NEWSLETTER NO 22.
of the Association of Corporate Lawyers,

For all those who has forgotten or has not been aware, the Association web site address is
www.udruga-korporativnih-pravnika.hr

WHAT WAS HAPPENING DURING NOVEMBER?

1. **XXIV. TRADITIONAL SYMPOSIUM – Opatija 4th to 6th November, 2009**
2. **COOPERATION WITH THE ASSOCIATION OF HEALTH CARE CORPORATE LAWYERS – 2nd HEALTH CARE LAWYERS CONGRESS, Topusko, 12th to 13th November, 2009**
3. **Two-day-seminar in Zagreb, 16th to 17th November, 2009: PRACTICAL APPLICATION OF FIDIC CONTRACTING CONDITIONS & MDB HARMONISED CONTRACT ON CONSTRUCTION (2006 ISSUE)**
4. **ASSOCIATION OF CORPORATE LAWYERS REPRESENTATIVES – PARTICIPANTS OF THE ROUND TABLE ORGANISED BY THE Legal Association of Railway Companies (PUŽ)**
5. **Lecture CORPORATE SAFETY – INFORMATION SECURITY**
6. **ON AGREEMENT ON ARBITRATION BETWEEN SLOVENIA AND CROATIA – a view by an Association Member**

1. XXIV TRADITIONAL SYMPOSIUM – Opatija 4th to 6th November, 2009

Iskra Gudan, LLB
KONČAR – ELECTRICAL INDUSTRY, Inc.

XXIV Traditional Symposium organised by the Croatian Association for the Civil Law Sciences and Practice was held in Opatija from the 4th to the 6th November, 2009.
The number of participants was not smaller in comparison to the previous years, and lawyers from the Administration of Justice and the University prevailed. Topics themselves were interesting and included various legal areas: property right law, trade law, employment law, administrative law. Lecturers introduced nothing innovative in their lecturing style, prepared matters were presented in a „classical“ way. It can be understood in a certain way, taking into consideration the type of the symposium and the huge number of participants. It should be interesting to note that the total of 11 lecturers participated in the Symposium, out of which number more than 36 % were retired persons. In every respect the knowledge was their greatest asset, but where could we find the actuality?
I can estimate that the main advantage of this traditional symposium that should be emphasised after all, the fact that the organiser took care and enable all the participants to consult with the lecturers on the presented themes and to obtain concrete answers linked to the practice during the afternoon. Colleagues participants of the symposium still preferred the „a question and an answer attitude“compared to the consultation – discussion with the lecturers. It is not a miracle since individual consultations with lecturers are estimates as the best mode of counselling where anyone can explain

his/her question and the state of the fact to which it refers and the confidence is guaranteed. I consider that every colleague with such an attitude influences the organisation and the quality of symposiums and conferences.
Each participant received the Proceedings of the XXIV Symposium under the name „Year Book 16“, comprising more than 35 topics from the areas of the symposium itself.
The main advantage of this and similar conferences and symposium has remained the same: to hear something new from the theory and to change opinion and practical experiences of other colleagues, and especially if we take into consideration request amendments to laws, i.e. adoption of new laws, we can conclude that such symposium and conferences are useful. The main advantage is based in the fact that lecturers are often members of working groups that are able to explain and clear out the aims and purposes of the legislator, and the conditions under which the rules are being adopted. Regardless all the stated, the symposium was also an opportunity to obtain new information, possibility to compare you own work with the work of other colleagues and the basis for improvement of work in your own working environment.

2. COOPERATION WITH THE ASSOCIATION OF HEALTH CARE CORPORATE LAWYERS – 2nd HEALTH CARE LAWYERS CONGRESS, Topusko, 12th to 13th November, 2009

The President of the Association of Corporate Lawyers
Mr. Sc. Josipa Jurinić, LLB.
Main Legal Counsellor
Ericsson Nikola Tesla Inc. Zagreb

Keeping further cooperation between the Association of Corporate Lawyers and the Association of Health Care Lawyers. Representatives of the Association of Corporate Lawyers participated at the 2nd Congress of the Health Care Lawyers realised in Topusko on 12th and 13th November of this year.

