

Albania

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Piercing the corporate veil

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Albanian legislation was recently updated with the enactment of some important new Laws such as the Company Law, Tax Procedure Law and amendments to the existing Bankruptcy Law. The new developments in these Laws have also introduced the principle of piercing the corporate veil. This is a significant step in Albania and important to note, as one can no longer run a business relying on the principle of limited liability as a safety net.

Bankruptcy Law

According to the recent changes to the Bankruptcy Law (Law 9919 dated May 19 2008) where members or shareholders of a company, during the exercise of their duties, have been aware of the insolvency of the company and have failed to submit any request to the court for the initiation of bankruptcy procedures, for a period of three months starting from the date of knowledge of financial incapacity, they will be considered personally liable.

Will the members and directors only be liable for the damage caused to the creditors as a result of the delay? Or can this provision be interpreted to mean that the corporate veil is pierced?

In the latter interpretation, one may deduce that the mere failure to submit any request to the court for the opening of the bankruptcy procedure after the shareholder(s) became aware of the insolvency is not sufficient to cause the shareholder(s) to be subject to a piercing of the corporate veil. However, the criteria causing the shareholder(s) to be considered personally liable are not sufficiently clear. Also, this Law does not refer to the relevant provisions of the Company Law.

Company Law

Under the new Albanian Company Law (Law 9901 dated April 14 2008), one of the explicit exceptions from the principle of limited liability is the abuse of the legal form set out in Article 16 of the Law. Article 16(1)(a) refers to the act of “abuse”, thus interpreting that it requires an element of fault (under Albanian law, fault includes gross negligence or wilful misconduct) on the part of the persons who act or fail to act as required, and therefore it is implied that this fault must be proved.

Strangely, there is no element of abuse present in the wording of Article 16(1)(b), and thus no link to the requirement of proving fault. Care should be taken not to apply or enforce this provision frivolously, and to ensure that it is read in light of the need for the existence of fault and the consequent harm to the interests of the creditors. The provision of Article 16(1)(c), also problematic, recognises the principle of a standard of duty of care in introducing such terms as “ought to have known”, a lower threshold than the concept of abuse, and is short of the requirement of intent. This provision also mentions that the shareholders “should have acted” to ensure that the company had sufficient capital to fulfil the obligations towards third parties, thus placing a high standard of duty of care upon shareholders.

Tax Procedure Law

The principle of exceptional liability of shareholders is also recognised by Article 99 of the new Tax Procedure Law (Law 9920 dated May 19 2008). This Law expressly provides that after the sale of a seized property and when the tax liabilities of the legal person are not fully paid, liability for the remaining tax will be transferred to the shareholder(s) responsible in conformity with Article 16 of the Company Law. Furthermore, this Law states that the director and shareholder(s) are jointly liable for the unpaid tax liabilities of the legal person. It also stipulates that the same rules apply when there are unpaid tax

liabilities at the completion of the process of liquidation or bankruptcy of the company.

Having considered the above, it is clear that the principle of piercing the corporate veil is now recognised by Albanian legislation. What needs to be elaborated is: who is subject to this piercing and what is the role of the Albanian courts in the interpretation and implementation of this principle in practice?

Article 16(1) of the Company Law speaks of “members and shareholders... who act or fail to perform required actions”. The new Tax Procedures Law provides that “... administrators, quota-holder(s) or shareholder(s) are jointly liable for the unpaid tax liabilities...”. However, it remains unclear what the term “fail to perform required actions” means, given that the Company Law does not seem to provide for any specific required actions on the part of members or shareholders aside from the general duties deriving from being a member or shareholder.

It is crucial for the court to play a fundamental role in the implementation of exceptional liability of shareholder(s), especially as the Company Law does not clearly formulate the rule with consistent reference to “abuse”. Furthermore, these new amendments do not expressly require a causative link between the acts of the persons referred to in the provisions mentioned above and the consequences and the extent of their liability. The role of the court is also important because this principle can be implemented only in cases where the court decides on the fault of the shareholder or member, and in the declaration of the insolvency of the company due to the abuse of the limitation of liabilities principle. The legal amendments mentioned above have not taken into consideration these important elements, thus risking the failure of the legislative guarantees offered even in the case that the business activity fails.

