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Slobodan N. Ilijić, LLM [1]

REVIEW OF PUBLICATIONS

HARMONISATION OF SERBIA'S BUSINESS LAW WITH THE EUROPEAN UNION LAW (2016) AND HARMONISATION OF SERBIA'S BUSINESS LAW WITH THE EUROPEAN UNION LAW (2017)

Editor: ***Professor Vuk Radović, PhD***
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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 and associates of that faculty. Editorial work in both Proceedings was entrusted to Professor Vuk Radović, PhD. Regarding the timeline, first were presented certain studies, essays and papers from the 2016 Proceedings, and then from the 2017 Proceedings. Studies, essays or papers cover insurance law and certain current topics closely related to insurance law.

1. From the Proceedings of Studies, Essays and Papers from 2016

1.1. Rights and obligations of minority or non-consenting shareholders are currently under consideration of joint-stock companies, including joint-stock insurance and reinsurance companies, insurance brokerage companies and insurance agencies in Serbia. **Professor Mirko Vasiljević, PhD**, dealt with these rights and obligations in the essay titled **Economy and Legislation of Some Rights of Minority Shareholders** (**unity of interest or unity of opposition**). The essay's starting point covered minority shareholders according to equity from several aspects. It was pointed out that minority shareholders according to equity are shareholders who object to a decision made by a majority vote at the general assembly. It was further specified that minority shareholders are the minority among the shareholders of that company who criticize most shareholders according to equity of their abuse of the majority position in the company in order to impose personal interests that are adverse to company's interests. Author draws attention

[1] Author is a member of the Presidency of the Association of Serbian Jurists, e-mail: slobodanilijic@yahoo.com

to the fact that conflicts of interest occur or develop from such defined minority shareholders. Furthermore, it was pointed out that minority shareholders' rights are often questioned when individual shareholders disagree with the manner in which the decision was reached at the general assembly, since they did not participate in the work of the general assembly or were not present at the general assembly. Minority shareholders are sometimes recruited among shareholders who voted against a decision made by a majority vote at a general assembly. Finally, minority shareholders can include those shareholders who abstained from voting when the decision was passed at a general assembly. Overall, the author identifies minority shareholders as a disorganized, heterogeneous and elusive group of shareholders within a large number of shareholders of that company. As minority shareholders become dissatisfied and want to leave the company, focus of the essay is shifted to consideration of some minority shareholders' rights when leaving the company. Therefore, the legal bases from the applicable Company Law were recognized that regulate the exit of minority shareholders from a company. Since the Serbian legislature stipulates the mandatory buyout of shares for leaving the company, full attention was paid to the legal procedure by which the share price is determined at the highest value of such shares. It was stated that the highest value of the shares in that situation is determined by calculating the factors in a triangle that make statutory factors – bookkeeping, market and estimated value of that company's shares. In addition to these factors, in determining the share price, the author included in the analysis other aspects that may affect the company's obligations, such as market manipulation of the value of shares, the transition of public to non-public company, etc. It was also pointed to certain legal ambiguities in regulation and other rights of minority shareholders, such as the right to request to convene an assembly of the company, the right to propose an amendment to the agenda, the right to convene an assembly of the class of shares, the right to judicial protection. In conclusion, it was pointed out that the legal solution according to which the mandatory buyout of shares for the exit of minority shareholders does not confirm the interest of the company, as a legal entity, but leads to the opposition of the interests of the majority shareholders and the minority shareholders. To sum up, the essay critically evaluates applicable legal solutions for mandatory buyout of shares when a minority shareholder decides to exit the company.

1.2. International multilateral conventions stipulated in all types of traffic certain level of protection of passengers against transportation disruptions. However, there are more disruptions in passenger transportation in the EU. Due to the frequency of this disruption, the EU passed a special regulation for each sector of traffic thus introducing a greater protection of passengers in transportation compared to the one stipulated by international multilateral conventions. The study on this topic was prepared by **Professor Nebojša Jovanović, PhD**, entitled **Increased protection of passengers against transportation disorders in the European Union**. Author stated denials of passengers' admission to a vehicle, cancellation of a contracted transportation, delay of a vehicle on departure and arrival, as well as interruption of a journey as disruptions in transportation of passengers. Moreover, the reasons for

