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INSURANCE IN THE SERBIAN CIVIL CODE FROM 1844 – CONTRIBUTION TO THE HISTORY OF LEGAL REGULATION OF INSURANCE CONTRACTS IN SERBIA

SCIENTIFIC PAPER

Abstract

Comparative legal and normative analysis of the Serbian Civil Code provisions from 1844 (hereinafter referred to as the SCC) on insurance contracts is the subject of this paper. Since it is a Serbian legal tradition from the period of restoration of the Serbian statehood and the struggle for final liberation from the Ottoman Empire, the SCC could not reflect achievements of domestic legal theory and case law. Jovan Hadžić, the author of the Code, given his legal education and positive law in Vojvodina at the time, modelled the SCC on the Austrian Civil Code (hereinafter referred to as the ACC). Such an outcome was caused by the absence of previous regulations or business customs that applied to insurance contracts. Therefore, in this paper we compare legal provisions of both codes relevant to insurance contracts. The paper analyses the rules of certain aleatory contracts of the SCC, especially insurance, the regulation and subject matter of insurance contracts, the form and conclusion of insurance contracts. Obligations to protect and salvage property according to the SCC were analysed separately, having in mind that they could be applied accordingly in marine insurance.

Key words: *the Serbian Civil Code, the Austrian Civil Code, aleatory contract, insurance, risks*

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I. Historical Background before the Adoption of the Serbian Civil Code in 1844

When legal customs and individual laws, as well as the Nomocanon, were no longer sufficient for Serbia, in 1349 Dušan's Code was promulgated at the Assembly in Skopje (Emperor Stefan Uroš IV Dušan Nemanjić, also known as Dušan the Mighty, who was the Serbian king from 1331, and from 1346 to 1355 the Emperor of the Serbs and Greeks). The Code contained 135 articles, and in 1354 new articles were incorporated (Articles 136 to 201). The Code is a codification of customary law based on the rules of the Byzantine law (an abridgement of the Syntagma and the Code of Justinian). Although the Code of Justinian contained four articles devoted to maritime loans through the acceptance of the Roman law in Volume XVII, Book IV, Chapter XXXIII, they were not included in the Dušan's Code.

Dušan's Code regulated the basic class relations and defined the character of the state and social organization of medieval Serbia. Although the code did not mention insurance, it established collective liability for indemnity. The collective liability system coincided with the principle of mutual cover of losses or damages in extraordinary cases. In this sense, some claim in the legal history of insurance that the transition from the first natural risk communities (defence against any type of danger in family, with relatives, in a village community or a tribe) to the first risk communities consciously and exclusively created in order to protect against certain dangers by assigning roles to members of that community who are threatened by the same danger - represented the beginning of insurance.[2] Since there was no insurance institution in medieval Serbian society, the ruler had to formulate a legal obligation to protect property and a manner to compensate for its losses. Collective liability for damages arose in a certain number of cases prescribed by law. These are circumstances of causing damage to someone else's property, such as arson (Article 99 – *On arson*: Whoever is found to have set fire to a house or a threshing floor or straw or hay, that village must surrender an arsonist, if the village does not surrender an arsonist, the village must pay what an arsonist would have paid.), as well as in case of setting fire to threshing places and hay outside the village (Article 100 – *On arsonists*: Whoever is found to have set fire to a threshing floor or hay outside the village, the village must pay or surrender an arsonist.). In addition, the obligation to bear collective liability for damages referred to a guard's failure to warn the villagers of several villages about possible damage due to robbery, theft or any other danger (Article 158 – *On guards*: If there is a desolate hill among the administrative divisions, villages surrounding that hill should keep watch, because if they do not keep watch,

[2] Franz Büchner, *Grundriss der Individualversicherung* (6., überarb. Aufl.), Verlag Versicherungswirtschaft, Karlsruhe, 1968 according to: Predrag Šulejić, *Pravo osiguranja*, Dosije, Beograd, 2005, p. 30.

whatever is done in that hill, in the wasteland, any damage or robbery or theft or any evildoing, should be paid by the surrounding villages which were told to guard the road.), as well as when a merchant or a traveller was robbed because he was not allowed to spend the night in a village (Article 159 – *On merchants*: Buyers, who pass at night to a lodging place to spend the night, if a ruler or a lord of that village does not allow them to spend the night in the village, according to the emperor's law and as it is written in the code, if a traveller loses anything, that lord and the ruler and the village should pay all, because they did not allow them in the village).

Certain elements of insurance and specific forms in medieval Serbia have already been written in our legal theory, and in the new century, the first insurance of a private house against fire risks in Serbia was the one concluded in 1839 for the account of the insured who was a judge of the Court of Appeal in Belgrade.[3] Examples of insurance based on mutuality and solidarity existed in Serbian legislation even after the adoption of the SCC, but they were not organized on a premium and contractual basis as private insurance, but as a type of compulsory social insurance, such as the mining-fraternal fund from the Mining Code of the Kingdom of Serbia from 1866,[4] and therefore these insurance lines were not considered in this paper. For the restoration of the Serbian state and the establishment of legal order and legal security, we will discuss certain circumstances that existed before the adoption of the SCC in 1844.

After the war between Russia and the Ottoman Empire from 1826 to 1829, which ended with Russia's victory, the Treaty of Adrianople was concluded on September 2, 1829. According to that treaty, the Ottoman Turks were again obliged to allow Serbia to annex six nahiyas that were conquered by the Serbian insurgents during the First Serbian Uprising (1804–1813). The Sultan also had to grant autonomy to Serbia and the principalities of Moldavia, Wallachia and Greece, which were formally ruled by Turkey, but the Sultan had to guarantee their progress and full freedom of trade and movement.[5] However, the Sultan Mahmud II again tried to avoid fulfilling the obligations assumed by those agreements, so he issued the hatt-i sharif in

[3] Zdravko Petrović, Vladimir Čolović, Duško Knežević, *Istorija osiguranja u Srbiji, Crnoj Gori i Jugoslaviji do 1941. godine*, Belgrade Banking Academy, Dosije studio, the Institute of Comparative Law, Belgrade, 2013, p. 69.

