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Shipyard Bankruptcy Policy: A Solution in Search of a Problem*

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ABSTRACT

The prevailing approach in *mainstream* economic theory is that the role of government should be reduced to ensuring an appropriate institutional framework and political stability for the proper functioning of the (free) market. Although the free market concept has proven (at least in theory) to be an unsurpassed mechanism for the effectiveness of economic decision-making and the reconciliation of production and consumption, there are still disputes about the degree of state intervention in the market, which are being re-actualized (in the post-transition and globalization process) when it comes to solving solvency problem(s) in the shipbuilding industry. Although various methodological approaches are available to study such a complex problematic framework, this paper analyzes the legal aspect, since the empirical debates (on some aspects) on the legal regulation of the maritime domain and insolvency proceedings (as well as the ambiguities that have arisen in the application of existing regulations) clearly show which areas and issues need to be urgently addressed and/or reformed.

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1 Discussion Framework

Shipbuilding is a labor-intensive activity and the shipbuilding industry links the associated manufacturing and service industries and uses large (spare) capacities. Shipbuilding is specific because it ensures the employment in the region where the activity takes place. It offers a whole range of professions, from unskilled workers to highly qualified professionals in both the shipbuilding industry and in the related industries. It also contributes to the economic growth and prosperity of the developing regions. In terms of volume, it has a major impact on employment at national level. Therefore, the development and maintenance of the shipbuilding industry is both a social and political issue for the government. It is estimated that one job in shipbuilding creates 3 to 5 additional jobs in the regional economy [1]. Therefore, it is difficult to make decisions in connection with the reduction of the workforce, as the social cost of the new unemployed is not insignificant.The construction of a ship directly involves a whole range of supporting domestic and foreign industries, and this in turn has a direct and/or indirect impact on the production and employment of other industries in the region and the state. Direct effects are visible in all industries that supply materials and equipment for shipbuilding and provide services to shipyards. These include services commissioned by the shipyards (i.e. major ship sections), corrosion protection, subcontracting, etc. Indirect effects are difficult to measure and represent the impact of the shipbuilding industry (including all material and equipment suppliers, distributors, customers, agents and other interest groups) on the entire chain of other branches which as a result, develop (or increase) production and employment or extend to complementary sectors. Indirect effects also include the prosperity of the regional consumer goods and services industry, which depends on the purchasing power of shipbuilding workers [2, 3].

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The effects of shipbuilding are also reflected on the construction of coastal infrastructure. As a result, (new) foreign and domestic investments are attracted, the living standard of the local population improves and the image of the region where shipbuilding industry is located enhanced. Today, socially responsible behavior is increasingly demanded. Moreover, shipbuilding is an environmentally friendly industry and does not contribute to additional pollution. It is a predominantly export-oriented business, it secures revenues on the international market and contributes significantly to the difference between exports and imports and to a more favorable trade balance of a given country. It is a strategically important industry as it has an impact on the development of the region in which it is located, mainly through the employment of local population. It is therefore important to create the conditions for increasing international competitiveness. Some countries, for example, have decided to start the industrialization of the country through this particular sector. This is supported by the fact that today's largest shipbuilding powers such as Japan, South Korea and China, are absolute market leaders, whereas until a few decades ago they had no market share at all [4].

Shipbuilding has a long tradition in Croatia. The favorable geographical position along the Adriatic coast was crucial for the establishment of the present shipyards, which were founded in the mid-19th and early 20th centuries as part of the naval arsenal of the Kingdom of Dalmatia (the Austrian Crown Land in the Habsburg Monarchy). At that time, the shipyards were successful in building warships, and over the years they increasingly concentrated on merchant ships construction. Today, all types of merchant ships, floating docks, cranes, special and warships and in general all vessels, are present in the production facilities of the largest Croatian shipyards [5].

However, as far as Croatia is concerned, in recent times and in the context of the problems surrounding Uljanik and 3. Maj (the bankruptcy proceedings against the 3. Maj shipyard, which were blocked for a whole year, were discontinued at the end of September 2019), there has been a discussion whether shipbuilding is (still) a strategically important industry or not. The main feature of our shipbuilding industry is that the government has always provided substantial financial support, despite the extremely low value added. The reason for this is that until recently the major Croatian shipyards were mostly or solely state-owned. They were restructured and privatized by the end of 2013. For this reason, shipbuilding in Croatia is directly dependent on state's financial support (i.e. guarantees and subsidies) without which it would be difficult for shipyards to obtain loans. The shipbuilding industry in Croatia has long been considered one of the most important industrial sectors, due to the large number of employees, export orientation and the large number of subcontractors involved directly or indirectly in the production of ships. According to (different) available data (the same are subject to cyclical changes depending on the number of ships delivered), in the last period (in the last 10 years) shipbuilding in Croatia employed 2-5 % (with subcontractors up to 10 %) of total labor force (mainly in Istra, Primorje-Gorski Kotar and Split-Dalmatia counties with the largest shipyards: Brodosplit, Brodotrogir, Uljanik, Viktor Lenac and 3. Maj), it contributed 10-15 % to exports and 0.8-1.8 % to Croatia's GDP. Croatia has 259 companies active in ship and boat construction, with a total turnover of almost HRK 2 billion and almost 11 thousand employees [5-7].

