR COUNTRIES IN SOUTH/EASTERN EUROPE: A CASE STUDY OF KOSOVO

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Abstract

The paper is focused on judicial theoretical approaches on legislation of the South-East countries of Europe, specifically in Kosovo. It regulates the issue of bankruptcy and re-organization of enterprises based on this process. This was because, according to our pretense, it is the most underdeveloped legislation in this part of the Balkans. There are no doubts that there are states in the South-East Europe that achieved results in the sphere of modernization of the legislation. However, it was regulated by business which includes business activities, registration, and operation of business enterprises. However, it is uncontested that the issue of bankruptcy remains a segment that is regulated in each country according to the perceptions and concepts they have related to their own legal systems. Apart from the differences identified by concrete, formal, procedural, and material disposals, the issue has become complicated when we talk about judiciary that proceeds with the process of bankruptcy. Up until now, it has not noticed any initiative related to the harmonization and standardization according to model laws UNCITRAL. At least up until now, there are no recommendations or guidelines regarding the improvements, harmonization, and standardization of legislation made by relevant international institutions for the countries that aspires for EU integration. It is important that countries in South-East Europe, including Kosovo, should urgently review this segment of legal system through common shares, assisted by UNCITRAL. This is in accordance with the principles of model law on bankruptcy UNCITRAL, to harmonize and standardize legislation on bankruptcy.

Keywords: Bankruptcy, law, unification, standardization

Introduction

Nowadays, the inability of business associations to fulfill obligations towards creditors is a phenomenon that is being encountered often in the trade circulation in Kosovo and other regions. However, the procedures of bankruptcy even though to a considerable extent are considered to be effective, are rarely implemented by the courts in the country. Legislation that regulates the process of bankruptcy of the business subjects are characterized with the paying inability which represents one of the basic principles of the modern trade system. In countries of transition, this issue has paid a considerable attention through the reform of the legislation system. It should be stressed that in countries with a long tradition of the market economy, the issue of regulating effective procedures of bankruptcy is considered to be one of the most dynamic zones. This is in a bid to offer new solutions such that the trend of changes in the world economy could be followed. In this sphere, an important contribution is given by a determined number of international and multilateral institutions such as the World Bank, (<http://cour-europe-arbitrage.org/content.php?lang=en&delegation=1&id=1>), International Monetary Fund, UNCITRAL Union (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html), European Union, and others. (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html).

The aim of modern legislation on bankruptcy is to carefully and rationally solve the problems of those subjects that overloads financial debtors which often ends with not being solved or productive. This was because they earn due to their profitable activities, which is taken through procedures of execution in order to satisfy the pretense of creditors. However, this loss of productivity damages not only the debtor and his/her family, but also affects the society where he/she lives.

Debtor often becomes a burden to the society and offers less contribution to the society. One of characteristics of modern legislation on bankruptcy is to give to the overloaded debtors “a new start,” free of many pretense of previous creditors. This version of a new start is not applied only to judicial persons, but could be used also by private (personal) debtors in limited cases. However, it is not implemented for debtors that have no actives or that have actives to only pay expenses based on the procedure of bankruptcy.

Differences Between Liquidation and Bankruptcy

As a rule, a business society can possibly end its activity in two ways. According to outlooks which are the result of current legislation

commentary, it constitutes of a universal terminology. In this literature, we consider the usage of the terms bankruptcy, liquidation, court liquidation, voluntary liquidation etc. Regardless of these terms, we may conclude that there are only two ways of extinguishing a business society which was considered to be the liquidation of bankruptcy of a society. Liquidation fosters the extinguishing of a business society when it has the needed means to fulfill obligations before its creditors (Pravni Leksikon "Savremena Administracija), (PLSA), (1964:429). Bankruptcy (Ibid) "presents a process of a more complicated solution of collective fulfillment of the obligations of creditors from the entire property (wealth) of a debtor in which case, a judicial person extinguish existing"(Pg.887). Based on these definitions, it could be concluded that between liquidation and bankruptcy, there are differences in the formal and material understanding as well.

