



**BiH BANKRUPTCY
AND LIQUIDATION LAWS:
CHECKLIST FOR MANAGERS OF COMPANIES IN OR ABOUT TO ENTER
BANKRUPTCY PROCEEDINGS**

August 31, 2004

INTRODUCTION TO THE CHECKLIST

The attached ***CHECKLIST FOR MANAGERS OF COMPANIES IN OR ABOUT TO ENTER BANKRUPTCY PROCEEDINGS*** initially was prepared in outline form for USAID's Fostering an Investment and Lender-Friendly Environment project (FILE) with the special assistance of Chief Judge Gregory F. Kishel of the United States Bankruptcy Court for the District of Minnesota. After its delivery to USAID on May 31, 2004, this draft outline was circulated to thirty-five bankruptcy trustees and general managers for their comments. During July and August, FILE staff followed up with telephone calls and letters to this group, seeking out their comments and suggestions for revisions to the Checklist.

Because this vetting process took place during the summer months, however, only a limited amount of feedback specific to the items contained in the Checklist was generated from the local partner vetting audience. Eight of the trustees provided extensive written comments, some of which were very useful to the process of analyzing and improving the thoroughness, focus, and accessibility of the Checklist.

FILE's professionals have revised the Checklist, accordingly, based on the thoughtful comments of these local professionals. After the attached *Checklist for Managers of Companies in or About to Enter Bankruptcy Proceedings* receives broad circulation, FILE expects to receive additional comments and suggestions from a larger group of interested local stakeholders, notably from participants in FILE's training events and seminars scheduled to take place over the next several months. As these comments and suggestions come in, further thought will be given to the contents and structure of the Checklist and, if appropriate, revisions will be made and a "second edition" published.

CHECKLIST FOR MANAGERS OF COMPANIES IN OR ABOUT TO ENTER
BANKRUPTCY PROCEEDINGS

Successful implementation of the BiH's bankruptcy laws requires the knowledgeable participation of the debtor company's management. The BiH entities recently enacted new bankruptcy laws, conforming to internationally recognized standards for bankruptcy reorganizations and liquidations; and FILE is launching educational and Pilot Case programs that will demonstrate the efficient handling of bankruptcy adjudications under the new laws from start to finish. Such efficient bankruptcy administration is a necessary factor in the effort to transform the BiH economy to a market economy, i.e., the process needed to restructure and/or liquidate inefficient businesses to free up capital for viable enterprises.

Under the BiH laws, a bankruptcy case is commenced by a voluntary or involuntary petition, and proceeds under administration by a trustee under a presumption of liquidation. A debtor may elect to propose a reorganization plan by filing it with its voluntary petition, or by filing it at any time before the final hearing in the case. With the approval of the Board of Creditors, the trustee also may file a reorganization plan.

The initiation of a reorganization procedure places great demands on company managers, who will be centrally involved in a self-directed effort to rehabilitate the company under bankruptcy. These demands are of several different sorts: legal, managerial, political/public relations, and financial.

This checklist will set forth some considerations for company managers in BiH who are contemplating a voluntary filing for bankruptcy, with the goal of filing a plan of reorganization.

Irrespective of a company's reorganization prospects, its managers must be mindful of their obligation under the law to file a voluntary bankruptcy petition on behalf of the company within 30 days after the company becomes unable to pay its on-going financial obligations. This requirement of Article 4 of the Bankruptcy Law also stipulates that the "institution authorized for representation" of the company (i.e., usually its managing board) may be held responsible for losses sustained to the company's property thereafter.

