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CONFERENCE REVIEW

INSURANCE AT THE 31ST CONFERENCE OF THE KOPAONIK SCHOOL OF NATURAL LAW

In the period from 13 to 17 December 2018, the Kopaonik School of Natural Law organised a regular international conference of lawyers on Kopaonik Mountain. The general topic of this year's conference was **Law and the Order of Reason**. All papers submitted by the Serbian and international authors were divided into six areas or grouped by departments: 1) Right to Life; 2) Right to Freedom; 3) Right to Property; 4) Right to Intellectual Creation; 5) Right to Justice; 6) Right to a State Ruled by Law. Each of the foregoing areas or law departments were further divided into sections. Published papers were printed in four volumes of the journal for legal theory and practice *Legal Life* no. 9-12/2018. The journal is published by the Association of Jurists of Serbia. This review mostly deals with the papers which considered insurance-related issues of liability. Main focus is placed on the papers which directly addressed the topics relevant for the theory and practice of insurance law.

1. The President and the founder of the Association of the Kopaonik School of Natural Law, Academician **Professor Slobodan Perović, PhD** presented the main paper dealing with the general topic of this Conference – Natural Law and the Order of Reason. Using a philosophical and legal concept of sensibility as a starting point, the author considered several general topics and legal issues important for the theory and practice in insurance business. Some parts of the general paper on insurance industry were particularly interesting such as the consideration of the term legal order (on about 30 pages). The topic on liability in different areas or branches of law was also interesting as well as the way it related to the insurance law. Within such framework, the general paper provided to the reader the overview

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of the development of liability concept, starting from subjective responsibility (guilt), through presumed liability, to absolute liability. The concept of liability was presented in the spirit of the order of reason found in the title of the main paper**.** After considering the concept of liability in different areas and branches of law, the author shed light on the relationship between the rule of law and equity. To that extent, the relationship between liability and equity was particularly interesting in the rules of insurance law. A specific view presented in the main paper (on page 75) was this: „As a criterion used in decision-making, the Law also provides for equity in relation to liability for a motor accident caused by moving vehicles. If the accident has occurred by the sole guilt of one party, the liability rules based on guilt shall be applied, and if guilt is mutual, each party shall be responsible for the total loss suffered in proportion to their respective guilt. However, if none of them is guilty, the parties shall be equally responsible unless the reasons of equity require otherwise". Quoted view is but one of the views presented in the main paper that was relevant for the insurance law. In any case, the main paper again confirmed the importance of the relationship between the concept of liability and equity in the rules of law governing insurance.

2.1. Following the premise of reason presented in the general topic of this conference of lawyers, the majority of papers covered the topics dealing with different aspects or issues of liability. This is quite understandable because within the *Order of Reason* the authors highlighted the legal concept of liability. This review includes only insurance-related papers. It is a common knowledge that the legal concept of responsibility may be defined as the relationship between a person (natural or legal) and his/her (or their) behaviour in reality or in the conduct of a business activity. The responsibility so understood is insurable in a modern world under particular conditions, even when it comes to liability insurance. Therefore, an insurance professional reading those papers is able to more-or-less clearly associate particular aspects or different liability issues presented therein to particular insurance lines in Serbia. While the papers on liability clearly addressed particular old risks, some new ones emerged emphasising the relevance for the insurance industry.

2.2. Three papers were inspired by the adoption of the new Law on Biomedical Assisted Fertilisation (*Official Gazette of RS*, no. 40/2017 and 113/2017). Firstly, for the insurance of activities carried out by medical institutions and for the liability insurance of medical staff the issues considered in such papers were noteworthy. In Serbia, these insurance lines are voluntary for the time being. It is also worth noting that the papers presented another fact of interest for the insurance industry, namely, in Serbia, biomedical assisted fertilisation can be performed by both state-owned and private medical institutions.