[4] According to Article 103 of the said code, mining-fraternal funds were formed "to support mining supervisors and workers, their widows and minor children", for disability assistance and pension and assistance in case of illness and death (*Mining Code* for the Kingdom of Serbia from 15 April 1866, with changes and amendments from 27 July 1877, 6 February 1896 and 27 January 1900. Belgrade: State printing company of the Kingdom of Serbia.) For more information on origins of compulsory social insurance in Serbia see: Slobodan Jovanović, Ozren Uzelac, „Principi solidarnosti i uzajamnosti u obaveznom socijalnom osiguranju zanatlija, trgovaca i rudara u 19. veku u Srbiji", *Evropska revija za pravo osiguranja*, 21(1), 2022, p. 9–16. Available on: *https://erevija.org/articl.php?id=269*.

[5] Адрианопольский мирный договор между Россией и Турцией, *https://www.vostlit.info/Texts/Dokumenty/Turk/XIX/1820-1840/Mir_adrianopol_1829/text.htm*, 1. 12. 2021.

September 1829, which repeated the provisions of the Russian-Turkish agreements. This led to further negotiations from which a new hatt-i sharif was issued in 1830, with precisely stated rights of Serbs in the Principality and the confirmation of Prince Miloš as the hereditary monarch. Due to non-fulfilment of obligations from hatt-i sharif from 1830 concerning the borders of six taken nahiyas and some other issues, in 1833 the Turkish sultan adopted the next hatt-i sharif which officially abolished feudalism in Serbia and confirmed the borders determined by the topographical map that was the result of the work of the Russian-Turkish commission established for that purpose.[6] According to the stated hatt-i sharif, Serbia was still politically dependent, because it was still an autonomous province within the Ottoman Empire, although it had the right to enact laws. Until that time, the Ottoman Empire rules were in force in Serbia only for Turks, and customary and church law were in force for Serbs. Since the confirmation of the second supreme leader Miloš as prince in 1817, his arbitrariness gradually began to exceed reasonable limits in the absence of written laws and submission of the police and courts to his own discretion. Prince Miloš ruled as the Ottoman viziers understood and valued that position: absolute loyalty, shameless arrogance and unscrupulous bribery.[7] He acted as the master of life and property of all citizens in the Principality, and his contemporaries later called him "a true tyrant and a big anarchist".[8]

Although there was a need to establish the legal order of newly formed autonomous Principality, ensure legal security and regulate property relations,[9] prince Miloš initiated creation of the Civil Code in 1829, primarily under the pressure of growing dissatisfaction with his rule.[10] Due to general illiteracy of the people,[11,12]

[6] Radoš Ljušić, *Kneževina Srbija (1830–1839)*, Srpska akademija nauka i umetnosti, Beograd, 1986, p. 14–19.

[7] Gale Stokes, *Politics as Development: The Emergence of Political Parties in Nineteenth-century Serbia*, Duke University Press, Durham and London, 1990, p. 5.

[8] R. Ljušić, 203–205.

[9] Zoran Mirković, *Srpska pravna istorija*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2019, p. 140.

[10] Dragan Nikolić, „Građanski zakonik, knez Miloš Obrenović i zakonodavna komisija u Srbiji 1829–1835. Godine", in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (editors), *Srpski građanski zakonik – 170 godina* (str. 63–72), Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 64.

[11] Holm Sundhauzen, *Historische Statistik Serbiens 1834–1914. Mit europäischen Vergleichsdaten*. Südosteuropäische Arbeiten, vol. 87, R. Oldenbourg Verlag, München, 1988, p. 528, 534 according to: Zoran S. Mirković, „Uvodna pravila i uvođenje u život Srpskog građanskog zakonika", in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (editors) in: *Srpski građanski zakonik – 170 godina* (str. 75–103), Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 96, 99.

[12] The first census with data on the illiteracy rate was from 1866, 22 years after the adoption of the Serbian Civil Code. According to that census 96% of the population was illiterate, and in 1900 it was 83%. Data from the report of the Ministry of Justice to the State Council for 1844 concerning literacy and education of judges looked even more unfavourable. The report stated that in district courts, Belgrade City Court and the Court of Appeal, 18 judges were illiterate, seven were poorly literate, 14 of them completed primary school, six completed a little more than primary school (three went to secondary school, one went to school of theology and two studied "military science in Russia"), and none of the judges were lawyers.

lack of legal science,[13] legal terminology,[14] legislation and case law, and especially because of obstruction and lack of interest of the prince himself[15] and other reasons, a long time has passed since the adoption of the Code. This is supported by the fact that Miloš Obrenović was the initiator of drafting the Civil Code, that he abdicated at the beginning of June 1839, and that he was succeeded by his son Milan Obrenović, who, ruled for less than a month due to his premature death (from June 13, 1839 until July 8, 1839) and that he was replaced in that position by the First Regency that governed the Principality. After the First Regency, Prince Mihailo Obrenović, the second Miloš's son, ruled from March 1840 to 1842, in a similar way to his father, and after his overthrow, with the support of constitutional defenders, Aleksandar Karađorđević ascended the throne on September 14, 1842, during whose reign the Serbian Civil Code was adopted (*Civil Code for the Principality of Serbia*).

