New Year's Eve
NEWSLETTER NO 45
of the Association of Corporate Lawyers

WHAT WAS HAPPENING DURING NOVEMBER AND DECEMBER, 2013

1. **Presentation of ECLA Member from Finland – Finish Industrial Lawyers (Teollisuuslakimiehet)**
2. **Contribution to Round Table Discussion – Croatian Insolvency Law**
3. **Seminar of Association of Lawyers from Banking Sector of Bosnia and Herzegovina**
4. **News from ECLA Newsletter: After ECLA Forum – Interview with Sergio Marini on Corporate Lawyer Ethical Code**
5. **New Laws on Physical Planning, Construction and Civil Engineering Inspection**
6. **Law Faculty Student Practical Work**

Dear Colleagues,

1. We are representing you an ECLA Member Organisation from Finland – Finish Industrial Lawyers (Teollisuuslakimiehet)

Julia Ormio, the president of Finish Industrial Lawyers

The Organisation was established in 1955 with the main aim to found a forum for gathering of corporate lawyers and exchanging information on Finish and foreign legislation and economic development.
During those years it was not strange that every company employed only one lawyer and therefore the Forum of Finish Industrial Lawyers was the only place where colleagues could associate.

Today the Organisation works according the same concept, but teams are larger and information more available. A novelty is also a larger number of lady colleagues and that was not the case at the beginning.

The first lady joined the organisation at the mid 1970-ies.

Maintaining the tradition, the organisation has kept the original name although only a smaller part of members represents the traditional industrial sector. The organisation has become well-known and popular and its members are proud of its roots in the Finish industry.

The main aim of the Organisation is gathering and linking, as well as exchange of experiences. Finally, the most of the things corporate lawyers do today is not the stuff learnt at the Law Faculty. Therefore seminars that are being organised are very practical and they usually end with very vivid discussions. Topics represent new challenges brought about by the globalisation process.

More recently members have tried to connect with colleges from abroad as much as possible, and it has been especially emphasised when they have found out benefits of ECLA Membership. It is natural that the issue of the legal privilege is very important issue within ECLA, but to be a part of the European network of in-house lawyer colleagues is even more important. One of especially interesting things has been a visit to AIGI (Italian Corporate Lawyer Association) in Milan. It is always a benefit to say hello to someone you have met before.
(Web: www.teollisuuslakimiehet.org)

