**NEWSLETTER NO 62**

**Of the Association of Corporate Lawyers**

# WHAT WAS HAPPENING DURING MARCH AND APRIL OF 2017

1. **Law on Extraordinary Management Board in Trade Companies of Systematic Significance for Republic of Croatia**
2. **Public Media about "Lex Agrokor"**
3. **ICC 2017 Arbitration Rules**
4. **New Arrangement of Costs of Administrative Disputes**
5. **Decision of the Constitutional Court No U-I-3685/2015 and other of 4th April, 2017: "Swiss Francs"**
6. **Fourth Directive on Money Laundering Prevention**

## 1. Law on Extraordinary Management Board in Trade Companies of Systematic Significance for Republic of Croatia

The Law on the Procedure of the Extraordinary Management Board in Trade Companies of the Systematic Significance for the Republic of Croatia (further on referred to as "the Law") was published in the Official Gazette of the Republic of Croatia, NN 32/17 of 6th April, 2017, and it came into force on 7th April, 2017. The Law was adopted in an urgent procedure and its contents are explained below.

*Reasons for its passing*

It is stated in the explanation of the Bill that existing legal solutions in the legal order of the Republic of Croatia are not efficient enough to manage risks to which the Croatian economy is exposed in case of deep financial difficulties that would have a systematic significance for the Republic of Croatia.

*Scope of application*

The Law defines that the extraordinary management board procedure shall apply to a joint stock company that is a debtor and to all of its depending and associated companies if the existence of any bankruptcy or pre-bankruptcy reasons is determined in the sense of the Bankruptcy Law, Articles 4 and 5, regarding the debtor as a controlling company. The stated joint stock company should be, at the same time, a company of a systematic significance for the Republic of Croatia independently or together with its depending or associated companies. The Law defines the company of a systematic significance for the Republic of Croatia in its Article 4 as a joint stock company that fulfils two of the following conditions, either independently or together with its depending or associated companies cumulatively: during the calendar year preceding the year in which the proposal for opening of the procedure is applied, the company employed the average of more than 5000 employees independently or together with its dependant or associated companies and the existing balance sheet liabilities amounted to more than HRK 7,5 billion (i.e. more than the counter value of the stated amount expressed in Croatian Kunas) for the company itself or for the company together with its dependent or associated companies calculated on the day of application of the proposal for opening of the procedure. The Law prescribes that the procedure is going to be implemented to dependent of associated companies as well, if the controlling company fulfils conditions from Article 4 of this Law independently or together with its dependent or associated companies. It is important to emphasise that, in the sense of the Law, dependent and associated companies are companies that have their headquarters in the Republic of Croatia, that are incorporated pursuant the jurisdiction of the Republic

of Croatia, and in which the controlling company from Article 4 of the Law has at least 25 % of stocks.

*Initiation of proceedings*

Pursuant the Law, Article 21, a debtor that fulfils conditions prescribed by the Law or a debtor's creditor (and/or a creditor of the debtor's associated and dependent companies) with the debtor's consent is authorised to submit a proposal for opening of proceedings. It should be emphasised that from the moment of submission of the proposal for opening of proceedings to the moment of passing of a decision on rejection of the proposal or on opening of proceedings, the debtor cannot dispose of its property. The exception are disposals performed during the normal course of business activities or if the Law itself foresees otherwise. The Commercial Court of Zagreb is the only competent court for proceedings. On the same day when the Commercial Court of Zagreb receives the proposal for opening of proceedings, it shall inform the Government of the Republic of Croatia and the Ministry on the submitted proposal. Within the time period of two days, the Government of the Republic of Croatia shall make a decision on the proposal for nomination of the extraordinary trustee on the basis of the proposal of the Ministry and deliver the decision to the Court without delay. Within the time period of two days from the date of receipt of the decision on nomination of the extraordinary trustee, the Court shall pass the decision on opening of proceedings.

*Proceedings competent bodies*

Bodies of extraordinary management proceedings are the court, the extraordinary trustee, counselling body and the creditor council.

The central person in proceedings is the extraordinary trustee. The extraordinary trustee can be any person fulfilling conditions to be a management board member pursuant the Trade Company Law. He/she shall be proposed by the Government of the Republic of Croatia and elected by the Court. He/she has rights and obligations of a debtor's body and it exercises all the rights bound with the ownership share of the debtor in associated and dependant companies in that name. He/she can have deputies nominated by the Court on the basis of a proposal of the Government of the Republic of Croatia. He/she manages debtor's business activities independently and makes all the activities entrusted to him/her in proceedings, but he/she cannot reach any decision or perform any activities aiming at disposal of the debtor's real property, stocks or shares in dependent and other companies or transfer of the economic whole is the value exceeding HRK 3.5 million without the consent of the creditor council. Within the time period of 3 days from the nomination, the extraordinary trustee shall select a counsellor for restructuring (and auditors, legal and other counsellors specialised for individual fields, as necessary). After passing of the decision on opening of extraordinary management proceedings, persons authorised for representation of dependant and associated companies are authorised to make only those activities that are necessary for regular performance of business activities, while they shall obtain a consent of the extraordinary trustee's consent for all those activities exceeding the stated framework (as well as for those for which they need to have a consent of the supervisory board). The court is exclusively competent to supervise activities of the extraordinary trustee. The court can revoke the extraordinary trustee and appoint a new one at any moment, but on the basis of the Government of the Republic of Croatia.