MANAGER'S CHECK POINTS 1 - 2:**KNOW YOUR COMPANY'S OBLIGATIONS**

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| <input type="checkbox"/> | 1. Know Your Company's Debts/Financial Obligations |
| Be thoroughly familiar with your Company's financial obligations. | |
| <input type="checkbox"/> | a. Know which, if any, of your creditors have mortgages, liens, execution orders or the like outstanding and enforceable against property of the Company. Have these creditors listed by their names and addresses, together with the property subject to their lien, the nature of their security, the amount of their claim, the terms of the indebtedness, and the dates from which interest has been accruing. |
| <input type="checkbox"/> | b. Have the same information on hand about any other bank or institutional creditors (such as private or public investment or pension funds or government agencies) of the Company |
| <input type="checkbox"/> | c. Have all relevant information on hand about tax debts, the taxing entity to which the debt is due (together with copies of tax reports and filings), and any information relevant to tax liens on property of the Company. |
| <input type="checkbox"/> | d. Have the names and addresses of all past and present employees who have claims as creditors for unpaid wages or contributions, etc. Make a list showing the amounts they are claiming, or are likely to claim, for unpaid wages, and the dates they worked, or did not work, and what their status was during the relevant past time-periods. |
| <input type="checkbox"/> | e. Have all relevant information on hand about debts to pensions and other funds (status of obligations, accrual of penalties for nonpayment, etc.). |
| <input type="checkbox"/> | f. Have the names and addresses of all your general creditors, including suppliers, on a list showing the amounts of their claims, the products or services supplied, the terms of delivery, the dates when the debt was incurred, etc. |
| <input type="checkbox"/> | g. Have a comprehensive summary of the Company's debt structure, with debts classified according to the priorities of the bankruptcy law, i.e.: Unpaid employee wages and contributions (to the extent allowed as priority debts under Article 33(2) of the Bankruptcy Law); Debts owed to creditors having rights towards the company's property as security for their claims (as allowed by Article 32 of the Bankruptcy Law); Claims of the general creditors (those that have no specific legal priority, are not secured by any property right, and are not specified as belonging in any higher or lower payment rank; and Other creditors claims, such as those for interest, costs, penalties, gifts, "insider" loans and the like (as specified in Article 34 of the Bankruptcy Law). |
| <input type="checkbox"/> | 2. Know Your Company's Contractual Rights and Performance Obligations |
| <input type="checkbox"/> | Be thoroughly familiar with your Company's contractual obligations and rights, including those arising under leases of its property. Be able to summarize the status of each party's performance (i.e., both your Company's performance and that of the other party(ies) to the lease or contract) of its respective obligations under the contract. |

MANAGER'S CHECK POINTS 3 - 7:**KNOW YOUR COMPANY'S ASSETS AND CAPACITIES**

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| <input type="checkbox"/> | 3. Know Your Company's Property Have a full list on hand of the Company's assets - immovable and movable, tangible and intangible - including accounts receivable and rights to payment.. |
| <input type="checkbox"/> | 4. Know the Status of Your Company's Receivables (and Other Claims of Indebtedness Owed by Others) Have an aged accounts receivable list and similar information about other claims that the Company has against third persons, including name and address of the account debtors, past due status, other terms, etc. |
| <input type="checkbox"/> | 5. Be Able to Estimate Realistic Replacement or Market Values for Your Company's Fixed (land, buildings, equipment and the like) and Other Saleable (raw materials, finished goods, other supplies in inventory and the like) Assets |
| <input type="checkbox"/> | 6. Know Whether Enforcement Actions By Creditors May Affect the Company's Property Realize that creditors with rights of separate settlement and other creditors that have begun court actions may seize property from the Company, making it more difficult for the Company to operate or reorganize. |
| <input type="checkbox"/> | 7. Know Whether Your Company Can Continue (Or Re-Start) Some or All of Its Operations |
| <input type="checkbox"/> | a. Will Utility Services Continue to be Available Identify all unpaid claims for utilities furnished to the Company; evaluate whether the Company's in danger of having utility service discontinued and consider the options for dealing with such a problem, if necessary. |
| <input type="checkbox"/> | b. Will Suppliers Reclaim Goods Already in Your Inventory Identify all possible claims for reclamation (the ability of a supplier to demand return of goods identifiable to its sale if the Company was insolvent at time of delivery and bankruptcy results); be prepared to deal with them. |
| <input type="checkbox"/> | c. Will Your Suppliers Continue to Supply the Company Evaluate the Company's status with critical trade vendors - will they threaten to discontinue shipments if they have unpaid receivables and the Company goes into bankruptcy? Are there alternate sources? Can the Company afford to satisfy their demands in order to keep up a flow of necessary supplies? Be prepared to be firm but also persuasive with vendors: Offer payment-on-delivery for post-bankruptcy deliveries if they will forgo immediate payment of pre-bankruptcy receivables. |
| <input type="checkbox"/> | d. Will Key Management People And Skilled Employees Remain in Place Management must know the people in the Company, the ones that are most needed, and their willingness to stay on, probably at a reduced level of compensation if the Company continues to operate during bankruptcy. |