2. Contribution to Round Table Discussion – Croatian Insolvency Law

The Round Table – Croatian Insolvency Law was held in the premises of the Croatian Academy of Arts and Sciences on 14th November, 2013. Introductory speech presenters and speakers were well prepared to participate in the discussion. Prof. dr. sc. Jasnica Garašić from the Law Faculty of the University of Zagreb gave a complete presentation of deficiencies of amendments to the Bankruptcy Law of 2012. In her speech, Davorka Huljev, a bankruptcy administrator, pointed out the legal position of commissioners in the pre-bankruptcy settlement procedure, while dr. sc. Jelena Čuveljak, a judge of the Commercial Court of Zagreb, talked about the possible competition between the pre-bankruptcy settlement and the bankruptcy procedure. These are two points of view of practitioners and the practitioners who have a role of insolvency procedure bodies. Therefore we would like to give our contribution to the discussion of practitioners, but from the point of view of a creditor.
Both, dr. sc. Jelena Čuveljak, a judge of the Commercial Court of Zagreb and Ms Davorka Huljev discuss about the situation from the Law on Financial Operation and Pre-Bankruptcy Settlement (Official Gazette of the Republic of Croatia No 108/12, 144/12, 81/13 and 112/13) when an entrepreneur is insolvent and in addition to prescribed payments unnecessary for ordinary business operation, it can effect other payments as well from the moment of opening of the pre-bankruptcy settlement procedure to the moment of achieving of the pre-bankruptcy settlement with the prior written consents of pre-bankruptcy settlement commissioners. The experience has proved that the supervision of the debtor's payments should be detailed and complete and it is very hard for large entrepreneurs. Besides, when the entrepreneur asks for consent to effect other payments in addition to payments prescribed by the law, it is very hard to assess the legitimacy of such payments. Dr. sc. Jelena Čuveljak, a judge of the Commercial Court of Zagreb states that there has been no case up to now that the pre-bankruptcy settlement is stopped because the entrepreneur has been effecting payments contrary to the compulsory legal provisions. In addition, it has been also noticed that no discussions have been made about permissible payments in front of the Financial Agency and therefore it is not clear in what manner controls have been performed and whether the stated payments have been affected in accordance with the law.
Therefore she considers that such legal solutions open possibility of abuse by pre-bankruptcy settlement debtors, because the over indebted legal person is enabled to make new decisions about payments without a control and these decisions can be harmful to other pre-bankruptcy settlement creditors. In practice the described situation represents a violation of the basic principles of the pre-bankruptcy settlement, more precisely the principle of the equal treatment of all the creditors and the principle of the treatment in good faith.
Regarding the Law on Financial Operation and Pre-Bankruptcy Settlement it is important to emphasise the fact that only the first part of the Law, the part that is connected to the financial operation, was adopted with the aim of harmonisation of rules and regulations of the Republic of Croatia with the acquis communitaire of the European Union, i.e. more precisely with the Directive 2011/7/EU of the European Parliament and Commission of 16th February, 2011 on the combat against late payments in business transactions, while the second part of the Law connected to the pre-bankruptcy settlement procedure does not represent an issue of harmonisation of rules and regulations of the Republic of Croatia with the acquis communitaire of the European Union. The practice has proved that provisions bound to the financial operation are not doubtful during implementation, but exactly the provisions bound to the pre-bankruptcy settlement procedure. The fact that all the amendments also refer to provisions bound to the pre-bankruptcy settlement procedure supports the statement as well.

Regarding all the stated, we would like to point out that during adoption of the Law on Financial Operation and Pre-Bankruptcy Settlement and during its later amendments, the legislator has not taken big entrepreneurs into consideration at all. Today it can be seen on the Financial Agency web site that out of the total number of legal persons, i.e. trading companies, over which a pre-bankruptcy settlement procedure has been started, a significant number can be considered as big entrepreneurs on the basis of the criteria of the Accounting Law (Official Gazette of the Republic of Croatia No 109/07 and 54/13). What is the problem? The Law on Financial Operation and Pre-Bankruptcy Settlement starts from the supposition that there are unpaid invoices for due and mature liabilities of the pre-bankruptcy settlement debtor at the moment of opening of the pre-bankruptcy settlement procedure and that those liabilities are only debtor's liabilities. More precisely, the legislator has not taken into consideration situations when the pre-bankruptcy settlement debtor is a big entrepreneur and also a party of a consortium and/or participant in the performance of large projects that can be in various phases from public bidding in public procurement procedures or any other domestic or foreign public bidding.

When a domestic public bidding is in question, we have to start from existing provisions of the Public Procurement Law during the bidding phase and consideration of entering into a consortium with another bidder. Pursuant stated provisions, the Employer can, among other things, disqualify a bidder from the public procurement procedure if a bankruptcy or a pre-bankruptcy settlement procedure has been initialled over the stated bidder, if it undergoes a winding up procedure or if an above stated procedure has been initialled over it to determine conditions for official initiation of the bankruptcy procedure, pre-bankruptcy settlement procedure of winding up procedure. An amendment draft to the Public Procurement Law is under the procedure at the moment proposing deletion of the pre-bankruptcy settlement as a reason enabling an employer to remove a bidder from public procurement procedures.