Material differences between liquidation and bankruptcy are perceived from the fact that a business society has the capacities of fulfilling its obligations before creditors or not. Liquidation can be implemented if a determined circumstance which impact extinguishing of the enterprise exists. This involves the termination of the time the enterprise was established, achievement of the goals of establishing the enterprise, the lack of the minimum founders based on the time limit, etc. Despite the causes, liquidation always extinguishes the solvent enterprise of a society that has the capacities to fulfill obligations before its creditors. Bankruptcy involves extinguishing the insolvent enterprise which cannot fulfill its obligations before its creditors. Just because of this circumstance, it has been considered necessary as a collective solution. This is accomplished through selling the entire property (wealth) of the debtor under bankruptcy based on the capacities of the judicial person. Therefore, it is possible for bankruptcy to come during the process of liquidation if it is verified that the society is overloaded with debts and the property at its disposal is not enough to fulfill its total obligations before all creditors of the society.

Formal differences between liquidation and the bankruptcy are considered through disposal of liquidation or bankruptcy. In cases when a solvent enterprise is extinguished by liquidation, then the disposals of implementing this process are usually contained in the laws that regulate trade societies. On the other hand, bankruptcy as a rule is regulated by a special law.

Difference in these institutes was considered also during the process of extinguishing a determined enterprise. The liquidation officer is nominated based on the decision process for initiating the process of liquidation brought by partners and complementers. Thus, the founding assemble depends on this form of business enterprise.

By nominating the leading officer of liquidation, all authorized representatives of the society are extinguished from their rights of representation. Therefore, it is possible that the leading officer would become the controller of the society. In the procedure of bankruptcy, the head of bankruptcy is one of the procedural organs and has this status based on legal disposals. The head of bankruptcy is nominated by the bankruptcy judge from the competent court based on the decision for opening the procedure of bankruptcy and based on the list. In order to be the head of bankruptcy, a vast amount of knowledge and special preparation to conduct such activities is required or taken into consideration. This is because this procedure is complicated and at the same time, it is a more responsible job compared to the job of the liquidation officer. This was clearly argued as the process of liquidation of a society can be realized by the owner without the involvement of the court (court in this case, has only supervising function and controls only the process of legality and the treatment of creditors in the society). Meanwhile, the process of bankruptcy is realized through opening, direction, and the closure of the procedure by the competent court. In addition, we should not mix the forced liquidation by the court with bankruptcy.

Furthermore, the cessation of business society by bankruptcy is a more complicated process compared to liquidation. During the process of bankruptcy, there are bankruptcy organs and creditors forms the assembly and the council of creditors. The bankruptcy judge organizes court review to determine requests. The opening of bankruptcy procedure produces some procedural-judicial consequences against the debtor in bankruptcy and the rights he had until that moment. Thus, in the liquidation procedure, there are quite a less number of activities. Regarding the treatment of the measure of wealth that remains after its distribution in the bankruptcy procedure, the rules of division among the share holders (rules of liquidation distribution) will be applied. In several ways, institutes of liquidation and bankruptcy produce similar results in the legal aspect of determined business society. Business society which is extinguished by the decision for the liquidation closes up. Therefore, bankruptcy process results in expiation due to the registration of business subjects based on the legal disposals for the registration of the enterprise.

Legal Framework for Liquidation and Bankruptcy in Kosovo

Legal framework of the country for the process of liquidation and bankruptcy consists of the Law for liquidation and re-organization of judicial persons in bankruptcy (taken from:

(<http://www.kuvendikosoves.org/?cid=1,191>) . *In reality, it represents an act more of procedural character, Law on banks, financial institutions, and financial non-banking institutions which regulates their liquidation or bankruptcy³⁶. In addition, the Law for trade societies also regulates the liquidation sphere and bankruptcy for determined trade societies*. However, as an assistant in interpreting situations where there is superposition of other laws regarding the field of liquidation and bankruptcy, the Law for liquidation and re-organization of judicial persons prevails. Hence, this is foreseen explicitly by article 1 which is taken from: (<http://www.kuvendikosoves.org/?cid=1,191>)*.

