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RESTRUCTURING OF COMPANIES AND THEIR CONSEQUENCES IN RELATION TO EMPLOYEES:

*Conditions, dilemmas and challenges in the Laws of the EU,
Austria, Macedonia and Serbia*

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FOREWORD

ABOUT THE OeAD IMPULSE Project “Restructuring of Companies and the EU Law”

The International Project “*Restructuring of Companies and the EU Law*” (RoCEU) takes place in the period between 1st April 2016 – 31st March 2018. The project is supported by the Austrian Agency for International Cooperation in Education and Research (OeAD) as part of the New Cooperation Program for Higher Education – IMPULSE and is coordinated by the Research Institute of Central and Eastern European Business Law (FOWI) at the Vienna University (WU). FOWI has been engaged in a great number of research projects focusing on business law in CEE countries and established a reliable network of scholars in this region in the last 26 years.

Leading university in the “Restructuring of Companies and the EU Law” IMPULSE project is the Vienna University of Economics and Business (Wirtschaftsuniversität Wien – WU), while the other two partners in the project are the University in Belgrade (Faculty of Law) and the Ss. Cyril and Methodius University in Skopje (Faculty of Law “Iustinianus Primus”).

The project aims at conducting a comprehensive research including *company and labour laws* on restructuring of companies from the perspective of the EU requirements. Only the combination of company and labour law can create the delicate balance between flexibility and security which is necessary to achieve the sometimes conflicting aims of economic growth and employment protection at the same time. In the *centre of the research* are



divisions and mergers of public limited liability companies (both national and cross-border), which are regulated by the Third, Sixth and Tenth Company Law Directives plus the Transfer of Undertakings Directive focusing on the employees' situation in such cases. Another significant part of the research focuses on the EU regulation on takeover bids. The thirteenth company law directive aims to achieve greater legal certainty regarding takeover bids, while protecting the interests of shareholders and employees. From a labour law perspective the research will concentrate on the impact of restructuring on the employees and labour market. Emphasis is put on how the negative consequences of restructuring can be eased for the employees and which requirements the EU formulates in such situations. It is important to analyse how groups of companies influence the definition of 'employer' and the resulting consequences for the employees. Employees' rights at EU level vary from strong participation rights to generally formulated information and consultation rights. Employee participation in case of restructuring is one focus of the research. Besides, the situation of unemployed and possible instruments of an effective employment policy will be examined.

The *RoCEUIMPULSE* Project contains a detailed program of activities which include: *organization of international conferences at the participating universities* (where prominent experts in the fields of labour law and company law, social partners and representatives of the broader academic community take part), *academic courses for students, mobility of scientific staff* (with research stay at the WU in Vienna), *procurement of relevant literature and technical equipment* for the improvement of the educational process, *final conference in Vienna* and *publication of a Book*.



ABOUT the CONFERENCE “Restructuring of Companies and Their Consequences in Relation to Employees: Conditions, Dilemmas and Challenges in the Laws of the EU, Austria, Macedonia and Serbia” and the PARTICIPATION of the “Justinianus Primus” Law Faculty in the Project

On the 6th of November 2017, a Conference with a title “*Restructuring of Companies and Their Consequences in Relation to Employees: Conditions, Dilemmas and Challenges in the laws of the EU, Austria, Macedonia and Serbia*” was held at the Faculty of Law “Justinianus Primus” in Skopje. The Conference was part of the OeAD IMPULSE project and was structured in four different sessions where different speakers delivered their presentations. The first two sessions were devoted to the issue of “restructuring” analyzed through the prism of labour law, while the second two sessions dealt with the same issue from the aspect of company law. Apart from the members of the national research teams from the universities of Vienna, Skopje and Belgrade, the Conference was attended by many other labour and company lawyers, representatives of Trade Unions and Employers’ Organizations, judges and experts from practice.

In addition to the Conference, an academic course for students with a title “*Restructuring of Companies and the EU Law: Key Company and Labour Law Aspects*” was also held at the Faculty of Law “Justinianus Primus” in Skopje. The academic course encompassed several lectures attended by 40 students of first, second and third cycle of studies at the “Justinianus Primus” Faculty of Law in Skopje. Lectures were conducted by members of the Project (i.e. professors from all the three universities) and were staggered in three consecutive days (from 6th to 9th November, 2017). During the academic course, students extended their knowledge in key aspects of the EU law in the field of “corporate restructuring and its consequences for workers” and the



process of harmonization of the Macedonian and Serbian labour and company laws with the EU law.

