

ALBANIA LEGAL NEWSLETTER

DOING E-BUSINESS IN ALBANIA: NEW E-COMMERCE LAW

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In the spirit of consolidating and tailoring the legal framework to achieve the “information society” in recognition of living in a real digital era (e.g. including the law on electronic signature, new law on data protection and consumer protection etc), the law No 10128, “On E-Commerce”, dated 11.05.09, was brought into effect. The E-Commerce law sets forth rules for conducting business through electronic digital services, i.e. with the aim to protect the consumers from potential fraudulent transactions, ensure the privacy of data of persons involved in such operations, and to assure the freedom of movement of the information by clearly determining the liabilities of service providers.

The object of the law: This is to promote a-without-border commerce, thus further enabling the freedom of movement of goods and services particularly in light of Albania now being in the phase of application for full membership to the EU.

The new E-Commerce law further strengthens the protection of consumers (further to the Consumer Protection Law No. 9902, dated 17 April 2008) and imposes, among other requirements the obligation of the providers of information to give to the recipient of their service all information regarding their trading name, address, e-mail account, registration number, etc. The law further states that providing false or incorrect information shall be considered to be an administrative offence, and as such punishable by penalties.

Formation of E-Contracts: This law now covers a chapter on electronic contracts whereby it explicitly states that offer and acceptance can be done electronically, but in any cases the contract is nevertheless deemed valid if it complies with the contract general principles and the form conditions provided in the Albanian Civil Code, together with the special require-

ments provided in consumer protection law. Prior to this law, electronic formulations of contracts have been construed in light of the Civil Code provisions and formation pursuant to the expression of each party’s doubtless expression of will to enter into contractual relations.

The future of promotional e-mails:

This new law also addresses the increasing concern of unsolicited communications, providing expressly that the recipient shall have the right to opt-out and obliges the providers to monitor and update the “opt-out” cases, failing which providers (or senders) shall be held liable according to the Consumer Protection Law and the Civil Code.

Regulated businesses: This new law does mention those regulated businesses (such as licenced law firms) providing that in the case of offer of services the special rules of the regulatory bodies on the exercise of such businesses shall apply.

Contracts excluded from application of this law: This law shall not apply to contracts that create or transfer rights in real estate (except Lease Contracts of immovable property with a term up to 9 years); contracts by law requiring the involvement of courts, public authorities or professions exercising public authority; contracts of guarantees granted and on collateral securities furnished by persons acting for the purposes of outside their trade, business or profession; contracts governed by the Family Code or by the part on inheritance in the Civil Code; and financial services (which are defined as any service related to the activity of credit institutions, of the insurance companies and investment companies in the CMD “On distant contract”) for which the CMD “On distant contracts” is applied.

Are transactions under this law safe and secure? Is Albania able to guarantee security as the crucial element of a successful e-commerce system? Introducing an E-

commerce law into Albanian legislation also includes the necessity to guarantee the security of the transactions in order to gain the confidence of consumers. We are yet to see if our country employs adequate infrastructure to handle the safe inter-exchange related to e-commerce operations.

Av Eni Kalo and

Av Shirli Gorenca (IP, ICT and Commercial Contracts)

VISIT TO THE VALLEY OF THETH

June 2009, brought not only high temperatures, but also a great experience for our staff: a trip to the valley of Theth.



The valley of Theth, located 70 km away from Shkodra, is becoming increasingly appealing for many foreign tourists. It would be a shame if Albanians did not take the opportunity to see the beauties of the country with this idea in mind. We decided to go there, encouraged by the GTZ Office, in the person of Ismail Beka, and guided by Jani Ziso, the President of Albanian Alpinists Association. After a traditional Albanian breakfast in Tradita,

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a restaurant in Shkodra, we headed to a remote village of the area defined by Edith Durham as High Albania. Along the way it was impossible not to be astounded by the breathtaking landscapes consistently offered by the Albanian Alps.

