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*Violation of the Consumer Acquis in Croatian Swiss Loans
Case Law and Practice*

**POLISH FINANCIAL OMBUDSMAN 1ST INTERNATIONAL CONFERENCE
FINANCIAL MARKETS AND CONSUMER PROTECTION**

22.10.2020, Rzecznik Finansowy, Warsaw



OUTLINE

- **BACKGROUND OF THE CROATIAN SWISS LOANS**
 - **CROATIAN COLLECTIVE REDRESS PROCEEDING**
 - **CONVERSION ACTS**
 - **SWISS LOANS CASE LAW AND PRACTICE**
 - **CONCLUSION**
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BACKGROUND OF THE CROATIAN SWISS LOANS

- **Article 22 of the Croatian Obligations Act** (Act on Amendments to the COA, Official Gazette 3/94) prescribes the possibility to conclude a loan agreement so that the loan principal, as the subject-matter of the agreement expressed in HRK as the official currency in the Republic of Croatia, is calculated with regard to another currency.
- Judgment of the Supreme Court of 12 February 1992, Rev-2872/1991:
- ***“What parties wish to achieve by the currency clause is that at the moment of fulfilment of the obligation, the creditor receives in money the exact value the parties had in mind when they concluded the agreement, which means they wish to achieve the principle of equal value of mutual payments.”***

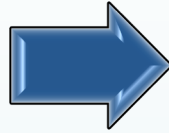
BACKGROUND OF THE CROATIAN SWISS LOANS

- Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States (SAA) of 29 October 2001, *Official Gazette of the Republic of Croatia – International Agreements (OG IA)* Nos. 14/01, 15/01, 14/02, 1/05, 7/05, 9/05 and 11/06
- Obligation to align the Croatian existing legislation with the *acquis communautaire* stipulated in Arts. 69 and 74 SAA
 - Harmonization clause – Art. 69 SAA
 - Consumer protection – Art. 74 SAA
 - The first Consumer Protection Act (CPA), OG No. 96/03 was enacted in June 2003 and represented partial approximation with the EU consumer protection *acquis* transposing Directives 98/6/EC, 85/577/EEC, 97/7/EC, 94/47/EC, **93/13/EEC**, **84/450/EEC**, **87/102/EEC**, and partially the Directive 1999/44/EC Consumer Protection Act
 - The new CPA was enacted in August 2007, OG Nos. 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12, and 56/13 and implemented Directives 2002/65/EC, 98/27/EC, and **2005/29/EC**

CROATIAN CROATIAN COLLECTIVE REDRESS PROCEEDING

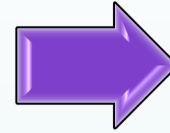
Judgment and order of the High Commercial Court of the Republic of Croatia of 13 June **2014**, Pž-7129/13-4

- UCT:
- VARIABLE INTEREST RATE ✓
- CURRENCY CLAUSE X



Judgment and order of the Supreme Court of the Republic of Croatia of 9 April **2015**, Revt-249/14-2

- UCT:
- VARIABLE INTEREST RATE ✓
- CURRENCY CLAUSE X

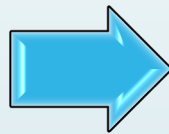


Decision of the Constitutional Court of the Republic of Croatia of 13 December **2016**, U-III – 2521 / 2015

- UCT:
- VARIABLE INTEREST RATE ✓
- CURRENCY CLAUSE?

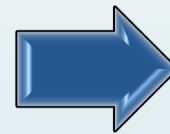
Order of the Supreme Court of the Republic of Croatia, 3 October **2017**, Revt 575/16-5

- UCT:
- VARIABLE INTEREST RATE ✓
- CURRENCY CLAUSE?