increased legal protection of passengers (the first section) were outlined, followed by specific sources of the EU law, namely the regulation on the protection of passengers against transportation disruptions for certain sectors of traffic (the second section), as well as a detailed legal explanation for each of the above stated transportation disruptions (the third section). The basis of responsibilities in which the stipulated increased protection of passengers against transportation disruptions are separately analysed (the fourth section). Adequate attention in the study was paid to the EU regulations not only from the point of view of increased protection of passengers' rights but also from the point of view of how these regulations govern the restriction of increased passengers' rights due to transportation disruptions. With regard to the said restrictions, it is pointed out to the territorial limits, then the restrictions applicable to persons, restrictions regarding the type of traffic, as well as the restrictions in relation to different means of transport (the fifth section). In the next section, the author explains in more detail special or increased passengers' rights in case of a transportation disruption. Hence, it can be said that this section is the central part of the entire study. The study included, as part of increased passengers' rights in case of transportation disruption in the EU, the following: issuance of a ticket; equality with respect to the carrier; two types of passengers' rights for the carrier to explain to them the reasons for a disruption; transportation disruptions where the passenger is entitled to cancel the journey and reimburse the fare; transportation disruptions where the passenger is entitled to continue travelling and to be cared for; passengers' rights and the carrier's obligations in case of a re-routing, that is, the carrier's actions, in case of a transportation disruption, enabling a passenger to arrive at a destination by another means transport than the one he/she contracted with the carrier; passengers' rights to flat fee in air, rail, water and bus traffic. Regarding the passengers' right to a flat fee, author of the study specified the amounts of individual fees in different sectors of traffic and pointed out the criteria according to which these fees are created. Finally, the central section of this study ends with the consideration of passengers' rights under contracted transportation conditions or the carrier's general business conditions (the sixth section). The EU regulations on special or increased passengers' rights due to transportation disruptions stipulate that the EU member states designate an authority to deal with passengers' complaints and deadlines for resolving such complaints. The study concluded that, in terms of protecting passengers against transportation disruptions, the Serbian law is in line with the EU law on air and water traffic, and not in line with land and rail traffic. According to the author, the reasons for this situation in Serbian law should be sought in economic circumstances.

1.3. Professor Vuk Radović, PhD, wrote a paper under the title **European Cooperative - halfway between the European company and the traditional cooperative**. In the first place, provisions of the EU Cooperative Society Regulation were discussed, followed by the relation between that cooperative and the European company as a corporation, and finally the implementation of that regulation in the EU member states, with reference to the powers stipulated for that national legislator in the matter of the cooperative. It was pointed out that the regulation does not oblige

member states to amend their existing law on cooperatives, but merely to offer the European cooperative as a possible form, as a manner of cooperative development outside the national framework. It was concluded that the said regulation was expected to defend the cooperative and its legal identity, but these expectations were not met because the said regulation brought the European cooperative closer to corporations. Prior to the adoption of the said regulation, the cooperative experienced an upward trend in the EU, and a similar phenomenon occurred in Serbia in the 21st century. Since in our country establishment of agricultural cooperatives is an ongoing process, as well as the need for insurance in agriculture, it would be useful for employees in the agricultural insurance to become familiar with the organizational form of a company in modern European cooperative.

1.4. Professor Tatjana Jevremović Petrović, PhD, in a paper entitled **European joint stock company and groups**, considered the European joint stock company in the context of a group of companies. Of course, the paper does not mention the European joint stock company in insurance industry, nor the group of companies that include insurance companies. However, the cross-border business of a European joint stock company within the context of a group of companies is the business of such companies in Serbia. This is a sufficient reason for a domestic insurance employee to become familiar with the state of the cross border competition and its impact on the Serbian insurance market.

1.5. In the paper of **Professor Aleksandra Jovanović, PhD**, entitled **Reputation, regulation, innovative technologies and the applicability of the traditional reputation model**, risks in general were considered, but the focus was on reputational risk. Having pointed to the complexity of the reputational risk, the author presented the term as follows: a reputational risk is a threat to the good name and standing of a company. Reputational risk can occur in the following ways – due to internal factors such as the actions of the company itself, corporate governance practices in the company, expectations that the company is socially responsible, actions of employees, but also external factors, actions of others who have a direct or indirect connection with the company (suppliers, customers). In addition to defining the term, the author stressed that a reputational risk can easily affect a company, especially in a globalized economy. Particular attention was given to the consideration of the reputational risk in the practice of audit, brokerage and law firms, rating agencies, etc. For most of these companies, the Serbian legislator introduced compulsory professional liability insurance many years ago for damage caused to third parties, so this paper is recommended to employees in the insurance industry who are engaged in contracting and implementing compulsory professional liability insurance of auditors, attorneys and insurance and reinsurance brokers.

