

# PRESENTATION AND DISCUSSION OF THE DRAFT LAW ON BANKRUPTCY



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Education and Research EAER  
**State Secretariat for Economic Affairs SECO**

# FRESH START

- One of the features of the modern legislation on bankruptcy is to provide “a new beginning” to the overloaded debtors in order to relieve the claims of the previous creditors.
- The “new beginning” version is not applied for the debtors that lack active assets or that have as many assets as to cover the expenses of the bankruptcy procedures.
- Uncertain order of priorities solved by granting secured creditors adequate priority
- Additional remedies for preventing debtors’ fraud and aiming to maximize recoveries

## The Interview

### Institutional meetings

- Ministry of Justice, Ministry of Finance, Ministry of Economy Development, Trade and Entrepreneurship, NRC and GDT

### 6 Questionnaire Samples

- judges; lawyers, bailiffs, administrators, prosecutors and business representatives

# METHODOLOGY

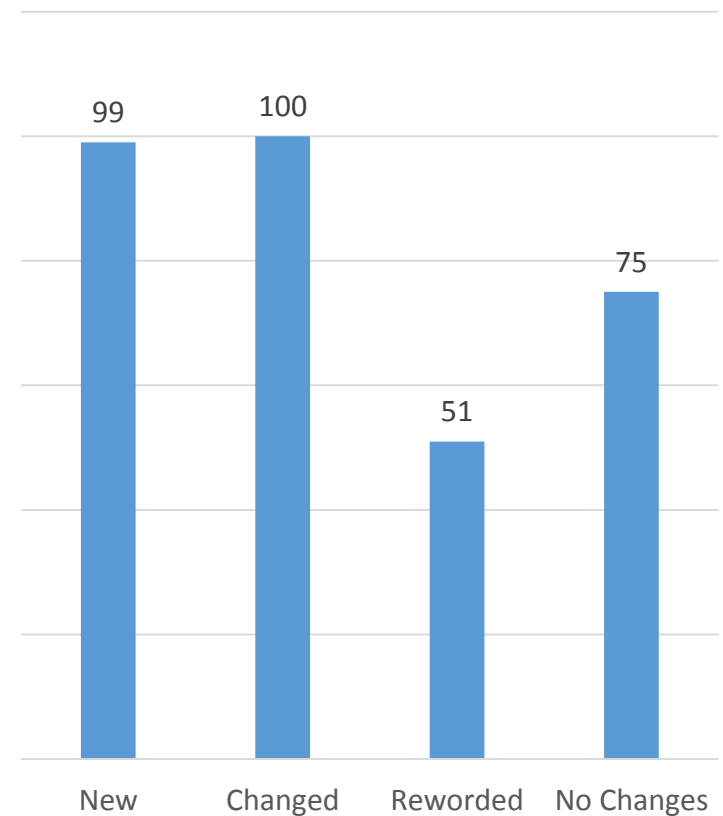
### Informal meetings

- experts, pedagogues of the bankruptcy area, lawyers, etc.;

