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CONFERENCE REVIEW

INSURANCE LAW AT 26TH LEGAL DAYS IN BUDVA

The Association of Jurists of Serbia and Republika Srpska organized the 26th Legal Days in Budva. The Conference was held in Budva from 2nd to 6th June 2023, with the traditional topic *Current Issues of Modern Legislation and Justice*. Within the general topic, this year's conference included sub-topics (1) Changes in judicial legislation and case law; (2) Novelties in the Draft Civil Code of the Republic of Serbia; (3) Current issues of enforcement, bankruptcy and notarial law; (4) Evolution of administrative law; (5) Innovations in criminal substantive and procedural law; (6) Tendencies in development of European and environmental law; (7) Improvement of labour and social insurance rights. Proceedings from the Conference was published, whose editor-in-chief is professor Miodrag V. Orlić, PhD.

1. Three papers that directly dealt with the insurance law were first presented.

1.1. Professor Vladimir Čolović, PhD, a research fellow at the Institute for Comparative Law in Belgrade, presented a paper on the topic of **war risk insurance**. The author stated that he was inspired by wars in various parts of the world and the effects of unexploded bombs and mines from the WW II, including the current situation in Ukraine. While researching war risk insurance, the author found a starting point in the broader legal interpretation of Article 931 of the Law of Contracts and Torts. War operations and rebellions are mentioned in that article, however, an insurer is not obliged to compensate for damages caused by war operations and rebellions, unless otherwise agreed. The same article stipulates that an insurer is obliged to prove that the damage was caused by one of the said events. Therefore, the issue is whether the war risk should be linked to the war conflict or the war risk can be realized even after the end of the war conflict. The author specified that under general terms and conditions an insurer could envisage that the war risk is insured, in which case the insurance contract can provide insurance against war risks to the insured. The author reminded that at the time of entry into force of Article 931 of

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the Law of Contracts and Torts (in 1978) it was unrealistic to think of war risk insurance, and in the meantime war conflicts had taken place on the territory of the former SFRY, some of which have not ended. The aforementioned and the unexploded bombs and mines from the WWII were the reason to comment on two cases from the Croatian case law. (1) In the first Croatian case, a landmine was activated on the road, originating from the war conflict in the nineties of the 20th century, and the deceased, based on his employment in a company, was still insured under the collective insurance contract two months after cessation of the war. The Supreme Court in Croatia based the judgement on the premise that it was not a war damage, but an accident, and that the family was entitled to compensation based on the collective insurance contract. According to the insurer's general terms and conditions with whom a company concluded the collective insurance contract, the insurer is not liable if the accident occurred because of war, civil war, revolution, terrorism, etc., in which the insured participated. The Supreme Court in Croatia concluded that the damage caused by the activation of a mine did not provide sufficient grounds for it to be a war damage, regardless of the fact that the damage occurred two months after the cessation of war. In the court proceedings before the lower courts it was determined that the insured was traveling on a dirt road at that moment, that he did not lay mines and that there were no markings on the road indicating that it was a minefield, as well as that all this did not point to the conclusion that there was a war damage. (2) The second case was about the dismantling of mines left from the WWII near Rijeka. The author expressed the opinion that laying mines was a war risk, as was dropping bombs from airplanes. From the aforementioned court cases, the author concluded that Croatian insurers excluded damages from war operations, i.e. war risks, without exception in the general insurance terms and conditions. Regarding the Croatian general insurance terms and conditions, the author posed the question: Does the passage of time erase the property of a war risk and should such damages be included in insurance, since according to statistical data, a premium can be easily determined for such risks? According to the author, the uneven case law in Croatia regarding war risk arouses insecurity among citizens, who may or may not insure their houses, apartments and other real estate. According to researches about war risks, the author concluded that they were the risks that can be transferred to an insurer, but only if they were envisaged in the general insurance terms and conditions. Then, the author presented the following statements – first, war risks are subjective risks, because people influence their realization. Second, war risks are variable, given that it is very difficult to determine in advance the extent of damage they cause. Third, war risks are pure risks since they can lead to the loss of property. Fourth, war risks can be general and individual, which means that they affect a single object or several individual objects. The author also stressed the following characteristics – the insured event for war