In summary, the participation of the Faculty of Law “Justinianus Primus” within the RoCEU IMPULSE Project has been limited to the following activities:

- ✓ **Initial (kick-off) Meeting** at the Vienna University of Economics and Business (June 2nd, 2016) – attended by Professor Todor Kalamatiev and Dr. Aleksandar Ristovski
- ✓ **International Conference** with a title “*Restructuring of Companies and Protection of Employees’ Rights: Views from the EU, Austria, Serbia and Macedonia*” and **Academic Course for Students** from the University in Belgrade (which was held at the Faculty of Law in Belgrade from 2nd – 4th March, 2017) – attended by Professor Todor Kalamatiev and Dr. Aleksandar Ristovski
- ✓ **One month research stay** at the Vienna University of Economics and Business for two participants of the Ss. Cyril and Methodius University in Skopje, “Justinianus Primus” Law Faculty (Professor Todor Kalamatiev and Dr. Aleksandar Ristovski) – June/July, 2017
- ✓ **International Conference** with a title “*Restructuring of Companies and their Consequences in relation to Employees: Conditions, Dilemmas and Challenges in the laws of the EU, Austria, Macedonia and Serbia*” and **Academic Course for Students** from the Ss.Cyril and Methodius University in Skopje (which was held at the “Justinianus Primus” Law Faculty in Skopje from 6th – 9th November, 2017) – attended by Professor Todor Kalamatiev, Professor Goran Koevski and Dr. Aleksandar Ristovski



- ✓ **Closing Conference of the IMPULSE Project** with a title “Stakeholder Protection in Restructuring – Selected Company and Labour Law Issues” (which was held at the Vienna University of Economics and Business, 12-13 February, 2018) – attended by Professor Todor Kalamatiev, Professor Goran Koevski and Dr. Aleksandar Ristovski

In the capacity of national project coordinator and Editor-in-chief of the Proceedings of the Conference “*Restructuring of Companies and their Consequences in relation to Employees: Conditions, Dilemmas and Challenges in the Laws of the EU, Austria, Macedonia and Serbia*” held at the Faculty of Law “Justinianus Primus” in Skopje on the 6th of November 2017, I would like to express my gratitude to all the Conference Participants for their selfless and dedicated contribution to this event.

I would also like to express a special gratitude to all authors who participated with their contribution in this Proceedings. Without their dedicated effort, the publication of the Proceedings would not have been possible.

Professor Todor Kalamatiev,
Editor-in-Chief



LIST OF CONTRIBUTORS TO THE CONFERENCE PROCEEDINGS

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Bojana Velkovska graduated in 1989. She passed the judicial examination in 1991 and was engaged as an authoritative associate in the basic public prosecution in Skopje and the Court of Appeal. In 2002, she was elected as Judge in the Basic Court I. In 2007, she was appointed as Judge in the Department of labour disputes in the Basic Court Skopje II. In 2017, she obtained MA degree at the University American College. She is also engaged as Trainer in the Macedonian Chamber of Commerce, OSCE, JURIDICA, AKADEMIK, Barrister Association, Judge Academy, Public Prosecutors and other organizations.

Orde Gjorgjioski is employed in the Food Industry “Vitaminka” JSC Prilep on the job position Manager of the Legal and General Affairs Department. His main preoccupation is the corporative management, business law, civil law etc.. In 2016 he obtained a Ph.D. at the Faculty of Law “Iustinianus Primus” in Skopje and gained a scientific title Doctor of Legal Sciences in the area of business law. At this point he is working on his second doctoral dissertation in the field of management. He has participated in numerous lectures, conferences, and workshops in his area of interest.

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Aleksandar Shopov is a judge and President of Basic Court Veles. He holds a LLM degree in commercial law. Judge Shopov is a regular lecturer at the Academy for Judges and Public Prosecutors of the Republic of Macedonia, in the area of commercial and civil law. He also participates with expert presentations at seminars and trainings organized by the Chamber of Bankruptcy Trustees, the Notary Chamber and the Chamber of Bailiffs.