A head of the Ministry nominates the counselling body within 15 days from the date of nomination of the extraordinary trustee, and it consists of five members out of which one is the representative of employees. The counselling body gives its opinion

on the decisions and activities of the extraordinary trustee in cases foreseen by this Law and at the request of the Ministry or the Court.
The Creditor Council has nine members as the maximum and it consists of creditors' representatives that will be divided into special groups regarding the different legal position of each group. It has right to be informed on the debtor's condition and on the condition of its associated and dependant companies, it participates in compiling and preparation of a settlement in the name of creditors and it gives its consent to the extraordinary trustee for the final settlement wordings.

*Creditors in the Extraordinary Management Board Proceedings*

Creditors in the proceeding are personal creditors who have any property law claim for the debtor and/or its associated and dependent companies at the moment of opening of the extraordinary management board proceedings. They are divided into groups on the basis of their claims. Immature claims become due at the moment of opening of proceedings. Creditors are divided into groups on the basis of their claims. The extraordinary trustee will publish an invitation in the Official gazette within the time period of 5 days from the date of publishing of the resolution on the determined and challenged claims inviting creditors whose claims have been defined to inform the extraordinary trustee and the court on creditor committee members within the term of 30 days. (The extraordinary trustee will define the number of creditor committee members and the manner of division of creditors into special groups in his/her invitation). Each special group selects one creditor committee member if not defined otherwise by the law. The creditor committee reaches its decision by the majority of votes of the present members, and each creditor committee member has right to one vote. If a creditor group does not nominate its creditor committee member in time, the court shall nominate him/her on the basis of the proposal of the extraordinary trustee.

*Legal consequences of opening of proceedings, debt with the precedence of satisfaction and payments during proceedings*
Rules on legal consequences of opening of bankruptcy proceedings shall apply to the legal consequences of opening of proceedings in an appropriate manner, unless defined otherwise by the Law.
With a previously obtained consent of the Creditor Committee, the extraordinary trustee can take over a new debt in the debtor's name and for its account to decrease the system risk, continue business operations, preserve the property or if it is about satisfaction of receivables from the operating business that will have a precedence over other creditors' claims during their satisfying, with the exception of employees and former employees. Creditors of claims from new debts will be considered creditors with the right of precedence with an appropriate application of provisions of the Bankruptcy Law regarding the bankruptcy estate creditors, unless defined otherwise by the Law. They will be also considered as bankruptcy estate creditors in case of opening of bankruptcy or any other proceedings after completion of the extraordinary management board proceedings on the debtor or on its associated or dependant companies. Legal activities of obtaining of a new debt shall not be considered as legal activities with which some creditors would be put in a more favourable positon and therefore they are excluded from challenging in accordance with provisions of the Bankruptcy Law.
The extraordinary trustee can effect payments of mature claims with the origin before passing of the decision on opening of the proceeding if it is indispensable to decrease the system risk, continue business operations, preserve the property and if

those claims are from regular or operative business, with the consent of the creditor committee. Such payments can be also effected by persons who represent dependent and associated companies for the same reasons and with the consent of the extraordinary trustee.
Claims that refer to delivery of goods and rendering of services that were not due by the date of opening of extraordinary management board proceedings are considered to be claims whose satisfying is bound to the ordinary business operations. Claims of financial and credit institutions and security holders do not enter into claims of operating business, with the exception of debts with the precedence of satisfaction.

*Prohibition of initiation and conducting of litigation, enforcement, administrative proceedings and proceedings for assurance and exercise of right to separate satisfaction*
Initiation of litigation or enforcement proceedings or proceedings for assurance or out of court collection is not permitted against the debtor and its dependant and associated companies from the date of opening of proceedings to their conclusion, with the exception of proceedings regarding employment relationships disputes. Proceedings in due course will be suspended on the date of opening of the extraordinary management board proceedings. During the extraordinary management board proceedings, the debtor's creditors with separate satisfaction rights and the creditors of the debtor's depending and associated companies cannot exercise their right to separate satisfaction. The Financial Agency shall apply provisions of the Bankruptcy Law, Articles from 69 to 71, to proceedings with the basis of payment filed against the debtor and its dependant and associated companies in an appropriate manner.

