BAROŠ, BIČAKČIĆ & PARTNERS

Newsletter

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Rješavanje Sporova

Dispute Resolution

Jedna od naših specijalnosti u pružanju advokatskih usluga odnosi se na rješavanje sporova. Dugogodišnje iskustvo daje nam za pravo da izdvojimo i prezentujemo neke od veoma zanimljivih i kompleksnih predmeta, istovremeno i zanimljiva stanovišta sudske prakse. Rješavanje sporova zahtjeva veoma predan pristup povjerenom predmetu, u suprotnom i najmanja greška može da uzrokuje nepopravljive posljedice.

One of our specialties in providing legal services is dispute resolution. Many years of experience give us the right to choose and present some of the most interesting and complex cases, and at the same time some interesting points of the case law. Dispute resolution requires a very dedicated approach to the entrusted case, otherwise the smallest mistake may cause irreparable consequences.

Investicione arbitraže

Investment arbitrage

Veliki broj investicija prati nastanak spornih situacija koje se ne mogu sporazumno rješiti, usljed čega se postavlja pitanje nadležnosti za rješavanje nastalih sporova. Investitori kao ugovorne strane najčešće se odlučuju na arbitražnu klauzulu, pa u slučaju nastanka spornih situacija, iste uglavnom povjeravaju arbitraži kao nadležnoj instanci za rješavanje sporova. Prilikom ugovaranja arbitraže svakako je potrebno obratiti pažnju na formulaciju arbitražne klauzule, određivanje vrste arbitraže, broja arbitara, mjerodavnog prava, arbitražnih pravila i sl.

A large number of investments is followed by the emergence of disputable situations that cannot be settled amicably, which raises the issue of jurisdiction for resolving the arising disputes. Investors as contracting parties usually opt for an arbitration clause, and in the event of disputes, they generally entrust them with arbitration as the competent dispute resolution instance. When agreeing on arbitration, it is important to pay attention to the formulation of an arbitration clause, to determine the type of arbitration, the number of arbitrators, applicable law, arbitration rules, etc.

Međutim, u posljednje vrijeme sve više dobija na aktuelnosti i značaju ICSID arbitražni sud sa sjedištem u Vašingtonu. Međunarodni centar za rješavanje investicionih sporova (ICSID) svoju nadležnost uglavnom zasniva na odredbama bilateralnih sporazuma zaključenih između država potpisnica, koji u slučaju nastanka spora predviđaju mogućnost pokretanja ICSID arbitražnog postupka.

ICSID arbitražni postupak predstavlja nepoznanicu za mnoge države. Često se desi da iz zaključenog ugovora sa investitorom proizilazi nadležnost određenog arbitražnog suda, međutim, koristeći mogućnost predviđenu bilateralnim sporazumom umjesto ugovorene arbitraže, investitor se ipak odluči za pokretanje ICSID arbitražnog postupka. Pokretanje ICSID arbitražnog postupka često iznenadi predstavnike državnih organa koji nisu računali na mogućnost pokretanja arbitražnog postupka koji nije ugovoren. ICSID arbitražni postupci su u ekpanziji, sve veći broj investitora se odlučuje za korišćenje mogućnosti ugovorene bilateralnim sporazumom između država, pa slobodno možemo da kažemo da je ICSID trenutno najaktuelniji centar za rješavanje investicionih sporova. Mali broj advokatskih kancelarija ima tu privilegiju da vodi investicioni spor i zastupa investitore na ICSID-u.

However, lately, the ICSID arbitration tribunal headquartered in Washington has been becoming increasingly popular and significant. International Centre for Settlement of Investment Disputes (ICSID) mainly relies on the provisions of bilateral agreements concluded between signatory states which, in the event of a dispute, provide for the possibility of initiating an ICSID arbitration procedure.

