LAW ON BANKRUPTCY

1.44

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Regulate the issue of delivery in bankruptcy proceedings in a way to make it faster and more efficient and to specify the provisions related to the finality date and starting date for the implementation of the reorganization plan so that all participants can know with certainty when the adopted plan begins to be implemented.	2016		√	
Regulate additionally the position of secured and pledged creditors in a way that provides the two-instance procedure with respect to their settlement from the sale of pledged property.	2016		√	
To regulate in detail the procedure of electronic sale, if possible, by following the example from the Law on Enforcement and Security.	2020			√
Due to the COVID-19 pandemic, to consider legal regulation of digitalization process in operations of creditors' bodies and communication between bankruptcy bodies.	2020			√
Stipulate that the opening of bankruptcy proceedings produces effects as of the date of publishing the notice of the opening of bankruptcy proceedings in the Official Gazette.	2017			√
The provisions on automatic bankruptcy in the case of a debtor's permanent insolvency should be incorporated into the bankruptcy regulatory framework, but in a form that would be in accordance with the Constitution of the Republic of Serbia.	2012			√
Stipulate the possibility and procedure for amending the adopted reorganization plan.	2016		√	
Regulate the procedure of personal insolvency either by amendments to the current Law on Bankruptcy or the adoption of a separate law.	2016		√	
To establish electronic sale of debtor property	2020			√

CURRENT SITUATION

According to data available on the website of the Bankruptcy Supervision Agency, as of 1 July 2021 there were a total of 1,808 pending bankruptcy proceedings under way in the Republic of Serbia, with the exception of bankruptcy proceedings conducted under the Law on Enforced Collection, Bankruptcy, and Liquidation (SFRY Official Gazette Nos. 84/89, SRY 37/93, and 28/96) and bankruptcy proceedings conducted against banks, which are within the jurisdiction of the Deposit Insurance Agency. The average duration of the procedures initiated under the Law on Bankruptcy Proceedings is about 3 years and 10 months, while average duration of the proceedings initiated under the Law on Bankruptcy is about 1 year and 8 months.

In the first six months of 2021 there were 178 bankruptcy proceedings initiated. This means that approximately 29 bankruptcy proceedings were averagely initiated per month. Compared to 2020, when the monthly average was 24 initiated bankruptcy proceedings, the increase in the number of initiated bankruptcy proceedings is noticeable. That number is still significantly below the monthly average of 80 initiated proceedings in 2012. The grounds for such a decrease in initiated bankruptcy proceedings after 2012 were presented in previous editions of the White Book, and the main cause was the Decision of the Constitutional Court of Serbia on the unconstitutionality of automatic bankruptcy.

Public consultations on the Draft Law on Amendments to the Law on Bankruptcy as well as on the Draft Law on Amendments to the Law on the Bankruptcy Supervision Agency, prepared in 2020, were held from 15 January 2021 to 3 February 2021. The drafts should enter the procedure of discussion

and adoption before the National Assembly of the Republic of Serbia during this year. These are the fifth amendments to the Law on Bankruptcy since its entry into force in early 2010.

Additionally, the Ministry of Economy has formed a working group intending to prepare a draft of a law that will regulate (previously introduced then abolished) the bankruptcy of entrepreneurs, following the Program for resolving problem loans for the period from 2018 to 2020 of the Government of the Republic of Serbia.

The main goal of proposed Amendments to the Law on Bankruptcy and the Law on Bankruptcy Supervision Agency, as was the case with the earlier amendments, is to make the procedure more efficient and more transparent.

Most of the latest amendments are expected to improve the quality of the procedure, but actual results of the amendments will be seen after their adoption end entry into force and in court practice in the following period.

POSITIVE DEVELOPMENTS

In addition to the improvements indicated in the previous edition of the White Book made by the last amendments to the Law on Bankruptcy at the end of 2018, given that a new change in bankruptcy regulations is expected in the coming period, we can point out to certain potential improvements that are the subject of the Draft Law on Amendments to the Law on Bankruptcy and the Law on the Bankruptcy Supervision Agency.