1.6. Professor Nataša Petrović Tomić, PhD, covered a current topic in the theory of insurance law, entitled **Key shortcomings of the proposed regulatory framework for insurance regarding unfair clauses**. The first part of the essay defines unfair contract clauses by referring to two EU consumer law directives (Directive 93/13 and Directive 2008/83). According to this definition, an unfair

contract clause aims or results in the creation of, to the detriment of a consumer, a significant imbalance between the rights and obligations of contracting parties. It is particularly emphasized that unfair contract clauses are the result of the economic strength of one contracting party in relation to the other party, that is, they are the result of a better knowledge of the matter, greater specialization of one compared to the other contracting party. It is pointed out that unfair contract clauses stem from the fact that the contract is drawn up by a professional, a stronger contracting party, so that these clauses apply to all contracts of professionals and consumers, regardless of their nature and subject matter. Despite the existence of specific rules for certain contracts (e.g. insurance contract, loan agreement, etc.), it is stated that unfair contract clauses do not exclude the application of general consumer protection rules. After defining unfair contract clauses and some its components, the focus is on practical aspects of such clause. In this respect, it is emphasized that unfair contract clauses are not reserved only for the stage of contract conclusion, but can be found in model contracts, then in standard contracts, and they occur especially in written contracts. Unfair contract clauses can be found in the annexes to a basic contract, in the invoices, they can further be found in the provisions on payment of price, in risk classification, in conditions of execution, etc. That part on unfair contract clauses is concluded with the statement that such clauses do not apply to a contract as a whole. **1.6.1.** Theoretical review of unfair contract clauses presents the opinions of three French writers on insurance law. One believed that consumer protection was unnecessary in insurance contracts, while the other indicated that unfair contract clauses were continuously suppressed through mandatory provisions in statutory regulations or by-laws of insurance. Finally, the third believed that consumer regulations are supplementary (subsidiary) to an insurance contract. Author of the essay found the French writers' opinions on unfair contract clauses to be radical. **1.6.2.** Further, it was stated that unfair contract clauses are stipulated in consumer protection regulations, and that insurance legislation generally does not exclude the implementation of consumer law norms on unfair contract clauses. Therefore, it is emphasized that the protection of insureds against unfair contract clauses is required (1) due to complexity of insurance contracts; (2) because the subject matter of the insurance should ensure the safety of private life; (3) due to the fact that an insurer concludes an insurance contract as a "commodity"; (4) due to presence of unfair contract clauses in insurance contracts. The essay emphasizes that unfair contract clauses should be determined by implementing an insurance contract, or by comparing the advantages and disadvantages of such contract. However, the author found that in insurance contracts, where both parties are insurance professionals, there is no room for establishing unfair contract clauses. The first part of the essay is finished by a question: Can each of insurance contract clause obtain the "status" of an unfair contract clause? **1.6.3.** The second part of the essay began with the title - Analysis of the Draft Civil Code - with the starting point being that the Draft Civil Code (hereinafter referred to as the Draft) was just inspired by the Principles of European Insurance Contract Law (abbreviated: Principles). Interpreting the provisions of the

