NEWSLETTER NO 61

Of the Association of Corporate Lawyers

WHAT WAS HAPPENING DURING JANUARY AND FEBRUARY, 2017

1. **Annual General Meeting of the Association of Corporate Lawyers**
2. **Bar Exam Bill**
3. **Pilot project: E-registration into Land Registry**
4. **Reciprocity Test in Procedures Regarding Expulsion of Unauthorised Lodgers from Housing**
5. **European Account Preservation Order**
6. **Bill on Procedure on Compensation of Damages Due to Violation of Market Competition Right**

1. Annual General Meeting of the Association of Corporate Lawyers

The Annual General Meeting of the Association of Corporate Lawyers was held on 24th February, 2017.

The Annual General Meeting adopted 2016 Association Supervisory Board Annual Report and 2016 Association Financial Reports.

2. Bar Exam Bill

In January, 2017, the Ministry of Justice introduced the Bar Exam Bill. At the moment, the matter regarding the bar exam is governed by the Law on Trainees in Juridical Bodies and the Bar Exam (Official Gazette of the Republic of Croatia NN 84/08, 75/09).

I would like to point out that some rumours have been heard about changes in legal rules and regulations bound to the Bar Exam during a time period longer than a year and that no reliable data are available nor on those changes, neither on the time when they could be expected.

The Bill foresees that any person who has completed the university master degree, i.e. the integrated 3-year-bachelor and the university master degree study of law fulfils conditions to sit for the Bar Exam under certain conditions. Regarding the current legal solution, two possibilities are opening for corporate lawyers: acquiring of conditions to sit for the Bar Exam after four-year-long performance of legal activities (without any practice at a court or attendance of theoretical lectures), i.e. after three-year-long performance of legal activities (with the obligation to do prescribed practice at a court and without the obligation of attendance of theoretical lectures).

The possibility of applying to the Court President for performance of the court practice after the performance of legal activities not shorter than six months is also new when we compare it with the current solution in which legal activities have to be performed during the time period not shorter than a year.

The Bill also comprises a new organisation of the Bar Exam, itself: unlike the current solution (compilation of three judgements + an oral part), a written part of the exam would be made of a verification of legal knowledge answering questions of multiple choice (for which the applicant has to give at least 75 % of correct answers). Within the time period of 15 days, the applicant would make two written tasks from individual subjects foreseen by the Law (constitutional organisation and organisation of the administration of justice; civil substantive law; civil procedural law; criminal substantive and criminal procedural law; state administration system and administrative law; EU system and law basis). The applicant

would sit for the oral part of the exam at the end. The oral part would consist of examination from six groups of subjects that are stated in the wordings above.
The Bill foresees that the content of the written part and topics of written tasks are confidential.
The Bill foresees a possibility that the applicant who is assessed during the oral exam with "fail" from one subject, can re-sit for the Bar Exam for the stated subject within the time period from one month to three months from the date of the sitting for the Bar Exam. The current Bar Exam organisation does not allow re-sitting for the Exam.
The applicant who does not pass the Bar Exam can re-sit for the Bar Exam after six months from the first sitting for it. To the contrary, the current organisation foresees re-sitting for the Bar Exam four months from the date of the first sitting for it.
To the contrary of the present arrangement that foresees achievement of points for Exam results (0-100), the Bill foresees assessment of applicants with the mark "passed" or "failed", that is "passed with congratulation".
The most important difference between the current and the proposed arrangement is the limitation of the number of (re-)sitting for the Bar Exam to the maximum of five. After that the applicant loses the right to sit for the Bar Exam.
Transitional and final provisions are very important for corporate lawyers who have started working on legal activities before coming of the new Law in force, since the Bill foresees that they can sit for the Bar Exam under conditions prescribed by the new Law.
Furthermore, the Bill foresees that all the applicants that have fulfilled conditions to sit for the Bar Exam before the new Law comes into force will sit for the Bar Exam pursuant the Law on Trainees in Juridical Bodies and the Bar Exam (Official Gazette of the Republic of Croatia NN 84/08, 75/09) by 31st December, 2017.
The Bill foresees that all the applicants are going to sit for the Bar Exam pursuant the new Law since 1st January, 2018 regardless the law on the basis of which they have fulfilled conditions for it.
The Bill Explanation says that the reason for such an arrangement of transitory and final provisions is the fact that new conditions are more favourable for applicants, while regarding applicants that have already fulfilled conditions pursuant the existing law, their legitimate expectations to sit for the exam pursuant the existing law are protected.