Examples of proposed regulatory amendments that are worth mentioning as potential positive change are as follows:

Improved position of secured and pledged creditors

In the previous edition of the White Book, it was pointed out that one of the remaining problems related to the lifting of the ban on enforcement against pledged property in the reorganization procedure was the provision according to which the bankruptcy judge would not make a decision on lifting the ban on enforcement if the bankruptcy administrator proves that pledged property is crucial for reorganization of the debtor or for the sale of the bankruptcy debtor as a legal entity. It is pointed out that this wording gives the bankruptcy administrator the opportunity to avoid lifting the enforcement ban because it seems that the bankruptcy administrator can easily prove that some of the property is necessary for reorganization or sale of a legal entity, while a secured creditor can hardly prove otherwise. Additionally, one of the recommendations in the last year's White Book was to additionally restrict possibilities for banning enforcement against the bankruptcy debtor's property during the procedure of the adoption of a pre-packaged reorganization plan, in order to prevent bankruptcy debtors from averting an enforcement settlement over an indefinite period of time and without the support of the majority of creditors through multiple consecutive bankruptcy filings.

The proposed amendments to the Law on Bankruptcy envisage the introduction of the authority for a bankruptcy judge to make a decision on the abolition of security measures, upon the proposal of a secured or pledge creditor, including a ban on enforcement against the pledged property of the bankruptcy debtor. It is additionally proposed that the bankruptcy judge may, when making this decision, request the opinion of an expert whether the pledged property is crucial for the reorganization.

If the proposed amendments to the law are adopted, the possibility for the pledge and security creditor to get settlement from the value of the pledged property within the bankruptcy proceedings or outside of it, will be significantly improved, and the possibility for abuse will be at least partially reduced in terms of multiple submission of a pre-prepared reorganization plan with a proposal for determining the measure of prohibition of enforcement against the pledged property of the debtor.

Additional increase of transparency and efficiency of the proceedings

Amendments to the Law on Bankruptcy have been proposed in order to expand the principles of publicity and information, to collect, process and analyze statistical data related to bankruptcy proceedings and now, in addition to allow all creditors to explicitly request and receive all information related to the bankruptcy debtor, on the course of the bankruptcy procedure, on the property and management of the property of the bankruptcy debtor and all state authorities have the obligation to submit to the bankruptcy administrator data on the property, rights and interests of the bankruptcy debtor, free of charge. Also, it is proposed to introduce the sale of the bankruptcy debtor's property electronically, through the portal of the authorized organization for the sale of property. It is proposed to shorten the deadline for filing bankruptcy claims from 120 to a maximum of 60 days, as well as to shorten the deadline for scheduling hearings to decide and vote on the reorganiza-

tion plan from 90 to 60 days. In addition, the draft Law on Amendments to the Law on the Bankruptcy Supervision Agency proposes, among other things, the addition of two new articles, which regulate the implementation of actions in bankruptcy proceedings through an electronic portal, and collection and statistical processing of the data related to bankruptcy proceedings.

All proposed changes should lead to greater transparency and efficiency of bankruptcy proceedings.

REMAINING ISSUES

As mentioned in section related to positive developments, the proposed amendments to the Law on Bankruptcy, if adopted, would significantly resolve the problems of secured and pledge creditors regarding possible abuses of legal gaps by bankruptcy debtors regarding the rendering and revocation of ban of enforcement against the pledged property of the debtor, especially in the procedure initiated on the basis of a pre-packaged reorganization plan.

However, the proposed amendments to the law do not cover all the problems pointed out in previous editions of the White Book, so we hope that this will be done in the coming period.

In practice, a problem also arises in certain cases when the delivery of a decision on the confirmation of a plan lasts longer than the procedure of the adoption itself. This has direct negative implications on the duration and efficiency of bankruptcy proceedings.

It often happens in practice that it is necessary to change a reorganization plan which has already been confirmed by a court, but the current legislation does not allow it. This poses a serious problem, because it may happen that a bankruptcy debtor's business activity is not on the expected level after the adoption of the plan and therefore the debtor cannot comply with the payment dynamic envisaged in the adopted plan, whereas a majority of the creditors are willing to accept an amendment to the plan, which formally cannot be made.