ICSID arbitration procedure is unknown to many countries. Often, the concluded contract with the investor stipulates the jurisdiction of a particular arbitral tribunal, however, using the option provided for in a bilateral agreement instead of the agreed arbitration, the investor nevertheless decides to launch an ICSID arbitration procedure. Launching ICSID arbitration often surprises the representatives of state authorities who had not considered the possibility to initiate arbitration other than the agreed one. ICSID arbitration proceedings are expanding, growing number of investors are deciding to use the possibilities offered by bilateral agreements between the states, so we can say that the ICSID is currently the leading centre for settlement of investment disputes.
Not many law firms have the privilege to lead an investment dispute and represent investors before the ICSID.

Posebno je mali broj kancelarija iz regiona koji se može pohvaliti takvom referencom. Drago nam je da spadamo u mali broj kancelarija koji je dobio tu privilegiju.

U ICSID predmetu br. ARB/36/16 investitori iz Slovenije su pokrenuli arbitražni postupak protiv Bosne i Hercegovine koji je nastao povodom dodjele koncesije za izgradnju dvije hidroelektrane na rijeci Vrbas, ukupne instalisane snage 85,7 MW. Osnov za pokretanje ICSID arbitražnog postupka leži u kršenju odredbi Sporazuma o recipročnom unapređenju i zaštiti investicija koji je zaključen između Bosne i Hercegovine i Republike Slovenije, kao i kršenju odredbi Ugovora o energetskoj povelji čiji su potpisnici takođe Bosna i Hercegovina i Republika Slovenija. U predmetu je formirano arbitražno vijeće, očekujemo nastavak arbitražnog postupka.

Dakle, rješavanje potencijalnih sporova i arbitražna klauzula je svakako stvar na koju treba obratiti posebnu pažnju prilikom realizacije određene investicije.

Investitorima u svakom slučaju stoji na raspolaganju pokušaj rješavanja spora putem domaćeg pravosuđa, međutim, malo ko od stranih investitora polaže povjerenje u domaći pravosudni sistem.

There is a particularly small number of offices in the region that can take pride in such a reference. We are pleased to be among the offices that have received this privilege.

In the ICSID case no. ARB/36/16 investors from Slovenia initiated arbitration procedure against Bosnia and Herzegovina which had arisen due to the award of the concession for the construction of two hydropower plants on the Vrbas River, with the total installed capacity of 85.7 MW. The ground for initiating ICSID arbitration procedure lies in the violation of provisions of the Agreement on Reciprocal Promotion and Protection of Investments concluded by and between Bosnia and Herzegovina and Republic of Slovenia, as well as the violation of provisions of the Energy Charter Treaty also signed by Bosnia and Herzegovina and Republic of Slovenia. In this case, the arbitration panel has been formed, and we are expecting the continuation of the arbitration procedure. Therefore, resolution of potential disputes and arbitration clauses are certainly matters to which particular attention should be paid when implementing a certain investment.

In any case, investors are able to try to resolve the dispute through the domestic judiciary, but few of the foreign investors trust the domestic justice system.

S druge strane, jedna od bitnih stavki koja se odnosi na arbitražne postupke svakako predstavljaju i troškovi arbiražnog postupka. Investicione arbitraže su izuzetno finansijski zahtjevne i u slučaju propalih projekata, često i van ugovorne odgovornosti investitora, sigurno je da određeni broj investitora uslijed nedostatka finansijskih sredstava ne uspije ostvariti zaštitu svojih prava putem arbitražnog postupka.

On the other hand, one of the important matters to consider in arbitration proceedings are the costs of those proceedings. Investment arbitration is extremely financially demanding, and in the case of failed projects, often beyond the contractual responsibility of the investor, it is certain that a particular number of investors, due to lack of financial resources, fail to secure their rights through arbitration.

Često se desi da iz zaključenog ugovora sa investitorom proizilazi nadležnost određenog arbitražnog suda, međutim, koristeći mogućnost predviđenu bilateralnim sporazumom umjesto ugovorene arbitraže, investitor se ipak odluči za pokretanje ICSID arbitražnog postupka.

