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NEWSLETTER NO 60

Of the Association of Corporate Lawyers

WHAT WAS HAPPENING DURING NOVEMBER AND DECEMBER OF 2016

1. Letter Addressed to Minister of Justice

We are presenting the letter we have addressed to the Minister of Justice, Mr Ante Šprlje. Unfortunately, the Minister has not answered yet our request for a meeting with the topic of the status of lawyers employed by trading companies.

CROATIAN CHAMBER OF ECONOMY
The association of lawyers, members of the Croatian Chamber of Economy

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Zagreb, 16th October, 2016

REPUBLIC OF CROATIA
MINISTRY OF JUSTICE
Mr Ante Šprlje
Minister

Grada Vukovara Street No 49
10000 Zagreb

SUBJECT: Request for a term for a meeting with representatives of the Association of Lawyers at the Croatian Chamber of Economy

Dear Minister,

We are using the opportunity to congratulate you for your election for the new Minister of Justice.
We already contacted you, as representatives of the Association of Lawyers at the Croatian Chamber of Economy, during your short term of office, with a request for a meeting in your Ministry to acquaint you with issues bound to the position of lawyers employed by trading companies, members of the Croatian Chamber of Economy.

Unfortunately, you did not have an opportunity to meet us, but we hope that you will find a way to respond our request this time. Namely, it is of the utmost importance for us to meet you in person to report you about attitudes of the trade industry.

As you already know, the Association of Lawyers at the Croatian Chamber of Economy was established in 2016, and it gathers lawyers employed by members of the Croatian Chamber of Economy and members of the Croatian Chamber of Economy – trading companies.
Establishing the Association, the Croatian Chamber of Economy would like to give its contribution in the area of the commercial law not only to the rule of law in the economy, but also to the legal culture of trading companies. The Association is active with the aim to promote the interests of the legal profession and the protection of the professional status of lawyers employed by trading companies, improve cooperation with competent bodies, protect the professional status, perform activities in the legislative area and similar.
In the above described manner, the intention is to involve activities of trading companies, as a part of the society as a whole, into as efficient operation of the legislative system of the Republic of Croatia as possible.

Therefore, supported by Members of the Croatian Chamber of Economy, we feel free to ask you for a term for a meeting in the Ministry of Justice during which we would like to:

- Represent you the Association;
- Acquaint you with difficulties faced by the Association Members on a daily basis and that harden their work and put them into an unfavourable position compared to other colleagues of the same profession;
- Explain reasons for involvement of Association Members into the procedure of electronic communication with courts, i.e. the possibility of assignment of a certified e-mail address to the Association members.

We are kindly asking you to inform us about the term for a meeting using our telephone number 01/4848 622 or our e-mail address: zajednica.pravnika@hgk.hr.
Our contact person is the Association Business Secretary, Ms. Andreja Čavlina.

With kindest regards,

President of the Association of Lawyers at the Croatian Chamber of Economy

Marina Kralj Miliša

2. Information on Association Annual General Meeting

The Annual General Meeting of the Association of Corporate Lawyers was held in the premises of the Croatian Chamber of Economy, Roosevelt Square 2 in Zagreb, on 20th December, 2016. The Annual General Meeting made decisions on 2017 Association Activity Plan and Association Financial Plan. Both plans were adopted.
After completion of the Annual General Meeting, an agreement was signed by and between the Zagreb Stock Exchange Academy and the Association. The Agreement referred to various aspects of cooperation and especially attendance of the Association Members to regular Zagreb Stock Exchange Academy trainings and organisation of predefined forms of expert trainings purposed for Association members by the Zagreb Stock Exchange Academy.
An occasional banquet was also organised and attended by Association members and invited guests in an occasional communication.