The President of the Association, employed by the company Ericsson Nikola Tesle Inc., wrote an expert paper "CONCILIATION IN PRACTICE – Considering on wider acceptance and obstacles in conciliation procedure conduct" published in the Congress Proceedings. She also made a presentation with the same theme during the first Congress day, i.e. on 12th November, 2009.
Iskra Gudan, a member of the Association employed by Končar, made a presentation, which was realised very successfully, under the title „ALTERNATIVE MANNERS TO SOLVE DISPUTES IN PRACTICE OF KONČAR CONCERN – CONCILIATION / ARBITRATION. In practice solving of disputes by conciliation, as one of alternative ways to solve disputes, still represents a novelty, although the Conciliation Act was adopted as early as in 2003, and amended in 2009. The number of conciliating procedures is small in comparison to the number of court subject matters. Therefore

there have to be a wish for a change, i.e. for a turn of the practice to the benefit of conciliation, i.e. alternative solving of disputes, present in all the structures of the society. It was the reason of selection of the stated themes selected by members of our Association.
The main conclusion of informal discussions among representatives of our Association and participants of this year Congress is:
Health Care lawyers can be a strong starting force and advocates of alternative solving of disputes in the same manner as the corporate layers giving their contribution through their own positive attitude towards alternative solving of disputes and widening of such an attitude in their own working environment. They should start from knowledge and skills obtained during life time learning and their openness towards the new, and in the first line if that new contribute to faster resolving of a dispute, reaching of settlements and keeping of a good business relationship between the parties in the dispute for the future.
Taking into consideration the huge interest of the Congress participants for the presented themes and their acknowledgement to our representatives, it is obvious that those themes will be further detailed representing an area of common activities of those two associations in the future.

3. Two-day-seminar in Zagreb, 16th to 17th November, 2009: PRACTICAL APPLICATION OF FIDIC CONTRACTING CONDITIONS & MDB HARMONISED CONTRACT ON CONSTRUCTION (2006 ISSUE)

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A seminar under the title Practical application of FIDIC contracting conditions and MDB harmonised contract on construction (2006 issue) was held in Zagreb from 16th to 17th November, 2009 and a few of our Association Members took part in it as well. The total number of 75 participants were present at the seminar (lawyers, investors, counselling engineers, contractors, expert from public administration bodies, ministries and agencies), making a large number of participants for such kind of a seminar. Anthony Glover and Simon Worley from European Construction Ventures (ECV) – a company specialised in education and counselling in civil engineering lectured at the seminar.
FIDIC is the abbreviation for the French title of the International Federation of Counselling Engineers, comprising today 80 national associations as its own members. FIDIC has issued four „first issues“while the latest two were dealt at the seminar since they are used the most frequently in practice: Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer – the so called New Red Book and Conditions of Contract for Plant and Design Build – Build for Electrical and mechanical Plant and for Building and Engineering Works Designed by the Contractor – the so called New Yellow Book. As it can be seen from the titles themselves, the conditions vary depending on the fact who takes the responsibility for the design – the Contractor or the Employer. Regardless the fact which conditions are applied to the contracting, or in other words which book is implemented, all FIDIC general terms of

contract are characterised by a balanced approach to rights and obligations of the Contractor and the Employer. The system of presentation and the terminology is unified in all four books, meaning that when you study general conditions of the contract from one book, you are generally acquainted to the general conditions of the contract form other books as well. All conditions of contracts comprise general conditions, Manual for special condition preparations, Form of the offer, Form of the contract and Agreement on resolving of disputes. MDB harmonised contract on construction (2006 issue), mentioned in the title of the seminar, remained mentioned only in the title of the seminar. Unfortunately limited time and huge subject matter did not leave any time for comments of those terms of contract. Those terms of contract are used by the European Bank for Renewal and Development and the World Bank for Renewal and Development among others.

Croatian companies that have been participating in the foreign market performing investment works face FIDIC General Conditions of Contract very often. Furthermore, FIDIC has proved to be very acceptable for domestic contracting as well. In such a way HAC (Croatian Motor Ways) has accepted FIDIC New Red Book as the model for contracting of motor way construction in Croatian. In such a way FIDIC has been proved as an unavoidable model of contracting. Therefore the great interest and the huge number of seminar participants should not be surprising. Since this can be only Module 1, we hope that we can expect further seminars (Module 2, Module 3) on FIDIC Conditions of Contract.

4. ASSOCIATION OF CORPORATE LAWYERS REPRESENTATIVES – PARTICIPANTS OF THE ROUND TABLE ORGANISED BY THE Legal Association of Railway Companies (PUŽ)

On 26th November, 2009 the Round Table organised by the Legal Association of Railway Companies (PUŽ) was held with the title „TIME OF RECOGNITION: ARBITRATION – RECONCILIATION – CORPORATE LAWYER“dealing with two topics:
1. Possibilities of application of alternative manners in resolving of disputes in practice – depend on us!?
2. Lawyer – the importance of the role “Hand in hand with management“

Representatives of our Association, Aida Marijan and Josipa Jurinić talked about the stated topics and attracted a great deal of attention of our colleagues shown with many questions and overwhelming discussion prolonged even after the time for holding of the event.
The Association of Corporate Lawyers is going to initial further cooperation and informs its members on it in more details.

