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REVIEW OF THE PROCEEDINGS

HARMONIZATION OF THE SERBIAN BUSINESS LAW WITH THE EUROPEAN UNION LAW (2018) AND HARMONIZATION OF THE SERBIAN BUSINESS LAW WITH THE EUROPEAN UNION LAW (2019)

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The subject of this review are two Proceedings published by the Faculty of Law, University of Belgrade. Authors of studies, essays and papers in each of these two Proceedings are teachers of that faculty. Editorial work in both Proceedings was entrusted to professor Vuk Radović, PhD. Regarding the timeline, first certain studies, essays and papers from the 2018 Proceedings were shown, and then from the 2019 Proceedings. Studies, essays and papers cover insurance law and certain current topics closely related to insurance law.

1. Studies, Essays and Papers from the 2018 Proceedings

1.1. Insurance portfolio transfer is a current topic in insurance law. Two laws based on legal affairs, according to which one insurance company sold concluded insurance contracts to another insurance company, regulate it. Current laws do not envisage other forms of statutory changes of insurance companies, as a reason for transfer of insurance portfolio. Provisions of one law stipulate the transfer of insurance portfolio as an administrative law institute, while provisions of another law connect it with bankruptcy and liquidation procedures. It must be emphasized that insurance

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contractual relations and the protection of insureds in the Republic of Serbia are more developed today compared to when the mentioned laws were adopted, so the need to modernize regulation of transfer of insurance portfolios appeared as a current topic of insurance contractual relations. The Proceedings contain one study about statutory changes and the protection of participants in statutory changes. That study can be objectively linked to the laws regulating the transfer of insurance portfolio. It is the study of professor Vuk Radović, entitled "Members' rights in case of statutory changes with special reference to nonconformity of the Serbian law with the EU law". It should be pointed out that the study belongs to the Serbian company law. The study does not discuss the insurance law, nor the transfer of the insurance portfolio. Four statutory changes were analysed – merger, acquisition, division and spin-off. It is emphasized that in addition to these four statutory changes, the Serbian company law does not prohibit other variants that can be classified in one of these statutory changes. The subject of the study covered the protection of members of companies involved in statutory changes, with reference to company law literature on statutory changes regarding protection of creditors and the protection of employees. Analysis in the study covered the period from the adoption of the Law on Enterprises in 1996 to the Company Law adopted in 2011. Significance of this study for insurance law may be that the legislator views the transfer of insurance portfolios in terms of various statutory changes, and that one law fully regulates the transfer of insurance portfolios. From the insurer's point of view, this study is interesting, because it points to connection of various statutory changes with the transfer of insurance portfolios.

1.2. **Novak Vujičić**, a lecturer at the Faculty of Law, University of Belgrade, published a paper in the Proceedings entitled "Harmonization of rules on collective exercise of copyright and related rights in the Republic of Serbia with the European Union law: at least three disputed issues". The paper belongs to the intellectual property right. It examines the extent to which the Law on Copyright and Related Rights, i.e. the Draft of Amendments to that Law from 2016, is harmonized with the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market from 2014. The author explores three issues. The first issue – monopolies of organizations for collective exercise of copyright and related rights in their areas, which are guaranteed by the Law on Copyright and Related Rights. The second issue – rules of the Law on Copyright and Related Rights, which oblige the right holders to assign to organizations for collective exercise of powers for all their copyrights, that is, subjects of related rights. The third issue – the exemption of artisan shops from the obligation to pay fees for public communication of musical works, interpretations and phonograms. In the analysis of the above three issues, it was established that the Draft Law on Amendments to the Law on Copyright and Related Rights from

2016 does not offer compliance with the EU law, specifically with the aforementioned Directive from 2014. The author of the paper stressed that the Law on Copyright and Related Rights (Official Gazette of the RS, No. 104/2009, 99/2011, 119/2012 and 29/2016-Decision of the CC) stated that the organization for collective exercise of copyright and related rights is a non-profit legal entity and that the Intellectual Property Office, as the competent authority, issues a work permit to that legal entity. In addition, the author emphasised that each organization is specialized in exercising certain powers (e.g. powers to broadcast) regarding certain subjects (e.g. musical works) for the Republic of Serbia. The said Directive from 2014, whose compliance with the amendment to the current law the author investigated in the paper, is also interesting in terms of insurance law. Before adoption of the said Directive from 2014, a large public discussion was held in the EU. As usual, the leading lobbyist of insurers and reinsurers in the EU, namely the Insurance Europe (CEA), participated in the discussion. Within the CEA, the subject of dispute was whether the said Directive should introduce compulsory insurance or whether it is sufficient to insure voluntarily licensed legal entities, which collectively manage copyright and related rights.