In Theth we were welcomed by a local family who prepared a fabulous traditional

dinner, leaving us filled with appreciation for their open generosity and hospitality, which according to celebrated Albanologists characterizes the nature of Albanians. Spending time there, talking with the locals, exchanging points of view, dining at their table was a very insightful experience which certainly made us more aware of the reality of that part of Albania: the isolation, and the strong will and great efforts to

survive despite the tough elemental conditions of nature. Like every tourist visiting Theth, we were of course attracted by the key sites of the Natural Park. A trek of nearly three hours brought us to probably the most beautiful Northern Albanian site: "Syri i Kalter" (meaning Blue Eye). Now back to the city, to our desks we at least have the many pictures taken (over 2000 shots) to reinforce reminisce ...

E-PROCUREMENT IN ALBANIA

Introduction ...

The Council of Ministers has established that all public procurement procedures shall be carried out in electronic form from the end of January 2009. Electronic public procurement has actually been in use since December 2007, albeit by a limited number of government contracting authorities, typically of central government. A subsequent amendment to the rule states that the tender procedures for the purchase of electricity and the management, functioning, equipment maintenance and operation of the Thirra tunnel on the Rrëshen - Kalimash motorway shall not be subject to the electronic system. According to a Public Procurement Agency instruction, the list of exceptions also includes the tender procedures for small purchases and those that are negotiated without being published.

E-procurement enables economic operators to participate in a tender procedure online - they can then access the agency's official website at the same time. Further, it allows the economic operator to prepare electronically (i.e., in a portable document format) a considerable set of documents to be submitted by the bidder (e.g., certificates evidencing the incorporation of the entity, bylaws, balance sheets and technical documentation). These may be used for different tenders taking place at different times within their validity period (i.e., for certificates issued by the public authorities, tenders should be no older than three months). The new system therefore creates flexibility, reduces the cost and time involved in the preparation of documents and increases efficiency, transparency and data confidentiality.

Legislation ...

The concept of e-procurement, and other related terms, was introduced when Parliament approved the Public Procurement Law (9643/2006). This law was drafted in compliance with the EU Directive on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (2004/18/EC), due to Albania's obligations under the EU Agreement on Stabilization and Association, ratified by Parliament through Law 9590/2006 and the national plan for the implementation of such agreement, approved by Council of Ministers' Decision (463/2006).

Several definitions are taken from the EU directive and included in the Public Procurement Law, as well as other secondary legislation issued by the Council of Ministers and the Public Procurement Agency (PPA). These include, among other things, 'dynamic purchasing system', 'electronic auction' and 'electronic procurement system'.

General provisions on e-communication in a tender procedure are included in Chapter IV of the Law. These address the process whereby the contracting authority receives offers and makes a request to participate through electronic means. The e-signature should be used in the submission of offers and other related documents. The contracting authority is required to provide to the economic operators information related to the necessary specifications in the submission of offers and requests to participate electronically. Further, the Public Procurement Rules approved by Decision 1/2007 may designate the submission of voluntary accreditation schemes aimed at enhanced levels of certification service provision for the

respective devices.

The Rules require *inter alia* that the contracting authority send the PPA an official written copy of the invitation to submit a tender and an electronic copy of the respective tender documents. The PPA is responsible for the publication of these documents on its official website. The public should be able to access these documents easily and download them at any time. The use of the documents for the purposes of participating in the tender procedure should be permitted without restrictions. This also applies in the cases where amendments are made to the tender documents. Thus, economic operators that download the tender documents may submit their bids in a public procurement procedure without being rejected by the contracting authority for not submitting the documents in hard copy.

The e-procurement rules do not apply in the cases of appeals; bidders should follow the written form in the Public Procurement Law.

E-procurement process

The Rules on e-procurement procedures are set out in Decision 659/2007 and an Agency Instruction for the Examination and Evaluation of the Offers in the E-Procurement Procedure. Such rules provide that the electronic system be used in a tender procedure either totally or partially (i.e., combined with the submission of certain documents in hard copy). The rules address several aspects of the procedure, such as scanning of documents, integrity and data-security system used by the contracting authority, availability of appropriate communication means, documentation of the data, time stamping etc.