3. 24th Croatian Arbitration Days

The 24th Croatian Arbitration Days were celebrated on 8th and 9th December, 2016. The first day was dedicated to the energy arbitration. Experienced lecturers lectured attendants on a general idea of the energy arbitration, electric power arbitration pursuant the Energy Charter Treaty and energy disputes from the point of view of the European Union. The lecture of Ignacio Torterola was very instructive. He talked about his experience in the function of the State Attorney representing Argentina in such kind of arbitration. Attendants also heard lectures on the most recent experiences of the International Chamber of Commerce regarding application of trade customs in power sector disputes and a very interesting lecture on models for calculation of damages in power sector arbitrations. A very interesting lecture was presented by Josip Lebenger who introduced attendants to the experience of the Croatian Power Authority HEP in the role of the claimant in an arbitration led in front of the International Court for Resolving of Investment Disputes versus the Republic of Slovenia. He presented a chronology of events that had led to the dispute, the course of the dispute itself and the passing of the arbitral award prescribing the Republic of Slovenia to pay finally the Croatian Power Authority HEP a damage in the amount of EURO 19.987 million including the interest (EURIBOR + 2 %) and USD 10 million for attorney-at-law costs and other costs. The third lecture cycle was dedicated to legal grounds to bind persons who were not signatories of the arbitration agreement and procedural aspects of participation of the third persons in an arbitration. The lecture on the warranty agreement and the arbitration agreement presented by Nina Tepeš and Tomislav Jakšić drew a special attention. They talked about the issue of the relationship of the warrantor and the creditor in case when the arbitration was agreed, i.e. the question whether the arbitration agreed between the creditor and the main debtor could be binding for the warrantor as well.

The second day of the 24th Arbitration Days was dedicated to novelties in the Croatian Arbitration Law and practice at the regional level. Lectures on the influence of setting aside of arbitral awards regarding the recognition and enforcement of the award in the third country and on recognition and enforcement of awards in the practice of Croatian Courts were held as well as on the arbitration and establishment of facts in a separate procedure, novelties in the Serbian arbitration practice, etc. The lecture presented by Prof. Dr. Ph. Mihajlo Dika on the Arbitration Law – de lege ferenda drew a special attention.

Prepared by: Ivana Gabrić, LLB, Končar – Infrastructure and Services Ltd.

4. Right of Party to Reimbursement of Complete Cost of Proceedings Not Depending on Fact the Party Has Not Succeeded Completely with its Claim

Does the party that succeeds partially in a dispute have right to reimbursement of the complete cost of proceedings or only to a proportionate part of the cost?
The provision of the Civil Procedure Law, Article 154, Para 2, prescribes that if a party succeeds partially in a dispute, the court can determine that each party has to cover its own costs or that one party has to reimburse a proportionate part of the cost of the other party and the intervener.
Nevertheless, the question arises how to interpret the above cited provision in case of a partial success in a dispute, i.e. when the party in the proceeding has had the success with the grounds, but not with the amount of its claim.

- To give an example, I am going to share with you one of the proceedings led in front of the Municipal Labour Court of Zagreb, due to payment in which the worker filed a claim for payment of the salary, overtime work, work in shifts, night work, work during public holydays and weekends.

The claim was basically compiled on the basis of the Civil Procedure Law, Article 186. b., because the plaintiff did not possess the complete documentation on working hour records in which the manner of calculation of the plaintiff's salary could be seen. In the sense of deficiency of the necessary documentation, and pursuant the above stated provision, in his claim, the plaintiff expressed that the claim would be defined precisely after performance of a financial expertise.

In its response to the claim, the defendant **challenged the claim completely**, stating that it paid the salary including all the other receivables completely to the plaintiff pursuant the Labour Law, Collective Labour Agreement and the Annex to that Agreement. Besides, the defendant violated procedural provisions grossly because it was denying to submit the documentation required not only by the plaintiff, but also by the Court for years obstructing the stated procedure and causing additional unnecessary costs.

In spite of that, the plaintiff succeeded to obtain the complete documentation on the basis of which a financial expertise was done resulting in a precise definition of the plaintiff's claim. In that particular case, the financial expertise found out a lower amount compared to the claim specified by the plaintiff and the claim was decreased on the basis of the expertise and the opinion of the expert witness and the value of the dispute was also defined.

The Municipal Labour Court of Zagreb passed the judgement without final force and effect in favour of the plaintiff, meaning that the plaintiff succeeded partially in the dispute, while the decision regarding the civil proceedings costs was passed pursuant the Civil Procedure Law, Article 154, Para 2, and adjudicated to the plaintiff a proportional part of the cost.

The plaintiff filed an appeal against such a decision passed by the Court regarding the part referring the civil procedure costs.