### 5 Brainstorming activities

# THE “PROGRESS” OF THE BANKRUPTCY LEGISLATION IN ALBANIA

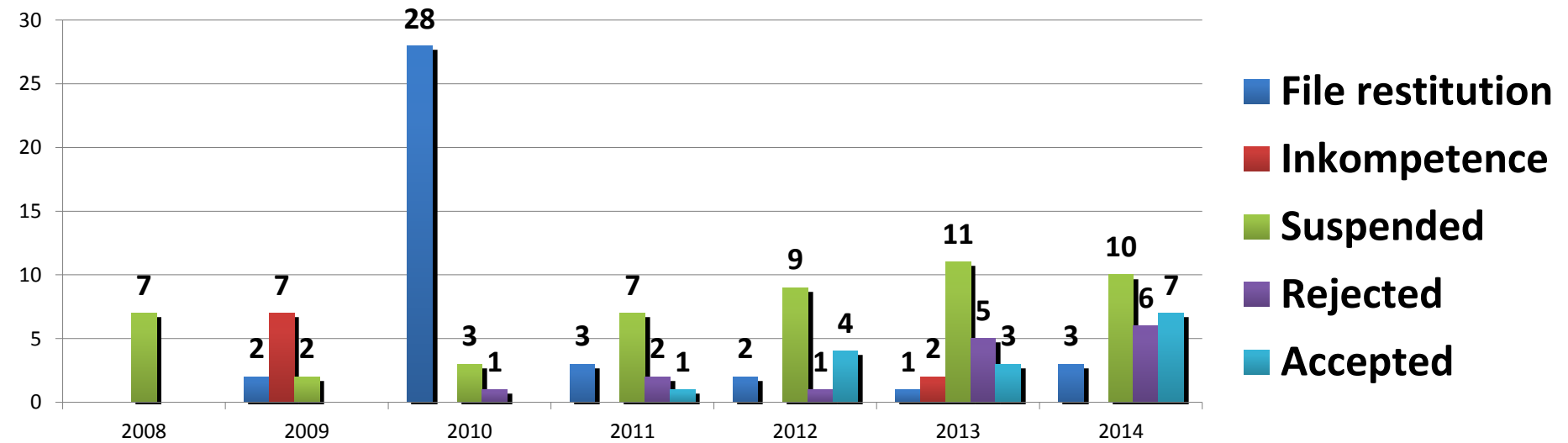
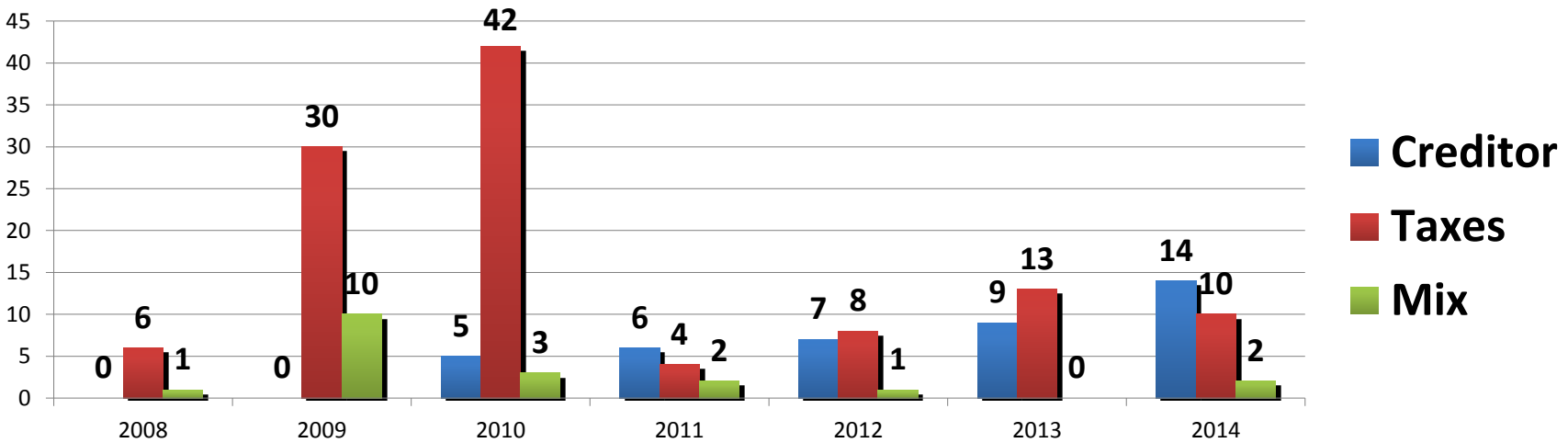
- Law No.8901 dated 3.05.2002 “On Bankruptcy”: In force on 1 October 2002; comprising 284 Articles; developed according to the German model;
- The amendments in the Law no.9919 dated 19.05.2008 are made regarding the establishment of the Bankruptcy Supervision Agency;
- Law no.10137, dated 11.05.2009, changes only Article 43, point 1 of Law no. 8901. (the word ‘licensed’ is substituted by the word ‘certified’)