*Settlement*
The extraordinary trustee can propose satisfaction of creditors with settlement within the time period of 12 months from opening of proceedings with the consent of the creditor committee. The court will prolong the stated time period for the next 3 months at the request of the extraordinary trustee. The settlement is considered accepted if the majority of creditors vote for it and if the sum of claims of creditors who have voted for the settlement in each group is higher than the sum of the claims of creditors who have voted against the acceptance of the settlement. As an exception, it will be considered that creditors accept the settlement if the total sum of the claims of creditors who voted for the settlement amounts to two thirds of the total claims as the minimum. The court will deny confirmation of the settlement by virtue of the office if rules and regulations on the content of the settlement and proceedings are essentially violated during its compilation and adoption, of the acceptance by the creditor, unless its deficiencies can be removed or if the acceptance of the settlement has been achieved in an illegal manner.

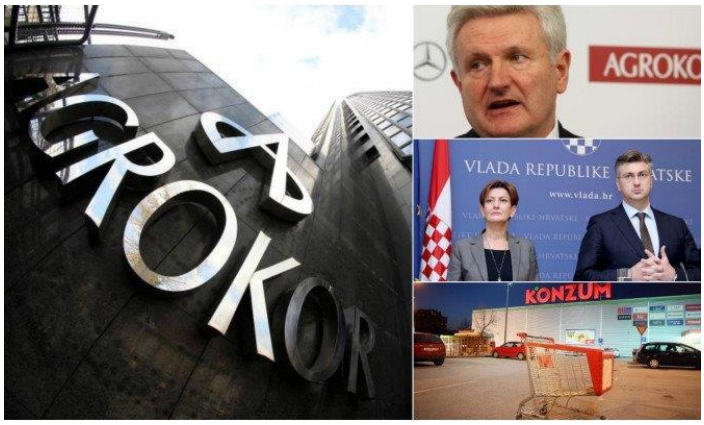
*Conclusion of proceedings*
The court can make a decision to conclude the extraordinary management board proceedings and to open bankruptcy proceedings at the request of the extraordinary trustee and with the obtained consent of the creditor committee at any moment during the proceedings. Before the extraordinary trustee files the request, he/she shall obtain a consent of the Ministry. The Court will discontinue the proceedings at the request of the extraordinary trustee if no claim is reported during the time period for reporting of claims from the decision on opening of extraordinary managing board proceedings or unless the court approves the settlement.
The extraordinary managing board proceedings concludes with the legal validity of the decision on cessation of the proceedings, implementation of the settlement or the

laps of 15 months from the date of opening of the proceedings if no settlement is made during the stated time period.

*Prepared by: Ivana Gabrić, LLB, Končar - Energy and Services Inc.*

**Public Media about "Lex Agrokor"**

Persons outside the state government system also participated in development of the Law on Extraordinary Management Board in Trading Companies of Systematic Significance for the Republic of Croatia, colloquially called "Lex Agrokor". The Ministry of Economy says that they asked for the opinion of various legal and financial experts during development of the Law and that no one of them were paid for those advices. During the development of the "Lex Agrokor", **Martina Dalić, the Minister of Economy,** consulted **consultants Ante Ramljak, Tomislav Matić and Borislav Škegro,** who are interconnected through current or previous relationships with Quaestus, a company for risky capital management whose president of the Supervisory Board is Škegro. The Ministry of Economy has not confirmed, neither denied consultation with Ramljak, Matić or Škegro. The consultant Ante Ramljak is emphasised as the most important in the context of counselling of the Minister, Martina Dalić, during creation of the law. He has been a cofounder and the general manager of the company Quaestus Counselling in charge of supervision of all the projects and activities of the company in the South-Eastern Europe since 2007. The Commercial Court of Zagreb received Agrokor proposal for initiation of the extraordinary management board proceedings in the concern and its depending and associated companies on Friday, 7th April, 2017. Ante Ramljak was nominated to be the extraordinary trustee who had, among other things, already signed the final version of the Memorandum on Agrokor Bills of Exchange sent to the addresses of 159 suppliers and 31 banks, factoring companies and other financial institutions. There was a possibility of emerging of another suppliers, but their number probably would not change more significantly. We were informed unofficially from Agrokor that the total debt based on recourse bills of exchange were between HRK 3 and 3.5 billion and not HRK 5 billion as it had been supposed by the time being. In addition to rumours about the conflict of interest of **Zdravko Marić, the Minister of Finance**, and the former Agrokor Financial Manager, who had somehow "hided" at essential trade moments of the state since its independence and whose recall was already asked for by the opposition in the Parliament and the clumsy excuses of **Boris Vujčić, the Governor of the Croatian National Bank,** explaining the he was not responsible for intensive circulation of promissory notes without financial backing, mass media published the information pursuant which the Government wrote the "Lex Agrokor" with the help of an attorney's-at-law office for which there are indications that it is connected with VTB bank, one of the larger Agrokor creditors. It should be noted that if Agrokor had been bankrupt, the interests of that bank would have been jeopardised most, and therefore the law was adopted to prevent such an outcome.




