

BOYANOV & CO.

ATTORNEYS AT LAW

82, PATRIARCH EVTIMII BLVD.
SOFIA 1463

MAIL@BOYANOV.COM
WWW.BOYANOV.COM

TELEPHONE: (+359 2) 8 055 055
FAX: (+ 359 2) 8 055 000

IMPORTANT AMENDMENTS TO THE BULGARIAN COMMERCE ACT

On February 20, 2013 **Bulgarian Parliament adopted significant amendments to the Commerce Act** (the “Amendments”). The Amendments were promulgated in State Gazette on February 28, 2013 and **entered into force on March 4, 2013**.

The most important Amendments refer to:

- (i) payments under commercial transactions (the Amendments implement the provisions of Directive 2011/7/EU of European Parliament and Council of 16 February 2011 on combating late payments in commercial transactions) and
- (ii) changes to the insolvency regulation, including the insolvency clawback rules.

A brief summary outlining the Amendments is provided below.

Payments under Commercial Transactions

Payment periods

According to the Amendments **the parties to a commercial transaction can not agree on a period for performance of a monetary obligation exceeding 60 days**. As an exception a longer payment period may be agreed if necessary due to the specific nature of the goods or services to be provided or for other important reasons, and such if extension is not grossly unfair to the creditor or inconsistent with morality.

The Amendments introduce specific rules in cases **where the payer is a public contracting authority**. In such case **the period for performance of a monetary obligation can not exceed 30 days**. As an exception the parties may agree on a longer period, but in any event not exceeding 60 calendar days.

If no payment term was agreed by the parties, the payment must be made within 14 days as of the receipt of the invoice or other request for payment. Where the date of receipt of the invoice (or an equivalent request for payment) is not clear, or where the debtor

receives the invoice (or an equivalent request for payment) earlier than the goods or the services, the 14-days period starts running from the day following the date of receipt of the goods or services. In cases where the law or the contract provide for a procedure for acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, the 14-days period starts running from the date on which such acceptance or verification takes place if the debtor has received the invoice or the equivalent request for payment earlier.

The above rules apply also to agreements concluded by freelancers, craftsmen and individuals providing services themselves.

Outside the scope of the new rules remain payments under negotiable instruments, debts in insolvency proceedings and payments made as compensation for damages (including insurance compensations).

Compensation to creditors

In case of late payment (unless otherwise agreed) the creditor is entitled to receive the statutory interest for delay and a compensation for the recovery costs incurred due to the late payment of amount not lower than BGN 80 (approx. EUR 40), without sending any invitation to the debtor.

In addition, the creditor is entitled to claim compensation from the debtor for any damages, incurred as a result of the debtor's late payment and compensation for recovery costs of a higher amount.

Where the parties agree on payment schedules providing for instalments and any of the instalments is not paid by the agreed date, the interest and compensation shall be calculated on the basis of the overdue amounts.

The parties may agree on limitation of the liability of the debtor in respect of the statutory interest and/or the fixed compensation, unless it is grossly unfair to the creditor or inconsistent with morality. Any limitation of the liability of the public contracting authority is considered void.

The above rules regarding the payment periods and compensation of the creditors apply to agreements concluded after 15 March 2013.

Insolvency

Definition of insolvency

The definition of “insolvency” has been changed to include all cases in which the debtor is unable to perform a matured monetary obligation due under or in relation to a commercial transaction, including its validity, performance, non-performance, termination, invalidation or dissolution.

Clawback rules

No more null and void transactions ex lege

Prior to the Amendments certain transactions concluded by the debtor after the initial date of insolvency (such as, *inter alia*, any performance of a monetary obligation regardless of the manner of performance, establishing a pledge, mortgage or other type of security interest over an asset included in the bankruptcy estate, transactions for no consideration or undervalued transactions involving assets from the bankruptcy estate) were null and void *ex lege*. Thus it was not necessary for the bankruptcy trustee or any of the creditors to challenge these transactions in front of the court in order to announce their invalidity and the respective parties were obliged to return any payment or other consideration received under such transactions in the insolvency estate.