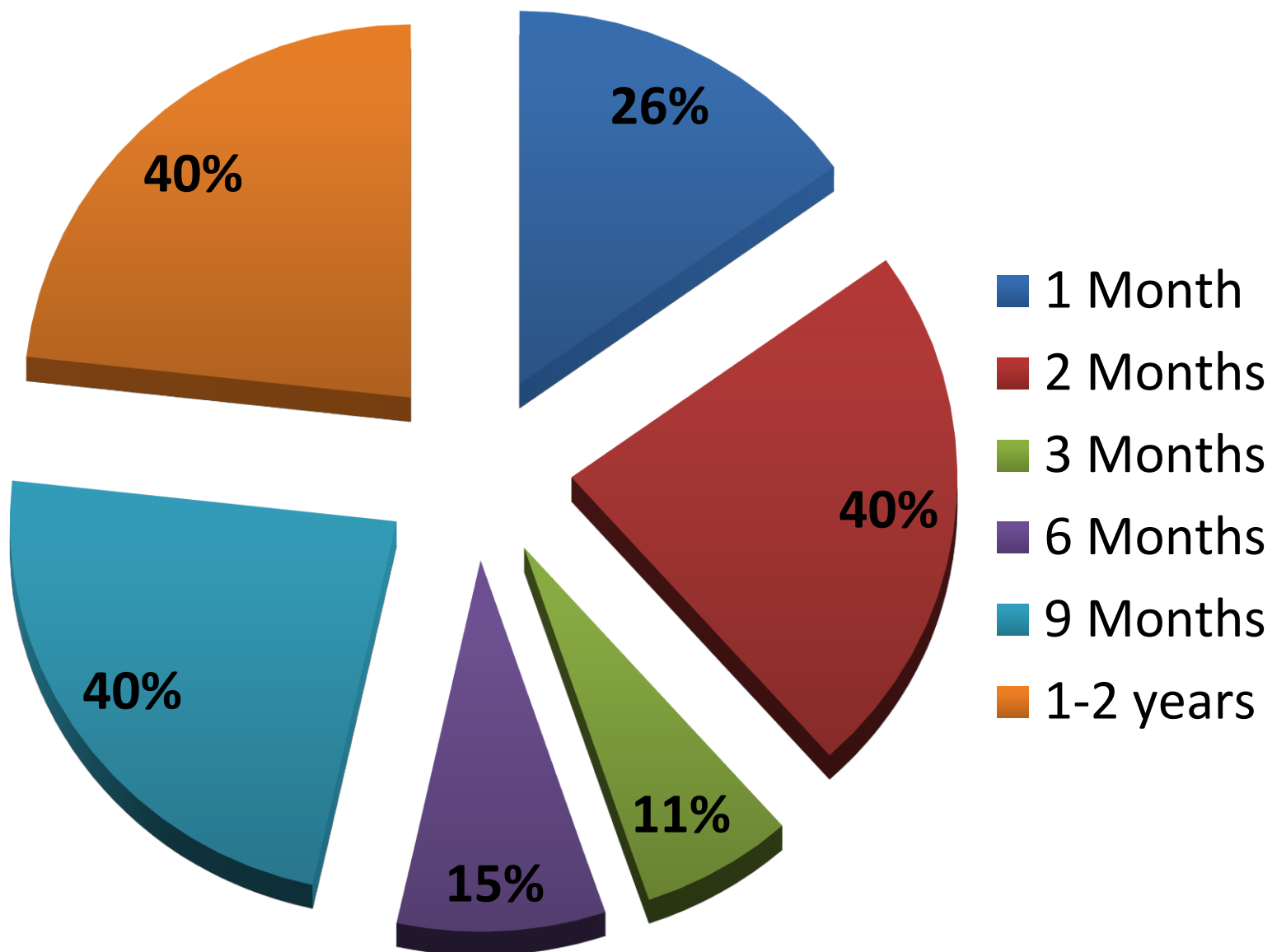
# INTERNATIONAL ORIENTATION

- The Convention of the International Labour Organization (ILO) no.173
- Directive 2002/74/EC on Bankruptcy
- EU Regulation for the Bankruptcy Proceedings 1346/2000
- UNCITRAL (2005) Instruction on Bankruptcy Law
- UNCITRAL (1997) Instruction on International Bankruptcy
- Bankruptcy laws of specific countries: USA, *Germany, Italy, Montenegro, etc.*

