NEWSLETTER NO 9.
of the Association of Corporate Lawyers

WHAT HAS BEEN HAPPENING SINCE PUBLISHING OF THE LATEST NEWSLETTER AND DURING SEPTEMBER?

1. On 29th September, the Association Presidency Meeting was held in the premises of the company "Konstruktor" in Split. A member of the Presidency, being at the same time a Member of the Managing Board of "Konstruktor", Mrs. Meri Soko, together with her team of lawyers, who are members of our association, proved to be an excellent host.
2. On 5th September 2008, Mrs. Gorana Aralica Martinović, the deputy president of the Civil Procedure Department of the Commercial Court of Zagreb gave a lecture with the topic: **Civil procedure course, interim measures and the main hearing with a special review of amendments of the Civil Procedure Law from July 2008,** within the frames of cooperation with the Commercial Court of Zagreb.
3. From 29th to 30th October, the Association members were present at the In-house Counsel Conference 2008 in Brussels. More details to be expected in the next Newsletter.

1. LECTURE – CIVIL PROCEDURE COURSE, INTERIM MEASURES AND THE MAIN HEARING WITH A SPECIAL REVIEW OF AMENDMENTS OF THE CIVIL PROCEDURE LAW FROM JULY 2008

On 5th September, **Mrs. Gorana Aralica Martinović, the deputy president of the Civil Procedure Department of the Commercial Court of Zagreb** gave a lecture to Members of the Association of the Corporate Lawyers having the topic: **Civil procedure course, interim measures and the main hearing with a special review of Amendments of the Civil Procedure Law from July 2008,** that are to be implemented as of 1st October, 2008.

The presentation that is published at the Association web site (http://www.udruga-korporativnih-pravnika.hr/dogadanja.htm) summarises the most important changes and their roles in individual phases of the civil procedure, while this report emphasises some of novelties especially subrayed by judge Aralica Martinović.
Judge Gorana Aralica Martinović emphasises that during the preliminary examination of the statement of claim, the Court examines competency, jurisdiction of the domestic court, reasons for the exemption, capacity of the parties and timeliness as procedural presumptions and it prepares materials for making decisions on the subject matter. Parties can raise the plea of the statute of limitation by the moment of reaching of the decision on conclusion of the previous procedure. After that parties can raise other substantive and legal pleas, but they cannot furnish new facts or evidences.

She emphasises that the Amendment of the Civil Procedure Law has extended jurisdiction of Commercial Courts that expect an increase of the number of litigations by 35 – 40 percent.
She points out the specific quality of the delivery of the statement of claim to the Defendant's statement of defence, because the novelty of 2008 has introduced the legal institute of the disposition without hearing.

Regarding the delivery in the civil procedure, it is pointed out that the Law on Electronic Document has been under preparation. That Law would enable integration of the civil procedure into the process of introduction of information technology to the society as a whole. The institute of bulleting board has been significantly extended regarding legal persons, physical persons who perform a registered business activity and physical persons.

A small claim dispute is defined as a dispute in which the monetary claim does not exceed HRK 10,000.00, while in the procedure regarding commercial disputes a small claim dispute is further defined to be the dispute in which the monetary claim does not exceed HRK 50,000.00.
The main hearing is defined as the central phase of the civil procedure having the task to discuss and to consider the facts on which the groundness of the statement of claim depends together with sanctioning of abuses and the institute of replacement of fines with imprisonment.
Regarding the civil procedure in the Supreme Court of the Republic of Croatia, more important changes are the following: parties can lodge appeals versus the second instance judgement / decision if the value of the subject mater of the dispute of the challenged part of the judgement / decision exceeds HRK 100,000.00, i.e. HRK 500,000.00 if those are disputes of commercial courts. In addition, a rule has been adopted that an attorney can loge an appeal in the name of any party if the attorney is an attorney-at-law as well as an exception of the rule that a party can lodge an appeal alone if the party has passed the bar exam, i.e. any person who is authorised for representation, under provisions of this or any other law, can also lodge an appeal in the name of the party, in that representation function, although he/she is not a lawyer– if that person has passed the bar exam.
Regarding conciliation in the court of the first instance, the novelty prescribes that a settlement reached in front of a conciliation judge is a court settlement.
The Enforcement Law Novelty that came into force on 17th June 2008 emphasises further on that the functions of interim measures are: conservation, anticipation and regulation. The Court can define an interim measure, but it is not obliged to do that when it founds out that the presumptions foreseen by the law have been fulfilled.

Colleague Gorana Aralica Martinović finishes her lecture with a reference to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1953 (ratified by the Republic of Croatia on 5th November, 1997) noting that pursuant the Convention the enforcement of the legally valid judgement is a component part of the procedure in which a decision is being reached on a person's rights and obligations of the civil matter nature.