According to the Amendments any challengeable transactions must be invalidated by the court upon a claim by the bankruptcy trustee or (in case the trustee fails to file a claim) of any of the bankruptcy creditors. Such a claim must be filed not later than one year after the date of opening of the insolvency proceedings (or the date of resuming opened insolvency proceedings if the same has been suspended).

Voidable transactions and hardening periods

The Amendments also significantly change the scope of voidable transactions and introduce hardening periods (prior to the Amendments there were no hardening periods under Bulgarian insolvency law and the initial date of insolvency/overindebtedness as set by the court could precede the opening of insolvency proceedings without any limitations, thus making transactions concluded after such date null and void or voidable and creating uncertainty among creditors).

The following transactions may now be challenged in insolvency proceedings:

- (i) performance of a monetary obligation prior to its maturity, if made within one year period prior to the date of filing the petition for opening of insolvency proceedings, or, respectively, two years, if the creditor knew that the debtor was insolvent/overindebted (it is presumed that the creditor was aware of the debtor's insolvency/overindebtedness if the debtor and the creditor are related parties or if the creditor was aware of or was in a position to be aware of circumstances based on which he could reasonably suppose the existence of insolvency/overindebtedness of the debtor);
- (ii) performance of a due monetary obligation of the debtor if made within six month period prior to the date of filing the petition for opening of insolvency proceedings, or, respectively, one year, if the creditor knew that the debtor was insolvent/overindebted;
- (iii) the creation of a mortgage or a pledge to secure receivables from the insolvent debtor, which were unsecured prior to that.

The above described invalidation provisions do not apply if:

- in the case of (i) or (ii) above, if the payment falls within the ordinary course of business of the insolvent debtor and (a) is made in accordance with the agreement between the insolvent debtor and its counterparty and either simultaneously with the provision to the insolvent debtor of goods or services of equal value or within 30 days after the due date of the payment, or (b) after payment is made the creditor has provided to the debtor goods or services of equal value;
- in the case of (iii) above, if (a) the security was provided prior to or simultaneously with the granting of the loan to the insolvent debtor or (b) the security replaced another security *in rem*, which is not subject to invalidated pursuant to the respective insolvency provisions or (c) is provided to secure a loan granted for the purposes of acquisition of the secured asset.

Pursuant to the Amendments certain transactions concluded by the insolvent debtor within certain periods of time prior to the date of filing the petition for opening of the insolvency proceedings may be also invalidated upon a petition of the trustee or, if the

trustee fails to file such a petition – by a creditor in the insolvency proceedings. These are:

- (i) transactions for no consideration (excluding ordinary donation), concluded with a related party to the insolvent debtor within a period of three years prior to the date of filing the petition for opening of the insolvency proceedings;
- (ii) transactions for no consideration concluded by the insolvent debtor within a period of two years prior to the date of filing the petition for opening of the insolvency;
- (iii) undervalued transaction, made within a period of two years prior to the date of filing the petition for opening of the insolvency proceedings, but not earlier than the initial date of insolvency/overindebtedness;
- (iv) creation of a pledge or mortgage or granting a personal guarantee to secure a third party obligations made within a period of one year prior to the date of filing the petition for opening of the insolvency proceedings, but not earlier than the initial date of insolvency/overindebtedness;
- (v) creation of a pledge or mortgage or granting a personal guarantee to secure a third party obligations made in favour of a creditor who is a related party to the insolvent debtor within a period of two years prior to the date of filing the petition for opening of the insolvency proceedings, or
- (vi) any transaction, which is harmful to the creditors and is concluded with a related party to the insolvent debtor within a period of two years prior to the date of filing the petition for opening of the insolvency proceedings.

The Amendments expressly state that the invalidity of any voidable transactions shall not affect any rights, which third parties acting in good faith have acquired against consideration prior to the date of registration of the invalidation claim.

The Amendments also apply to pending insolvency proceedings.