Taking into consideration the complete proceedings and the fact that the defendant had challenged the claim completely, the question arouse whether those were the reasons due to which the plaintiff had right to reimbursement of the complete civil proceeding cost regardless the fact he had changed the value of the subject of the dispute?

The reason of that question is that the Supreme Court of the Republic of Croatia gave a totally new approach to the interpretation and the implementation of the stated legal provisions to domestic courts. In that sense, the Supreme Court posted the understanding at the Civil Law Department Meeting held on 6th June, 1980 pursuant to which the Article 154, Para 2 of the Civil Procedure Law should be interpreted as follows:

"When a partial success of parties is faced in a procedure (the Civil Procedure Law, Article 154, Paragraph 2), when determining procedural costs, the terms "partial success" and "proportional part of costs" should be evaluated not only from the point of view of the quantity, but also from the point of view of the quality, taking into consideration the grounds, but also taking into consideration the level of accepted, i.e. rejected part of the claim".

That means that in case when the defendant in the procedure challenged the grounds of the claim that caused the procedural costs, those cost would be accepted by the plaintiff in full, regardless the value of the adjudicated amount.

Besides, the European Court for Human Rights postured the attitude regarding that issue in its decision passed in Strasbourg on 18th July, 2013 that came into force and effect on 9th December, 2013 in the subject matter Klauz versus Croatia (Claim No. 28963/10).

In addition to the question whether there is a violation from Article 1 of the Convention that enables parties an access to the Court and from Article 1 of the Protocol 1 to the Convention that protects the property of the party, the main question in that case referred to the fact that the applicant was ordered to reimburse the costs of the state represented by the General Attorney's Office in the civil procedure, that amounted almost 79 % (of the principal) of the remuneration the state should have paid to him pursuant the judgement for abuse he suffered from a police officer that had already been pleaded guilty for a criminal offence of abuse during performance of his official duty. As a consequence, the reimbursement paid to the applicant was significantly decreased because he had to reimburse the stated costs, despite the fact Croatian courts had undoubtedly determined that he had right to ask for a compensation of immaterial damage caused by the abuse made by the police.

The stated judgement stated, among other things, as follows:
„First of all, the Court notices that the interpretation of the Supreme Court of the application of the Civil Procedure Law, Article 154, gives a significant discretion to domestic courts regarding allocation of costs in cases of partial success in a procedure, directing them to apply that provision in a qualitative manner, and not only quantitative. Such an approach enables them to allocate all the costs to the party that succeeded in the procedure with the grounds, but not with the amount of the claim. Nevertheless, domestic courts in this subject matter applied that provision mechanically, not applying sufficient attention to special circumstances of the applicant subject matter, especially to the fact that it was about reimbursement of immaterial damage caused by a result of the criminal offence of abuse committed by a police officer and that it was not a classic civil law dispute between private parties."

"According to the stated it could not be said that decisions of domestic courts in that subject matter were proportional to the legitimate objective purposed by the rule stated in the Civil Procedure Law, Article 154, Paragraph 2, that requires one party to reimburse the costs to the other party depending on their success in the dispute, and those costs are to be determined in proportion to the amount of the claim. Its application resulted with the limitation in this case, that decreased the very essence of the applicant's right to the access to the court."