Principles in relation to provisions of the Draft, the author found that the user is any policyholder, insured and beneficiary, whether a consumer or a professional. She specified that the Principles adopted an objective approach to unfair contract clauses because they referred to the subject matter of such clauses and not to a contracting party. It was pointed out that the subjective approach dominated over unfair or dishonest contract clauses until the publication of the Principles. The Draft defined unfair contract clauses, first, as clauses not subject to specific negotiations, and second, as clauses that created inequality in rights and obligations, to the detriment of policyholders, insureds and beneficiaries. The next five sections of the second part of the essay analyse in more detail unfair contract clauses. **1.6.4.** For the first of five sections, it can be pointed out that provisions of the Draft, which were not individually negotiated, are based on provisions of the Principles, Directive 93/13 and the Law on Consumer Protection of the Republic of Serbia. This section is finished with the following question: Is there a disagreement in the Draft between, on one hand, provisions on unfair contract clauses in insurance contracts and, on the other, provisions of the Law on Consumer Protection? **1.6.5.** The author's attention in the next section was directed towards the term - imbalance - used in provisions of the Draft. First, it was pointed out that the imbalance is significant when there is a clear disproportion between the rights and obligations of contracting parties, but also that the absence of balance does not yet mean a significant imbalance. It was also pointed out that in this analysis, the term "inequality" is not the same as "imbalance", that is, equality of contractual rights and obligations is the precursor of significant imbalance. **1.6.6.** The subject of the next section was criteria for evaluating unfair contract clauses. It was emphasized that the basic criterion for the assessment of unfair contract clauses should not only be sought when concluding a contract, but also in the interpretation of insurance terms and conditions, that is, when interpreting general or special insurance terms and conditions. It was stated in the essay that the assessment of unfair contract clauses is done in relation to the principle of conscientiousness and honesty. **1.6.7.** Legal consequences of determining unfair contract clauses were the subject of a separate section. That section specified that the Draft stipulated that unfair contract clauses are not binding for a policyholder, an insured or a beneficiary, and that other provisions of the contract, which were not marked as unfair, could remain in force. In other words, practical consequence of this would be simply to replace the unfair contract clause in the contract. Such substitution would be carried out by the court because of implementation of the principle of protecting reasonable expectations, as explained in the essay, with a note that the term *principle of protecting reasonable expectations* was taken over in the Draft from the Anglo-Saxon law. The author pointed out that the implementation of the principle of protecting reasonable expectations would cause controversy in the domestic justice system and our insurance law. If, however, the insurance contract cannot survive without an unfair contract clause or a disputed provision, the author believes that the contract will become null and void. **1.6.8.** The last section in the second part of the essay is entitled Exemptions. Within that section, the question was raised: Which insurance

contract provisions may contain exemptions to implementation of an unfair contract clause? The answer contains the following insurance contract provisions: provisions on sum insured, on premium, on description of the insurance cover, if they are presented in a simple and understandable manner. In connection with the aforementioned answer, a critical comment was made on the wording from the Draft, which read "an essential description of approved cover". **1.6.9.** Article 1399 of the Draft was characterized, in the conclusion of the essay, as the result of a copy-paste approach to unfair contract clauses by the editor of that Article of the Draft, after which the author described the path to seek its new formulation.

1.7. In Serbia, there is an interest of the legal public in insurance to follow comparative legal solutions and legal understandings in the domain of the general part of the agency contract, as they may be important for the codification of the insurance agency contract. A contribution to this interest of the legal public in Serbian insurance came from **Mirjana Radović, PhD, Associate Professor**, entitled **Right of a commercial representative to a special fee due to termination of an agency contract (the so-called finder's fee).** Since the study presented the term finder's fee, the distinction between the commission on commercial transactions and the finder's fee was highlighted, after which different legal understandings of finder's fee discussed during drafting of Directive 86/653/EEC of 1986 were explained in detail, as well as alternative solutions in provisions of that directive. In accordance with alternative solutions of the said directive, the conditions for acquiring the right to a finder's fee are set out, then the exclusions or loss of rights in case of the finder's fee are explained, and finally the manner for determining the level of the finder's fee is considered. The need to regulate the finder's fee in Serbian law was examined in a study in relation to provisions of the Preliminary Draft Civil Code of RS (text dated 15th May 2015). The study concluded that the Preliminary Draft solutions were closer to the German than the French legal understanding of a special finder's fee, with one exception. The study's author recommended that the domestic legislator monitor the work on the ongoing changes to the 1986 Directive, in order to determine the final text of the agency contract in the codification of civil law. In this study, the focus was on only one legal institute within the general part of the agency contract, but the entirety of the contract was clearly defined with that institute. Therefore, the overall approach to the agency contract in this study deserves the attention of editors regarding insurance in domestic legislation and insurance employees.

1.8. The Law on Housing and Maintenance of Residential Buildings came into force on 31st December 2016, and thus introduced mandatory insurance against the professional liability of the manager of a residential building, and in the official explanation of that law's proposal it was recommended to conclude a voluntary liability insurance for a building, apartment and shared parts of buildings. In the study of **Nenad Tešić, PhD, Associate Professor**, entitled **Several glosses to the Proposal of the Law on Housing and Maintenance of Residential Buildings,** many legal aspects of the law on housing for collective housing or collective housing rights were explained. At the beginning, it was