5. Lecture CORPORATE SAFETY – INFORMATION SECURITY

Aida Marijan, LLB.
Director of Legal Services and Representation
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Within the frames of regular monthly activities, in the premises of the Association, on 30th November, 2009 the lector with the topic Corporate Safety – Information Security was held. The presenters of the theme were Aida Marijan – Končar and Nelka Fikeys Krmić – Ericsson Nikola Tesla who presented these problems within the frames of the valid laws and implementation in practice. Although the response of the colleagues was not as we had expected, the present participated in the discussion and shows that the stated theme attracted our attention, or the attention of our employers.

Corporate safety as the overwhelming safety and security of a corporation has been attracting attention of the management every day more intensely. One of the reasons is surely the environment in which companies are working today and influences of the global crisis. Uncertainty, insecurity and risks we are exposed to in business activities introduce the corporate and information safety and security as an important strategic question.

It should emphasise that we have very often a wrong concept of corporate safety considering it as a physical and technical security and protection. In the same way we wrongly consider the term information security as the safety of information resources. Quite the opposite, the corporate safety comprises also the security of information system, intellectual property rights, business secret protection, trade mark protection and similar. It integrates the inside and outside safety and security of a company.

It is important to refer to the International Standard ISO (IEC 27001) – Information Safety Management that determines the following general requirement: „The organisation has to establish, implement, apply, maintain and improve the documented system of information safety system within the frames of overall business activities and of the organisation and risks it faces."

The question of the safety of data within the company, i.e. protection against misuse of data by company employees within the frames of corporate safety represents a very important question.

If a corporation likes to regulate this question with its internal by-laws, it has to take into consideration the protection of the privacy of each employee and the interest of the employer within the frames of the legislative frame in force.

How to perform the stated, since the legislative frames has not defined this problem completely and that cannot respond all the requirements present in the environment in which corporations performed their business operations was shown on the example of Ericsson Nikola Tesla.

6. ONE ARBITRATION AGREEMENT AND TWO STATES

Summary: The integrated text can be found on the Association web site

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The beginning of this month has been marked with an arbitration agreement. In Croatia, Slovenia and also within the European Unison institutions. Pahor – Kosor Agreement. November, 2009. The Government of the Republic of Croatia and the Government of the Republic of Slovenia have signed the Arbitration Agreement. Prime Minister Kosor and Prime Minister Pahor, with the counter signature of the Swedish Prime Minister and the President of the European Council Reinfeldt, have recently expressed a range of positive assessments on this historic agreement by two neighbouring states. It seems that only now it is possible to envisage cutting of the Gordian knot made around almost twenty years of the open political and legal issue of demarcation and border dispute between Croatia and Slovenia. Only now open territory issues open between two countries are additionally emphasised with Slovenia, and only now, through the prism of this Agreement can we see the destiny of Croatia with more details with or without further connection to the train towards the EU. At the very moment we can witness an optimistic and exclusive glossary of the international political diplomacy on mutual confidence between two prime ministers and opening of a new European perspective between two friendly countries. Just a little unusual, but we witness sudden and unexpected reconcilable tones of the leaders of Croatian and Slovenian Governments. Political scenery comprising voting procedure for / against acceptance of the arbitral agreement in the Croatian Parliament and the question of the national consensus on solving of open issues with Slovenia comes all of a sudden, as thou the politicians themselves, and not only regular citizens, had not been ready to see more detailed determinations of the content of the Agreement and reached a consideration on possible not only short-term, but also long term consequences for Croatia.

Prior to make any estimation of the possible significance and effects of this Agreement that has been the talk of the complete public and wider society I have sought and read the complete working of the Agreement led by the curiosity of a lawyer. Just a legitimate step. I have been interesting in the real content of the Arbitration Agreement wordings. Governments of two countries have decided to remove the confidentiality mark form the Agreement wordings and it has been publicly available. In that sense there is a question how many people have really considered the content of the Arbitration Agreement prior to entering into any discussions and assessment on the significance of the stated Agreement?