The strength of Croatian shipbuilding is reflected in the tradition of building various ships and overhauling ships for many contracting parties around the world. Croatian shipyards have for decades been successfully carrying out major projects that contribute to the reputation and validation of product quality worldwide, and for example specialization in the manufacture of non-standard ships is the reason for building a competitive advantage. For example, the Flying Clipper is one of the most modern sailboats and the most complex passenger ships ever built. It was built at Brodosplit Shipyard which brought Brodosplit in the spotlight as the world's rare shipyard capable of building (i.e. designing, constructing and equipping) such a unique ship with complex furnishings and luxurious interior.

Although undervalued, the labor sector in the Croatian shipbuilding industry is of extremely high quality. Croatian workers are highly respected and employed in many companies in Europe and the world, from welders to design engineers. The existing infrastructure also represents the strength of Croatian shipbuilding. Namely that the number of shipyards, their capacity and equipment is sufficient for all stages of ship production. The weaknesses of Croatian shipbuilding industry are reflected inhigh production costs, dependence on the state and its support. Shipyards in Croatia cannot compete with Asian competitors, including those from Romania. Not long ago (1988), Croatian shipbuilding industry was ranked 3rd in the world (after Japan and South Korea) with a market share of 2.3 %. Today, with a market share of 0.2 %, we are ranked 10th in the world, and 2nd in Europe (after Romania).

Job cuts are a trend that continues year after year, while non-compliance with delivery is an additional weakness and a financial burden for the shipyards. The demand for specialized vessels represents an opportunity for shipbuilders to position themselves in the market and (by developing a business strategy in this direction) to improve business operations, while investments in innovation (at national level) can be applied and implemented in shipbuilding. In addition to the above-mentioned specialization, one of the proposals to save the shipbuilding industry lies in a possible synergy between shipbuilding and the energy sector. In other words, product differentiation. In economics and marketing, product differentiation is the process of distinguishing a product (or service) from others in order to make it more attractive fora a particular target market. This involves differentiating it from competitors' products as well as a firm's own products. With

regard to shipbuilding and the energy sector, the differentiation mainly relates to the construction of renewable-energy power plants. By doing so, classical shipbuilding would be supplemented by the so-called off-shore projects (e.g. wind farms).

The threats to the development of Croatian shipbuilding are related to lower prices ofEastern competitors, aging workforce, lack of interest of young people in further (re)training in shipbuilding industry, job insecurity and low wages [4]. Shipbuilding is considered the oldest and one of the most important, open and competitive markets in the world. Croatia has not only mismanaged its national pride (either poorly or not at all, considering the long-term sustainability of this industry worldwide) but it has not found a suitable alternative. Apart from ships, Croatia has no other national product of such complexity and value, which makes our country present and recognizable on the world market. On the other hand, the relatively small share of the domestic component in ship production remains a problem. In Croatia, the share of the domestic component is between 50 and 60 %, whereas 10-15 years ago the share was up to 70-75 %.

Furthermore, the 2011 study refutes the thesis of shipbuilding as a strategic industry in Croatia from the point of view of financing and financial sustainability of shipyard [6]. In particular, the results of the analysis carried out in this study lead to the conclusion that high levels of State support to the shipyards undermines the financial stability of the State, that the shipyards do not creating new values, are not modernizing and are not making progress. Some of the steps recommended in the study (but which have not yet been taken in the meantime not made) to achieve a better (financial) perspective for shipbuilding in Croatia include(ed) the following: a) identify the financial operations of subcontractors, in particular the cost of services provided to large shipyards; b) compare the costs and benefits of possible privatization of the entire industry; c) develop cost/benefit scenarios for major employee redundancies with an elaborated social security and severance program; d) develop public debates on the financial sustainability and viability of existing shipyards; e) determine the actual net effect of shipbuilding in the creation of added value; f) analyze the structure and nature of costs in shipbuilding, (i.e. how much imported and domestic inputs are involved).

Although now privately owned, shipyards in Croatia have beene kept alive for almost three decades (1992 onwards) with various forms of state aids (subsidies, grants and guarantees). In the rehabilitation and restructuring of the shipyards, 30 billion kuna were invested [5, 8]. This fact reveals the true picture of the operations of Croatian shipyards, which were unable to cope with the challenges of the market and could only survive by becoming a burden on the government budget. Taking into consideration, that the government budget is in deficit, it can be concluded that grants to shipbuilding were largely debt-financed. If one also takes into account the growing expenses for the interest that must be paid on these debts, the full impact is much greater. Taking into account the above facts, it can be concluded that the restructuring of the shipyards was used to ensure social stability rather than to formulate a clear strategy for the recovery and development of the Croatian shipbuilding industry. The consequences of restructuring and rehabilitation of shipyards will have a long-term impact on public finances.