Independently from the announced amendments of the Public Procurement Law that would enable debtors in a pre-bankruptcy settlement procedure to offer and to contract and to consolidate them financially, initiation of a pre-bankruptcy settlement procedure opens a range of problems for their partners with whom they are in a consortium. First of all, we have to think about provisions of the main contract with the employer that usually comprises a provision on the employer's right to momentary termination of the contract with the contractor (consortium) in case of a bankruptcy, winding up or any of the procedure of settlement with its creditors. Construction contract agreements arrange as a rule longer (several-year-long) performance terms and the subject of the contract has a huge value. In such a situation, both the employer and the contractor have the interest to avoid termination of the contract. Exactly due to the risk of possible, but very certain decision on termination, all the burden of responsibility for the whole project relies on the member of the consortium over which a pre-bankruptcy settlement procedure has not been initialled. Regardless the fact whether such a consortium member succeed to convince the employer that the consortium is able to fulfil the contract regularly despite the initialled pre-bankruptcy settlement procedure or the employer does not ask such a question, but the consortium member over which the pre-bankruptcy procedure has been initialled does not fulfil its obligations regularly due to its own insolvency. We would like to note especially that the described risk lasts during all the time of performance of works from the contract made with the employer. The principle of joint liability towards the employer requires a maximum engagement of each consortium member not only financially, but also regarding the performance of works. In the contrary, a consortium member over which the pre-bankruptcy settlement procedure has not been initialled is forced to enter into risks of over bridging of difficulties of the performance of the contract such as non payment of workers by the pre-bankruptcy settlement procedure debtor that is also a consortium member, non payment of subcontractors by the pre-bankruptcy settlement procedure debtor resulting in a slowed down and low quality performance of works. The final target is a successful and timely taking over of works by the employer.

Referring to payments effected by the employer to consortium members, as well as between consortium members, experience obtained by the time being shows that the performance of a contract during the pre-bankruptcy settlement procedure is treated as an ordinary business operation under the condition that the pre-bankruptcy settlement commissioner gives his/her consent. As we have stated above, the pre-bankruptcy settlement procedure commissioner is

the person who gives consent for payments necessary for the ordinary business operation in addition to payments expressly stated in the Law as necessary for the ordinary business operation from the initiation of the pre-bankruptcy settlement procedure. We would like to repeat once again that the performance of the contract by the pre-bankruptcy settlement debtor and payment of obligations based in that contract during the pre-bankruptcy settlement procedure are not expressed in the law as necessary for regular business operation. Therefore, they depend on the consent given by the pre-bankruptcy settlement commissioner. The member of the consortium over which the pre-bankruptcy settlement procedure has not been initialled is also exposed to the risk of making decisions by the pre-bankruptcy settlement commissioner on the fact whether the issue at question belongs to the ordinary business operation or not without any predefined criteria. An additional hardening circumstance is the fact that there is no time period within which the pre-bankruptcy settlement commissioner has to give his/her consent and there is no possibility of appeal to his/her restraint from the decision. And all the more so, the pre-bankruptcy settlement debtor does not have any influence on issuing of consents. Consequently, the performance of the consortium agreement and the main contract depends on the third party that does not participate in the project.

All the stated above applies similarly to the domestic public bidding not belonging to the public procurement procedures and to foreign public bidding where the employer secures itself in the main contract with the same contractual stipulations and the pre-bankruptcy settlement procedure opens the same dilemmas.

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3. Seminar of Association of Lawyers of Banking Sector of Bosnia and Herzegovina

Organised by the Association of Lawyers of the Banking Sector of Bosnia and Herzegovina, a one-day-long seminar was held in Sarajevo on 13th December, 2013. The topic was Insurance of Receivables pursuant the Law on Property and the experience of the comparable law. Topic wholes referred to novelties of the Mortgage Law implemented by the Property Law, insurance of receivables in the Croatian law, land debt and non-accessory insurance and refinancing means. Lecturers were prof. dr. Meliha Povlakić and Darja Softić Kadenić, professors from the Law Faculty of Sarajevo.