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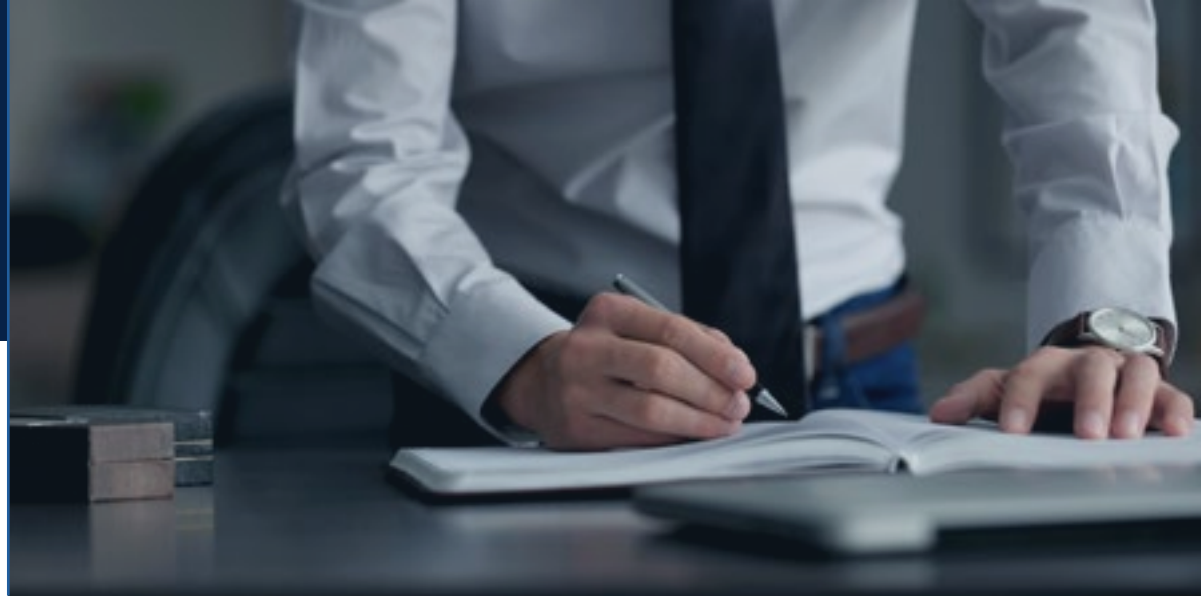

Ugovori o kreditu sa valutnim klauzulama Libor – Euribor, jednostrana promjena kamatne stope

Loan agreements with currency clauses Libor – Euribor, unilateral changes of the interest rate

Već je opštepoznata konfuzija koja je nastala u pravnom prometu zahvaljujući ugovorima o kreditu koji sadrže valutnu klauzulu. Naime, predmetna problematika u domaćem pravnom sistemu se prevashodno veže za ugovore o kreditu sa valutnom klauzulom u švajcarskim francima (CHF). Nagli porast švajcarskog franka u odnosu na domaću valutu uslovio je i porast obaveze korisnika kredita i njihov revolt izražen u odnosima prema banci. Međutim, brojni sudski postupci i medijsko eksponiranje predmeta koji sadrže CHF valutnu klauzulu,

The confusion in legal transactions which has arisen due to loan agreements that contain a currency clause is already widely known. Namely, in domestic legal system this matter primarily refers to loan agreements with currency clauses related to the Swiss francs (CHF). The sharp rise of the Swiss franc in relation to the domestic currency caused the increase in the liability of borrowers and their revolt against the bank. However, numerous court proceedings and media exposure of cases containing CHF currency clause have

podstakao je i ostale korisnike kredita da preispitaju zaključene ugovore o kreditu sa bankom (koji ne sadrže CHF valutnu klauzulu), nakon čega su mnogi potražili sudsku zaštitu. Veliki broj sudskih postupaka koji se vode već nekoliko godina, doveo je do stvaranja dragocjene sudske prakse.