CONFERENCE PROGRAM

09:15 - 09:45	REGISTRATION OF PARTICIPANTS
09:45 - 10:00	<p>OPENING OF CONFERENCE AND WELCOME SPEECHES</p> <p>Prof. Dr. Nikola Jankulovski, Rector of "Ss Cyril and Methodius" University in Skopje Prof. Dr. Goran Koevski, Dean of the "Iustinianus Primus" Faculty of Law in Skopje</p>
10:00 - 11:45	LABOUR LAW SESSION (THEORETICAL ASPECTS)
10:00-10:15	<p>Moderator: Prof. Dr. Todor Kalamatiev, University "Ss Cyril and Methodius", Skopje</p> <p>Dr. Erika Kovács, Vienna University of Economics and Business <i>Employees' participation rights in case of cross-border restructuring in the EU law - An overview</i></p>
10:15-10:30	<p>Prof. Dr. Ljubinka Kovačević, University of Belgrade <i>Maintenance and protection of employees' rights in the event of change of employer in the Republic of Serbia</i></p>
10:30-10:45	<p>Prof. Dr. Todor Kalamatiev, University "Ss Cyril and Methodius", Skopje <i>Protection of employees' rights in the event of change of employer in the Republic of Macedonia</i></p>
10:45-11:00	<p>Doc. Dr. Aleksandar Ristovski, University "Ss Cyril and Methodius", Skopje <i>Collective dismissals and their consequences in regard to the employees' rights - analysis of the "most critical aspects" in terms of Macedonian labour law and its compliance with the EU law</i></p>
11:00-11:15	<p>Prof. Dr. Toni Deskoški, Doc. Dr. Vangel Dokovski, University "Ss Cyril and Methodius", Skopje <i>Arbitrating Corporate Disputes - focus on employment disputes</i></p>
11:15 - 11:45	Discussion



11:45-12:15	Coffee Break
12:15-14:00	LABOUR LAW SESSION (PRACTICAL ASPECTS)
12:15-12:30	Moderator: Mr. Emil Krstanovski (National Coordinator of the International Labour Organization in Macedonia) Ms. Mirjanka Aleksevaska (Representative of the Ministry of Labour and Social Policy of Macedonia) <i>Harmonization of labour legislation of Macedonia with the EU law with a particular focus to restructuring of undertakings</i>
12:30-12:45	Mr. Darko Dimovski (Acting President of the Federation of Trade Unions of Macedonia – SSM) <i>Role of the trade unions in the protection of employees' rights in the event of collective redundancies</i>
12:45-13:00	Mr. Angel Dimitrov (President of the Organization of Employers of Macedonia - ORM) <i>Between flexibility and security in the event of restructuring of companies</i>
13:00-13:15	Ms. Bojana Velkovska (Labour disputes Judge of the Primary Court Skopje II) The influence of company status changes on employees' rights with a particular reference to Article 78 of the Law on employment relations of the Republic of Macedonia (Offering a modified contract of employment)
13:15-13:30	Mr. Orde Gjorgjioski (representative of PI "Vitaminska" A.D Prilep) <i>Achieving compromise between the need for restructuring of the company (employer) and the necessity of protecting workers</i>
13:30 – 14:00	Discussion
14:00 - 15:00	Lunch Break



15:00-16:45	COMPANY LAW SESSION (THEORETICAL ASPECTS)
15:00-15:15	Moderator: Prof. Dr. Martin Winner , Vienna University of Economics and Business Prof. Dr. Martin Winner , Vienna University of Economics and Business <i>Basic types of restructurings</i>
15:15-15:30	Prof. Dr. Goran Koevski , University "Ss Cyril and Methodius", Skopje <i>Restructuring of Companies in light of the Macedonian model of corporate governance</i>
15:30-15:45	Prof. Dr. Mirjana Radović , University of Belgrade <i>Liability of the companies involved in a division for obligations of the company being divided - Serbian law in a comparative legal context</i>
15:45-16:00	Prof. Dr. Vuk Radović , University of Belgrade <i>Prearranged reorganization plan as a hybrid procedure in Serbian bankruptcy law</i>
16:00-16:15	Prof. Dr. Darko Spasevski , University "Ss Cyril and Methodius", Skopje <i>Macedonian Bankruptcy Law and the Protecting of Creditor's Rights</i>
16:15-16:45	Discussion
16:45-17:00	Coffee Break
17:00-18:00	COMPANY LAW SESSION (PRACTICAL ASPECTS)
17:00-17:15	Moderator: Prof. Dr. Goran Koevski , University "Ss Cyril and Methodius", Skopje Mr. Aleksandar Shopov (President of the Primary Court Veles) <i>Reorganization plan in the event of bankruptcy in the court practice of the Republic of Macedonia</i>



17:15-17:30	Mr. Aco Petrov (President of the Chamber of Bankruptcy Administrators of the Republic of Macedonia) <i>Reorganization plan in the event of bankruptcy – case analysis</i>
17:30-17:45	Mr. Ivica Medarski (Representative of "Insurance Makedonija jsc Skopje - Vienna Insurance Group") <i>Practical aspects and differences between status changes and takeovers of companies</i>
17:45-18:00	Ms. Ana Atanasovska (Representative of "EVN Macedonia") <i>Legal unbundling of the Distribution Operator – way and challenges</i>
18:00-18:15	Discussion
18:15	End of the Conference and Closing Ceremony