risk will exist if the realized risk was covered by a concluded insurance contract and if the covered war risk caused the loss or damage to the insured object. A presentation on concepts related to war risk insurance followed. The author explained the concept of war. He defined the war as an armed conflict with an international dimension. War as a risk covered by insurance, according to this author, exists even when states are not at war, but undertake acts of hostility among themselves. The next concept was the civil war. The author defined it as a small-scale armed conflict within the borders of a country. The author compared the civil war to an uprising or a rebellion, whereby a civil war is larger than an uprising or a rebellion. The revolution – according to the author the revolution was an organized, sudden and violent (with the use of force) overthrow of the existing government of a country by the population of that country, as well as the replacement of one government by another, with the taking over of administration and control over the territory and population. The next was an uprising. The author defined it as an organized armed resistance directed against the existing government by the citizens even if organized from abroad. The author emphasised that the goal of revolution and uprising is the same – to overthrow the existing government or prevent that government from ruling in a certain territory. Finally the author discussed a rebellion – an armed revolt against the existing government of a country by its citizens, with the author's opinion that it was difficult to distinguish the rebellion from the uprising, that is, that rebellion did not include actions of foreign citizens. The author then explained political risks. Regarding insurance law, the author distinguished two types of political risks. One type is a political unrest, such as a strike, a demonstration, a rebellion, and the other type is a set of measures of competent state authorities, such as banning exports, banning ships from entering the port, etc. The author emphasised that, regarding insurance, it is important to qualify carefully each event that may present a risk, and only then attach consequences to that event. The author moved on to research a relation between war risks and terrorism risks. This relation is unclear with regard to insurance. The author stated that there is no model in insurance referring to the assessment of the likelihood of damage from the risk of terrorism, as the national security prevents the state from publishing detailed data on the consequences of terrorism risks. He further stated that there are no preventive measures against terrorism risks, since the insurance offer depended on preventive measures. The author then explored a relation between catastrophe risks, on one hand, and war, political and terrorism risks, on the other. The author stated that there is a range of different models in insurance depending on the country, then models by stages, etc. The biggest problem with catastrophe risks, according to that author, is that there is no option to establish a homogeneous community of risks with a sufficient number of insured persons on a larger territory. The author researched how an insurer should calculate the premium for war risks, so he started from the insurance

portfolio. Namely, according to the author, the insurance portfolio is a set of rights and obligations under insurance contracts within one insurance type, i.e. the same or related risks. Another name for an insurer's portfolio is the insurer's capital, the author pointed out. The final aspect of the war risk research was related to the determination of the war risk insurance premium. The author pointed out that war risks can be insured. Then he referred to the war risk aspects in insurance of goods in transit. He concluded the paper with the statement that he tried to show the complexity of war risk insurance and justify the insurers' opinion that these risks are difficult to insure. He criticised Article 931 of the Law of Contracts and Torts that it regulated war operations or rebellions. The legal term for war operations is linked to war risks, and the legal term for rebellion to political risks. The author emphasized that in the Article 931 of the Law of Contracts and Torts, risks related to the war are covered and may refer to demonstrations, protests and other events directly linked to current political circumstances. The author criticised the Article 931 of the Law of Contracts and Torts by stating that such regulation and putting war and political risks in the same article is the first mistake of the Law. The second mistake of Article 931 of the Law of Contracts and Torts is that it did not regulate the insurer's obligation to pay damages due to occurrence of the said risks. The author suggested that this provision should be specified according to the second mistake of the Law of Contracts and Torts. Namely, if the insurer wanted to include specified risks in the insurance cover, the insurer could do so through the general insurance terms and conditions.

1.2. A research fellow at the Institute of Comparative Law **Mirjana Glintić, PhD,** submitted the paper entitled **Disadvantages of voluntary earthquake insurance.** Introducing the issue of earthquake insurance, the author pointed out that strong earthquakes were recorded in various parts of the world since the 1970s. Earthquake insurance has since proven to be a solution that enabled compensation to the insured. She explained the main features of earthquake insurance and stated that earthquakes are natural disasters. An earthquake of over six degrees intensity of the Mercalli scale has a devastating effect on insured items. Earthquake insurance is more widespread in the Western Hemisphere than in the Asian continent. Earthquake insurance is a property insurance, where payment of the sum insured enables the value of the property to be preserved in the condition that existed before the earthquake. It is noted that the earthquake insurance is not an independent subject matter of insurance, but always with certain insured risks. The author specified that, as a rule, catastrophe risks are covered either as additional insurance or multiple risks are included in one policy. This is done because the separation of risks would entail excessively high premiums for independent earthquake insurance, and a large amount of damage due to an earthquake. This consideration of the main characteristics of the earthquake insurance is rounded off by statements that a policy covered a direct seismic impact of an earthquake, then consequences of an