After numerous attempts, unsuccessful and bizarre translations of legal institutions from the French *Code civil*,[16] finally the Serbian Civil Code was drawn up partially based on the Austrian Civil Code from 1811 (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*, *Patent vom 1. Juni 1811, Justizgesetzsammlung, Nr. 946* [General Civil Code for German Successor Countries of the Austrian Monarchy, Patent of June 1, 1811, Collection of Laws, no. 946] and adopted on 11 March 1844. Considering different historical and political circumstances, in Vojvodina (without Srem) the Hungarian customary and judicial law were in force, while in the District Court in Pančevo and the district courts in Banatski Karlovac, Bela Crkva, Kovin, Titel and Žablje, the Austrian Civil Code was in force. A special role in the development of private law in Vojvodina in the first half of the 20th century had the department of Belgrade Court of Cassation (Department B), which was formed in Novi Sad in 1920, whose case law, together with the ACC

[13] Lazar Marković wrote in the Preface of the SCC with brief explanations from 1921, that his notes along with certain paragraphs present a kind of "appurtenances" and that those who wish to study Civil Law must refer to Civil Law systems and professional monographs, i.e. scientific commentaries, which did not exist in Serbia at the time of publication of that SCC edition (Lazar Marković, *Građanski zakonik Kraljevine Srbije: sa kratkim objašnjenjima*, 2. izdanje, Izdavačka knjižara Gece Kona, Beograd, 1921, str. IV i V). However, apparently the author of that short comment was not aware that Dimitrije Matić, a professor at the Lyceum in Belgrade from 1848 to 1851, had already published a commentary on the SCC in the edition of the Lyceum of the Principality of Serbia in 1851 (Димитрије Матић, Обясненѣ Грађанскогъ законика за Княжество србско. Част 2. Одд. 2. у Княжества Србскогъ Кньигопечатньи, Београд, 1851).

[14] Lack of legal terminology was a big problem and that was shown in the Preface of the second edition of the translation of the ACC in Serbian from 1921, in which professor Aranđelović, its author, mentioned that he mostly adhered to the terminology of the SCC and the Montenegrin General Property Code (Dragoljub Aranđelović, *Austrijski građanski zakonik*, 2. izdanje, Prosveta, Beograd, 1921, p. VI).

[15] D. Nikolić, p. 65.

[16] Slobodan Jovanović, *Političke i pravne rasprave*, Sv. 1. Geca Kon, Beograd, 1908, str. 71; Sima Avramović, „Srpski građanski zakonik (1844) i pravni transplanti – kopija austrijskog uzora ili više od toga?" in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (editors), *Srpski građanski zakonik – 170 godina*, str. 13–45, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 21 (footnote no. 28 in the stated part).

and later the laws of the Kingdom of Serbs, Croats and Slovenes, formed the entirety of civil law,[17] while the Serbian Civil Code was in force on the territory of Serbia at that time, whose territory increased after acquisition of internationally recognized independence at the Congress of Berlin in 1878 and after the Balkan Wars fought for the final liberation from Turks from 1912 to 1913. A large number of papers were published on the Serbian Civil Code from 1844, and in none of the ones used in this paper did we notice an analysis of provisions concerning insurance contracts,[18] so we used the commentary of Dimitrije Matić from 1851, professor of the Lyceum in Belgrade from 1848 to 1851, in appropriate places. In the continuation, focus will be only to those parts and provisions of both codes that are relevant to insurance contracts. In certain places, we will discuss the contents of legal solutions of today's positive law in the discussed issues.

II. Aleatory Contracts

In Part Two - On actual rights, Section Two, Chapter XVII of the SCC, general provisions on contracts were stated - the character, concept, conditions and termination of contracts. The contract had to be clear and understandable, the contents had to be possible, defined and in accordance with existing laws (SCC, 1844, Articles 536 and 538).

It can be said that regulation of insurance contract law was underdeveloped, because the SCC from 1844 contained only two articles concerning insurance contracts in Chapter XXIX - On aleatory contracts[19], while some legal theorists refer to them as "risky contracts" or "uncertainty contracts"[20], as well as aleatory contracts on purchase of hope.[21]

In the first two articles of this chapter, the said contracts were defined and a common rule was highlighted according to which it was forbidden to cancel

[17] Dušan Nikolić, „Dva veka Austrijskog građanskog zakonika (1811–2011)", *Zbornik Matice srpske za društvene nauke*, 135(2), 2011, 313–327. DOI: 10.2298/ZMSDN1135113N, p. 321.

[18] S. Avramović, 2014; Nebojša Jovanović, „Ugovor o igri i opkladi u srpskom Građanskom zakoniku", in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (editors), *Srpski građanski zakonik – 170 godina* (str. 301–318), Pravni fakultet Univerziteta u Beogradu, Beograd, 2014; D. Nikolić, (2014); Z. S. Mirković 2014; Milena Polojac, Zoran S. Mirković, Marko Đurđević (editors), *Srpski građanski zakonik – 170 godina*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014; D. Nikolić (2011), Jožef Salma, „Srpski građanski zakonik (SGZ, 1844) i obligaciono pravo", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 38(2), 2004, p. 311–355.

[19] P. Šulejić, str. 169–170; Jakov Radišić, *Obligaciono pravo – Opšti deo*, Centar za publikacije Pravnog fakulteta Univerziteta u Nišu, Niš, 2016, p. 135; Slobodan Perović (editor-in-chief), *Komentar Zakona o obligacionim odnosima*, knjiga II, Savremena administracija, Beograd, 1995, str. 1463; Andrija Gams, *Uvod u građansko pravo*, Naučna knjiga, Beograd, 1988, p. 207–208; Code civil des français, 1804, Livre III. Des différentes manières dont on acquiert la propriété, Titre XII. Des contrats aléatoires, Article 1964.

[20] Jovanović, Nebojša, „Ugovor o igri i opkladi u srpskom Građanskom zakoniku", in: Milena Polojac, Zoran S. Mirković, Marko Đurđević (editors) *Srpski građanski zakonik – 170 godina* (p. 301–318), Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 302.

