

AN INTRODUCTION OF CREDITORS RIGHTS IN THE ALBANIAN INSOLVENCY LAW

Gentjan Skara

Department of Law, Beder University

Jetnor Zaimi

Department of Law, Beder University

Kelmend Nezha

Department of Law, Beder University

Abstract

All the insolvency proceedings in Albania are governed by the Insolvency Law 2002. According to this law, insolvency proceedings can be open against physical and legal entities as defined by the Albanian Company law. However, certain entities – mainly public bodies - are excluded from the insolvency proceedings.

This paper provides the creditors right in Albanian Insolvency Law. After providing enough information, about the grounds of opening the insolvency procedure and subjects which are legitimated to make request to open the insolvency proceedings, it analyze the creditors right to request the opening insolvency proceedings and types creditors. Then the paper will conclude with the review of creditors' claim according to Albanian insolvency law.

Keywords: Albanian Insolvency Law, Creditor's Right, Creditor's Claim

Grounds for opening an insolvency procedure

The procedure for opening insolvency proceedings is stipulated in the second chapter of the first part of Albania Insolvency Law 2002 which deals with the subjects taking part in

the insolvency procedure. The insolvency proceeding can be open, by every physical or legal person¹ and for sole entrepreneurship². In the case that the division of the assets has not been done, the insolvency procedure can be open also, after dissolution of the legal entities. From the general principles of opening insolvency procedure, there are some exceptions³. According to this article, the opening of insolvency proceedings shall be excluded in the following cases:

- a) state and its bodies;
- b) strategic sector appointed by the state;
- c) local government and their bodies;
- d) the insolvency of banks and other financial institution that are regulated with specific law.

The grounds for opening an insolvency proceeding are laid down in the article 13 of the Albanian Insolvency Law. The grounds for opening an insolvency procedure are applicable to every company that they are legal entities according to Albania Company Law. Article 13(1) Albanian Insolvency Law spells out that the insolvency procedure have to be open only if exist a cause. The following part of provision article 13 Albanian Insolvency Law list three grounds for opening an insolvency procedure as follow:

a) Insolvency as defined by article 13(2) of Albania Insolvency Law which constitutes a general cause for opening an insolvency procedure. According to this article 13(2) Albanian Insolvency Law, the debtor is deemed insolvent if he is unable to pay his debts on the date of maturity. The insolvency is presumed if the debtor does not pay the debts.

b) Imminent insolvency as defined by article 13(3) Albanian Insolvency Law. If the debtor ask to open an insolvency procedure, imminent insolvency constitute as a cause to open the insolvency procedure. The debtor is in imminent insolvency, when he is unable to pay his debt in their day of maturity.

c) Over – indebtedness as defined in article 13(4) of Albanian Insolvency Law. Over – indebtedness constitutes a legal cause for opening of insolvency procedure in the case of the legal person. The debtor is in over – indebtedness when is verified that his assets do not cover the liabilities toward third parties and, and in this circumstances, after the examining the assets of the debtor there is no possibility to continue the business / activity. As can be seen,

¹ Law No. 9901, date 14 April 2008, On Entrepreneurs and Companies (in this paper this law will be cited as Albanian Company Law), Article 3(3) stipulates a company shall acquire legal personality on the date of its registration with the National Registration Center. Therefore, Albanian Law confers the status of legal person to all business entities regulated by the Albanian Company Law article 3(3).

² Law No. 8901, date 23 May 2002, On Insolvency Law, article 11(1).

³ Ibid. article 12.

this is a complex definition which combines two criteria. First, the need of the state where it is shown that his assets do not cover the obligation toward the third parties. Second, according to the circumstances there is no possibility business / activity. In this case, when the two conditions are meet, then the insolvency proceeding can be open.

Based on article 13 of Albanian Insolvency Law, companies on the difficulties financial means, can request opening the insolvency procedure only in the insolvency and over – indebtedness. According to article 13(5) of Albanian Insolvency Law, the Council of Ministers has the duty to set the criteria and methods of calculation of economic indicators, on which the insolvency procedure is based.