2.2.1. The first paper was prepared by the group of authors comprised of **Marta Sjeničić, PhD**, **Ranko Sovilj, PhD** and **Sanja Stojković Zlatanović, PhD**. The

group of authors entitled their paper New Trends in Legislation Development in the Field of Biomedically Assisted Fertilisation. From the insurance perspective covered in this paper, it was interesting to hear about the experience in Serbia regarding the mistakes made in the practice of biomedically assisted fertilisation. **2.2.2.** Unlike the first paper, the paper of **Olga Jović Prlainović, PhD** analysed the practice of the European Court of Human Rights in the area of biomedical assisted procreation. Her paper was entitled Aspects of Biomedical Assisted Procreation. **2.2.3.** The third paper covering that area was submitted by the co-authors. Namely, **Jelena Šantrić, PhD** and **Dunja Šantrić** covered the topic Medical and Legal Problems of Establishing Children's Origins from Biomedically Assisted Fertilization. The co-authors explored the right of a child conceived by different forms of biomedical assisted fertilization to know who his or her parents are. The co-authors approached the research by comparing the norms of the ratified UN Convention on the Rights of the Child (*Official Gazette of SFRY* – International Agreements no. 15/90 and *Official Gazette FRY* – International Agreements, no. 4/1996 and 2/1997), the Family Law, the new Law on Biomedical Assisted Fertilization and the Preliminary Draft of Civil Code of the Republic of Serbia (text of 15 May 2015).

2.3. Insurers seek to put the greatest possible risk group under their control aiming to accept the risks that enable complete overview and management. When insurers provide insurance coverage to children at school, that means that they have analysed all standard risks attaching to such insurance. However, in recent years, in addition to standard risks new once have emerged that have not been sufficiently assessed. One of such risk groups that require insurance protection are the risks relating to the use of information and communications technologies by school children aged seven to seventeen. Such risks were the topic presented in the paper of **Nadežda Ljubojev, PhD** entitled Risks and Protection of Pupils While Using Information Communications Technologies in the Republic of Serbia. The insurance professional reading this paper will immediately detect the connection between the new risks analysed in this paper and already assessed, standard risks attaching to the insurance of pupils. It should be noted that the presentation of new risks and protection against them was based on the set of provisions laid down in the ratified international conventions and numerous Serbian laws. Nevertheless, the focus was on the consequences arising from the application of the Decree on Safety and Protection of Children when Using Information Communications Technologies (*Official Gazette of RS*, no. 61/2016).

2.4. New risks, and thus new insurance-related aspects of liability, were discovered in two papers which analysed „transitional" legislation. It would be useful for an insurance professional to read these two papers and become informed about these new risks, that is, new aspects of liability, as much as possible. **2.4.1.** In his paper entitled Codification of Rules Governing Damage Compensation under

Special Legislation, **Branko Morait, PhD** reported the inclination of a „transitional" legislator to use special laws in order to modify the general rules of the law of obligations relating to the cause and compensation of damage. To that extent, the author pointed out to some of these special laws such as: the Public Notaries Act, Legal Profession Act, etc. The insurance professionals will find interesting the modification of the general rules of the law of obligations regarding the cause and compensation of damage in special legislation, in relation to the rules of the Law of Contracts and Torts, considering that the foregoing two respective laws introduced mandatory professional liability insurance in 2011. **2.4.2.** The paper of **Marko Perović** entitled Permission and Approval for Entering into a Contract Stipulating an Obligation addressed some new aspects of liability in „transitional" legislation. The author pointed out that the freedom of contract principle was limited by compelling norms, rules of public order and standards of good customs. The author took the provisions of the Law of Contracts and Torts and other laws addressing permissions and approvals as an example of limitations imposed on the freedom of contract. Since the regulations governing the insurance business envisage numerous provisions on various permissions and approvals, the insurance professional will find it useful to read both papers and become informed about new risks i.e. new aspects of liability, taking a relatively impartial position.

3.1. As a rule, **the papers addressing the insurance law** were grouped into the Third Department – Right to Property. This review notably included the papers which the organiser classified into the *Insurance* section. In addition, within the section *Contract and Liability for Damage,* presented was a paper that commented on a characteristic lawsuit relating to compulsory third party liability insurance and compensation of damage in the form annuity payment.

