



USAID
FROM THE AMERICAN PEOPLE

BOSNIA-HERZEGOVINA

Second Edition of
Judges' Bankruptcy Benchbook
(Vetted)

Contract Number
PCE-I-00-98-00015-00 TO 821

Submitted to:
U.S. Agency for International Development

Submitted by:
Chemonics International, Inc.
Emerging Markets Group, Ltd.
National Center for State Courts

December 31, 2005

This publication was produced for review by the United States Agency for International Development. It was prepared by Chemonics International Inc.

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development of the United States Government.

**JUDGES' BANKRUPTCY BENCHBOOK
TABLE OF CONTENTS**

INTRODUCTION.....	3
FUNDAMENTAL PRINCIPLES AND BODIES OF THE PROCEDURE ACCORDING TO THE LAW ON BANKRUPTCY.....	4
I. PRELIMINARY PROCEEDING	5
A) COURT ORDER PRONOUNCING THE COURT UNAUTHORIZED	5
B) ORDER REQUIRING SUPPLEMENTING OF THE PETITION (ART. 4, PAR. 4 OF THE LAW)	6
C) ORDER REJECTING PETITION FOR OPENING A BANKRUPTCY PROCEEDING	8
D) ORDER DETERMINING THE ADVANCE PAYMENT FOR COSTS OF THE PRELIMINARY PROCEEDING.....	9
E) HEARING OF BANKRUPTCY DEBTOR.....	11
F) ORDER ON APPOINTMENT OF INTERIM BANKRUPTCY TRUSTEE.....	111
G) ORDER IMPOSING SECURITY MEASURES	16
SCHEDULING HEARING FOR DETERMINATION OF PRECONDITIONS FOR OPENING OF BANKRUPTCY PROCEEDING	17
HEARING FOR DETERMINATION OF PRECONDITIONS FOR OPENING OF BANKRUPTCY PROCEEDING.....	18
II. DECISION ON PETITION FOR OPENING OF BANKRUPTCY PROCEEDINGS.....	19
1) ORDER REJECTING THE PETITION FOR OPENING OF BANKRUPTCY PROCEEDING	20
2) ORDER INITIATING BANKRUPTCY PROCEEDING	20
DETERMINING COSTS OF THE PRELIMINARY BANKRUPTCY PROCEDURE	218
DIRECT OPENING OF BANKRUPTCY PROCEEDINGS	218
III. ACTIVITIES OF COURT AFTER ISSUING ORDER ON OPENING OF BANKRUPTCY PROCEEDING.....	193
A) TABLE OF CLAIMS (FORM NO. 14)	193
B) HEARING FOR INVESTIGATING REPORTED CLAIMS (INVESTIGATION HEARING)	194
C) REPORTING HEARING.....	216
IV. LIQUIDATION OF BANKRUPTCY DEBTOR'S ASSETS	227
A) ROLE OF THE COURT IN SALE OF BANKRUPTCY DEBTOR'S ASSETS ACCORDING TO THE RULES OF ENFORCEMENT PROCEEDING	238
B) DISTRIBUTION OF FUNDS OBTAINED BY LIQUIDATION OF THE BANKRUPTCY DEBTOR	239
V. CLOSING OF BANKRUPTCY PROCEEDING.....	31
VI. ACTIONS OF BANKRUPTCY COURT IN THE BANKRUPTCY REORGANIZATION PROCEDURE.....	34
A) FILING OF THE PLAN AND ITS FIRST COURT'S AMENDMENT.....	34
B) STATEMENT ON THE PLAN	38
C) DISCUSSION ON THE PLAN	39
D) CHANGE TO THE PLAN BASED ON THE DISCUSSION HEARING	42
E) VOTING PLAN.....	44
F) CONFIRMATION OF THE BANKRUPTCY PLAN BY THE COURT	48

INTRODUCTION

This Benchbook is the product of close cooperation between USAID' Fostering an Investment and Lender-Friendly Environment Project (FILE) and over 30 judges currently handling bankruptcy proceedings in Bosnia and Herzegovina (BiH). Its primary goal is to provide bankruptcy judges with a benchbook that compiles fundamental instructions on bankruptcy implementation. The authors believe that this will immensely benefit judges who are starting to handle bankruptcy cases and will assist more experienced bankruptcy judges as a reference in their every day work, since the substance of bankruptcy law is broad and diverse.

The intention of the authors for this Benchbook was to indicate in a simple and practical manner the basic tasks for a bankruptcy judge in handling bankruptcy proceedings. Thus, the Benchbook explains certain provisions of the Federation and RS Laws on Bankruptcy (collectively, the "Law"), points out certain interpretations of ambiguous legal provisions, and provides practical suggestions for resolution of some of the dilemmas in implementation of the Law. Some of the recommended solutions from this Benchbook reflect successful practices of BiH bankruptcy judges thus far.

The Benchbook has been uniformly composed for the Laws on Bankruptcy in both entities. Such method of work logically imposed itself, since the two entity Laws are identical in over 95% of the text. In that regard, the Benchbook will point out the differences in those places where they exist.

The Law on Bankruptcy was enacted first in Republika Srpska in 2002, and in that entity it entered into effect on January 1, 2003 ("Official Gazette RS" no. 67/02). To date, the Law in that entity has undergone minor amendments on two occasions ("Official Gazette RS" no. 77/02 and 96/03). In the Federation, the Law, almost identical to the RS one, was enacted in 2003, and entered into effect on July 1, 2003. To date, the text of the Law was amended once by the amendments dated June 12, 2004.

Brčko District, as separate legal system in BiH, enacted its Law on Bankruptcy, Compulsory Settlement, and Liquidation in Brčko District of Bosnia and Herzegovina in 2002. The text of that Law has not been the subject of this Benchbook, although the judges of Brčko District, when reading the Benchbook, will likely be able to use certain parts in implementing the Law there.

This Benchbook contains a detailed description of the principles and procedures of the Law. It also contains 33 court forms for use by judges.

FUNDAMENTAL PRINCIPLES AND BODIES OF THE PROCEDURE ACCORDING TO THE LAW ON BANKRUPTCY

The Law has introduced very important changes into development of bankruptcy in BiH. In that regard, it should be noted that, prior to the new Law, the Law on Bankruptcy and Liquidation ("Official Gazette FBiH" no. 23/98) was applied in the Federation, and the Law on Compulsory Settlement, Bankruptcy, and Liquidation ("Official Gazette SFRJ" no. 84/89) was applied in RS. Conceptually, both Laws were in fact modifications of the Law on Compulsory Settlement, Bankruptcy, and Liquidation of ex SFRJ from 1989.

In the post-war economic, political and legal environment, it became apparent that existing laws concerning bankruptcy were insufficient to deal with the problems faced by companies and their

creditors. Therefore, entity ministries formed a joint working group whose primary goal was to establish a new bankruptcy system in BiH that could resolve the problems of insolvency of certain legal entities and the payment of their creditors.

The new method of resolving these problems primarily stresses the following:

- 1) A bankruptcy procedure is urgent (art. 9. par.2), and must quickly resolve claims of a multitude of creditors;
- 2) The burden of managing bankruptcy proceedings is now equally distributed between three key bodies in the procedure:
 - a) a bankruptcy judge, who monitors a bankruptcy trustee and manages the bankruptcy procedure;
 - b) a bankruptcy trustee, who is responsible for managing the bankruptcy estate, determining the liabilities of the bankruptcy debtor, and distributing liquidated assets of the bankruptcy debtor to its creditors; and
 - c) an assembly of creditors, the representative body of the bankruptcy debtor's creditors, which has the decisive role in setting the course of bankruptcy proceedings (liquidation of assets or reorganization of bankruptcy debtor).
- 3) The possibility to reorganize the bankruptcy debtor was introduced as a model for completing bankruptcy procedure. This is the greatest change in the bankruptcy law.

Bankruptcy procedures can also include a board of creditors; the assembly of creditors decides whether such a board is necessary.

The procedures that the judge will oversee in a bankruptcy proceeding are discussed below, mainly in chronological order.

I. PRELIMINARY PROCEEDING

The deadline for issuing the first court order on a petition for opening bankruptcy proceedings is **15 days** after receipt of the petition by the court intake registry office. The order should either:

1. pronounce the court territorially unauthorized, and surrender the petition for opening of bankruptcy proceedings to jurisdiction of another, territorially authorized, court; or
2. require supplementing the petition for opening of bankruptcy proceedings; or
3. set the advance payment amount for the preliminary proceeding.

A) Court Order Pronouncing the Court Unauthorized

Before venturing to consider the merits of a petition for opening bankruptcy proceedings, the court must first determine whether it is territorially authorized to process the petition. In that regard, the court should consider the following:

- a) art. 7(1) of the Law, which determines territorial jurisdiction of the bankruptcy court in accordance with location of bankruptcy debtor;

- b) art. 26 of the Laws on Courts in RS and art. 27 of the FBIH Law on Courts, which determine legal jurisdiction of municipal/basic courts to process bankruptcy cases.

In case a bankruptcy judge, on the basis of these provisions, finds that the petition has been filed in an unauthorized court, he will issue a court order pronouncing the court unauthorized to adjudicate this case. It is interesting to point out that, as opposed to article 233 of the Civil Procedure Code (CPC), according to which appeal is allowed against every court order (including an order by which the court is pronounced unauthorized), unless explicitly disallowed by law, article 7(3) of the Law explicitly prescribes that an appeal against this order is not allowed.

B) Order Requiring Supplementing the Petition (art. 4(4) of the Law)

After deciding that the court is territorially and legally authorized, in reviewing the petition for opening bankruptcy proceedings, the bankruptcy judge must examine:

1. Whether the creditor made a credible claim?
 - a) Not only must the creditor's claim be **mature**, but payment of the claim must also be **demanded** by the creditor before the petition for opening of bankruptcy proceedings is filed (article 4, par. 1, related to article 6. par. 2 of the Law).
 - b) The creditor must make his claim **credible** (art. 4, par. 1 of the Law). In this phase, the creditor does not have to prove his claim, but only the likelihood of its validity. From the court's standpoint, the standard is lower than the standard of proof, and it will be established every time the court has more reason than not to believe that a certain fact is valid. Therefore, the court does not need to insist that a creditor prove the existence of the claim, but only to show it is more likely than not.
 - c) The creditor's claim must be designated in the exactly **fixed**, and not an **approximate, monetary amount**.
2. Debtor's likely inability to pay (article 4, par. 1, related to article 6, par. 3)
 - a) The most frequent proof by which a creditor or debtor will establish the bankruptcy debtor's likely inability to pay is the debtor's **frozen bank account**. In this regard, it would be enough that only one bank account is frozen of several used by the bankruptcy debtor in transactions. Bank confirmation can be used as proof that a debtor's account is frozen, or an excerpt from the Official Gazette in which banks are required to publish lists of companies with frozen accounts on a monthly basis.
 - b) Although a frozen bank account is the most common indicator that a certain company is unable to pay its debts, it is not the only evidence on which this conclusion can be drawn. A debtor could be **unable to make payments even if its accounts are not frozen**, i.e., although transactions are still passing through them. The key criterion is whether the debtor can pay its due and claimed

liabilities within the legally prescribed time (30/60 days), and not whether it is still able to perform transactions through its accounts. In cases where the inability to pay is not proved by a frozen bank account, the petitioner must submit other documentation from which the conclusion could be made that the debtor is unable to make payments. Examples of other documentation include the debtor's **balance sheet and income statement for the latest fiscal period (from which the ratio between debtor's liabilities and assets is apparent), debtor's cash flow analysis (cash availability to cover liabilities due)**, threats of initiation of enforcement proceedings sent by its creditors and related replies that it is not in a position to make payments on its debts, etc.

3. Whether appropriate documentation has been attached?

As a rule of thumb, with the petition for opening of the bankruptcy proceeding, the **creditor** must file appropriate documentation to make his claim and debtor's payment inability likely (article 4. par. 1). In this regard, the petition should have the following attachments:

- a) Contracts, court judgments, court and out-of-court settlements, authorized bodies' orders, written admissions of liabilities, invoices, and similar documents from which it can be deduced that the creditor's claim is likely.
- b) Bank confirmation that debtor's account is frozen, debtor's balance sheet or income statement for the latest fiscal period (six or 12 months), debtor's cash flow analysis (monthly), findings and opinions of experts (engaged by the creditor prior to the opening of bankruptcy proceedings) and other documentation from which it can be deduced that debtor's inability to make payment is likely.

