Financed by the Dutch Government and the EU

Legal Opinion:

Post-War Collecting

of

Pre-War Debts

The Slavonska Banka cases

April, 1998

I. Introduction

I.1 Two cases

May 1991: a resident -Slobodan- of the present Croatian Danube Basin has a debt of 200 Yugoslavian Dinar on his current account with his bank, the equivalent of approximately 28 Deutschmark.

May 1991: another resident –Milan- has a deposit of the amount of two month's wages: 12.000 Yugoslavian Dinar, the equivalent of 1.800 Deutschmark.

In this period a civil war starts and tears apart the Socialist Federal Republic of Yugoslavia into several independent states. In this process, people were killed, cities were destroyed and people were separated from their homes and families.
In this war, the present Croatian Danube Basin (the Region) was separated from the rest of independent Croatia. At first the Region – at that time called "Republika Srpska Krajina"- was isolated by a military front, later this front became a "zone of separation". No one could cross this 'border', no one could give a telephone call to the other side of this border, and there was no possibility to make financial transactions to the other side. No means of communication could be used from one side of the 'border' to the other side.
Since Milan and Slobodan were on one side of this 'border', and the bank had its office on the other side of the 'border', they had no contact with their bank for over 6 years and vice versa.

January 1998: Milan goes to an office of his bank to get information on the balance on his bank account. He is told he has no money left on his account, due to the high inflation.

January 22, 1998: Slobodan receives mail from his bank, for the first time since 1991. It is one slip of paper; a computer printout only stating his name, his address, his account number and the balance on his account: minus 35.000 Kuna, the equivalent of 10.000 Deutschmark.

Slobodan is one of the at least 847 account keepers with this bank in the Croatian Danube Basin (the Region) who have received a similar slip stating a large debt in January 1998. The bank is called Slavonska Banka and resides in Osijek. These approximately 850 keepers of a bank account were all residents of the Region in 1991, which means that they have lived at the same address the past 7 years. In a reaction to this slip, the clients have sent letters to the bank, asking for information on their original 1991-debt. Until to date (April 1998), Slavonska Banka[1] has not given this information. Igor is one of the at least 847 current account keepers with this bank in the Croatian Danube Basin (The Region) who have received a similar slip stating a big debt in January 1998. The bank is called Slavonska Banka and resides in Osijek. These about 850 current account keepers all were residents of The Region, which means that they have lived at the same address the past 7 years. In a reaction to this slip, the clients have sent letters to bank, asking for information about their original 1991 debt. Until now (March 1998), Slavonska Banka has not given this information. Instead, Slavonska Banka has started to

[1] A remarkable fact in these Slavonska Banka cases is the fact that Mr. Branimir Glavaš is a member of the Supervisory Board of the Bank. Glavaš had an active leading function in the Croatian army during the war in 1991. After his military function he became Zupan (Prefect) of the Osijek County until September 1997.

collect these alleged debts by putting liens[2] on the property of its account keepers. OSCE has tried to mediate, by asking the bank for more specific information in a great number of meetings. But this problem is far from being solved.

All the other banks have followed the example set by Slavonska Banka and are now collecting their accumulated debts as well. Thus, this post-war collecting of pre-war debts concerns an important part of the domicile population of the Region.

I.2 Questions

This paper will focus on the legal aspects of the Slavonska Banka cases. The question is what is the legal position of the customers?

- Do they have to pay this apparently disproportional sum?
- Could this perhaps be a case of Force Majeure, a factual impossibility to fulfil one's obligation?
- If this is a case of Force Majeure, what would be the consequences for the debts?

II. The Slavonska Banka Case from a legal point of view II. The Slavonska Banka Case from a legal point of view

In order to find answers to these questions, this chapter will firstly give a brief introduction into Croatian Law and general principles of law. Secondly, Force Majeure will be explained. Following this paragraph, a summary will be given of the factual situation in The Region where these clients have lived for the past years.