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Full Professor, Ss. Cyril and Methodius University in Skopje
Faculty of Law "Iustinianus Primus"

**PROTECTION OF EMPLOYEES' INDIVIDUAL RIGHTS IN
THE EVENT OF A CHANGE OF EMPLOYER (TRANSFER OF
UNDERTAKINGS) IN THE REPUBLIC OF MACEDONIA**

A. Introduction

*The Paper was received on 15.10.2018
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In the modern business environment, labour relations become increasingly dynamic and, as a consequence, there are more frequent changes on the side of the employer as a contractual party in the employment relationship. Usually, such changes are related to changes in the organization of the business and/or in the ownership of the assets with which the business is being performed and which are directed towards a greater competitiveness and more efficient fulfilment of the employers' business objectives.

The change of the employer can lead to a transfer of the employment contracts of the employees and safeguarding of their employment relationships only as a consequence of a so called '*transfer of an undertaking, part of an undertaking, business or part of a business*' from the employer-predecessor (transferor) to the employer-successor (transferee).

The matter related to the 'change of employer' and the consequences of this change for the employees, in the Macedonian legislation was regulated for the first time with the Law on Labour Relations from 2005 (Article 68).¹ The regulation of this matter is first and foremost an expression of the thorough changes in the Macedonian economy that are a consequence of the privatization of the undertakings with social ownership, the different types of restructuring of the companies in terms of increasing their competitiveness on the market

¹ See Тодор Каламатиев, Љубинка Ковачевиќ and Александар Ристовски, *Заштита на правата на вработените во случај на промена на работодавачот во Република Македонија и Република Србија (компаративна анализа)*, (Година XVIII), 220.

S. Brekoulakis, Part I Fundamental Observations and Applicable Law, Chapter 2 - On Arbitrability: Persisting Misconceptions and New Areas of Concern in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library, Volume 19, Kluwer Law International 2009, 39.

S. Kröll and P. Kraft, Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse against the Award, § 1059 – Application for Setting Aside in Karl-Heinz Böckstiegel, Stefan Michael Kröll, et al. (eds), *Arbitration in Germany: The Model Law in Practice (Second Edition)*, 2nd edition, Kluwer Law International 2015, 411.

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Vinay Reddy, V. Nagaraj, Arbitrability: *The Indian Perspective*, *Journal of International Arbitration* 19(2): 117–149, 2002, 121.

Patrick M. Baron and Stefan Liniger, A Second Look at Arbitrability, *Arbitration International*, (Kluwer Law International 2003 Volume 19 Issue 1) pp. 27-54.

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MACEDONIAN BANKRUPTCY LAW AND THE PROTECTING OF CREDITOR’S RIGHTS BY THE CREDITORS BODIES IN THE BANCURPTCY PROCEDURE

A. Introduction

*The Paper was received on 10.12.2018
It was reviewed and accepted for publication*

Creating a strong and safety bankruptcy environment is very important as a precondition for protection of creditors’ rights, which will eventually lead to increasing of legal centrality for the investors. Macedonian Law on Bankruptcy is enacted in 2006 and in this whole period until the moment is amended eight times¹.

The most important researches worldwide are showing that the future developing of the financial markets is conditioned with the stabile investor protection. An important component of a country’s creditor rights is its insolvency framework, which together with a supporting judicial environment affects the degree to which commercial distress is resolved using formal bankruptcy proceedings.² Strong bankruptcy regimes also play a role in determining higher liquidation values and improved chances of ex-post firm survival.³ A good insolvency regime is one with ex ante screening mechanisms that prevent managers and shareholders from taking imprudent loans and lenders from giving loans with a high probability of default. At the same time it should also deliver an ex-post efficient outcome, in that the highest total

¹ Official gazette of the Republic of Macedonia no. 34/2006, 126/2006, 84/2007, 47/2011, 79/2013, 164/2013, 29/2014 и 98/2015

² Stijn Claessens, Leora Klapper, “Insolvency Laws Around The World – A Statistical Analysis And Rules For Their Design” available at <https://www.cesifo-group.de/DocDL/dicereport106-forum2.pdf>

³ Ibid.

value is obtained for the distressed firm with the least direct costs and loss in going concern value.⁴

