



“Advanced Training of Judges in Aspects of
Bankruptcy and Reorganization”
Neum, 16-17 September 2004

**CREDITORS AS PETITIONERS FOR
OPENING OF BANKRUPTCY PROCEEDINGS**

Conditions for Initiation of the Preliminary Procedure in Bankruptcy

- Creditor is represented by legally designated person or by special contract
- Existence of legal interest in initiation of bankruptcy proceedings
- Probability of creditor's claim
- Probability of debtor's insolvency
- Advance payment for the preliminary procedure

Representation Based on the Law or the Power of Attorney (I)

- The court ex officio monitors civil capacity of parties (whether a certain person can be a party, and whether it can appear independently in court proceedings)
- On the basis of article 295 of the CPC, the court can request that deficiencies be corrected on the side of the represented party within certain deadline
- In case the party fails to comply with the court's request, on the basis of article 67 of the CPC, the court should dismiss the motion for initiation of bankruptcy proceedings

Representation Based on the Law or the Power of Attorney (II)

- State owned property and ownership interests are represented by the public attorney's office as legal representative
- Commercial entity is mostly represented by its director (d.o.o. and d.d./a.d.) or founders (d.n.o/partnership)
- Commercial entity can be represented by other persons also (art. 23 of the Law on Commercial Entities of FBiH, art. 41 of the Law on Companies of RS)

Case Example

- Motion for initiation of bankruptcy has been filed by the Tax Administration. Can they represent their interest directly in the court proceedings?
- According to the Laws on Tax Administrations, they are a part of the Ministry of Finance, and as such do not have legal capacity. They are represented by the public attorney before courts.

- What's the situation with initiation of bankruptcy by the PIO Fund, Health Insurance Fund?
- Those funds have legal capacity, and as such they represent their interests in courts

- Is the director who isn't registered in the register of companies represent that company in bankruptcy (besides the fact that he has been appointed in legally prescribed manner)
- NO - Art. 24 of the Law on Companies of FBiH and art. 41 and 93 of the Law on Companies of RS

- Who represents a company whose organizational status has not been adjusted to the Law on Companies, and can they even participate in bankruptcy?
- Since such companies have not adjusted their status, question:
 1. Do they even exist as legal entities (for example djl in FBIH)?
 2. Should legal protection be provided for such companies?

Legal Interest

- Any creditor who can prove likelihood of its claim
- Any creditor can choose the court method to realize claims (enforcement or bankruptcy procedure)
- It is considered that legal interest in initiation of bankruptcy does not exist on **part of secured creditor** unless:
 1. they renounce the security for their claim
 2. prove that their claim would not be satisfied in full from the security

Secured creditors

- It is considered that they have no legal interest, because in faster, cheaper, and simpler way they can exercise their rights (in enforcement procedure)
- Consequences of initiation and opening of bankruptcy are much more severe than those in initiation of enforcement procedure (taking over the control of company by bankruptcy trustee, employee layoffs etc)
- Waiver is possible under condition (if bankruptcy is opened), partly or in full, only by a statement in the motion for initiation
- It is considered that secured creditor has no legal interest in bankruptcy if debtor is not directly liable to secured creditor (pledged property in the name of someone else's debt)

- Waiver, or proof that satisfaction from security is impossible are also prerequisites for:
 1. right of vote in assembly of creditors (article 28, par. 2)
 2. right of satisfaction from bankruptcy estate (Article 39)

Documentation Necessary for Initiation of Bankruptcy Proceedings

- Authorization of representation of creditor, if represented by representative or attorney (excerpt from the register of legal entities, or power of attorney)
- Documentation which indicates likeliness of claim (judgments, settlements, contracts etc)
- Documentation which indicates likeliness of debtor's insolvency (most often proof of debtor's blocked account)
- Excerpt from the register of legal entities for debtor (for identification of debtor)