Slovenians reacted and following the example of Croatia they passed their "Lex Mercator" proclaiming that company as a systematic significant company just in the same way the

Croatian Government proclaimed Agrokor. Pursuant that law on the protection of national interests, the interests of suppliers and employees of the chain of stores that was a part of Agrokor Concern taking into consideration more than 10 thousand of employees employed only in Slovenia and 20 thousand in the region, on the basis of a proposal of the Slovenian Government the court would nominated a special temporary member of the management board of that company in case of a need whose main task would be to monitor and prevent burdening of Mercator, by the new Agrokor management, with new financial liabilities through loans, guarantees, commodity loans. The Law was applicable only to business transactions linked with the majority owner and no freedom of the private commercial initiative would be broken with it, as explained by the **Slovenian of Economics, Zdravko Počivalšek**. After reviewing company documents, Mercator Supervisory Board concluded that there had not been any anomalies in the company and that the business interests had not been damaged. Nevertheless, the new management board received the consent of the majority of creditors' banks that its immature payables would not be included into the current collection despite the owner's, i.e. Agrokor's mature payables. Agrokor's companies in Serbia, such as Idea, Mercator, Roda, Dijamant, Frikom, Kikindski mlin, Mg Mivela and Nova Sloga have 12 thousand employees. **Lazar Šestović, the main economist of the World Bank for Serbia** mollified the public with statements that companies in Serbia, working within the frame of Agrokor, were independent legal entities that were operating with profit and without problems.

**Pursuant the opinion of Prof PhD Sanja Barić**, the principal of the Chair for Constitutional Law of the Law Faculty of Rijeka, the state had to make actions and it had the constitutional base to pass the "Lex Agrokor", but the essence was the manner of making actions. From the point of view of the constitutional law, the essence is focussed on the fact whether extraordinary measures were proportional and rational when they were compared to the wished aim to be accomplished. The limit of acceptable constitutionality was trespassed even for such an extraordinary situation. That was neither the issue of blind insisting on the legal standards, because the rescue was possible in the same manner and with the same speed using other measures and in accordance with the Constitution. The crucial question is whether the stated regulation and other legal order make possible to prevent such events in the future since the crucial fact is that laws were not respected or they were defective. It is not constitutional and it iss contrary to the principle of the share of power that a court as an executive body supervises a trustee in a company and that it can recall only on the basis of a proposal of the Government.

**Prof PhD Jasnica Garašić from the Law Faculty of Zagreb** is toughly repeating that the Government is not conscious what it did with such a flaggingly passed legal regulations and that international aspects have not been mentioned any moment at all. If a settlement is achieved among creditors, it will not comprise assets outside Croatia. She also adds that the Government should have go into an urgent amendment of the Bankruptcy Law and that it could have inserted rules for the case when insolvency procedures are being opened against more than one daughter company to coordinate among themselves and to make a common plan into that law. Now some law articles exist from which so many questions are going out, such as who is going to implement them and how, that it will be a real miracle unless Croatia faces a range of legal actions filed by damaged creditors after completion of the process of restructuring of Agrokor.

**The President of the Constitutional Court, Miroslav Šeparović,** said that he expected arrival of the "Lex Agrokor" in front of the constitutional judges and presented his principal opinion that all the constitutional laws could be limited in accordance with the principle of linearity if there was a legitimate aim in the public interest.

**The former President of the Supreme Court, Krunislav Olujić,** pointed out that during voting for the "Lex Agrokor" the Croatian Prime Minister boasted that the law had been compiled on the basis of the best European practices, but he missed to tell at the same time that we had had laws functioning in saving, more or less successfully, trading companies in our legislation as well, since the stated law was taken over from the Yugoslav legislation where it had been used to save companies of a social interest.

**Mislav Kolakušić, a judge of the Commercial Court,** who was against the enactment of the "Lex Agrokor" considered it to be an unconstitutional measure, but since the most recent amendments were nevertheless adjusted to a certain extent with the Constitution of the Republic of Croatia, but globally the situation did not change, i.e. the law had been prepared only for one person known in advance what was contrary to the Constitution of the Republic of Croatia. He added that it was unacceptable that the company owned by Ivica Todorić was not on the list of the tax debtors as well as that there was a provision in the law allowing evasion of taxes because all the debtors should be on the debtors list with or without special legal provisions.

**The Minister of State Assets, Goran Marić,** stated the most sever accusations against Agrokor claiming that the Concern had entered into de facto fictive "Management Agreements" with Ledo, Jamnica, Tisak and other associated companies in the total value of HRK 500 million at annual level pulling money out of those companies and that he expected urgent termination of such damaging agreements made by and between Agrokor and its associated companies. Thanks to those agreements, stated companies were disabled to pay to their suppliers and they paid to Agrokor instead. He pointed out that although the Law on Financial Stability Commission headed by the Governor of the Croatian National Bank did not perform its tasks because in the ex-country it had not been possible to open so many uncovered bills of exchange in the value of billions of Croatian Kunas without noticing it by competent institutions. Minister Marić concluded that with this situation in Agrokor we could only talk about the rudiments of the market economy in Croatia.