SUMMARY OF SOME CONSTITUTIONAL BREACHES OF THE NEW LAW ON TRADE

Ivan Ester, LLB.
MAGMA d.d. Legal Department Head

GENERAL

Provisions of the *Law on Trade* regulating working hours (Sunday, working hours on the eve of public holidays) are of discriminatory nature and they limit and disturb competition applying unequal conditions on retailers dealing with the sales of the same kind of goods and consequently putting trade companies with the implied prohibition in a less favourable position in comparison with trade companies without implied prohibition and which sell the same kind of goods (Art 49, Para 2 of the Constitution of the Republic of Croatia)

Further more, such a regulation implements a "model" that enables certain entrepreneurs – retailers to obtain more favourable market results that are not grounded in a successful competition, but in uneven market positions.

SOME ACTUAL VIOLATIONS

1. The Law is incomplete regarding determination of retailers that are not covered by the prohibition, **without** any clear and transparent **criteria,** and the stated terms are **incomplete and not transparent** (e.g. "...*retail shops within the frames of gas stations"*). In such a way, for e.g., the sales area of the retail shop of retailers that are not covered by the prohibition to work non stop is not determined.

2. The state directly influences the market itself and creation of prices.

3. The law influences already obtained rights – and disturbs the legal security contradicting the principle of the rule of law. Constitutional right from Art 49, Para 5

Entrepreneurs' rights are decreased by interventions of the state that has changed rules limiting the rights that belonged to entrepreneurs prior to the intervention.

4. Religious discrimination and violation of the right to work and to impartial working conditions bound to religious discriminating and derogation of international agreements - Art 14, 41 and 54 of the Constitution - Catholics compared to other religious communities, e.g. free Saturdays following free Sundays resulting in decreased incomes, questionable achievement of planned results, additional employees.

5. The Law violates the principle of proportionality – Art 16, Para 2 of the Constitution – **the principle that should regulate limitation of rights to certain categories.**

The Law has not taken the principle of proportionality into consideration, and consequently the expected «benefits» planned to be achieved as a result of limitation of rights, is not proportional to the damage suffered by, in this particular case, the entrepreneur – retailer, due to limitation of rights. .

6. Discrimination of retailers regarding working hours during general working days «in the eve of public holidays», Art 49 Para 2 of the Constitution

In such a way retailers are **discriminated** in comparison with other entrepreneur sectors, **the freedom of entrepreneurship is limited**, and pursuant the **principle of proportionality,** such a limitation has no grounds in the Constitution.

7. Limitation of the right to work and the freedom of entrepreneurship of «small retail shops» – Art 54 and 49 of the Constitution, of small retail shops that achieve almost all of its income during weekends (especially family craft shops).

IS IT REALLY NECESSARY TO PRESCRIBE SO MANY DIFFERENCES AMONG LEGAL PROFESSIONS BY THE LAW

Igor Jenul, LLB.
LUKA RIJEKA d.d.

The response to the above stated question should be looked for in the sphere of the politics. When legal criteria were applied, developed in practice within the sphere of the law, the differences would disappear. Let us explain the thesis.

We can start from the criteria on the basis of which it should be decided on evaluation of a legal profession:

1. **Educational criterion** – whether the lawyer has completed the University Study of Law and has taken a degree in law. All the persons who pretend to work in the field of law as legal professionals have to fulfil that criterion, or in other words all persons of authority in the filed of application of law in their working environments performing their working tasks have to take a degree in law.
2. **Requirement of expertness** when performing legal profession regarding the particular legal profession and what it really represents and which working efficacy during performance of that particular legal profession is required and expected from a particular lawyer.
3. **Social standing** (the highest values of the Constitutional Order of the Republic of Croatia) protected by the lawyer's engagement in his/her profession regardless the place where he/she actually works in the function of the lawyer, regardless the fact whether he/she is a judge or an in-house lawyer.

When they finish the University Study of Law and take a degree, all the lawyers have potentially same prospects in «achieving» of prestigious working place of a judge, a state attorney or an attracting position of a public notary.

Discrimination starts during the phase of being trainees and fulfilling of conditions to stand for the bar exam. It continues when the question of representation and tariffs for that representation comes into question regarding the principal or the employer and goes as far as to the access to public offices, one of them being land registers.