3.2. The paper of a judge of the Supreme Court of Cassation, **Jelena Borovac**, commented on lawsuits in the area of compulsory motor third party liability. Specific characteristics of the lawsuits that were addressed in the paper stem from a permanent disability of the claimant and extremely increased medical needs in order to stay alive. The author entitled the comment on the lawsuit Money Rent in Case of Permanent Disability due to Permanently Increased Medical Needs. **3.2.1.** The paper firstly presented the factual basis of the final judgement. Namely, after a traffic accident which had occurred on a highway, a person on a passenger seat was seriously injured. The injured passenger i.e. the plaintiff had a confirmed neurological and functional disability of all four limbs, medically called quadriplegia. For the claimant to stay alive, he had to, at his own expense, hire a physiotherapist and other medical staff for the provision of 24-hour continuous therapy in the period of 72 months (from the occurrence of the traffic accident to the finality of the judgement). These facts, established in the lawsuit, were taken as the legal grounds stipulated in Article 195 of the Law of Contracts and Torts, after which it was underlined that

major life activities of the claimant/plaintiff were one hundred percent reduced by the fact that the claimant depends on another person 24 hours a day. In the judgement it was stated that one hundred percent reduced daily life activities throughout the period of 24 hours could not be remedied by assistance and care provided by an unqualified person or a family member. The paper further pointed out that the claimant with reduced daily life activities due to quadriplegia could be kept alive solely by continuous 24-hour work of physical therapists and other medical staff. Since in Serbia, there was no institution that provided 24-hour assistance and care to the persons suffering from quadriplegia, such medical assistance and care could be provided only by a private clinic or a polyclinic or a physical therapists and medical staff hired outside a regular healthcare institution. If the claimant had not been provided with continuous 24-hour professional medical assistance and care, his health condition after the traffic accident would have considerably deteriorated and possibly led to a fatal outcome. That is why the claimant was subjected to such medical assistance and care, as stressed in the paper. **3.2.2.** Since the court awarded the compensation for damage in the form of annuity for increased medical needs, the paper provided more details of continuous 24-hour administration of three types of therapies. (1) The first type was kinesitherapy. As described, in such therapy the therapist moved every wrist of the claimant by his own hand because the claimant could not do it by himself, whereas he used other movements to prevent the shortening of muscles and tendons. In that way, as explained in the paper, it was prevented that muscles and tendons become brittle and susceptible to breaking in ordinary movements. The claimant also had daily breathing exercises in order to maintain this function because he could not exhale i.e. could not cough by himself and the physical therapist enabled him to do so by putting pressure on his chest, as stressed in the paper. Breathing exercises were necessary because due to the lack of oxygen the claimant was short of breath, which could lead to frequent respiratory infections. (2) The second type of therapy consisted of lymphatic drainage. The paper explained that such therapy was aimed at preventing deep venous thrombosis in arms and legs and eliminating excess water in the body. In the course of lymphatic drainage, one litre of fluid after another was eliminated from the claimant's body, whereby swelling of legs was being reduced on a daily basis and kidney function was encouraged. (3) The third type of therapy was named verticalization. That type of therapy was administered by placing the claimant on, and tying him to the tilt table, where the machine installed at the lower part of the table would gradually lift him from the horizontal into a vertical position. In that way, as stated in the paper, complications in the cardiovascular system of the claimant were prevented. The physical therapist carried out such therapy every day, for two hours, at a price of 20 EUR per hour. In addition to those three therapies, medical staff worked with the claimant on catheterization and auscultatory percussion of the urinary bladder

every day, in every four hours. The staff also measured diuresis i.e. the quantity of fluid intake and excretion. Bowels were emptied every other day with the help of enema. All described therapies and professional medical activities were performed by 8–10 persons and their shift lasted 12 hours, whereby the price was 20 EUR per shift, as stated in the paper. **3.2.3.** As explained above, the paper described permanent disability of the injured party and his increased needs for medical care, subsequently explaining a substantive and legal difference between the claimant's increased needs for medical care and indemnity for assisted living expenses, and between the annuity received and medical expenses incurred due to the increased medical needs of the claimant. In the conclusion it was stressed that the indemnity paid due to the increased needs of the injured party for medical care differs from the indemnity for assisted living and from the indemnity for medical expenses and thus, the person whose liability arises from third party motor liability is liable to pay indemnity in the event of permanent disability of the claimant due to increased medical needs. In the conclusion of the paper it was additionally pointed out that the compensation for the damage and the annuity due to increased medical needs and indemnity for assisted living may be awarded cumulatively, since these are the compensations paid for the purpose of meeting different needs. Finally, in connection with the previous conclusions, the paper suggested that the subtitle of Article 353 of the Preliminary Draft of Civil Code of the Republic of Serbia needs to be changed (working paper of 15 May 2015).