When a petition for opening of bankruptcy proceedings is filed by the **debtor**, it has to show the likelihood of the existence of bankruptcy, i.e., its inability to make payments. The debtor accomplishes this by filing bank confirmation that its account is frozen, or by its balance sheet and income statement for the latest fiscal period (six or 12 months), cash flow analysis (monthly), findings and opinions of experts (engaged prior to the opening of bankruptcy proceedings), etc.

4. If the petitioner is a legal entity, whether the person who filed the petition is authorized to represent the petitioner?

According to the Law on Companies, a company can be represented only by the company's director or another person who is authorized by the company's statute. Thus, in legal transactions or with reference to third parties, members of supervisory board, owners, or founders of a company are not authorized to represent the company, except if they are authorized to do so by explicit provision in the company's statute. Regardless of the basis from which they derive the right to represent the company (law or statute), persons who represent the company, together with the scope of authorization, must be registered in the register of companies.

In reviewing a petition for opening bankruptcy proceedings, the bankruptcy judge must verify the excerpt from the company register for legal representatives and

their scope of authorization. In this regard, the excerpt must be attached to the petitioner's petition.

5. Whether there is an excerpt from the company register for the company against which bankruptcy proceedings are being opened?

In order for a bankruptcy proceeding to run smoothly in this phase, it is of crucial importance for the bankruptcy judge to accurately identify the legal entity against which the bankruptcy proceeding is conducted. In practice, there are often cases of multiple related companies with very similar titles or business organizational forms. In order to avoid conducting a proceeding against one company and entering certain legal consequences in the register of companies for another company, before taking any legal actions the court must be certain against which company the bankruptcy proceeding is being conducted. The most practical solution is when the excerpt from the register of companies is attached to the petition for opening of bankruptcy proceedings itself. However, if there is no such document attached, then the court should require this excerpt from the petitioner to supplement the petition for opening bankruptcy proceedings.

After a petition for opening bankruptcy has been reviewed, if the court finds that there are some of the above-mentioned omissions, it will issue an order requiring the petitioner to supplement or adjust the petition for opening bankruptcy proceedings (Form 1). The judge delivers the order, together with a copy of the petition filed to the court, to the petitioner and sets the deadline to comply within 15 days of receipt of the order. This order is a procedural order by which the court administers the case; thus appeal of this order is not allowed (see article 11 par. 1 of the Law).

C) Order Rejecting Petition for Opening a Bankruptcy Proceeding

After seven days from ordering the petitioner to supplement its petition, the court will inspect the case file and determine on what date service was made by reviewing the date on the return receipt for this order. If more than 15 days has elapsed from the date of service of the order (date on return receipt), and the petitioner has not filed a petition within this deadline, the court **must** issue an order that states that the petition is considered withdrawn (Form 3).

If, however, the petitioner does file the petition within 15 days, the court will examine:

1. Whether the petitioner has supplemented the petition in accordance with the court's instructions; and
2. Whether the petitioner attached the documentation required by the court.

If, after receipt of the new, corrected, and supplemented petition, the court concludes that the petitioner failed to comply with the court order (i.e., has not corrected or supplemented the petition or has not filed the required documentation in the manner required), the court **must** issue an order rejecting the petition for opening the bankruptcy proceeding (Form 4).

D) Order Determining the Advance Payment for Costs of the Preliminary Proceeding

The deadline to determine the advance payment for conducting the preliminary proceeding is **15 days after receipt of an acceptable petition for opening of bankruptcy proceedings**. This deadline can begin as of:

1. the date when the petition for opening bankruptcy proceedings is first received (contains all legally prescribed and necessary elements); or
2. the date when the supplemented and corrected petition for opening of bankruptcy proceedings is received, when the court required supplementing or correcting the petition, or attaching the missing documentation, and the petitioner complied with court order within the stated deadline.

In regular course of actions, the advance payment must be made by the **creditor** who initiates bankruptcy procedure, or by the **debtor** itself if it filed the petition for opening bankruptcy proceedings. The rule is, only if a petition for opening bankruptcy proceedings is filed by **liquidator** (from the liquidation procedure), or by a creditor with a final enforcement order not enforced within 60 days, the court does not have to order advance payment for preliminary procedure expenses, if it decides to open bankruptcy directly (article 44, par. 1), without the preliminary procedure.

The purpose of the advance payment is to finance all expenses that could arise in the course of the preliminary proceeding. These expenses are:

Fee of interim bankruptcy trustee	max. 1200 KM per month
Expenses of interim bankruptcy trustee	max. 1000 KM
Fee and expenses for possibly appointed expert	max. 500 KM
Advertisement of one order on security measures and appointment of interim bankruptcy trustee in Official Gazette	max. 100 KM
Advertising order on opening of bankruptcy proceeding	max 100 KM

The above noted represents net amounts, and besides those the court should calculate and pay gross amounts, which include the tax for services performed.

With regard to payment of an interim bankruptcy trustee, it should be noted here that the maximum amount of his monthly advance payment in FBiH is restricted by cantonal regulation, most often to the amount of two average salaries in the related canton. In the RS, however, there is no such limitation on the amount of the monthly advance fee payment for a bankruptcy trustee, and determining the amount of the advance payment is left at the discretion of court.

Besides these almost ordinary expenses of the preliminary proceeding, the court must also take into consideration extraordinary expenses that could arise for various reasons. These expenses could include:

- i. Subsequent ordering and advertising of security measures in Official Gazette, which were not ordered together with the order appointing an interim bankruptcy trustee (100 KM);

- ii. Expenses relating to an unexpectedly long duration of the preliminary proceeding (longer than the planned 60 days), if debtor files an appeal of the order opening bankruptcy proceedings and this order is reversed and returned for a new preliminary proceeding, or if the second instance court issues its decision after significant delay. These could entail the new appointment of an interim bankruptcy trustee or an expert for additional tasks, and also longer obligation of interim bankruptcy trustee to care for bankruptcy debtor's property, until the moment of legally final completion of the preliminary procedure.
- iii. In the event of a bankruptcy against a company that provides no protection for its assets (e.g., an abandoned company), the interim bankruptcy trustee must look after these assets. In order to achieve control over the assets of the future bankruptcy debtor, the interim trustee may have to employ a security service to be paid from the advance payment for preliminary proceedings. In this regard, the average additional expenses would be about 1500 KM per month.

Based on the foregoing calculations, and court practice developed thus far, by order (Form 2) the court should instruct the petitioner to make the advance payment for financing the preliminary proceeding in the amount of 5000 KM within 15 days of receipt of the order.

Seven days after the court has issued an order to serve the advance payment order on the petitioner, the court will verify the case file to determine on what date service has been carried out by reviewing the date on the return receipt for this order. If more than 15 days has elapsed from the date of service of the order (date on return receipt), and the petitioner has not submitted proof of advance payment made in the court's account, the court **must**, in accordance with article 13, par. 2, issue an order rejecting the petition for opening of bankruptcy proceedings (Form 3). No legal remedy is allowed against this order, since it is procedural in nature (see art. 11, par. 1).

As a limited exception, according to article 13, par. 4, the court may not have to issue the order for advance payment for expenses of the preliminary proceeding. This happens in cases where the following two conditions are met:

1. The petition for opening of bankruptcy proceedings is filed by the debtor; and
2. The value of the debtor's assets is sufficient to cover the expenses not only of the preliminary, but also of the entire bankruptcy proceeding.

However, even though prescribed by law, this option (issuance of order exempting advance payment for the preliminary proceeding) should be practically avoided by the bankruptcy judge because the court itself cannot finance up front the regular expenses of the preliminary proceeding from its own budget, such as the fees of the interim bankruptcy trustee, possible expert services, advertisement of the order on initiation of the preliminary proceeding, and the order on opening of bankruptcy proceedings. For this reason, the court should always issue an order on advance payment in the preliminary proceeding, otherwise it will be unable to finance expenses of the preliminary proceeding.

E) Hearing of Bankruptcy Debtor

After the payment of determined amount has been made, in accordance with legally prescribed rules, to cover expenses of the preliminary procedure, the court, in compliance with article 9, par.

2, issues an order that schedules hearing of bankruptcy debtor (Form 10). The summons to the bankruptcy debtor should be addressed to the debtor's address, without indicating the names of the director or other representatives, to avoid difficulties and discussions regarding who represents bankruptcy debtor after filing of the petition for initiation of bankruptcy, in case the actual representative (actual or acting director for example) and representative registered in the register of companies are not the same person. Acting in this manner, the bankruptcy debtor will be formally summoned to a scheduled hearing, and the court will have proof that the summons has been sent to bankruptcy debtor, regardless who can represent it before court, in accordance with the law and statute.

The goal of the hearing is to determine whether the conditions exist for conducting the preliminary procedure and for gaining wider insight into the bankruptcy debtor's prospects. In that regard, the court will investigate the following circumstances:

1. if the petition is filed by creditors:
 - a) Is the claim of the petitioner credible? Bankruptcy court should hear the bankruptcy debtor about the likeliness of the petitioner's claim. In that regard, the bankruptcy court will make a decision, on the basis of bankruptcy debtor's argument, either to deny the petition for initiating bankruptcy proceedings as inadmissible (due to unlikely claim of the petitioner) or, if other requirements are met as well, to appoint an interim bankruptcy trustee for determining the existence of bankruptcy reasons in the preliminary procedure, if those reasons cannot be determined by the bankruptcy court itself (see art. 14, par. 1).
 - b) Does legal interest of the petitioner for initiating bankruptcy exist (art. 4, par. 1)? Namely, the legal interest of the petitioner for initiation of bankruptcy will not exist if there is an easier and more efficient way for it to exercise its rights regarding the bankruptcy debtor.
 - c) Is there a reason to order security measures petitioned for by the creditor: are the creditor's claims in that regard accurate, and are there reasons for the court itself to pronounce these measures ex-officio?
 - d) Is it a type of company against which bankruptcy proceedings cannot be initiated (art. 5, par. 2), or does initiation require approval in accordance with article 5 of the Law (in FBiH and RS for a company that manufactures weapons and military equipment, and in RS, also for a company with more than 50% of state-owned equity)?
 - e) Who is the legal representative of the debtor (is the actual representative also registered in the register of companies), and is filing the petition by the creditor in compliance with the law (was the petition filed by an authorized person on behalf of the creditor)?

In case the bankruptcy court concludes, on the basis of the hearing of the bankruptcy debtor, that the petitioner has no legal interest to initiate bankruptcy proceedings, it will issue an order denying the petition, against which the petitioner is allowed to file an appeal, in accordance with article 50, par. 1 of the Law.

In case the petition for initiating bankruptcy proceedings was filed by bankruptcy debtor, the court should:

- a) Obtain information and wider insight into the situation of the bankruptcy debtor (is the debtor still operating, what is the level of its business activities (is the future bankruptcy estate being preserved or damaged), how many employees are there, what are its liabilities to creditors, what are the goals the debtor is trying to achieve through bankruptcy proceedings etc.);
- b) Consider the issue of ordering security measures ex officio;
- c) Is it a type of company against which bankruptcy procedure is not allowed (art. 5, par. 2), or requires approval in accordance with article 5 of the Law (in FBIH and RS for a company that manufactures weapons and military equipment, and in RS for a company with over 50% of state owned equity);
- d) Who is the legal representative of the debtor (is the actual representative also registered in the register of companies)?

F) Order on Appointment of Interim Bankruptcy Trustee

After the petitioner submits the proof of advance payment of the required amount for expenses of the preliminary proceeding, **the bankruptcy judge must determine** whether all conditions have been met, in the specific case, to open the bankruptcy proceeding. In this regard, the bankruptcy judge must determine within the preliminary proceeding (article 43 par. 4. of the Law):

- 1) whether the debtor is unable to make payments;
- 2) whether the petition is acceptable; and
- 3) whether the court expenses in the bankruptcy proceeding would be covered from debtor's bankruptcy estate.

The aforementioned conditions can be established by the judge in two ways:

- 1) on his own, without engaging an interim bankruptcy trustee or expert; or
- 2) by appointing an interim bankruptcy trustee and, if necessary, an expert.

Although the law allows the first option (article 14 par. 1 – “may appoint”), in court practice this is very rare because the petition for opening bankruptcy proceedings does not contain all the relevant data to indicate whether all conditions have been met to open bankruptcy proceedings in a specific case, and whether the future bankruptcy estate is of such volume to cover the expenses of bankruptcy proceedings. In this regard, it is common for a bankruptcy judge to issue an **order appointing an interim bankruptcy trustee** (Form 8) in order to examine whether all conditions are met to open the bankruptcy proceeding.