stated that this study's author participated in the drafting of the law but did not participate in the final drafting of the law's provisions. The first section sets out the civil law reasons for implementing the initiative to pass the said law. In the second section, the question of the optimal name of the law is discussed. The third section dealt with provisions of the Draft Law relating to decision-making in multi-owner buildings and provisions governing the management of shared parts of a building. In the fourth section, the author pointed out the provisions of the Draft Law, which represent elements of electronic management of a multi-owner building. The author advocated the introduction of an electronic bulletin board, which would be used for scheduling a session for the owners of parts of a building and which would display decisions made at that session. The fifth section covers Building Maintenance Costs - this is the author's focus. The subject of the analysis are problems of current and investment maintenance of a building, as well as the possibility to raise funds for its investment maintenance. After analysing the stated problems, the author's opinions are as follows. Author does not agree with the legal criterion according to which important decisions on the disposal of shared parts of a building are made with the consent of the apartments' owners and other special parts of a building, to which more than half of the total area of apartments and other special parts of the building belongs. The Constitutional Court declared these legal criteria unconstitutional. Author does not agree with the current rule that these decisions can be made by a simple majority of the total number of members of the assembly of residential building. This rule is "even more unconstitutional" than the previous one considering the quiet enjoyment of property. Author proposes that the key criterion for such decision-making should be the value of individual real estate in relation to the total value of all the separate parts of a building, whereby the base for calculating the tax stated in the decision on property tax should be taken as relevant for determining this value. The sixth section again covers costs – but now insurance costs. Author of the study indicated that three insurance types should be distinguished in multi-owner residential buildings: (1) insurance of shared parts of a building; (2) insurance of a building for damage caused to third parties; (3) insurance of a professional manager of a building. According to the author the first type of insurance includes (1) insurance against fire, lightning, explosion, storm, hail, falling aircraft and water leakage from installations. In addition, this type of insurance includes glass insurance, specifying that it is insurance of the front door glass, insurance of glass partitions in hallways, glass roofs, etc. He also categorized machinery breakage insurance in this type of insurance and explained that this insurance includes water and sewerage systems, video surveillance systems, power lines, elevators and antennas. Finally, the first type of insurance would include the remaining insurance of shared parts of a building, which, according to the author, include insurance against the impact of an unknown motor vehicle in a building and insurance of shared parts of a building against floods and torrents as natural disasters. (2) The second group of insurance types would include insurance of a building from damage caused to third parties. The essence of this group of insurance types, according to the author, would refer

to insurance against a dangerous matter, specifying that damage to a building could be caused by shared parts of the building or devices in the building. (3) The third group of insurance types would be insurance of a professional manager of a building. Regarding this group of insurance types, the author noted that at the stage of making a Draft of this Law only the liability of a professional manager of a residential building was discussed, that is, no mandatory insurance was envisaged. Author of the study advocated the introduction of compulsory professional liability insurance of a professional manager of a building in the Draft of this law.

2. From the Proceedings of Studies, Essays and Papers from 2017

2.1. Paper written by **Professor Nataša Petrović Tomić, PhD**, was entitled **Protection of insurance users through relevant international private law in the European Union**, with a subheading **About limited autonomy of will in mass risk insurance contracts in the EU**. The paper deals with an insurance contract from the perspective of international private law. In the first two sections, it was noted that no harmonization of contractual insurance law had occurred in the EU, so most of the paper refers to implementation of the Regulation no. 593/2008, known as the Rome I Regulation. First, it was recognised that the insurance contract was exempted from the general contractual regime of that regulation, and then from that fact the author of the paper concluded that the specifics of the insurance contract also affected the international private law. Author paid special attention to the mass risk insurance, for which the EU stipulated special connecting factors. The paper stated that the EU law adopted the principle of limited autonomy of will of contracting parties when choosing the applicable law for insurance contracts. Adoption of the aforementioned principle in the EU law is a consequence of the tendency to protect consumers and prevent avoidance of compulsory regulations of the country where the consumer is habitually resident. Author criticizes parcelling of the international private law under insurance contracts, but proposes the introduction of unique conflict-of-laws rules for mass risks and for other insurance and reinsurance types the general conflict-of-laws rules.

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A total of 36 studies, essays and papers on 950 pages were published in both Proceedings. This review covered only some of the studies, essays and papers with topics in insurance law or topics close to insurance. Authors in both Proceedings dealt with current topics at an enviable scientific, professional and practical level in the field of insurance law and business law. The studies, essays and papers presented in both Proceedings are recommended for those involved in the insurance industry.

Translated by: ***Jelena Rajković***