With such a decision, the European Court for Human Rights established that such a strict and formal application of the rules on the proportionate reimbursement of costs, did not always achieve justified objectives, and that the proportional part of costs should be estimated from the qualitative point of view, and not only quantitative.
Providing the above stated example from our own practice, and taking into consideration the judgement of the Supreme Court of the Republic of Croatia and the judgement of the European Court for Human Rights in the subject matter Klauz versus Croatia, the Court took the attitude that in that particular case such qualitative estimation of civil procedure costs was applied and allocated the complete procedural costs of the plaintiff.
Besides, it should be emphasised that there are various legal opinions regarding such a court practice. Therefore, Damir Jelušić, Attorney-at-Law from Vukić, Jelušić, Šulina, Stanković, Jurcan & Jabuka Attorney-at-Law Company Ltd. gave his review:
„In fine, we conclude the paper with the legal attitude according to which in the subject matter Klauz versus Croatia, domestic courts did not violate the applicant's statutory and conventional right to access the court warrantied by the provision of the Convention, Article 6.1, and as a consequence neither the right of the propriety in the sense of provision 1 of the Protocol No 1 to the Convention in neither out of three performed procedural adjudication processes obliging the plaintiff to pay procedural costs in proportion to the party's success in the dispute. Just the opposite, we consider that domestic civil procedure courts of all the instances reached their decisions regularly and legally and in harmony with legal rules and regulations and on the basis of the created and equal judiciary of the Supreme Court that, nota bene, participated in the dispute during its revision phase, reading reimbursement of costs. Therefore, although we prefer to be an opposition, as a matter of principle, in this case we completely correspond with the legal attitude of the Government as a legal representative of the state in the subject matter in which the partial quantitative success of the applicant was proportionally small in the dispute was a product of exclusively, only and uniquely of imposing of utmost unrealistic and inapt claim based on the reimbursement of the damage reading its amount. Or, in other words, if the applicant represented by his attorney-at-law, had filed its claim that would be at least within approximately realistic frames, his obligation based on the reimbursement of procedural costs would not have been created."
Starting from all the stated above, I believe that in this particular case there is no room for such a unilateral interpretation as explained by Damir Jelušić, attorney-at-law, in his review.
The practice has been showing more and more each time that the attitude of the Supreme Court of the Republic of Croatia as well as the attitude of the European Court for Human Rights is accepted and that it is the right way how to prevent potentially a party that was sued in the procedure to misuse his/her procedural authorisations and enable solving of court proceedings in even shorter term.

Bearing in mind the stated decision as well as the principle of cost effectiveness of the court proceeding, I believe that the decisions of domestic courts should follow the attitude of the European Court for Human Rights that took the justified attitude, as I have already stated above, that the severe and formalistic application of the rule on proportionate reimbursement of costs does not always achieve justified objectives.

Prepared by: Lucija Jukić, LLB, Končar - Metal Structures Inc.

5. Some Facts on Corporate Governance of Trade Companies

Corporate Governance is a system of management and control of a corporation. It comprises management and control structure and procedures for trading companies.

Corporate Governance structure is made and determined by allocation of authorities and responsibilities among various bodies within the corporation. Those are, first of all, management board, supervisory board, majority or minority shareholders or company members. Other stakeholders interested for the success of the company business operations could be among them as well. In addition to shareholders and/or company members, they can be employees, creditors and similar. In such a way, the manner of determining and achieving of objectives of the trade company and the supervision of their fulfilling is determined at the same time. The basic principles on which the corporate governance theory is established are care about rights and the equal treatment of all the shareholders / company members (regardless the amount of their share), transparent business operation and public disclosure of data regarding business operation of the company and responsibilities of the management board. A good corporate governance contributes to the economic development of the company and enables an inflow of a fresh capital from external sources. Achievement of the stated principles and objectives will largely depend on the legal and administrative frame of the individual state.

In addition to outside and inside interest and influential groups, the corporate governance environment consists of the legal regulatory framework and supervision institutions, as well as domestic and foreign business and social environment.

Corporate governance areas are shareholders' rights, social responsibility, risk management, management structure, compensations and rewards, transparency and publishing of reports and internal control.

Over years a methodology for measurement of the corporate governance quality has been developed including:

- assessment of the role of supervisory boards and managing boards in a dualistic management system and managing boards in a monistic system;
- assessment of shareholders' rights and their participation in the operation of the company;
- assessment of the transparency and publishing of prescribed information;
- assessment of the external revision system with a special emphasis on independency of auditors and auditing committees as well as the internal audit system and control of shareholding companies;
- assessment of system of remuneration of supervisory board members and top management as well as remuneration policy in the company;
- assessment of the risk management of the company;
- assessment of social responsibility of shareholding companies and existence of formalised practices of socially responsible business operations.

Corporate governance processes and practices in a shareholding company provide for a protection of possible losses of values and various forms of activities that are not in the interest of the company, shareholders and other important interested and influencing groups.