By this order, a person from the list of bankruptcy trustees authorized in the relevant entity is appointed as interim bankruptcy trustee. The fact that a person is on the list of bankruptcy trustees for a certain canton/district court does not imply that a person from this area cannot be appointed as the bankruptcy trustee in a different canton/district court.

It is not unusual that in certain courts' there is an insufficient number of bankruptcy trustees or an insufficient number of qualified bankruptcy trustees for a certain industry from which the debtor originates (financial or wood sector for example). In such cases, bankruptcy courts may need to appoint bankruptcy trustees who are not found on the provisional list of bankruptcy trustees in the entity of the respective bankruptcy court.

The aforementioned court practice, the most practical solution in given conditions, has its foundation in articles 22, 23 and 24 of the Law. It is not prescribed anywhere in those articles that only a person found on the established provisional (art 23, par. 3) or permanent list (art. 24) can be appointed as bankruptcy trustee (even interim); thus the path is open for bankruptcy courts to appoint any person as bankruptcy trustee who has completed professional training and passed the professional exam.

Before issuing the order on appointment of an interim bankruptcy trustee, the bankruptcy judge must **hear from the bankruptcy debtor** about the circumstances of the opening of the bankruptcy proceeding. In this regard, the bankruptcy judge issues an order which schedules the hearing for the debtor (Form 10). Exceptionally, this hearing can be held later, but in such case the order appointing the interim bankruptcy trustee should include an explanation of why the bankruptcy debtor was not heard from prior to issuance of the order appointing the interim bankruptcy trustee.

When issuing an order appointing an interim bankruptcy trustee, the **bankruptcy court must take into account** the following:

1. whether the proposed bankruptcy trustee has a conflict of interest in the specific case. In this regard, the interim bankruptcy trustee, as well as the bankruptcy trustee, must not be a person (article 23 par. 4 of the Law):

- a) who would have to be exempted as a judge in bankruptcy proceedings (compliant application of article 357 of the CPC);
- b) who is closely related to bankruptcy judge (here, the legislator leaves it up to bankruptcy judge to determine in each specific case what type of kinship with bankruptcy trustee can be considered inappropriate – compliant application of article 357. p. 5 of the CPC);
- c) who is one of debtor's creditors or their representatives, or is in a competitive relationship with the bankruptcy debtor;
- d) who is a person responsible for liabilities on part of bankruptcy debtor;
- e) who is a former employee of the debtor or member of one of its bodies;
- f) who worked in advisory capacity for debtor, or participated in operations related to property and equity of the debtor;
- g) that cannot be appointed as member of supervisory board or director of the company (compliant application of the Law on Companies).

2. The order should set forth all the duties that the interim bankruptcy trustee must carry out within 30 days of his appointment. These duties are:

- a) determine whether conditions are met to open bankruptcy proceedings (*i.e.*, determine whether debtor is unable to make payments);
- b) determine whether debtor's assets can cover the expenses of the bankruptcy proceeding;
- c) in case the debtor is still operating, determine whether operations can continue during the preliminary proceeding;

- d) In FBiH, perform inspection of privatization and debtor's business operations.

The bankruptcy judge can appoint an expert to perform tasks under a) and b), but this is not a common court practice because it adds to the cost of preliminary proceedings, especially in view of the fact that trustees are professionally trained and quite capable of performing these tasks in a satisfactory manner.

In conducting task b) above, the interim bankruptcy trustee must:

- 1) set the time frame for the duration of bankruptcy proceedings and establish the general costs of proceedings, in cooperation with bankruptcy judge;
- 2) determine, on the basis of bankruptcy debtor's bookkeeping records, what assets are encumbered with preferential rights and where priority of satisfaction belongs to preferred creditors, even ahead of satisfaction of expenses of bankruptcy proceedings;
- 3) provide a general appraisal of the bankruptcy debtor's assets;
- 4) make a conclusion in his report, on the basis of the aforementioned elements, whether the bankruptcy debtor's assets are sufficient to cover the expected amount of court expenses in bankruptcy proceedings.

In conclusion, an order appointing the interim bankruptcy trustee must be advertised in the Official Gazette (Form 11) and entered in the register of companies.

G) Order Imposing Security Measures

Ex officio, or on motion of the petitioner or interim bankruptcy trustee, the court can issue an order imposing security measures (Form 7).

As a rule of thumb, to order these measures, the necessity of the measures must be apparent from relevant documentation and filings submitted to the court. Therefore, the bankruptcy judge should not order security measures "offhand" without clear indicators that activities of the debtor or third parties are such that they are justified because these activities can jeopardize the future bankruptcy estate.

Types of security measures are stated in article 15 of the Law. The most common measures imposed by courts in BiH are:

- 1) Ban on disposing of debtor's assets without approval from the bankruptcy judge or interim bankruptcy trustee;
- 2) Temporary suspension of all security and enforcement measures during the preliminary proceeding.

Imposing the measure under item 2 is only declarative in character. The legal consequence of a ban on enforcement against debtor's assets, i.e., separation of assets of third parties from debtor's property, is in effect by operation of law once the preliminary proceeding starts. In order to make this consequence known to all, the court should include this ban ex officio in the order on appointment of the interim bankruptcy trustee, if not in a special order (Form 7 or 8), on motion

of the interim bankruptcy trustee or bankruptcy debtor. For practical reasons, an order on the measure under item 2 should also be served ex officio on the enforcement court with jurisdiction in debtor's location since, in the majority of cases, the greatest portion of debtor's assets that can be subject of enforcement procedure is located in the same area. Optionally, the obligation of serving an order for measure under item 2 on other enforcement courts for debtor's assets outside the court's location should be carried out by the bankruptcy trustee or debtor's management, if interested.

In conclusion, the court must make sure that the order of any security measures is published in the Official Gazette (Form 11) and entered in the register of companies.

Scheduling Hearing for Determining Preconditions for Opening Bankruptcy Proceedings

After receiving the report of the interim bankruptcy trustee regarding preconditions for opening the bankruptcy proceeding, the bankruptcy judge must review the report and decide if, based on information in the report, he can make a decision on opening the bankruptcy proceeding. If the judge cannot make such a decision due to lack of information, he should issue an order for **supplementing the interim bankruptcy trustee's report**.

After reviewing the interim bankruptcy trustee's report and determining that it contains all necessary information for making a decision on opening bankruptcy proceedings in the particular case, the court issues **an order scheduling a hearing** to discuss whether the conditions are met to initiate bankruptcy proceedings (Form 10). Although in certain courts it is common practice to schedule the hearing for determination of preconditions for opening of bankruptcy proceedings by the order appointing the interim bankruptcy trustee, such practice should be avoided. The hearing should be scheduled only after the court receives the report of the interim bankruptcy trustee. Not only is this an explicit legal requirement of article 43. par. 1 of the Law, it makes practical sense for management of the proceeding. In certain cases the interim bankruptcy trustee submits his report to the court before the stated deadline, in which case the court is bound by the previously set date of this hearing, scheduled in the order appointing the interim bankruptcy trustee. Therefore, in such situations it would be much more practical for the court not to schedule the hearing at once, but rather to schedule it after receipt of the report, since it provides greater flexibility and efficiency in scheduling the hearing and managing the proceeding in general.

Additionally, the interim bankruptcy trustee in his report may fail to provide all necessary information, or fail to carry out all required duties, and in such cases the bankruptcy judge will have to issue a special order and require the interim bankruptcy trustee to supplement his report or carry out additional duties. If the hearing has already been scheduled by order on appointment of the interim bankruptcy trustee, the court will have to postpone the hearing.

It would be optimal if the bankruptcy judge held the hearing for determination of preconditions for opening the bankruptcy proceeding within 15-20 days after receipt of the interim bankruptcy trustee's report. **The order scheduling the hearing** is served on the bankruptcy trustee and the petitioner. Presence of the debtor and interim bankruptcy trustee at the hearing is not required.

Hearing for Determination of Preconditions for Opening of Bankruptcy Proceeding

If the interim bankruptcy trustee or debtor is not present at the hearing, the bankruptcy judge should not postpone the hearing. Article 43 par. 1 of the Law explicitly stipulates that the interim

bankruptcy trustee and debtor are summoned to this hearing “if this is possible,” which implies that their presence at the hearing, if they have been summoned, is not mandatory. Besides, by subsidiary application of provisions of CPC, article 84 par. 2, absence of debtor (i.e., the defendant) is not a reason to postpone the hearing, provided there is proof that service of the summons was completed. Therefore, the hearing will be held regardless of debtor’s (defendant’s) absence.

If, however, the petitioner fails to appear at the hearing, the court must issue an order dismissing the bankruptcy proceeding, in accordance with rules of CPC, article 84 par. 2, treating the petitioner as a plaintiff in a civil proceeding. According to these rules, plaintiff’s failure to appear at the hearing is treated as his choice to withdraw the complaint, based on which the civil court (bankruptcy court) issues the decision establishing withdrawal of the complaint (petition for opening of the bankruptcy proceeding). Accordingly, presence of the petitioner is necessary to hold the hearing for determination of preconditions for opening of bankruptcy proceedings.

The hearing commences with opening of the hearing. After this:

- 1) Presence of the summoned parties and completion of service of the summons on absent parties is confirmed;
- 2) Authorization for representation of respective parties in the proceeding is verified. In this regard, the bankruptcy judge must take into account that only the legal representatives of the debtor, registered in the register of companies, have the right to represent parties, i.e. lawyers for individuals and legal entities, and attorneys employed by companies that are parties in the proceeding (see article 301, par. 1 of the CPC). For purpose of proof of authorization for representation, the bankruptcy judge should require proof of the basis for representation (power of attorney, excerpt from register of companies etc.). If the proof of authorization for representation is missing, according to provisions of CPC, art. 309 par. 2 and 3, the bankruptcy judge can allow representation of parties, provided the representatives obtain the power of attorney in the shortest possible time and submit it to the court. In this regard, the bankruptcy judge should give a short deadline to a representative, optimally one day, under threat that the representative’s statements, made in the name of a represented party, would be disregarded. The deadline should be short in any case because the bankruptcy judge must keep in mind that, within 3 days of the hearing for determination of preconditions for opening of bankruptcy proceeding, he must make the decision to initiate the bankruptcy proceeding or to reject the petition for opening of bankruptcy proceeding.

After it has been established (1) which of the summoned parties are present and if service of the order scheduling the hearing is complete for all parties, and (2) who is authorized to represent parties in the proceeding, the bankruptcy judge makes the decision whether the hearing can be held or not. In case some of the parties haven’t been properly informed of the hearing, the court must postpone the hearing in accordance with the provisions of article 111 par. 1 of the CPC. Present parties are informed about the new date of the postponed hearing at the hearing itself, and the court doesn’t have to send them special notification. Absent parties will be informed about the postponed hearing by special order delivery.

If the court decides to hold the hearing (because all summoned parties are present and absent parties have been duly informed), the court:

- 1) announces the subject of discussion;
- 2) shortly describes the course of the proceeding to date (when the petition was filed, is it allowed, when the interim bankruptcy trustee was appointed, what security measures have been taken, what actions have been taken by the interim bankruptcy trustee in the course of the preliminary procedure, etc.);
- 3) calls on the interim bankruptcy trustee to present his report;
- 4) gives the floor to the bankruptcy debtor to comment on the report and findings of the interim bankruptcy trustee;
- 5) gives the floor to the petitioner to comment on the report and findings of the interim bankruptcy trustee, and state whether he stands by his petition;
- 6) gives the floor to all participants in the proceeding during a discussion of respective issues;
- 7) after the discussion is finished, announces when the decision on the petition for opening of bankruptcy proceeding will be made (maximum legal deadline is three working days after the hearing) and in what manner the decision will be announced.

II. DECISION ON PETITION FOR OPENING OF BANKRUPTCY PROCEEDINGS

On the date publicly announced by the court at the hearing for determination of preconditions for opening of bankruptcy proceeding, the court issues an order deciding on the petition for opening of bankruptcy proceeding. The decision may be:

1) Order Rejecting the Petition For Opening of Bankruptcy Proceeding (Form 12).

