

# ALBANIAN BANKRUPTCY LAW, WHERE WE STAND, WHERE TO GO

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## Abstract

The number of businesses in our country going bankrupt is growing. Businesses that start the procedures of insolvency are increasing, but only few of them are intended to be called legally bankrupt. This is due to the fact that the Albanian bankruptcy law has some shortage that prevents proper legal regulation of bankrupt businesses. Bankruptcy laws have evolved over time in response to changing economic conditions and the political and economic strength of different interest groups. The Albanian bankruptcy law has been under scrutiny in recent times. The aim of this article is to give an overview of German insolvency law, where we find the German principles under which the law in force is based, and USA insolvency law, in order to highlight the aspect in which the Albanian law requires adjustments.

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**Keywords:** Bankruptcy, insolvency law, Albanian bankruptcy law, shortage, adjustments

Bankruptcy is a process where the ownership of an insolvent person's property transfers to the Official Assignee in Bankruptcy to be sold by him for the benefit of those to whom the individual owes debts (creditors).

The laws governing bankruptcy were developed to protect both the position of the debtor and the position of the creditor.

Black's Law Dictionary (Eighth edition) defines “insolvency” as:

1. The condition of being unable to pay debts as they fall due or in the usual course of business.

2. The inability to pay debts as they mature – Also termed ‘failure to meet obligation.

Incapacity to pay debts upon the date when they become due in the ordinary course of business; the condition of an individual whose property and assets are inadequate to discharge the person's debts. The Insolvency Statute in

general admits insolvency reasons:

The illiquidity, i.e. the inability to pay the due obligations

The over indebtedness, which requires that the assets of the debtor do not cover his obligations. (The over indebtedness is only an insolvency reason for legal entities and not for natural persons.)

The imminent illiquidity

Insolvency is a term of more extensive signification than bankruptcy; it includes all the forms of inability to pay a given debt. But often these terms are used as a substitute for each other.

Insolvency would not be possible without the existence of credit since insolvency is, by definition, the incapacity to pay one's debts. Insolvency laws are under greater scrutiny than ever before as governments and legislators seek to mitigate the effects of the global financial crisis on both businesses and consumers. International financial institutions have been involved in reform efforts and, in certain cases, have made financial assistance conditional upon insolvency law reform.

We could define the final aim of bankruptcy from two points of view:

The first one is the Classical view according to which the final aim of all bankruptcy proceedings is the realization of the rights of creditors of a debtor in crisis, for equality in their treatment during the execution of collective forced imposed by the state of insolvency of the debtor in crisis.

And the second is the modern view, according to which the aim of bankruptcy proceedings is just the elimination from the channels of the subjects in crisis when their business continuity results not productive for the economy in general.

The aim of this article is to give the most important principles of USA insolvency regime, and German insolvency regime, in order to compare them with Albanian insolvency law, and to point out what we can do to improve the Albanian insolvency law.

### **USA Bankruptcy liquidation<sup>16</sup>**

At the heart of the code is the preservation of the going-concern value of the financially distressed firm if this economically viable or a timely liquidation if it is not. The two main procedures for achieving either of these objectives, chapter 7 is the one who handles the liquidation.

Under Chapter 7 of Bankruptcy Code, the debtor can be a individual, partnership, or a corporation or other business entity<sup>17</sup>(no individual may be a debtor under chapter 7 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an

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<sup>16</sup> Under Chapter 7 of Bankruptcy Code

<sup>17</sup> 11 U.S.C.

approved credit counseling agency either in an individual or group briefing.. Individuals may use a chapter 13 proceeding to save their home from foreclosure.) .

A voluntary case begins with the debtor filing a petition with the bankruptcy court serving the area where the individual lives or where the business debtor is organized or has its principal place of business or principal assets.

An involuntary case may be commenced under certain circumstances by a petition filed by creditors holding claims against the debtor.

In addition to the petition, the debtor must also file with the court:

Schedules of assets and liabilities;

Schedule of current income and expenditures;

Statement of financial affairs;

Schedule of executor contracts and unexpired leases

Copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case.