earthquake such as fire or explosion, and the impact of parts of objects or objects thrown by an earthquake onto the insured property. Moving on to disadvantages of voluntary earthquake insurance, the author pointed out that the premium in the Republic of Serbia for the earthquake insurance ranged from 50 euros per year, depending on the area. The author then presented disadvantages of earthquake insurance, first from the point of view of the insurer, and then from the point of view of the insured. Presentation of disadvantages of voluntary earthquake insurance from the insurer's point of view pointed to the following conclusions. The insurer cannot offer and provide full protection against earthquakes, given that the damage is too extensive. In theory, there are opinions that earthquakes are uninsurable risks. In order for insurers to provide cover for the earthquake risk, that is, for an uncertain event, it is necessary to identify the risks and link the premium to the risks. She explained in more detail the conditions that an insurer must provide – first, the probability of an earthquake and the extent of the expected damage. Earthquake risk must be determinable and computed as to attach a premium to each potential client or a group of clients. The insurer simply cannot fulfill those two conditions cumulatively, and therefore the insurer cannot insure a certain building, because it is risky in case of an earthquake. Furthermore, increasing earthquake prediction capabilities may lead an insurer to insure buildings against earthquakes, that is, there is a small likelihood that an earthquake will occur in the insurance period. If an earthquake occurred, since there is still no way to fully and reliably predict an earthquake, then a large number of insureds with earthquake, fire and explosion insurance would file claims to that insurer, and not only the buildings are destroyed or burned but also the infrastructure of a place, a city. This requires a lot of capital from the insurer. Reinsurance has an important role in earthquake insurance, along with fire and explosion insurance. Moving on to disadvantages of voluntary earthquake insurance from the point of view of the insured, potential insureds are interested in earthquake insurance only when an earthquake occurs. First of all, not recognising the importance of an insurance contract, neglect of the risk seriousness and excessive reliance on the state aid leads to the fact that, in the world and in our country, a small percentage of damages caused by earthquakes is covered by insurance, the author pointed out. Then, insureds with insurance contracts, with included earthquake risk, contract deductibles and do not undertake preventive measures on insured buildings, relying on insurers to provide sufficient funds to cover damages due to earthquakes. Finally, municipalities, development companies and other investors do not insure their buildings and other facilities, thus setting a negative example for other potential insureds. The author proposed several ways to introduce compulsory earthquake insurance – the state should establish an insurance company for natural disasters, or participate in the premium, or establish a reinsurance company, or establish a special fund as a legal entity for natural disasters, or establish a pool of insurers or reinsurers for natural disasters, etc.

1.3. A group of authors including a **professor Vladimir Kozar**, **PhD**, the Faculty of Law for Commerce and Judiciary in Novi Sad; **Vladimir Vrhovšek**, a judge of the Higher Court in Belgrade; **Sandra Đorđević**, Master of Laws, published in the Proceedings a paper entitled **Liability of the owner and the Guarantee Fund for damages caused by an uninsured vehicle and an employer's responsibility for damages caused by an employee's actions**. The main idea of this paper is based on the well-known maxim of the contract law that everyone is liable for the damage they cause to a third party and this liability is reflected in claim indemnity, i.e. in returning the damaged item to the condition before the damage. The first topic in this paper deals with the consequences of the motor vehicle owner's failure to conclude a compulsory motor third-party liability insurance. Those consequences are prescribed in Article 91 of the Law on Compulsory Traffic Insurance (*the Official Gazette of the RS,* 55/2009, 78/2011, 101/2011, 93/2012, 7/2013) (hereinafter referred to as the Law). Article 91 paragraph 1 of the Law stipulates that any damages caused by the use of a motor vehicle in cases when the owner failed to contract a compulsory insurance, and they were required to do so pursuant to this Law, shall be paid in the same amount and under the same terms as if the compulsory insurance was contracted on the date of the loss event. Compensation of damages shall be done from the Guarantee Fund that is established for the purpose of financial protection of passengers in public transport and third party claimants in cases where the damage has been caused by the use of uninsured or unidentified means of transport, as well as for damages payable by the insurance company in respect of which bankruptcy proceedings have been initiated under this Law. After the compensation is paid, the recourse shall be claimed from the owner of a motor vehicle, who failed to contract compulsory insurance in the amount equal to the amount of compensation paid out, interest accruing since the payment of compensation and expenses. The group of authors pointed out that the right to recourse that the insurer has from the party responsible for the damage is basically required by subrogation, because the insurer thus becomes the insured, to the extent that it has paid compensation. The group of authors indicated the opinion of jurisprudence – fulfillment with subrogation occurs in case of fulfillment of a third-party's obligation, when the fulfiller agreed with the creditor before or during fulfillment that the fulfilled claim is transferred to him, with all or any secondary claims. As a rule, by paying the entire debt to the creditor, the joint and several debtor does not fulfill someone else's obligation, but own obligation from the joint and several liability. The group of authors concluded that the transfer of the insured's rights to the insurer by its legal nature is a legal personal subrogation, and is explained by the principle of non-accumulation of damage. The second topic of this paper was the basis of the tortfeasor's liability. Tortfeasor, that was insured, defended himself in the lawsuit by saying that his insurer should have borne the damage, but if the insurer was bankrupt, the Guarantee Fund was