Initiation of insolvency Proceeding

The insolvency procedure can be open only by the subject foreseen by the insolvency law. According to the Albanian Insolvency Law, the right to request opening the insolvency procedure has: a) the debtor; b) the creditor and c) tax authorities.

a) Request submitted by the debtor

According to Insolvency Law every debtor has the right to request the Commercial Section Court⁴ to open an insolvency procedure⁵. The company – acting as the debtor according to Insolvency Law- may request opening of the insolvency procedure under the three grounds: insolvency; imminent insolvency and over - indebtedness.

b) Request submitted by creditor

Every creditor may request to open the insolvency procedure. Creditors of the companies may request the opening of the insolvency procedure but only on the grounds of article 13(2) Albanian Insolvency Law and article 13(4) Albanian Insolvency Law not only under article 13(4) Albanian Insolvency Law.

c) Request submitted by tax authorities

Another way of opening the insolvency procedure is the request submitted by tax authorities. In theory this is an important because the law gives authority to tax authorities to initiate the insolvency procedure only if, there exist a balance sheet of loss for 3 consecutive years, even if the company insolvent on any grounds related to article 13 of Albanian Insolvency Law.

⁴ Ibid, Article 4(1) of insolvency law defines the territorial responsibility of the Commercial Section Court where the debtor who is legal person, has the residence or headquarters.

⁵Ibid, Article 14(1).

In addition, article 104 of Tax Procedure law⁶ provides the right of the tax administration to request the opening of insolvency procedure. According to this article, the tax administration shall have the right to request the start of the insolvency procedure in the following cases:

- a) two year after the company has been registered by the National Registration Center as under a passive status;
- b) when the tax liabilities are declared as uncollected;
- c) In the cases where a company declares losses of its own for at least 3 years;
- d) Where the company has not carried out any economic activity for a time period of at least 2 years from the date of entry in to force of this law;
- e) In the case when the company has unpaid liabilities towards the tax administration for at least 2 years from the date of entry in to force of this law.

Pursuant to article 6 of the Albanian Insolvency Law, the Commercial Sections of the Court, investigate all the circumstances relating the insolvency procedure. In particular, the Commercial Sections of the Court may require hearing for this purpose the witnesses, specialist and debtors. Only after the investigation, the Commercial Sections of the Court shall take a decision under the grounds of article 13 Albanian Insolvency Law, whether to open or not the insolvency procedure.

Creditors' request and Classification of Creditors

The insolvency proceeding is applied on the insolvency estate that includes all property and rights of the debtor on the date of opening the insolvency proceedings and on the property that the debtor acquires during the insolvency proceedings⁷.

As I noted above, insolvency law provides to creditors the right to request opening insolvency procedure. Insolvency law determines details of the creditor's request in order to be accepted by the Commercial Section of the Court⁸. The request of the creditor shall be accepted when:

- a) the creditor has a legitimate interests for opening the insolvency procedure;
- b) presenting a claim under the insolvency law and if the court finds that reasons for opening of insolvency procedure are sufficiently convincing to the Commercial Section Court; and

⁶ Law no.9920, dated 19.05.2008 "On Tax Procedures".

⁷ cf On Insolvency Law (n 2) article 33(1).

⁸ Ibid. article 17.

c) another reason to open insolvency procedure is assumed in the case when the debtor, despite he has not rejected the claim, has not paid the debt for three months after maturity

Only in this case the request of creditor shall be accepted. Based on the request, the Commercial Section Court will decide whether the request of creditor is legitimate or not. Then if the request is accepted, the Commercial Section Courts invite and hear the debtor's claim.

Chapter 2 of the Second Part of Albania Insolvency Law 2002 provides the types of creditors which are as follow:

a) Secured creditors⁹.