[21] J. Radišić, p. 135

an aleatory contract due to excessive damage ("more than half was damaged") (SCC, 1844, Article 790; ACC, 1811, Article 1268[22]; LCT, 1978, Article 139, Paragraph 5). Focus here was on this and other rules from Article 559 of the SCC on onerous contracts.[23] In case of insurance contracts as aleatory contracts, the aforementioned rule is manifested in prohibiting an insured to require premium return if an insured event did not occur.[24]

Aleatory contracts were deemed as contracts where one party gave the other party a hope of achieving some uncertain benefit, with or without payment of a certain sum of money (SCC, 1844, Article 789).[25] The Code included in those contracts betting, gaming or gambling and other purchases and sales that are uncertain and dependent on luck, as well as the purchase and sale of hope, lifetime allowance, insurance, as well as games including firearms, a bet for a race on foot, on a horse or in a chariot, and other games, for which effort and skill are required (SCC, 1844, Article 791). Betting and insurance are contracts based on uncertainty. If it was proven that one party knew the outcome and thus made a profit that was considered cheating and the bet was void. It is a general rule according to which, in addition to intentionally causing an insured event, even in today's insurance contract law, an insurer's obligation is excluded (LCT, 1978, Article 920). After the Serbian Civil Code entered into force, the one who played a game of chance and made a fraudulent gain was obliged to return the bet, and the one who knew and lost was considered to have made a gift (Article 792). In regulating aleatory contracts (game of chance, gambling and betting), the Code emphasized their nullity if it was concluded in connection with an illegal matter and if the prize was not handed over to an organizer or a third party. If it was a prohibited game of chance, the winnings were confiscated, and the organizers were held responsible.

By comparing the ACC provisions on aleatory contracts (ACC, 1811, Articles 1267–1292) from Chapter 29 of the Code, it was concluded that Jovan Hadžić, the author of the SCC and the mayor of the City Hall in Novi Sad, combined several provisions from the ACC in certain provisions of the SCC. That was Article 795, prescribing consequences in case of purchase of uncertain items, i.e. purchase of hope: "Whoever bought for a certain price an uncertain good, such as the fruit of annual

[22] *AÖBGB, §. 1268. Bey Glücksverträgen findet das Rechtsmittel wegen Verkürzung über die Hälfte des Werthes nicht Statt.* (In aleatory contracts there is no legal remedy if the value was reduced by more than one half).

[23] L. Marković, p. 322.

[24] P. Šulejić, p. 170.

[25] Please note that the ACC regulated aleatory contracts, except for insurance, with twenty-one articles (Articles 1267 to 1287), while the SCC regulated these contracts with only nine (Articles 789 to 797). In addition, the SCC did not regulate illegal conduct in business of insurance companies (Slobodan Radulović, Nataša Vujadin, Aleksandar Minkov, "Prevention of Illegal Conduct in Business Insurance in Serbia", *International Review*, 3–4, 2014, p. 97–103), which was elaborated on by adopting the Law on Insurance Companies in 1892.

vineyards, fields, benefit from a mill or future inheritance without an inventory, fish as much as can be taken out in fishnet once, twice, etc., he made a purchase and had to be satisfied, even if all his hopes were thwarted" (SCC, 1844, Article 795). The mentioned provision regulated a contract of purchase and sale of hope as well as the ACC (ACC, 1811, Article 1276[26]), and then stated all the fruits it can be concluded (future natural fruits from vineyards, fields, as well as civil fruits in the form of benefits from a mill), as well as in connection with the purchase of future inheritance without an inventory (ACC, 1811, Article 1278[27]). On the other hand, Jovan Hadžić left out provisions of the ACC regulating in more detail rights and obligations of a buyer and seller of inheritance. These are, for example, rules according to which a buyer acquired rights and obligations of a seller that he had as an heir, except for his personal rights (ACC, 1811, Article 1278), that a buyer of inheritance did not have any rights to items that the seller did not inherit for some reasons such as the assignment of the inheritance before the division of the inheritance, legacy, substitution of fulfilment, claim that would exist even without the right to inheritance, as well as that he received everything that constituted the inheritance, either by renunciation of the legatee, co-heirs or in any other way, to the extent in which the seller would be entitled to those parts of the inheritance (ACC, 1811, Article 1279[28]), that obtained fruits and claims were included in the inheritance, and inheritance would be debited with debt payments, fulfilment of legacy, taxes and court fees, and if not expressly agreed otherwise, funeral expenses (ACC, 1811, Article 1280[29]), that the creditors of the inheritance and the legatees can turn to a buyer of the inheritance and to the heirs for the settlement of their claims, etc.

We would say that one important provision from the ACC on bets was included in the text of the SCC. It was a rule about conscientiousness and honesty

[26] The said article of the ACC is more abstract and does not state such future items but regulates purchase of usage of a future item or whoever bought hope at a certain price concluded an aleatory contract (*AÖBGB, §. 1276. Wer die künftigen Nutzungen einer Sache in Pausch und Bogen; oder wer die Hoffnung derselben in einem bestimmten Preise kauft, errichtet einen Glücksvertrag…*)

[27] *AÖBGB, §. 1278. Der Käufer einer von dem Verkäufer angetretenen, oder ihm wenigstens angefallenen Erbschaft tritt nicht allein in die Rechte, sondern auch in die Verbindlichkeiten des Verkäufers als Erben ein, in so weit diese nicht bloß persönlich sind. Wenn also bey dem Kaufe kein Inventarium zum Grunde gelegt wird, ist auch der Erbschaftskauf ein gewagtes Geschäft.*

[28] *AÖBGB, §. 1279. Auf Sachen, die dem Verkäufer nicht als Erben, sondern aus einem andern Grunde, z. B. als Vorausvermächtniß, als Fideicommiß, als Substitution, als Schuldforderung aus der Verlassenschaft gebühren, und ihm auch ohne Erbrecht gebührt hätten, hat der Erbschaftskäufer keinen Anspruch. Dagegen erhält er alles, was der Erbschaft selbst zuwächst, es sey durch den Abgang eines Legatars, oder eines Miterben, oder auf was immer für eine andere Art, in so weit der Verkäufer darauf Anspruch gehabt hätte.*

[29] *AÖBGB, §. 1280. Alles, was der Erbe aus dem Erbrechte erhält, wie z. B. die bezogenen Früchte und Forderungen, wird mit zur Masse gerechnet; alles hingegen, was er aus dem Seinigen auf die Antretung der Erbschaft, oder auf die Verlassenschaft verwendet hat, wird von der Masse abgezogen. Dahin gehören die bezahlten Schulden; die schon abgeführten Vermächtnisse, Abgaben und Gerichtsgebühren; und wenn es nicht ausdrücklich anders verabredet worden ist, auch die Begräbnißkosten.*

when betting, which, with certain specifics, also applied to insurance contracts. Fair and otherwise permitted bets are binding[30] to the extent that the stipulated price was not only promised but also actually paid or deposited, whereby the refund of the price cannot be legally demanded (SCC, 1844, Article 793: "… the price should be given or deposited with third parties; otherwise it has no effectiveness or importance in court). The said rule could also be applied to insurance contracts in terms that the insurance premium return could not be legally demanded from an insurer if the insurance contract was legally concluded and its subject matter was possible, defined and in accordance with public order.

