NEWSLETTER NO 24.
of the Association of Corporate Lawyers

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www.udruga-korporativnih-pravnika.hr

WHAT WAS HAPPENING DURING JANUARY

1. **A seminar on the new Labour Act has been hold**
2. **Activities within the frames of cross border cooperation programme Croatia – Bosnia and Herzegovina 2007 – 2013 have been continued**
3. **New Labour Act**
4. **How important it is to read carefully every amendment of the law**
5. **Administrative contract – a new instrument of Croatian legislature**

1. A seminar on the new Labour Act has been hold

The Seminar with the topic of the new Labour Act was hold in the Association premises on 21st January 2010 at 13:00 p.m. Lecturers of the Seminar were Viktor Gotovac, Labour and Social Law Branch of the Faculty of Law of Zagreb, Jesenka Šojat, a judge of the Municipal Court and Aida Marijan, the director of Legal affairs and representation in company KONČAR – ELECTRICAL INDUSTRY, Inc.

2. Activities within the frames of cross border cooperation programme Croatia – Bosnia and Herzegovina 2007 – 2013 have been continued

The Association compiled and submitted a draft project within the frames of cross border cooperation programme Croatia – Bosnia and Herzegovina that has being performed during the time period from 2007 to 2013 and that is aimed to stimulate cooperation between Croatia and Bosnia and Herzegovina. The programme is supported by component II (cross border cooperation) of the EU "Instrument for Pre-Accession assistance" (IPA). The aim of the programme is supporting of establishment of cross border networks and partnership for development of common cross border activities to revitalise economy, protect environment and increase social cohesion of the area covered with the programme.

The title of the draft project is: Role of wind farms in the promotion of entrepreneurship. The Administrative check up of our project has been in due course and we have been invited to supplement our documentation. We expect the final results in April.

3. New LABOUR ACT (Official Gazette "Narodne Novine" No. 149/09)

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After almost two years of negotiations and suspense the **new Labour Act** was finally approved by the Parliament, published in the Official Gazette "Narodne Novine" No. 149/09, and came into force on 1st January 2010.

Within the frames of pre-accession activities of the Republic of Croatia aimed at the accession to the European Union, and with the aim of completely complying with additional measure for opening of negotiations regarding the negotiation chapter 19 (Social policy and employment), the Government of the Republic of Croatia adopted the Action Plan for harmonisation of legislature and creation of necessary administrative capacities for adoption and implementation of acquis communautaire of the European Union on 30th August 2007 and on 4th April 2008 the negotiation principles of the Republic of Croatia were adopted in that chapter. In accordance with the dynamics of legislative activities determined in the stated documents, the legislative initiative has been started for amendments of the Labour Act with the aim to harmonise laws with directives, or in other words, to implement necessary additions, clarifications or redefinitions of individual legal institutes.

When the wordings of the new law were being prepared, the whole acquis communautaire was taken into account, or in other words those directives governing working hours, working conditions, participation of employees in management, but also directives regulating the scope of freedom of movement of employees, freedom to render services, protection of basic human rights and equal possibilities, as well as in the area of implication of obligations taken over through international agreements and conventions the Republic of Croatia is a party of. In addition to harmonisation with acquis communautaire, labour law institutes were also harmonised vertically with already implemented national legislature in the area of retirement insurance, protection of human rights, equality of sex and parental rights, first of all because a lack of horizontal harmonisation of regulations leads into legal insecurity and prolongation of court proceeding duration.

The recently adopted Law governs basic issues of individual and collective employment contracts, the issue of surveillance of implementation of labour regulations, offence responsibilities and transitional period from the existing to the new regulations, as well as all other issues aiming at full compliance of the labour legislation.

The cease of validity of Regulation on jobs prohibited for employment of women was prescribed and implementation of the Rules on Labour Card was defined by the date of accession of the Republic of Croatia to the European Union (Article 298).

On the date of the accession of the Republic of Croatia to the European Union, Labour Card will not be a public document any more, and its issuing will be stopped. The manner of procedure with the Labour Card and return of Labour Cards to employees were prescribed for Employers (Article 299).

Procedures for achievement and protection of rights of employees that had been started before this Law came into force, will be finished pursuant provisions of the Labour Act that were valid before the date when the new Law came into force, unless the right determined by the new Law is not more favourable for the employee (Article 297).