**Tihomir Jaić, a representative of family farms in the Agricultural Chamber** estimated that Agrokor's debt to family farms amounted to approximately HRK 1.5 billion and that a part of small family farms had received only 15 % out of the total debt and that not even incurred expenses or VAT had been covered with it, it could be concluded that the stated family farms did not receive even the value of their investments. Small producers had to take loans to continue production and normal life. There were cases in which Konzum had not paid debts since 8th September, 2016 and it did not have any interests and therefore it did not want to write debts off, because small producers could not afford it to the contrary of banks whose interests had been serviced and due to that the debt towards banks were de facto paid off. Jaić explained that Agrokor had blackmailed small producers with terms of payment prolonging them to indefinite time periods and now small family farms faced collapse due to debts. In addition, if Konzum had not sold fruits and vegetables, 50 % was written off for family farms meaning that if goods had not been sold, they would be thrown away and small family farms had to cover a part of that. That was only one of the reasons for which a law on unfair commercial practice should be passed, but, unfortunately, that law had not been important for the last two governments, because the later had been passing without result almost three years, while the "Lex Agrokor" was passed in two days.

**The president of the Management Board and the majority owner of the Atlantic Group, Emil Tedeschi,** pointed out that a lot of small, middle and big suppliers had very bad liquidity and that the implementation of the law was necessary immediately. According his opinion the law was the only variant of salvation of Agrokor taking into consideration the fact that banks, suppliers and the management board of Agrokor could not find out any high-quality solution during the last month. He was proud of the Croatian Government because it was so wise to pass the law that gave a possibility to put the old Agrokor liabilities towards suppliers in front of the interests of banks and financial institutions. The condition of the economy and care of the Croatian Government about business entities, first of all for producers and traders was primary and he considered it to be a good attitude.

To conclude the story, the opinion of **Prof PhD Ljubo Jurčić from the Faculty of Economy of Zagreb** is very interesting according to which bankers motivated by invisible, but strong geo political interests were fighting for resources trying to weaken Agrokor, and it was a battle for the soil and the water in the clash between America and Russia. According to his opinion, Russia wanted to enter into this region not due to economic, but due to geo political or geo economic reasons. The cold war had terminated, but aims survived. NATO wanted to move towards Russian borders, while Russia wished to move the clash lines as far as possible from its borders. Russians wished to enter that region through the crude oil, or

through the capital or in some other way. At the moment of entrance of Sberbank into Agrokor, it was suitable for the later company to have an access to a little cheaper capital and that was the point where the position of Agrokor and the position of Croatia should be separated. But the importance of the role of Agrokor balance sheet is not bigger than the importance of geo politics. Russians would buy a share in Ina, not so due to the profitability of business, but to obtain an anchorage in the Balkan countries, and in such a game Croatia did not have any alternative strategy.

*Prepared by: Hrvoje Herceg, LLB, Energy and Services Ltd.*

## 2. 2017 ICC Arbitration Rules

Amended ICC Arbitration Rules came into force on 1st March, 2017 (further on: 2017 ICC Arbitration Rules). Amendments were applied to 2012 ICC Arbitration Rules (further on: 2012 ICC Arbitration Rules).

The amendment increased the filing fee for the request to commence an arbitration from USD 3,000.00 USD to USD 5,000.00. The scales of administrative expenses were amended, and the flat amount for the administrative expenses when the amount in dispute exceeded USD 500 million was increased from USD 113.215,00 to USD 150.000,00. 2017 ICC Arbitration Rules prescribe a reduced time limit for establishing Terms of Reference – that time limit amounts to 30 days now compared with earlier 2 months. Further on, 2017 ICC Arbitration Rules do not comprise the provision on the basis of which the Court decision on nomination, approval, exception or replacement of an arbitrator should not be explained any more.

The most significant amendment introduced by 2017 ICC Arbitration Rules refers to the introduction of a new type of procedure. Contracting 2017 ICC Arbitration Rules, parties will agree to apply the expedited procedure rules, independently from the provision of the arbitration agreement. In an expedited procedure, the Court of Arbitration may appoint a sole arbitrator independently from the provisions of the arbitration agreement. Parties can appoint the sole arbitrator within the term determined by the Secretary General, and unless they do so, the Court will do that for them. Expedient Procedure Rules shall apply in cases where the amount in dispute does not exceed the amount of USD 2,000,000.00 or when parties agree on the application of the stated procedure rules (OPT IN). Expedient Procedure Rules shall not apply if the arbitration agreement were concluded before the date of validity of 2017 ICC Arbitration Rules (1st March, 2017) or if parties agree not to apply the Expedient Procedure Rules (OPT OUT) or if the Arbitration Tribunal estimates for any specific case that the application of the Expedient Procedure Rules would be inappropriate. The Tribunal may decide not to apply the Expedient Procedure Rules any more at any moment during the procedure after consultation with the Court of Arbitration.