The world is familiar with the bankruptcy for a long period of time. The Romans have the first written history on the subject. The word “bankruptcy” is believed to originate from ancient Latin *verbiage* describing a “broken bench”, *bancus*, the tradesman’s counter, and *ruptus*, broken, denoting one whose place business was broken or gone.⁵ A tradesman in the square who could not pay creditors’ claims literally had his bench broken which put him out of his misery. One of the earliest recorded descriptions of the concept underlying bankruptcy is found in the Bible. In the book of Deuteronomy, Chapter 15, Verses 1- 2, Moses brings home God’s law from the mountain with the burning bush to the Israelites and counsels them to forgive debts every seven years. Moses counsel was “At the end of every seven years, thou shalt make a release.⁶ And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it: he shall not exact it of his neighbor, or of his brother, because it is the Lord’s release”⁷.

According to the “Legislative Guide on Insolvency Law” these are the key objectives of the bankruptcy procedure: provision of certainty in the market to promote economic stability and growth; maximization of value of assets; striking a balance between liquidation and reorganization; ensuring equitable treatment of similarly situated creditors; provision for timely, efficient and impartial resolution of insolvency; preservation of the insolvency estate to allow equitable distribution to creditors; recognition of existing creditor rights and establishment of clear rules for ranking of priority claims; establishment of a framework for cross-border insolvency and ensuring a transparent

4 Ibid.

5 Enoch K. Beraho, “A study of global bankruptcy trends: examples from USA, UK, Australia, Ukraine, Malaysia and China”, available at https://businessperspectives.org/images/pdf/applications/publishing/templates/article/assets/2305/PPM_EN_2008_03_Beraho.pdf

6 Ibid.

7 Ibid.

and predictable insolvency law that contains incentives for gathering and dispensing information.⁸

B. Position of creditors in Macedonian bankruptcy law

The position of the creditors should be addressed from legal point and from practical point. The second perception is addressing the practical implementation of the Law of bankruptcy. This can be measured by two components, i.e. average recovery rate and the average duration of the procedure. If we analyze the Doing Business report for Macedonia for 2016⁹ and 2017¹⁰ for these two issues the following can be noticed: the average recovery rate in 2016 is 44,2% and in 2017 is 47,2%, while the average duration of the procedure in 2016 is 1,8 years, and in 2017 is 1,5 years.

According to the Law on Bankruptcy, A Bankruptcy Proceeding aims to achieve a collective settlement of the creditors of the bankruptcy debtor through liquidation (conversion into cash) of the debtor’s property and distribution of the proceeds to the creditors, or by concluding a special contract which allows a forced settlement of the claims established as a part of the plan directed towards maintaining of the debtor’s business venture.¹¹

During the bankruptcy procedure, the creditors are enforcing their rights throughout bodies in which they participate i.e. the board of creditors and assembly of creditors.

8 “Legislative Guide on Insolvency Law”, UNCITRAL, 2005, available at https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

9 Doing Business Economy Profile 2017 : Macedonia, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/25575/109959-WP-DB17-PUBLIC-Macedonia.pdf?sequence=1&isAllowed=y>

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11 Article 3 of the Law on Bankruptcy

According to the Macedonian legislation we can detect 1) creditor of the bankruptcy estate and 2) bankruptcy creditors. According to article 2, (2), 64) of the Law on Bankruptcy, “Bankruptcy creditor” shall be an individual or a legal entity with claim against the debtor, that occurred before commencement of the bankruptcy procedure, regardless the reason and According to article 2, (2), 1) of the Law on Bankruptcy, “Creditor of the Bankruptcy Estate” shall be an individual or a legal entity, with a claim (receivable) from the debtor on any basis, incurred after opening of the Bankruptcy procedure. Furthermore, the legislation is making a difference between “Secured creditor” shall be an individual or a legal entity that has a collateral right, other right to settlement over an asset, or a right registered in the public registers and “Unsecured creditor” shall be a creditor without any security provided upon his receivable.

The board of creditors is very important stakeholder in the bankruptcy procedure. This means that the legislation is giving very important responsibilities to this body of the bankruptcy procedure.