This order is issued if it has been determined at the hearing that debtor's inability to make payment hasn't been established, petitioners claim against bankruptcy debtor doesn't exist, an authorized body refused to provide concurrence for the proceeding (Ministry of Defense for both entities and, in RS, concurrence of Government for companies with majority state owned equity), and/or debtor's assets are not sufficient to finance costs of bankruptcy proceeding. In addition to a decision and reasons for rejection, the order must also contain the following:

- a) discharge of interim bankruptcy trustee;
- b) cancellation of any pronounced security measures;
- c) determination of costs of the preliminary procedure;
- d) return to petitioner of surplus funds left from advance payment for conducting the preliminary proceeding.

The order rejecting the petition for opening of bankruptcy proceeding is served on the petitioner and debtor, delivered to the register of companies and also to the competent prosecutor's office if the petition has been rejected due to inability to cover the costs of the proceeding from debtor's assets. It is also advertised in the Official Gazette. Only the petitioner can appeal this order within 8 days after receipt of the order, and his appeal stays the effect of the order. In case an appeal is filed, the preliminary proceeding moves forward until the appeal is adjudicated and all measures of bankruptcy court, pronounced up to this point, remain in effect. In this period, therefore, the interim bankruptcy trustee must look after debtor's assets, as is common in preliminary proceeding, until the court discharges him by special order.

In case the order rejecting the petition for opening of bankruptcy proceeding is issued due to lack of debtor's assets to finance the bankruptcy proceeding, the court delivers such order to the appropriate prosecutor's office and, in FBiH, also to the registry court, for which it is the basis to

remove the company from court register, based on article 71, par.1, p. 3 of the Law on Companies FBiH.

2) Order Initiating Bankruptcy Proceeding (Form 13)

An order initiating bankruptcy proceeding is issued if the following conditions are satisfied:

- a) if the petition is allowed (Ministries of Defense or, in RS, the Government, for companies with majority state owned equity, have not refused approval for the bankruptcy proceedings within legally prescribed deadline);
- b) if reason for bankruptcy exists (non-payment of due and claimed debts for 30/60 days);
- c) if either debtor's assets are sufficient to pay the costs of the proceeding or, if that's not the case, petitioner has advanced a sufficient amount of money to finance further court proceedings.

Besides an array of elements that should be contained in the order initiating bankruptcy proceeding, the bankruptcy judge must always schedule the investigation and reporting hearings by this order. In the practice of some courts in BiH, the order initiating bankruptcy proceeding schedules only the investigation hearing, whereas the reporting hearing is scheduled at the investigation hearing itself. It should be noted that courts often do not advertise the order scheduling the reporting hearing in the Official Gazette, even though they should in accordance with articles 48 par.1 with respect to article 47 par. 1 point 1.

Such court practice, besides being contrary to the law, represents a much more complicated and inefficient solution compared to what is prescribed by article 47 par. 1 point 1. of the Law. Thus, it should certainly be abandoned.

The issued order is posted on the court notice board the same day, advertised in Official Gazette, and delivered personally to the debtor and petitioner. In addition, the order must be delivered to the register of companies, prosecutor, and all known creditors and debtors of the debtor company (those reached by interim bankruptcy trustee in his work – but delivery to Tax Administration of the Entity is mandatory), See art. 48 of the Law.

In advertising the order in the Official Gazette, in connection with scheduling the investigation and reporting hearings, the bankruptcy judge must take into account that advertisement of the opening of bankruptcy proceeding is often not published immediately and in the same time the order is delivered to other participants in the proceeding. In this regard, it should always be assumed that advertisement in the Official Gazette will take approximately 20 days after dispatch of the order on opening of bankruptcy proceedings to the Official Gazette of the entity, and calculate the 30 day deadline for reporting claims as of this moment. Therefore, it is necessary for the bankruptcy judge to always set forth a sufficient time between the deadline for reporting claims and the hearing for investigation of claims in order to avoid shortening the legal deadline for reporting claims due to delays in publishing the advertisement in Official Gazette.

Only the debtor can appeal this order, and in FBiH (as opposed to RS), this appeal stays the implementation of the order initiating bankruptcy proceeding. Where the order initiating bankruptcy proceeding is confirmed, the legal consequences enter into effect as of the date of its opening.

Determining Costs of the Preliminary Bankruptcy Procedure

After issuing the order on the opening of bankruptcy proceedings (either denying the petition or ordering the opening of bankruptcy proceedings) the bankruptcy court should decide on costs of the preliminary procedure, by that or special order. Those costs are paid in the preliminary procedure from the amount of advance payment made. In case bankruptcy proceedings are opened, those costs become costs of bankruptcy proceedings.

Costs of the preliminary procedure include:

- (1) costs incurred by interim bankruptcy trustee or bankruptcy debtor with his/her consent (article 16, par. 4 of the Law), including engagement of staff to secure the property of future bankruptcy debtor, maintaining existing production, hiring lawyers to provide legal assistance, etc.;
- (2) costs of certain court actions (announcing temporary measures, for example);
- (3) the fee of interim bankruptcy trustee for his work (art. 16, par. 8);
- (4) the fee of an appraiser in determining the conditions for opening of bankruptcy proceedings or appraising bankruptcy debtor's assets in the preliminary procedure.

Direct Opening of Bankruptcy Proceedings

Article 44 of the Law states that bankruptcy proceedings can be opened without conducting the preliminary procedure. According to the provisions of that article, investigation of insolvency of the bankruptcy debtor through the preliminary procedure is not necessary in the two following cases:

1. the petition for initiation of bankruptcy proceedings is filed by a liquidator from the procedure of liquidation of a company/commercial entity, which had been initiated prior to bankruptcy;
2. the petition for initiation of bankruptcy proceedings is filed by a creditor, whose legally valid enforcement order has not been satisfied for 60 days.

In these two cases, it is deemed that existence of the bankruptcy debtor's insolvency has been proved, and in the latter case that the creditor has made its claim credible. In such case, the bankruptcy court would, without conducting the preliminary procedure (appointment of interim bankruptcy trustee, temporary measures, hearing for determining the conditions for opening of bankruptcy proceedings), directly issue an order opening the bankruptcy proceedings. However, with regard to article 9, par. 2, in such case the court would still need to hear the bankruptcy debtor about the circumstances of the filed petition, before issuing an order on opening of bankruptcy proceedings. In that sense, the bankruptcy court should conduct the inquiry described in section C, **Hearing of Bankruptcy Debtor**.

Bankruptcy practice indicates certain problems in the application of direct opening of bankruptcy proceedings. In such cases, the liquidator, due to poor performance in the liquidation procedure, or a creditor, due to lack of data, is not able to provide information for the bankruptcy judge about whether the value of the bankruptcy estate will be sufficient to cover the costs of bankruptcy proceedings. In several cases, bankruptcy courts have opened the bankruptcy proceedings without conducting the preliminary procedure, but later, after opening of bankruptcy proceedings, it became clear that some of the requirements for opening of bankruptcy proceedings, from article 43, par. 4, were missing (insufficient bankruptcy estate, even to cover

the costs of the proceedings). Bankruptcy judges were therefore forced to dismiss bankruptcy cases, without any possibility to recoup court expenses, let alone satisfy creditors in any way.

Accordingly, the bankruptcy court should proceed cautiously with application of direct opening of bankruptcy proceedings. Article 44 of the Law says that the court “may” open the bankruptcy proceedings directly, under prescribed circumstances. It is clear that the court is not required to do so, but it is an option depending on the circumstances of the case.

III. ACTIVITIES OF COURT AFTER ISSUING ORDER ON OPENING OF BANKRUPTCY PROCEEDING

A) Table of Claims (Form 14)

The first activity the bankruptcy court should perform after opening the bankruptcy is to compose a table of claims of creditors who reported them. The court should compose this table immediately after the deadline for reporting claims has elapsed, and certainly no later than eight days prior to the investigation hearing. In fact, the bankruptcy judge is not only responsible to compose the table of claims with all the data indicated in article 110 of the Law, but also to present this table to all interested parties on the court premises no later than eight days prior to the investigation hearing.

The table should only contain a list of all creditors who reported their claims on time, together with the basis for such claims and the documentation creditors attached to their claims. In this manner, any information about the origin of any reported claim is made available to all interested parties, especially to creditors who reported claims, based on which, among other things, every creditor with a reported claim can contest reported claims at the investigation hearing.

In order to make it accessible to public on the court premises, the court can post the table on the notice board of the court or in the court registry office. If the table with associated documentation is located in the court registry office, the bankruptcy judge does not have to issue a special authorization every time an interested party wishes to review the table and attached documentation.

B) Hearing for Investigating Reported Claims (investigation hearing)

At this hearing, **the bankruptcy trustee** investigates reported claims. Only **reported claims** can be investigated, which clearly results from article 112 para. 1, of the Law. Claims that have not been reported are not subject to scrutiny at the investigation hearing, even if the bankruptcy trustee is convinced they exist (based on his review of the bankruptcy debtor’s business documentation, for example). Therefore, the bankruptcy judge must not allow discussion of these claims. Since this is a not a civil case, the bankruptcy judge cannot discuss or decide the existence of a legal basis for recognizing or disputing reported claims that are disputed or recognized by the bankruptcy trustee. Any discussion about the basis of a reported claim can be conducted only in a civil proceeding, to which the bankruptcy judge must direct a party whose claim has been disputed, by order at the investigation hearing itself.

The investigation hearing can be held even if the bankruptcy trustee is the only present party, thus the court cannot postpone it for such reason.

Reported claims can be disputed by:

- 1) the bankruptcy trustee;
- 2) any bankruptcy creditor whose claim has been previously recognized by the bankruptcy trustee.

Therefore, reported claims cannot be disputed by:

- 1) bankruptcy creditors whose claims have not been recognized;
- 2) perfected creditors with right to separate settlement for an amount that, according to estimate, can be covered from the collateral of the perfected security right.
- 3) extraction creditors, who are not bankruptcy creditors.

Based on provisions of article 114 of the Law, only those claims recognized by bankruptcy trustee are considered to be recognized claims. Any objection against the trustee's recognition of claims by a creditor whose claim has been recognized does not prevent recognition of these claims. This means that the claim will be considered recognized if it is recognized by the bankruptcy trustee, despite it being disputed by some of the creditors with voting rights or by the bankruptcy debtor itself.

At the hearing, the court must have the table of reported claims in which to immediately enter results of investigation. Entering the fact that a certain claim has been recognized into the table of claims has the effect of final adjudication (article 114 par. 4 of the Law). However, disputed claims at one investigation hearing can be recognized by the bankruptcy trustee in writing after the hearing or at the next investigation hearing, if any. Therefore, once a claim is recognized by the bankruptcy trustee, it can no longer be disputed either by bankruptcy trustee or other creditors with voting rights, whereas a claim disputed by the bankruptcy debtor can be recognized by the bankruptcy debtor subsequently. Only the bankruptcy trustee has this right of subsequent recognition, not a bankruptcy creditor.

The order of actions taken at the hearing should be:

- 1) bankruptcy judge opens the hearing with a statement of the type of hearing, the case, and the subject matter of the hearing;
- 2) bankruptcy judge invites all creditors present to identify themselves and to submit the basis for representation of legal entities, and individuals as well, if there are representatives;
- 3) Bankruptcy judge briefly explains the course of the investigation hearing, and rights of present and absent creditors who reported their claims;
- 4) Bankruptcy judge calls on bankruptcy trustee to submit his report about reported and investigated claims, and to state the total number of reported, disputed, and recognized claims;
- 5) Bankruptcy trustee presents his report on total reported, recognized, and disputed claims;
- 6) Bankruptcy judge invites bankruptcy trustee to make a statement on each individual reported claim, and warns him of his obligation to give reasons for disputing each disputed claim;
- 7) After each claim is either recognized or disputed by the bankruptcy trustee, the court verifies if any of bankruptcy creditors disputes the claim that is subject of scrutiny;

- 8) If a claim is disputed, the court issues a procedural order at the hearing that directs the bankruptcy debtor or creditor to civil proceeding to determine the disputed claim;
- 9) The court enters results of investigation of claims into the table of claims;
- 10) Bankruptcy judge closes the hearing and notifies the present parties that they must sign the minutes of the hearing immediately. In the same time, the court will notify all present that, in exchange for copying fee, they can get a copy of the minutes.

C) Reporting Hearing

The date of the reporting hearing is scheduled by order on opening of the bankruptcy proceeding, which is advertised in the Official Gazette. The bankruptcy judge should not send the order scheduling the reporting hearing to each individual creditor whose claims has been recognized, since there is the legal presumption that these persons have been notified of the hearing by the advertisement of the order on opening of bankruptcy proceedings in the Official Gazette, and thus personal delivery of the order to these persons is unnecessary.