responsible. The Law on Compulsory Traffic Insurance stipulates that the funds of the Guarantee Fund be used for payment of the sum insured, i.e. for compensation of damages to claimants caused by the use of a motor vehicle or other means of transport for which a compulsory insurance was concluded with the insurance company against which bankruptcy proceedings were initiated. The third topic of that paper was the statute of limitations for claim compensation from an uninsured vehicle. The Law of Contracts and Torts prescribed a subjective limitation period, that is, that the claim for damages will expire three years after a party sustaining injury or loss became aware of the injury or loss and of the tortfeasor. In any event, such claim will expire five years after the occurrence of injury or loss (Article 376 of the Law of Contracts and Torts). If a loss is caused by a criminal offence, and a longer statute of limitations is prescribed for the criminal prosecution, the claim for compensation against the liable party shall expire upon the expiration of the limitation period set forth in the statute of limitations of the criminal prosecution (Article 377 of the Law of Contracts and Torts). According to the current legal understanding, the recourse claim of the Guarantee Fund against the liable party also expires within the terms of Article 376 or Article 377 of the Law of Contracts and Torts. The fourth topic concerns subrogation, joint and several liability of the company and the employee. Liable for damage caused by an employee while working or in relation to work, to a third person shall be the company at which the employee was employed at the moment of causing the loss, unless it is proved that the employee, in given circumstances, had proceeded as he should have. A claimant is entitled to demand recovery directly from the employee, if he caused the damage wilfully. In that case, the liability of the company and the employee is joint and several – emphasized the group of authors. The Labour Law stipulated that an employee who caused damage to a third party at work or in relation to work, with intent or by gross negligence, which damage was compensated by the employer, is obliged to compensate the employer the amount of damages paid. The group of authors concluded that a third party that sustained damage caused by an employee at work or in relation to work can sue either the employer or both the employer and the employee.

2. In this section, two papers from the Proceedings will be presented. They discussed topics from the Law of Obligations, which, *mutatis mutandis*, can be applied in the law of insurance.

2.1. Insurance law associated a dangerous object with a motor vehicle, and a dangerous activity with the use or operation of a motor vehicle in everyday traffic. Motor vehicle and its use or operation belong to the most developed insurance system, both in our country and in the world. **Professor Ilija Babić, PhD,** discussed in the paper a dangerous object and a dangerous activity not in relation to a motor vehicle (in a parking lot, in a public garage, etc.) and its use or operation (in a parking lot, in a public garage, etc.), but in relation to obligations. The title of