A cost management meeting shall be held not later than 15 days from the date when the Arbitration Court has received the file. The Tribunal can extend that term at the request of the Arbitration Court or on the basis of its own decision. The Secretary General can determine the advance payment of the costs of Arbitration to be settled by the Claimant by the moment of the Cost Management Meeting. It is important to point out that Terms of Reference do not apply to the Expedient Procedure. After constitution of the Arbitration Court, parties can file new requirements only if the Arbitration Court approves so. The Arbitration Court has the discretion right to apply such procedure rules it considers appropriate, for example, it can limit the number of applications by parties after consultations with the parties.

Further on, the Arbitration Court may make the award exclusively on the basis of the documents filed by the parties without any hearing of witnesses or expert witnesses after consultations with the parties. In case of hearings, the Arbitration Court can hold them in a video or telephone conference or in a similar manner. The Arbitration Court shall make the award within the term of 6 months from the date of holding of the Cost Management Meeting. The Tribunal can extend the stated term on the basis of its own decision or on the basis of a reasonable request of the Arbitration Court.

Finally, 2017 ICC Arbitration Rules shall apply to the Expedient Procedure in the extent not determined in Article 30 or Annex VI. 2017 ICC Arbitration Rules comprise scales with calculated costs for the Expedient Procure now.

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

### 3. New Arrangement of Costs of Administrative Disputes

The third novelty of the Administrative Dispute Law (Official Gazette of the Republic of Croatia, NN 29/17) came into force on 1st April, 2017 introducing different formation of administrative dispute costs as the main novelty.

Regarding the above stated we should remind ourselves that the Constitutional Court of the Republic of Croatia previously passed the decision and resolution No U-I-2753/2012 and other of 27th October, 2016 (Official Gazette of the Republic of Croatia, NN 94/16) cancelling the provision of Article 79 of the Administrative Dispute Law (Official Gazette of the Republic of Croatia, NN 142/12) that prescribed that each party of an administrative dispute would covere its own costs and postponed the effect of validity of the stated provision by 31st March, 2017.

The cancelled provision of Article 79 of the Administrative Dispute Law was challenged by the Association of Lawyers in Economy and numerous Croatian attorneys-at-law due to a conflict of that norm and Article 29 Para 1 of the Constitution of the Republic of Croatia, i.e. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the Republic of Croatia, NN – International Treaties 18/97, 6/99, 8/99, 14/02 and 1/06, further on: "the Convention"), considering that the amended provision of the administrative dispute costs were significantly hardening and disabling realisation of the legal protection against administrative acts that could finally result in a fact that only richer citizens could participate in an administrative dispute.

In the same manner, providing that the Constitutional Court cancellation of Article 79 of the Administrative Dispute Law does not mean that the costs of administrative proceedings have to or should be regulated in the same manner as costs, for example, of a civil procedure. The new regulation allows to take into consideration singularity of the administrative procedure in the extent that does not challenge the essence of the administrative and conventional right to access to the court.

New wordings of Article 79 of the Administrative Dispute Law start from the concept based on the admission of exclusively justified costs, admission of costs proportionally to the success in the dispute, admissibility of individual challenge of the cost decision in a claim and limitation of the admitted amount of the cost refund on the account of the counter party.

At the same time a new provision of Article 79, Para 2 of the Administrative Dispute Law on the inappreciability of the value of the subject of the administrative dispute that remains within the frames of the substance of the costs of the administrative dispute, not influencing the regulation of the value of the matter of dispute in other regulations, such as the Law on Courts or the Law on Court Fees should be pointed out. The aim of the provision of the inappreciablbty of the value of the administrative dispute is to limit the amount of dispute costs to be refunded by the party that lost the dispute to the party that was successful in the dispute not influencing the relationship between the attorney-at-law and the client, but governing exclusively the amount of reimbursement of expenses of the administrative dispute that can be reimbursed on the account of the counter party in the dispute.

Providing that defendants represented by official persons do not have right to reimbursement of representation expenses and, at the same time, defendants had been rarely represented by the Stated Attorney's Office as proved by the up to date practices of the first instant courts, and no parties with the capacity of an interested person participated in the majority of disputes, reimbursement of representation expenses in an administrative dispute is relevant, first of all, for the representation of the plaintiff. Unless the number of representation of defendants represented by the State Attorney's Office that is authorised by a power of attorney to perform actions for some of defendants, i.e. for the government administrative

bodies and other state bodies increases significantly, such new regulation of administrative procedure costs will objectively strengthen the status of the plaintiff in the administrative dispute in the first line. Namely, plaintiff will engage an attorney-at-law more frequently and his/her decision to propose taking evidence in the dispute will be easier since those expenses will be admitted as justified expenses incurred due to the dispute. On the other hand, that would result in a larger number of administrative disputes, a longer average duration time of administrative disputes and more frequent taking of evidence in the dispute.

One of the main challenges of interpretation of regulation of expenses in the administrative disputes will be primarily determination of the level of success in the administrative dispute pursuant Article 79, Para 4 of the Administrative Dispute Law. Namely, contrary to other kinds of court disputes and to the administrative dispute, in the administrative disputes no final decision on the matter of the dispute should be made.