Judgment of the High Commercial Court of the Republic of Croatia of 14 June **2018**, 43 Pž-6632/2017-10

- UCT:
- VARIABLE INTEREST RATE ✓
- CURRENCY CLAUSE ✓



Judgement and order of the Supreme Court of 3 September 2019, Rev-2221/2018-11

- UCT:
- VARIABLE INTEREST RATE ✓
- CURRENCY CLAUSE ✓

CROATIAN COLLECTIVE REDRESS PROCEEDING

- ▶ Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2:
- ▶ *“there is however a **duty of Croatian courts to interpret national law in the spirit of the law of the European Union and of her overall acquis (what includes among others also a practice of the Court of Justice of the European Union)**, to what the Republic of Croatia obliged itself by signing the Stabilisation and Association Agreement that was in force from 2005”*

CONVERSION ACTS





- ▶ **Act on Amendments to the Consumer Credit Act, Official Gazette 102/15**
- ▶ **Act on Amendments to the Credit Institutions Act, Official Gazette 102/15**
 - ▶ These amendments enabled **one-off conversion of loans denominated in Swiss francs (CHF loans) into loans denominated in Euro (EUR loans) and the one-off conversion of loans denominated in Croatian Kuna and indexed to CHF (“HRK/CHF loans”) into loans denominated in HRK and indexed to EUR (“HRK/EUR loans”).**

List of infringements by case by decision

Status Active cases Closed infringement cases All

Type of infringement Non-communication cases Other All

Infringement number

Decision date from  to 

Decision type

Press release/Memo (when checked, only results containing a press release/memo will be displayed)

Member state

Policy area / Department in charge

Title

Showing records 1 - 2 of 2 records Page 1 of 1

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Infringement number	Decision date	Decision type	Press release	Memo	Member state	Policy area / Department in charge	Title	Active infringement cases	Non-communication cases
20152198	16/06/2016	Formal notice Art. 258 TFEU			Croatia	Financial Stability, Financial Services and Capital Markets Union	Amendments to the Consumer Credit Law and the Credit Institutions Law in Croatia	Yes	No

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

- ▶ Article 25 ICSID Convention:
- ▶ «(1) **The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment** , between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.»



ICSID

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Pending Cases with Details



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Croatia



1. Erste Group Bank AG and others v. Republic of Croatia (ICSID Case No. ARB/17/49)

Subject of Dispute:	Banking services and debt instruments
Economic Sector:	Finance
Instrument(s) Invoked:	BIT Croatia - Austria 1997
Applicable Rules:	ICSID Convention - Arbitration Rules

2. Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia (ICSID Case No. ARB/17/37)

Subject of Dispute:	Banking services and debt instruments
Economic Sector:	Finance
Instrument(s) Invoked:	BIT Croatia - Austria 1997
Applicable Rules:	ICSID Convention - Arbitration Rules



Pending Cases with Details



3. Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (ICSID Case No. ARB/17/34)

Subject of Dispute:	Banking services and debt instruments
Economic Sector:	Finance
Instrument(s) Invoked:	BIT Croatia - Austria 1997
Applicable Rules:	ICSID Convention - Arbitration Rules

5. UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia (ICSID Case No. ARB/16/31)

Subject of Dispute:	Banking services and debt instruments
Economic Sector:	Finance
Instrument(s) Invoked:	BIT Croatia - Austria 1997
Applicable Rules:	ICSID Convention - Arbitration Rules

SWISS LOANS CASE LAW AND PRACTICE



**Consumer
Credit Rules**



**Unfair
Commercial
Practices**



**Unfair
Contractual
Terms**

Violation of the Consumer Protection Acquis

Consumer Credit Rules

- ▶ Judgment of Croatian High Commercial Court of 14 June 2018, 43 Pž-6632/2017-10, 62:
- ▶ **“By offering the lowest interest for contracts in which the principal is pegged to the Swiss franc currency, the bank is encouraging consumers, in an unfair way,** to conclude contracts containing precisely the foreign currency clause in Swiss francs, and where **failure to provide this relevant information** at the very start leads to **significant imbalance to the detriment of the consumer and is contrary to the principle of good faith.**”
- ▶ Judgment and order of the Commercial Court in Zagreb of 4 July 2013, P-1401/12, 94:
- ▶ **“[...] upon conclusion of the agreement, she did not receive terms and conditions of... bank,** or the General terms and conditions on interest rates of that bank [...]”