According to article 35 Albanian Insolvency Law secured creditors are those which, through a legal action, have set lien over the asset as a security for their claims.

b) Creditors of Insolvency¹⁰

According to article 39(1) Albanian Insolvency Law, they are personal creditors of the debtor who, at the time of the opening of the insolvency proceedings, have legally based claims against the estate of the debtor. Insolvency creditors are not free to enforce their right to claim in each step of insolvency procedure. They must submit their claims to the insolvency trustee for verification and then to participate in the distribution.

c) secured creditors in the role of insolvency creditors¹¹

According to article 41 Albanian Insolvency Law, secured creditors are considered as insolvency creditors and enjoy the right of special payment. Also, they are entitled to preferential repayment of their claims pursuant to article 150 Albanian Insolvency Law.

d) Insolvency creditors of lower ranks¹²

The claims of insolvency creditors of lower rank are settled after the insolvency creditors.

Bodies of Creditors' representative

According to Albanian Insolvency Law, bodies of creditors' representative are the committee creditors and assembly creditors. In order to understand better their role, it is necessary to introduce briefly the role and duties of insolvency trustee and then analyzing two main bodies.

⁹ Ibid. article 35.

¹⁰ Ibid. article 39.

¹¹ Ibid. article 41.

¹² Ibid. article 42.

A. Insolvency Trustee

The Commercial Section Court appoints the insolvency trustee who is a physical person, specialized as an expert in the economic field and is independent from the debtor and creditors¹³. Also, creditors can choose another insolvency trustee and will be subject of a Commercial Section Court decision to accept or not¹⁴. The Commercial Section Court may challenge the appointment only if the judge assumes that the new insolvency trustee can not perform this task in the appropriate form¹⁵. The duties of the insolvency trustee are:

- a) the insolvency trustee has a duty to pay attention and act as a conscientious and industrious insolvency trustee;
- b) the insolvency trustee is responsible for damage caused to the parties involved in insolvency proceedings if he violates or fails to fulfill the tasks assigned by this law; and
- c) the insolvency trustee is not liable for the negligence of persons – who are tasked to help - in the exercise of duty , but responds only to their supervision and for the decisions that have particular importance¹⁶.

In the end of his duty, the insolvency trustee submits a report to the creditors' meeting. This report is verified by the Commercial Section Court regarding the final accounts¹⁷. If the creditors' committee is appointed, the observation of this organ should be attached to the report submitted to the creditors' meeting¹⁸.

B. Creditors' Committee

Creditors' Committee is appointed by the Commercial Section Courts, before the first meeting of the assembly creditors¹⁹. The latter shall have the right to decide whether to appoint or not the creditors' committee. In the case that the creditors' committee is appointed by the Commercial Section Courts, the creditors' assembly shall decide whether to approve or dismiss it²⁰. Creditors' Committee represents the secured creditors, insolvency creditors with the larger claims and creditors with the small claims. Also, the member of Creditors' Committee can be appointed person which are not creditors²¹. Creditors' assembly has the

¹³ Ibid. article 43.

¹⁴ Ibid. article 44(1).

¹⁵ Ibid. article 44(2).

¹⁶ Ibid. article 47.

¹⁷ Ibid. article 53(2).

¹⁸ Ibid. article 53 (3).

¹⁹ Ibid. article 54 (1).

²⁰ Ibid. article 55 (1).

²¹ Ibid. article 54 (2) and article 54 (3).

right to decide to remove the members appointed by the Commercial Section Court or the appointment of the other member on the creditors' meeting²².

According to article 56 Albanian Insolvency Law, Creditors' Committee tasks are as follow:

- a) to support and supervise the activities of the insolvency trustee;
- b) to request and receive information about the insolvency proceedings;
- c) inspects the books and records; and
- d) orders an examination of the revenues and cash balances.

Creditors' Committee members are responsible and obliged to compensate secured creditors and insolvency creditors in the case if, for their fault, they breach or fail to fulfill tasks set by Article 58(1) Creditors' Committee tasks. The voting decision of the creditors committee is determined by the insolvency law. Thus, the creditors' committee decision is valid when a) in the decision has participated majority of its members and b) the decision is taken by majority votes of participant members²³. Creditors' committee members shall be rewarded for their work and reimbursed for their expeditors²⁴.

