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No. 1/2019
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REVIJA KOPAONIČKE ŠKOLE PRIRODNOG PRAVA

ČASOPIS ZA PRAVNU TEORIJU I PRAKSU

Naučni časopis Kopaoničke škole prirodnog prava *Revija Kopaoničke škole prirodnog prava* izlazi od 2019. godine. Časopis objavljuje naučne članke, teorijska istraživanja i studije iz srpskog i uporednog prava, analize izabranih sudskih i arbitražnih odluka, komentare zakonskih rešenja, prikaze knjiga i druge naučne priloge istaknutih domaćih i inostranih autora. Tematska sadržina priloga prilagođena je Heksagonu Kopaoničke škole prirodnog prava: *Pravo na život, Pravo na slobodu, Pravo na imovinu, Pravo na intelektualnu tvorevinu, Pravo na pravdu* i *Pravo na pravnu državu,* a objavljeni radovi raspoređuju se prema odgovarajućim katedrama Kopaoničke škole. Kao glasilo Kopaoničke škole prirodnog prava – Slobodan Perović, časopis prati naučni rad i aktivnosti Škole i o njima obaveštava čitaoce.

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA
– SLOBODAN PEROVIĆ

Broj 1/2019 / Godina I/ BEOGRAD

REČ UREDNIKA

Izdavačka delatnost Kopaoničke škole prirodnog prava – Slobodan Perović koja čini bogatu biblioteku naučnih radova posvećenih pravnoj teoriji i praksi, od decembra 2019. godine predstavljena je i naučnim časopisom *Revija Kopaoničke škole prirodnog prava*. Kao poseban i samostalan časopis Kopaoničke škole prirodnog prava – Slobodan Perović, *Revija* objavljuje naučne članke, komparativne studije, analize sudskih i arbitražnih odluka, komentare zakonskih rešenja, prikaze knjiga i druge naučne priloge istaknutih domaćih i inostranih autora.

Tematska sadržina priloga prilagođena je Heksagonu Kopaoničke škole prirodnog prava: *Pravo na život*, *Pravo na slobodu*, *Pravo na imovinu*, *Pravo na intelektualnu tvorevinu*, *Pravo na pravdu* i *Pravo na pravnu državu*, a objavljeni radovi raspoređeni su prema odgovarajućim katedrama Kopaoničke škole. Časopis izlazi dva puta godišnje, objavljuje se na srpskom jeziku, pri čemu se radovi inostranih i pojedinih domaćih autora objavljuju na engleskom jeziku.

* * *

Pred nama se nalazi prvi broj Revije Kopaoničke škole prirodnog prava. Posvećen je sferi imovinsko-pravnih odnosa koji su, u određenim segmentima, praćeni prilozima iz oblasti procesnog prava, Prava EU i međunarodne trgovine. Sa aspekta sistematike Heksagona prirodnog prava, radovi u ovom broju po svojoj tematskoj sadržini ulaze u oblast katedara *Pravo na imovinu* i *Pravo na pravdu* Kopaoničke škole prirodnog prava. Broj okuplja petnaest radova raspoređenih u pet sekcija: Ugovor (I), Arbitraža, alternativno rešavanje sporova, sudovi (II), Privredna društva (III), Pravo EU (IV) i Međunarodna trgovina (V).

U prvoj sekciji, *prof. dr Bénédicte Fauvarque-Cosson* u članku *Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts*, analizira pitanje raskida i izmene ugovora zbog promenjenih okolnosti u svetlu reforme francuskog Građanskog zakonika, sa posebnim osvrtom na primenu pravila o reviziji ugovora od strane francuskih sudova. Drugi rad, *Right to a Clean Environment: Role of Contracts and Contract Law* čiji je autor *prof. dr Larry A. DiMatteo* bavi se značajem ugovora i ugovornog prava za ostvarivanje ciljeva održivosti, pri čemu je posebna pažnja posvećena primeni klauzula o održivosti ugovora sa stanovišta opštih pravila ugovornog prava. *Prof. dr Davor Babić*, autor rada *Contract Interpretation According to the Croatian Obligations Act* analizira pitanje tumačenja ugovora prema pravilu *contra proferentem* sa stanovišta rešenja hrvatskog Zakona o obveznim odnosima. Rad *The Enforceability of Smart Contracts* čiji su autori *dr Mateja Đurović i Franciszek Lech* odnosi se na "pametne" ugovo-

re kao novi oblik ugovora koji nastaje kao rezultat razvoja savremenih tehnologija. *Dr Jovan Nikčević* napisao je rad *Razgraničenje ugovora o delu i ugovora o prodaji* u kome se podvlače osnovne distinkcije između pomenutih ugovora, polazeći od kriterijuma predviđenih Zakonom o obligacionim odnosima i Bečkom konvencijom o međunarodnoj prodaji robe. Sekcija se zaključuje radom *Ključna pitanja ugovora o međunarodnoj distribuciji* autorke *Ljubice Tomić* u kome se ugovor o međunarodnoj distribuciji analizira sa aspekata opštih pravila obligacionog prava, prava konkurencije i međunarodnog privatnog prava.