3.3. The main thesis of the paper presented by **Vladimir Čolović, PhD** is contained in the title General and Special Insurance Conditions as an Integral Part of Insurance Contract. In its introduction, the paper explained in more detail that general and special insurance terms and conditions constitute an integral part of the insurance contract but are not the condition precedent to the contract validity. It was further stated that general and special insurance terms and conditions constitute an integral part of the insurance contract but are not the condition precedent to its conclusion „because the insurance contract is considered concluded when the application for insurance is accepted ". The first section deals with general and special insurance conditions as general terms of business. It was explained that the general terms of business represent the list of contractual clauses which may be either an integral part of the contract or the contract may invoke such clauses. Further in the text it was stressed that „the general terms of business do not constitute the contract i.e. model contract alone but represent a particular type of a form which the parties refer to ". At the end of the first section it was argued that „a contractual provision which was not subject to individual negotiations is considered cancelled if, contrary to the commercial standards and the principle of fair dealing, it causes a considerable imbalance between the rights and obligations of the contracting parties to the detriment of the consumers". Finally, the first section ended with the conclusion that

the general insurance terms and conditions play an important role in the establishment of an insurance company. The topic of the other section was the conclusion of insurance contract. That section focused on the construction of rules governing insurance contract laid down in the Law of Contracts and Torts. The provisions of the said Law were compared with the provisions of the Preliminary Draft of the Civil Code of the Republic of Serbia (text of 15 May 2015). In his answer to the question which are more acceptable- consensual or formal insurance contracts- the author expressed the view that a formal contract is more acceptable as envisaged in the alternative to Article 1401 of the Preliminary Draft of the Civil Code of the Republic of Serbia. A characteristic part of the presentation provided in the second section of the paper refers to the difference between the cause and the purpose of the insurance contract. The author explained the objective or the cause of the insurance contract as what the parties wish to achieve by the conclusion of that insurance contract, whereas the purpose of such contract covered all other circumstances of relevance for the conclusion thereof. The third section of the paper dealt with the definition of general and special insurance terms and conditions in the Preliminary Draft of the Civil Code of the Republic of Serbia. After a brief presentation of the provisions of Article 1410 of the Preliminary Draft of the Civil Code of the Republic of Serbia, the author found that the Article was „problematic or not properly worded ". In the third section, a particular attention was paid to informing the insured persons. This topic was considered from the perspective of the German Insurance Contract Act. The fourth section of the paper related to the specific characteristics of the general insurance terms and conditions in relation to the contract on compulsory motor third party liability insurance. This section ended with the conclusion that the general conditions for third party liability insurance are accepted without specifying any special conditions. The fifth section considered the relationship between general and special insurance terms and conditions on the one hand, and the role of insurance policy in concluding the insurance contract, on the other. The starting point was the conclusion that the policy is a written document which contains all important elements of the insurance contract and which the insurer issues to the insured. In addition, the paper stated that the policy, which is unilaterally defined by the insurer, often introduces the rules accepted by the insured which govern the relationships in insurance. The same section stressed the views of the author that special insurance terms and conditions represent contractual provisions negotiated by the parties when concluding the contract. The topic of the sixth or final section of this paper were the Principles of European Insurance Contract Law and the conclusion of insurance contract. From the sixth section of the paper, more precisely from the footnote 40 of that section, it could be concluded that the Principles of the European Insurance Contract Law are an informal project of a group of EU law professors, notably intended for the purposes of voluntary insurance. In the sixth section, the following

were separated from the project: the insurer and the policyholder are the contracting parties, the insurance contract defines the obligations of the contracting parties, the insurer's obligation is to deliver to the policyholder a document which will inform the policyholder about the insurance terms and conditions and provide him with other information about the insurer. Conclusions followed after six sections. Firstly it was emphasized that the rules for particular types of insurance are laid down in the general insurance terms and conditions, that the contracting parties are free to define certain elements in accordance with the subject matter of insurance, the insured risk, and specific characteristics of the insured. Furthermore, it was noted that the premium level depends on how the special insurance terms and conditions are defined, that the insurance contract is concluded upon the acceptance of application, and that the conclusion of the contract is evidenced by the signature affixed to the contract or policy or to the cover note.