II.1 General principles of law

Croatian Law is a mixture of different systems of law[3], which results in an unique system. The general principles of Croatian civil law are based on Roman Law -as other (European) continental systems of private law are.
Two general principles of law are:

The principle of equity

This means, that subjects of civil law (e.g. people, authorities and companies) are submitted to the 'law of reason'. Parties always have to be reasonable in the fulfilment of obligations and other legal liaisons between subjects of law. This is a very broad criterion, but very important: Regardless of the type of obligation one has or has agreed upon, parties can only be obliged to act *within* the borders of equity.

The principle that one can not stipulate an impossible performance.

Contracting parties can not be obliged to fulfil an impossible obligation. In this paper, a closer insight will be given into one of those situations of impossibility of performance: Force Majeure.

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[2] A lien is a temporary measure employed by judicial authorities, at the request of the claimant, to limit the exercise of ownership rights over a certain property by an owner against whom claims have been lodged, pending the determination and/or the discharge of the claim. A property on which a lien is placed can not be sold, used as collateral security for a loan or transferred in any other way for financial benefits of the owner. If the court of first instance or on appeal does not discharge a lien, its execution would mean sale of such property by the authorities to recover a judgement debt.

[3] The Croatian Law has not drastically changed since Croatia left Yugoslavia. Croatian Law is a mixture of Austrian Laws, Hungarian Laws, Italian Laws and more recently developped laws and regulations. Merely a part of the areas of law has been codified. Croatian Law is originally based on Roman Law and it has been influenced by the Code Napoleon.

II.2 Force Majeure

As mentioned in the above, Force Majeure is a basic principle of civil law in the various continental Civil Codes, including the Croatian Civil Law.
Force Majeure can be defined as:
Temporary or permanent impossibility to fulfil one's obligations, due to factual circumstances such as
- Act of God[4],
- War,
- Physical obstacles,
  or due to
- (New) legislation.

In other words, Force Majeure is the situation in which insuperable obstacles prevent one from doing what one is supposed to do.

II.3 Codified Force Majeure in Croatian

Force Majeure (insuperable obstacles) is codified in Croatian Law. For cases of civil law, the Law on Obligations[5] is the most important legislation:

According to article 137 Croatian Law on Obligations (LoO):
When an obligation can not be fulfilled due to insuperable obstacles, the debtor will have to pay back his debt on the basis of "unjust enrichment".
A more specific example of Force Majeure dealing with debts is art. 354 LoO:
The obligation will cease to exist when its fulfilment has become impossible, caused by reasons whereof the debtor is not responsible.

II.4 The factual situation in the Region from Summer 1991 to January 15, 1998 in relation to Force Majeure

II.4.a. Period I: Summer 1991 – 1996; "Republika Srpska Krajina"

Early Summer 1991 Croatia declared itself independent, and in parts of Croatia the "Republika Srpska Krajina" ("RSK"), an autonomous quasi-state, was proclaimed. This resulted in an armed conflict and a civil war in former Yugoslavia was a fact. As a result of this war, the Region became a part of this so-called "RSK".
People within the borders of the "RSK" could not leave the Region to go to Croatia proper. As mentioned above those borders with Croatia proper were not real borders, but a mere frontline. No one could pass this line.
The "RSK" and the Yugoslavian Federation were still integrated in most public areas; such as electricity, telephone services. Also the monetary system of the "RSK" was linked to the Yugoslavian monetary system. Exchange controls prevented people from transferring money abroad. Thus, making financial transfers from Yugoslavia and the Region to other countries and Croatia proper was not possible.[6]
Contact by mail was not possible, because no mail could be sent from the Region to Croatia proper. The Yugoslavian telephone services (PTT) provided the telephone services; but no telephone contact could be established between Yugoslavia and Croatia proper.
In these Slavonska Banka cases it has to be kept in mind that the clients of the bank lived in "RSK" and the Bank resided in Croatia proper, in Osijek on the other side of the "zone of separation".