Commencement of a bankruptcy case creates an “estate.” The estate technically becomes the temporary legal owner of the entire debtor’s property. It consists of all legal or equitable interests of the debtor in property as of the commencement of the case, including property owned or held by another person if the debtor has an interest in the property.

The debtor’s creditors are paid from nonexempt property of the estate. The bankruptcy trustee gathers and sells the debtor’s nonexempt assets and uses the proceeds of such assets to pay creditors in accordance with the provisions of the Bankruptcy Code. Part of the debtor’s property may be subject to mortgages pledge the property to other creditors. In addition, the Bankruptcy Code will allow the debtor to keep certain “exempt” property; and the trustee will liquidate the debtor’s remaining assets.

When a chapter 7 petition is filed, the U.S. trustee appoints an impartial case trustee to administer the case and liquidate the debtor’s nonexempt assets.

If all the debtor’s assets are exempt or subject to valid liens, the trustee will normally file a

“No asset” report with the court, and there will be no distribution to unsecured creditors.

### **USA Bankruptcy reorganization**

The process of the reorganization of a bankrupt company under the supervision of a court or the appropriate regulator. Chapter 11 proceedings requires a reorganization plan, which is filed with the bankruptcy court or regulator and describes how an insolvent company will change structurally to help it

pay its debts and stay in business. This plan is subject to court or regulator oversight to ensure enforcement. Depending upon the specific plan, a company's original owner or managers may maintain control. Other times, the company's creditors become the new owners of the business; this especially happens when one or more creditors have had their debt completely discharged. Changes also must occur structurally (perhaps in risk management or marketing) to ensure that the bankruptcy does not repeat itself.

The USA bankruptcy law has been evolved over time, from 1878, the first law amended from the American Congress, till the latest change on 2014, the creation of American Institute of Bankruptcy.

Laws that have regulated the bankruptcy process in USA have in common some important factors: interest pro debtor, creditors and professionals, financiers, bankers, lawyers etc. The biggest influence has been professionals, because they were better positioned than other groups. Their interests have been to have as many applications for bankruptcy, and increase their costs. Creditors encountering obstacles in this process, is that their requirements are inhomogeneous, are difficult to organize with each other. While viewing debtor's bankruptcy process as a good opportunity of economic and social sure to recover. Because of philosophy pro debtor, most countries in the world are adopting the provisions of the USA in the design of their legal regulations. They are moving towards a more generous arrangement with the phenomenon of bankruptcy. This does not mean to create an American style trend of the bankruptcy system, but a global convergence of bankruptcy. The aim of all insolvency regimes are to establish a competition process with economic policy which would aim to reward countries that adopt efficient economic policies, and to punish those who do the opposite.

### **The bankruptcy legal framework in Germany**

Bankruptcy law in Germany dates back to 1877. For 20 years this law has been discussed and has been subject to changes, which continue and nowadays. In 1999 Bankruptcy Statute was adopted. According to this document the conditions to start a bankruptcy procedure should be formulated in such a way as to allow the opening of insolvency proceedings, as compared with the Act of bankruptcy. Under the Bankruptcy Act rejected 84% of claims due to lack of assets. The basic goal of the bankruptcy regime in Germany is paying creditors. Companies which in the condition of the financial crisis, first try to resolve issues with their financial creditors outside the doors of the courts. But the problem in this way lies in the fact that managers of companies that will deal with these issues should take personal responsibility of the risk and probably

until meatballs and criminal disputes with creditors, allowing in this way and the accumulation of losses. Rules used for a bankruptcy procedure in Germany, based on the German Code of Bankruptcy. If full creditor consent could not be obtained or the company had become legally insolvent, in-court proceedings had to be initiated. The old, as well as the new code prescribe two insolvency tests. The first one is a cash-flow test that triggers insolvency upon failure or impending failure to adequately service debt payments or the likelihood that failure to service debt payments will occur. This test is similar to Continental European peers. The last (and much rarer one) is a balance-sheet based test for over-indebtedness of the firm. If the financial situation of the firm has decayed past a state in which assets could unlikely cover the costs of bankruptcy proceedings the filings were rejected. Lastly, of the codes under review Germany prescribes the strictest notice period of only three weeks upon breach of one of these criteria under criminal liability.