Inclusive, the Bill essentially changes conditions for sitting for the Bar Exam and the structure of the Bar Exam itself. Our proposal to colleagues is to be active at e-Counselling "eSavjetovanja" web site and to follow rule and regulation proposals such as the Bar Exam Bill. All comments and suggestions that could improve conditions for sitting for the Bar Exam to all our colleagues, and corporate lawyers in the first line, are welcome and desirable.

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

3. Pilot project: E-registration into Land Registry

The e-registration into the Land Registry pilot project started on 15th February, 2017 and it is going to last for 30 days. The Land Registry Department of the Municipal Court of Osijek and the Land Registry Department of the Municipal Court of Velika Gorica, as well as public notaries and attorneys-at-law from those municipalities authorised by the Croatian Public Notary Bar Association and the Croatian Bar Association will take part in it.
The e-registration project is a part of an overwhelming reform of unification of land registries and cadastres in Croatia to be implemented during next four years.
Proposals for registration into the Land Registry will be submitted by public notaries and attorneys-at-law and the main aim of implementation of the Land Registry e-

registration is speeding up of the procedure and enable citizens to forward their sales and purchase agreements, after concluding them and certifying them by a public notary, to the Land Registry Department of the corresponding Municipal Court for implementation over their public notaries or their attorneys-at-law. When the Land Registry Department of the corresponding Municipal Court receives the registration application and when it implements it, their land registry certificates will be available at their public notary or attorney-at-law office. For example, the registration procedure at the Land Registry Department of the Municipal Court of Osijek lasts usually 3 days, while the average time for registering into the land registry in Croatia is 26 days. An additional aim of this system is decreasing of costs for citizens necessary for registering of real property bought outside their place of living.
Those citizens who like to register their new real estate will be able to do that in person as well.
Provisions of the Land Registry Law in force foresee that public notaries and attorneys-at-law can submit proposals for registering into Land Registers. E-registration, as well as submission of proposals for registrations in Land Registries electronically are governed by the Rulebook on Technical and other Conditions of Electronic Operation in Land Registries.
Therefore, the existing legal constitution does not foresee conditions under which corporate lawyers would be authorised users in procedures regarding submission of proposals for registrations into Land Registries and in procedures of issuing of verified land registry certificates electronically ignoring thus the trade sector completely. Since the Association of Corporate Lawyers has contacted the Croatian Chamber of Economy with the request to enable availability of public data electronically to trading companies such as land registry certificates and similar, that issue should be updated over the Association and/or the Community of Lawyers Members of the Croatian Chamber of Economy that will send a letter to the Ministry of Justice with an additional request to enable electronic registration to the Croatian Chamber of Economy / trading companies / corporate lawyers.
The stated pilot project comprises a production of the Common Information System for Land Registries and Cadastres (ZIS). The emphasis is on ordinary subject matters that will be received by Land Registry Departments electronically and that will have the full functionality.
Possible complaints and comments regarding the electronic registration application will be collected through the pilot project enabling availability of electronic registration in the land registry all over Croatia from 15th Marc, 2017.
Functionality of e-registering into Land Registries is one of functionalities researched and developed through European Union Project: IPA 2008 “One stop shop” having the total value of EURO 553,000.00.

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4. Reciprocity Test in Procedures Regarding Expulsion of Unauthorised Lodgers from Housing

The right to the integrity of home has always been a very interesting topic, especially in countries with frequent crises, whether economical, transitional or even war as we can say it for our beautiful homeland. When we talk about the topic of this article it is worth to emphasise the **European Convention for the Protection of Human Rights and Fundamental Freedoms** ratified by the Republic of Croatia on 7th November, 1997. From the stated date, the cited international contract has represented a **part of the interior legal order** and it is above the Croatian national laws when we consider its legal force.
As a consequence, all **governmental bodies of the Republic of Croatia are obliged to apply the Convention directly in their activities** after the ratification. **Domestic courts**

are, in the same manner, obliged to provide for every protection of conventional rights of each individual. When such a protection is missing before the domestic bodies, the protection of violated rights will be provided for by the **European Court of Human Rights**. **The right to respect for private and family life** is at a special place just right among the most important rights warrantied by the Convention and it is prescribed by Article 8 of the Convention for protection of human rights and fundamental freedoms:

The right to respect for private and family life

Article 8

*1. Everyone has the right to respect for his private and family life, his **home** and his correspondence.*

*2. **There shall be no interference by a public authority** with the exercise of this right **except** such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

This provision imposes **obligations of substantive and procedural nature** to domestic authorities – first of all, domestic authorities shall respect each individual's home. Nevertheless, domestic authorities shall provide for protection for each individual whenever it is necessary. The main precondition for fulfilment of those obligations is a **good knowledge of the meaning of terms** from the cited Article 8 of the Convention as well as the **scope of the right to housing as it is defined in the practice of the European Court.**

The reciprocity test is a practical answer to the question: Does the **order for expulsion of an unauthorised lodger** represent an **unjustified intervention into his/her right to housing**?