Consumer Credit Rules

- ▶ Judgment and order of the Commercial Court in Zagreb of 4 July 2013, P-1401/12, 69, and 98:
- ▶ “[...] **that they were creditworthy for a “Swiss” loan, but not for a EUR loan**”; “[...] **the bank made two calculations**, one for a loan in Swiss francs and the other in EUR and **the Swiss franc loan was more favourable for her and she was 100% creditworthy for it**, while in the other option of a EUR loan, she would probably have to provide additional insurance [...]”.
- ▶ High Commercial Court of the Republic of Croatia of 14 June 2018, 43 PŽ-6632/2017-10, 62:
- ▶ “[...] individually persuading consumers during the conclusion of the agreement that the *Swiss franc* is a safe currency, also **often giving them an individual assessment that they are creditworthy only for entering into the agreement that contains terms under which the principal is pegged to the Swiss franc exchange rate.**”

Unfair Commercial Practices

- Judgment and order of the Commercial Court in Zagreb of 4 July 2013, P-1401/12, 114-128, 91:
- “...*The bank had tried to talk her into taking out a CHF loan because it had the most favourable interest rate [...]*”
- “...*the clients most often opt for housing loans in Swiss francs, as the interest rates are significantly lower, i.e., starting from 4.40%, which is the lowest interest rate for a housing loan on the Croatian market.*”
- Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, 21:
- “[...] the initial interest rate, although concluded as variable, was lower than the rate for agreements on loans concluded in Kuna or with a currency clause in EUR, **so it is easy to explain why the consumers found it more acceptable to conclude loan agreements with a currency clause in Swiss francs.**”

Unfair Contractual Terms



- Judgment and order of the High Commercial Court of 13 June 2014, Pž-7129/13-4, 57:
- “Such term is ***not only unintelligible to the average consumer, but it is unintelligible to anyone***, which is confirmed by the fact that the only certain element on which the amount of the **interest rate, which is variable**, depends is the bank's discretion (...)”.
- Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, 22:
- “***For an average consumer such terminology was absolutely unintelligible***”.

Unfair Contractual Terms



- Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, 18, 24:
- «(...) the legal concept of the currency clause is generally accepted by all entities and persons in this society and is used on a daily basis (...) This is why it can be safely established that **this institute is absolutely recognised and accepted in our the society** and is as such applied for many years, including in legal transactions such as credit agreements (...)»
- “(...) this court upholds the opinion from the challenged judgment of the court of second instance that **contract terms on the currency clause in Swiss francs in credit agreements** concluded by the sued banks in the relevant period **were intelligible** (...)”.

Unfair Contractual Terms

- ▶ High Commercial Court of the Republic of Croatia of 14 June 2018, 43 Pž-6632/2017-10, 52:
 - “...whether the banks presented to consumers in the precontractual stage information containing accurate, unambiguous criteria written in plain and intelligible language, **in the spirit of EU law**, on the basis of which an **average consumer, who does not have the expertise and to whom the legal concept of the foreign currency clause is familiar only as a general principle, could understand and is able to foresee the economic consequences which are derived for him from agreeing to the foreign currency clause in the Swiss francs**”.


Unfair Contractual Terms

- Judgement and order of the Croatian Supreme Court of 3 September 2019, Rev-2221/2018-11, 24 and 25:
- “[...] **contractual terms were unintelligible to clients**, since the consequences and reach of such contractual terms were not explained to them in a valid manner [...]” and emphasizing that the banks, although aware of the risks for the consumers, **“consciously omitted to inform clients about it.”**



CONCLUSION

- ▶ ECB Opinion to the Slovenian request for the introduction of conversion from 2019:
- ▶ “[...] it is important to ***carefully consider the impact of the draft law in order to ensure legal certainty, and to prevent moral hazard from arising in the relationship between creditor and debtor.***”
- ▶ **What about the ‘moral hazard’ that was done towards the consumers by concluding contracts, which violated the key aspects of the consumer *acquis*?**



Thank you for your attention!