Kompleksnost predmeta dovela je do različite sudske prakse, pa iako se radi o istoj problematici, formirana praksa sudova u Republici Srpskoj značajno odstupa od prakse u Federaciji BiH, kao što se razlikuje praksa formirana u ostalim zemljama u kojima su bili prisutni isti sudski sporovi (Francuska, Bugarska, Rumunija, Srbija, Crna Gora, Hrvatska, Slovenija itd.).

Prama praksi formiranoj pred sudovima u Republici Srpskoj: Banka ne može jednostrano da vrši povećanje ugovorene kamatne stope, prema parametrima koji nisu unaprijed poznati korisniku kredita, bez utvrđenih ograničenja, uprkos odredbama zaključenog ugovora. Ugovorna odredba koja bi jednoj strani ostavljala mogućnost diskrecionog postupanja na račun i štetu druge ugovorne strane protivila bi se odredbama domaćeg zakonodavstva (zakona o obligacionim odnosima), načelu ravnopravnosti ugovornih strana i kao takva ne bi bila dopuštena.

have encouraged other borrowers to review concluded loan agreements with banks (which do not contain a CHF currency clause), after which many sought judicial protection. A large number of court proceedings that have been conducted for several years have led to the creation of valuable case law.

The complexity of cases has led to different case law, even though they refer to the same issue, the established practice of the courts in the Republic of Srpska significantly differs from the practice in the Federation of BiH, and the practice is also different in other countries where the same disputes have been present (France , Bulgaria, Romania, Serbia, Montenegro, Croatia, Slovenia, etc.).

According to practice established before the courts in Republic of Srpska: The bank may not unilaterally increase the interest rate, according to parameters that are not known in advance to the loan beneficiary, without the specified limitations, despite the provisions of the concluded agreement. A contractual provision that would leave a party with a possibility of discretionary action on the account and to the detriment of the other party would be contrary to the provisions of domestic legislation (law on obligations), the principle of equality of contractual parties and as such would not be permitted.

Dakle, radi se o zauzetim stavovima sudske prakse koji su primjenjivi i u mnoštvu drugih sličnih predmeta. Zadovoljstvo nam je istaći da smo učestvovali u rješavanju najsloženijih predmeta iz ove oblasti i da smo dali naš doprinos formiranju usvojene sudske prakse.

Hence, the adopted case low is applicable in many other similar cases. We are pleased to note that we participated in solving the most complex cases in this area and that we gave our contribution to the formation of the adopted case law.

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Pristup predmetu – izgradnja slučaja