Law for liquidation and re-organization of judicial persons in bankruptcy is applied in accordance with other laws that have impact in this aspect which include: Law on obligation procedures, Law on obligation relations, Law on banks, micro-finance institutions, non-banking financial institutions, Law on trade societies, Law on Tax Procedures, Law on Payment System, Criminal Code, etc.

From this, it was seen that the Law on liquidation and re-organization of judicial persons in bankruptcy without being completed with the other laws, is not rich enough for the necessary elements regarding the content and the achievement of its goals. Therefore, there is a need for the review of the structure of this act in procedural and material dimensions. Currently, the rules on this matter creates confusion on the way on how this process is organized within chapters of determined laws. Consequently, the disposable data related to the order of Disposable Procedures show that the process of Liquidation is more used in practice compared with re-organization and bankruptcy. In general, it is interesting to note that the institute of bankruptcy in Kosovo is seen as a “legal death” and not a “possibility for a new start.” Due to this situation, the process of liquidation and re-organization of judicial persons remains confused, not practical, and not harmonized with the Acqui Communitaire. Therefore, changes and completion of legislation for bankruptcy and liquidation should fulfill other criteria as foreseen by the UNCITRAL rules.

* See more Law on liquidation and reorganization of judicial persons in bankruptcy, Nr. 2003/4

³⁶ See more Law on banks, microfinance institutions, non bank financial institutions, Nr. 04/L - 093

* *See more Law on trade societies, Nr. 02/L-123

* Explanation: Law on liquidation and reorganization of judicial persons in bankruptcy, Nr. 2003/4 article 1 considers: "General disposals regarding the sphere of activities that this law has in the execution procedure until they do not fall into the conflict with the disposals of this law"

Changes and Completion of Judicial Framework for Liquidation and Bankruptcy

Being aware that the problem of liquidation and bankruptcy has displayed weaknesses consequently, it was considered that the process of completion and changes of legislation framework is not only a needed action but a very urgent one. Current law for liquidation and re-organization of judicial persons in bankruptcy has been adopted in 2003. The conditions and economic circumstances of Kosovo changed drastically when the country was under UNMIK* administration. However, due to the circumstances, it was necessary to change and complete the Law on Liquidation and bankruptcy. This act with the force of law should fulfill the standards and criteria of Acqui Communitaire (<http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507492/IPOL>)

by processing a more precise and complete procedural disposals. From this point of view, we consider that they should be regulated on the following issues:

1. Court and procedures of bankruptcy should specify clear subjects that have the rights and obligations to initiate procedure of bankruptcy.
2. Procedural regulation of stopping the issue regarding the faith of requests for opening procedure of bankruptcy, court incompetence, or return of the issue for completion of acts.
3. Regulation of the procedure for turning the issue, in cases where the court decide to turn the issue in order to complete the acts.
4. Determination of the cases of incompetence, in cases when court decides incompetence because applicant has submitted a request before the wrong court which is not legitimated to open the procedure of bankruptcy.
5. Determination of when a request can be refutable, in cases when court can decide related issues to refuse the request for opening the bankruptcy procedure because of the absence of the causer of the bankruptcy. This happens when there are no possibilities for opening the bankruptcy procedure or when it has increased its capitals with no debts before the seekers.

* Explanation: The mandate of UNMIK was established by the Security Council in its resolution 1244 (1999). The Mission is mandated to help the Security Council achieve an overall objective, namely, to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance regional stability in the western Balkans.

6. Determination of the way to receive request for opening the bankruptcy procedure.
7. Regulation of the duration of the trial of issue in the determination of the legal deadlines for bankruptcy procedure.
8. Regulation and determination of procedures along with the request for opening the bankruptcy procedure in the court practice to proceed, as well as the request for opening the liquidation procedures regulated by law.
9. Clearance of definitions related to terms “inability to pay,” “debtor,” “bankruptcy portion,” “repayment,” “re-organization,” “enforced liquidation” etc.
10. Elimination of cases when there are no unified terms with the other laws.
11. Elimination of eventual confusion that can be caused by implementing the Law on liquidation and re-organization of judicial persons in bankruptcy in relation to civil procedure. Liquidation and bankruptcy procedure is a special procedure and should minimize references with the general disputes. Liquidation and bankruptcy procedure foresees court competence, but does not determine specific rules based on which court could exercise these competences. Thus, this makes the Law on dispute procedure inappropriate in every day practice.
12. Elimination of confusion between the Law on liquidation and re-organization of judicial persons in bankruptcy and other laws mentioned above.
13. Regulating the problematic reports between the Law on liquidation and re-organization of judicial persons in bankruptcy with the Law on tax procedures. There is a lack of law logical consequence. Furthermore, law on bankruptcy connects bankruptcy with paying inability or with overloading debts, whereas law on taxes connects bankruptcy with presenting financial statements of trade subject 3 years with loses. Both laws should be in harmony with each other, not leaving space for different interpretations by implementing subjects.