Av Jola Gjuzi, Senior Associate



LAW ON FOREIGNERS – NEW SECONDARY LEGISLATION ENACTED

Recently enacted were several decisions for the implementation of the changes in the Law “On Foreigners”. These new decisions brought about many changes to those previous decisions and to the application procedures. It is noteworthy also that now the application forms are available both in Albanian and in English enabling a better opportunity for foreigners to understand the requirements and conditions for acquiring the relevant permits.

All the new visa application forms, resident permit forms, working permit forms etc. provided through these new decisions are similar to the forms and

samples used in Shengen Countries. According to these decisions the residence permits currently bring issued shall be substituted with permits in the form of an electronic card. In light of these new changes resident permits granted for a period of up to 1 year and valid at the time of the production of the electronic cards (*the date for this is not yet defined*) shall remain to be valid until the stated expiry date. However all foreigners provided with resident permit for a period of 5 years and those who are provided with a permanent a resident permits are obliged to substitute their existing permits with the electronic cards prior to

December 31, 2009, when their existing paper permits shall be deemed to have expired.

These decisions also provide an updated list of the countries whose nationals require a visa and the countries whose nationals do not need a visa prior to entering Albania. All in all these new decisions provide much more clarity and detailed information on the forms and procedures to be followed to acquire the relevant permits and/or visas etc.

Emel Haxhillari,
Associate - Employment

RATIFICATION OF INTERNATIONAL CONVENTION OF SALE OF GOODS

The Republic of Albania ratification of the UN Convention “*On Contracts for the International Sale of Goods*” through Law no.10092, dated 9.3.2009 “On the adherence of the Republic of Albania to the United Nations Convention “On Contracts for the International Sale of Goods” came into force on 17.4.2009. No exception of any article has been made and the Convention shall be entirely applied within the Republic’s territory. Pursuant to the Constitution of the Republic of Albania international agreements that have been ratified by law, constitute part of the internal legal system. The UN Convention “On Contracts for the International Sale of Goods” provides general rules and describes general procedures concerning international sale of goods contracts and related standards. By ratifying this Convention the Republic of Albania becomes its 74th State Party. According to its terms, the Convention shall enter into power the first day of the month following the 12 months after its ratification (in April 2010).

Also referred to as the Vienna Convention on International Sale of Goods, this multilateral act instills standards and promotes uniformity in its application and good faith in international trade.

a. The applicability of the Convention

An important aspect of the Convention is the exclusion of sale of goods

bought for personal, family or household use, which means that the consumer is not subject to this Convention. It also excludes sales by auction, by authority of law, sales of stocks, shares, securities, ships, vessels, aircrafts or electricity. This Convention is in fact only applicable to international sale of goods, excluding sale of services. Article 3, which is subject of much debate, provides that “*contracts for the supply of goods to be manufactured or produced are to be considered as sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services*”. This article may possibly create problems in interpretation and/or division of tasks when for example a contract includes the delivery of goods and provides promise of installation.

b. The formation of the contract

According to the Convention there is no specific form of the international contract for sale of goods. However we can find a reservation provided in article 96, under which the Countries whose legislations require a written form of the contract may invoke article 12 of the Convention. When a Country invokes this provision, the “non-formality” rule of article 11 shall not be applied.

c. The governing law of the contract

Concerning the applicable law to the contract subject to this convention, it is determined by some rules, which avoid the conflict of laws. However the Vienna Convention is not mandatory as the concept of freedom of the contractors arises in any international convention in respect to contracts and commerce. The parties can exclude the application of this Convention, as provided in its article 6. This “opting-out” mechanism can be used by the parties at the moment of the conclusion of the contract, by explicitly indicating the exclusion and by choosing or not the applicable law. The implicit exclusion is also possible by simply indicating the applicable law or by indicating the jurisdiction or the arbitral tribunal. The exclusion may also be decided after the conclusion of the contract, during the judicial or arbitral procedure.

Parties are also free to exclude certain provisions of the Vienna Convention by replacing them with provisions subject to national law. They are also able to insert in the contract only certain provisions of the aforementioned convention. As it is understood by the above the interest of the parties prevails.