At the reporting hearing, the assembly of creditors makes the following decisions:

- 1) adopts the report of the bankruptcy trustee;
- 2) decides on whether the bankruptcy trustee is going to draft a plan for reorganization of the bankruptcy debtor or if the assets of the bankruptcy debtor should be liquidated immediately;
- 3) decides on continuation of debtor's operations;
- 4) decides on manner and conditions of liquidation of debtor's assets;
- 5) decides on replacement of bankruptcy trustee;
- 6) appoints Creditors' Committee, if necessary;
- 7) decides on initiation, continuation, or termination of litigation in which the bankruptcy debtor is the plaintiff;
- 8) decides on filing a complaint to reverse certain actions of the bankruptcy debtor.

Actions at the reporting hearing are taken in the following order:

- 1) Bankruptcy judge opens the hearing with a statement of the type of hearing, the case, and the subject matter of the hearing;
- 2) Bankruptcy judge invites all creditors present to identify themselves and to submit basis for representation of legal entities, and individuals as well, if there are representatives;
- 3) Bankruptcy judge briefly explains the course of the reporting hearing, what decisions can be made by the assembly of creditors, and the rights of present creditors with recognized claims;
- 4) Bankruptcy judge creates a table of voting rights for present creditors (Form 14), based on which it will assess whether a decision of assembly of creditors represents the necessary majority;
- 5) Bankruptcy judge invites the bankruptcy trustee to briefly outline his report and briefly explain reasons for decisions he is proposing to assembly of creditors in his report;
- 6) Bankruptcy trustee presents basic features of his report and explains reasons for measures he has proposed to the assembly of creditors in his report;

- 7) Bankruptcy court invites the assembly of creditors to vote on adoption of the bankruptcy trustee's report, on each individual measure proposed by the trustee in his report, and any proposal made by any of creditors present;
- 8) After establishing that the necessary majority made the decisions of the assembly of creditors, the judge will note them in the minutes of the hearing. He will not issue any court order.

If a decision to have the trustee start drafting a bankruptcy plan or liquidating the debtor's assets does not have the necessary majority, the court will note in the minutes that the necessary majority has not been reached. Thus, the bankruptcy trustee is authorized to start liquidating the debtor's assets, in accordance with provisions of article 101, pursuant to article 2, of the Law. Specifically, from the aforementioned provisions it is apparent that the general goal of bankruptcy proceeding is liquidation of debtor's assets and proportional satisfaction of bankruptcy creditors, and reorganization of bankruptcy debtor is a possibility which diverts from legally prescribed rules on liquidation. Therefore, if a decision of the assembly of creditors has not been reached on this, based on article 101 of the Law, the bankruptcy trustee has every authority to initiate liquidation of the bankruptcy debtor's assets. The court, therefore, makes no decision on this, but only notes in the minutes that no decision is made and the resulting legal consequences.

IV. LIQUIDATION OF BANKRUPTCY DEBTOR'S ASSETS

All assets of the bankruptcy debtor in bankruptcy proceedings **are sold by the bankruptcy trustee** (article 101 par. of the Law). Thus, under no circumstances are the conditions of the sale controlled by the bankruptcy judge, regardless of whether assets are encumbered by a perfected lien or not. However, the bankruptcy judge can play a certain role in the sale of these assets if the sale is conducted according to the rules of enforcement proceeding.

The bankruptcy trustee sells the debtor's assets in accordance with the decision of the assembly of creditors made at the reporting hearing, or decision of the creditors' committee (see article 101, par. 2). He is, therefore, bound by this decision, notwithstanding his disagreement with it (e.g., the assembly made a decision that the minimum price cannot be lower than an amount deemed totally unrealistic by the bankruptcy trustee). In such case, the bankruptcy trustee is required to attempt the sale of assets under these conditions, and the bankruptcy judge has no right to alter the decisions of the assembly of creditors.

If the sale of the bankruptcy debtor's assets is unsuccessful, the bankruptcy trustee can ask the assembly of creditors to make a decision he proposes about the sale. He, therefore, can propose to the assembly a decision on the precise manner and conditions of the sale. If the assembly rejects the bankruptcy trustee's proposal for the second time, the bankruptcy trustee can request that this decision is made by the bankruptcy judge instead of the assembly (article 29 par. 6 and article 108 of the Law).

The bankruptcy judge issues the decision approving the proposal of the bankruptcy trustee, from article 29 par. 6 of the Law, by court order. This decision is issued by the bankruptcy judge based on assessment of the validity of the trustee's proposal and evidence of trustee's failure to sell the assets in accordance with the decision made by the assembly of creditors.

If the bankruptcy trustee fails to sell the assets in accordance with the decision of the assembly of creditors, and proposes no manner of sale of his own, he must sell the assets without a court

decision according to the rules provided in articles 102 through 107 of the Law. This will mean that bankruptcy debtor's real property will always be sold individually, in accordance with the rules of enforcement procedure, whereas the moveable assets will be sold in accordance with the rules determined by the bankruptcy trustee, since the Law prescribes no rules for moveable assets. In case, however, there is preferential right over property (real or moveable), then the sale must be conducted in strict accordance with the provisions of articles 102-107 of the Law (that is, real property according to the rules of enforcement procedure, and moveable items in accordance with rules provide in art. 103. through 107) - see. art. 38 of the Law.

A) Role of the Court in Sale of Bankruptcy Debtor's Assets According to the Rules of Enforcement Proceeding

Sale of assets according to the rules of enforcement proceeding will occur in the following situations:

- 1) if such decision was made by the assembly of creditors at the reporting hearing;
- 2) if assembly of creditors made no decision at the reporting hearing about the future course of bankruptcy proceeding (liquidating assets of bankruptcy debtor or reorganization of debtor), the bankruptcy trustee is authorized by the law to liquidate assets according to the rules of the enforcement law.

In a sale of the bankruptcy debtor's assets, the bankruptcy judge plays the following role:

- 1) in case of an auction, the judge issues an order on award of real property to the highest bidder, who has previously paid the sales price to the court's account.
- 2) in case of direct settlement, according to rules of enforcement law, the judge issues an order on award after reviewing the sales agreement entered between the bankruptcy trustee and buyer, by which he actually issues approval of this agreement.

An order on award of real property is issued by the bankruptcy judge only if the following conditions are met:

- 1) Sales price is paid;
- 2) Buyer is eligible to own real property, according to article 88 of LEP (Law on Enforcement Proceeding). Here, the court should especially take into account that an order on award of real property cannot be issued if the buyer is a foreign person who is not eligible to acquire property in BiH, according to the property law (reciprocity condition);
- 3) The property of bankruptcy debtor that is the subject of sale is not excluded from legal transactions, or there is no preemption right of other person, all in accordance with the rules arranging transfers of real property.

All other actions of sale of the debtor's assets, according to the rules of enforcement proceeding, are performed by the bankruptcy trustee.

B) Distribution of Funds Obtained by Liquidation of the Bankruptcy Debtor

Any cash amount from the sale of assets of the bankruptcy debtor is paid by the buyer to the account of the bankruptcy debtor that was opened by bankruptcy trustee upon opening of the bankruptcy proceeding. As a rule, proceeds from sale of assets paid to the account of bankruptcy

debtor are distributed only when the majority of the debtor's assets have been realized. However, according to his own assessment, the bankruptcy trustee can also perform a partial distribution of proceeds before the majority of bankruptcy debtors' assets have been realized, but only with approval of the creditors' committee or assembly, if a committee has not been established (see article 117 par. 3). Here, the bankruptcy trustee must compose a distribution list for the partial distribution, and proportionally repay all creditors in the amount and ranking of their claims as determined at the investigation hearing.

Distribution is performed by the bankruptcy trustee based on the distribution list (article 117 par. 3, pursuant to article 118 of the Law). In order to carry out distribution of realized assets, the following activities must be undertaken pursuant to the law:

- 1) bankruptcy trustee drafts a distribution list (article 118), based on the table of claims and realized amount of bankruptcy estate, whereas the amount of repayment for each creditor is determined;
- 2) bankruptcy trustee makes the proposed distribution list available to the public, on the premises of the court (court registry office) – article 118;
- 3) bankruptcy trustee will advertise on the court notice board the total amount of claims and the amount of bankruptcy estate that is available to satisfy claims (article 118);
- 4) within 23 days of advertisement of the distribution list (15 days according to article 119 par. 1 plus 8 days according to article 123 par. 1 of the Law), creditors can file an objection against the proposed distribution list. Objections are filed with the bankruptcy court.
- 5) Bankruptcy judge makes a decision on filed objections against the distribution list. Deadline for court decision on objection against the distribution list is not specified, but the court should always take into account that the bankruptcy proceeding is urgent in nature. Court can make two decisions on this objection:
 - a) reject the objection by court order (Form 30). This order is served on the creditor and bankruptcy trustee, and only the creditor can appeal this order within eight days after the receipt (article 123 par. 2 of the Law). The appeal itself stays the implementation of the order. Main distribution cannot be carried out until this order is legally final (article 11 par. 5 of the Law);
 - b) amend the distribution list by court order (Form 29). This order is served on the creditor and bankruptcy trustee, and it is posted on the notice board of the court. Bankruptcy trustee and creditor can appeal this order within eight days of advertisement of the order on the notice board of the court (article 123 par. 3. of the Law). Appeal stays the implementation of this order (article 11 par. 5 of the Law). Main distribution cannot be carried out until this order is legally final.
- 6) After deciding on objections against the distribution list, or if there were no such objections, bankruptcy judge schedules the hearing for main distribution by court order. This order is published in the Official Gazette, and the hearing must be held within 15 to 30 days after publication (article 124 par. 7 of the Law).

At the main distribution hearing:

- 1) bankruptcy judge, together with creditors and bankruptcy trustee, reviews the distribution proposal, which in fact represents the distribution list that may have been modified on the basis of objections and appeals, closing balance of the bankruptcy trustee, and his report (article 124 par. 1 and 4 of the Law);

- 2) creditors have the right to file objections against the distribution proposal (rules described above under point 5 apply);
- 3) bankruptcy trustee has the right to amend or supplement the proposal for distribution at the hearing, taking into account disputed claims, claims of creditors with right to separate settlement, and already performed partial distributions (article 122 of the Law). The condition is that all present creditors concur with proposed changes;
- 4) Upon proposal of the bankruptcy trustee, creditors make the decision on distribution of assets that could not be realized during bankruptcy proceeding (article 123 par. 5 of the Law);
- 5) By court order, the judge issues approval of distribution proposal if there are no more proposals for changes or supplementing the distribution list, or if these proposals have already been decided.

After the main distribution hearing:

- 1) bankruptcy judge issues a written court order approving the proposal for main distribution (Form 31), against which appeal is not allowed;
- 2) bankruptcy trustee conducts the distributions in accordance with the approved distribution list and submits proof to the court;
- 3) bankruptcy judge orders personal delivery of documentation to all creditors whose claims have not been satisfied according to the distribution list, with notification that they can exercise their rights against bankruptcy debtor according to general rules of the enforcement proceeding. With this documentation, the bankruptcy court also delivers an excerpt from the distribution list approved by bankruptcy judge, which serves as an enforceable document in an enforcement proceeding.

V. CLOSING OF BANKRUPTCY PROCEEDING

The bankruptcy proceeding can be closed in one of the following ways:

- 1) Closing of the bankruptcy proceeding after liquidation of the debtor's bankruptcy estate.

The Court issues the **order on closing the bankruptcy proceeding** (Form 15) immediately after the bankruptcy trustee submits evidence to the court that he has accomplished the distribution based on the proposal approved by the bankruptcy judge at the main distribution hearing (article 126 par. 1 of the Law).

This order is **published** in the Official Gazette with the reasons for closing the bankruptcy proceeding – art. 126 par. 2 of the Law. Appeal is not allowed against this order (article 11 par. 1, pursuant to article 126).

After the order has been published in the Official Gazette, all the preconditions are met for the bankruptcy judge to issue a special **order instructing the registry court to eliminate the debtor from the register of companies** – article 140 par. 3 of the Law. Although article 140 par. 3 of the Law speaks of the legal finality of an order on closing the bankruptcy proceedings as a precondition for eliminating the bankruptcy debtor from the register of companies, it should be understood that the order becomes legally final the moment it is issued, since an appeal is not allowed against such an order (article 13 of the LEP, pursuant to article 11 par. 1 of the Law).