Is this principle constructed according to standards and true intention? Will the courts apply the narrowest interpretation of the provisions related to piercing the corporate veil as

anticipated by the doctrine? One may conclude at present that while the introduction of this principle is a very positive move, there remains a high risk of its misapplication.

Financial and corporate

Recommended firms

Tier 1

Apicella & Partners
Boga & Associates
Kalo & Associates
Loloçi & Associates
Tonucci & Partners
Wolf Theiss

An international appetite to invest in the Albanian real-estate sector has stimulated activity in the legal market. Low prices are already attracting investors keen on constructing and purchasing retail businesses and shopping malls. Serbian group Delta M's multi-billion dollar deal to acquire a majority share of Euromax is Albania's headline property transaction of recent times, although the country's mid-market also thrives.

There is positive activity in other sectors too. The country's plan to sell its first foreign-currency bond is a sign that the economy is undeterred by the credit crunch, while a privatisation programme provides a stream of commissions for Albanian legal services. In recent months, for example, foreign investors were invited to bid for an 85% stake in Armo, the state-owned oil company. A consortium headed by US Refinery Associates won the tender with a bid of \$197 million. Lawyers are now advising parties on the privatisation of state-owned insurance company Insig, as well as the country's proposed sale of its electricity distribution and rail companies.

Infrastructure activity is beginning to blossom with the planned construction of a highway from Tirana to Pristina, the largest city in Kosovo - this will do much to generate business between the cities. Legal practices also compete for mandates arising from the trans-Adriatic gas pipeline project. This will provide work for law firms until 2010, when its construction is expected to be completed.

Investors are showing a growing interest in developing plants for both traditional and renewable power generation. And the political framework to support this activity is falling rapidly into place: Albania's recent membership invitation from Nato is a step towards a new era of foreign direct investment.

Apicella & Partners

Apicella & Partners appears in rankings for the first time after receiving a raft of positive recommendations from clients and competitors. Founding lawyer Bernardino Apicella was managing partner of Tonucci & Partners in Albania but left to set up his own practice in July 2006, taking key clients including Maire Engineering with him.

In the past year, the firm has advised the Italian industrial group on several engineering, procurement and construction (EPC) contracts, including the construction of a 100MW thermal-power station in the southern city of Valona.

Apicella officially opened the doors to his new firm in April 2007 and has been seeing a consistent flow of work in the oil, gas and telecoms fields. The firm is also forming close ties with the government, which it advised alongside Field Fisher Waterhouse on a €150 million contract to produce biometric passports and ID cards for Albanian citizens.

Apicella also led his team in advising an Albanian construction company on a joint-venture agreement with NCH, a US investment fund, and Balkan Accession Fund on its acquisition of shares in an Albanian leasing company.

In one standout deal, the firm advised a shareholder of Banca Italiana di Sviluppo in the sale of its controlling stake to Veneto Banca. In other banking deals the firm acted for an international consortium including Valartis Bank and Tudor Capital in the privatisation of state-owned oil company Armo.

Apicella & Partners is also advising a construction company on a €129 million hydro-power plant project in Kalivac.

Clients praise the firm's international approach. Says one: "They have a western-style service; there are few Albanian lawyers in the market that can cater to western needs."

Leading lawyers

Bernardino Apicella

Boga & Associates

Described by one competitor as the most active firm in Albania, Boga & Associates advised on a number of medium-to-high value transactions across a number of sectors this year, ranging from construction to securities projects.

Name partner Genc Boga is known for his wide-ranging contacts and high visibility in the market.

Since December 2007, the firm has been assisting an Italian power company on Albanian regulations for the construction and operation of a €1.3 billion thermal power plant. In the same period, the firm has also

been advising Albania's state-owned insurance company, Insig, on its privatisation.

Boga & Associates also demonstrated its capacity to deal with relatively new legislation on the trading of governmental bonds and the lending of securities when it advised a financial institution on a €50 million investment in the Albanian securities market in July 2007.

Another standout deal saw Genc Boga advise on a syndicated loan to the largest telecoms company in Albania. Boga is assisting on the negotiation of the loan agreement and other financing agreements in a deal worth €100 million.