As a result of the progress made in restructuring, the yards have significantly reduced their workforce and production has also decreased, not only because of the restructuring but also because of the weak state of the shipbuilding market and also because of the compensatory measures by which Croatia has undertaken to reduce overall production capacity by 471,324 CGT to 372,346 CGT (compensated gross tonnage). Sales and export revenues of the five largest yards are declining and the decision of the yards to gradually shift their efforts towards non-shipbuilding products seems reasonable. The liquidity situation of Croatian shipyards is satisfactory and the impact of the restructuring and privatisation of the yards is nevertheless generally positive [5].

However, a question remains as to why these processes were not started earlier, which would have led to budget savings and enabled the the shipyards to avoid the compensation measures required by the EU to reduce production. It is difficult to predict future trends on the market, but it is necessary to create a strategy for the development of Croatian shipbuilding in order to achieve highest competitiveness and sustainability of the industry. The positive effects of the restructuring and privatization of certain shipyards underline the need to implement these measures. Undoubtedly, the situation of the shipbuilding industry hascertain economic, political and social consequences for the domestic (especially regional/local) economy, but also certain legal issues (especially when it comes to bankruptcy, as was argued in the case of the Uljanik and 3. Maj) which are the subject of discussion in this paper.

2 Defining the Terms

Given the complexity and actuality of the problem we are analyzing, we consider it important to make a terminological distinction in order to clarify what is meant by the terms “pre-bankruptcy proceedings” and “shipyard”.

In Croatia, the implementation of (pre)bankruptcy proceedings is regulated in detail by the Bankruptcy Act as a *lex generalis* regulation [9]. From a legal point of view, bankruptcy is a non-contentious *sui generis* court proceeding (general enforcement) in which the collective settlement of all creditors insolvent debtor’s estate is carried out, either through a liquidation procedure or through a (different) model of reorganization (bankruptcy plan or pre-bankruptcy proceedings). The preparation of a bankruptcy plan is a very complex legal and economic project. The legal complexity is particulary evident in the compli-

ance with strict procedural rules by numerous measures of economic, financial and organizational nature (there is no *numerus clausus* measure). From an economic point of view, the bankruptcy plan must be tenable meaning that a meticulous plan of income and expenditure must prove the debtor's ability to finance both the liabilities assumed and the liabilities arising from the continuing economic activities. The bankruptcy plan must therefore be legally permissible and economically viable. Pre-bankruptcy proceedings, are instituted as an option in the case of a pre-bankruptcy reason. Following the European legislation, the aim is to help entities that are fundamentally financially sound and have a business perspective, but their main obstacle to further progress is the inadequate balance sheet structure. Although this review shows some differences, it points to two basic bankruptcy goals: 1) the settlement of creditors and the realization of their property claims, 2) to close down a business entity that is unable to fulfill its obligations. However, insolvency proceedings represent only one of the options available to an entity when it enters the phase of bankruptcy.

The alternative could be some of the status changes defined in the Company Act [10]. This is, similar to reorganization process or the pre-bankruptcy procedure, a way to use remaining assets more productively (e.g. for new business ventures). The reasons for this status change are different as well as the factors that influence it, but it can be argued that the goal of such a change is unique – the continuation of the business.

The regime and status of seaports are determined by the legal regulations of the country on whose coast they are located. In particular, the Government of the Republic of Croatia prescribes criteria for the classification of ports open to public transport and determines the classification of ports of special use according to their importance for Croatia. In accordance with the Maritime Domain and the Seaports Act, the Regulation on the Classification of Ports Open for Public Transport and Ports of Special Use was also implemented [11]. According to the activities carried out in the ports of special use, they can also be classified as shipyard ports.

3 Research Aim(s)

In recent years, we have witnessed on the global stage the inconsistent economic policies of EU Member States ranging from proclaimed liberalism to ad hoc interventionism. It is the result of a mismatch between the capabilities of the nation-state and its existing obligations to citizens. Doctrinal analyzes suggest that governments are therefore trying to fulfill their expected function by introducing insolvency regulations aimed at saving infrastructure "losers" from liquidation bankruptcy while preserving those entities that underpin national development policies. This was also the aim of the Act on the Procedure of Extraordinary Administration in Companies of Systematic Importance for the Republic of Croatia, which as such is not applicable to Croatian shipyards (article 4) [12]. Moreover, in 2011 the legislator also implemented the *lex specialis*, the Act on the Organization of the Rights and Obligations of the Shipyards in the Process of Restructuring, which regulated these issues before and after bankruptcy, which does not currently apply to Croatian shipyards [13].

Therefore, the purpose of this paper is to analyze shipyards bankruptcy problems and to provide answers to possible doubts that may arise in current and future business crises of Croatian shipyards. The authors limit themselves to the generally established facts on the legal issues of bankruptcy proceedings, without going into numerous and diverse specific problem potentials [14-16].