The Arbitration Agreement comprises only 11 articles. During my legal practice, I have witnessed that the size or the quantity does not matter, but what matters is, of course, the quality and the preciseness of the content of each agreement. In fact, it seems to me that what we should aspire to in law, i.e. preparation of legal documents (more precisely agreements and/or contracts) is creation of summarised, clear and precise agreements. Although it is sometimes very hard to reach the motto: „Less is more indeed“. Usually, in the practice, when contracts are analysed and negotiated when one of the contracting parties is a legal person belonging to the Anglo-Saxon legal environment, agreements are very detailed, comprehensive, full of definitions, „limits“, provisions of exclusion of responsibilities and similar. Such agreements require additional legal engagement on negotiations, understanding of the content, preparations of amendments of the working and all the other legal manoeuvres regarding such an agreement. As a rule such agreements are prepared and signed in two language versions. Even Sir Winston Churchill searched for associates and counsellors for his war cabinet who were able to create a clear and brief report and argumentation. He had all the right. Sometimes even brief agreements conceal numerous spaces for various

legal interpretation and understatement. Cautiousness and agreements can be brought under the common denominator.

But, let us go back to the wordings of the Agreement. The Arbitration Agreement in this essence (Article 1 and Article 3) foresees establishment of the International Arbitration Tribunal that will have a task to determine the course of the border between Croatia and Slovenia on the sea and on the land, the junction between Slovenia and the open sea and the regime for usage of relevant sea areas. In international public law the issues of such demarcations have been creating large disputes regarding interpretation and derininton of numerous open issues, and arbitral bodies have been expected to keep their professional immunity to political urgencies of confronted parties.

The Agreement foresees (Article 2) that the Arbitral Tribunal shall have five members; each state shall nominate one member, while the president and more two members (who are recognised experts of international law) shall be nominated by two states by mutual agreement from the list made by the President of the European Commission and Commissioner for extension. In case the states cannot agree, the president and two members of the Arbitration Tribunal shall be nominated by the President of the International Court in den Hague from the stated list. Already that provision of the Agreement (Article 2) has created a range of critics in Croatian political and legal circles. Which is the list of possible members of the Arbitral Tribunal, who is on the list, are they credible, independent and experienced experts of international law, are we on an equal footing with Slovenia since we are not an EU member and Slovenia is, etc.

The Arbitration Agreement determines additionally in Article 4 that the Arbitration Tribunal shall apply international law, i.e. rules and principles of international law for determination of the course of the border on the sea and on the land between the two states, applying the principle of equity and the principle of good neighbourly relations with the aim of reaching of a fair and just solution. From the legal and the political point of view, a very important provision of the stated Arbitration Agreement is expressed in Article 5 where it is determined that „no document or procedure made unilaterally by any of the parties after 25th June 1991 shall have any legal significance for realisation of tasks of the Arbitral Tribunal, neither will be any such document or procedure be binding for any party in the dispute, and it can prejudge in no way any of the decisions. “

Further on, the Agreement regulates briefly issue of Arbitration Tribunal Proceedings (Article 6) and the issue of the legal significance of the Arbitration Tribunal Decision (Article 7) in the sense of definitely binding decision for both parties and in the sense of the judgement representing the final solution of the dispute. The Agreement determines in Article 8 no document unilaterally presented in the negotiations on the Accession to the Community shall have any prejudging influence to the Arbitration Tribunal in reaching of a decision; neither shall it be binding for any party in the dispute. The Agreement in Article 9 determines that both parties shall constraint from any procedure or statement that may influence negatively the Accession negotiations of the Republic of Croatia for Accession to the European Union and the Republic of Slovenia shall remove all the reserves regarding disputable negotiating chapters bound to the dispute in question. In Article 11, the Agreement states that this Agreement shall be ratified by both countries without any delay and in accordance with their constitutional conditions, but also that all procedural terms stated in the Agreement shall apply from the date of signing of the Contract on Accession of the Republic of Croatia to the European Union. And that is all.

The Agreement is supplemented by a common statement of the states signatories of the Agreement on the fact that the Agreement is signed and that both parties shall ratify the Agreement in accordance with their constitutional conditions submitting the Agreement to parliamentary ratification of both states. There is also a short (additional) statement of the Republic of Croatia supplementing the stated common statement „whose witnesses are the Presidency of European Union Council and the United States of America“on so called „non-prejudicing“and that reads that „nothing in this Arbitration Agreement shall not be considered as the consent of Croatia for requirements of Slovenia for the territorial contact with the open sea“. That statement has raised dust in our country in the same way as the issue of legal interpretation of the territorial contact of Slovenia with the open sea, nevertheless there is no doubt that the stated statement has a huge political and legal significance for Croatia. Practically, the Arbitration Agreement does not prejudice solving of the border dispute.