# Subjects that file for bankruptcy



Duration of file examination



Findings and Problems	Solution from the Draft Law
<p><b>Confusion with the terminology and the concepts.</b></p>	<ul style="list-style-type: none"> <li>• Developing a glossary of 29 Terms and Concepts as: creditor with the special repayment right; Bankruptcy measure; Insolvency</li> </ul>
<p><b>The subjects involved in the bankruptcy proceedings as a Debtor, are limited</b></p>	<ul style="list-style-type: none"> <li>• The circle of the subjects is enlarged by: agricultural families, public juridical persons, non-profitable organisations that pursue economic profit or <i>local administrative units</i>.</li> <li>• <i>The local administrative units</i> undergo only reorganization, upon the provision of the <b><u>High State Control permit</u></b>.</li> <li>• The draft provides for the descendent's estate, the co-ownership of the spouses pursuant to the legal community regime and the contract regime, the joint property of a continuing or jointly administered community.</li> </ul>



Findings and Problems	Solutions from the Draft Law
<p><b>The subjects with public interests have difficulty regarding insolvency</b></p>	<ul style="list-style-type: none"> <li>• The Bankruptcy Proceeding <b>can not initiate for the subjects exercising their activity in the public interest sectors and defined also as strategic</b></li> <li>• From the moment the subjects license is removed, they may become subjects of the bankruptcy law.</li> <li>• [...] every subject, has the right to request the initiation of the bankruptcy proceeding, only after the respective regulatory authority has provided the preliminary permit</li> </ul>
<p><b>The provision in Article 104 for the tax law, creates a parallelism regarding the bankruptcy proceeding initiation for the subjects suffering losses</b></p>	<ul style="list-style-type: none"> <li>• It is suggested the nullification of the provision and defining in the draft the bankruptcy initiation from the tax authorities in the cases of 3 year insolvency.</li> </ul>

## Findings and problems

## Solutions from the Draft Law

**Difficulties in solving the cases with insufficiency of the bankruptcy measure**

- **“Special public fund”** is the fund administered by NBA to cover the liquidation expenses in a bankruptcy proceeding in the case of the insufficiency of the debtor estates.

**Suspensions and interruptions of bankruptcy proceedings due to uncovered expenses**

- **Extending the concept of** court expenditures:
  - Court expenditure;
  - Administrator remuneration;
  - Expenses of the creditors’ committee.
  - Expenses of the administrator activity;
  - Obligations pursuant to the two sided contracts, that are to be paid upon the initiation of the bankruptcy proceeding;
  - Obligations arising from the unsupported enrichment;

Findings and problems	Solution from Draft law
<b>Unclear definition of the bankruptcy administrator remuneration</b>	<ol style="list-style-type: none"> <li>1. The bankruptcy administrator has the right of <ul style="list-style-type: none"> <li>• A monthly payment, reward as a percentage of the discharged obligations from the bankruptcy measure, and</li> <li>• Reimbursement for the expenses during the duty fulfillment.</li> </ul> </li> <li>2. The remuneration is assessed depending on the volume and degree of difficulty.</li> <li>3. The detailed rules regarding the remuneration &amp; reward are defined by DCM.</li> <li>4. The remuneration, reward and the expenses reimbursed to the bankruptcy administrator are approved by the court.</li> </ol>
<b>Lack of legal regulation of the debt restructuring process</b>	<ul style="list-style-type: none"> <li>• The debtor can ask the court to approve the debt restructuring agreement, reached with the consent of the creditors who own the majority of the credit amounts. The agreement is communicated to the prosecutor.</li> </ul>

## **Findings and problems**

## **Solution from the Draft law**

**The status and competences of the Agency should be further clarified**

- ABSA has the right to follow the judicial investigation of bankruptcy cases, and if requested by the court, to give opinions and be heard regarding the fulfillment of its responsibilities and legal duties.
- Defines the administrator deposit
- Has the right at any time to request specific information or an intermediate report on the state of the plan.
- Is informed by the Court no later than 5 days from the request to open the procedure as well as get regularly updated on the procedure status.
- The agency administers the special public fund