C. Creditors' Assembly

The Commercial Section Court has the right to convene Creditors' Assembly. Secured creditors, all insolvency creditors, insolvency trustee and the debtor have the right to participate in the meeting. The time, place and agenda of creditors' agenda should be published except when the Commercial Section Court decides to postpone it²⁵.

Creditors' assembly shall be convened by the request of:

- a) Insolvency trustee;²⁶
- b) Creditors' committee;²⁷
- c) Insolvency creditors only in the case when their claims compose at least 1/5 of the summary of all the claims of insolvency creditors.²⁸

Creditors' Assembly is headed by the Commercial Section of the Court²⁹. The decision of creditors' assembly is valid only if the amount of claims in favor of the decision

²² Ibid. article 55 (2).

²³ Ibid. article 59.

²⁴ Ibid. article 60.

²⁵ Ibid. article 61.

²⁶ Ibid. article 62(a).

²⁷ Ibid. article 62(b).

²⁸ Ibid. article 62(c).

²⁹ Ibid. article 63(1).

is more than a half of the total claims of creditors with the right to vote³⁰. The right of vote is determinate on the basis of claims submitted by creditor and are not rejected from the insolvency trustee or any creditor with the right of vote. Creditors of lower ranks do not have the voting rights³¹. Creditors, whose claims are rejected, have the voting rights only if the insolvency trustee and creditors with voting rights agree to allow this voting right in the meeting. If there is a disagreement, the commercial section court is competent to decide³². The decision of the Creditors' Assembly can be annulled only by the Commercial Section Court, if there is a common interest of insolvency creditors with the request of secured creditor, insolvency creditors or insolvency trustee (in the case that the request is submitted in the creditors' assembly). Creditors of lower rank do not have the right to ask annulment of the decision³³. The decision of the Commercial Section Court should be published publicly³⁴. If the secured creditor and any insolvency creditor are not agreeing with the decision of the Commercial Section of the court, they have the right to appeal it³⁵.

Creditor's claim toward the debtor

After the decision of opening the insolvency procedure, creditors are asked to submit their claims to the insolvency trustee, within a fixed time limit. The deadline can not be less than 15 days and not more than 90 days³⁶. In the decision of opening the insolvency procedure, Commercial Section Courts sets deadline for:

a) Creditors' assembly meeting for reporting. Creditors' assembly meeting must be held within 45 days and, in any event no later than 90 days from the date of the notification of decision, according to the report of insolvency trustee, and should decide on further extension of insolvency procedure³⁷; and

b) Creditors' assembly meeting for verification. This meeting must be held no earlier than 10 days and no later than 60 days after the expire of the deadline for filing claims. Also this meeting reviews and verifies the claims filed in the proceeding³⁸.

In the decision of the opening insolvency procedure, creditors are required to notify the insolvency trustee for their claims and rights secured over the assets of the debtor listed

³⁰Ibid. article 63(2).

³¹ Ibid. article 64(1).

³² Ibid. article 64(2).

³³ Ibid. article 65(1).

³⁴ Ibid. article 65(2).

³⁵ Ibid. article 65(3).

³⁶ Ibid. article 27(1).

³⁷ Ibid. article 28(1)(a).

³⁸ Ibid. article 28(1)(b).

on the order based in the art 605 of the Civil Code³⁹. This notice should contain detailed information on the assets secured, nature and cause of the birth if the right secured and secured claims as well.⁴⁰ Creditors of lower rank are obliged to present their claims only in the case if the Commercial Section Court asks⁴¹. Then the insolvency trustee registers all claims according to the order listed in art 605 of Civil Code and submits this “table of claims” to the Commercial Section Court. Failure to not submit such detailed information makes creditors responsible for the consequences arising from the damage.