Employers are obliged to adjust their rules of procedure and/or bylaws with provisions of the new Law within the time period of six months from the date the new Law has come into force and the Minister in charge of issues of labour shall pass regulations for implementation of the new Law within the time period of six months from the date when the new Law has come into force; by the stated date the existing rules of procedure and/or bylaws in the area of labour shall apply. The Minister in charge of labour issues shall pass the regulation for appropriate implementation of provisions from Chapter XVII, Points 4, 5, 6 and 7 of the Law within the time period of six months from the date those provisions come into force.

3. How important it is to read every amendment of the law carefully

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The criminal offence of illegally received money fencing was modified by the Law on Amendments of the Penal Law, Article 48, of 14th December 2000 in such a way that in Article 279, Para 1, a full stop was put after the word “criminal offence“ and the rest of the sentence was deleted. That Amendment deleted the part of the sentence that read “for which imprisonment up to five years can be sentenced or for a criminal offence committed by a group or a criminal organisation, *the imprisonment from six months to five years shall be sentenced“.* Consequently, the legislator widened the circle of possible committers of the above described offences and deleted the penalty sanction for the above described activity. Para 2 of the same Article was not changed by this Amendment, but forbidden proceedings described in this Para is being sanctioned by the penalty from Para 1, meaning that such a penalty after implementation of the stated amendment does not exist any more.

If we consider the above stated case within the principle of legality, we can make the following conclusion. The principle of legality does not refer to the description of the criminal offence only, but to the prescribe penalty as well. Unless the penalty exists, the committer cannot be proclaimed guilty for the committed criminal offence. That is clearly determined in Article 2, Para 2 of the Criminal Law according to which “no one can be punished for an act for which the law had not prescribe the type and the measure that can be used for punishing of the committer before the act was committed“.

Although it is allegedly a “clear error of the legislator“, (Accidentally? Or on purpose?), it has taken the legislator four years, six months and nineteen days to correct such an omission. The correction was published in the Official Gazette “Narodne Novine” No. 84 of 11th July 2005, in the manner that the General Secretary of the Croatian Parliament gave the corrigendum defining that Article 48 of the Law on Amendment of the Penalty law should read as follows “In Article 279, Para 1 after the words: “crime“ a comma shall be inserted, and after the words “for which an imprisonment of five years can be sentenced or crime committed by a group or a criminal organisation” should be deleted. So only with the stated intervention of the legislator the criminal sanction was returned back...

Although legal theory understands that the term “corrigenda of the law” has also the effect of the correction to the earlier time, that is beginning of the moment when the law that is being corrected came into force, and not from the moment when the correction has been published, it is not possible to neglect the provision of the legality principle. Namely, the purpose of the legality principle is the legal security that understands that every citizen who performs an activity has right to know whether that activity is punishable or not at the moment he/she performs it; consequently, if it has been introduced to citizens after the

novel came into force on 14th December 2000 that money laundering was not unpunishable any more, meaning that before that very moment citizens could laundry money without punishment.
All the stated opens a range of other issues on justification of activities that were possibly preformed, but we are going to leave this issue open for possible future contemplations.
What we, lawyers-practitioners, can do is to monitor carefully and to read clearly all amendments to laws to prevent waiting for as long as five years for necessary interventions and initiate procedures whose legality is very questionable in the meantime?!

Source: P. Novoselec: "Court Practices"
Croatian Annals for Penalty Law and Practice (Zagreb), Vol. 13, No 1/2006, p.p. 335-343

4. Administrative Contract – a new instrument of Croatian legislature

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The new General Administrative Procedure Act (official gazette "NN" No. 47/09) (further on referred to as the "GAPA") that came into force on 1st January, 2010 introduces a new legal institute to the Croatian law – Administrative Contract prescribed by stipulations of Articles 150 to 154.
The legal definition of the Administrative Contract is that it is a contract on performance of rights and obligations determined in the resolution solving an administrative issue and that is made by and between an administrative body and another party, if entering into such a contract is prescribed by the law.
Regarding the parties of an Administrative Contract pursuant the Croatian GAPA, one party has to be an administrative body passing the resolution for the performance of which the Administrative Contract is being entered into.
Further on, the Croatian legislator has selected the concept on the basis of which the Administrative Contract can be made only due to realisation of rights and obligations determined in the resolution. That means that an administrative procedure has to precede any Administrative Contract showing clearly its subordinated position of sub-contracting.
Pursuant provisions of the Croatian Administrative Procedure Act, the Administrative Contract can be made only if it is expressly prescribed by a special law, and in such a way possibilities of realisation of the administrative contract institute depends on special laws.
Regarding Administrative Contracts, the Croatian Administrative Act governs only the most basic issues, while specialties of those contracts in different administrative areas will be governed by special laws. If special laws do not prescribe making of an administrative contract, it shall not be entered into.
The Croatian Administrative Procedure Act limits entering into administrative contracts in the described manner.
Any Administrative Contract shall be made in written form and in its wordings it shall not be contradictory to the sentence of the resolution and obligatory regulations or public interest and it shall not be made to the damage of any third persons. Therefore if the content of any Administrative Contract has a legal effect to the third persons' rights, those third persons are to give their consent to such a contract to make it valid.
The Administrative Contract is null and void if it is contrary to the resolution for which performance it has been made, and due to any other reasons of being null and void