The main aim of the seminar was a more detailed introduction to novelties implemented by the Property Law of Bosnia and Herzegovina regarding the mortgage law, a completely new mean of insurance that was the land debt and arrangement of the comparable law, as well as the possibility of usage of non-accessory insurance means. In her lecture on mortgages in Bosnia and Herzegovina, prof. Povlakić pointed out that the protection of the debtor was the most important at the moment, and not the protection of the creditor as it used to be earlier, that the principle of priority had to be defined in accordance with the moment of creation of the mortgage and that moment also depended on the type of the mortgage, that regarding the collecting of debts of the mortgage creditor the mortgage creditor had to select the object of the execution and similar. Regarding the security of the mortgage right, prof. Povlakić pointed out a significant property regarding the principle of indivisibility and deviations from that principle by alienation of a part of a real property having the value lower than 1/5 of the claim (she gave an example of selling of one flat during the construction of 20 flats). Prof Povlakić's lecture drew the attention of the largest number of participants. She talked about the topic of the lend debt. It was a new legal instrument implemented by the Property Law of Bosnia and Herzegovina that had been created on the model of the legislation of Germany and Switzerland. It was about the mortgage without a claim, i.e. that the right to collection of debts from the value of a real estate did not suppose an existence of a claim. The lend debt was a unilateral legal transaction that was not time limited and it was initialled by a registration into the Land Registry in such a manner that the same legal owner was registered on the Sheet B and the Sheet C of the Land Registry File. Types of land debt were ownership land debt and not ownership land debt, land debt with a letter and separated and insurance land debt.

Prof. Softić Kadenić gave a lecture with the topic of the maximum mortgage, a new old institute in the Bosnia and Herzegovina. She instructed the present that the maximum mortgage compared to "classical" mortgage was used for insurance of legal relationships within whose frame there had not been receivables yet, but which had the possibility of their creation. When there was a maximum mortgage, the highest (maximum) amount to which the insurance could reach had to be registered in the Land Registry. The maximum mortgage was suitable for insurance of relationships liable to changes and it was the dominating type of the mortgage for insurance of payables having an uncertain origin and value (e.g. damage) for frame loan contracts and for loans with changeable interest rates. When it was compared to the "classical" mortgage, the maximum mortgage was accessory regarding the legal transaction, i.e. a legal base had to be present as well as the maximum value had to be defined, it had to be about receivables that can be replaced with other receivables and that can be transferred without a mortgage and the termination of individual, even if all the receivables had not resulted in the termination of the mortgage.

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4. **News from ECLA Newsletter: After ECLA forum – Interview of Sergio Marini on Ethics of Company Lawyers**

Ethics - hot topic thoroughly discussed on ECLA Forum. Sergio Marini, ECLA Vice President, Shell Regional Senior Legal Manager, Milan, leader of the ethical and independence panel on ECLA Forum, elaborated on the Ethical Code for European company lawyers

Why was the Code of Ethics for European company lawyers needed? S.M. I think that one of the reasons why ECLA exist is to make the company lawyers in Europe feel like ONE entity. The stronger the feeling, the more are the chances that we have to see our requests recognized at European level, we know that. I believe that the best way to be and feel part of our association is to share values, so why not to try to write down the ethical principles that a European company lawyer is asked to share. That is what I tried to do.

What are the sources of your work? S.M. The starting point was a comparative study of the existing Codes that most of the organizations that are part of ECLA have adopted. None of the principles that can be found in the ECLA code is contrary to any national code and, at the same time, every principle contained in the ten articles is shared by at least two national codes. As I have had already the chance to say, the comparative study has been particularly interesting because it is evident how each code reflects the culture and recent history of its country. I have tried to pick every shared value to make a document that reflects our common professional believes and feelings

How can the Code of Ethics be used in the future? S.M. I believe it can be a reference for the national associations, certainly not an obligation or a constraint. Each national association must have its own code of ethics which CAN be inspired by the ECLA Code of Ethics and hopefully not be in contrast.