Within the corporate governance practice, a special emphasis is put on relationships between shareholders, supervision and management of the trade company.
Some issues and disputes could also arise out of those relationships. Although the court practice in the Republic of Croatia is not very rich in that area, the Trading Company Act is precise regarding the authorisation of business decisions. Only the managing board of a shareholding company is authorised to manage business operations and represent the shareholding company, and not the supervisory board or the general meeting of shareholders. The supervisory board or the general meeting can give their consents for performance of certain activities to the managing board, but that consent cannot replace the activity of management of business operations of the company that should be performed by the managing board on the basis of the stated consent. The stated arises out of the sentence of the Supreme Commercial Court of the Republic of Croatia based on the decision No Pž-7742/2003 of 26/09/2006, and the later decision of the same court no Pž-251/04-3 of 17/05/2005 and the decision of the Supreme Court of the Republic of Croatia No Rev-2017/2012 of 16/10/2012. Regarding the stated, the decision of the managing board should be explained, while the decision of supervisory board members do not have to be explained. Therefore, the issue in the area of the relationships between the managing board and the supervisory board is not in the legal frame, but in its implementation.
In the European Union and its state members, the focus of interest regarding the corporate governance is put on the link with a range of complex areas such as trading company law, capital market law, regulation of banks, stock exchange, bankruptcy, labour and social law, accounting, auditing, social responsibility, business ethics and integrity.
The legal frame of the corporate governance has an important role in achievement of trust of investors, generation and allocation of the capital, while the regulatory frame enables sustainability and feasibility, as well as the legal protection. In that sense, J. Barbić, academician, asks a question how to implement the law of the European Union not eroding national legal systems simultaneously. Every day larger requirements are established for companies whose shares are quoted at stock exchanges regarding their compliance with the law of the European Union, the regulation is more sever and they are given a bigger significance and responsibility putting them in the focus of the interest of the European Union.
The quality of corporate governance depends on the corporate governance environment and the corporate governance practice itself.

Conclusion: "The today life tolerates passive persons every day less, it likes active ones who will help themselves alone making opportunities and turning them to their own benefit." D. Hoyka (2013)
Therefore "never consider a pain anything the will serve you in your life" Euripides, Ancient Greek Playwright.

Prepared by: Gordana Štanfel, LLB, Končar - Electrical Industry, Inc.

6. Decision of Constitutional Court of Republic of Croatia No: U-III-2521/2015 and other of 13th December, 2016

On the basis of the civil action of the Consumer Association – the Croatian Union of Associations for Protection of Consumers (further on referred to as: the Consumer) versus eight Croatian banks, the court of the first instance determined that banks had abused collective interests and rights of consumers contracting a foreign currency clause without informing consumers completely on all the necessary parameters important for making a valid decision. Further on, the court of the first instance determined that the contracted interest rate that was changeable during the existence of the obligation based on loan agreements in accordance with unilateral decisions and other internal acts of banks, while banks and consumer had not negotiated individually such a contract provision and exact parameters on the basis of which banks could change the rate of the contracted interest rate or the method of its calculations had not been contracted in loan agreements.
The second instance decision changed the first instance decision regarding the foreign currency clause. The court of the second instance determined that the stated provision fulfilled requirements of intelligibility and therefore it was not dishonest, i.e. null and void. The

Second Instance Court confirmed the first instance decision in the part regarding the invalidity of the contractual provision on the changeable interest rate (with the exception of Sberbank, changing that part of the first instance decision with the rejection of that part of the claim).
The plaintiff and defendants filed their appeals against the second instance decision and the Supreme Court of the Republic of Croatia dismissed them as ungrounded.
The Consumer and seven banks files Constitutional Complaints to the judgement and the decision of the Supreme Court No: Revt 249/14-2 of 09/04/2015.
On 13/12/2016, the Supreme Court passed the Decision No: U-III-2521/2015 and other with which it accepted partially the constitutional complaint filed by the Consumer and cancelled the decision of the Supreme Court in part referring to the foreign currency clause (and regarding Sberbank in the part referring to the changeable interest rate). The remaining part of the Consumer's Constitutional Complaint was rejected as well as constitutional complaints of seven banks.
In the essence, the Constitutional Court emphasised that, in its assessment of the intelligibility of the foreign currency clause and the changeable interest rate, the Supreme Court applied double criteria, estimating the foreign currency clause to be a generally accepted model of contracting and well known to consumers not liable to the honesty test, while, at the other hand, the changeable interest rate as liable to the honesty test. The Constitutional Court emphasised that the Supreme Court had not explained reasons for different estimation of the same legal standard: why the failure of banks to introduce consumers to economic consequences of a loan agreement regarding the changeable interest rate resulted in dishonesty and invalidity of the provision on the changeable interest rate and why that had not been the case with the foreign currency clause. In the same manner, the Constitutional Court emphasised that the Supreme Court had not explained reasons due to which it had considered that in that particular case it had not been obliged to initiate a preliminary procedure, i.e. sent a requirement to the European Union Court asking for an interpretation of the law of the European Union in the sense of Article 267, Para 3 of the Treaty on the Functioning of the European Union.
Regarding Sberbank, the Constitutional Court emphasised that the Supreme Court had not explained why the provision on the changeable interest rate offered by Sberbank in its loan agreements had not been understandable to users, regardless the fact that the content of that provision had been different from provisions of other banks.