- 2) Closing of bankruptcy proceedings due to lack of bankruptcy estate

A bankruptcy proceeding can also be closed if, **after opening** of the bankruptcy proceeding, it is determined that the **bankruptcy estate is insufficient to cover court expenses** (article 132 par. 1 of the Law). In practice this should not be frequent, since the bankruptcy trustee must assess in the preliminary proceeding whether the bankruptcy estate, as known to him at the time, will cover the costs of the bankruptcy proceeding. It is then the court's obligation, at the hearing for determination of preconditions for opening of the bankruptcy proceeding, to verify this assessment of the interim bankruptcy trustee. If estimated that the bankruptcy estate would not cover the costs of the bankruptcy proceeding, the court must issue an order rejecting the petition for opening bankruptcy proceedings.

Insufficiency of the bankruptcy estate must be **reported** to the court by **the trustee**. He or she will be able to draw this conclusion during the preparation of his report for the reporting hearing, when he is obliged to assess the value of bankruptcy estate at the bankruptcy debtor's disposal. The bankruptcy trustee would, therefore, have to report the insufficiency of the bankruptcy estate to the court before or when submitting his report for the reporting hearing.

After receiving the report of the insufficient bankruptcy estate from the trustee, the court issues an **order** that instructs the petitioner to **make the advance payment** in an amount sufficient to continue the bankruptcy proceeding (Form 2) – article 132 par. 1, pursuant to article 13 and article 43 par. 4 of the Law. If the petitioner fails to pay the set amount within 15 days, the court will **schedule, by order, a hearing** of representatives of the assembly of creditors, creditors of the bankruptcy estate, and the bankruptcy trustee. This hearing can be also conducted **within the investigation hearing**, on motion of the trustee (article 132 par. 2).

In light of the provision that, before closing the bankruptcy proceeding due to the insufficiency of the bankruptcy estate representatives of the assembly of creditors must be heard (article 132 par. 2). It can be concluded that such closing can occur only **after the investigative hearing has been held** at which claims were investigated and the voting rights of each creditor established.

After the report of the insufficiency of the bankruptcy estate, the bankruptcy trustee is not obliged to take any actions for liquidation of the assets of the bankruptcy estate (article 132 par. 3). **An order on closing of the bankruptcy proceeding due to insufficiency of the bankruptcy estate** is issued after the court hears the bankruptcy trustee, representatives of the assembly of creditors, and creditors of the bankruptcy estate. At this hearing, the court might verify whether such reason truly exists to close the bankruptcy proceeding.

The order on the closing of the bankruptcy proceeding due to the insufficiency of the bankruptcy estate is **published in the Official Gazette** – article 140 par. 1, pursuant to article 126 par. 2 of the Law. **Appeal** of this order must be filed within ten days of the advertisement in the Official Gazette (article 141 par. 1, pursuant to article 11 par. 2 and article 13 par. 2 of the Law). An appeal can be filed by any bankruptcy creditor and the bankruptcy debtor (article 141 of the Law). The appeal stays the implementation of the order (article 11 par. 5, pursuant to article 141 par. 1 of the Law).

After the order on closing of bankruptcy proceedings due to the insufficiency of the bankruptcy estate becomes legally final, the court issues an **order which instructs the registry court to eliminate the bankruptcy debtor from the register of companies** – article 140, par. 3 of the Law).

3) Closing of bankruptcy proceedings due to insufficiency of bankruptcy estate

After opening the bankruptcy proceedings, the bankruptcy judge can close the proceedings in case it turns out that the bankruptcy estate can cover the costs of bankruptcy proceedings in full, but not matured liabilities of bankruptcy estate as well (article 133, par. 1 of the Law).

Liabilities of bankruptcy estate are (article 42 of the Law):

- 1) liabilities caused by bankruptcy trustee (or interim bankruptcy trustee – article 21, par. 2 of the Law) in the course of managing, liquidation, and distribution of bankruptcy estate;
- 2) liabilities resulting from bilateral legal agreements, which are fixed, or where bankruptcy trustee has requested the performance of the agreements;
- 3) unjust enrichment of bankruptcy estate.

Insufficiency of bankruptcy estate is reported to the court by bankruptcy trustee in a report. See article 133, para. 1.

VI. ACTIONS OF BANKRUPTCY COURT IN THE BANKRUPTCY REORGANIZATION PROCEDURE

The reorganization **plan can be filed** in the bankruptcy court by the bankruptcy debtor or the bankruptcy trustee. The bankruptcy debtor is the only party with the right to file the reorganization plan along with the petition for opening of the bankruptcy, whereas, after the opening of bankruptcy proceedings, such a plan can be filed by both the bankruptcy debtor and the bankruptcy trustee (see article 143, par. 1 of the Law).

1) Bankruptcy Trustee as the Proponent of the Bankruptcy Plan

When the bankruptcy plan is filed by the bankruptcy trustee, the **bankruptcy judge first confronts the matter of the plan for reorganization** of the bankruptcy debtor when the creditors discuss the possibility of creating the plan at the reporting hearing. At the same hearing, after discussion, the assembly of creditors makes a decision by which the bankruptcy debtor is instructed to draft the plan for reorganization of the bankruptcy debtor (see articles 98 and 99 of the Law). In this regard, the **bankruptcy court can make no decisions** or issue orders to the bankruptcy trustee.

After the assembly of creditors makes the decision on issuing the order to the bankruptcy trustee, pursuant to article 99 of the Law, he must start formulating the plan immediately, not awaiting the confirmation of this decision by the bankruptcy court. Such a decision should not even be made by the bankruptcy court, since it is not authorized to make it under the Law.

According to article 143, par 2 of the Law, the bankruptcy **trustee must file the reorganization plan** with the bankruptcy court not later than thirty days after the assembly of creditors makes its decision. However, if there are justified reasons, the bankruptcy trustee can move the bankruptcy court for an **extension of this deadline** for another thirty days (see the same provision of the Law). For this purpose, when justified, the bankruptcy court will extend the deadline for the bankruptcy trustee to file the plan for another thirty days (see Form 16), especially having in mind complexity of the plan to be composed in the specific case and the phase of the plan creation reached. In case of breach of these deadlines, the bankruptcy court could reject such plan (see Form 17).

Upon receipt of the text of the bankruptcy plan filed by the bankruptcy trustee, the bankruptcy court **ex officio examines this plan** in the following respects (see art. 156, par. 1. item 1):

- a) whether the reorganization plan has been filed by an authorized party (bankruptcy trustee or bankruptcy debtor). Unauthorized parties would include one of the creditors, Creditors' Committee, a third person, the interim bankruptcy trustee, etc.;
- b) whether the plan has been filed within the legally prescribed deadlines (30 days after the reporting hearing, plus possible extension of another 30 days by the court);
- c) whether the draft of the plan was approved by the Creditors' Committee, if established, before being filed in court (art. 29, par. 6 of the Law);
- d) whether the classes of creditors, established for purpose of voting on the plan, have been defined based on the criteria in article 147 of the Law;
- e) whether the plan includes all the mandatory elements required by articles 144, 145, and 146 of the Law.

In case any of the aforementioned elements is missing in the bankruptcy plan, except under item b), the bankruptcy court will issue an order instructing the bankruptcy trustee **to rectify the observed deficiencies** before a stated deadline. In case the party filing the plan fails to rectify the observed deficiencies in the plan within the stated deadline, or fails to rectify the observed deficiency in accordance with the court's requirement, the court will issue an **order rejecting the filed reorganization plan** (Form 18), which the bankruptcy trustee has the right to appeal (see art. 156, par 3). The bankruptcy court can reject a plan that was not filed on time without inviting the bankruptcy trustee to rectify the observed deficiency, since the breach of the deadline itself cannot by definition be rectified subsequently.

2) Bankruptcy Plan Filed by the Bankruptcy Debtor

The bankruptcy debtor is the only one authorized to file the reorganization plan in the bankruptcy court **along with the petition for opening of the bankruptcy proceedings**. In addition, the bankruptcy debtor also has this right **after the opening of the bankruptcy proceedings** (see art. 143 of the Law).

a) Filing the Plan Along with the Petition for Opening of the Bankruptcy Proceedings

The very fact that the reorganization plan has been filed along with the petition for opening of the bankruptcy proceedings does not mean that the **bankruptcy procedure** can be in any way **modified or shortened** until the subsequent investigation hearing. In this regard, the bankruptcy court must always:

- 1) conduct the preliminary proceeding in accordance with the general rules of articles 13 through 22 of the Law;
- 2) issue a decision on opening of the bankruptcy proceedings;
- 3) hold the investigation hearing, the subsequent investigation hearing, and the reporting hearing.

Specifically, each of these phases (the preliminary proceeding, opening of the bankruptcy proceedings, the investigation hearing, the subsequent investigation hearing, and the reporting hearing) will have to be conducted regardless of whether the plan has been filed along with the petition or after opening of the bankruptcy proceedings, since the plan must include the solution

for all reported creditors, and everyone with a recognized claim must be able to vote on the plan. Since the final list of reported and recognized claims becomes known only after the deadline for subsequent reports of claims has expired (see art. 113, par. 2) and **after** the bankruptcy trustee has made a statement on them at the **subsequent investigation hearing** (art. 113, par. 2), the right to vote on the plan of each creditors becomes recognized only then. Only then is it, therefore, possible to foresee in the plan all the rights belonging to each creditors and the manner of exercising these rights.

b) Filing the Reorganization Plan After Opening of the Bankruptcy Proceedings

After the opening of bankruptcy, the bankruptcy trustee has the right **to submit the reorganization plan** in the bankruptcy court in **any phase of the proceedings**, but the court will not consider a plan filed after the final hearing (see article 143, par. 1). On a related point, it should be noted that even the fact that, at the investigation hearing, the assembly of creditors made a decision in favor of liquidation of the bankruptcy debtor's property, this is still not an obstacle for filing the reorganization plan by the bankruptcy debtor. Specifically, according to article 158 of the Law, on a motion by the bankruptcy debtor or the bankruptcy trustee, the bankruptcy court can order the stay of liquidation in such situations, or even the stay of distribution of the bankruptcy estate, if such actions threaten the implementation of the plan itself.

c) Actions of the Bankruptcy Court Upon Receipt of the Reorganization Plan Filed by the Bankruptcy Debtor

After the investigation and reporting hearings have been held in the bankruptcy proceedings (regardless whether the reorganization plan proposal has been filed along with the petition for opening of bankruptcy or after the proceedings had been opened), **the bankruptcy court will ex officio review** the following elements of the bankruptcy debtor's plan:

- 1) whether the rules have been followed on submittal of the plan and its contents.
 - a. whether the reorganization plan has been filed by **an authorized representative of the bankruptcy debtor**. In this regard, if the plan is filed by the bankruptcy debtor before opening of the bankruptcy proceedings, the legal representative of the bankruptcy debtor who is registered in the register of companies, or his/her attorney, will be authorized to submit the petition for opening of the bankruptcy proceedings, as well as the plan itself. However, in case the bankruptcy debtor submits the reorganization plan after opening of the bankruptcy proceedings, this can be only done on behalf of the bankruptcy debtor by the legal representative registered on the day of opening of the bankruptcy. This appears to be the only possible solution, since the art. 51 of the Law in both entities stipulates that the rights of bankruptcy debtor's bodies are transferred to the bankruptcy trustee at the moment of opening of bankruptcy, and article 74 of Bankruptcy Law of RS also says that at that moment all employments with the bankruptcy debtor are terminated;
 - b. whether the **classes of creditors**, established for the purpose of voting on the plan, have been formed according to the criteria in article 147 of the Law;
 - c. whether the **plan contains all** of its mandatory elements from articles 144, 145, and 146 of the Law.

As when the reorganization plan is filed by the bankruptcy trustee, the bankruptcy court will require the debtor to rectify any deficiencies in the aforementioned elements within the stated deadline, subject of rejection of the plan itself. In case the bankruptcy debtor fails to comply with the court order, the court will reject the plan (see art. 156 of the Law) by court order (Form 17).

- 2) whether it is evident that creditors are not going to accept the plan, i.e., that the court will not confirm the plan.