III. Regulation and Important Elements of Insurance Contracts in the SCC

The Serbian Civil Code from 1844, in the Chapter on aleatory contracts, included two provisions on the life annuity contract - annuities, in which it stipulated the obligation to pay annuity even if a debtor started paying more than the value of the item he would obtain after the death of the maintenance debtor (SCC, 1844, Article 796; ACC, 1811, Article 1285[31]). According to Professor Matić, the obligation to pay the annuity ended not only with natural death, but also with a violent death of a person for whom the annuity was contracted.[32] Creditors and heirs were expressly prohibited from terminating or cancelling a life annuity contract, but they had the right to settle their claims, and the children had the right to legal maintenance (SCC, 1844, Article 797; ACC, 1811, Article 1286[33]). However, if the annuity contract was

[30] SCC, 1844, Article 792: "… If it is proven that one party knew and pretended not to have known the outcome and thus achieved gain then it was a fraud and the bet was void …" and the SCC, Article 794: "… Winnings from a prohibited game or gambling are destroyed…"

AGZ3, 1811, 1270 (*AÖBGB, §. 1270. Wenn über ein beyden Theilen noch unbekanntes Ereigniß ein bestimmter Preis zwischen ihnen für denjenigen, dessen Behauptung der Erfolg entspricht, verabredet wird; so entsteht eine Wette. Hatte der gewinnende Theil von dem Ausgange Gewißheit, und verheimlichte er sie dem anderen Theile; so macht er sich einer Arglist schuldig, und die Wette ist ungültig. Der verlierende Theil aber, dem der Ausgang vorher bekannt war, ist als Geschenkgeber anzusehen.*)

[31] SCC, Article 796: Whoever bound himself to a certain amount of money, or another item of defined value, to give to another a determined annual portion, until one or the other, or even the third one, is alive, he is obliged to give until then, just so that he may be deceived in his hope, and that would have paid much more than he received.

ACC, Article 1285: Duration of the annuity may depend on the life of one or another person, or even a third person. In case of doubt, three months in advance is paid and in all cases ends with the life of the annuitant.

AÖBGB, §. 1285. Die Dauer der Leibrente kann von dem Leben des einen oder anderen Theiles, oder auch eines Dritten abhängen. Sie wird im Zweifel vierteljährig vorhinein entrichtet, und nimmt in allen Fällen mit dem Leben desjenigen, auf dessen Kopf sie beruhet, ihr Ende.

[32] Д. Матић, p. 1025.

[33] *AÖBGB, §. 1286. Weder die Gläubiger, noch die Kinder desjenigen, welcher sich eine Leibrente bedingt, sind berechtiget, den Vertrag umzustoßen. Doch steht den Erstern frey, ihre Befriedigung aus den Leibrenten zu*

concluded fraudulently or by using any illegal means to collect a larger annuity to the detriment of creditors or heirs, such a contract was void according to the SCC (SCC, 1844 Article 537).[34] Having in mind that the outcome of an insurance contract was related to the unpredictability of the occurrence of an event at the time of its conclusion, it was considered an aleatory contract in the Serbian Civil Code because the outcome depended on future uncertain circumstances independent of the contracting party's ability and will.[35] On the other hand, Jovan Hadžić omitted from the SCC the provision on regulating the operation of the joint pension fund in accordance with its nature, purpose and conditions, which was formed to support members, their wives and orphans (ACC, 1811, Article 1287[36]).

Shortening of the number and contents of the provisions made by Jovan Hadžić when drafting the Serbian Civil Code[37] was visible in special provisions concerning insurance contracts. The Austrian Civil Code regulated insurance contracts in five articles, while the SCC regulated it, in addition to two previously mentioned articles on annuities, in only two more (Articles 798 and 799). Unlike the ACC, which in Article 1288 provided a definition of an insurance contract, in the SCC it was left to persons who were supposed to apply the Code to indirectly determine the content of the definition of an insurance contract from the general definition of aleatory contract and other provisions. If we accepted the definition from Article 789 of the SCC on aleatory contracts deemed to be relevant for an insurance contract, then it would turn out that an insurance contract can be concluded with or without the obligation to pay the insurance premium. Such a conclusion would be contrary to the definition of an insurance contract from the ACC, according to which the insured is obliged to pay the promised price to cover accidental loss (ACC, 1811, Article 1288[38]: "When someone promised to assume the risk of loss that could happen to another person through no fault of his and to provide compensation for a certain price, it was an insurance contract. An insurer was obliged to compensate the loss,

suchen; den Letzteren aber die Hinterlegung eines entbehrlichen Theiles der Rente zu fordern, um sich den ihnen nach dem Gesetze gebührenden Unterhalt darauf versichern zu lassen.

[34] Д. Матић, p. 1026.

[35] N. Jovanović (2014), p. 303.

[36] *AÖBGB,* §. 1287. Der Vertrag, wodurch vermittelst einer Einlage ein gemeinschaftlicher Versorgungsfond für die Mitglieder, ihre Gattinnen oder Waisen errichtet wird, ist aus der Natur und dem Zwecke einer solchen Anstalt und den darüber festgesetzten Bedingungen zu beurtheilen.

ACC, Article 1287. Contract on the establishment of a joint pension fund for members, their wives or orphans through contributions is evaluated based on the nature and purpose of such an institution and the conditions applied in its operations.