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[4] Lightning, storm, etc.
[5] Zakon o Obveznim Odnosima
[6] For this very reason, it was not possible to pay back the debt from Hungary, contrary to what the Bank has claimed in some cases.

II.4.b. Period II: 1996 – 1998; UNTAES transitional administration
On January 15, 1996 the Region was put under the transitional administration of UN: United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES).
During this period, contact between the Region and the rest of Croatia was gradually re-established. Contact by mail and telephone became step-by-step possible.
The mail services started to function in the Autumn of 1996. It took until Spring 1997 before people were able to leave and enter the Region freely. The checkpoints between Croatia proper and the Region disappeared in the end of Summer 1997.
January 15, 1998 the UNTAES mandate ended and the administration of the Region had been completely transferred to the Croatian authorities.

Everyone who lives in Eastern Slavonia or in the rest of the Eastern Croatia knows the facts that are mentioned in the above. One could very well say that the isolation of the Region is a 'fact of common knowledge'.

Keeping in mind the circumstances in the Region, the next chapter will focus on Force Majeure in the Slavonska Banka cases.

III. Force Majeure applied on the Slavonska Banka cases

III.1 The contracts: Current account and loan

The 850 clients of Slavonska Banka all had a contract with their bank in 1991.The 850 clients of Slavonska Banka all had a contract with their bank in 1991. Most of them had a regular current account contract on the basis of which the clients were obliged to have a constant money inflow, such as a salary, a pension, etc. The bank was obliged to send information on the balance of the client's account once a month. Most of them had a regular contract on current account. The clients were obliged to have a constant inflow of money, such as a loan a pension, etc. The bank was obliged to send information on the balance of the client's account once a month. The keepers of those bank accounts were allowed to have a (contractually) limited overdraft.The owners of those bank accounts were allowed to go into a (contractually) limited overdraft.

Some of the 850 cases concerned loans. On the basis of the loan contract, the customers had the obligation to pay back the loan in instalments. In its turn, the bank had stipulated to keep the customer informed on the loan on a regular basis.
In the period from early Summer 1991 until January 22, 1998 neither the bank nor the customer has fulfilled these obligations.

III.2 An expired debt?

In 1991, the Bank and its customers had a current account agreement. The customers had a negative balance, a debt to the bank. In January 1998, the Slavonska Banka started claiming these debts. The period between the moment that these debts originally were made to the moment that the Bank claimed the repayment of these debts for the first time, is 6,5 years (early Summer 1991 - January 22, 1998).

The expiration terms according to Croatian Law are:
Art. 371 Law on Obligations (LoO):
Claims expire in 5 years, unless another term is determined by law *Claims expire in 5 years, unless by law another term is determined*

Art. 372 LoO:
The expiration term for periodical obligations is 3 years.
Taking into consideration the articles 371 and 372 LoO, we have to conclude that the original debts from the clients to the bank have expired.[7] More than 5 years have passed before the first notification has been sent.[8]

III.3 No expiration due to Force Majeure?

By claiming the -normally expired- debts of its clients, Slavonska Banka recognises (and implicitly claims) Force Majeure. Due to insuperable obstacles, Slavonska Banka had not been able to reach its debtors prior to this date.

Debts do not expire in case of Force Majeure according to art. 383 LoO:
There can be no expiration when the creditor did not have the possibility to claim his debt and the creditor could not demand fulfilment of the obligation in court caused by insuperable obstacles.

The bank and its customers had been kept separated by the same border: if the Bank could not fulfil its obligations due to insuperable obstacles (as they implicitly state), the customers had not been able to fulfil their obligations for the very same reason.

III.4 Force Majeure: Insuperable obstacles to fulfil one's obligations from 1991 onward

One should not complicate issues that are crystal clear, both from a legal perspective as from the perspective of every citizen.
If contracting party X can by no means reach contracting party Y to fulfil his obligation, Y can not expect from X to do so.