1.3. For a long time, the European Commission, as an EU body, has suggested the need to standardize conditions for insurance sale through different channels. That suggestion dated back to the 70s of the 20th century. Two generations of directives were adopted (1976 and 2002), and amendments in the third directive are the subject of a paper written by **professor Nataša Petrović Tomić, PhD**, under the title "Directive on insurance distribution and personalization of consumer counselling – with reference to the concept of adequacy assessment". It is the Directive on Insurance Distribution 2016/97 of January 20, 2016, whose deadline for implementation in national legislations of the EU member states was October 1, 2018. The first novelty in that directive was its application to all sales channels, and the second was that its goal was to establish the same level of protection for consumers, that is, insureds, policyholders and insurance users. It was stressed that the said directive was adopted in order to fight against unfair sale of insurance. That directive, the author emphasized, required all insurance distributors to act honestly, fair and professionally in accordance with the best interests of insureds, policyholders and insurance users, which was shown as a characteristic novelty of the directive. As stated in the paper, before concluding an insurance contract, an insurer's employee, a broker or a representative is obliged to identify needs and requirements of an insured or a policyholder, and then to objectively present all the components of a specific insurance contract in an understandable manner so that an insured or a policyholder could make an informed decision. Each of offered insurance contracts should be in accordance with needs and requirements of an insured or a policyholder, the author emphasized in the paper. If an insured or a policyholder seeks advice, an insurer's employee, a broker or a representative is

obliged to provide an insured or a policyholder a personalized explanation. Such personalised explanation best meets needs and requirements of an insured and a policyholder. Otherwise, when advising or counselling, it is specified in the paper, it is crucial that the insurer's employee, a broker or a representative understands why an insured or a policyholder conclude a certain type of insurance contract. The reason is related to the personal situation of an insured or a policyholder, and this was also taken as one of the characteristics of the said directive. In any case, an insurer's employee, a broker or a representative is required to provide an insured or a policyholder adequate explanation in case of a complex insurance contract. The author's two evaluations are dominant in the conclusion of the paper – the directive has transformed the existing mediation system, but it remains to be seen when and how the Serbian insurance law will face this transformation.

2. Studies, Essays and Papers from the 2019 Proceedings

2.1. Professor Marko Đurđević, PhD, chose for the essay a current topic about the Draft Civil Code of the Republic of Serbia from 2015. The subtitle was "Review of proposals of some rules on the effects of contracts". The subtitle referred to insurance contracts in the Draft Civil Code of the Republic of Serbia (hereinafter: Draft). To be fair, the essay does not mention insurance contracts, but the third chapter includes insurance contracts in the Draft. The essay consists of three chapters and a conclusion, with the third chapter being the most elaborate. **2.1.1.** The first chapter – On the effects of contracts in general. The author explained that the effects of contracts mean its consequences in the sense of a contractual relationship, created by a contract as a legal act or a legal transaction. Moving from theory to the Draft, it was specified that by the decision of the Government of the RS from 2006, the members of the Commission for drafting of the Civil Code of the RS (hereinafter: the Commission) were appointed and that the Commission was assigned the task of preparing the text of the Civil Code within a year. Explaining that decision, the Government of the RS stated that the Commission should include the analysis of existing legal solutions, their modernization and upgrade, and especially their compliance, both with each other and with modern achievements of the civilization of law, case law and legal theory, both general and ours. The author of the essay emphasized what the Commission should not have done. In this regard, it was stated in the Explanation of the decision of the Government of the RS that the Commission should not be reduced to a simple acceptance of existing special laws in this area and their technical formulation in terms of the Code. The author stressed that the Commission decided to take into account solutions of ratified international conventions, other "international standards", especially those formulated in the EU law, achievements of legal science and modern development of comparative law.

2.1.2. The second chapter was entitled "Harmonization as a method and its limits". The term "harmonization" was mentioned in the Explanation of the decision of the Government of the RS. Researching the performance of the Commission regarding harmonization, the author indicated that the Commission understood harmonization as a way to find legal solutions for open issues in the application of the existing law. It was concluded that the Commission found the limits of harmonization methods in the application of law and clear and precise legal standards of the future Civil Code of the RS. **2.1.3.** The third chapter was entitled "Open issues in regulating the effects of contracts and the results of harmonization". The author reduced the list of open issues regarding the regulation of effects of contracts in the Draft to five issues. List of open issues includes (1) lack of a standard formulating the obligation of a contract; (2) incompleteness of rules on complaints due to non-fulfilment of a contract; (3) termination of a contract due to non-fulfilment; (4) termination or amendment to a contract due to changed circumstances, (5) simulation. The author researched each of these five issues separately in the essay from the point of view of the arrangement of their rules in the Draft and the case law. **2.1.4.** Conclusion started with the statement that the Commission had no ambition to create new legal norms and make an original document, a codification. That was not achievable in one year. It was stated in the conclusion that in terms of the rules governing the effects of a contract, the Commission followed the middle path between the reorganization and the legal and technical compilation of the Proceedings of regulations. It was concluded that the Commission's task referred to harmonization of the rules on the effect of contracts with modern solutions from comparative law, but this did not lead to the expected outcome.