[37] D. Nikolić (2011), p. 319.

[38] *AÖBGB,* §. 1288. Wenn jemand die Gefahr des Schadens, welcher einen Anderen ohne dessen Verschulden treffen könnte, auf sich nimmt, und ihm gegen einen gewissen Preis den bedungenen Ersatz zu leisten verspricht; so entsteht der Versicherungsvertrag. Der Versicherer haftet dabey für den zufälligen Schaden, und der Versicherte für den versprochenen Preis.

and the insured to pay the promised price."). According to prof. Matić, the price of insurance (premium) is determined according to the item for which the highest interest was determined.[39] From the comments of the said author we learned that even then it was common for the price for such security to be paid immediately after the conclusion of a contract, because in this way the one who received the payment immediately bore the insured risk.[40]

Upon reading Article 1289 of the ACC from 1811, we can easily confirm that to the greatest extent it was literally transferred to Article 798, provided that in that provision of the SCC it was stated that special regulations that apply to those insurance lines will be adopted subsequently ("… it will… special regulations that will apply to those insurance lines."). However, special regulations on insurance contracts were never adopted, not even during the Kingdom of Serbia and the Kingdom of Serbs, Croats and Slovenes formed in 1918, nor during the Kingdom of Yugoslavia from 1929. The aforementioned provisions of the ACC and the SCC stipulated that the subject matter of an insurance contract can be items transported by waterways or by land (ACC, 1811, Article 1289, the first sentence; SCC, 1844, Article 798[41]). In addition, in the continuation of the same sentence, it was possible to provide insurance cover for other items and property. Insurance of houses and parts of land (land lots) against fire, water and other risks was explicitly stated (ACC, 1811, Article 1289, the second sentence; SCC, 1844, Article 798[42]). Although the aforementioned provision did not explicitly prescribe essential elements of an insurance contract, Dimitrije Matić, in his commentary on the said SCC provisions, stated that due to precaution and stronger evidence, the names of policyholders, a description of the item and its quantity that was the subject matter of insurance should be stated, as well as insured perils, insurance duration and the amount (premium) that should be paid for insurance of the said item.[43] However, the SCC prescribed an additional rule according to which a written contract agreed to by policyholders was effective only if signed. The signature on a written document was an essential component of the contract under the law (*essentialia negotii*), which meant that an insurance policy had to contain signatures of an insurer and an insured, under threat of nullity (*forma ad solemnitatem*) (SCC, 1844, Article 541).

[39] Interest – author's note.

[40] Д. Матић, p. 1026.

[41] *AÖBGB, §. 1289. (erste Satz). Der gewöhnliche Gegenstand dieses Vertrages sind Waaren, die zu Wasser oder zu Lande verführet werden...*

SCC, Article 798 "As for the insurance in case of uncertainty for collection, as insurance of goods on water and on land …"

[42] *AÖBGB, §. 1289. (zweite Satz) …Es können aber auch andere Sachen, z. B. Häuser und Grundstücke gegen Feuer-, Wasser- und andere Gefahren versichert werden.*

SCC, Article 798 "… houses, immovable property and agricultural land against fire and water …"

[43] Д. Матић (1851), p. 1026.

Another SCC provision concerning insurance was in Article 799, which regulated the issue of conscientiousness of an insured when concluding an insurance contract. If a person insuring his loss knew in advance that the loss had occurred, such insurance contract was void.[44] The aforementioned SCC provision did not impose sanctions when an insured knew that the danger to his items had ended when concluding an insurance contract, and in case of negligence of an insurer regulated by the ACC, i.e. an insurance contract was void if an insurer, at the time of insurance contract conclusion, knew that there was no longer any threat to the items that should have been insured (ACC, 1844, Article 1291: "… or if an insurer was aware that an insured item was not at risk at the time of concluding the contract..."[45]). Another important rule in insurance contract law referred to the fact that the insurer's liability did not exist in case the insured event was caused by the fault of an insured person,[46] which was also regulated by Article 1290 of the ACC in the second sentence: "…The right to insurance indemnity does not exist if an insured failed to report the loss, so he could not prove its occurrence, as well as when an insurer proved that the insured loss was caused by an insured's fault."[47] If we compared the stated rules, we could confirm that they were completely in accordance with the incorporated Roman law from Code of Justinian from 534 A.D. concerning marine loan provisions: "… the rule of public law does not permit that you should bear the loss of the merchandise which is stated was not caused by a tempest, but was due to the inveterate avarice and unlawful boldness of your debtor." (*Codex Justinianus*, Volume XVII, Book IV, Title XXXIII, Article 3). Regarding this SCC provision, professor Matić stated that a policyholder was not obliged to inform an insurer of the reasons for which he wanted to conclude insurance, but he had to honestly and conscientiously report the facts "about which he was asked", which "may cause an accident."[48]

Having in mind that an insurer was exempted from the obligation to compensate the loss if the insured event was caused by an insured's fault, the insurer's

[44] ACC, 1811, Article 1291: "If an insured was aware of the loss of the insured item... at the time of concluding the contract, the contract is void."

AÖBGB, §. 1291. Wenn der Untergang der Sache dem Versicherten… zur Zeit des geschlossenen Vertrages schon bekannt war; so ist der Vertrag ungültig.

SCC, 1844, Article 799: "If a person insuring his own loss knew in advance about the loss, then the said contract is void …"

[45] *AÖBGB, §. 1291. …oder der gefahrlose Zustand derselben dem Versicherer zur Zeit des geschlossenen Vertrages schon bekannt war; so ist der Vertrag ungültig.*

[46] SCC, 1844, Article 799, the second sentence: "If he caused loss through his own fault, there is no place for indemnity."

[47] §. 1290. (zweite Satz) …Unterläßt er die Anzeige; kann er den Unfall nicht erweisen; oder kann der Versicherer beweisen, daß der Schade aus Verschulden des Versicherten entstanden ist; so hat dieser auch keinen Anspruch auf die versicherte Summe.