Every person, authority and company in the Croatian Danube Basin knows that these two contracting parties -Bank and clients- had not been able to reach each other at least until the end of Period I.[9] Parties could not even contact each other during this period. Therefore, this is a case of Force Majeure.
The next step is: When did this Force Majeure, these insuperable obstacles, cease to obstruct the fulfilment of obligations?

III.5 When did the Force Majeure end?

The situation of Force Majeure could only have ceased to exist at the moment it became physically possible to fulfil the obligations. The first possibility to do so was April 1997.

Despite the fact that the contracting parties could have contacted each other, they did not do so. The Bank should contact the customer first, and not the other way around, since the claim of the Bank would normally have expired, if there had not been a situation of Force Majeure.[10] The bank has to inform the customer that it:
- claims a 1991-debt to a certain amount; and
- this debt has not expired due to Force Majeure.

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[7] If a claim has expired, the original obligation still exists, but the creditor can by no legal means demand fulfilment of this obligation
[8] The argument that the current accounts were never closed and that therefore the debt can not expire is not valid. The only claim the bank could possibly have that did not expire, is the claim on the interest that has been built up in the last three years: From January 22, 1998 back to January 22, 1995.
[9] See II.4.a
[10] The burden of proof of the period of Force Majeure rests upon the Bank.

There was no obligation on the side of the customers to contact the Bank. One can not demand someone else to fulfil an obligation he did not know he had. The customers that had a debt in 1997, did not know they had a debt, and could not have known. This constitutes an excusable legal misconception. There had been a war, two changes of currency and massive inflation.[11] Slavonska Banka can not, in terms of equity, expect its clients to know the balance of their bank account after over 6 turbulent years, including a period of Force Majeure. In this situation, a bank is obliged to notify its customers on their debts, especially since the inhabitants of the Region knew that their deposits had become worthless due to inflation.

IV. Consequences of Force Majeure

As mentioned above, Force Majeure had lead to a temporary impossibility to pay back debts during the "RSK". In what way does this period of Force Majeure affect the obligations?

IV.1 Temporary impossibility to fulfil one's obligation

The following circumstances have occurred in the Slavonska Banka case. The clients had a debt in 1991; they have not been able to fulfil their obligations (the paying back of that debt) in the following years. In a temporary period of Force Majeure, all contractual obligations cease to exist until the insuperable obstacles have disappeared. Therefore, no contractual interest or penalty clause is applicable, since the agreement can not be enforced until the end of the period of Force Majeure.
It has to be kept in mind that of *all* sorts of obligations cease as a result of Force Majeure. Obligations based on contract as well as obligations based on tort can not be enforced.[12]

IV.2 After the Force Majeure: Unjust enrichment

In Article 137 Law on Obligations[13], it is stated what happens when the Force Majeure has ended: The original debtor will have to pay back his debt on the basis of "unjust enrichment". This paragraph will concentrate on the question whether and how the contractual parties were unjustly enriched. To get an insight in the possible unjust enrichment, a closer look at the financial facts and the economical situation is necessary. This will be followed by sub-paragraphs on unjust enrichment in general and unjust enrichment in this particular case.

<u>IV.2.a Financial and economy-related facts from Summer 1991 to January 1998</u>

<u>The currencies</u>

In 1991, before the independence of Croatia, all the accounts were in Yugoslavian Dinar. When the war started, the customers living in "Republika Srpska Krajina", became separated from the Bank, that resided in Croatia proper.
On January 1, 1992, in Croatia a new currency was introduced, called the Croatian Dinar. The currency conversion rate at this point was determined at 1 YUD = 1 HRD. After this introduction there was no exchange rate HRD to YUD due to the economical embargo, imposed on FRY. Due to the "RSK", the Yugoslavian Dinar stayed the official currency in the Region.