3.4. Some of the insurance regulations adopted in the EU were discussed even in the papers presented in the previous conferences of lawyers at Kopaonik. On this occasion, **Jovan Slavnic, PhD** submitted a paper on new EU insurance regulations entitled Insurance Distribution Directive. The key issue discussed in the paper was whether the Directive (EU) 2016/97 of 20 January 2016 made it easier or more difficult to sell insurance in the European Union. In the beginning it was pointed out that the Directive regulates selling of insurance. The paper drew attention to the fact that the common translation of the original title of the EU Directive is the Insurance Distribution Directive and thus, the author used that translation in the title of his paper. As stated in the paper, according to the Directive, insurance distributors are mainly insurance undertakings, insurance intermediaries and insurance agents and brokers. After analysing the scope of the former Directive 2009/138/EC of 25 September 2009, it was concluded that the said Directive did not regulate minimum unification of rules on the sale of insurance investment services, cross-selling and direct selling by insurance undertakings. However, as stressed in the paper, the Directive 2016/97 defines minimum standards for all insurance distributors, and for selling of all types of insurance. Following the basic information provided about the Directive 2016/97 of 20 January 2016, its provisions were analysed in detail and divided into two sections. The subject of the first chapter included the interpretation of business rules for all insurance services, while the second chapter briefly addressed special rules for the sale of insurance investment services. The headings of the sections contained in the first chapter correspond to the legal rules of that Directive. The first section outlines general principles that apply to carrying out insurance distribution activities. The second section describes new rules on the duty to inform consumers before the conclusion an insurance contract. These new rules include the avoidance of conflicts of interest between the intermediaries and the insurance undertakings, the manner of ensuring the transparency of access for insurance intermediaries, and

finally, the information through the notification of intermediary's assistant, as well as the conditions for, and exceptions from the duty to inform. The third section in the first chapter deals with the rules on the duty to inform consumers and the obligations of the distributor in insurance cross-selling. The fourth section specifies the obligations of insurance vendors to obtain approval for new insurance services and adjust the existing ones to the market, all before they are marketed and distributed to consumers. It was pointed out that only the insurance against major risks was excluded from the above obligations. The first chapter ends with the fifth section which contains new rules on the obligation to advise consumers and the application of insurance selling standards without advising consumers. In the second chapter, the author placed its focus on the following legal rule: before the conclusion of an insurance contract, the distributor is obliged to deliver to the consumer a standardized document with key information on the sale of insurance investment service. In the conclusions, the author answered the key question raised at the beginning. The answer is that the Directive 2016/97 could have facilitated the sale of insurance if each EU Member State had incorporated into its national laws the sanctions against the violation of the legal rules contained in that Directive. The author found that the weakness of the Directive lied precisely in the fact that it did not prescribe civil sanctions for the violation of the stipulated legal rules. Finally, the conclusions further highlighted a reformed character of this Directive in relation to the former one, since the Directive 2016/97 raised the interests of consumers to a higher level.

3.5. As part of judicial reform, in the beginning of the 21st century, the laws of Serbia started to attach compulsory professional liability insurance to individual legal professions. **Slobodan Ilijić, LLM** submitted a paper entitled Compulsory Liability Insurance of Two Types of Legal Professions in the Republic of Serbia. This was the title that actually indicated the introduction of compulsory professional liability insurance in relation to two legal professions – bankruptcy administrators and lawyers– which entailed the analyses of the provisions of at least two laws and thus, the paper was divided into two parts. **3.5.1.** In the first part of the paper, it was pointed out that the Law on Bankruptcy of 2009 (LoB) was the first law in Serbia to introduce compulsory professional liability insurance of bankruptcy administrators. The presentation in the first part of the paper is based on the provisions of the LoB and scientific opinions. The analysis, mainly of the provisions of Article 30 of the LoB, both individual and in their relation to other Articles of LoB, pointed out the following: (1) the legislator prescribed a minimum sum insured of 30,000 EUR in Dinar equivalent ruling as at the date of the conclusion of a compulsory contract on professional liability insurance and the premium is paid by a bankruptcy administrator, from his own funds; (2) the concept of the LoB is based on the conclusion of an individual contract on compulsory professional liability insurance which an active bankruptcy administrator was obliged to conclude with an insurer; (3) the legislator