Uvodni rad u drugoj sekciji *Obligations of Arbitrators in International Commercial Arbitration* autora *prof. dr Jelene S. Perović Vujačić* analizira obaveze arbitara u međunarodnoj trgovinskoj arbitraži. U fokusu rada su osnovne obaveze koje arbitar preuzima prihvatanjem svog imenovanja, kao i pravne posledice povrede obaveza od strane arbitra. *Prof. dr Milena Petrović* napisala je rad *Međunarodna trgovačka arbitraža i međunarodno privatno pravo* u kome analizira uticaj međunarodnog privatnog prava na međunarodnu trgovačku arbitražu u svim segmentima i fazama arbitraže. Alternativnom rešavanju sporova posvećen je rad *Consumer ADR: The Albanian Experience in Transporting EU Directive 2013/11* autorke *prof. dr Nade Dollani*. U radu su izloženi opšti principi EU Direktive 2013/11 i predstavljeno iskustvo Albanije u njenom prenošenju u nacionalno zakonodavstvo. Radovi koji slede posvećeni su pitanjima koja se odnose na sud i postupke pred sudovima. *Dr Aleksandra Maganić* u radu *Ogledni postupak ili postupak za rješavanje spornog pravnog pitanja – sličnosti i razlike* – bavi se komparativnom analizom oglednog postupka radi rešenja pitanja važnog za jedinstvenu primenu prava koji je u pravni sistem Hrvatske uveden reformom parničnog procesnog prava s jedne, i postupka za rešavanje spornog pravnog pitanja koji se primenjuje u Srbiji, s druge strane. Izlaganja o sudovima zaokružena su radom *Trends in Respect of Specialization of Commercial Disputes Judiciary* autora *prof. dr Gorana Koevskog i dr Darka Spasevskog* u kome su analizirani trendovi razvoja sudova posebne nadležnosti u oblasti privrednog prava sa osvrtom na iskustvo Makedonije u pogledu ovog pitanja.

Akademik prof. dr Jakša Barbić napisao je rad *Djelovanje zajednice (poola) prava glasa* koji ulazi u treću sekciju posvećenu oblasti privrednih društava. *Akademik Barbić* na sveobuhvatan način analizira zajednicu prava glasa koja se naziva i "pool" prava glasa u društvu.

Za četvrtu sekciju, posvećenu pravu EU, *prof. dr Gian Antonio Benacchio* napisao je rad *Interpretacija prava između ravnoteže i razumnosti u sudskoj praksi Evropske unije. Prof. Benacchio* analizira sudsku praksu Suda Evropske unije u kontekstu njene mogućnosti da modelira nacionalna pravila prema standardima

razumnosti, što može dovesti do nepravednih ili manje uravnoteženih rešenja. Autor ističe značaj interpretativnog delovanja luksemburškog Suda putem koga se može postići ravnoteža između "starih pravila i novih problema", kao i između vrednosti, prava i interesa karakterističnih za društva u stalnoj i brzoj transformaciji.

Peta sekcija obuhvata dva rada iz oblasti međunarodne trgovine. Rad *Pravila o poreklu robe kao nova granica spoljnotrgovinske liberalizacije* autora *prof. dr Predraga Bjelića* upućuje na sve veći značaj globalnih proizvodnih lanaca u međunarodnoj trgovini, zbog koga se pristupa liberalizaciji režima pravila o poreklu proizvoda kroz različite oblike omogućavanja kumulacije porekla proizvoda. *Prof. dr Radovan Kovačević* u radu *Pregovori SAD i Japana o novom bilateralnom trgovinskom sporazumu* detaljno analizira pregovore između SAD i Japana o zaključenju novog trgovinskog sporazuma.