his paper was **Liability for damage caused by dangerous objects or activities entrusted to a third party according to the Law of Contracts and Torts and the Draft Civil Code of the Republic of Serbia**. The topic was presented in seven parts. They are designed so that each part individually presents an explanation for the final proposal presented in the seventh part in the form of Article 321 of the Draft Civil Code of the Republic of Serbia. The first part dealt with a dangerous object and a dangerous activity – original and derivative liability. That topic covered two sections. One section referred to a dangerous object and a dangerous activity in general, and the second one referred to original and derivative liability. The second topic contained four sections. The first section related to sale and exchange, and the second to usufruct and guarantee. The third section covered a discussion about a lease agreement and a life support agreement. The fourth section dealt with the contract of use and transgressing. The third topic dealt with the party obliged to keep (supervise) the object. The fourth topic covered the hidden flaw of a dangerous object or a dangerous activity. The fifth topic covered a relation between the owner and the holder of a dangerous object, that is, terminological confusion. The sixth topic explained the exclusion of liability for damages, and the seventh topic referred to an explanation of objections to solutions in Article 321 of the Draft Civil Code of the Republic of Serbia. In conclusion, the title above Article 321 of the Draft Civil Code of the Republic of Serbia was formulated – Entrusting objects to a third party. Proposal of Article 321, paragraph 1 of the Draft Civil Code of the Republic of Serbia would be: "An owner of a dangerous object shall be liable as well as a party authorized to use an object (for example, the usufructuary, the tenant, the bailee, the party to whom the object was given for testing) or is otherwise obliged to keep, but is not with him at work (for example, a party to whom the object was given on the basis of a temporary service contract)." Article 321 paragraph 2 of the Draft Civil Code of the Republic of Serbia would be: "However, in addition to him, the owner of the object will also be liable if the damage resulted from a hidden defect or a hidden property of the object, to which the owner did not draw his attention." Article 321 paragraph 3 of the Draft Civil Code of the Republic of Serbia would be: "In that case, the liable party that paid the compensation to the claimant is entitled to demand the entire amount from the owner of a dangerous object."

2.2. In addition to insurance contracts concluded for one year, long-term compulsory or voluntary insurance contracts are increasingly concluded on the Serbian insurance market. In this regard, it may be important whether the circumstances changed after concluding of a contract and whether, due to changed circumstances, the contracting parties are interested in terminating or amending a contract. **Ivana Radomirović**, a PhD student at the Faculty of Law at the University of Belgrade, considered this law of obligations in her paper. It can also be applied *mutatis mutandis* in insurance law. Ivana Radomirović submitted a paper entitled

Termination or amendment of a contract due to changed circumstances - current issues. The author stated that the contracting parties entered into the contract with the principle of trust. However, events and circumstances may serve as a reason to request amendment or termination of a contract. In the first chapter, the law of obligations was discussed in terms of the general practices for trade in goods, as a legal source in the former legal system of the federal state. General practices for trade in goods were applied before 1978, that is, before the adoption of the Law of Contracts and Torts. Termination or amendments to a contract due to changed circumstances were regulated by those practices no. 2, 55, 56 and 58. The author rounded off that part by discussing the wording of the cited practices. The second chapter compared the law of obligations to the Law of Contracts and Torts and the Draft Civil Code of the Republic of Serbia. Termination or amendments to a contract due to changed circumstances were regulated in Article 133–136 of the Law of Contracts and Torts. First she researched the origin of those provisions in the Law of Contracts and Torts. In this regard, it was stated that they originated from German and English legal theory of obligations. Then the author considered the components in the laws of obligations of Montenegro, Croatia, the Federation of Bosnia and Herzegovina and the Republika Srpska. The final sentences of that chapter referred to the provisions of the Draft Civil Code of the Republic of Serbia. The fourth chapter discussed the application of rules on termination or amendments to contracts due to changed circumstances. The starting point was that changed circumstances must occur after the conclusion of a contract and before the contractual obligations are realised. Therefore, this law of obligations referred primarily to bilateral contracts with delayed fulfilment of obligations. The fifth chapter discussed the procedure of application of the rules on termination or amendments to contracts due to changed circumstances. In that chapter, it was concluded that it was necessary to prove in court that changed circumstances occurred. The judgment of the Commercial Court of Appeal from 2017, cited in the footnote, stated that the plaintiff failed to prove that changed circumstances occurred, i.e. that the court did not recognise the fact that there was a global economic crisis. That was a way to object to the provisions of the Civil Procedure Code in that period. The next thesis pointed out that changed circumstances caused the contractual obligation for one contracting party to become more difficult, which was stipulated by the Law of Contracts and Torts. The author emphasised that the Law of Contracts and Torts did not contain the wording that it was "excessively difficult" for one contracting party to fulfill a contract, which was stipulated by the general practices for trade in goods. Finally, the purpose of a contract was linked to changed circumstances, that is, changed circumstances thwarted the intended purpose of a contract. In conclusion, the author gave recognition to the Commission for drafting Civil Code of the Republic of Serbia for regulating the termination or amendments to contracts due to changed circumstances, including

in the wording all that was best from the general practices for trade in goods and from the Law of Contracts and Torts.

3. From the point of view of insurance law, it can be stated that the twenty-sixth conference of Budva Legal Days dealt with current topics. The tradition was held under new conditions and with a good attendance.

Translated by
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