UDK:303.443:328.34:368:347(094.46)(497.11):343.791:347.53:343.287:347.961

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CONFERENCE REVIEW

CURRENT ISSUES OF MODERN LEGISLATION AT 22nd LEGAL DAYS IN BUDVA

The Associations of Lawyers of Serbia and Republika Srpska organised 22nd Legal Days in Budva from 4 to 8 June, 2017. General multi-year topic of this conference of lawyers held in Budva was *Current Issues of Modern Legislation*. In 2017, within the framework of this general topic, the three topics were selected: (1) Draft Civil Code of the Republic of Serbia (hereinafter: "Draft"); (2) Property and Legal Relations, Procedures; (3) Administrative and Labour Regulations. In the Conference Proceedings, fourteen papers were printed. This review will include the summary of those papers which were insurance-related or which directly addressed the topic of insurance.

1. Paper which Directly Addressed the Topic of Insurance

1. 1. In the Proceedings, the paper of the **Professor Nataša Petrović Tomić, PhD was the only one to directly deal with the insurance topic,** and was entitled *Key Deficiencies of the Proposed Regulatory Insurance Framework Regarding Unfair Clauses*. The introductory part of the paper gave the definition of an unfair contractual clause, inspired by the two EU Directives dealing with the area of consumer right. According to the definition, the purpose or consequence of an unfair clause is to cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Introductory part lays out two opinions of the French theoreticians who argue that legal protection of consumers is unnecessary in contractual relationships. According to one opinion, the laws governing contractual relationships in insurance stipulate sufficient protection and thus exclude

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Paper received: 2. 9. 2017.
Paper accepted: 15. 9. 2017.

from insurance contracts the application of consumer right and the institute of an unfair clause. This opinion also contains the attitude that the legal protection of consumers and the unfair clause institute cannot be treated equally in the contractual relationships where the protection of a weaker party is not prescribed and in the insurance contracts, where the protection of a weaker party is prescribed and known. Another opinion is that in the legal and consumer relationship, the legal regulations governing consumers and unfair clauses may be applied as subsidiary or incidental. The author of the paper found that both opinions were radical and further in the text sought to refute them. Firstly, the author thinks that in society, the legal protection of consumers has generally reached a high level and that the protection of policyholders is justified for the following reasons: (1) due to special legislative technique of a complex contract; (2) due to the subject matter of the contract which should ensure the safety of private life; (3) due to economic power of insurance company writing insurance contracts; (4) due to presence of unfair terms in insurance contracts. Secondly, the application of unfair clauses to an insurance contract creates difficulties because it is not easy to determine the imbalance between rights and obligations of the contracting parties. Thirdly, the scope of application of unfair clauses in insurance contracts is limited because unfair terms of consumer law cannot be applied to the contracts written by the professionals. Fourthly, the main issue is which clauses in insurance contracts can be defined as unfair? Are these all the clauses in the contract or only some of them, and which ones? The answer to these questions will determine the efficiency of protection provided to insurance service consumers.

Part of the paper title – key regulatory insurance framework – notably relates to Article 1399 of the Draft Civil Code of the Republic of Serbia, to the effective law of Serbia governing the consumer protection, and a part of the Acquis in the area of consumer protection and insurance law. The paper supports the mentioned Article because the Article recognises the specific nature of insurance contracts and in all such contracts enables the application of unfair clauses. Considering historical and theoretical aspects of unfair clause institute, the author explained who, was the first to use the term "unfair clause", and where and when the term was used, and then concluded that within the meaning of the Draft, the unfair clause is a part of the contract which was not subject to negotiations and which creates imbalance in rights and obligations between policyholder, insured, and insurance beneficiary. After placing different aspects in her focus (provisions which were not subject to separate negotiations) the author concluded that there is a mismatch between the definition of unfair terms provided in the effective law of Serbia and the definition of unfair clauses in the Draft. The author began the analysis of unfair clause elements – considerable imbalance between rights and obligations to the detriment of consumers – by noting that the English, French and German versions of the EU Directive

93/13 use considerably different terms to name this element. She concluded her consideration of this element with the recommendation that the said differences should be eliminated and different interpretations in the court practice and other areas should be avoided. In the subsequent element – criteria for the assessment of unfair clauses– the author found that it is much easier to meet these criteria when concluding the insurance contract instead of trying to meet them subsequently, at the moment of their performance. For the element of unfair clause – legal consequences – the paper stressed that the court may find an unfair provision of the contract null, whereas all other parts of the contract may remain effective. The final element of unfair clause institute, which was considered in the paper, related to the exclusions from application. After quoting appropriate provisions of Article 1399 of the Draft, which stipulate exclusions from the application of unfair clause institute, the paper concludes that they limit the application of this institute. In the conclusion it was found that the provisions of Article 1399 of the Draft are the result of copy-paste approach and, to that extent, their correction is proposed in four items.

2. Papers with Insurance-related Topics

2.1. The President of the Commission for drafting the Civil Code, **academician Professor Slobodan Perović, PhD** presented the paper entitled Draft Civil Code of the Republic of Serbia. Having presented the principles on which the Draft is based, within the chapter on the application of these principles he touched upon the provisions of insurance law. He pointed out that compared to the Law of Contracts and Torts, the Draft extends the provisions regarding the liability for the loss to the event of a traffic accident, public demonstrations and manifestations, terrorist acts, liability for the loss from construction facility, liability for the loss from animals, as well as to other types of tort liability. Presenting the content of the list of contracts named in the Draft, the author stressed that the named contracts included all insurance classes.

2.2. *Fault-based Liability under the Draft Serbian Civil Code* is the title of the paper prepared by the **Professor Miodrag Orlić, PhD,** member of the Government Commission for drafting the Civil Code of the Republic of Serbia. In the conclusion of the paper it was mentioned that the Commission for the preparation of the Draft Serbian Civil Code proposed the return to the system of tort liability which is contained in the Outline of the Law on Obligations and Contracts written by the Professor Mihailo Konstantinović, PhD. In addition, he relied on the opinion which took roots in the Serbian court practice and on the prevailing trends in the comparative law. Drawing from these bases, the Commission, among others, changed the provisions of the Law of Contracts and Torts compared to the subjective tort liability and the rules of the term of guilt, after which, in the conclusion of the paper, paragraph 1 of Article 295 of the Draft and Article 299 of the Draft were quoted.

2.3. The paper of the **Professor Nikola Bodiroga, PhD** dealt with the topic of *Disciplinary Liability of Notaries Public*. This topic was connected with mandatory professional liability insurance of enforcement officer for the losses to third parties, which was introduced by the Law on Enforcement and Security. Truth be told, the paper did not consider this form of mandatory insurance, however, it is beyond doubt that a severe and minor disciplinary breach contains the error relevant for this form of mandatory insurance.

3. 22nd Legal Days in Budva was also participated by the employees of insurance companies.

Translated by: ***Zorica Simović***