According to article 38, (1) of the Law on bankruptcy, the board of creditors is body of the bankruptcy procedure, established for the purpose of protection of the creditors’ interests in the bankruptcy procedure and for performing the procedural activities which under the Law is authorized to perform on behalf of all creditors which are party in the procedure. As member of the board of creditor can be appointed any creditor who, in accordance with article 87 of this Law, reported his claim and which claim the bankruptcy trustee determined as founded. The Law on bankruptcy prescribes provisions which are determining who can be appointed as a member of the Board of Creditors in order to assure equal treatment for all creditors.¹²Article 39 (1) of the Law on bankruptcy prescribes that the proposal for appointing members of the board of creditors is submitted by the bankruptcy trustee in written in a period of three days upon the expiry of the deadline for reporting the creditor’s

¹² According to article 38, (3), As member of the board of creditor cannot be appointed creditor who:

claims. The proposal must be elaborated and the bankruptcy trustee should state the reasons for proposing creditors for members of the board of creditors. When preparing the proposal for appointment of the Board of Creditors, the bankruptcy trustee should take into consideration the limitations stipulated in article 38 paragraph (3) of the Law on bankruptcy. Then, based on the proposal of the bankruptcy trustee, in a period of three days of submission of the proposal, the bankruptcy judge shall adopts a decision for establishing the board of creditors, by determining the number of members and appointing the members of the board of creditors. The decision is delivered to the appointed members of the board of creditors and to the Central register of Republic of Macedonia. Appeal is not allowed against the relevant decision.

The Law on bankruptcy sees that the Board of Creditors is very important body of the bankruptcy procedure, so the Law allowing in some case where the specific expertise is very needed and important in order to act in the procedure, to involve person from outside. Namely, article 39 (3), prescribes that based on proposal of the board of creditors, the bankruptcy judge may appoint as member of the board of creditors individual who, considering his professional knowledge may contribute in the work of the board of creditors, without voting rights in adopting decisions.

- 1) Is at the same time debtor of the bankruptcy debtor and his obligations towards the bankruptcy debtor exceed 1% of the estimated value of the property that is included in the bankruptcy estate;
- 2) The last two years prior the opening of the bankruptcy procedure was appointed as member of the management or supervisory bodies or procurator of the bankruptcy debtor;
- 3) Is a trade company related to the bankruptcy debtor, i.e. the debtor from item 1 of this paragraph is a related company in accordance with Article 491 of the Law on Trade Companies;
- 4) Has been appointed a member of the management or supervisory body of the debtor referred to in items 1 and 3 of this paragraph;
- 5) In accordance with this Law, is considered as close to the person referred in items 1, 2 and 3 of this paragraph,;
- 6) Is creditor with rights to separate settlement in the bankruptcy procedure and
- 7) Is a bankruptcy trustee, enforcement agent, notary, certified valuer or an accountant, and a creditor.

For procedural aspect it is very important to stress the provision of the article 39 (4) which state: the number of members of the board of creditors, appointed by the bankruptcy judge, must be odd and may not be less than three or more than five.

According to article 39 (5), the Board of Creditors shall adopt the decisions by a majority of the votes of the total number of members entitled to vote. Each member of the Board of Creditors has the right to vote and vote “for” or “against” the proposed decision, which in accordance with this Law, should be adopted by the board of creditors. The members of the Board of Creditors cannot abstain from voting.

If the Board of Creditors did not make a decision because one of the members of the board of creditors requested the voting be postponed at the session itself, in that case, based on proposal of the bankruptcy trustee, the bankruptcy judge will order the responsible person of the legal entity - the creditor member of the board of creditors, to compensate for the costs that arise due to the postponement of the voting.¹³

Very important provisions governing the rights and responsibilities of the Board of Creditor are incorporated in article 40 of the Law on Bankruptcy. Namely, the board of creditors shall be obliged to conduct the activities, for which it is authorized under this Law, and particularly to follow the course of operations and control the amount of cash. For conducting separate operations within its scope, the Board of Creditors may authorize some of its members. Those are general provisions applicable during the whole procedure. According to article 40 (2), within its scope of operations the board of creditors shall particularly: survey the reports of the bankruptcy trustee on the bankruptcy procedure and on the statute of the bankruptcy estate; examine the trade books and the complete documentation taken over by the bankruptcy trustee; may file to the bankruptcy judge objection against the work of the bankruptcy trustee; submit proposal to the bankruptcy judge on the manner cashing in the debtor's

¹³ Article 39 (6) of the Law on bankruptcy

assets; proposes to the bankruptcy judge whether the work in progress or the activity of the bankruptcy debtor should proceed; and give its opinion to the bankruptcy judge for approval of the justified inventory shortages.