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[11] See Financial and economical facts IV.2.a
[12] In this Slavonska Banka case: Whether the original debt is a debt within the limits of one's allowed overdraft, or a debt that has exceeded this overdraft caused by issuing 'uncovered cheques', both situations are affected in the same manner by the Force Majeure: the obligations 'freeze'.
[13] See II.3: examples of codified Force Majeure in Croatian Law

The inflation
From the beginning of the war, money in both the Region and Croatia proper started to devaluate quickly. In 1993 inflation reached its peak: The inflation went up to huge percentages a day in the Region, and Croatia proper suffered from inflation up to vast percentages as well. Money became worthless.

The Croatian Kuna
On May 30, 1994 the Croatian Kuna (HRK) was introduced as the new official currency in Croatia. At this point the official conversion rate was set at 1000 HRD = 1 HRK.
In 1997 the Kuna was introduced in the Region, both Kuna and Dinar were valid currencies. From July 17, 1997[14], the only valid currency in the Region is the Croatian Kuna.

The bank towards its clients
Remarkable in these Slavonska Banka cases is the discrepancy between the calculation of the pre-war debts and the pre-war deposits. Whereas the deposits have disappeared, the debts do not only still exist, but debts[15] have drastically *in*creased.
Slavonska Banka has not responded to the requests of clients to have an explanation on the original debt and how this debt had accrued to the enormous negative balance on the account stated on the slip. As the result of OSCE mediation, officials of the Bank have (after they had been asked numerous times to give information by their clients) told OSCE that clients could receive a computer printout *against payment* at their Slavonska Banka office. These printouts provide only information starting at January 1, 1992 and not information on the original debt, the balance of account in Summer 1991. Only when cases have been brought to court, after a lien has been put on the property of the alleged debtor, Slavonska Banka hands over documents that state the 1991-debt.

IV.2.b Unjust enrichment in general
As mentioned above, according to article 137 LoO, the 'pre-Force Majeure' obligations have to be settled by reimbursing possible unjust enrichment.
Article 210 LoO gives a definition of unjust enrichment in general, and article 214 LoO defines:
The person who has been unjustly enriched has to return a) the fruits, possibly b) in combination with an official Contract interest.

An impartial expert should calculate the total amount of unjust enrichment. This calculation will be based on the following elements:
1- the original debt, increased with
2- interest which represent the 'fruits' of possessing the money from 1991 to 1998 instead of repaying the money in due time (the objectified commercial interest rate at the time in Croatia), and possibly
3- an interest at Contract rate[16] that starts running: I) In case of 'bad will' (the debtor knew in 1991 he was unjustly enriching himself; e.g. one issues all his uncovered cheques to take advantage of the war situation) from the first day of being unjustly enriched[17] on, or II) In case of 'good will'; from the moment the Force Majeure ceases to exist and the creditor is requesting the debtor to pay

[14] Although one could pay with Dinar in shops until the end of September.
[15] An example of the unreasonable accrual of debts is someone who had a positive balance before the war on which Slavonska Banka kept deducting monthly instalment during the Force Majeure. This resulted in a negative balance that has accumulated to a high debt caused by interest and penalty interest.
[16] This Contract rate is an official rate, set by the National Bank.
[17] This moment is the moment when the Force Majeure occurs.

the (specified) unjust enrichment.
The total sum of money has to be reimbursed on the basis of unjust enrichment.

IV.2.c Unjust enrichment in the Slavonska Banka Cases
To settle the Slavonska Banka cases we have to know: What did the debtor gain by having the debt in his possession? According to a very probable manner in which objectified unjust enrichment can be determined, the debtor has gained:

The original debt in Dinar, combined with the accrued objectified interest. This total amount of money must be divided by 1000, in order to convert the Dinar debt into a Croatian Kuna debt according to the official conversion rate.