has defined a number of contractual elements regarding this compulsory insurance (subject, scope of cover, circle of potentially responsible persons, etc.) using the formula - all risks associated with the performance of administrator's activities; (4) due to the fact that the above-mentioned formula was raised to the level of the law, the insurers were obliged to define general insurance terms and conditions in order to regulate a set of unresolved issues (the group of those who made an error or omission, the group of injured parties, etc.). In that way, in a number of issues the insurers were able to regulate the relationships in compulsory professional liability insurance of bankruptcy administrators; (5) it was noted in the paper that the answers to the questions raised in this compulsory professional liability insurance could be found in the Serbian legal theory of bankruptcy and insurance law. Answered were the following: firstly, the questions relating to the group of persons who made an error or omission, then what constitutes an omission or an error in this compulsory insurance, and finally who comprises the group of injured parties. The author concluded that having obtained these answers, it was up to a legislator to respond; (6) the LoB has adequately regulated supplementary professional liability insurance of bankruptcy administrators (the sum insured exceeding a minimum sum insured for this compulsory insurance, the premium paid from the bankruptcy estate, etc.) and the criticism is unfounded. (7) In the conclusions of the paper regarding the compulsory professional liability insurance of bankruptcy administrators, it was noted that in one part of Article 30 of the LoB, this type of insurance was summarized (all risks ...), and that it would be a good idea to review the verbiage in that part. **3.5.2.** In relation to the second part of the paper, it was pointed out that the Law on Legal Profession was passed in 2011 (LoLP) and that before the adoption of that Law, Serbia had other laws dealing with legal profession but the LoLP was the first to introduce compulsory professional liability insurance of lawyers. Therefore, in the second part of the paper, compulsory professional liability insurance of lawyers was considered based on numerous legal sources which regulate this compulsory insurance. The analysis presented in the paper included Article 37 of the LoLP, independently and in conjunction with other Articles of that law, the provisions of the Statute of the Bar Association of Serbia, the decisions of the Bar Association and of the regional bar associations, the provisions of the Code of Professional Ethics of Lawyers, as well as other laws, and finally the general and special insurance terms and conditions, after which the following was noted: (1) one of the main objectives of adopting the LoLP was the introduction of compulsory professional liability insurance, whereas the conclusion of an individual contract on compulsory professional liability insurance of lawyers was one of the conditions precedent to the registration of each lawyer in one of the regional bar associations, and for acquiring the license or extending its validity; (2) a minimum sum insured for compulsory professional liability insurance of lawyers was not determined by the LoLP, instead, the Law authorised the

Bar Association of Serbia to do so; (3) the legislator provided for the conclusion of compulsory insurance of lawyers in practice either through an individual contract on compulsory professional liability insurance or by entering into a collective agreement on compulsory professional liability insurance of lawyers, where the sole attorney, the lawyer's offices and partnership law firms were free to choose one of the two contractual options; (4) the legislator finds that the contract for this compulsory insurance can be concluded only with the insurer already licenced for selling such insurance, however, the insurer possessing such license can assess the risks at the site of the insured and refuse to conclude the contract for that insurance; (5) in relations to the provisions of the LoLP, the academic community have divided opinions about whether the conclusion of the contract for compulsory professional liability insurance between a partnership law firm and an insurer will bind only the law firm to take out compulsory insurance or such contract covers both the law firm and all lawyers who are the members thereof; (6) as illustrated in the paper by stating expert opinions on standard and additional risks encountered in the work of lawyers, the legal regime in Serbia relating to this compulsory insurance did not adequately express, in a legal and legislative manner, either the subject matter of compulsory professional liability insurance of lawyers or the scope of coverage; (7) in the conclusions laid out in the second part of the paper, it was pointed out that the compulsory professional liability insurance of lawyers is summarized and regulated in the LoLP, the Statute of the Bar Association of Serbia etc., and it would be desirable to review the effective solutions regarding this insurance and in view of the proposals and suggestions presented in this paper, assess whether they need to be revised.

3.6. The fact that for the 31st Conference of the Kopaonik School of Natural Law the organiser received more than 250 papers following the public invitation to Serbian and foreign authors, and that 150 papers were accepted after a blind peer review, shows that the Conference of the Kopaonik School of Natural Law is the leading conference on the Balkans where this year, the insurance law was adequately represented.

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