Regarding bankruptcy procedure, when to deposit request for opening bankruptcy procedures should be clarified. In cases when the procedure starts by the creditor, then the problem of who is going to determine the bankruptcy administrator is eliminated.*

* For more, see Administrative Order for the program of exams for bankruptcy administrators, Nr. 01 / 2013, date 16.04.2013, Ministry of Justice of the Republic of Kosovo.

Role of Court in Bankruptcy Procedure

The role of court in bankruptcy procedure is supervising.* Court that is competent in developing procedure of bankruptcy should judge upon acts and should be verified without court hearing. This should be expressly foreseen by law. Based on the changes and completion of the law, they suggested seeing the possibilities of judging the bankruptcy procedures done by authentic judges. However, this was done with the assistance of other subjects whose status is not determined by law.

Decision of opening the bankruptcy procedure even though detailed by law has again, a need for more specifications. In cases when the court opens the bankruptcy procedure, it should determine suitable deadlines (90-120 days) in presenting the requests of the bankruptcy administrator. It should through more diligence review the various phase of verification of the creditor's claims. This claim was done from the creditors gathering such that they do not go beyond the legal deadlines which are usually not more than 180 days in preparing the creditor's list.

Requests for suspension of bankruptcy procedure when the other issue is judged should be clear for judges and there are no unified practices. Thus, related to the indictments that could be raised, for example labor contests, Law on liquidation and re-organization of judicial persons in bankruptcy, foresees the suspension of bankruptcy trial.

Legal terms starting from the practice of judges showed that the legal deadline of 30 days is very short. Even if there are special sections for judging issues of bankruptcy again, this is not enough because it is not easy for court to ensure information or to deposit the needed documents. In addition, more time is needed to be at the disposal of expert which should ensure access to needed documents in preparing its report.

In cases of re-organizing trade subjects, they do transfer of activities from parts with loses to the sound part without loses in their activities. Within bankruptcy, there is no re-organization but there are restructurings of debts towards deadlines, rates, etc. In restructuring of debts, 1/3 of the agreements were successful and restructuring of debts through buying is done through the assistance of banks.

Determination and specifying of procedures in the phase when judge will have to call creditors and debtors because the law has not a special procedure for this issue seems to create a defect in practice. Thus, law do not

* Explanation: With the Law on liquidation and reorganization of judicial persons in bankruptcy, Nr, 2003/4 article 2 it is noted: "Court is Economic Court" with residence in Prishtina competent for the entire Kosovo territory, and competent on issues of liquidation and bankruptcy. The Law on Courts of the Republic of Kosovo, Nr. 03/L-199, concretely article 11 point 3. Administrative and economic issues are under the competence of Prishtina Principal Court.

give the answer to the question if there will be acted in the trial and if the interested parties are going to be invited according to the Law on Dispute Procedures. After the first meeting of creditors, they should be clarified if the court is going to continue with the trial or not. It will be precise if creditor is going to appear in trial or not. However, it may be that the appearance in trial is going to be obliged at least in their first hearings.

Clear Determination of Obligations and Responsibilities of Administrators

It happens that they are late with the report or that they resign since the trial has started for a long time. This creates difficulties for the court and delays the process by not respecting deadlines. Meantime administrators require everything from the court and they make requests by fulfilling obligations that the law gives to them. Consequently, it is difficult for administrators to take the needed documentation from parties and as a result, they make a request to the court. Administrators should make a request in obtaining forms after the first phase.