If we ask ourselves about the situation in other professions, it seems that the most appropriate comparison would be with medical professions. If a medical practitioner likes to work as a doctor, he/she has to pass a professional state exam. The same name was assigned to the bar exam earlier, and it was also called attorney-at-law exam. The conditions for standing for the expert state exam for medical practitioner are exactly the same regardless the place where the medical practitioner having a degree in medicine performed his/her so called «professional training» and no distinctions are made among institutions in which the medical practitioner performs his/her «training» followed by «accompanying» (See Art 126 and 131 of the Law on Health Care and Protection – Official Gazette «Narodne Novine» No. 121/03, 44/05, 48/05, 85/06 – further on the Law on Health Care and Protection). In such a way professional training is estimated in the same manner if it has been performed in a health care institution or in a trading company that performs health care services, and part of their professional training young medical practitioners could perform in a private consultancy (Art 131 Para 5 of the Law on Health Care and Protection). When we talk about medical practitioner then, there is no difference in estimation of professional training and further more trading companies engaged in health care and protection services are equalized with health care and protection institutions, while every private medical doctor as a counterpart to the attorney-at-law can provide the medical doctor trainee only a part of professional training unlike the attorney-at-law who is equalized to the court as a counterpart to the health care and protection institution.

The impression that the medical profession comprises only health care and protections services can be disguising, since when we study more carefully any trading company rendering services of health care and protection, we will find out that it works on the commercial principles in the same manner as any other trading company in commerce and it is bound by medical ethic and disciplinary code as the lawyers are bound by legal ethic and disciplinary code.

It is the best illustration of the level at which all segments of the society, including legal persons in trade as well, state administration and faculties, are pervaded by the law and lawyers who are their employees and those employees can be considered as medical practitioners in charge of curing of property law rights and other rights of their organisations and employers. They act in the sphere of prevention, diagnosis and curing of legal conditions in their working environments. They - *in statu nascendi* - solve legal issues and it is their efficiency that is in the roots of the business operation success under condition that their employer enables them to do so and restrains from taking outside counsels who cannot be so successful due to the same nature of matter since they are not familiar with the organisation in question or business activities out of which the particular legal issues has arisen. The reason for that is the fact that each in-hose layer is qualified by a large scale by:

1. Respect towards employees;
2. Certainty at work;
3. Quality of contracts and agreements;
4. Preventive activities against occurrence of employment contract disputes and illegal situations, resulting in savings for the organisation relieving it form expensive and uncertain disputes;
5. Presence of a lawyer in every business situation since each business situation represents a legal relationship.

In-house lawyers perform other activities of legal character as well, from participation in incorporation of a company to monitoring of rules and introduction of individual

departments and persons into importance of rules for their work. The same can be said for layers employed by state administration offices and faculties, schools and other institutions.
It can be concluded on the basis of all of the above stated that there is no one valid reason for discriminatory attitude towards one category of lawyers in relation to the other and that all the conditions and possibilities of education, training and working of lawyers should be set at a common base having the same authorisations and obligations for all the lawyers having a degree in law – the same rights and obligations for that so important category of experts, if we really want to have the rule of law and the state of the rule of law. We should not afford that the law is reduced to a huge number of long-term disputes in the overcommitted judiciary.
I would like to add a few words about the social standing of lawyers in general. If we compare the social standing of lawyers based on their working places (legal profession types) i.e. whether the lawyer works at court, in the state attorney's office, whether he/she is a secretary of a faculty, whether he/she is as property law officer in the state administration, a legal officer in a medical or commercial trade company etc. it cannot be declared that work of a public notary is more important than work of an in-house lawyer in the oil company or telecommunication company. Only one bad answer in economy can result in a huge debt for the whole country, and it has the same importance as a dispute on a property boundary line or certification of a signature. Therefore making distinctions, as it is unfortunately a practice in this country, is very harmful for the country as a whole because those distinctions weaken economy, decrease the quality the profession in public sector and state administration and concentrates assets in those social fields that produce no added value and that influence only marginally refreshment of manufacturing of goods and rendering of services in the domestic economy. This problem is really deep since the law represents a real infrastructure of social and human relationships and it should be one the pylons of culture of each country. But, the above stated standardisation has been preventing it to be so.

˚The term legal profession is used herein meaning any task performed by a lawyer regardless his/her employment status or type of organisation he/she is working for as long as it is a task that can be solved by a person possessing legal knowledge to the difference of legal transaction, the term defined by legal science.

WE SEND SPECIAL GREETINGS TO THE COLLEAGUES IGOR JENUL FROM LUKA RIJEKA (Rijeka Harbour) AND IVAN ESTER FROM MAGMA WHO GAVE THEIR CONTRIBUTIONS TO THIS NEWSLETTER. ALL OF US FACE INTERESTING TOPICS ABOUT WHICH THERE IS A LOT TO SAY, OR TO EXPRESS OUR ATTITUDE AND OPINIONS WE WOULD LIKE TO SHARE WITH OTHER COLLEAGUES.

WHAT ARE WE PREPARING FOR OCTOBER?

1. ECLA Board Meetings are organised twice a year and our Association is the host of these Board Meeting that is going to be held in Zagreb from 17th to 18th October, 2008. **We invite all colleagues who would like to participate the programme following the ECLA Board Meeting to apply. The Plan of Activities is announced at out web site together with the list of participants and invited guests from Croatia.**
2. For the end of October we are preparing presentations of our members dealing with actual topics