4 Literature Review

In the Republic of Croatia there are perhaps a hundred scientific papers dealing with the extensive and complex problems of bankruptcy regulation [17-19]. Moreover, there is also a modest number of monographs in the field of bankruptcy, in contrast to capital scientific papers that exist, for instance, in US and German law. Nevertheless, in recent years an increasing number of studies have analyzed the economic and legal effects of liquidation and reorganization proceedings. Most empirical economic research in the field of bankruptcy focuses on the key indicators of bankruptcy proceedings (i.e. costs and the duration of bankruptcy proceedings, the degree of creditors' settlement), bankruptcy intensity and conducts comparative legal analysis [20-22]. In order to address the weaknesses of the existing bankruptcy regulations and to make bankruptcy proceedings more efficient, legal experts [23-29], and economists [18, 30, 31] analyzed a number of procedural measures that ultimately contributed to and led to a number of changes in bankruptcy legislation. These papers analyze bankruptcy process actions, their advantages and disadvantages, consequences and preconditions for their successful implementation.

However, for the purposes of our paper, papers analyzing the bankruptcy problems of shipyards are much more important. These papers [32-37] deal, for example, with the legal prerequisites for bankruptcy proceedings, the procedural actions, the authorized proponents, the conditions to be met by the settlement, the principles of dividing creditors into different groups, the notification and voting process, the majority required for the adoption of the settlement, the absence of or need for judical confirmation of the plan, the legal consequences of the adopted plan, the protection of creditors, the monitoring of the application of the settlement and its refutation. Further literature explains the so-called secondary legal framework and compliance with the EU's *acquis communautaire*. First, the case-law of the EU's Court of Justice and the decisions of the European Commission [38-40].

In this paper the authors have adopted a four-part methodology. First, the existing literature is analyzed. It

can be noted that the economic and legal literature, although extensive, is sometimes limited in its inability to provide answers, as well as useful explanations and appropriate approaches to the insolvency problems of shipyards. Afterwards, open issues (e.g. questions and dilemmas) related to shipyards bankruptcy are presented and *de lege lata* solutions are critically reviewed. Finally, *de lege ferenda* recommendations are also given. The analysis of the existing legislation and the assessment of its compliance with the global trends in addressing the problems of shipyards by the institute of bankruptcy and the elaboration of proposals for the necessary change to the existing situation are the main contributions of this paper.

5 Open Questions and Dilemmas

Regardless of the varying intensity of reforms in bankruptcy and maritime law, the positive-legal analysis highlights a number of issues, the common denominator of which is: dilemmas and open questions. Finally, the authors will consider some of the disputes that may arise in the event of a shipyard bankruptcy proceedings.

5.1 Defining Shipyards Property

What constitutes a shipyard property? In principle, it can be concluded that the property of the shipyard consists of movable assets, cash and rights (mainly concession rights). Of course, the activity takes place in a specific area – the maritime domain. Therefore, as legal entities, the shipyards do not own the premises where they carry out their main activity – the construction of ships, but have a concession to carry out maritime activities.

For example, 3. Maj uses a land area of 303,649 m^2 and a sea area of 209,165 m^2 for which it has been granted a 32-year concession by the Republic of Croatia as from 16 September 1999. For comparison, some figures of selected shipyards worldwide are listed here: Hyundai Ulsan Korea 7,200,000 m^2, Daewoo Geoje Korea 4,000,000 m^2, Samsung Geoje Korea 3,300,000 m^2, Hyundai Samho Korea 3,300,000 m^2, Saijo Shipyard Japan 1,740,000 m^2, Aker Turku Finland 1,440,000 m^2, Cosco Da Li an China 1,200,000 m^2, Odense Steel Shipyard Denmark 1,100,000 m^2, St. Nazaire France 1,080,000 m^2 and Rostock Germany 850,000 m^2.

Floating docks and other equipment are the property of the shipyard. Thus, in the case of bankruptcy, they can be sold as part of bankruptcy proceedings, as they form the bankruptcy assets. Regading the cranes, one must take into account the provisions of Article 2 and Article 118 of the Maritime Domain and Seaports Act, according to which all port cranes permanently fixed for special use in the port area of ports are the property of the Republic of Croatia. However, the State transfers them to the concessionaires in accordance with the terms of the concession contract [41]. When it comes to this question, we believe that the legal solution is, some ways, a "new nationalization" of fixed loading cranes. If it was necessary to implement this solution in ports open to public transport, why was it done with cranes in all ports, i.e. in ports for special use? If we know that large cranes move on rails built into the ground on which they are located (in this case, on the maritime domain), do these rails become port equipment, since without them the cranes cannot perform their function? Furthermore, the logical question arises how the rails on which the port cranes move can belong to the Republic of Croatia if they are located on a maritime domain.