Approach - Building a case

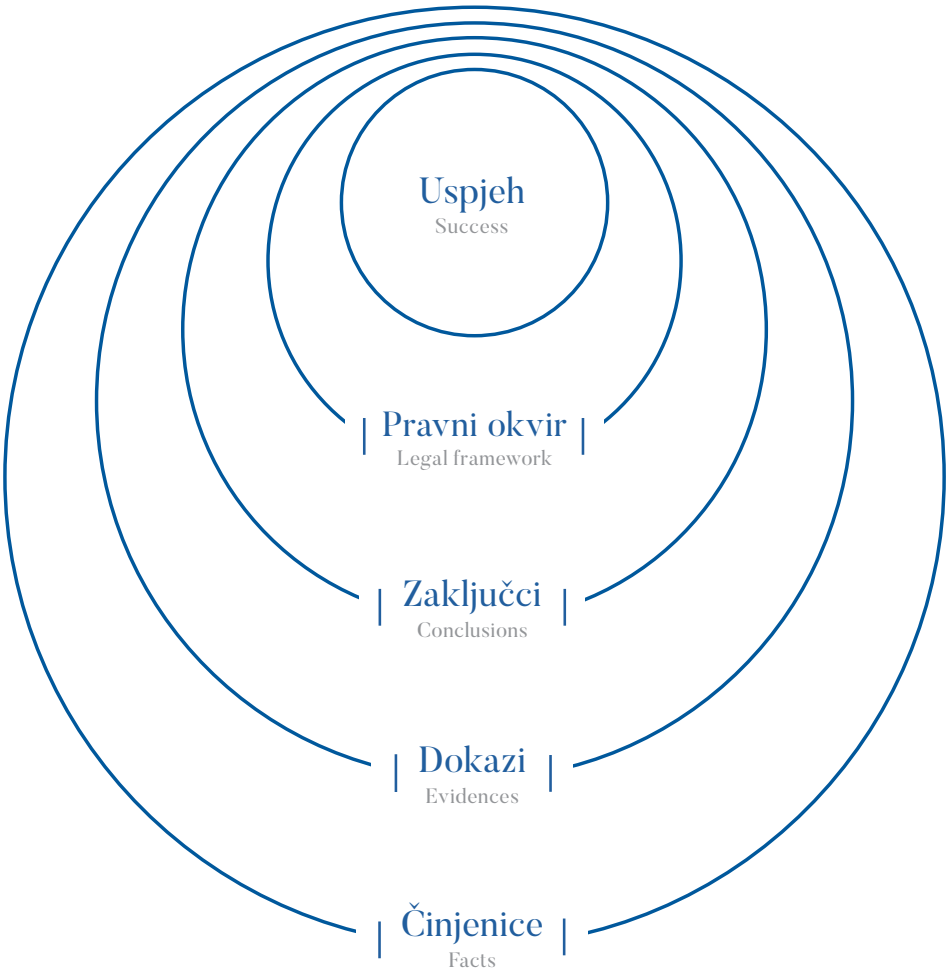
Rješavanje sporova, bez obzira da li se radi o vrijednosno beznačajnom sporu ili velikoj investicionoj arbitraži zahtjeva u potpunosti isti pristup. Predan rad na predmetu istovremeno predstavlja i izgradnju samog slučaja koji mora da ima čvrste temelje, ukoliko postoji intencija da se ostvari uspjeh.

Poput izgradnje kuće, svaki sprat koji se izgradi mora da bude temeljno postavljen da bi poslužio kao dobar osnov za naredni koji se na njega niže, tako i kod rješavanja sporova iz mnoštva činjenica potrebno je izdvojiti odgovarajući dokazni materijal, iz dokaza je potrebno izvesti odgovarajuće zaključke koji moraju biti usaglašeni sa zakonskom regulativom.

Dispute resolution, regardless of whether it is a dispute of insignificant value or a large investment arbitration, requires the same approach. Committed work on the case also means building the case which must have a solid foundation, if there is an intention to achieve success. Like the construction of a house, each floor that is being built must be thoroughly set up to serve as a good basis for the following ones, and in despite resolution, from a multitude of facts it is necessary to extract the appropriate evidence, from the evidence it is necessary to make the appropriate conclusions which must be harmonized with the legislation.

Naš pristup se sastoji od analize činjeničnog stanja, izgradnje adekvatnih dokaznih materijala iz kojih proizilaze odgovarajući zaključci koji imaju podlogu u pravnim normama. U velikom broju predmeta to predstavlja pravi izazov i zahtjeva veliku količinu utrošenog vremena, ali istovremeno predstavlja i jedini put koji vodi do uspjeha.

Very often there are many allegations and facts, without a lot of relevant evidence. Our approach consists of an analysis of the facts, the construction of adequate evidence folowed by relevant conclusions that have the basis in the legal norms. In a large number of cases this presents a real challenge and is very time-consuming, but at the same time it represents the only path leading to success.



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Za sve pravne savjete i informacije stojimo vam na raspolaganju.

For all legal advice and information we are at your disposal.

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