

## THE SUPREME COURT SORTED OUT FEES IN BANKRUPTCY



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**LAWIN Tallinn office represented successfully one of its clients in a Supreme Court case where the court decided that the minimum fee rates of trustees, established for proceedings of smaller bankruptcy estates, would not be applied if a bankruptcy estate exceeded 640 000 euros. This limits the fees of the trustees in bigger bankruptcy proceedings.**

Due to the economic recession, the number of bankruptcy proceedings has grown considerably in Estonia. While the number of insolvency proceedings was about 200 in Estonia in the year 2007, the number of cases per year increased up to approximately 1000 in the years 2008-2010. The bankruptcy proceedings have given rise to polemics about several aspects of interpretation of the Bankruptcy Act, and the judicial practice regarding the principles of determining the fees of trustees in bankruptcy has also varied.

Until the year 2010 remuneration of trustees in bankruptcy was regulated mainly by subordinate legal instruments (regulations of the Minister of Justice) and the law laid down only the minimum fee rate for a trustee in bankruptcy, which was 1% of sale and recovery of a

bankruptcy estate as well as of the money received and included in the bankruptcy estate as a result of other activities of the trustee.

By amendments to the Bankruptcy Act that entered into force on 1 January 2010, the calculation of fees of trustees in bankruptcy became regulated by the Bankruptcy Act. However, the wording of the amendments was probably not the best, as it gave rise to different interpretations followed in practice.

The main controversy was about whether the value of a bankruptcy estate, on the basis of which the fee of a trustee was to be calculated, was to include the value added tax or not. In bankruptcy proceedings with bigger bankruptcy estates, i.e. above 640 000 Euros (formerly above 10 000 000 kroons) there was the question whether the rates applicable to proceedings of estates of lower value, i.e. up to 640 000 Euros (formerly up to 10 000 000 kroons) could correspondingly apply.

The Supreme Court has answered both of these questions last year.

Although regarding the value added tax the court revealed its position on 31 December 2010 in a dispute (civil case 3 -2-1-92-10) which was basically about calculation of the value added tax upon distribution of proceeds from the sale of a pledged object among creditors, but the same principles should be applied to determination of the amount of a bankruptcy estate on the basis of which the fee of a trustee is calculated. The court decided that while the value added tax was a state tax added to a sale price, on principle it did not belong to the seller, and therefore the price of property sold in a bankruptcy proceeding should be taken as basis net of VAT.

In its ruling of 12 October 2011 regarding civil case 3-2-1-71-11, the Supreme Court determined that if a bankruptcy estate exceeded 640 000

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euros (formerly 10 000 000 kroons), the minimum fee rates of trustees, established for proceedings of smaller bankruptcy estates, would not be applied and the court would be able to determine the fee of the trustee within the limits of 1% - 5% of the cost of the property received in the bankruptcy estate. In said dispute LAWIN Tallinn office successfully represented its client that did not agree with the fee assigned to a trustee by a lower court, and the Supreme Court agreed with the interpretation of the Bankruptcy Act presented by our law office.

## BOARD MEMBER AS A HOLDER OF PROCURA — IS IT PERMITTED?



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**Procura has earned the trust of businesspersons in Latvia as a practical and convenient solution for representation of companies in their day-to-day activities. The law does not establish express restrictions of holders of procura. However, a question arises can really any legally capable individual be a holder of procura? This article reviews one of such exceptions, involving management board members of a company.**

The restriction is highly related to the role and functions of the management board. The law provides that the management of a company is carried out by the management board appointed by shareholders (or supervisory board) in order to perform the decision-making and representation functions of the company. Meeting of shareholders has an exclusive competency to determine whether the members of the management board, when managing the company, shall represent the company jointly or they may represent the company individually. The decision-making function is executed jointly by all members of the management board together, but representation (joint or individual) derives from the will expressed by the shareholders. The members of the management board are obliged to comply with the decisions of the meeting of shareholders.

The meeting of shareholders can decide that the members of the management board can only jointly represent the company and include this requirement in the charter of the company. If the management board itself issues the procura to one of the members of the management board to represent the company individually on the basis of procura, the will of the meeting of shareholders and its trust in the management board are thereby violated. The shareholders have a privilege to decide who shall be the representative of the company. If they had preferred that the company is represented by one specific person they would have elected the particular person as the member of the management board and granted him/her the right to represent the company individually. If the shareholders have decided otherwise, their decision should be respected.