[48] Д. Матић, p. 1027.

liability was to prove such a complaint.[49] The rebuttable presumption of conscientiousness of an insured was valid.

Finally, the SCC did not foresee that marine risk insurance, including the rules on ship liens, would be subject to maritime laws (ACC, 1811, Article 1292[50]), since maritime trade, as well as business customs and previous regulations did not exist in Serbia.

IV. The Form and Conclusion of Insurance Contracts

In absence of special rules on the form of the insurance contract, general rules of the Law of Obligations of the Serbian Civil Code from 1844 were applied. Thus, a contract had the same force and effectiveness whether concluded verbally or in writing, before the court or out of the court, in the presence of witnesses or without them (SCC, 1844, Article 540). Commitment of the Serbian people to the struggle for liberation from the Ottoman Empire, the absence of local insurance experts[51] and institutional and organizational assumptions for insurance sector contributed to the establishment of the first branches of foreign insurance companies in Serbia in the first third of the 19th century. Incompetence of staff in insurance sector was also manifested in taking over tariffs and insurance terms and conditions from abroad, which were applied in a bad and incomplete translation, while in life insurance, due to lack of statistical data, the mortality tables of seventeen English societies from 1843 were applied.[52] In addition to providing adequate financial protection, the legal history of insurance showed that foreign insurers through local representatives effected insurance in accordance with business practices of their founders from Italy, Austria and England.[53] This meant applying their insurance terms and conditions and issuing insurance policies as written contractual documents and proof of a concluded insurance contract. Due to historical development of insurance in the principality, and since 1882 in the Kingdom of Serbia, it can be argued that an insurance contract had a written form according to the agreement of contracting parties (contracted form, *forma ad probationem*). However, *forma ad solemnitatem*, as we previously stated, resulted from Article 541 of the SCC according to which a written contract agreed to by contracting parties is valid only if it was signed, under threat of nullity if it did not contain signatures of contracting parties. In this sense, solutions of our

[49] Д. Матић, p. 1028.

[50] *AÖBGB, §. 1292. Die Bestimmungen in Rücksicht der Versicherungen zur See, so wie die Vorschriften über den Bodmereyvertrag sind ein Gegenstand der Seegesetze.*

[51] Antonije Tasić, *Osnovi osiguranja*, Zajednica osiguranja imovine i lica „Vojvodina", Novi Sad, 1975, p. 85–86.

[52] Slobodan Samardžić, *Požarno osiguranje u sistemu neživotnog osiguranja*, Želnid, Beograd, 2009, p. 23; L. Marković, p. 325.

[53] Z. Petrović, V. Čolović, D. Knežević, p. 69–71.

current insurance contract law from the LCT can be observed, according to which an insurance contract is concluded when policyholders sign an insurance policy or a cover note (LCT, 1978, Article 901, Paragraph 1), as well as a mandatory rule according to which signatures of contracting parties must be stated in a policy, in addition to other prescribed essential elements of its validity (LCT, 1978, Article 902, Paragraph 1).

In addition to general rules on concluding an insurance contract, the LCT also regulates the conclusion of an insurance contract by making an offer to an insurer (LCT, 1978, Article 901, Paragraphs 2, 3 and 4). General rules on giving and accepting an offer to conclude a contract were also known in the Serbian Civil Code from 1844. A contract was concluded when one party promised something, and the other received it or declared to receive it (SCC, 1844, Article 531). Thus, the SCC accepted the so-called statement theory, according to which a contract was concluded as soon as the person offered had accepted the offer.[54] The stated rule could accordingly be applied to conclusion of an insurance contract. Acceptance of the offer could be done with words, suitable signs and actions that clearly show the will. A decisive action which represented an insurer's will to conclude an insurance contract was offering insurance to which the insured should make a statement. On the part of the insured, a decisive action that would constitute a sign of acceptance of the offered insurance was the payment of the premium to the representative of an insurer. A decisive action by an insured person, which would mean acceptance of offered insurance, would be payment of premium to an insurer's intermediary.

V. Obligation to Protect and Salvage Property

Prince Miloš early noticed the need to organize protection of national and state property against fire. Therefore, upon his order, the first regulation on extinguishing fires was adopted with a total of 17 articles.[55] The regulation resolved issues of organization of firefighting and preventive fire protection. Article 1 of the regulation prescribed the obligation to determine obligations of the inhabitants of each place, that is, to assign an equal number of persons to implementation of certain measures in case of fire, to have buckets with water on standby, a person who will be in charge of bringing ladders, sacks, etc. so that "no one dares to be idle" during firefighting. The Ministry of Interior ("Попечитељство[56] внутрени дјела") became responsible, among other things, for protection against fire, flood and other natural disasters ("…предохраняванѣ одъ пожара, наводнения и други непогода…"). For the first time in the Serbian state in the 19th century this Ministry was in charge of the said disasters and thus remained until today.

[54] Z. Mirković, p. 145.
[55] Uredba za zaštitu od požara, *Novine srbske*, 1834.
[56] Ministry since 1862 when the Law on Centralised State Administration was adopted.

Keeping and protecting other people's belongings in case of fire, demolition of a building, theft, sinking of a ship or any accident was the obligation of everyone, both those who personally saved the belongings and the persons to whom they were temporarily handed over. In the said case, the SCC stipulated that items should be treated as if they were deposited or entrusted, so the recipient of items was obliged to keep and return them after the end of the danger or when requested by its owner (SCC, 1844, Chapter XIX – On deposit, Article 579). Anyone who received someone else's item for keeping or deposit, was obliged to keep it as his own item from any malfunction or damage. On the other hand, the depositor was obliged to compensate the recipient for all expenses incurred by a recipient during keeping of an item (SCC, 1844, Article 575), including compensation of the value of his own item that he sacrificed or lost for protection of its owner's item (SCC, 1844, 577).