The appointed member of the Board of Creditors may be dismissed in the course of the bankruptcy procedure, if he did not fulfill his obligations determined under this Law, he is not present of the sessions and does not justifies his absence, without explanation refuses to vote for adoption of decisions which are of interest of the creditors and with such non adoption the conducting of the bankruptcy procedure is aggravated or delayed, as well as in cases when the basis for his appointment or election by the board of the creditors ceased and in other cases determined under the law.¹⁴ The proposal for dismissing the appointed or elected member of the Board of Creditors can be submitted by any creditor, the Assembly of Creditors and the Board of Creditors. The decision for dismissing the appointed or elected member of the board of creditors is adopted by the bankruptcy judge within a period of three days of the day of submission of the proposal. The bankruptcy judge may ex officio adopts a decision for dismissing the member of the Board of Creditors when there are reasons for his dismissing, as stated in article 41 (1).¹⁵

Upon the effectiveness of the decision for dismissing the member of the Board of Creditors, within three days, the bankruptcy judge shall appoint member of the Board of Creditors on the place of the dismissed member, upon proposal of the bankruptcy trustee.¹⁶ The Law on bankruptcy, prescribes provision for the liability of the members of the Board of Creditors. If the members of the Board of Creditors fail to act as a bona fide merchant, they shall be obliged to compensate the secured creditors and the bankruptcy creditors for any damage caused.¹⁷

¹⁴ Article 41 (1) of the Law on bankruptcy

¹⁵ Article 41 (2) of the Law on bankruptcy

¹⁶ Article 41 (4) of the Law on bankruptcy

¹⁷ Article 41 (1) of the Law on bankruptcy

According to article 43 of the Law on bankruptcy, the Bankruptcy Judge shall ex officio convene the first session of the Board of Creditors within three days of the day of delivering the decision for establishment of the board to its members. Upon proposal of the members of the board of creditors, the members of the Board shall elect a president on that session. The bankruptcy trustee is not authorized to propose president of the Board of Creditors. Then, according to article 43 (2), the future sessions of the Board of Creditors are convened by the president of the Board of Creditors. The president of the Board of Creditors is obliged to convene the meeting of the Board of Creditors upon request made by any of the members of the Board of Creditors within a period not longer than three days. The meetings of the board of creditors are managed by the president of the board of creditors, who runs the work on the sessions, for which minutes are prepared, for all decisions adopted, with a note on the majority with which the decision was adopted and who of the members voted for or against. The minutes and the adopted decisions are submitted to the bankruptcy judge, the bankruptcy trustee and all members of the Board of Creditors. If the president of the board of creditors refuses to convene a meeting within the determined deadline, the session is convened by the bankruptcy judge. At the meeting of the Board of Creditors, a member of the Board of Creditors may be replaced with proxy authorized with power of attorney and who can vote for the decisions that are taken at the session.¹⁸ The members of the Board of Creditors who voted “for” the adoption of any of the decisions that are in the competence of the Board of Creditors, cannot vote differently after the end of the session, nor require the annulment of the decision of the Board of Creditors.

The bankruptcy judge and the bankruptcy trustee shall be invited to the session of the Board of Creditors, without voting rights. The bankruptcy judge is not entitled to run the sessions of the Board of Creditors. The members of the board of creditors can decide to hold the session in absence of the bankruptcy judge.

¹⁸ Article 43 (3) of the Law on bankruptcy

The Board of Creditors can held its session provided that the majority of total number of members of the board of creditors are present. The presence on the sessions is obligatory for the members of the Board of Creditors.

The members of the Board of Creditors may attend and adopt decisions on the organized sessions by using a conference telephone line or by using other audio and video communication equipment, in a manner in which all persons participating in the session so organized are able to hear, see and talk to each other, unless it is prohibited by law. The participation at these sessions shall be considered as attendance and personal participation of the persons involved in this way.

The Law on bankruptcy, prescribes in article 44 (1) that he members of the Board of Creditors are entitled to a reward for their work as well as to reimbursement of their necessary expenses. In addition, article 44 (2) stipulate that the bankruptcy judge shall determine the reward for the work performed and the reimbursement of the expenses of the members of the Board of Creditors, in accordance with the norms and standards stipulated by the Regulation on determination of rewards for the Bankruptcy trustee and for the members of the Board of Creditors. The members of the Board of Creditors have the right to appeal against the decision of the bankruptcy judge regarding the reward for the work and the reimbursement of the expenses.

The assembly of creditors has very important role in the bankruptcy procedure too. This body is representing the interest and the will of the creditors. According go article 45 of the Law on bankruptcy, the bankruptcy judge shall organize the first and the final closing session of the Assembly of Creditors. All bankruptcy creditors, creditors with a right to separate settlement, the Bankruptcy trustee and the debtor are entitled to participate at the session of the Assembly of Creditors.