2.2. Professor Nataša Petrović Tomić, PhD, wrote a paper "Division to fixed-sum insurance and insurance against loss" with the subtitle "Insurance law at a turning point". For some time now, the author has been advocating for the urgent adoption of the insurance contract law,[2] so the conclusion of the paper began with that view. In order to encourage development of insurance, it is necessary to regulate the contractual insurance law in terms of personal insurance in a way to introduce a division based on the insurer's obligation criteria. It is crucial that the legislation ceased to be an obstacle to contracting the obligation of the insurer in case of personal insurance. The author explained that not all personal insurance types are always and exclusively with fixed sums. She stated that that is only characteristic for life insurance, and the other two types of personal insurance are mixed (hybrid). Accident insurance and voluntary health insurance also cover property risks, such as medical expenses, which is why the rules applicable to insurance against loss are applied

[2] Professor Nataša Petrović Tomić, PhD: "Need to Improve Serbian Insurance Regulatory Framework by Adopting Insurance Contract Law", *Tokovi osiguranja* no. 2/2018, 7-18

in that part of obligation in comparative law. The focus of the paper is on personal insurance, more precisely on accident insurance and voluntary health insurance. Voluntary health insurance is not discussed in detail, so the author referred readers to her paper on voluntary health insurance written earlier.[3] Furthermore, it was stressed that by adopting the division according to the type of insurer's obligation, the conditions to solve the issue of accumulation of rights in case of personal insurance will be prescribed. It was specified in the paper that now the issue of accumulation is satisfactorily regulated only in life insurance. In accident insurance, the case law tried to deal with a vaguely formulated exception to the rule that accumulation is in principle allowed in this type of insurance as well. In the continuation, it is stated that the legislator did not specify when that insurance was considered as liability insurance, so it was up to the case law to determine on a case-by-case basis whether accident insurance can be qualified as liability insurance. The author concluded that it was a difficult task for many courts. The author also stated that personal insurance was less represented – especially accident insurance and voluntary health insurance. She connected that statement with controversies following exercise of the rights from those insurances. The final sentence of the paper was – considering the usefulness of the mentioned types of coverage, as independent services or as supplementary to life insurance, amendments to the regulatory framework are urgently needed.

2.3. Professor Mirjana Radović, PhD, wrote a paper "Mandatory elements of a contract as a result of a specific way of implementing the European Union law into the Serbian law". The paper on "mandatory elements of a contract" included an introduction and a conclusion, but five chapters completely explained these elements. It started with the traditional theoretical division of contract law in the Republic of Serbia, which accepts the following elements: (1) essential elements; (2) natural elements, and (3) auxiliary elements. Positive laws in the RS, when this paper was completed, contained the legal phrase "mandatory elements of a contract". The list of positive laws included the Law on the Protection of Financial Service Users from 2011, with a significant number of "mandatory elements of a contract" in credit, leasing, credit card and cash deposit contracts. Then, the paper mentioned the Law on Payment Services from 2014 with a certain number of "mandatory elements of a contract" for credit card contract and the payment services framework contract. Furthermore, the analysis included the Law on Electronic Communications from 2010 with the corresponding number of "mandatory elements of a contract" in contracts concluded between an operator and a user of a publicly available electronic communication service. Finally, the paper also mentioned the Consumer Protection Act from 2014 with numerous "mandatory elements of a contract" in

[3] Professor Nataša Petrović Tomić, PhD: „O pravnoj prirodi dobrovoljnog zdravstvenog osiguranja, povodom Predloga zakona o zdravstvenom osiguranju", *Zbornik XXIV Budvanski pravnički dani (ur. prof. dr Miodrag Orlić*), 2019, 487-506

tourist travel contracts. The subject of the legal phrase "mandatory elements of a contract" referred to the legal enumeration of questions and data, which a certain type of contracts had to contain. In the author's opinion, "mandatory elements of a contract" in relation to the essential elements of a contract present a broader concept, which includes various components of a contract, from essential, through natural to auxiliary, and even mandatory in the true sense of the word. "Mandatory elements of a contract" present information at the time of concluding a respective contract. The paper emphasised the difference between "mandatory elements of a contract" and pre-contractual information, but also the similarities between them. It is highlighted that "mandatory elements of a contract" in the said laws present the obligation of a business entity to inform the other contractual party of certain information by including that information in the text of a concluded contract. It is specified in the paper that the EU law does not stipulate sanctions for violation of "mandatory elements of a contract" unlike the Serbian law. Administrative fines are prescribed only for "mandatory elements of a contract" in the Law on the Protection of Financial Service Users and the Law on Payment Services. For other laws mentioned in this paper, Misdemeanour Courts are competent for minor offence liability. In the conclusion, it is indicated that the "mandatory elements of a contract" of various contracts, listed in this paper, serve to regulate one party's obligation, that is, a business entity, to inform the other contracting party about certain information through their inclusion in the text of a contract. The legal phrase "mandatory elements of a contract", which is used in the EU law terminology, should be correctly marked in Serbian legislation with the phrase "information at the time of concluding a contract". In terms of insurance law, it is interesting that the National Bank of Serbia, as a supervisory authority in the insurance sector, was the proponent of the Law on the Protection of Financial Service Users and the Law on Payment Services. The so-called administrative fine is stipulated in those laws, charged by the National Bank of Serbia in favour of its revenues.

Translated by: ***Jelena Rajković***