

Albania

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Netting contracts and insolvency under Albanian law

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Are nettings contracts valid and enforceable in Albania when a participant bank of non-banking financial institution is subject to insolvency proceedings? This is a question that we are increasingly being faced with due to the increase in demand for the offer of brokerage and clearance services by foreign companies to Albanian banks and non-banking financial institutions.

Current legislation on nettings contracts

Albania has no detailed legislation dealing specifically with netting contracts and the applicability thereof, and certainly none for the applicability and enforceability of such in the case of the insolvency of a participant bank or non-banking financial institution. There are Bank of Albania regulations that cover such activities within the activity of the Albanian Interbank Payment System (AIPS) and the Albanian Electronic Clearing House (AECH). Netting “shall imply the return of a sole net obligation/claim, arising from the payment orders that one/some participants send/receive from one/some other participants to derive out or originate a sole net obligation”. These regulations provide that the AECH and AIPS shall function in a manner to ensure the development in compliance with the standard of the BIS principles of netting (Lamfalussy Standards) that provide six minimum standards for the design and operation of cross-border, multi-currency netting schemes or systems.

Principles of the Netting legislation

The key question is the validity and enforceability of the netting contract after instruction of payment or settlement in the case of insolvency of a participant bank or non-banking

financial institution. Importantly it needs to be noted that under Albanian law, liquidation (i.e. due to bankruptcy) of banks and non-banking financial institutions are regulated and governed by the insolvency provisions contained in the Banking Law and relevant regulations. The provisions of the Insolvency Law (No 8901 dated May 23 2002, as amended) do not cover the insolvency of the Albanian banks and non-banking financial institutions.

Although the relevant provisions of the Banking Law itself on insolvency do not have clear provisions to enable us to conclude whether the netting contracts are valid and enforceable in the event of the insolvency of a participant bank, there is some comfort to be drawn from the aforementioned regulations.

The essential principle in this case is that liquidation procedures of a participant and/or participants in AECH or AIPS do not have retrospective effect against the payment instructions entered into prior to the date of the decision for liquidation of participants.

It is noteworthy that the Banking Law, while regulating the liquidation of banks and non-banking financial institutions and the duties of the liquidator in a mandatory insolvency situation, does not explicitly provide for any guidance or rules for the liquidator’s right to set off amounts according to the netting contracts.

The regulation further states that the Bank of Albania enjoys the right to use as collateral the securities of a participant placed in liquidation proceedings to meet its obligations against the other participants of the system, but only if these securities are not used as a tool to guarantee the execution of other obligations.

Given the often heavy reliance on matters of specific timing in the settlement and clearing of netting contracts, there should be (as a minimum standard set out in the Lamfalussy Standards) clearly defined legal procedures (e.g. a strict rule for timing and notification of instructions for payment) in this respect for

netting providers and the participants to enable them to manage their credit risk.

Conclusion

Netting contracts would appear to be valid and enforceable where payment instruction has been made *prior* to the date of the decision for liquidation.

As a final note we refer to the priority of creditors as provided in the Banking Law, which provides that, in the case of a mandatory insolvency procedure, secured claims shall be paid first in accordance with the terms agreed between the parties. However, it is to also be noted in this respect that Albania has ratified the ILO Convention No 173/1992 and the very first priority claims (even over secured claims) are employee claims arising out of their employment.

Financial and corporate

Recommended firms

Tier 1

Boga & Associates
Kalo & Associates
Tonucci
Wolf Theiss

Tier 2

Apicella & Partners
Hoxha Memi & Hoxha
Loloci & Associates
Zaka Kosta & Tashko

Albania has a small legal sector in which it is hard to find top lawyers for hire and in which associates tend not to move firms. "The legal market is very narrow," says one local partner: "Taking partners from outside is not easy and finding top-quality associates is quite difficult."

Commercial and private practice has had to develop quickly over the 20 years since the economy began opening up and, considering this, one partner notes "the standard is very high". This impresses clients, who find top firms "quite a difference from the environment one would expect from a developing country such as Albania".

However clients do note that standards are not as high as in western Europe. "Legally, there are many laws that need further clarification, as there are many which are ambiguous, and sometimes the laws are not automatically properly applied," says one client. Capital markets regulations have been keeping Albania behind, and recent legislation such as the Pension and Corrective Investments law have been enacted with this in mind.

