

# Filing of the Motion for Initiation of Bankruptcy Proceedings and Preliminary Procedure

Detailed Analysis of Legal Provisions



# Basic Features of the Bankruptcy Procedure

1. Procedure for liquidation of debtor's assets and group settlement of creditors, with option of reorganization
2. The procedure is urgent
3. The court must investigate all circumstances relevant to bankruptcy procedure
4. Bankruptcy debtor is heard before each court decision (art. 9, par. 2)
5. Compliance with the CPC

# Reasons for Bankruptcy?

- Over indebtedness concept abandoned
- 30/60 days of insolvency is enough
- According to the text of the law, each time a debtor fails to pay any monetary debt for longer than 30/60 days, conditions are met to initiate the bankruptcy procedure (art. 6, par 2)
- Threatening insolvency – only the debtor

# Initiation of Bankruptcy Procedure (I)

## CREDITOR:

1. Must have legal interest (do mortgage creditors with an enforceable document have it?)
2. Must make the following likely:
  - the claim
  - insolvency
3. Must submit relevant documentation to support that
4. Must make the advance payment

# Initiation of Bankruptcy Procedure (II)

Debtor:

- Must file for bankruptcy as soon as the conditions are met (there is even legal representative's liability for damages that occur)
- Does it have to have legal interest?
- Must it submit documentation on insolvency?
- Must make the advance payment for the preliminary procedure, unless the court exempts it

# Purpose of the Preliminary Procedure (art.14 and 16)

To determine:

- if there is reason to open the bankruptcy proceedings (insolvency)
- if the motion is founded
- if the debtor's assets will be sufficient to cover the procedure costs
- if the current production can be maintained

# Is This Phase of the Process Mandatory in Every case?

- There is an option for direct opening of bankruptcy proceedings (art. 44) based on a motion from one of the two parties:
- Liquidator – motion results from already initiated liquidation procedure
- Creditor with legally valid enforcement order, which has not been executed for at least 60 days

**Flaw:** it is not always known what is the value of debtor's assets, in order for the court to determine if the costs of the procedure will be covered

# Court's Obligations in the Preliminary Procedure (I)

Review (within 15 days):

- authorization to file for bankruptcy (who is the legal representative of a legal entity when no director has been appointed?)
- Legal interest of the petitioner, if creditor
- Likelihood of claim and insolvency



# Court's Obligations in the Preliminary Procedure (II)

- Order by writ the correction of pleadings, if necessary (art. 4, par. 3). No right to appeal this order (art. 295, par. 5 CPC)
- Order by writ the advance payment for the preliminary procedure (art. 4, par. 4). No right to appeal this order (art. 295, par. 5 CPC)
- In case of failure to comply with these court requirements, order on dismissal follows or presumption of withdrawal of the motion. Is there right to appeal this order?

# Court's Obligations in the Preliminary Procedure (III)

- After the advance payment is made, appointment of interim bankruptcy trustee by order (is there an order on opening of the preliminary procedure?). By law, this is not required (unless the debtor is still operating), but in practice, the appointment is still done along with the appraiser. Bankruptcy debtor must be heard before this order is issued. Appeal is not allowed against the order on appointment of interim bankruptcy trustee.
- Order by writ the security measures:
  - ex officio
  - upon request of authorized personBankruptcy debtor must be heard before the issuance of this order. Appeal by bankruptcy debtor does not stay the execution of the order (art. 15, par. 7)

# Court's Obligations in the Preliminary Procedure (IV)

- After receipt of the interim bankruptcy trustee's report ("30 days after the appointment – after issuance of order, service of process, or announcement?) schedule the hearing to discuss the motion for initiation of bankruptcy proceedings.
- On the basis of the discussion on the motion for opening of the bankruptcy proceedings, issue the order on opening of the bankruptcy proceedings or order rejecting the motion for initiation of bankruptcy proceedings
- In RS, for companies in 51% of state ownership, the court must request the Government's approval

# Order on Opening of the Bankruptcy Proceedings (I)

- Bankruptcy trustee is appointed
- Creditors are invited to submit their claims in court
- Secured creditors are invited to inform the trustee about their rights within 30 days
- Investigation and reporting hearings are scheduled
- Debtor's debtors are invited to settle their debts

# Order on Opening of the Bankruptcy Proceedings (II)

- Posted on the court's notice board the same day
- Published in the official gazette
- Personal service on the petitioner and bankruptcy debtor, and the deadline period for bankruptcy debtor's appeal starts to run on the day of posting on the notice board of the court. Appeal does (not) stay the execution of order
- Copy is sent to creditors and debtor's debtors (only known?)
- Delivered to the prosecutor's office

# Order Rejecting the Motion for opening of the bankruptcy proceedings

If:

- The motion is inadmissible (lacks approval of the Ministry of Defense (both entities) or the Government (RS))
- There are no reasons for bankruptcy
- Bankruptcy estate is insufficient to cover the expenses (unless the advance payment is made) – delivered to the prosecutor's and the registry court for deletion of the company from the register (FBIH)

# Dilemmas Related to the Preliminary Procedure (I)

- How do you determine the value of estate managed by the bankruptcy trustee, as the basis for the trustee's insurance against professional risk?
- Are litigations resulting from the bankruptcy proceedings urgent, and if not, how can this status be ensured for them?
- In what cases is the stay of the bankruptcy procedure possible in order to decide on a previous issue?

# Dilemmas Related to the Preliminary Procedure (II)

- In bankruptcy procedure, is appeal allowed only when it is specifically indicated, or is it possible for every court decision, with appropriate application of the CPC?
- Is there right to appeal bankruptcy judge's decision on appeal?
- In FBiH, if an appeal is filed against an order on opening of the bankruptcy procedure, when does bankruptcy trustee take his office, and when does the 45 deadline period start to run, within which he/she must submit the report in court.



# Dilemmas Related to the Preliminary Procedure III)

- How is the enforcement procedure stayed, i.e. the right to extract property in the preliminary procedure (art. 15, par. 3)? Is this ordered by the bankruptcy or enforcement court?
- What are the legal consequences of failure to appear at the hearing for discussion on the motion for opening of the bankruptcy proceedings?
- What is the average time necessary to conduct the preliminary procedure, and what are its expenses?

# Dilemmas Related to the Preliminary Procedure (IV)

- Must the trustee have judge's approval to pay the workers in the preliminary procedure? What workers should be paid?
- What does the article 16, apr. 1 mean, that the interim bankruptcy trustee must take care of bankruptcy debtor's property? Does debtor's management still have its powers?
- How is debtor's insolvency proved? By bank confirmation, one or more of them?
- If the motion is filed by an unauthorized person, is this motion denied or rejected?