Will it prevail over the national Codes? S.M. Absolutely not, it wants to be a kind of summary of the values we all share on our profession despite the country we come from. It may "influence" the national code in a positive way if it will be the case, but not prevail.

***Sergio Marini**, Shell Regional Senior Legal Manager, is an Italian lawyer with over 20 years of experience both in the construction and in the energy sector. Since 1995 he is a member of AIGI (Associazione Italiana Giuristi d'Impresa) and, at present, a member on its Board of Directors. Since 2008 he is Vice-president of ECLA.*

ECLANEWS, 10/13.

5. New Laws on Physical Planning, Construction and Civil Engineering Inspection

A conference with the topic "New Laws on Physical Planning, Construction and Civil Engineering Inspection" organised by Novi Informator d.o.o. was held in Sheraton Hotel in Zagreb, on 16th December, 2013. An especially large number of participants who gathered at the conference was not a surprise taking into consideration the importance and the significance of topics discussed at the conference.

The Minister of Construction and Physical Planning of the Republic of Croatia, **Ana Mrak-Taritaš,** gave an introductory speech **on reasons for passing of new laws on physical planning, construction and civil engineering inspection.** She listed numerous reasons for passing of those laws. As the most important reasons she listed were numerous deficiencies and the understatement of the existing Law on Physical Planning and Construction and harmonisation of the Croatian legislation with the European Union rules and regulations.

The Minister of Construction and Physical Planning of the Republic of Croatia, **Ana Mrak-Taritaš,** talked also about the second topic referring to novelties brought about by the **Law on Physical Planning.** Since it was a completely new law, and not an amendment of the existing one, it was clear that there were numerous changes. Therefore she addressed only the most important. Pursuant the new law, permits could be issued directly from physical plans. Decreasing of the issue of location permits to the lowest possible measure represented an important novelty. (Location permits would be issued only in the following cases: 1) for an exploitation filed and construction of mining plants and facilities having the function to exploit and warehouse mineral raw materials, 2) for interventions in the space that was not considered as construction pursuant special rules and regulations arranging the construction, 3) for stage and/or phase construction of a building and 4) for construction on a land, i.e. on a building for which the investor had not resolved the property law relationships or for which an expropriation procedure should be taken). She also specially emphasised the importance of the Physical Planning Information System (**ISPU**) that should comprise all relevant information on disposal of the space and that was linked with the cadastral plan, the land registry and the personal identification numbers of owners. An initiative had been made to make the access to public information and data from the area of physical planning simple, quick and free for everyone.

The following topic was the new **Construction Law** presented by the Head of the Legal Sector in the Ministry of Construction and Physical Planning, **Josip Bienenfeld**. Changes were various in that area as well. The stated law introduced Directive 2010/31 of 19/05/2010 on the energy efficiency into the domestic legal system in such a manner that all the issues bound to the energy features of buildings were arranged by one law. Pursuant the new law, the construction permit became a public act of the government body on the basis of which the construction of a building could be initialled. The construction permit would be valid for **3 years** from the date of its legal validity and the investor had to register the construction site to the construction administration at least **8 days before beginning of works**. Terms for completion of buildings were also defined and they depended on the group to which the certain building belonged. It was also noted that the payment of the public utility fee and the water management contribution would not represent a precondition for issuing of construction permits any more, but they should be paid by the investor when the construction permit became.

The third topic was the new **Law on Civil Engineering Inspection** presented by an assistant to the Minister in the Ministry of Construction and Physical Planning, **Davorin Oršanić**. He pointed out an increase of authorities of public utility order keepers. Pursuant the new law they would be in charge of issuing of decisions on the obligation of exposing of the energy certificate, finalisation of the outside appearance of buildings and similar.