The ranking of the creditors is regulated by the insolvency law in several articles. The insolvency law provides that the insolvency procedure shall not be open in the case that there is not enough money to cover the costs and expenses of the procedure⁴². According to the insolvency law the ranking of the claims is as follow:

- a) The right to separation from the insolvency estate under a title of certificate;⁴³
- b) Secured creditors;⁴⁴
- c) Insolvency creditors;⁴⁵
- d) Unsecured creditors of lower rank;⁴⁶
- e) Living means for the debtor.⁴⁷

As I noted above, Albanian Civil Code provides also the priority of the creditors claim. According to Albanian legal system, the ranking of the civil codes prevails over the rank introduced by insolvency law⁴⁸. Therefore the procedure of ranking of Civil Code shall be followed in the case of the insolvency procedure. The rank of the Albanian Civil Code is as follows;

- a) loans arising from financial transactions secured by the lien securing the purchase price of a particular facility;
- b) claims from wages in labor relations or service relations and alimentary for not longer than 12 months;
- c) claims for unpaid contributions together with interest, and also workers’ credit for damage suffered due to non - payment of above mentioned contributions;

³⁹ Albanian Civil Code 1994, article 141.

⁴⁰ cf Albanian Insolvency law (n 2) article 27(2).

⁴¹ Ibid. article 141(3).

⁴² Ibid. article 171(1).

⁴³ Ibid. article 186.

⁴⁴ Ibid. article 187.

⁴⁵ Ibid. article 150.

⁴⁶ Ibid. article 227(2) and article 228.

⁴⁷ Ibid. article 232.

⁴⁸ Constitution of Albania 1998, article 116.

- d) claims arising from the remuneration from the death and injury of health;
- e) copy right claims of authors and their heirs for compensation arising from the alienation of the whole or part of their rights in the intellectual field for obligations incurred during the past two years;
- f) state claims arising from the budget and credit of the Institute of Social Security for compulsory insurance, as defined by law;
- g) Claims arising from financial transactions, secured with securing charges, defined according to criteria established by law;
- h) Claims from wages in labor relations or service relations and alimentary for not longer than 12 months in excess of the limit specified in the letter "b" of this article;
- i) the remuneration for brokerage under the agency contract, during the last year;
- j) claims secured by mortgage or pledge defined by law, by the value of things in the mortgage or pledged;
- k) claims arising from court expenses for maintaining the property and executive action, made in the common interest of creditors, by value of sales proceeds;
- l) banks claims, which are not included in the letter "f" and claims arising from voluntary contribution;
- m) claims for supply with seeds, chemical fertilizers, insecticides, water for irrigation and for cultivation and collection of agricultural products (fruits) for which credits are used.

However, we have also to note that, the Republic of Albania has ratified C173 Protection of Workers' Claims (Employer's Insolvency) Convention, 1992, which prevail over the domestic legislation⁴⁹. The protection of Workers' Claim (Employer's Insolvency) Convention claims of employees rank higher than other claims⁵⁰.

Conclusion

The procedure for opening insolvency proceedings is done only in three situations laid down by Albanian Insolvency Law 2002. As we saw, the insolvency proceeding can be open, by every physical or legal person and for assets of simple associations. Also, there exists exception from the general principles of opening insolvency proceedings.

According to Albanian Insolvency Law, the insolvency procedure can be open only by the subject foreseen by the insolvency law. Therefore, the right to request opening the

⁴⁹ Ibid. article 122(2).

⁵⁰ ILO Convention, C173 Protection of Workers' Claims (Employer's Insolvency) Convention, 1992, Article 6 in conjunction with article 8.

insolvency procedure has a) the debtor; b) the creditor and c) tax authorities. The creditors' request to open the procedure of insolvency will be accepted only in the situation laid down by law. Also, according to Albanian Insolvency Law 2002, bodies of creditors' representative are the committee creditors and assembly creditors.

Another important feature is the creditors' claim which is regulated by insolvency law 2002 in the detail manner. In the decision of the opening insolvency procedure, creditors are required to notify the insolvency trustee for their claims and rights secured over the assets of the debtor listed on the order based in the art 605 of the Civil Code

References:

Albanian Civil Code 1994

Constitution of Albania 1998

Law No. 9901, date 14 April 2008, On Entrepreneurs and Companies

Law No. 8901, date 23 May 2002, On Insolvency Law

Law no.9920, dated 19.05.2008, On Tax Procedures

ILO Convention, C173 Protection of Workers' Claims (Employer's Insolvency) Convention, 1992