The Serbian Civil Code from 1844, in the chapter regulating the manner of obtaining items, stipulated two rules regarding the salvage of other people's belongings that can be applied accordingly to insurance related to an insurer's obligation to compensate those costs in maritime insurance. General rule of the SCC determined that the person who salvaged someone else's movable property from destruction or damage has the right to demand compensation from its owner for the cost incurred due to salvage measures. In addition, the SCC recognized his right to a proportionate reward for efforts (SCC, 1844 – On actual rights, Section 1, Chapter IV – On acquisition of items, Article 255). In one, special provision, the SCC regulated the said rights concerning two types of danger. It recognized the right of a person who salvaged items affected by fire, as well as items found on a "wrecked" (broken) ship, to expenses and compensation for the salvage. However, the SCC limited the amount of the salvage award to a maximum of the value of salvaged items, i.e. "salvaged goods" (SCC, 1844, Article 257).

In addition to stated rules, the SCC in one provision prescribed one rule characteristic for the general average[57] in marine law, when expenses and contributions of a responsible person are also covered by a marine insurance contract. Thus, in case of immediate danger and the need for urgent action to salvage someone else's property, the person who sacrificed his own belongings had the right to demand compensation from those whose property he salvaged. Compensation was calculated in proportion to the value of the salvaged and protected goods (SCC, 1844, Article 631), provided that the SCC did not contain rules on which value was taken into account - the value of the item at the time of acquisition or purchase,

[57] Pursuant to Article 3, Paragraph 1, Item 16 of the Merchant Shipping Law, *the Official Gazette RS,* no. 96/2015, 113/2017 – state law "general average is any intentional and reasonable extraordinary expense and any intentional and reasonable loss done or caused by the master of the ship or his deputy, if they were reasonably undertaken in order to salvage the property of the participants in the navigation from a threat of a real danger."

the value at the time of sacrificing the item or some third value. The said provision is sufficiently broad since it does not mention at all the place where the sacrifice occurred as a condition for filing a claim. Therefore, it can be applied in all cases of immediate action by every conscientious person aimed at preventing damage to other people's belongings due to immediate danger "on water and on land"

Unlike the SCC, the ACC from 1811 stipulated that in the event of occurrence, the insured is obliged to notify the insurer within three days, provided that he lost the right to the indemnity if, due to a delay in claim reporting, he could not prove its cause or if the insurer proved that the loss was caused by the insured's fault.[58] A three-day deadline for reporting a claim in non-life insurance is also regulated by the LCT, with the insured's obligation to compensate the insurer any loss that the latter would have due to the delay in claim reporting (LCT, 1978, Article 917 – Duty to notify of the occurrence of an event covered by insurance). It is interesting that the LCT did not expressly regulate the insured's obligation to prove that the insured event was caused by the effect of one of the insured risks, which is one of the basic rules in insurance applied by using the method of defined risks. We believe that it should have been done with one short provision in the LCT so that the insureds would know in advance about the content of the obligation to inform an insurer about an insured event, which is explained in more detail in the comments to Article 917 of that law [Perović, 1995, 1494–1495]. In his comment to the SCC, professor Matić said that in order to prove an insured loss easier, the insured should notify the loss to the authorities without any delay and demand that experts accurately determine all circumstances related to that event.[59] He especially pointed out that an insured would have to bear any increase in the resulting loss if he did not care about taking measures to reduce the resulting loss, while the salvage expenses should be compensated by the one who benefited from them.[60]

VI. Conclusion

The insurance regulation method in the SCC is inadequate which can be attributed to the underdevelopment of legal science and the absence of insurance tradition and case law. On the other hand, decades of struggle for the reconstruction

[58] §. 1290. *Ereignet sich der zufällige Schade, wofür die Entschädigung versichert worden ist; so muß der Versicherte, wenn kein unüberwindliches Hinderniß dazwischen kommt, oder nichts anders verabredet worden ist, dem Versicherer, wenn sie sich im nähmlichen Orte befinden, binnen drey Tagen, sonst aber in derjenigen Zeitfrist davon Nachricht geben, welche zur Bekanntmachung der Annahme eines von einem Abwesenden gemachten Versprechens bestimmt worden ist (*§. 862*). Unterläßt er die Anzeige; kann er den Unfall nicht erweisen; oder kann der Versicherer beweisen, daß der Schade aus Verschulden des Versicherten entstanden ist; so hat dieser auch keinen Anspruch auf die versicherte Summe.*

[59] Д. Матић, p. 1028.

[60] Д. Матић, p. 1028.

of the Serbian state, and the low level of social and personal wealth, did not provide an incentive for more intensive development of insurance, building business practices and expanding the range of insurance services. Although insurance in the SCC had characteristics of a contract, it was not regulated in more detail for the above reasons. This was contributed to by the lack of previous national and comparative regulations that would regulate contracts on land insurance and personal insurance. It is sufficient to point out that Austria adopted the first law regulating in detail the insurance contract law only on December 23, 1917, while according to Article 1965 of the French Civil Code from 1804 maritime laws applied to insurance contracts. The French Civil Code did not regulate insurance contracts with any other provision, until the Insurance Code of July 13, 1930 came into force. In this sense, decision of Jovan Hadžić to use the ACC provisions on games of chance and insurance as a starting point for insurance regulation seemed more than justified.

Having in mind given limitations, the SCC regulated the annuity insurance contract and non-life insurance contract with two articles each, in the first case those were Articles 796 and 797, and in the second Articles 798 and 799. Mandatory general rules of contract law from Chapter XVIII (Article 531 on contract conclusion, Article 532 on contract conclusion through an offer, Article 536 on intelligibility and definiteness of a contract, Article 538 on possible and permissible subject matter of a contract, Articles 540 and 541 on form and effectiveness of a contract, etc.) and mandatory special rules on insurance from Article 799 on the nullity of an insurance contract in case the insured knew about occurrence of a loss at the time of concluding an insurance contract and the exclusion of an insurer's obligation in case of the insured's intentional causing of loss had priority in applying to an insurance contract, followed by general rules on aleatory contracts. Due to described inadequacy, rights and obligations from an insurance contract, general and special conditions of foreign insurance companies were applied.

Translated by: ***Jelena Rajković***

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