The civil engineering inspection would proceed in the following manners:

1. If someone built outside the area foreseen in the plan, an inspector should inspect the construction site and issue a decision on demolition not later than 8 day after the site visit;
2. If someone built inside the area foreseen in the plan, but without necessary permits, the inspector would make a decision prescribing the tem for obtaining necessary permits and defining a fine.

The topic **Registering Procedure into Land Registers pursuant the New Construction Law** was presented by the Head of the Land Registry Department of the Municipality Court of

Sesvete, **Ana-Marija Končić**. At the very beginning of her presentation, she pointed out her own opinion that stipulations of the new Construction Law that arranged registering of buildings into the cadastral operating documents and the land register, as well as entrances and notes in the land register, should be praised because they brought a complete resolution for issues that had been opened by that moment. She emphasised that pursuant stipulations of the new Law, the cadastral office recorded every building in the cadastral out of official duty when the licence for use was issued for that building. (Pursuant the older regulation, that was done when requested by the client). Regarding registration of a building into the Land Register it was stipulated that the cadastral office submitted the notice that the licence to use was enclosed stating the construction authority that had issued the licence, its class, registration number and the date of issuing together with documents prescribed by special rules and regulations to the competent court out of official duty. On the basis of the stated, the Court would put a notice in the deed of title that the licence to use was enclosed when the building was evidenced in the cadastral operation office (stating the title of the authority that issued the licence, its class, registration number and the date of issuing). She also emphasised a very important fact since courts did not have sufficient expertise for accurate estimation of the construction act or act on the usage of the building, such notices represented only the proof of registering of a document and not the proof on the legality and usability of the building. That meant that it relived courts from the responsibility from the attitude that registration of a building into the land register meant at the same time that the building was legal and usable.
The last topic **Financing of the Construction of the Public Utility Infrastructure and Public Utility Contribution** was presented by a senior administrative counsellor for legal affairs of the County of Istria, **Desa Sarvan**. The New Law on Physical Planning kept the existing legal solutions bound to the financing of construction of the public facility infrastructure, explained and defined in more details. The presenter thought that there was no reason to limit physical persons who planned to construct or finance construction of the public utility infrastructure, but it was important to define precisely the contents of the contract stipulating responsibility of parties in such projects. She pointed out that the most important issue for conclusion of stated contract was definition of the value of mutual performance – the value of works on construction of the public utility infrastructure facilities at one hand and the level of financial means foreseen for financing the construction that could be returned to the investor or set off with the public utility contribution on the other hand. That issue was important because contractual liabilities had to be balanced (in accordance with the General Obligation Law) with the aim to avoid damaging of any of contractual parties or to avoid the situation in which one contracting party could have some special benefits. Therefore the presenter considered that the law should define rights and obligations of contractual parties and the contents of those contracts in more details to avoid disputes and remove possible doubts.
Conclusion: Since novelties brought by those three laws were numerous, only some of the most important were briefly pointed out in that presentation. Every of new laws should be carefully studied to review all the novelties and the presenter drew our attention to the Official Gazette of the Republic of Croatia No 153/13 where all three laws were published.
Prepared by: Hrvoje Sokolić, LLB, Končar – Power Plant and Electric Traction Engineering Inc.

6. Law Faculty Student Practical Work

In accordance with the Cooperation Agreement made with the Law Faculty of the University of Zagreb in 2008, Ivana Gabrić, Iva Kuten and Iva Dobrić, students of the fifth year and Sonja Zibar, a student of the fourth year of the Law Faculty of Zagreb performed their student practical work in the company KONČAR – ELECTRICAL INDUSTRY, Inc. in December, 2013. During three weeks of their practical work they were introduced to activities of the legal department of the company and individual legal areas dealt by company lawyers. They also attended a course for Končar trainees where they were introduced to the organisational charter of the Končar Group and the production programme of individual Končar Group companies.

In Zagreb, December, 2013

Association of Corporate Lawyers
www.udruga-korporativnih-pravnika.hr