* * *

To bi bile osnovne crte prvog broja naše Revije. Predajući ovaj časopis pravničkoj javnosti, Kopaonička škola prirodnog prava – Slobodan Perović nastavlja da zida zdanje svoje publikovane reči, čineći ga bogatijim za još jedan pogled na opštem horizontu onog prava čija je svrha da služi pravdi kao stožernoj vrlini. Na to je obavezuje njen naučni identitet i integritet, a posebno je obavezuje stožerno ime njenog Osnivača.

Prof. dr Jelena S. Perović Vujačić
Glavni i odgovorni urednik

PRVA SEKCIJA

UGOVOR

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BÉNÉDICTE FAUVARQUE-COSSON

DOES REVIEW ON THE GROUND OF *IMPRÉVISION* BREACH THE PRINCIPLE OF THE BINDING FORCE OF CONTRACTS?

One of the striking features of the French reform is the introduction of revision and termination for unforeseeable changes of circumstances - imprévision. The aim of the new provision was to encourage parties to agree rather than bring the matter before the court for termination or for judicial revision for imprévision. Although courts have a general power to review the contract, the Court of Cassation relied on the principle of the binding force of contracts to justify the rejection of 'judicial review for imprévision'. Thus, the paper will elaborate whether the courts will seize the powers finally given to them – a power of revision. Furthermore, the drafting history of imprévision and the comparison between similar provisions in other international sources of law will be presented, as well as the relevant courts' practice.

Key words: Imprévision, Unforeseeable changes of circumstances, Force majeure, Hardship, Judicial review

INTRODUCTION

One of the striking features of the French reform of contract law (Ordonnance nº 2016-131 of 10 February 2016) is the introduction into French law of revision and termination for *imprévision* – unforeseeable changes of circumstances.[1] In 1804, without serious debate on the subject, the drafters of the Code civil chose to ignore the rule *rebus sic stantibus* invented by the canon lawyers to

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allow the termination of the contract in the case of changed circumstances. The Cour de cassation then relied on the principle of the binding force of contracts to justify the rejection of 'judicial review for *imprévision*'.[2] 140 years after the famous *Canal de Craponne* decision of the Cour de cassation, it will no longer be possible, on this point, to relate French law to English law on the basis that they both refuse judicial review for *imprévision* but knows the doctrine of frustration; nor to continue to contrast French law with German law which, on the contrary, recognises it.[3]

In the French reform, there was neither slavish copying, nor the 'myth of the foreign legislator',[4] nor acculturation or intrusion of European law. Article 1195 is one of the most striking illustrations of the phenomena of hybridization across legal families and is also a testimony to legal pluralism within Europe. It draws its inspiration from the European and international environment, whilst differentiating itself from them in several respects.

The question of the power of the court to review contracts is a major subject of contract law. Not only does it form part of substantive debates about the powers of judges in society, and more specifically in contract law - while the Avant-projet Catala rejected the court's power to revise the contract,[5] the Avant-projet Terré, by contrast, accepted it, after requiring the parties to renegotiate;[6]

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[1] On this innovation, cf the various different commentaries on the reform, too numerous for them all to be cited here. See esp Olivier Deshayes, Thomas Genicon and Yves-Marie Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations. Commentaire article par article,* Lexis Nexis, Paris, 2016, 384, who see in this a 'flagship provision of the *Ordonnance*' and a 'genuine break' within private law; François Chénédé, *Le nouveau droit des obligations et des contrats. Consolidations. Innovations. Perspectives,* Dalloz, Paris, 2016, 25.51, for whom it is 'one of the greatest innovations of the reform'.

[2] Decision of the Cour de cassation of 8 March 1876, *Canal de Craponne*: 'in no case shall it be for the courts, however fair their decision may seem, to take into account the passage of time and circumstances in order to modify the parties' contracts and to substitute new clauses for those which were freely accepted by the contracting parties'; cf French administrative law since the celebrated decision of the Conseil d'Etat of 30 March 1916, *Gaz de Bordeaux*: for administrative contracts, the Conseil d'État admits that the court has the power to terminate the contract or to award an indemnity to the party who is financially disadvantaged.

[3] Konrad Zweiger, Hein Kötz, *An Introduction to Comparative Law*, 3rd edn, Clarendon Press, Oxford, 1998, 533.

[4] In the famous expression of Carbonnier, in Jean Carbonnier, *Essais sur les lois,* Defrénois, Paris, 1979, 201; see also Jean Carbonnier, *Droit civil. Introduction*, 27th edn, PUF, Paris, 2002.

[5] cf below fn 10.