It should be mentioned that the transitional provisions prescribe that the amended provision of Article 79 of the Administrative Dispute Law applies to already started and not finished administrative disputes in front of administrative courts and the Supreme Administrative Court of the Republic of Croatia. During the initial period it is realistic to expect not harmonised first instance court practices regarding the application of the new article 79 of the Administrative Dispute Law while the Supreme Administrative Court of the Republic of Croatia would have the role of harmonizer of the practice in its capacity of the second instance court in the administrative procedure when deciding on the appeals filed against the judgement reached by administrative courts on the dispute expenses.

Since the manner of the legal regulation of the reimbursement of expenses of the procedure represents one of the components of the right to access to the jurisdiction that is immanent to the right of the fair judging, the new regulation certainly returned the institute of expenses of the administrative procedure to the acceptable frameworks of the constitutional right despite some vagueness.

*Prepared by: Hrvoje Herceg, LLB, Energy and Services, Ltd.*

### 4. Decision of the Constitutional Court No U-I-3685/2015 and other of 4th April, 2017: "Swiss Francs"

With its Decision No U-I-3685/2015 and other of 4th April, 2017, the Constitutional Court did not accept proposals for estimation of the constitutionality of the Law on Amendments of the Law on Consumer Payment Appropriation (Official Gazette of the Republic of Croatia, NN 102/15; further on: "the Credit Law") and the Law on the Amendment of the Law on Credit Institutions (Official Gazette of the Republic of Croatia, NN 102/15; further on: "the Credit Institutions Law). Proposals for initiation of the procedure were filed by several applicants, including eight banks (Zagrebačka banka d.d., Privredna banka Zagreb d.d., Erste&Steiermärkische Bank d.d. etc.) among others. The conclusions of the Constitutional Court are briefed bellow.

In the first line it should be pointed out that the Credit Law provided for the conversion of credits and loans in CHF that were regularly serviced, terminated, sold or transferred or ceded in some other way, under the satisfaction procedure, with the liability that had not been stopped and for which enforcement proceedings had been initialled. The conversion did not comprise credits and loans in CHF given to legal persons, credits and loans converted into some other currency or paid off before the Credit Law came into force. The conversion procedure is voluntary for all the users of credits or loans in CHF and it is compulsory for creditors. The main aim of the conversion is to equalise the position of consumers who

have credits or loans in CHF with the position in which that consumers would have been if they had used credits or loans denominated in Euros or Croatian Kunas with a foreign exchange clause in Euros with the exchange rate applicable on the date of payment of credits or loans, the exchange rate being equal to that type of foreign exchange that the creditor applied on the stated date to all the credits and loans of the same type and same duration denominated in Euros or in Croatian Kunas with the foreign exchange rate clause in Euros.

In their proposals, applicants pointed out that connected laws were formally and materially contrary to the Constitution and that they damaged the principle of proportionality, that they represented discrimination for creditors and for consumers to which stated laws did not apply, that they offended the property right, entrepreneur and market freedom, the law of the European Union and that they had the retroactive effect.

In their plea of formal disagreement with the Constitution, applicants stated that challenged laws had been passed in an emergency procedure without a sufficient explanation and that no consultations with the European Central Bank had been held before their passing although they referred to issues for which the European Union Treaty foresaw obligatory consultations with the European Central Bank. The Constitutional Court concluded that reasons for the necessity of passing of the law in an urgent procedure listed by the Government had been sufficient (permanent elimination of disturbances in the economy, avoidance of a debtor crisis, etc.). Regarding the opinion of the European Central Bank, the Constitutional Court considered the opinion regarding the actual case given by the European Central Bank at its own initiative had been sufficient.

Regarding plea of damaging of the principle of proportionality, the Constitutional Court concluded that the contested laws satisfied the principle of proportionality: they had a legitimate aim (pursuant the data of the Ministry of Finance, the conversion had not caused distortive economic effects in banking services or monetary politics of the Republic of Croatia), the measure was necessary (since all earlier agreements made by and between interested parties were unsuccessful and the analysis of the Ministry of Finance had shown that the application of some other measures could provoke bigger disturbances that the conversion measure (conversion enabled elimination of a part of toxic credit portfolio and returned a significant number of consumers to the market since after conversion they were able to service the rest of their loans and credits regularly).

Applicants pointed out that applying contested laws one group of persons – consumers who had credit and loans in CHF, was discriminated positively when they were compared to others. The Constitutional Court concluded that the appreciation of the Swiss Franc did not influenced other consumer groups that had credits or loans and that it was not a discrimination, since the position of consumers with credits and loans in CHF and consumers with other types of credits and loans cannot be compared.