For future cranes, we believe that they should not be considered as port suprastructure. Namely, the port concessionaire can install his own (more modern and technologically advanced) carnes, which he can take with him when the concession expires. Since the Law on Ownership and Other Real Property Rights gives a general definition of a (non)movable asset that cannot be considered exclusive, the same law may determine a different classification of an asset in question in relation to the category to which the asset would by its nature belong [42]. In order to clarify the situation in theory but also in practice, whether the port cranes (the rails) are real estate or movable property, we propose to classify them as movable property in Maritime Domain and in the Seaports Act. Therefore, all other cranes (car cranes, elevators, etc.) are the shipyards property and constitute the bankruptcy assets.

Of course, all materials and equipment that are built into the ship are also property of the shipyard. In case of bankruptcy, the bankruptcy estate of the shipyard therefore comprises all the assets of the debtor at the time of the opening of the bankruptcy proceedings and the assets acquired by the debtor during the bankruptcy proceedings [9]. The bankruptcy estate serves primarily to cover the costs of the bankruptcy proceedings and then the claims of the creditors, i.e. claims whose settlement is secured by certain rights to the debtor's property (lien, mortgage, etc.). The bankruptcy estate consists of everything to which the debtor is entitled at the time of the opening of the bankruptcy proceedings or which lately falls within the actual debtor's authority. From a legal point of view, the bankruptcy estate is a bankruptcy estate which is preserved after deduction of the goods and rights not covered by it.

5.2 The Issue of Concessions and Possible Vested Rights in the Maritime Domain

A concession is a right that partially or totally excludes a part of the maritime domain from the general use and grants it to a legal or natural person for special (or economic) use. The rights and obligations arise from the conclusionsof the concession contract and this contract is concluded on the basis of the decision to grant the concession [11].

The decision to grant the concession and the concession contract are therefore not independent of each other, since the decision to grant the concession constitutes

a legally valid basis for conclusion of a bilaterally-binding legal transaction on the use of the maritime domain (i.e. concession contract). The decision to grant a concession essentially determines all the elements on the basis of which a part of the maritime domain is excluded from the general use and left for special (or economic) use by a specific person [11]. This decision defines the area of the maritime domain to be given for special (or economic) use, the manner, conditions and time of use, compensation as well as rights and obligations of the parties of the agreement. In the absence of a decision to grant the concession, there is no legal basis for concluding a concession contract. It is therefore not possible to assess the legal fate of a concession contract without a decision which must precede its conclusion of the contract, and a contract which lacks the legal basis for for its conclusion is not legally valid. All major shipyards in the Republic of Croatia have a valid concession agreement for the performance of their activities. However, the legal profession does not have a common view on the existence of possible vested rights that shipyards have in the maritime domain.

Thus, Vuković [43] asks the question: "What vested rights do owners of maritime domain have in the following cases: a) when bankruptcy proccedings are initiated against an entity engaged in economic activity in the port for special use (i.e. shipyard) and b) when a primary concession is granted for the management of ports' substructural and infrastructural facilities and for the use of the port area?" Vuković [43] concludes that the legislator has not explicitly prescribed in a separate law (and that would be the Maritime Domain and Seaports Act as a *lex specialis* in relation to all other acts) what happens to the bankruptcy debtor's rights (i.e. investments in facilities built on the maritime domain, concession and the continuation of business activity) if bankruptcy proceedings are initiated against that same debtor.

By analysing all the regulations governing the maritime domain, from the Maritime and Water Resources, Ports and Harbours Act (from 1974) up to the (new) Maritime Domain and Seaports Act, we can conclude that it was forbidden for anyone to acquire property rights in the maritime domain [11]. However, it is the fact that there are valid vested rights in the maritime domain. We cannot agree with some authors who stated that no all regulations have defined what is to be considered a valid way of acquiring property rights. Kundih [44] states that no legal regulation in Croatian legislation has clearly answered the question of who has a legally valid way to acquire ownership in the maritime domain.

In fact, during the period from 1945 to 1994, in the Republic of Croatia the rules of the General Civil Code were applied as legal rules. The cases of valid acquisition of real property rights were: purchase, sale, exchange, donation, court decision, etc. According to Article 424 of the General Civil Code, the following legal titles were valid: contract, last will, court decision and law. In any case, without a valid legal title, the registration is invalid.

However, none of these methods come into play in the maritime domain since it is under non-proprietary regime. These items wew also required under the previously valid regulations for acquiring the real estate ownership: valid legal title, book ancestor, existence of good faith of the acquirer, the fact that the entry itself was carried in line with the general prerequisites for registration (tabular document, application for registration, court permission, land registry entry made in the legally prescribed form, validity of the entry made, etc.).

It would be difficult to take this position if the ownership was not properly acquired in the following three cases: by a court decision (until 1974), legalization of illegaly built construction (February 15th, 1968) and in accordance with the provision of Article 35, Paragraph 2 of the Maritime and Water Resources, Ports and Harbours Act.

5.3 Maritime Domain and Shipyards: Ownership Issue(s)

The Kraljevica shipyard was founded in 1729 by Emperor Charles IV and therefore bears the name of the first shipyard in present-day Croatia. Over time, both the states and the legal systems regulatin the legal status of the Croatian coastline and accompanying shipyards changed [41].