Regarding publicity and transparency, law should clarify if the court decision is going to be public partially or totally.

Regarding expenses of bankruptcy procedure, there are problems regarding the default of bankruptcy expenses. In the tax offices for societies with losses during the last three years, there is no documentation to help on the quality of assets or wealth that trade subjects have.

Normally, all properties in the request should be listed. However, taxes do not have this documentation because for them, societies appears with loses.

Disposals for determining the portion of bankruptcy or assets of debtors in threshold and elimination of circumstances dictated from the lack of needed access of bankruptcy administrators in the information that could help the tax administration from the bank. Regulation of possibility so that administrators have easy access to the credit registers. Creation of register of obligation is a good idea to facilitate the orientation of administrators in evaluating property.

Creation of Mechanisms of Investigation of Assets

In Kosovo, there is no registration of debts. However, if it exists, this would facilitate the evidence of lists of creditors and their categorization. Informality along with two balances i.e. one official and an internal use of trade subjects, also hampers evidence of debtor property and their inability of paying.

Regulation of disposals for penalties in the cases of violation of laws regarding bankruptcy provokes bankruptcy. Law on liquidation and re-organization of judicial persons in bankruptcy does not foresee sanctions and penalties for administrators and debtors, and there are no forecasts on the

way of presentation of denunciation regarding these activities.

Bankruptcy in the Sphere of Execution

The main factors that result to doubts and hesitations of interested parties toward opening of bankruptcy procedure are the mentality of Kosovo which considers bankruptcy as something that encroaches human dignity. However, creditors are afraid of this process. These situations which were at the beginning are present because the bankruptcy procedures are not clear. Due to the lack of clear disposals, it appears that there exist a series of responsibilities of governing bodies of debtor regarding the opening of bankruptcy procedures. In this case, there are unclear potential alternatives for debtor. Courts are not efficient. Furthermore, executors of bankruptcy procedures are not familiar and the bankruptcy administrator is not considered as a welcome subject. It is interesting that in the Law on execution procedures (<http://www.kuvendikosoves.org/?cid=1,122>)^{*}, there are no legal disposals referred to as the execution process of court decisions on bankruptcy.

5. Creation of Supervising Agency on Bankruptcy

Beginning from the practices of many countries, it was evaluated that the creation of functional Supervising Agency on Bankruptcy would be a functional solution for this process. Agency would be created as a new institution which functions in order to affect the regulation of the entire legal cadre, regulations, and other issues that have to do with the process of bankruptcy. Moreover, this is done by licensing administrators. Agency should be built-up to really supervise bankruptcy even though this depends quite a lot on licensed administrators. Ministry of Justice has licensed some private administrators and these persons based on the current law have the right to take cases. However, they are decided by the court and continue with the procedure in two periods: in preliminary period of which it is evaluated if there are liquidation assets and if in this period, there are positive results. Then, the second phase continues after 30 days which is actually the final process for the administrator.

In the first part of law, the agency is engaged only with licensing and supervising. Therefore, this means that they were not placed by us. We are only supervisors.

Model Law UNCITRAL

In the international plan until now, there were a series of continual efforts to unify and harmonize legislation on bankruptcy. Some international acts efforts of regulating this issue have a special impact and it should be

^{*} See more Law on execution procedure Nr. 04/L-139

considered by the national legislator. Such acts which should be analyzed are Model Law (project convention) on cross border bankruptcy of UNCITRAL whose final text was adopted in 1997, Model Law of cooperation in case of international bankruptcy of International chamber of lawyers from 1998, project of cross border bankruptcy of the American Institute of Law, etc. Furthermore, it should be stressed that based on the continual efforts of minimizing international problems that may appear in a bankruptcy procedure, there is still no agreement or convention (signed or ratified broadly) so they could serve as orienting points in solving these problems rarely faced by these procedures. Therefore, as a result of this, there are a lot of difficulties in solving international conflicts on bankruptcy.

