

Track Changes

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May 2019

NOTARY OFFICES IN THE FEDERATION OF BOSNIA & HERZEGOVINA DEPRIVED FROM THEIR EXCLUSIVE AUTHORITY

THE CONSTITUTIONAL COURT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA ADOPTS THE DECISION BY WHICH IT RULED THAT CERTAIN PROVISIONS OF FIVE LOCAL LAWS ARE CONTRARY TO THE CONSTITUTION OF THE FEDERATION OF BOSNIA & HERZEGOVINA

FORM OF A NOTARIAL DEED – NO LONGER A “MUST”?

On 15 May 2019, a Decision U-22/16 of 06 March 2019 of the Constitutional Court of the Federation of Bosnia & Herzegovina (the “**Court**”) was published in the Official Gazette of Federation of Bosnia & Herzegovina (the “**FB&H**”), by which the Court found that provisions of five local laws are unconstitutional, having in mind that they anticipate the exclusive authority of notary offices in FB&H to regulate certain private law relations.

The provisions of the following five laws, were found unconstitutional:

- the Law on Registration of Business Entities of FB&H;
- the Law on Proprietary Rights of FB&H;
- the Law on Land Registry of FB&H;
- the Inheritance Law of FB&H; and
- the Family Law of FB&H.

By adopting this decision, the previously mandatory form of notarial deed for, *inter alia*, foundation acts and/or articles of association of business companies, as well as for documents regulating any changes in regard to business companies operations; agreements for acquiring ownership rights mortgage agreements; documents regarding the registration and transfer of rights in the land register; inheritance agreements, alimony agreements; matrimonial agreements, etc., shall no longer be requested from the parties.

The provisions regarding the obligatory form can be applied for the following maximum period of six months as of the publication of the decision, during which period the Parliament of the FB&H shall be given the opportunity to harmonize the provisions in question with the Constitution of the FB&H.

REASONS BEHIND THE DECISION

This decision was adopted by the Court following the failure of legislative body to amend the provisions of the Law on Notaries, further to the Decision U-15/10 of 02 December 2015, by which the articles regulating the categories of documents and legal relations that should mandatorily be administered by the notary offices, were declared as unconstitutional. Having in mind that the necessary amendments of the said provisions, were not adopted for an unreasonably long period of time, that is for more than two years, the Court found that it is in its obligation to resolve this serious breach of constitutionality.

As a part of its obligation in the process of European integration, Bosnia & Herzegovina introduced the "Latin type" notarial system, in which notary offices act as public services. In the decision, the Court highlights that, even though Bosnia & Herzegovina had the obligation to introduce a notarial system, such obligation did not contain any additional obligations / limitations regarding the way, capacity, or type of notary offices that Bosnia & Herzegovina should have considered as the most appropriate for its legal system.

The Court indicated that prescribing a strict form for legal affairs is an exception to civil and business law matters, whereas the principals of free disposition and free will are the rule. In the decision, the Court raised a question whether the degree of legal security of parties and of transactions was so low that it required for legal entities to be deprived from any possibility of choice regarding the manner of concluding valid legal acts and to be imposed only with the form of notarial deed?

FUTURE IMPLICATIONS

The Court has now enabled natural and legal persons to draft their own documents to be used in their legal operations, which shall be valid even without an obligatory form. Following this decision, clients will have the legal possibility to perform all legal actions and draft the documents for which the form of notarial deed was mandatory, that is drafting foundation acts and documentation regarding the changes in companies' operations, drafting real-estate purchase contracts, as well as handling inheritance and matrimonial matters.

Even though the decision highlights that its adoption is not a case of lawyers – notary offices "conflict" and that this is not a question for the Court to deal with, its adoption also provides a room for lawyers to offer their clients a full range of services, as stipulated above.

It is yet to be seen if the legislative body will find an appropriate solution for the provisions that were found to be unconstitutional.

Nevertheless, it is certain that both, the lawyers and notary offices, will still play an important role in the challenging business environment of Bosnia and Herzegovina as solid pillars providing clear guidance through its complex legal framework.

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