In practice, there could be a situation where the assembly of creditors, at the investigation hearing, votes for termination of operations and liquidation of assets of the bankruptcy debtor, whereas, in spite of this, the bankruptcy debtor submits the reorganization plan in bankruptcy court. The court can reject the bankruptcy debtor's reorganization plan in these circumstances only if **it is evident** that creditors are not going to accept the plan, i.e., that the court will not confirm the plan. This could be the case, for example, when the bankruptcy debtor foresees in the plan continuation of production despite an earlier contrary decision of the assembly of creditors, and there is no approval of the Creditors' Committee for this. Or, this could be the case when the bankruptcy debtor foresees in the plan repayment of all creditors' claims, despite of fact that it is not possible given the debtor's financial situation, its past business results, and the amounts of the claims themselves. If it is not quite clear that the creditors are unprepared to accept the plan, or that the court will not be able to confirm it, the bankruptcy court cannot issue the decision rejecting the bankruptcy plan, and will have to let the creditors vote on it. Otherwise, the court could usurp the right of creditors to decide on the plan, even if it's less favorable to them. In case it is obvious that the plan is not going to be adopted by the creditors or confirmed by the court, the bankruptcy court cannot require the bankruptcy debtor to rectify observed deficiencies.

- 3) whether it is evident from the plan that creditors get rights that cannot be realized.

The key word the bankruptcy court should to focus on is "**evident**". Specifically, in order to reject the plan for these reasons, it must be evident to the bankruptcy judge that the benefits given to the creditors by the plan are not realistic. This will be the case, for example, when the bankruptcy debtor foresees in the plan repayment of all liabilities, although they exceed by far the value of the debtor's entire property, or the past business results. In case, however, there is the slightest thought in the judge's mind that the benefits the plan gives to the creditors are realistic, he must not reject the plan, but instead should let the creditors decide on it, at the hearing for voting on the plan. In this case too, as under 2), the bankruptcy court will not be able to require the bankruptcy debtor to rectify deficiencies, and will have to issue the order rejecting the Plan under the above stipulated conditions.

- 4) whether the bankruptcy debtor has **already filed** such **plan** in the bankruptcy court in the past, which was **not adopted** by the creditors, **not confirmed** by the court, or which **was withdrawn** from the procedure after public scheduling of the hearing to discuss the plan.

In case some of the aforementioned conditions are met, the bankruptcy court will require the statement of the bankruptcy trustee on this plan. In case the bankruptcy trustee, with approval of the Creditors' Committee, moves the court to reject the plan, the court will issue the order rejecting the plan (see Form 18).

Statement on the Plan

If the bankruptcy court, after having reviewed the elements of the bankruptcy plan in accordance with article 156 of the Law, does not find any of the potential problems described above under A) of this section, the court makes **no decision on confirmation** of the plan or anything similar. Instead, the court will, in accordance with article 157 of the Law, by court order (Form 19), **deliver for statement** the text of the plan to the bankruptcy trustee, or to the last registered representative of the bankruptcy debtor, before opening of the bankruptcy by the debtor, depending on which one of them filed the plan, and to the Creditors' Committee itself. By the same order the **court can (but is not required to)** deliver the text of the plan to the chamber of commerce in the bankruptcy debtor's area and authorized ministry with jurisdiction over the bankruptcy debtor's operations. In the order on delivery of the plan for statement, the bankruptcy court will give a 30-day deadline to the authorized entities to make a statement on the plan.

After the plan has been delivered to the above-mentioned entities for statements, only they have the **right to submit** their **statements**. In this regard, individual creditors cannot make statements on the plan, and their written statements would have no significance for the court. Creditors should forward their remarks about the plan to the Creditors' Committee, which in turn needs to take a position regarding possible written proposals and statements of all the creditors about the plan. For the court, the only relevant statement is that of the Creditors' Committee.

Received statements of the authorized entities, along with the plan text itself, will be made **available for review** by court order to all interested parties. The court will also notify all the creditors who are sent summons of the hearing for discussion and voting on the plan (see Form 20).

Discussion of the Plan

After the bankruptcy court receives the statements on the reorganization plan of the bankruptcy debtor, and by court order makes the integral text of the plan along with the received statements available for review to all interested parties in the court registry office, the court will **schedule the hearing** for discussion and voting on the plan (see art. 160 of the Law).

Hearing(s) for discussion and voting on the plan **cannot be held prior to the investigation hearing** (see art. 161). Since the logic of this legal provision is not to discuss or vote on the plan before investigating reported claims of all creditors and their repayment rank (because the range of creditors' rights in the bankruptcy plan and their right of vote will depend on it), the conclusion is that the plan cannot be discussed or voted on before the deadlines expire for subsequent claim reports (art. 113, par. 2), and until the timely reported subsequent claims are investigated in the subsequent investigation hearing.

When scheduling these two hearings, the bankruptcy judge has **two options** (see art. 166 of the Law):

1. to schedule both hearings for the same day (Form 20);

2. to schedule these two hearings for different days, no more than 30 days apart (Form 20).

Before the bankruptcy court makes a decision on whether to hold the hearings for voting and discussion on the plan on the same day or not, it should require the **statement of the bankruptcy trustee on this**. The most important reason to separate these two hearings is the possibility to modify the filed plan on the basis of the discussion in the hearing for discussion of the plan. Specifically, in practice, it can so happen that on the basis of the discussion in the hearing, the proponent of the plan is forced to modify the plan, in order to get the votes. In this regard, the bankruptcy trustee is in the best position to report to the judge, at the time the hearings are scheduled, about the tone among the creditors regarding the plan, if there are proposals for modification of the existing plan, and the range and probability of changes. Even if the bankruptcy trustee was not the one filing the plan, but the bankruptcy debtor was, he will still be in the position to give the appraisal of the tone amongst the different classes of creditors.

Between the scheduling of the hearing itself and its conduct, no more than 30 days can elapse (see art. 160, par. 1). In this period of **30 days after scheduling** of the hearing to discuss the plan, the bankruptcy judge must (art. 160, par. 2 and 3):

1. publicly announce the scheduled hearing for discussion on the court's notice board and in the official gazette of the entity;
2. serve the order scheduling the hearing along with the plan, or the summary of the plan, on all bankruptcy and secured creditors, bankruptcy debtor, and bankruptcy trustee;
3. hold the hearing itself.

Although there is an obligation of the bankruptcy court to **serve the order** scheduling the hearing along with the plan, or summary of the plan, on all bankruptcy and secured creditors, bankruptcy debtor, and bankruptcy trustee, the service is considered complete 2 working days after the order has been announced in the official gazette of an entity (see art. 12, par. 2 of the Law). In this regard, the bankruptcy court should reject any objections referring to incomplete service, i.e. untimely notification of the hearing.

At the discussion hearing itself, after introductory actions (identification of attendees) and announcement of the subject of the hearing, the court should open the **discussion on rights of each of the creditors to vote on the plan**. For this purpose the court:

1. notifies the attendees in the hearing what kind of voting rights each of the creditor classes has in the bankruptcy proceedings (art. 162, 163, and 164);
2. invites the bankruptcy trustee to make a statement on each creditor's voting rights, whose claims have been investigated in the investigations hearings (recognized and disputed), claims of secured creditors (regardless whether they are reported or not), and their voting rights within the classes provided by the plan.
3. upon the statement of the bankruptcy trustee, opens the discussion on creditors' voting rights, in case some of the creditors disagree with the statement of the bankruptcy trustee.

On the basis of the discussion on the voting rights, the court must:

1. immediately **make a decision on voting rights** of the creditors with disputed claims and the secured creditors upon request of these creditors, in accordance with articles 28, par. 3, 162, par. 1, and 163, par. 1.
2. issue legally **final decision** on voting rights of the creditors with disputed claims and the secured creditors, upon request of present creditors that the court decision from paragraph 1 is reconsidered, in accordance with article 28, par. 3 of the Law.

After discussing the rights of each creditor to vote on the plan within its class, the bankruptcy court makes no special decision on this at the hearing itself, besides those indicated under 1 and 2 above. Only after the hearing on discussion on the plan is closed, on the basis of the discussion, the bankruptcy court will establish by a court order the **list of creditors and their voting rights** (Form 21), in accordance with article 164 of the Law, against which an appeal is not allowed.

After the discussion on creditors' right to vote on the plan, in the hearing for discussion on the plan, the bankruptcy judge invites:

1. each of the present bankruptcy and secured creditors to make statements on the plan and make proposals for its amendments;
2. the bankruptcy trustee to make a statement on each proposal for amendments of the existing plan, and consequences of accepting or rejecting offered proposals.

In the hearing itself, the **assembly of creditors can make no decisions**, not even the decisions concerning amendments of the Plan itself. In article 165 of the Law, it is clearly stipulated that only the proponent of the plan has the right to amend it. In case it is the bankruptcy trustee, such action requires the approval of the assembly or the Creditors' Committee (see art. 29, par. 6), whereas such a thing is not necessary to the bankruptcy debtor as proponent of the plan. However, the proponent of the Plan is limited to amendments that refer only to these issues discussed in the hearing for discussion of the Plan.

Besides, in the hearing for discussion of the plan, the bankruptcy trustee will, upon request of the bankruptcy judge, make a statement on the rights of the secured creditors, provided for them by the Plan, after which they will be discussed in detail, in accordance with art. 163, par. 1 of the Law.

Change to the Plan Based on the Discussion Hearing

The petitioner of the Plan himself, after the hearing for voting has finished, is entitled to **change certain provisions of the Plan**, according to article 165. However, these changes to the Plan can be related only to those elements that have been discussed at the discussion hearing. The contrary action by the trustee is not in his interest nor is it in the interest of the creditors in the bankruptcy proceeding, because it is probable that they will vote against changes that have not been discussed at the discussion hearing for the Plan, as the consequences of such a changed plan would be unknown to them. Also, as a last resort, the bankruptcy court could reject to confirm such a bankruptcy plan for these reasons, based on Article 175 of the Law.

For the decision on changes to the Plan, the **bankruptcy trustee needs to have a decision of the Creditors' Committee**, i.e. the assembly of creditors if the board has not been established, following the general rules requiring the trustee to need their approval for drafting the plan before it is filed to the court or to the creditors (article 29., par. 6). In the case the board, i.e., the assembly of creditors does not give an approval for changes to the plan, while the trustee insists

on the changes to the plan, he can ask for such a permission from the judge, under the rules envisaged in Article 29, par. 6 of the Law. Therefore, the assembly or the Creditors' Committee cannot change the Plan with their decisions, because the only person authorized to change it is its petitioner. However, in order for the trustee to make changes to the plan based on the discussion at the hearing, he needs to obtain the approval of the Creditors' Committee, i.e. the assembly of creditors, if the board has not been established.

In the event the petitioner of the Plan is the **bankruptcy debtor, he is not required to seek the approval from the board**, i.e. the assembly of creditors in order to make changes to the Plan. Such a conclusion is coming from the Article 165 of the Law, under which the bankruptcy debtor does not need any approval from the Creditors' Committee for such things, as it is the case with the trustee under the general rules of Article 29 of the Law. In this sense, the legislator has left it to the debtor to make decisions himself on changes to the Plan, taking in consideration, first of all, if such a plan would be accepted at the hearing for voting on the Plan.

Based on the above stated, it turns out that the bankruptcy debtor must only take in consideration the following **criteria when changing the bankruptcy plan**:

1. if the concrete changes have been discussed at the discussion hearing for the Plan;
2. if, in his opinion, such an amended Plan has a chance to be adopted.

If the petitioner of the bankruptcy plan decides to change the filed Plan in certain segments, he does not have to **submit the changed text** (but he can) **to the court** or to any individual creditors. This will especially be the case if the bankruptcy trustee as a petitioner of the Plan has acquired an approval from the board, i.e. the assembly of creditors for changes of certain provisions of the Plan (because the board represents the interests of all creditors, and he is required to report to those he is representing about all significant events). However, when voting on the Plan, the petitioner is always required to specially indicate to the creditors the changed provisions of the Plan (see article 166, par. 2).

In the above presented context, an issue is raised on **the requirement of the Plan's petitioner to make changes to the filed Plan**, according to the discussion held at the discussion hearing for the Plan. The question is what to do in a situation when there is an obvious approval by the majority of the creditors (bankruptcy creditors and secured creditors) to make certain changes to the bankruptcy plan, which the **petitioner does not want to make in the Plan**. Can the petitioner of the Plan in such a situation be forced to make such changes, in a way that the assembly of creditors will vote for the changes to the Plan in a certain direction, and should the court allow the assembly to vote about it at the hearing?

The short answer to the above question would be that such a possibility does not exist, because the legislator has not envisaged it in the text of the Law (see article 165). Accordingly, the bankruptcy **court should not allow the assembly to vote on it**. However, it is another issue that such a behavior of the Plan petitioner would have negative consequences for the petitioner itself.