prescribed by the General Obligation Law (Official Gazette "Narodne Novine" No. 35/05 and 41/08). Nullity of an Administrative Contract shall be determined by the Court in charge of administrative disputes on the basis of a lawsuit of a party (addressee of the administrative act) or an administrative body. Any null and void contract shall not have any legal consequences.
Conditions for amending of any Administrative Contract shall be determined by an administrative body protecting the public interest, but only in such an extent that is necessary to limit endangering of parties' rights in the minimum extent possible. A physical person shall have right to indemnification.
An administrative body shall be authorised to terminate the contract unilaterally if the other party does not fulfils obligations it has taken or if it is necessary due to removal of a hard and direct peril for life and health of people and for public security. An administrative body terminates an Administrative Contract with a resolution in which it shall list and explain reasons for termination and determine the damage due to protection of rights of the other party. The legal remedy for illegal termination of the Administrative Contract is provided for in an administrative procedure.
If the administrative body that is a party of an Administrative Contract does not fulfil its contractual obligations, the other contracting party can file an objection and ask for indemnification. That is a devolutive legal remedy – it is stated to the body in charge of supervision of the administrative body with which the party has entered into the Administrative Contract. Each objection shall be resolved by a decision and an administrative procedure shall be initiated against it that is within the jurisdiction of a specialised administrative court.

Administrative Contracts in the area of concessions

The main characteristics of the Law on Concessions (Official Gazette "Narodne Novine" No. 125/08) in accordance with which a contract on concession can be considered an Administrative Contract are:

- Notice on the intention on providing of an concession that comprises all legally relevant data; on receipt of offers, the procedure on selection of the most favourable offer will be performed applying criteria prescribed by the law;
- Concession providers shall always be administrative bodies and concessionaries legal or physical persons of the private law;
- The subject of a Contract on Concession is always of public interests;
- The decision on selection of the most favourable concessionary represents an administrative act; and
- Every Contract on Concession shall be in writing.

Administrative Contracts in the area of public procurement

The main characteristics of the Public Procurement Law (Official Gazette "Narodne Novine" No. 110707 and 125/08) in accordance with which a contract made on the basis of the performed public procurement procedure can be considered an Administrative Contract are:

- The Employer is always a public body or a trading company in which the public employer has a prevailing influence, and
- The decision on selection of the most favourable bidder represents an administrative act that is passed pursuant special procedural rules.

Nevertheless, the Public Procurement Law comprises also provisions that do not contribute to the possibility of considering a contract made on the basis of a performed public procurement procedure as an Administrative Act, and those provisions are:

- A contract can be made also on the basis of acceptance of a bidder's offer in case the validity of the offer has expired at the moment when the decision becomes

enforceable due to reasons the consent of a competent body has been waited for , and

- Provisions of the General Obligation Law apply to responsibilities of contracting parties representing a significant deviation from the administrative contract concept.

Therefore Public Procurement Contracts have characteristics of Administrative Contracts and well as Civil Law Contracts. The practice will certainly recognize the stated situation as unsustainable probably resulting in amendments of special laws.

Administrative Contracts in the area of Public – Private Partnership

It is characteristic for the Public – Private Partnership Law (Official Gazette "NN" No. 125/08) that it prescribes subsidiary implementation of the Public Procurement Law and the Law on Concessions. That opens further questions and probably requires amendment of the special law.

All three stated laws direct to extremely wide application of «exceptions» to govern processing issues in certain administrative areas, and especially regarding Administrative Contracts.

WHAT ARE WE PREPARING FOR FEBRUARY?

1. Seminar Amendments on the Law on Trading Companies. Time and date of the lecture to be announced later on.

2. Round table with the topic on the new Labour Act – it will be organised depending on the interest of the seminar organised in January.

Be active and take part in our and your Newsletter – and website

In Zagreb, January 2010

The Association of Corporate Lawyers

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