### **German Bankruptcy reorganization**

The 2012 reform of the German bankruptcy code is shown to have contributed towards the goal of achieving legal parity with other major European economies in the competition of bankruptcy codes, especially due to improved access to self administration and the provision of a pre-insolvency umbrella procedure. Case discussions further highlight the important role of the newly institutionalized debt-for-equity swap in in-court restructuring plans. The instrument contributes to the more flexible nature of the code, which more adequately addresses the needs of current restructurings in the light of more complex corporate capital structures.

### **Albanian bankruptcy legislation**

The phenomenon of bankruptcy in Albania is regulated by the Albanian Bankruptcy Law (No.8901 of 23 May 2002), amended by Law No.9919 of 19 May 2008 and Law No.10137 of 11 May 2009. This law is an adaptation of German legislation. It aims to establish the rules for the repayment of obligations by debtors in a bankruptcy procedure and to ensure an adequate, reliable and effective mechanism for the reorganization or liquidation of a company that is facing financial difficulties.

Bankruptcy law, much in the form that it is today, dates back to 1995. This law has improved and amended in 2002 and in 2008. Law of 2002 brought significant changes compared with the 1995 law, such as regarding the order of priority of creditors' claims, dismissing the remainder of the company's liabilities, etc., while the changes made in 2008, consist in the creation of the Bankruptcy Supervision Agency, as well as strengthening the role of administrator bankruptcy. The law has certain rules to be applied by commercial entities for repayment

of debts of debtors in a bankruptcy procedure mandatory. In support of economic development, as well as the treatment of its citizens justice, requires the observance of bankruptcy proceedings. During the comparative analysis with other regional countries, but also with the European Union countries in 2008, deficiencies were identified in respect of trade legislation bankruptcy proceedings. These deficiencies have been addressed by amendments to the law "On Bankruptcy". These changes introduced the establishment and operation of a special structure for the supervision of bankruptcy administrators, as is the Bankruptcy Supervision Agency.

Part of the reform was the implementation of mandatory rules: licensing of administrators; promote the same standards; maintaining the register of bankruptcy administrators and supervision of their activities. In terms of the legal framework and creating the appropriate structure (regulation of the profession of bankruptcy administrator) is a step forward, Albania applies the same system as Serbia and Kosovo. Bankruptcy law, with changes of 2008, the adapted legal framework with that of Germany.

#### Corporate Rescue and Reorganization

This Bankruptcy Law provides that the debtor has some alternatives to bankruptcy which may be agreed upon during insolvency. One of the alternatives provided by this law is corporate rescue, thus, Albanian Bankruptcy Law recognizes the principle of corporate rescue.

The law has no specific provisions for restructure of the company outside a formal procedure. However, prior to submission of the petition for the opening of the insolvency proceedings, the debtor is not prohibited to try to achieve an out-of-court restructuring. It should be highlighted that although the law does not prohibit the out-of-court reorganization, the directors of the company are obliged to request the immediate initiation of an insolvency proceeding, not later than 21 days from the date the legal entity becomes insolvent. In the case that they do not proceed with such request they will be personally responsible for the compensation of the creditors if such creditors suffer losses because of the failure to file the petition within 21 days.

The law provides that the reorganization of the debtor is possible and the mechanism for implementing the principle of corporate rescue is the Reorganization Plan ('RP') approved by the Creditors' Assembly, agreed by the debtor and approved by a court judgment of the Bankruptcy Court and filed with the Court Registry. There is no draft RP available and the Bankruptcy Law merely provides about the elements (some of them mandatory) to be included in the RP. The Bankruptcy Law provides for the necessary quorum/majority for the approval of RP. This law does not have

specific provisions related to the process for “cramming down” creditors who do not approve the RP. However, the law provides that RP cannot be approved by the Bankruptcy Court in the cases that this RP is objected from the majority of the bankruptcy creditors. In addition, this law provides that the creditors and the debtor, according to the Code of Civil Procedure, may initiate a special appeal related to the court decision for the approval of RP.