If the bankruptcy debtor is the Plan proponent, the result of such behavior for him would be that he vanishes as a legal entity, because in the event the Plan is not voted for, the property of the debtor would be cashed via sale, after which he would be deleted from the court registry of legal entities, after the bankruptcy plan has been concluded. Therefore, it is logical to assume that in this situation the debtor would not act to hurt his own interests, because of which he

should not allow that a plan he has filed is not voted for (it is assumed voting in favor of the Plan is of the utmost importance to him)

On the other hand, **if the trustee is the petitioner of the Plan**, rejection to make changes to the filed plan, in spite of the explicit request and approval by the creditors, and consequently failure to vote for the original text of the Plan, could make a triple damage for him. First, the judge can discharge trustee, by his official duty or at anybody's initiative, pursuant to Article 27 of the Law, using his right of overseeing the work of the trustee. Second, if such a trustee is still not discharged by the bankruptcy judge, the assembly, or the Creditors' Committee, and he continues to fulfill his duties in the process of liquidation of the debtor's property (the assumption is that it is not voted in favor of the Plan), when determining the fee for his efforts, the bankruptcy court will have to take into consideration, pursuant to Articles 25, par. 4 and 237 of the Law, the behavior of the trustee on the occasion of (not) voting for the filed Plan (i.e. his rejection to make changes to the Plan in the direction in which the majority in each group had wanted), and in accordance to this, to decrease the amount of the fee. And finally, and perhaps most importantly, the trustee will be required to compensate all the damage to the creditors caused by his behavior (see. Article 26 of the Law on Bankruptcy Procedure and 154 and 158 Law on Obligations), to the extent that such a damaging behavior by the trustee is proved in a separate litigation proceeding.

Voting on the Plan

The Plan, in either original text or in a later changed text, is voted on at the hearing for voting on the Plan. This hearing can be held on the same day or on the different day than the hearing for discussion on the Plan. (see Article 166. par. 1)

When the bankruptcy judge decides to hold **both the hearing for the discussion and the hearing for voting on the same day**, he will do so if, in his opinion based on the information acquired by the petitioner of the Plan or the trustee, there are no serious requests for changes to the Plan which are supported by the majority in all groups of creditors. In such a case, where it is therefore very likely that the Plan shall be adopted or rejected in the unchanged text as it is filed, the bankruptcy judge will make a decision to hold both the hearing for discussion and the hearing for voting on the same day.

In a different situation, where a bankruptcy judge is informed that groups of creditors are still negotiating with other creditors about certain provisions of the Plan, it would be logical to give to the creditors an opportunity to discuss their proposals at the hearing for discussion on the plan, and give them enough time for the discussion to be turned in changes to the Plan, if these changes are supported by the majorities in individual groups. Therefore, in such situations the bankruptcy court should always **divide the time for holding these two hearings**, in order to give the Plan's petitioner enough time to react on the discussion held at the hearing for discussion on the Plan.

In a regular course of events, the trustee, after he verifies if the conditions from Article 157 of the Law have been met (that the text of the Plan has been filed for declaration and that the declarations have arrived within 30 days), and after he posts the Plan and the arrived declarations in the court's registry office pursuant to Article 159, the **hearing for discussion and the hearing for voting on the Plan are scheduled by a single decision** (Form 20). But one has to keep in mind that the bankruptcy judge will be forced in such a situation to hold both hearings, pursuant to Article 160, par. 1, within a maximum deadline of 30 days from the day this Decision has been

issued. However, such a procedure as the most efficient one from the viewpoint of the bankruptcy proceeding (evading the drafting, posting and delivery of two decisions on scheduling separate hearings for discussion and voting on the Plan, with a simultaneous obligation to hold both hearings within 30 days from the day the decision is drafted on their simultaneous scheduling), requires from the bankruptcy court significant skills in planning and organizing a range of activities. **The bankruptcy court must especially consider the following:**

- 1) that the decision on simultaneous scheduling of both hearings should be posted in the entity Official Gazette (Article 160 does not say where such decisions should be publicly announced, but for the reasons of transparency, according to earlier conclusions of the judges, in such situation announcement should be made via the entity Official Gazette);
- 2) that the decision on simultaneous scheduling of both hearings must be delivered to all creditors who filed their claims, the secured creditors, the bankruptcy debtor and the trustee (see Article 160, par. 3), noting that the date of the delivery here should be the third business day from the day of announcing the decision in the entity Official Gazette (see Article 12, par. 2 of the Law);
- 3) that the hearing for discussion on the Plan can be held, according to the practical experience, no sooner than 15 days from the issuance of the decision (10 days for announcing in the Official Gazette, plus the assumption the delivery was made after three business days since the announcement of the decision in this Gazette);
- 4) that the hearing for voting can be held no later than thirty days from the hearing for the discussion on the Plan (see Article 166, par 1.), i.e. in practice no later than 15 days from the held hearing for discussion on the Plan, if both hearings have been scheduled by a single decision (see Article 160, par. 1, according to which each of these two hearings must be held within 30 days from the day of drafting the decision on their scheduling);
- 5) after the hearing for the discussion on the Plan, depending on the concrete situation:
 - a) the bankruptcy debtor as the petitioner of the plan must have several days for drafting the necessary changes to the Plan, in accordance to the discussion at the hearing for discussing on the Plan;
 - b) the bankruptcy trustee as the petitioner of the bankruptcy plan must have several days for drafting the necessary changes to the Plan, plus several days for the board or the assembly of creditors to give an approval for these changes;
 - c) after the hearing for discussion on the Plan, the bankruptcy court must, pursuant to Article 164, make a list of creditors and voting rights belonging to them (Form no. 21)

However, in some situations, depending on the circumstances of each individual case, the bankruptcy judge can **determine a hearing for voting on the Plan by a special decision** after the hearing for discussion has been completed. This will be the most often case when the trustee, the president of the Creditors' Committee, or the petitioner of the Plan do not have information

as to how the creditors and their groups will react at the hearing for discussion on the Plan (will there be requests to change the Plan or not). In such a situation, the bankruptcy court may decide to schedule the hearing for voting on the Plan later on, depending on the results of the hearing for discussion on the Plan. In this event, **the bankruptcy judge must take the following into account:**

- 1) the hearing for voting can be held no later than thirty days from the hearing for discussion on the Plan (see Article 166, par 1);
- 2) the hearing for voting on the Plan must be held no later than thirty days from the day the decision to hold it has been issued (see Article 160, par. 1);
- 3) the decision on scheduling a separate hearing for voting must be noticed to all creditors with voting rights and to the bankruptcy debtor (see Article 166, par. 2);
- 4) the decision on scheduling the hearing for voting must be publicly announced in the entity Official Gazette (interpretation of Article 160, par. 2);
- 5) based on experience from practice, the hearing for voting on the Plan should not be scheduled before expiration of the 15 days from the day it has been scheduled by a decision (10 days for publishing the decision in the Official Gazette, from which day a deadline of three business days starts to run, when it is considered that the decision on scheduling the hearing has been delivered – a total of 15 days);

The voting hearing itself happens in the following order:

- (1) the identity and role of all those present at the hearing is determined, and they are recorded in the minutes;
- (2) the subject of the hearing is announced, and the bankruptcy judge explains the procedure for voting;
- (3) the bankruptcy judge reads the List of creditors and the voting rights from Article 164 of the Law, based on which the voting on the Plan will be held;
- (4) the proponent of the Plan is invited to indicate possible amendments to the Plan in its original text, and the reasons for these changes (Article 166, par. 2);
- (5) after that, the bankruptcy judge invites each creditor within each individual group to make a statement whether he accepts the filed Plan or not, following the order of groups as indicated in the Plan itself;
- (6) after the statement of every individual creditor within the group, the bankruptcy judge establishes if the plan has been voted for by the necessary majority within this group (see Article 169);
- (7) after all groups of creditors make statements on accepting or rejecting the Plan, the bankruptcy judge determines if the Plan has been adopted by the creditors or not, with a possibility to apply the provision of the law on preventing obstruction (Article 170 of the Law);

- (8) if the bankruptcy judge has previously established that all groups of creditors have accepted the Plan, the trustee, members of the Creditors' Committee, if impaneled, and the bankruptcy debtor are invited to make their statements (Article 173, par. 2 and 175 of the Law):
 - a) in their opinion, have any provisions of the Law regulating the procedure of drafting, discussion, and voting on the plan been violated;
 - b) is the voting in favor of the Plan achieved in an impermissible way.
- (9) after the discussion on item 8 above, the bankruptcy judge makes a decision to confirm or reject the Plan adopted by the groups of creditors.

In case the Bankruptcy Plan fails to receive the support of the necessary majority within groups, the bankruptcy court must record that in the minutes. Next the bankruptcy judge should issue an order closing the hearing for voting on the plan, and possibly notify present parties that, since the reorganization of bankruptcy debtor has failed, the bankruptcy proceedings will resume in liquidation of bankruptcy debtor's property. The bankruptcy judge should also, at the hearing for voting on the Plan, issue an order scheduling a session of the assembly of creditors, which needs to decide on the manner and terms of liquidation of bankruptcy debtor's property. Of course, for such decision to be valid, it must be announced in the official gazette of the respective entity.

In practice, it is fairly common that one of the creditors, or even the proponent of the plan itself, on the basis of discussion of the Plan, motions the court for postponement of the hearing for voting on the Plan. The motion is based on the fact that it is impossible to properly amend the Plan in compliance with the discussion during the voting hearing. Thus, they seek an extension of negotiations between groups or individual creditors, until a common satisfactory solution is reached.

Creditors or the proponent of the Plan base their requests for postponement of the voting hearing on article 112 of the Code of Civil Procedure, where they are trying to find analogy between the two situations described in that article and the need for additional negotiations between creditors and their groups. However, bankruptcy judge should reject such requests having in mind the following:

- 1) at the voting hearing, no evidence is presented that could be relied on, and thus create need for postponement of the hearing (art. 112 par. 1, p.1);
- 2) bankruptcy proceedings are conducted ex officio, and in such procedure there is no room for court settlement or amicable dispute resolution;
- 3) the practice shows that readiness of parties and groups of creditors for compromise is not enhanced by extension of negotiations; rather the opposite is true – the shorter the deadlines the better the results. If the parties know they can negotiate without strict deadlines to achieve results (which is in fact the voting hearing), they are decreasingly willing to achieve compromise, hoping that long negotiations will influence the other sides to give in.

- 4) The bankruptcy procedure is an urgent procedure in its nature and, in that regard, no extensions should be allowed in already lengthy procedure

Confirmation of the Bankruptcy Plan by the Court

In order for the bankruptcy plan, adopted by the groups of creditors by the necessary majorities at the hearing for voting on the Plan, to come into legal effect, it needs to be confirmed by the bankruptcy judge (see Article 173 of the Law). The judge makes this decision confirming the plan in the form of a decision (Form no. 22), from which all creditors and the bankruptcy debtor can appeal.

Before issuing a decision on confirmation of the plan, the bankruptcy judge must do the following:

- (1) at the hearing for voting, request a statement of the trustee, the bankruptcy debtor, and the members of the Creditors' Committee, if one is established, in regards to the propriety of the overall procedure of drafting and voting on the Plan (see Article 173, par 2, and 175 of the Law);
- (2) before and after the hearing for voting on the Plan, examine in his official capacity the propriety of the overall procedure of drafting and adopting the Plan;
- (3) examine the proposal of each creditor not to confirm the Plan, for the reasons stated in Article 176 of the Law.

Based on the above-gathered information, the **bankruptcy judge issues a decision:**

- a) On confirmation of the Plan (Form 22);
- b) On the correction of the identified shortcomings within the stated deadline, under threat of issuing a decision rejecting the confirmation of the bankruptcy plan (Form no. 23);
- c) On rejecting the confirmation of the bankruptcy plan (Form 23).

The judge can **announce this decision on confirmation of the Plan** (Article 177, par. 1):

- a) At the hearing for voting on the plan;
- b) At a separate hearing, which must be held no later than 15 days from the day the decision is made,

When to announce the decision should depend on the complexity of the issues. For example, it is not the same when the bankruptcy judge is deciding on the request of some of the creditors not to confirm the plan because it puts them in a less favorable position than if the Plan did not exist, and when he is deciding whether the Plan was adopted by all the creditors in all groups. In this sense, the bankruptcy judge is not limited when it comes to the deadline by which he must make a decision on confirmation of the Plan. But the judge should always consider that a bankruptcy proceeding is an urgent proceeding (see Article 9, par. 1), and thus the decision on the confirmation of the Plan should be made as soon as possible.