By delegating daily duties of the members of the management board to the holder of procura who is also the member of the man-

agement board, the will of the shareholders is to a certain extent ignored and the ability of other members of the management board to carry out the functions delegated to the holder of procura is thereby “neutralized” or even blocked.

This approach is sometimes used in cases where there are disputes between the shareholders of the company and also the appointed members of the management board, blocking adoption of proper decisions and daily management of the company. Such approach, however, does not correspond to the intentions of the lawmaker whose intention has been that the management board shall carry out legal representation of the company – be identified with the company. Therefore, the law cannot be interpreted and applied in a manner implying that the lawmaker has entitled the management board to create itself a double who would carry out the same functions, but who would in fact be a small part of it, because it consists of just one member of the management board.

It would be absurd to assume that the members of the management board are concurrently the legal and contractual representatives of the company with different scope of powers as well as liability, allowing the members of the management board to choose in what situation what role would be more convenient for them.

Therefore, there is a basis to conclude that not all legally capable individuals can be the holders of procura, i.e. members of the management board of the particular company may not be the holders of procura. It is clear that, even though the law establishes no express restriction, interpretation of the law leads to a conclusion that issue of procuras to the members of the management board should not be permitted.

## IS A CLASS ACTION POSSIBLE IN LITHUANIA?



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**Article 49 paragraph 6 of the Lithuanian Code of Civil Procedure sets a possibility to launch a class action in protection of a public interest. The question is, however, does it function? The existing Lithuanian case law says it does not.**

A class action is claim, launched by a group of people collectively concerning the same matter and with same demands. It allows aggregating a number of claims into one lawsuit thus saving the claimants from lots of expenses.

The aforementioned provision of the Code of Civil Procedure provides for a class action to be launched “as foreseen in laws”. Up to date no laws foreseeing an actual class action in relation to specific issue or regulating the concept of a class action in general have been adopted. Thus a rather blanket provision of the Code of Civil Procedure stands alone without any supporting laws.

For this reason already in 2009 a regional court and subsequently the Lithuanian Court of Appeal have refused to accept a class action for consideration. The Court of Appeal has stated that the right of a class action, set in Article 49 par. 6 of the Code of Civil Procedure, cannot be realised in practice, because it is not set in law what type of claim could be identified as a class action, what are the requirements for the content of such claim, what is the procedure for launching and examining such claim at the court. Moreover, it is not even clear what would be legal power of a decision, adopted based on a class action. Thus for purely objective reasons, the right to a class action cannot be realised.

It should be noted, that the court kept quiet regarding the allegation by the

claimants that this way a person’s right of access to court is violated. However, this argument may be dismissed on the ground that these persons are always free to launch a claim personally.

So while the Lithuanian Code of Civil Procedure in theory provides a possibility to launch a class action, in practice the existing legal regulation with the discussed case law does not allow launching class actions. As the legal regulation stands in Lithuania at the moment, the right of a class action simply does not exist.

However, in July 2011 a class action conception has been approved by the Lithuanian government and the Ministry of Justice is to prepare the first drafts of necessary laws by 2012. Two options for implementing the concept of class action have been discussed: (i) *opt-in* – where the persons may join a class action by expressing their wish to join in, and (ii) *opt-out* – where the persons, who have the same interest, are automatically joined to the case and they have to expressly opt out from it, otherwise the decision in the case would be applicable to them. For quite obvious shortcomings of *opt-out* system, including issues with guarantees of due process as a judgment in such case may be enforced on persons who effectively did not participate in the court proceedings, the suggestion is to follow the *opt-in* system.

It is unclear when exactly such laws would be passed through the Lithuanian parliament or what would be their content, but obviously it will still take quite some time. Thus for the moment a class action is simply impossible in Lithuanian legal system and any attempt to launch one should result in rejection by courts.

## NEWS – ANNOUNCEMENTS – EVENTS

**LAWIN associate Irina Kostina and partner Daiga Zivtina are representing LAWIN in a working group on Court system efficiency in Latvia, recently introduced by FICIL (Foreign Investors' Council in Latvia).** The purpose of this working group is to assess the problematic issues of the Latvian court system and to draft a paper containing proposals for improvements of effectiveness and prestige of Latvian courts.

**Latvian Council of Sworn Advocates has appointed the LAWIN Riga Office as representatives in a working group organized by the Ministry of Justice** to prepare the official position of Latvia regarding the Proposal of Regulation of European Commission on *Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters*. LAWIN is represented by associate Valters Diure.