In Europe, there were efforts in minimizing or eliminating the above mentioned problems of bankruptcy. In June 5th 1990 at Istanbul, the current European Convention was adopted (European Convention on Certain Aspects of International Bankruptcy, taken from <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=4&NT=136> 20.02.2015) on “Some international aspects bankruptcy.” Thus, it was signed and ratified by only 8 countries. In 1995, the EU adopted a convention on procedures of bankruptcy and none of these has entered into force. Since 1995, the convention was not approved by all EU member states, and the Council of Ministers adopted the text of preparatory convention as a Regulation. This Regulation (Council Regulation on Insolvency Proceeding (CE), N. 1346/2000, taken (<http://eulex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF,16.01.2015>) was adopted on May 29th,2000. However, it entered into force by the EU member states in May 31st, 2002. Thus, the EU Regulation on bankruptcy procedures is expressed automatically by foreign decision in starting bankruptcy that is reflected in the German Legislation (articles 335-338 of Ins). In the EU Regulation on bankruptcy procedures, the reciprocity is ensured in an optimal way because every member states is obliged to recognize the decision in opening the procedure of bankruptcy in a member state (Ohrid Symposium, pg. 63).

Conclusion

Trade societies and various enterprises, especially those during economic transition often face determined financial difficulties. In some cases, they are not able to fulfill their obligations and cannot totally pay their debts as they are obliged to submit request for bankruptcy. Bankruptcy is a legal procedure through which trade societies that lose ability to pay debts and to fulfill their obligations could have a new financial re-start to gain protection from creditors. Some of the benefits of submitting request for bankruptcy are the removal of the legal obligation to pay most of debts or all

the debts, the prevention of recapture under the possession of assets, forbiddance of creditors activities to take money (for example: bullying on taking debt), giving the possibility of negotiating debt, offering the possibility for re-organizing the enterprise for getting it up, etc. However, bankruptcy cannot solve every financial problem. It is even not the best possibility for trade society that is in financial difficulties. There are problems that cannot be solved by submission of request for bankruptcy e.g. bankruptcy among the others cannot translocate the rights of some secured creditors; it cannot defend co-signers of debts or write-off debts that came up after opening the bankruptcy. In cases when trade society (commercial companies) which has financial difficulties can recover during protection through bankruptcy, it is organized in that way such that weaknesses of structures can be avoided. Hence, this brought the trade society into that situation.

Re-organization is also a specific process of restructuring trade society with the aim of effective continuation of activity by changing the statute of the organization, model of property, management structure, etc. In this case, owner should reduce expenses without any risk on the quality of products or the integrity of the trade society. The small societies as well, can use methods of reorganization, but often experience more difficulties. In the worst cases, trade societies are not able to get out of difficulties and consequently find themselves in financial destruction. In these cases, reorganization cannot help trade society to survive; and trade society is obliged to undergo liquidation.

According to the law on liquidation, the process through which trade society (or a part of it) is closed and the case by which its property is redistributed was understood. Liquidation can be understood also as the conclusion for dissolution even though “dissolution” in technical meaning is the last phase of liquidation. More precisely, liquidation is a process of ending the financial problems of trade society by cracking in a regular way, the problems of trade society. Also, it is accomplished by conducting determined researches and distributing assets of trade society to creditors in a proper way. This happens either because the trade society cannot pay all debts (e.g. non-solvent) or its members like to end its existence.

Furthermore, Kosovo does not have a proper legislation that could treat trade societies that enter into the procedure of bankruptcy or liquidation effectively. Changes of the current legislation are important for a modern economy which pretends to be part of the EU. However, we considered the above mentioned proposed changes to strengthen the environment which fosters business development. On the other hand, lack or non-functionality of laws on bankruptcy can damage the economy of a country. In Kosovo, there is an inclination not to submit request for bankruptcy and instead, a trade

society would be closed and the other opened with a new one without paying creditors any debt for what they are obliged to pay. In this way, an unsuitable condition for foreign creditors was created. Apart from changes and completion of laws, there should be a series of normative acts which should be promulgated so that the legislation will be efficient and functional. In this way, it is of Kosovo interest to finish the legal framework that has to do with bankruptcy, and to start the execution by the courts and other authorities that deals with business activities.

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