The law does not specifically provide for the length of RP. The efforts to reorganize a debtor according to Albanian Bankruptcy Law are not an easy task. Therefore, the persons participating in bankruptcy proceedings and especially the bankruptcy administrator(s) ought to be well-trained to perform such important duties.

The cross-border bankruptcy is covered by the law. A bankruptcy procedure for companies that have a registered permanent establishment in Albania or own an asset located in Albania should initiate immediately. The bankruptcy procedure is the same as that for any other bankruptcy procedure started by any Albanian debtor(s) or creditor(s). Analyzing the enforcement of the court decisions we may conclude that the decision(s) of the Albanian courts in other jurisdictions are recognized in conformity with the legislation of the countries the decision is addressed to, as Albania has not ratified the Convention for the enforcement of foreign judgments’ – Brussels 1968.

We should mention that Albanian Bankruptcy Law provides also the Ancillary Bankruptcy Procedures. The law provides that in addition to the debtor and creditors, the administrator or other appointed representative of the debtor’s assets in the cross-border bankruptcy procedures shall have the right to file a petition to start such ancillary procedures.

The court procedure shall not begin if there is insufficient money to cover the costs and expenses associated with the procedure. The ranking of the claims proceed with:

The right of separation from the bankruptcy asset (e.g. properties for which a creditor has ownership title shall be separated from bankruptcy asset)

Secured creditors

Unsecured creditors

Unsecured creditors of lower ranking

Means of living for the debtor (article 84) (i.e. cost of living the amount of which should be agreed by the creditors’ committee)

There are some alternatives to bankruptcy for the debtor that may be determined during the situation of insolvency provided by the Bankruptcy Law. The alternatives provided by the new law of the bankruptcy are (i) sale of the debtor, (ii) corporate rescue, and (iii) liquidation of the debtor. The principle of corporate rescue is recognized by Albanian Bankruptcy Law. The creditors’ Assembly has approved the re-organization plan for the

implementation of the corporate rescue approved by a court decision and filed with the Registry of the Court which oversees the implementation of PR.

The Bankruptcy consequences aren't contemplated in the bankruptcy law, the court decides the outcome of the surveillance. The Bankruptcy law provides only the rights of the creditors of the bankruptcy and the distribution of assets after the bankruptcy procedure.

It is redundant to say that the Bankruptcy Law plays an important role in all of the countries with a highly developed economy. Both creditors and debtors consider the bankruptcy law as a legal and significant mechanism to address the breaking up of the debtor-creditor relations. The fact of whether it will have the same or similar effects in Albania depends on a variety of factors. The judges must have a clear perception of the social policies embodied in the legislation and must ask to apply such policies through the development of an informative interpretation and through the enforcement of the approved provisions. The creditors must be informed of the benefits offered by this Law.

## **Conclusion**

From an assessment of the current legislation on bankruptcy, compared with other domestic laws and foreign legislation, addressing this area, experts believe that the situation of the debtor in a bankruptcy procedure, are in a discriminatory situation, because this spirit, followed existing law, it is oriented towards the implementation of the liquidation proceedings, leaving no proper space business to exploit other known possibility by law, that the reorganization, the main goal is the preservation of the activity. This is because the existing law provisions focus more on explaining the provisions that provide for the liquidation of a business, leaving unclear the process of reorganization of a business. In these conditions, it is necessary to devise clear legal provisions, to meet this opportunity that gives law itself, while maintaining the balance between rights and obligations, that all stakeholders in an issue.

Its design and the order of the provisions, or its leaders, follow the procedure, which has each of the cases of bankruptcy liquidation, reorganization or debt restructuring. This has led to the actual implementation of identified significant difficulties in understanding and interpreting the current law and the specialized entities in the financial field.

The envisaged strengthening and centralization of regulatory functions under the Albanian Bankruptcy Supervision Agency is likely to ensure a more consistent and effective approach to bankruptcy regulation. In this respect it is necessary to strengthen the role of the ABSA and raise the



quality of bankruptcy administrators' profession.

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