Findings and problems	Solution from the Draft law
<p><b>Cases of abuse in the bankruptcy proceeding, while no reporting in the prosecution office.</b></p>	<ul style="list-style-type: none"> <li>• After the receival of a copy of the decision for the bankruptcy proceeding initiation, <b>in order to avoid abuse or fraud in the bankruptcy proceeding, <u>the prosecutor asks the bankruptcy administrator to verify the transfers and the juridical operations regarding the debtor assets and the people related to him, occuring during (at least) the last three years</u></b>, prior to filing a request for the bankruptcy proceeding initiation.</li> </ul>
<p><b>Administrators find difficult to get information regarding the debtor assets prior bankruptcy</b></p>	<ul style="list-style-type: none"> <li>• The bank subjects, CIPRO, NRC, etc., <b>are obliged to provide the bankruptcy administrator with the data</b> and the respective documentation regarding the debtor juridical operations.</li> </ul>

## **Findings and problems**

## **Solution from the Draft law**

### **Cases of abuse in the bankruptcy proceeding, while no reporting in the prosecution office**

- There have been identified abuses in bankruptcy, while there are no reportings in the prosecution offices.
- When it is decided the discharge of the unpaid obligations of the debtor (natural person), the bankruptcy court has the right to revoke the decision of the unpaid obligations discharge, in cases when the debtor hides or inhibits the assets.
- The creditor request can be presented within one year from the time when the creditor is notified for an obligation contravention, but in any case not later than six years from the obligation discharge decision.

### **Lack of legal regulation of the debt restructuring process**

- The debtor can ask the court to approve the debt restructuring agreement, reached with the consent of the creditors who own the majority of the credit amounts. The agreement is communicated to the prosecutor.

## Findings and problems

## Solution from the Draft law

**Difficulties from the order of preference defined in Article 605 of the Civil Code**

- 1. Secured claims** up to the estate value that serves as a guarantee.
- 2. Priority claims**, where are included:
  - The claims arising from the termination of the work relations for the three month period, but no more than 500 thousand ALL as a total;
  - Financing gained as a loan;
  - Food claims;
  - Employee claims for the life damaging;
  - Claims for the unpaid taxes in the last year;
  - Remuneration of the bankruptcy administrator;
  - Obligations toward the special public fund;
  - Reorganisation expenses.
- 3. Claims of other bankruptcy creditors;**
- 4. Claims of the subordinated creditors;**
- 5. Claims of the partners, shareholders, founders, members.**

Findings and problems	Solution from the Draft law
<p><b>Legal regulation of the inter-border bankruptcy cases is not complete</b></p>	<ul style="list-style-type: none"> <li>• it is used the UNCITRAL (1997) model law on international bankruptcy</li> </ul>
<p><b>Lack of penalties</b></p>	<ul style="list-style-type: none"> <li>• Administrative contraventions are defined in the cases of:             <ul style="list-style-type: none"> <li>• the declarations with fake data.</li> <li>• Hiding, transferring or alienating the property or documentation for the bankruptcy administrator or court, in order to inhibit the bankruptcy proceeding.</li> <li>• Failure of the administrator to execute the court decisions or orders.</li> <li>• The bankruptcy administrator refuses to deliver the respective estates and documentation when he is dismissed from the job.</li> </ul> </li> </ul>



## Findings and problems

## Solution from the Draft law

**Lack of legal provision for the conversion of the procedure from reorganization to liquidation**

- Every creditor has the right to demand the conversion of the proceeding due to:
  - Failure to pay the matured obligations;
  - Notification of the supervising administrator on the failure of the debtor to implement the plan.
- Upon the request of the supervising administrator or the creditor complaints, after the hearing with the debtor, the court takes a decision on the conversion of the proceeding, from re-organization to liquidation. A special appeal can be undertaken against this intermediary decision in the Court of Appeal.

**No relation between the bankruptcy proceeding and the special subjects**

Regarding the spouses, in the case of the **continuing community**, related to **heritage**;  
The case of the **simplified bankruptcy** and for the **consumers**.

## **Findings and problems**

## **Solution from the Draft law**

**The necessity of detailing the territorial competence and the indicators in this respect**

- The bankruptcy proceeding is examined and judged in the Bankruptcy Court where the debtor has the main interest center.
- In case the debtor has transferred the main interest center in another area, the territorial competence belongs to the bankruptcy court where the new center of the new residence is located.
- In case the debtor has no main interest center, headquarter or residence in Albania, the territorial competence belongs to the bankruptcy court where the debtor has a branch or any other assets.
- In case a bankruptcy proceeding is declared as belonging to some bankruptcy courts, the direct competence for the examination and judging the case belongs to the court where the request for the bankruptcy proceeding initiation was primarily filed.