Regarding applicants' plea that the contested laws violated the property right, the Constitutional Court concluded that no violation was committed since effects of the increase of the value of the protective mechanism in Swiss Francs represented not realised profits for the majority number of credit institutions that did not result from the real inflow of the money in Swiss Franc, pointing out that it could not be neglected that credit institutions had not paid the due diligence when they were changing the interest rate changing it unilaterally and without certain parameters as determined by the Supreme Court of the Republic of Croatia. The Constitutional Court went further on pointing out that the property right should be considered in the context of the property right of citizens as well and that right had been jeopardised with unfair practices of banks that had not even developed or applied any models of solving debts before prescribing the conversion.

Furthermore, applicants pointed out that passing the contested laws, the legislator had entered into the area of the freedom of contracting neglecting completely the constitutional warranty of free export of profits and invested capital. The Constitutional Court concluded that the stated violations had never been done, referring to reasons stated in the decision on the plea for the violation of the property right.

The conclusion of the Constitutional Court regarding the stated plea regarding the retrospectivity of contested laws was especially interesting. Applicants pleaded that the effects of contested laws were completely retroactive. The Constitutional Court concluded that the majority of provisions of contested laws had the pro future effect, and therefore both, rights and obligations coming from the civil law, tax law and penal law effects of conversion to the addresses would be performed only after the contested laws came into force. The Constitutional Court pointed out that the conversion was not been made by force of the law, but only during performance of future (new, i.e. amended) credit and loan agreements whose conclusion depended on the will of consumers together with previous obligatory preparatory activities of credit institutions.

In addition, applicants pointed out the plea that the contested laws were not adjusted to the international agreements for motivation and protection of investments that had been concluded by and between the Republic of Croatia with the Republic of Austria and the Republic of France, neither with the Directive 2014/17 of the European Parliament and Council of 4th February, 2014 on contracts and agreements on consumer loans and credits regarding living real estates and on amendments on directives 2008/48/EU and 2013/36/EU and Regulation (EU) No 1093/2010. Regarding international treaties, the Constitutional Court pointed out that no actual type of contract and/or agreement was subject to the approval of the Croatian Parliament, and therefore it could not estimate their constitutionality. The Constitutional Court pointed out that Directive 2014/17 applied exclusively to contracts and/or agreements concluded after 21st March, 2016 and therefore it did not apply to controversial contract on credits and loans in CHF.

Finally, regarding the estimation of the constitutionality of the Credit Institution Law, the Constitutional Court pointed out that applicants' pleas were similar in their essence and therefore it did not accepted proposals. The Constitutional Court referred to reasons stated regarding the Credit law for its decision.

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**5. Fourth Directive on Money Laundering Prevention**

After three Directives on the Prevention of money laundering passed during the time period from 1991 to 2006 extending the circle of criminal offences bound to the money laundering, the forth Directive on the prevention of Money Laundering, Directive (EU) 2015/849, came into force on 25th June, 2015 and all the State Members had to implement it by 26th June, 2017.

Although a less than three months left by the final date of coming into force of the Fourth Directive, only few European Union Member States had integrated it into their legislations and, generally, only partially.

The Fourth Directive extended the money laundering as a criminal offence to tax criminal offences bound to direct or indirect taxes as well and now, avoiding of tax payments was considered to be a criminal offence. A circle of obliged persons subjected to the Fourth Directive was additionally widened by determination of the threshold of Euro 10.000 for commercial transactions paid in cash independently whether it was only one transaction or a range of linked transactions. The Fourth Directive applied also to the whole sector of games of chance and not only to casinos. It also comprised new products such as electronic money products.

Due to the need of determination of the real owner, that Directive prescribed the obligation of provision of the information on the end real owner to all legal persons and Member States should assure that all the entities founded in their territories pursuant the national laws receive and have appropriate, accurate and valid data on their real property.

The requirement regarding keeping and maintenance of a central register of information on real property for the needs of the in-deep analysis was also important.

Entities subjected to the Fourth Directive were obliged to make an in-deep analysis of all trading companies from the high-risk countries to overmaster the risks and decrease them.
The Directive defined the senior manager as an officer or employee who had enough knowledge on the exposal of the institution to the risk of money laundering and financing of terrorism as well as of the appropriate level to make decisions influencing the exposal of the company to the risk explicitly insisting that the senior managers did not need to be a member of the management board.
The novelty of the Fourth Directive also referred to the category of politically exposed persons. The definition was not changed and it was taken over form the Third Directive, but it was extended with the obligation of the implementation of the enhanced deep analysis of every person politically exposed in the home land as well.
The Forth Directive was not implemented in the majority of the European Union Member States by the time being, since they did not have supranational support in some important issues such as a super national estimation of risks bound with the money laundering and financing of terrorism by the European Commission and the European Supervisory Bodies in accordance with the Directives on Risk Factors for single deep analysis and enhanced in deep analysis.
At the time being, the European Commission was in the middle of the procedure of national estimation of risks with the aim to analyse the risks of the money laundering and financing of terrorism with the influence on the internal market and proposing of measures for their decrease. Independently form that, Member States would have to make their own national estimations of risks, and obliged persons subjected to the Fourth Directive should include super national estimation of risks in the procedure of national estimation of risks as well.

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