It is worth mentioning only the Act on the Placement of Vessels, Shipyards, Ports and Harbours under the Administration of the Ministry of Transport of the Democratic Federal Yugoslavia which states (Article 2, Paragraph 1): "All Yugoslav shipyards which are and will be under the authority of the Democratic Federal Yugoslavia (except those under the authority of the Ministry of National Defence of Democratic Federal Yugoslavia), shall be provisionally administred by the Ministry of Transport of the Democratic Federal Yugoslavia."

The maritime domain is a common good of interest to the Republic of Croatia and has its special protection, it is used under the conditions and in the manner prescribed by law [45]. The port area is also a maritime domain and the border of the port area is the maritime domain border. Buildings and other structures in the maritime domain which are permanently connected to this area shall be considered as a part of that same domain. No property rights or any other rights on any legal basis may be acquired in the maritime domain. The maritime domain may be only given for special (or economic) use within the framework of the procedure and in the manner prescribed by law (i.e. by means of a concession). This must be preceded by the established limit of the maritime domain and its entry in the land registry [11].

The provisions of Articles 1038 and 1040 of the Maritime Code [46] governed the fate of the rights acquired after the Maritime and Water Resources, Ports and Harbours Act entered into force. If there was any vested

right in the maritime domain, the competent public prosecutor initiates an expropriation process for the ownership of the facility and the former owner is gained the right to use the facility on the basis of concession without paying the concession fee for a period of time until the amount of the fixed fee reaches the amount of compensation for the confiscated property. If there is no valid basis, there is no right to receive the compensation.

Privatization, which has taken place in the Republic of Croatia (especially on real estate/immovables that are by its nature a common good) is still causing problems for the shipyards. Since the beginning of privatization (under the Act on the Transformation of Socially-Owned Enterprises), there has been an illegal conversation of real estate (that was indisputably a maritime domain) into ownership rights to real property [47]. Although many theorists and practitioners have warned of the inadmissibility and illegality of these conversions, the practice of conversion and privatization did not accept these standpoints.

For example, some shipyards registered their ownership of the whole shipyard area in the midst of privatization. In one case this became apparent when bankruptcy proceedings were initiated, and at that time the Republic of Croatia (as the maritime domain rightholder), filed a lawsuit against the shipyard and managed to register the area in the land registry as a maritime domain [48].

Just to give an example, we show here how much regulation alone can contribute to the legal (dis)order. The Maritime Domain and Seaports Act states (Article 2) that "special purpose port is a seaport used by legal or natural persons (nautical tourism port, industrial port, shipyard, fishing port, etc.) or by a state authority (military port) for special (or economic) purposes."

The Maritime Domain and Seaports Act does not provide a definition of a shipyard. Article 10 of the Regulation on the Classification of Ports Open for Public Transport and Ports for Special Use [49] states that "a shipyard is a port used for the activity of construction and/or repairment of vessels." However, both the shipyard and the entire shipyard area are maritime domain under the provisions of Article 2 because "(…) the border of the port area is the border of the maritime domain."

5.4 The Issue of Leasing a Maritime Domain in the Event of Shipyards Bankruptcy

When bankruptcy proceedings recently were initiated againts a certain shipyard, it was found that prior to the bankruptcy the shipyard had leased the operating pier and referred to the provision of Article 26 of the Maritime Domain and Seaports Act and also to one verdict of the High Commercial Court of the Republic of Croatia [50]. Article 26 of the Maritime Domain and Seaports Act states this: "A concessionaire who has been granted a a concession for the economic use of the maritime good may subcontract small-scale ancillary activities to legal and natural persons with the consent of the concession provider in order to make better use of the maritime good. The concessionaire is obliged to ensure that the legal and natural persons referred to in paragraph 1 of this Article, as well as third parties with whom he enters into legal relations do not use the maritime domain contrary to the conditions under which the concession is granted."

Furthemore, the verdict of the High Commercial Court of the Republic of Croatia [50], inter alia, states: "In order to resolve the dispute between the parties, it is important to answer the following questions: What is the nature of the business relationship between the parties, are they in a mandatory legal relationship based on a lease agreement (as determined by the court of first instance) or did the plaintiff transfer (or should have transferred) the concession obtained for the use of the maritime domain (as claimed by the defendant)? Does the transfer of the concession also constitute the authorized use of the maritime domain by a third party who is not also the concessionaire? For the correct answer(s), one must start from the relevant legal provisions. It should benoted that the plaintiff also leased movebles (one crane and five boat stands) to which the issues of concession on the maritime domain do not apply (…). The plaintiff is therefore legally entitled to enter into legal relations with third parties. This mens that, in addition to being authorized to transfer the concession (if the associated legal requirements are met) to another person, the plaintiff is also authorized to carrying out commercial transactions for the purpose of exploiting the maritime domain, including leases. In doing so, the plaintiff is obliged to ensure that third parties with whom he does business do not use the maritime domain contrary to the conditions under which he was granted a concession (Article 66 (2) of the Maritime Code)." Finally, the court concludes: "If the concessionaire concludes a lease agreement (as lessor) for a part of the maritime domain, this agreement is not considered to be a transfer of the concession. Although the concession agreement precisely defines the content of the economic exploitation of the maritime domain, it cannot defineor foresee in advance all the possible legal forms of the concession holders' right to use the maritime domain. The lease agreement is undoubtedly only one of the legal forms by which the concessionaire may exercise some of its concession rights. Therefore, if a third party (lessee) uses a part of the maritime domain under a lease agreement concluded with the concessionaire as the lessor, it cannot be said that the third party uses that object as a maritime domain under the lease; the lessee uses the maritime domain under the rights of the concessionaire, which allow him to enter into such an agreement. Obviously, the lease agreement, like any other commercial legal business, must be carried out in such a way that the interests of the concessionaire and the use of the maritime domain are not impaired, and the commercial profit (in this case the rent), may also form a part of the concession fee. The use of a part of the maritime domain under the lease agreement is of a subsidiary