The top four firms have all held their positions in the market for almost 15 years. The largest firms are Boga & Associates and Kalo & Associates, which were both established in 1994. International firms Tonucci & Partners and Wolf Theiss have a smaller number of lawyers on the ground, but maintain a large presence due to their international status and standards, deep reserve of internal expertise and wide-ranging networks.

Second-tier firms are smaller local firms with fewer staff, apart from Loloci & Associates. These firms were established in a second wave from 2002/03 and partly formed as spin-offs from the established firms in response to increased legal work coming primarily from big clients in the energy, banking and real-estate sectors.

The market has been affected by reluctance and hesitancy as a "psychological effect" of the credit crunch according to one local partner, and some firms note delays in closing

deals. "People are more reluctant to invest," says one partner. "For example construction, which is a major investment area in Albania, is not doing so well at the moment." Another partner explains that there is much more scrutiny from banks. "But they have not stopped lending; they are trying to be careful," the partner says.

Despite this, 2008 was a record year for the legal sector and large energy projects, particularly in the hydro and renewable markets, are sheltering firms from any slowdown.

Boga & Associates

One of the oldest firms in Albania, Boga & Associates is regarded by competitors as an established top-tier firm. Its longevity gives it an "advantage in the matter of experience," says one competitor, which has given it time to establish and its choice of the best work.

Clients across the board compliment the firm on the timing and quality of its work, its professionalism, language skills, expertise and wide network of contacts. Genc Boga, Renata Leka, Sokol Elmazaj and Silva Velaj feature on most significant deals.

In banking, Boga & Associates advised two Italian banks on their share transactions in local entities, with one deal valued approximately at €28 million, as well as a Turkish bank in a €10 million Guarantee Agreement with USAid. The firm also conducted the due-diligence for a German bank in relation to the IPO of its parent company.

Elsewhere, the firm is advising an international investment bank on a €100 million syndicated senior debt transaction for the largest telecommunications company in Albania. Boga also acted for a German finance institution in a €10 million syndicated loan, and conducted due-diligence for an international private-equity fund for a €76 million bid in the privatisation of a state-owned oil refining and marketing company.

The firm was active in the project financing market, advising two Norwegian companies in a bid for the construction of the Ashta hydroelectric power plant (HPP) and the Skavica HPP. The firm also advised a Slovenian company in a successful bid for the construction and operation of the €144 million Shala HPP projects.

"Boga has international experience," says one client. "He is ex-KPMG ... and he tries to replicate international standards in his team, who are all very good, fluent in English and international – from Italy, Albania and Macedonia."

Leading lawyers

Genc Boga

Kalo & Associates

One of the oldest firms in Albania, Kalo & Associates is recognised by peers and clients as one of the top four firms in the country, with "real expertise", according to one client. "They have great support among their staff and among the managers, and they have relationships all over Albania. Albania is a small country, so this is important," says another client.

The firm opened a new office in Kosovo in May 2008, which operates alongside its base in Tirana. Clients note that Përparim Kalo is particularly visible in the market: "[He is] very active in banking, acting as the attorney of many banks as well as many Greek banks," says one client. Alban Caushi also attracts praise from one client as a "very advanced lawyer".

The firm is mandated by three banks on a retainer basis, and has represented clients such as the European Bank for Reconstruction and Development, Alpha Bank, Deutsche Bank and the Black Sea Trade and Development Bank.

The firm recently advised the International Finance Corporation (part of the World Bank Group) on the unbundling and €101 million privatisation of the electricity distribution division of the Albanian Power Corporation. Another deal saw the firm advise Delta Maxi on its €30 million acquisition of Euromax, the largest supermarket chain in Albania, in August 2008.

"They are very good in the application of international law to Albania, in advisory law to the government and especially strong in privatisations," says one client. The firm has a strong international client base, including Philip Morris, Microsoft and Bechtel.

Leading lawyers

Përparim Kalo

Tonucci & Partners

Despite a perception among some competitors that "their profile has been a little low this year," peers across the board do not doubt Tonucci & Partners' position as a top-tier firm. "[They] are very well known and have a well-established reputation in the market," says one peer. The firm was established in 1996.