The Law prescribes who is entitled to call session of the Assembly of Creditors. Namely, according to article 46, the other sessions of the Assembly of Creditors shall be called by the Bankruptcy Judge upon a proposal by: the bankruptcy trustee; the Board of Creditors; one or more bankruptcy creditors provided that the total amount of their claims exceeds one fifth of the total amount of the claims of all bankruptcy creditors.

The bankruptcy judge shall run the Assembly of Creditors, but if the Assembly of Creditors is convened in accordance with article 46 paragraph (3) of the Law, the president of the Board of Creditors shall run the Assembly of Creditors. The decision of the Assembly of Creditors shall be adopted by majority of the verified claims represented by the creditors that attend the session.¹⁹

Very important provisions are contented in article 48 of the Law on Bankruptcy. This article is governing the voting rights of the creditors at the Assembly of Creditors. Namely, according to article 48 (1), voting rights have creditors, whose claims are not disputed either by the bankruptcy trustee, or by any creditors with a right to vote. Creditors whose claims are not disputed in whole shall also have the right to vote proportionally to the part of the claim that is not disputed. Each creditor whose claim is not disputed either by the bankruptcy trustee or by the creditors with a right to vote is entitled to one vote proportionally to the participation of the value of his claim in the total recognized value of the claims.

A creditor with a disputed claim shall also be considered as having a right to vote, if the existence of such claim is proved by the creditor by means of an enforcement document or if the claim is insured by a secured right registered in the public book, unless the debtor proves with a certified document that such has been terminated.²⁰

¹⁹ Article 47 (3) of the Law on bankruptcy

²⁰ Article 48 (2) of the Law on bankruptcy

The bankruptcy judge shall, before the beginning of the Assembly of Creditors adopt a decision on recognizing the right to vote of creditors with disputed claims, excluding the creditors pertaining to paragraph (2) of Article 48. The creditors shall not have the right to appeal against that decision.

According to article 48 (4) of the Law on bankruptcy, the bankruptcy judge may amend the decision on recognizing the right to vote of creditors with disputed claims on the next sessions of the Assembly of Creditors, upon a proposal of the bankruptcy trustee or any creditor with the right to vote attending the session.

The membership in the Board of Creditors and the right to vote at the sessions of the Assembly of Creditors, following the reporting session of the Assembly of Creditors shall be terminated for the secured creditors, who have stated at the reporting session that they shall not participate in the plan for reorganization and that they have commenced the enforcement of the secured right.²¹

Upon a request of the bankruptcy trustee or a bankruptcy creditor whose rights have been violated, the bankruptcy judge may abolish a decision of the Assembly of Creditors that is contrary to the interests of the bankruptcy creditors or that disables equal treatment of all creditors in respect to the collective settlement.²² Furthermore, according to article 49 (2) of the Law on bankruptcy, the request for abolishing a decision of the Assembly of Creditors can be submitted to the bankruptcy judge by the bankruptcy trustee, any creditor whose rights have been violated and who did not vote “for” the disputed decision, in a period of eight days of the session on which such decision was adopted. At the same time, according to article 49 (3), the bankruptcy judge can abolish such decision *ex officio*. Upon the submitted proposal, as well as when deciding *ex officio*, the Bankruptcy Judge shall make a decision within eight days. The decision is announced publicly. The

²¹ Article 48 (6) of the Law on bankruptcy

²² Article 49 of the Law on bankruptcy

creditor with a right to separate settlement whose rights have been disturbed has a right to appeal against that decision in a period of eight days as of the announcement of the decision. The bankruptcy trustee and the creditor have also right to appeal, provided that the bankruptcy judge adopted a decision for refusing the proposal and abolishing the decision of the assembly of creditors.

C. Conclusion

In order to ensure efficient protection of creditors in the bankruptcy procedure we need to have consistent application of the Bankruptcy Law. The bankruptcy law contains mechanisms that are placing the creditors in the central position in the bankruptcy procedure. The law itself in Article 4 stipulates that the entire bankruptcy procedure is a collective settlement of creditors. In that sense, creditors exercise their rights through the bodies of the bankruptcy procedure in which they are represented. Such bodies are the Board of Creditors and the Assembly of Creditors. Special authorities of these bodies are foreseen in accordance with the Law on Bankruptcy. These competencies should seek to protect the rights of creditors. The functioning of these bodies is realized through cooperation with the Bankruptcy Judge and the Bankruptcy Trustee, while the Bankruptcy Debtor is in a subordinate position in the bankruptcy procedure.

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