nature and results from the assignee's concession rights. For this reason, concluding a lease agreement with a third party does not require the concessionaire's consent, since such a contract does not constitute a transfer of the concession. Upon the withdrawal or termination of the concession, the licensee loses his right to use and/or use the maritime property, whereby the lease is terminated like any other contract based thereon. Withdrawal or termination of the concession means that the licensee loses its right to use the maritime domain, which ultimately leads to the termination of the lease agreement and all other contracts based on it."

We consider this decision of the court to be completely unfounded, as the lease is a contract subject to obligatory law and the object of the lease may be only movable and immovable property owned by another person and the maritime domain does not belong to anyone.

5.5 The Question of Employment Contract When Initiating Bankruptcy Proceedings

If there is one issue where there is always something to discuss and which is even imposed as a *kick-off* to often major institutional, economic, legal and even political discussions (and dilemmas), it is certainly the question of the position of employees in bankruptcy proceedings. Their position is determined by the relevant provisions of the Bankruptcy Act, in particular Article 191 and the provisions on the employment contract. When bankruptcy proceedings are opened, legal consequences arise not only for the debtor but also for the workers. It should be noted that employees in bankruptcy proceedings may appear as: bankruptcy proponents, sole creditors, separate creditors, bankruptcy (estate) creditors and as shareholders or members of the debtors' company.

The Bankruptcy Act regulates that the opening of bankruptcy proceedings is a specially justified reason for the termination of employment contract(s). Employees and former employees who have not been paid by the employer/debtor can, to a certain extent, settle their claims through the employees Compensation Insurance Agency in accordance with the provisions of the Employee Compensation Act [51]. In addition to the existing system of protection of material rights of employees in the case of bankruptcy of the empoyer and protection rights of employees arising from the employment relationship, the (recent) changes also protect the workers (and their existence) by paying them the minimum wage by the Agency in case of blocking the employers' account due to the impossibility of forced payment of wages. When analyzing the workers' position in the pre-bankruptcy proceedings, it should be emphasized that employees do not assert any claims arising from the employment relationship. Furthemore, if the debtor is in default with the payment of employeess' salaries during the pre-bankruptcy proceedings, the employees may also appy forenforcement against the debtor's funds. In addition, the court suspends pre-bankruptcy proceedings if the debtor is late in default of payment. In other words, the Bankruptcy Act protects the interests of employees during the pre-bankruptcy in several places.

5.6 State Aid Issue

State aid is a term that refers to forms of public assistance, using taxpayer-funded resources, given to enterprises to ultimately stimulate economic growth (or mitigate the effects of natural disasters). Within the EU, State aid is regulated by law [52] and is controlled/monitored in accordance with Article 107 of the Treaty on the Functioning of the European Union (TFEU). According to the categorization, State aid can also be sectoral, and in Croatia it has been granted mainly to shipbuilding in recent years. The European Commission is not competent to evaluate aid granted before accession to the EU. However, it is competent for aid granted after EU acession including aid granted under restructuring plans that started before accession. The Commision decides whether a State measure constitutes aid or not, it decides on the admissibility and inadmissibility of the State aid, it also decides whether the State aid already granted must be repaid, thus creating a so-called "soft law" which is still extensive today. For example, in 2004 Poland was negatively assessed by the Commission for granting State aid to large shipyards.