Finally, the Constitutional Court estimated that the Consumer's right to fair judging provided for by the Constitution of the Republic of Croatia, Article 29, Para 1, and by the Convention on the Protection of Human Rights and Fundamental Freedoms, Article 6, regarding its aspect of the right to explained court decision was violated.

Prepared by: Ivana Gabrić, LLB, Končar - Infrastructure and Services, Ltd.

7. Investment Disputes Having Republic of Croatia as Party

Five proceedings are in the due course at the International Centre for Solving of Investment Disputes in which suits have been filed against the Republic of Croatia at the moment.

The most recent proceedings have been initialled by UniCredit Bank Austria AG and Zagrebačka Banka d.d. In the proceedings the Republic of Croatia is represented by the State Attorney Office, and plaintiffs are represented by Allen & Overy Attorney-at-Law Office from London. The proceedings have been initialled on the basis of the Contract on Abetment and Protection of Investment concluded by and between the Republic of Croatia and the Republic of Austria (Official Gazette of the Republic of Croatia, NN 19/97).

The second proceedings have been initialled by Amlyn Holding B.V. The Republic of Croatia is represented in the proceedings by the Prime Minister Office and the State Attorney Office, and the plaintiff is represented by De Brauw Blackstone Westbroek N.V. Attorney-at-Law Office from Amsterdam. The proceedings have been initialled on the basis of the Contract on the Energy Charter (Official Gazette of the Republic of Croatia, NN 15/97).

The third proceedings have been initialled by B3 Croatian Courier Coöperatief U.A. The Republic of Croatia is represented in the proceedings by the State Attorney Office and Brendin Prat Attorney-at-Law Office from Paris, and the plaintiff is represented by the White & Case Attorney-at-Law Office from Paris. The proceedings have been initialled on the basis of the Contract on Abetment and Protection of Investment concluded by and between the Republic of Croatia and the Kingdom of Netherlands (Official Gazette of the Republic of Croatia, NN 10/98).

The forth, and probably the most famous, proceedings have been initialled by MOL, Hungarian Oil and Gas Company Plc. In the proceedings, the Republic of Croatia is represented by Squire Patton Boggs Attorney-at-Law Office from Washington, D.C., and the plaintiff by Weil, Gotshal & Manges from Washington, D.C., MOL General Counsel and the Dechert Attorney-at-Law Office from Washington, D.C. The proceedings have been initialled on the basis of the Contract on Energy Treaty (Official Gazette of the Republic of Croatia, NN 15/97).

The last, the fifth proceedings have been initialled by Georg Gavrilović i Gavrilović d.o.o. In the proceedings, the Republic of Croatia is represented by the Ministry of Economy, the State Attorney Office and Shearman & Sterling Attorney-at-Law Office from Frankfurt and Paris, and plaintiffs by Baker & McKenzie Attorney-at-Law Office from New York and Buterin & Posavec Attorney-at-Law Office from Zagreb. The proceedings have been initialled on the basis of the Contract Abetment and Protection of Investment concluded by and between the Republic of Croatia and the Republic of Austria (Official Gazette of the Republic of Croatia, NN 19/97).

Prepared by: Ivana Gabrić, LLB, Končar - Infrastructure and Services, Ltd.

In Zagreb, December, 2016

Merry Christmas and a prosperous New Year 2017

The Association of Corporate Lawyers

www.udruga-korporativnih-pravnika.hr