As a matter of principle, the **intervention** is forbidden and it represents any act of governmental authorities limiting the right to housing (for example a search of rooms, excessive noise or other emissions) or depriving it (for example a sentence of expulsion, even when it has not been executed or when the tenant has moved out voluntarily before the enforcement is executed!), but also an omission of the state to protect rights of an individual against interventions of the third parties.

Nevertheless, when certain suppositions are fulfilled, interventions will not represent a violation of the Convention. The first one out of three suppositions is that any intervention **should raise out of a rule** (e.g. the Law on Property). But, the existence of the second supposition of directivity of the intervention to **achieve a "legitimate objective"** (such as protection of rights of the third parties and satisfaction of housing needs of citizens), together with the existence of the third supposition of **necessity of intervening in a democratic society** (because, for example there is an urgent social need when a "legitimate objective" cannot be reached through application of a milder measure, when the owner or the user of the house does not have any other accommodation, neither can he/she provide for it) is estimated applying the reciprocity test. That is the reason why the domestic court has the freedom to estimate and that estimation shall be expressed in the explanation of the decision.

A negative answer to any of three stated suppositions does not mean that the **expulsion is contrary to the Convention,** i.e. unjustified, as in the following example:

Bjedov versus Croatia, § 66

"Each person threatened by the risk of interference into his/her right to housing shall be, in principle, provided for the opportunity that an independent court estimates the reciprocity and prudence of the measure regarding applicable principles comprised by Article 8 of the Convention, regardless the fact the person in question does not have right to live in the house on the basis of the domestic law".

In the practice by the time being, decisions of the European Court in subject matters of expulsion from housing of unauthorised lodgers refer exclusively to matters when expulsion form housing has been asked by a state or local government authorities (such as for

example Bjedov vs Croatia; McCann vs UK). It should be also emphasised that in the sense of the Convention trading companies owned by a state are considered to be the state.

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5. European Account Preservation Order

On 18th January, 2017, the Regulation (EU) No 655/2014 of 15th May, 2014 on establishment of a Union procedure for a European Account Preservation Order (further on referred to as: "the Regulation") came into force. The Regulation is in force in all the EU Member States except Denmark and the United Kingdom. In addition to the Regulation, the Commission Implementing Regulation (EU) 2016/1823 of 10th October, 2016 on establishing the forms (further on referred to as: "Implementing Regulation") is also important.

This Regulation establishes a Union procedure enabling a creditor to obtain a European Account Preservation Order which prevents the subsequent enforcement of the creditor's claim from being jeopardised. The analogue protection within the frames of the national law is provided for by previous and temporary measures pursuant the Enforcement Law.

The content of the Regulation is presented briefly below.

Scope

This Regulation applies to pecuniary claims in civil and commercial matters in cross-border cases whatever the nature of the court or tribunal concerned. The Regulation does not apply to, in particular, to revenue, customs or administrative matters, claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other analogous proceeding or arbitration have been opened. The regulation does not apply to bank accounts which are immune from seizure under the low of the Member State in which the account is maintained either.

The condition of a cross-border case is that the bank account or accounts to be preserved by the Preservation Order are maintained in the Member State that that is not the Member State of the court seized of the application for the Preservation Order or the Member State in which the creditor is domiciled.

Jurisdiction and initiation of proceedings

The preservation Order shall be available to the creditor before it initiates proceedings in a Member State against the debtor on the substance of the matter or at any stage during such proceedings up until the issuing of the judgement or the approval or conclusion of a court settlement and after the creditor has obtained in a Member State a judgement, court settlement or authentic instrument which requires the debtor to pay the creditor's claim (further on referred to as: decisions).

Where the creditor has not yet obtained a decision, jurisdiction to issue a Preservation Order shall lie with the courts of the Member State which have jurisdiction to rule on the substance of the matter. Where the creditor has already obtained a judgement or court settlement, jurisdiction to issue a Preservation Order for the claim shall lie with the courts of the Member State in which the judgement was issued or the court settlement was approved or concluded. Where the creditor has obtained an authentic instrument, jurisdiction to issue a Preservation Order for the claim specified in that instrument shall lie with the courts designated for that purpose in the Member State in which that instrument was drawn up.