Such a content of the Agreement is legally summarised, but the political and the national significance of the Arbitration Agreement opens stormy debates of the wider society. Well, an arbitration agreement comprising 11 articles that has marked not only „a historical turn“ between the two countries, but also a “win-win-win” situation as it was emphasised in a diplomatic and a business vocabulary by the Prime Minister Kosor, not only regarding Croatia and Slovenia, but also regarding the EU. Is it really so?

Regarding its content and the scope, the Arbitration Agreement has divided Croatian legal experts as well. Professors and members of the Academy, experts for international public law, law of the sea, arbitration (civil procedure law and international private law) have been already expressing their separate opinions on the Arbitration Agreement. There are opinions of a part of experts supporting the Agreement, and a part of those who are challenging and criticizing the Agreement, since this version it is unacceptable without an additional précising of the content and the scope of individual provisions and because it is mostly of the political and legal nature, and in a less extent a procedural legal texts, as they explain it.

It is a fact that the essence of the border dispute is placed in the approach, i.e. in the undisturbed passing of Slovenia towards the international waters. So, there is a dispute between the two opposed parties, the parties have not been able to resolve that dispute amicably for years, and they forward this dispute to the Arbitration Tribunal for resolution now.

From the legal point of view, this agreement is an arbitration agreement defined as an agreement by which the parties forward all or certain of their disputes arisen from certain relationship between them, either contractual or non-contractual. Any arbitration agreement can be made either in the form of an arbitration clause or in the form of a separate agreement. Slovenia and Croatia are here both, contracting parties, but also disputing parties, i.e. opponents in an arbitration procedure. That Agreement influences only those two persons and it is binding only for the contracting parties, in the sense of both, the substantive law and procedural law. The Arbitration Tribunal performs here the judicial function since the proceedings in front of an Arbitration Tribunal are not a trial, and in such a way the path of legal protection / remedies in front of a state court is excluded, i.e. the competency of any state court is derogated. Arbitration tribunals base their authority for performing of the judicial function on the consensual willing of the parties expressed in an arbitration agreement. Arbitration tribunal proceedings have

been developed exactly as a consequence of slow and expensive state court proceedings, and arbitration represents a compromise and an expression of a social solidarity. Arbitration proceedings are also an expression of readiness that the parties in dispute accept solutions that would not necessarily realise their requirements. Cicero had said that parties had gone in front of arbitrators hoping they would not lose everything, but that they had to be ready that they would either win everything. Those are only some of legal characteristics of an arbitration agreement that should be emphasised exactly by lawyers in the context of political ferments to enable better understanding of a legal nature and the sense of this Arbitration Agreement.

Signing the Arbitration Agreement in Stockholm under the lights of the scenery of the European Union has provoked a range of legal and political issues regarding the significance of the content and the consequences of signing of such an agreement for our country. The general public, intellectuals, politicians, legal experts, even church rows are divided. Slovenia and Croatian bishops sharpen their points of view and express opposed statements regarding the Agreement itself and interpret whether the equity principle above the legality principle? Common statements of groups of Croatian intellectuals, individual associations and practically the attitude have been taken whether the Arbitration Agreement is "good or bad for Croatia"? Not only in Croatia, but also in Slovenia. The Arbitration Agreement signed on the „Swedish Table"(the epithet already used by some mass media) has already united Croatian intellectuals who were ardent opponents pursuant their social and professional commitment and orientation by yesterday.

Is this a real agreement or is it a result of political pressures of Croatia bound to Accession to the European Union, denying of a part of Croatian sovereignty, issue of nationality, a document of the "strategic importance for the future of citizens of the Republic of Croatia"as mass media transmit or just one in a range of diplomatic initiatives? Individual Croatian critics of Kosor – Pahor Agreement ask for a national referendum on the Agreement in accordance with the Constitution of the Republic of Croatia, referring to the fact that Croatia has been put under a specific regime of a precedent violating at the same time the principle of the rule of law and that is a try of Slovenian misuse of its position obtained by its membership in the European Union as a political blackmail of Croatia with its own territory for entering into the full membership, legitimisation of the political to the damage of the legal solving of the problem. And the final word will have, as it seems now, the international law and the arbitration tribunal.

WHAT ARE WE PREPARING FOR DECEMBER?

Associating of Association Members on 18th December 2009 in the Croatian Conciliation Association, Teslina Street 1/1 – you will be informed in more details in the invitation we will send you in December.

Activate yourself and contribute your and our Newsletter – as well as the web site.

In Zagreb, November 2009

Association of Corporate Lawyers

www.udruga-korporativnih-pravnika.hr