The firm is also noted for its dealings in cross-border transactions. The firm represented a Hungarian Bank in its tendering process for the largest state-owned bank in Albania. In addition, Boga & Associates acted on behalf of two international financial institutions acquiring shares of a state-owned insurance company.

Leading lawyers

Genc Boga

Kalo & Associates

Kalo & Associates consolidates its first-tier ranking after winning some impressive mandates, satisfying clients in the process. "We asked several of our international firms and everyone recommended them," says one.

Partner Përparim Kalo also received praise: "He has a practice that is consistent with what you would expect from a top Washington law firm," says a client.

Banking transactions have featured strongly in the firm's workload, with competitors noting the firm's strong links with Greek banks. For example, Alpha Bank and National Bank of Greece appointed Kalo & Associates as counsel for a €230 million syndicated loan in April 2008. The firm also advised Société Générale on the €33 million acquisition of 100% of Banka Popullore.

In May 2007, Kalo & Associates won a role advising the International Finance Corporation and the Government of Albania on the privatisation of a distribution company and the Ashta hydro-power concession.

The firm has also advised on the drafting of Albanian legislation, covering areas such as telecoms, secured transactions, financial leasing and company law.

Kalo & Associates boasts a large banking finance department, advising in a range of transaction from syndicated financings to privatisations. The Albanian legal market is rapidly becoming more sophisticated, with recent changes to the capital markets law seeking to introduce corporate and municipal

bonds, and the firm has advised on a number of deals under the new legislation.

In addition, the practice has been involved in the drafting of new laws regarding companies, telecoms, secured transactions, financial leasing and concessions.

Leading lawyers

Përparim Kalo

Tonucci & Partners

The market notes that Italian firm Tonucci & Partners is still suffering after key lawyer Berardino Apicella left in July 2006 to set up his own practice. "Apicella was the face of the firm," says one competitor, noting that he was present everywhere.

Despite Apicella's departure, the firm still boasts the likes of Neritan Kallfa, who was acknowledged by one competitor as a prominent individual.

Tonucci & Partners has advised on some notable transactions this year. Italian bank Intesa Sanpaolo provided some strong work for the firm, mandating it on two M&A deals in the banking sector.

In June 2007 the firm represented Intesa Sanpaolo on its \$157 million acquisition of an 80% stake in the American Bank of Albania. In December of the same year, the firm again represented Intesa Sanpaolo on a \$48 million merger between American Bank of Albania and Banca Italo Albanese, the first bank merger in Albania.

Tonucci & Partners also acted for the Albanian Ministry of Economy, Energy and Trade on its €120 million sale of a 76% stake in telecoms provider Albtelecom to Turkish Calik Group subsidiary Calik Enerji Telecommunications in September 2007.

In the same month, leading lawyers Gianluca Carlesso and Neritan Kallfa advised TBIH, a subsidiary of Vienna Insurance Group, on its €16 million acquisition of a 76% interest in insurance provider Sigma.

Leading lawyers

Erinda Ballanca
Gianluca Carlesso
Neritan Kallfa

Wolf Theiss

Austrian firm Wolf Theiss continues to win big mandates, impressing clients and rivals with the breadth and depth of cross-border of its deals over the past year.

Managing partner Sokol Nako is active in many of the firm's key transactions. Since November 2007, Nako has been advising the Netherlands-based Balkan Financial Sector Equity Fund (a subsidiary of Development

Finance Equity Partners) and the Swiss Investment Fund for Emerging Markets on the on the acquisition of a stake in Credins Bank, a private Albanian bank.

Nako has also been working with partner Enyal Shuke, who advised the sponsors of the trans-Adriatic natural-gas pipeline on all aspects governed by Albanian law. The work includes advice on construction, ownership, permits, financing, operation and the pipeline's interconnection between Greece, Albania and Italy.

The firm drew on its heritage to land a role representing Austrian construction company Strabag in the acquisition of a majority stake in Trema Engineering 2, an Albanian building contractor. Nako and Rezarte Vukatana advised on various corporate, contract and competition issues surrounding the share purchase.

Wolf Theiss is also advising an Albanian retailer on its sale of shares to a Serbian investment group.

Leading lawyers

Sokol Nako
Enyal Shuke