The Italian firm has an international brand name that attracts deals from big companies and through its networks. Maintaining an alliance with Mayer Brown, the firm focuses on corporate and commercial matters, and advises Albanian, Italian and other foreign companies. "They are a typical Italian law firm; very capable and on Italian law matters

they are the only ones with this edge,” says one client.

In 2009 a key practitioner, Erinda Ballanca, moved on to set up her own practice. “This is a sharp loss to the team,” says one peer, adding that she is “an excellent lawyer, a master in her area”.

One of the firm’s highlights this year has been advising the Albanian government throughout its privatisation process.

Leading lawyers

Gianluca Carlesso

Wolf Theiss

“Wolf Theiss is a firm with international standards and top attorneys,” says one client. It wins approval across the board as one of the top four firms in the country, with clients describing its practitioners as “knowledgeable, efficient and well connected”.

Sokol Nako is singled out for his skill and appears on most of the firm’s transactions. “He is very experienced – and very experienced in areas that lawyers would not necessarily be,” says one client. “He has a good understanding of the authorities and the establishment ... so he is very knowledgeable and good for foreign investors.” The client adds: “He is also very business oriented and looks for business solutions. He has an international profile, which is hard to find, and he is always available.”

The firm is advising CEZ on the largest privatisation project of 2008 – the €250 million sale of the distribution arm of the Albanian Power Corporation. The firm has advised CEZ from the due-diligence and bidding stage, through to negotiation of the contract.

Another notable role saw the firm advise Cosmote in its €50 million bid for a 12% stake in the state-owned Albanian Mobile Company. Wolf Theiss also represented Titan and Andea Cement in share discussions with the International Finance Corporation and the European Bank for Reconstruction and Development.

Other lawyers recommended by clients are associates Endrit Shijaku and Agim Muco.

Leading lawyers

Sokol Nako

Apicella & Partners

Apicella & Partners was formed in 2006 by Berardino Apicella, former managing partner of Tonucci & Partners, and has since developed a strong reputation in the market.

In one high-profile and complex deal, Apicella & Partners worked alongside Field

Fisher Waterhouse to act for the ministry of the interior in the €100 million concession for the production and distribution of ID cards and biometric passports.

Major energy deals saw the firm advise Rätia Energie Group on the development of a project entailing the construction of a 350MW hydropower plant on the Drin Izi River, and act for Trans-European Energy in a state concession for the construction of a LNG re-gasification plant, pipeline to Italy and gas fired power plant, valued at over €1 billion.

Leading lawyers

Berardino Apicella

Hoxha Memi & Hoxha

Founded in December 2003 by former Boga & Associate senior lawyers, Hoxha Hemi & Hoxha is a relatively young and small firm that has established a strong reputation in the market – especially in government projects related to communications and in M&A.

“They are very professional; they have a couple of very good lawyers and they have recruited very strongly,” says one peer. “They have been very good at picking people – outstanding really.” Andi Memi, Shpati Hoxha and Ilir Johollari have been the firm’s most visible lawyers on the larger deals.

Clinching one of the major deals of the year, the firm represented Austrian energy company Verbund International in its successful bid for the construction and operation of the €166 million Ashta hydroelectric power plant.

In another high-profile deal, the firm advised the Albanian-American Enterprise Fund and the Safran Group on the concession for the design, distribution and production of ID Cards and biometric passports. The firm incorporated the project company and organised the clients’ equity participation in a transaction valued at €100 million. It was a “technically very complex” and “outstanding” transaction, says a peer.

In other top deals, the firm advised the government on a €50 million privatisation of the 12% remaining state-owned shares in Albanian Mobile Communication, and acted for the Vienna Insurance Group in a €22 million acquisition of an 87% stake in the Sigma insurance group.

“They are very strong in M&A work and in strategic work for new investments,” says one client, while another adds: “We have a very good collaboration with them; they know the realities of Albania, the law and foreign companies, and are very good with acquisitions.”

Leading lawyers

Shpati Hoxha

Andi Memi

Other ranked firms

Zaka Kosta & Tashko is a relatively new firm with a good reputation for its work in the telecoms sector and advising the International Finance Corporation (part of the World Bank Group) and Yak telecom. But competitors note that it won’t be all smooth sailing for the fledgling practice: “As a new firm, it is difficult for them to find a position in the market,” says one peer.