An illustration might clarify the enrichment: If someone had a debt of 700 Dinar[18] at the moment the Force Majeure situation occurred and in this case an expert would declare the objectified unjust enrichment interest to be set at 10%[19], the total unjust enrichment would be:
700 Dinar * (1.10 (for every year of interest: 6.4 years)) ≈ 1300 Dinar: 1000 ≈ 1.3 Croatian Kuna.

In case of customers who have been of 'good will' the second type of interest, mentioned in article 214 LoO has not started to run yet, because Slavonska Banka has not requested its clients the payment of the sum of unjust enrichment. The slip the bank has sent on January 22, 1998 can not be seen as such a request of payment, since it is referring to an incomprehensibly high debt on a bank account that has not been used for a period of over six years.

Debtors that have been of 'bad will', for instance people who deliberately cashed 8 uncovered cheques at one day (anticipating a situation in which the bank will not be able to claim its debt) will have to pay on top of the basic unjust enrichment an extra interest ex article 214 LoO. This leads, in the example mentioned above, to an unjust enrichment of[20]:
700 Dinar * (1.19[21] (for every year)) ≈ 2200 Dinar: 1000 ≈ 2.2 Kuna

The Bank will have to prove that those people were of 'bad will'. In cases of 'bad will', the Contact interest ex article 214 LoO has started to run at the moment the debtor made his debt. This is probably sometime Spring 1991.

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[18] In 1991 the value of 700 Dinar was approximately 100 Deutschmark.
[19] 10% would be a high rate, in this case it is just an example.
[20] With a Contract rate for this example set at 9 %.
[21] 1.10 + 1.09, the sum of 10% and 9%, the two different types of interest.

V. Conclusion

V.1 Force Majeure

In legal terms the collecting of alleged debts by Slavonska Banka is a clear case of Force Majeure.

The facts show that in the period starting early Summer 1991 there had been a situation of Force Majeure that prevented the contracting partners from fulfilling their obligations. "One can not stipulate an impossible performance"; no one can be held to an obligation he can not fulfil.

Due to Force Majeure, the obligations that parties had on the basis of their contracts have ceased to exist. This means: the fulfilment of obligations based on a loan contract or the fulfilment of obligations based on a current account contract can not successfully be claimed. Based on the Law on Obligations, new obligations start between the contracting partners: Obligations out of unjust enrichment.

V.2 Unjust enrichment

Instead of the original debt, new obligations have started on the basis of law: obligations on grounds of unjust enrichment. In order to find a solution in these 850 Slavonska Banka cases, the question that has to be answered is: Did the customers benefit from not being able to pay back their debt on time? And if so, how much will the customer have to pay to the Bank on the basis of unjust enrichment?

This sum of unjust enrichment will be the result of an objectified calculation, made by an impartial expert. A very probable manner of making the objectified calculation will be as follows. If the customer has a debt, it will consist of the initial 1991-debt, increased with an objectified unjust enrichment interest. The total has to be divided by 1000, in order to change the currency from Dinar (the original debt) into Croatian Kuna, in accordance with the official rate.

These financial calculations will lead to –if at all- a very small 1998-debt. This is not a surprise, since both Croatia proper and the Region have been the subject to massive inflation: Inflation causes money to become worthless, both deposits and debts.

VI. Back to the introduction

In the case of Slobodan and the Slavonska Banka the situation has to be solved as follows. The bank will have to prove their claim of unjust enrichment consisting of:
- amount of original debt, and
- the objectified profit Slobodan has made by not paying back the original debt due to Force Majeure.

This has to be proven by submitting documents, stating the 1991-debt and giving an insight in the calculation of the objectified fruits

If Slobodan had a loan or a debt he naturally has to pay the objectified unjust enrichment. However, contractual penalty clauses and interest rates can not be used in the period of Force Majeure.

And Milan has lost his deposits. Inflation caused his savings at the bank to disappear. Unfortunately for him and other people with savings, this is what happens when inflation affects an economy.

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