The court shall issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult. Where the creditor has not yet obtained in a Member State a decision requiring the debtor to pay the creditor's claim, the creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed.

The debtor shall not be informed on the application for a Preservation Order neither shall be heard before issuing of the Preservation Order.

Applications for a Preservation Order shall be lodged using the form established in the Implementing Regulation.

The obligation of initiation of proceedings on the substance of the matter

Where the creditor has applied for a Preservation Order before initiating proceedings on the substance of the matter, he shall initiate such proceedings and provide proof of such initiation to the court with which the application for the Preservation Order was lodged within 30 days of the date on which he lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later. The court may also, at the request of the debtor, extend that time period in order to allow the parties to settle the claim.

Security to be provided and responsibility for the damage

Before issuing a Preservation Order in a case where the creditor has not yet obtained a decision, the court shall, as a rule, require the creditor to provide security. Where the creditor has already obtained a decision, the court may require the creditor to provide security before issuing the Order.

The creditor shall be liable for any damage caused to the debtor by the Preservation Order due to fault on the creditor's part. The burden of proof shall lie with the debtor.

Obtaining of information on bank and account

Where the creditor has obtained in a Member State an enforceable decision which requires the debtor to pay the creditor's claim and the creditor has reasons to believe that the debtor holds one or more accounts with a bank in a specific Member State, but he does not know any data on the bank or on the account he may request the court with which the application for the Preservation Order is lodged to request that the information authority of the Member State of enforcement obtain the information necessary to allow the bank or banks and the debtor's account or accounts to be identified. The creditor may make such a request where the decision obtained by the creditor is not yet enforceable and the amount to be preserved is substantial, if the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for account information.

Ban to parallel applications for Preservation Order

The creditor may not submit to several courts at the same time parallel applications for a Preservation Order against the same debtor aimed at securing the same claim.

Time-limits

Where the creditor has not yet obtained a decision, the court shall issue its decision by the end of the tenth working day after the creditor lodged or completed his application. Where the creditor has already obtained a decision, by the end of the fifth working day. In case of an oral hearing, the court shall issue its decision by the end of the fifth working day after the hearing has taken place.

Appeal

The creditor shall have the right to appeal against any decision of the court rejecting, wholly or in part, his application for a Preservation Order. Such an appeal shall be lodged within 30 days of the date on which the decision was brought to the notice of the creditor. It shall be lodged with the court which the Member State concerned has communicated to the Commission.

Enforceability

A Preservation Order issued in a Member State in accordance with this Regulation shall be recognised in the other Member States without any special procedure being required and shall be enforceable in the other Member States without the need for a declaration of enforceability.

The Preservation Order shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement.

By the end of the third working day following the implementation of the Preservation Order, the bank or other entity responsible for enforcing the Order in the Member State of enforcement shall issue a declaration indicating whether and to what extent funds in the debtor's account or accounts have been preserved and, if so, on which date the Order was implemented. In exceptional circumstances, the declaration can be issued by the end of the eighth working day following the implementation of the Order.

The creditor shall be under a duty to take the necessary steps to ensure the release of any amount which, following the implementation of the Preservation Order, exceeds the amount specified in the Preservation Order where the Order covers several accounts in the same Member State or in different Member States or where the Order was issued after the

implementation of one or more equivalent national orders against the same debtor and aimed at securing the same claim.

Special cases

Funds held in accounts which are not exclusively held by the debtor or are held by a third party on behalf of the debtor or by the debtor on behalf of a third party, may be preserved under this Regulation only to the extent to which they may be subject to preservation under the law of the Member State of enforcement..

Amounts that are exempt from seizure under the law of the Member State of enforcement shall be exempt from preservation under this Regulation.

Releasing of preserved funds or termination of implementation

Upon application by the debtor, the court that issued the Preservation Order may order the release of the preserved funds or terminate its implementation if the debtor provides corresponding security.

Finally, there are no practices in the matters of the European Preservation Order in Croatia yet since the Regulation has come into force quite recently, but, it will be interesting to monitor implementation of the Regulation and cooperation among courts, FINA - the Croatian Financial Agency and banks regarding implementation of European Preservation Orders. It has been also especially emphasised to all the creditors to take care about calculation of deadlines from this Regulation, since EU Member States treat the date of submission of a communication to the post office as a part of the deadline in a different way.