5.7 The Issue of Environmental Claims in Bankruptcy Proceedings

Practice has shown that bankruptcies can lead to problems with contaminated land for which nobody takes responsibility. In recent years, the legislator has repeatedly amended bankruptcy regulations and a number of laws regulating environmental issues. It was not with the Act on Sustainable Waste Management [53], as a *lex specialis* with respect to the Bankruptcy Act [9] which is a general regulation of a bankruptcy proceeding, that the legislator established and later confirmed the link with the Environmental Protection Act [54], which was intented to regulate these two domains. According to the provisions of the Act on Sustainable Waste Management, if the polluter has not carried out the remediation of the area contaminated with waste, the remediation must be carried out by the Republic of Croatia, which is entitled to reimbursement of all costs of the remediation. In order to secure payment of the remediation costs, the Republic of Croatia acquires a statutory lien on the property on which the remediation has been carried out, up to the amount of the remediation costs (Article 38, Paragraph 2). The provisions of this Article shall apply to the legal entity which is subject to bankruptcy proceedings, as well as the real estate property of the legal entity, with the costs of remediation being shown in the bankruptcy proceedings (Article 38, Paragraph 8). According to the Environmetal Protection Act (Article 198), in addition to the statutory

lien on the operator's real estate and movable property, the costs of remediation are considered to be costs of bankruptcy proceedings.

6 Concluding Remarks

On the one hand, the development of a system of accountability is an essential prerequisite for the success of economic reforms. The fact that a large company has gone bankrupt is therefore not in itself a collective tragedy. On the contrary, it would be a tragedy if the loss of such a company was to be covered up. On the other hand, there is the conviction that the (free) market economy should be complemented by state regulation/intervention in certain areas and under certain conditions. In that sence, several Asian governments (first Japan, later Korea, now China and also India) have identified the shipbuilding sector as an important and strategic industry and have thus received political support in various ways. Moreover, most of these countries reacted quickly after the 2008 and took financial measures to support their companies. It is not easy to choose one of these positions, because if this were the case, the coexistence of the two would not be possible and one would have severely repressed the other. If we consider the exceptional and generally accepted complexity of this choice, if we accept the fact that there are *pro et contra* arguments in such complex (legal) issues, and if we finally face the bankruptcy practice mentioned above, the following conclusions can be drawn:

1. Should the whole area of the shipyard have the maritime domain status or would it be sufficient that only shipyard ports and slipways (for vessels) have this status? At the time of writing this paper (early December 2019) we did not know the thoughts of the author of the new Maritime Domain Act, but we think it would certainly be a good idea to (re)consider this issue in order to reduce future disputes and even litigation over the status of certain properties within the shipyard boundaries.

2. There is certainly no justified need for the government to own the cranes permanently anchored in the port area. They should be declared a supra-structure and put into ownership regime so that the shipyards become the owners of the cranes.

3. It should certainly be accepted, not only in relation to shipyards, that the concession grantor can, in the concession decision, grant the concession holder the right to construct buildings and other facilities necessary for the activity for which the concession is requested inthe maritime domain. The holder of the construction right acquires the right of ownership of the constructed facility in accordance with the concession decision and the concession contract. The concessionaire may then create mortgages or other liens on buildings owned (or based on building rights) without the consent of the grantor, unless this is explicity excluded in the concession award decision and the concession agreement.

4. In times of strong economic growth and credit expansion, it was believed that the general idea of bankruptcy was to "clean up" the market of uncompetitive and unprofitable entities. In particular, the certainly not negligible consequences of bankruptcy on social conditions in a society have not been taken into account. Bankruptcy (or reorganization within the bankruptcy proceedings framework) also begins to exert this social function by trying to preserve existing jobs as far as possible. Finally, the interest of the local government in the whole process should not be forgotten. It is often the case, especially in small(er) local communities, that a particular company is the main source of employment and income. The bankruptcy and the dissolution of such an entity can have enormous social consequences in this/these communitie(s).

5. Although the Bankruptcy Act also provides for special cases in which the termination of a lease to a bankrupt debtor (or lessee) is prohibited, the Bankruptcy Act grants the bankruptcy trustee a special right to decide whether or not to these contracts should remain in force. This debtor is entitled to this right, regardless of whether the debtor is the lessor or the lessee. The bankruptcy trustee may terminate these contracts regardless of their contractual duration, adhering to a statutory and not to an agreed termination notice. Claims against the debtor that arose before the opening of the bankruptcy proceedings may be realized by the bankruptcy creditor, and claims that arise after the opening of bankruptcy proceedings may be realized by the creditor of the bankruptcy estate.

6. The doctrine points out that the basic rule prohibits granting state aid to EU Member States. However, under certain conditions, State aid may be granted only if the aid proposal/program has been previously approved by the European Commission. State aid is therefore monitored by the EU Commission, which is empowered to establish the illegality of the aid and to order the Member States to ensure that the aid is repaid. If the Member State does not comply, the EU Commission takes the Member to the EU's Court of Justice. Furthermore, European governments tend to act less quickly or to a lesser extent under the state aid rules, which were again applied in the shipbuilding industry collapses. It became apparent that the EU Commission carries out strict state aid control, which even goes back to the time before accession and adoption of the EU *acquis communautaire* (i.e. in the case of Poland).

7. Legal standards on environmental protection require entities to act, omit or endure. This often concerns (directly and indirectly) the content of properly acquired property rights, ultimately leads to conflict. As environmental law does not have a long tradition, conflicts at institutional level must be resolved by the courts. In this way, the judicature will contribute significantly to the formation of new views on legal instruments for the protection of the environment.

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