By Commercial Contracts Department

Article 11: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”.

The implicit exclusion is subject to many doctrinal controversies and is deemed to represent the major difficulty of this text.



KOSOVO

PROJECT UPDATES

PRISHTINA AIRPORT

The Kosovo Government has authorized the Inter Ministerial Managing Board to continue working in accordance with the government's decision 14/24, dated 12.06.2009 and begins the implementation of the Private Public Partnership through a process of International Public Procurement.

The Expression of Interest for the concession of Airport has already been published and the tender is extended to be announced in September. The Minister of Transport and Telecommunications, Fatmir Limaj, has announced that the winner is expected to be announced in December (in an interview for daily newspaper "Kosovo Sot").

KEK

On 17.07.09 the Ministry of Economy and Finance and PPRC published the award of contract for the technical and transaction advisory services to "Consortium of ASP, Pierce Atwood, SNC Lavalin, Lansky Ganzger & Partner Rechstanwalte. The lowest priced responsive bid came in at 1,798,000.00 € (including VAT), with the highest at 2,533,713.00 € (including VAT).

MOTORWAY

MERDAR-MORINE

According to public statement by the Kosovo Prime Minister Hashim Thaci (on 27.07.09) construction of the Motorway Morine-Merdare is to begin in early autumn. With the Assembly of Kosovo having allocated 55million Euros negotiations are set to start with the 33 companies that have already expressed interest in this project.

"The acquisition of funds to initiate work on the Morine-Prizren-Prishtina-Merdar highway is an extraordinarily important decision, which will [promote] the secure economic development of Kosovo and the modernisation of the country," Prime Minister Hashim Thaci said. The leader of the Government further confirmed that it

is a project supported by all international actors.



'Musical Instruments' by Gjergji Pali (2001)

AVOIDANCE OF DOUBLE TAXATION IN KOSOVA

With the introduction of a free market economy and of foreign investments into Kosova as well as of investments of Kosovar tax residents in other countries, the issue of double taxation came up and, at the same, as a logical consequence, the issue of the avoidance of double taxation appeared. Therefore, in this short article we try to introduce some guidance on the existing provisions of Kosovar legislation related to the avoidance of double taxation.

The avoidance of double taxation in most countries is resolved through Double Taxation Treaties (DTT) which prevails over domestic legislation. In Kosova, the Law on Corporate Income Tax (Law no.03/L-113 dated 18.12.2008), which became effective as of 1st January 2009, provides that any applicable bilateral agreement on the avoidance of double taxation bypasses the applicability of the provisions of the law on corporate income tax related to the avoidance of double taxation. In addition, the Constitution of Kosova provides that the provisions of the international treaties duly ratified by the Parliament of Kosova prevail over domestic legislation in-

cluding tax legislation.

For the time being, there is only one existing double taxation treaty that has been agreed between Kosova and Albania that was signed on 28th September 2004 and effective as of 1st January 2006. Kosova does not recognize the tax treaties signed by Former Federal Republic of Yugoslavia.

In the absence of any DTT, the issue of avoidance of double taxation in Kosova is in fact resolved to a certain extent by article 26 of the mentioned Law "On corporate income tax". According to this article, the Kosovar resident taxpayer who generates income from business activities through its permanent establishment outside of Kosova and pays the tax on corporate incomes in the other state(s), is allowed a tax credit of the amount equal to the tax as paid in that other state. However, any tax credit is limited to the amount of tax which is due according to the law on corporate income on the corporate incomes generated in that other state. In addition, as stated above, this law provides that in the case that a DTT is effective with that other state the provisions of the law on corporate income tax on avoidance of double taxation are not applicable.

It is understandable that these provisions do not avoid the double taxation for the non-Kosovar tax resident(s), but at least it makes possible the avoidance of double taxation for the Kosovar tax resident(s) who generate incomes from business activities through their permanent establishment(s) in countries other than Kosova and who pay the relevant taxation in those other countries.

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