Sources: Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15th May, 2014 on establishment of a Union procedure for a European Account Preservation Order to make collection of cross-border debts in civil and commercial matters

Commission Implementing Regulation (EU) 2016/1823 of 10th October, 2016 on establishing the forms listed in the Regulation (EU) No 655/2014

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6. Bill on Procedure for Compensation of Damages Due to Infringements of the Market Competition Right

The area of protection of the market competition in the Republic of Croatia is governed by the Law on the Protection of Market Competition (Official Gazette NN No 80/13 and 79/09; further on referred to as "ZZTN"), while the imbursement is governed by a general regulation, i.e. in the Obligation Law (Official Gazette NN No 35/05, 41/08, 125/11 and 78/15). Nevertheless, it has been found out in the practice that damaged parties rarely ask for compensation of damages suffered due to infringements of the market competition right independently whether the Croatian Competition Agency has reached a decision on infringement or that decision is missing.

Such a practice is similar all over the European Union and therefore the European Commission motivated activities on harmonisation of rules on compensation of damages as well as facilitating of the position of damaged parties in those procedures as early as in 2004 with the aim to enable parties damaged by market competition right violation to accomplish compensation for damage. Private implementation represents the second side of an efficient protection of the market competition right that is being fully accomplished with a combination of public and private implementation.

The above stated activities have resulted in a Directive 2014/104/EU of the European Parliament and of the Council of 26th November, 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (Official Gazette No 349/1 of 5th December, 2014; further on referred to as: "the Directive").

Stated rules are implemented in Croatia into the Law on Procedures for Compensation of Damages Due to Infringements of the Market Compensation Right (further on referred to as: "the Law") that governs issued regulated by the Directive in great detail.

The main objective of the Law is to assure a full compensation for the suffered damage to parties damaged by an infringement of the European or national market competition law regardless the authority in charge of the protection of market competition (a Competition Agency, the European Commission and similar) has passed a decision on infringement of the market competition right or such a decision does not exist. Simultaneously with passing the Law in the sense of the Directive, the legislator likes to increase the achievement of a balance between public and private implementation of the market competition right and a balance between substantive and procedural rules for achievement of the right to compensation of damages on the basis of infringement of the market competition right. The main objective of the Law is assurance that every natural or legal person that has suffered a damage caused by infringement of the market competition right can require and receive a full compensation for that damage.

The stated law will contribute to the efficient market competition since it will enable motivation of proceedings for compensation of damages due to infringement of the market competition in the Republic of Croatia that are barely present at commercial court at the moment. The stated will result in the fact that every implementation of the protection of market competition under the public law (determination of the damage and penalization) will be followed by the implementation under private law (compensations for the damage caused by that infringement) motivating efficiency of the protection of market competition.

The Directive and the Law bring rules facilitating compensation of damaged persons for damages suffered due to infringement of the market competition law not only as persons that were damaged by their contractual partner, but also to persons that are so-called indirect buyers, i.e. those damaged because the increase of the price caused by infringement of the competition were transferred to them as well.

The Law precisely arranges issues of detection of evidences in proceedings for compensation of damages before competent commercial courts, protection of confidential data and disclosure of evidences present in the file of the subject matter of the authority competent of market competition. A special provision determines limitation of usage and disclosure of such evidences, first of all protection against disclosure of statements of entrepreneurs - repenters, and fines are also foreseen for infringement of rules on disclosure of evidences. Then, the effect of decisions reached by authorities competent for protection of market competition on infringement of the market competition right adopted in national proceedings for compensation of damages when the enforceable decision has been reached in another Member State is also estimated. Other provisions comprise issues of the limitation period, stay of proceedings and solidary liability of entrepreneurs who have infringed the market competition law with their common activities. A separate chapter arranges transmission of exaggerated prices to direct and indirect buyers, the defence and proceedings for compensation of damages for damaged persons from various levels of chains of supplies. Last two chapters of the Law arrange the issue of calculation of the level of the amount of the damage by competent commercial courts and compromised resolution of disputes.

A public discussion on the Bill was open by 8th December, 2016 at e-counselling central state portal “e-Savjetovanja”. The Law has not been passed yet, nor is it at the agenda of the Croatian Parliament, but it does not mean that damaged persons cannot demand the compensation for the damage before the court. Namely, the Directive has been valid and it has applied in all the Member States since 27th December, 2016 and the competent commercial court shall take statements of claim into consideration filed by natural and legal persons considered themselves to be damaged by infringement of the market competition right.

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Send us letters, propose topics and supplement
Our and yours Newsletter –and web site.

In Zagreb, February, 2017

Association of Corporate Lawyers

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