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| <input type="checkbox"/> | <p>e. Will Your Customers Continue to Purchase Your Company’s Products or Services</p> <p>Evaluate the Company’s standing with its customers in the same fashion, concentrating on the need to provide them reliable assurances of a continuing supply of the Company’s products or services during post-bankruptcy operations.</p> |
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MANAGER’S CHECK POINTS 8 - 9:

KNOW YOUR COMPANY’S OPERATING AND TRANSACTIONAL HISTORY

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| <input type="checkbox"/> | <p>8. Consider Whether Management Compensation Was Excessive in the Past</p> <p>Be candid and realistic about management compensation: Amounts of salaries, bonuses, benefits may be questioned and criticized, and if deemed excessive will seriously affect the Company’s credibility in negotiations.</p> <p>[Again, take note of the requirements of Article 4 of the Bankruptcy Law, which stipulates that the “institution authorized for representation” of the Company may be held <u>responsible for losses sustained to the Company’s property</u> when more than thirty days has passed in which the Company has been unable to make payments – if more than modest management salaries are taken thereafter management’s credibility will be severely jeopardized].</p> |
| <input type="checkbox"/> | <p>9. Be Ready to Report Suspect Transactions Made in the Recent Past?</p> <p>Management must be candid about unusual transactions made before bankruptcy, because of the likelihood that the trustee will bring “avoidance” proceedings against parties unfairly benefited by these transactions (including, possibly, “insiders,” such as management personnel, their family members and other associates).</p> <p>The ability of the trustee to “avoid,” or reverse, certain transactions which occurred in the past is unique to bankruptcy. The trustee has a duty to set aside past transactions that favor some creditors over others or which unfairly reduce the amount of property in the bankruptcy estate that can be shared among all of the company’s creditors. These “avoidance” provisions can be found in Articles 80 through 86 of the Bankruptcy Law.</p> <p>If there were insider transactions subject to avoidance, management’s credibility in negotiations will be affected if management personnel cannot account to the bankruptcy estate for the receipts derived from these transfers. It is crucial to recognize and deal with these issues before other interested parties discover them and raise issues with the trustee.</p> |