Findings and problems	Solution from the Draft law
<p><b>The court procedures are long and exceed the timelines established in the current law</b></p>	<ul style="list-style-type: none"> <li>•Acts judgment</li> <li>•Public notification</li> <li>•Electronic notification</li> <li>•Taking and accepting evidence – the expertise act, in a faster way, taking from the Administrative K.Pr.</li> <li>• Adopting the concept of: the expert of the parties or the expert of the court and there is only one session for providing the report or the act.</li> </ul>
<p><b>Delays caused by parallel judgments from the civil court regarding the cases linked to bankruptcy</b></p>	<ul style="list-style-type: none"> <li>• The draft provides for the special competence of the bankruptcy court, for judging the cases regarding the bankruptcy measure, including but not limited to:             <ul style="list-style-type: none"> <li>•Continuation of the judgment of the suspended suits due to bankruptcy proceeding initiation;</li> <li>• suits for the invalidity of the debtor operations;</li> <li>• suits for verification of the creditors claims.</li> </ul> </li> </ul>

## **Findings and problems**

**The necessity of detailing the court investigation and the expertise process**

## **Solutions from the Draft law**

- The bankruptcy court investigates mainly all the circumstances related to the bankruptcy proceeding.
- During the court investigation, the bankruptcy court can take as evidence the opinion of the expert of the party or/and the expert assigned by the bankruptcy court itself.
- The expert has the right to be acknowledged with the acts of the case and can not refuse without any legal reason the duty it has been assigned.
- The expertise decision is notified immediately to all the parties in the judgment and the expert as well. Along with the expertise decision, the bankruptcy court requires the expert to fill and sign a personal declaration where he acknowledges the penal responsibility in the cases of fake expertise and inviting him also to take an oath.

## Findings and problems

## Solutions from the Draft law

**Delays caused by parallel judgements by the civil court of the cases connected to bankruptcy**

- The draft law stipulates a **Special Jurisdiction for the Bankruptcy Court** regarding the judgement of the cases related to the bankruptcy measure, including but not being limited to:
  - continuation of the judgement for the **suspended suits** due to the bankruptcy procedure initiation;
  - the suits for the **invalidity of the debtor operations**;
  - the suits for the **verification of the creditors' claims**.

**Long timelines for the Appeal judgments**

- The deadline for the special appeal pursuant to this law is 5 days.
- The Appeal Court judges the case in the counseling room, as a rule within 30 days from its registration.
- The Appeal Court, can exceptionally decide for judging the case in a court session in the presence of the parties, in case it retains valid the verification of new facts, new evidence, even for the special jurisdiction cases of the bankruptcy court.

## Findings and problems

## Solutions from the Draft law

**The individual notifications for every creditor and the absence of their address, delay the bankruptcy procedure.**

- The notifications are done by the court via the swift mail service or the **electronic communication tools**, pursuant to the CPC.
- **The publications done in the public premises and in the bankruptcy court website are considered a notification** to all the parties in the bankruptcy procedure.
- The bankruptcy court authorizes the administrator **to make the notification for the public declaration in the debtor official website**, if available.
- The secretary office of the court notifies the NBA **not later than five days** from every request filing for bankruptcy procedure initiation.
- The secretary office of the court submits **for publication to the NRC** every decision for the initiation, suspension,

## Findings and problems

## Solutions from the Draft law

**Assets insufficiency and the dissolution of the company due to this fact results in the avoidance of creditors' payment.**

• LAW No. 129/2014 ON SOME AMENDMENTS ON LAW NO. 9901/2008 ON THE COMMERCIAL COMPANIES. **Articles 43/99/187/5:**

**The dissolution of the company**, as a consequence and **in the case of the assets insufficiency to cover the bankruptcy procedure expenses**, is decided by the bankruptcy court, when ... the court **decides to reject the request for the bankruptcy procedure initiation**, due to the insufficiency of the company assets to cover the expenses of the bankruptcy procedure.

• The draft stipulates only **the interruption of the bankruptcy procedure via suspension** in the cases of insufficiency of the bankruptcy measure to cover the expenses.

• **The procedure restarts as soon as the sufficient fund is provided**, in order to cover the costs via the special public fund or the funding of the interested parties.

**THANK YOU!**