We also underline the problem with the procedure of the distribution of funds collected through the sale of a bankruptcy debtor's property that was pledged in favour of secured and pledge creditors. The claims of secured and pledge creditors should be settled within five days from the date of receipt of the funds by the bankruptcy administrator. The bankruptcy administrator autonomously, independently, and without control by the bankruptcy judge, decides on the amount of settlement of secured and pledge creditors, who then do not have the right to appeal against this decision. The only legal remedy available to them is an objection to the work of the bankruptcy administrator as decided by the bankruptcy judge of first instance, and no appeal is allowed against this decision of the court. The legal solution which envisages the right to appeal for unsecured creditors may seem unfair, while secured and pledge creditors are not only deprived of a second-instance review of the legality of the decision of the bankruptcy administrator, but also of a first-instance review.

According to current legislation, the opening of bankruptcy proceedings produces effects as of the date on which a notice of the opening of bankruptcy proceedings is posted on a court's notice board. In practice, this rule creates problems as in some procedural situations it is not clear which is the relevant date of the opening of bankruptcy proceedings. In order to eliminate uncertainties, it is recommended that the opening of bankruptcy proceedings produce effects as of the date of the publication of the notice of the opening of bankruptcy proceedings in the Official Gazette.

The huge number of companies that have been insolvent for a long time hinders economic development, so although the Constitutional Court of the Republic of Serbia has declared automatic bankruptcy unconstitutional per its decision in 2012, we consider it reasonable to find the appropriate legal solution which would enable a kind of automatic bankruptcy proceedings in the case of permanent insolvency.

One of the outstanding issues where no progress was seen is that of personal insolvency. Specifically, we believe that the resolution of this issue would benefit both creditors and insolvent debtors. The existing options available to creditors regarding insolvent debtors who are natural persons do not lead to the most favourable collective settlement. On the contrary, they result in the settlement of the claims of some creditors through some kind of enforcement procedure, while other creditors, in most cases, do not have any possibility to settle their claims with over-indebted natural persons. In that sense, we consider that the introduction of the concept of personal insolvency would ensure creditors higher settlement amounts, while at the same time protecting the integrity and basic needs of over-indebted individuals.

Finally, the situation caused by the COVID-19 pandemic, which duration is uncertain, definitely imposes the need for increasing digitalization in the field of court proceedings and especially in bankruptcy proceedings, which often require the presence of a large number of people at hearings, meetings of creditors, public sales, etc. In that sense, it would be useful to regulate in more detail the procedure of electronic sale, as well as the way of functioning of creditors' bodies and communication between the bodies in bankruptcy procedure electronically.

At the end, many other questions arise with regard to improving and clarifying corresponding regulations in practice, such as the possibility and method of enjoying secured-creditor rights based on a pledge on claims; insufficiently precise definitions of entities to which Article 123, paragraph 2 of the Law refers, the ability to dispose of the subject of an exclusion request during a dispute regarding such a request; and others.

Some of the expectations presented in the previous editions of the White Book regarding comprehensive amendments to the Law on Bankruptcy have been met, but many other insufficiencies of legal solutions have not yet been fixed, and we sincerely hope to see at least concrete proposals of amendments this year.

FIC RECOMMENDATIONS

- Regulate the issue of delivery in bankruptcy proceedings in a way to make it faster and more efficient and to specify the provisions related to the finality date and starting date for the implementation of the reorganization plan so that all participants can know with certainty when the adopted plan begins to be implemented.
- Regulate additionally the position of secured and pledged creditors in a way that provides the two-instance procedure with respect to their settlement from the sale of pledged property.
- To regulate in detail the procedure of electronic sale, if possible, by following the example from the Law on Enforcement and Security.
- To consider legal regulation of digitalization process in operations of creditors' bodies and communication between bankruptcy bodies.
- Stipulate that the opening of bankruptcy proceedings produces effects as of the date of publishing the notice of the opening of bankruptcy proceedings in the Official Gazette.
- The provisions on automatic bankruptcy in the case of a debtor's permanent insolvency should be incorporated into the bankruptcy regulatory framework, but in a form that would be in accordance with the Constitution of the Republic of Serbia.
- Stipulate the possibility and procedure for amending the adopted reorganization plan.
- Regulate the procedure of personal insolvency either by amendments to the current Law on Bankruptcy or the adoption of a separate law.
- To establish electronic sale of debtor property.