MANAGER'S CHECK POINTS 10 - 15:**BE PREPARED TO REACT TO BANKRUPTCY DEVELOPMENTS**

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| <input type="checkbox"/> | <p>10. Have the Expertise on Staff that You Need To Deal With Bankruptcy Eventualities</p> <p>Consider engaging outside consultants and experts as early as possible: Management consultants, labor relations professionals, attorneys, bankruptcy experts, financial consultants, and the like may help management understand and explain its obligations and opportunities in bankruptcy.</p> |
| <input type="checkbox"/> | <p>11. Realize that Your Operations Will Be “Public” and that You Must Disclose Your Company’s Business Information</p> <p>Recognize, first and foremost, that <i>bankruptcy is a public process</i>. The Company can receive protection from creditors and may be able to reorganize and be rehabilitated financially. To get these benefits, however, the Company must treat its business as something which does not belong to itself alone. The Company and its management must report to the court and the bankruptcy trustee, and understand that its affairs will be put a matter of public record. Candor and full disclosure of important information are necessary.</p> |
| <input type="checkbox"/> | <p>12. Consult Other Laws Which Might Apply to a Continuation or Shut-Down of Operations</p> <p>Consider the possibility that other laws may apply and affect the Company’s activities and plans for the bankruptcy. Licenses may need to be obtained or renewed or permission may be needed to close down operations. Management should consult with attorneys knowledgeable about the legal requirements applicable to the industry or industries and region or regions in which the company does business.</p> |
| <input type="checkbox"/> | <p>13. Inform Employees; Know Their Attitudes, Availability</p> <p>Plan to meet with critical constituencies either just before or just after bankruptcy filing. In particular, ease concerns of employees, in order to maintain staffing and operations during critical early stage of case.</p> |
| <input type="checkbox"/> | <p>14. Prepare to Deal With Media</p> <p>Prepare for attention from the news media. Engage public relations professional if appropriate. Prepare a frank statement of the reasons for filing the bankruptcy, with a positive statement of the Company’s intentions to rehabilitate itself.</p> |
| <input type="checkbox"/> | <p>15. Prepare to Deal With Government</p> <p>Prepare for post-bankruptcy attention from any applicable government regulatory agency.</p> |

MANAGER'S CHECK POINTS 16 - 20:**PREPARE YOUR COMPANY TO PERFORM AND TAKE ADVANTAGE OF ITS
BANKRUPTCY-RELATED DUTIES AND OPPORTUNITIES**

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| <input type="checkbox"/> | <p>16. Prepare to Meet with and Inform the Trustee</p> <p>Realize that you must cooperate fully with the trustee and the court in the legal and administrative processes. Furnishing the trustee with financial and other documentation and information that is timely and thorough, will be of significant assistance to him, and will help him make such important decisions as whether: (1) the business should continue to operate; (2) management should remain in place; and (3) the bankruptcy should result in a liquidation or reorganization.</p> |
| <input type="checkbox"/> | <p>17. Convince the Trustee to Oppose Inflated Creditor Claims, Creditor Enforcement Actions, and Other Actions Which Could Harm the Company's Ability to Continue Its Operations and Reorganize</p> <p>Consider what you can do to obtain the trustee's support in defense against claims by creditors which could harm the Company's prospects (and where action by the trustee might cause the bankruptcy judge to retain jurisdiction over the dispute).</p> |
| <input type="checkbox"/> | <p>18. Know the Time-Periods When You Will Need to Take Action</p> <p>Certain events are slated to take place at certain, specific times in the bankruptcy case. Knowing these time periods is important.</p> <p>Among other things, if management seriously contemplates reorganizing in bankruptcy it needs to consider what it can and should accomplish in debt restructuring negotiations, both just before and just after the Company's bankruptcy is filed and later, in the mid-stages of the case, when a realistic plan of reorganization must be in final or nearly final form.</p> |
| <input type="checkbox"/> | <p>19. Make Commitments Firm</p> <p>Where your Company has a prospective investor or purchaser for unwanted property, those understandings or intentions should be reduced to writing and made as clear as possible at the earliest opportunity, so as to best preserve the prospects of reorganization.</p> |
| <input type="checkbox"/> | <p>20. Know the Requirements and Possibilities Related to Reorganization</p> <p>Knowing the processes and possibilities related to plans of reorganization is critical in cases where a reorganization is a realistic possibility. If the bankruptcy can be pre-planned under a "prepackaged plan," the matter needs attention very early in the case. If not pre-packaged, the matter of the "feasibility" of reorganization is still important and needs to be handled promptly. The Company's reorganization strategy need not be disclosed early, but the plan must include disclosures and must state the rights the parties will have in the post-reorganization period clearly and in detail.</p> |