[6] Art. 92 of Avant-projet Terré: 'The parties are bound to fulfill their obligations even if their performance has become more onerous. However, the parties must renegotiate so as to adapt or terminate the contract where its performance becomes excessively onerous for one of them as a

but it is also at the heart of the debates on the respective places of the principles of contractual freedom, the binding force of contracts and contractual justice both in French law and in comparative law.

As already noted by Denis Tallon in 1984, in concluding an important study of comparative law, 'The principle of the binding force of contracts has lost its dogmatic foundation with the decline of the autonomy of the will. And the argument of uncertainty is not confirmed: in legal systems that admit judicial review for *imprévision*, it has not been reported that a multiplication of claims has created uncertainty of this kind'.[7] Since then, the idea of contractual justice has been developing. It can be seen as a manifestation of the development of a wider phenomenon: the taking into account of ethics in the life of business.[8] The traditional conception of the judge, a simple servant of the contract, gives way to a new 'contractual morality' based on good faith and fairness.[9]

The legislative and judicial qualifications which have developed in French law have shown the limits of the approach based on the principle of the binding force of contracts to say that it is for the parties to anticipate risks and not for the court to rebalance their contract.[10] In times of economic and financial crisis, the difficulties encountered by certain economic operators due to contracts whose effects last over a long period have shown the importance of a fair distribution of contractual risk. In the situations where legislative provisions already take acco-

result of an unforeseeable change of circumstances and that party did not agree to assume that risk at the conclusion of the contract. In the absence of agreement between the parties within a reasonable time, the court may adapt the contract to the legitimate expectations of the parties or terminate the contract on the date and under the conditions it may fix'.

[7] Denis Tallon, 'Réflexions comparatives', in *La modification du contrat au cours de son exécution en raison de circonstances nouvelles,* René Rodière (ed), Pedone, Paris, 1984, 194.

[8] See esp the work of Professor Christopher Hodges and his report *Ethical Business Regulation: Understanding the Evidence*, www.gov.uk/government/uploads/system/uploads/attachment_data/file/49, 15.08.2019.

[9] cf Gaël Chantepie and Mathias Latina, *La réforme du droit des obligations. Commentaire théorique et pratique dans l'ordre du Code civil,* Dalloz, Paris, 2016, 443 ('The traditional conception, which forbids the court from interfering in the contract, is twisted round—expressed in such careful terms that it emerges as reinforced truth').

[10] Even the Avant-projet Catala had opened a door—although a narrow one, its arts. 1135-2 et 1135-3 contemplating a relaxation of the rules governing the treatment of imbalance occurring during performance of the contract: see art. 1135-2: 'In the absence of such an express term, a party for whom a contract loses its point may apply to the President of the tribunal de grande instance to order a new negotiation'; art. 1135-3: 'Where applicable, these negotiations should be governed by the rules provided by Chapter I of the present Title. In the absence of bad faith, the failure of the negotiations gives rise to a right in either party to terminate the contract for the future at no cost or loss'.

unt of *imprévision*,[11] these texts continue to apply and the new general rule of article 1195 will not apply, pursuant to article 1105(3) Cc (according to which '[t]he general rules are applied subject to these particular rules'), although this will not preclude the general rule serving as a source of inspiration to supplement or clarify a special legislative provision.

Between the binding force of contracts and contractual justice, would the scale tilt firmly to contractual justice? It seems not. In this respect, we should recall the mechanism of article 1195, which takes place in several stages. The first paragraph of article 1195 defines the conditions for its application and authorises one party to ask the other for renegotiation (without this producing any suspensive effect). The second paragraph of article 1195 deals first with the case where the parties jointly claim for the termination of their contract (a right which the parties already possess under article 1193, former article 1134(2)) or its judicial adaptation.[12] The Report to the President of the Republic[13] explains that the rules for *imprévision* are intended to 'play a preventive role: the risk of destruction or revision of the contract by the court should encourage the parties to negotiate'.[14] In fact, everything was planned in order to encourage the parties to agree rather than bring the matter before the court for termination or for judicial revision for *imprévision*. Article 1195 thus falls not only within the main-stream of the comparative law of contracts,[15] but also at the heart of a major movement in relation to the civil process, in France and elsewhere, which develops and promotes alternative means of dispute resolution (compulsory amicable dispute resolution, participatory procedure agreements, etc).

On the other hand, the place of article 1195 in the Code civil bears a very French trademark. This provisionis the third article in Chapter IV on 'The Effects of Contracts'.[16] The principle of binding force of contracts having been moved up

[11] See art. L 131-5 Code of Intellectual Property; art. 828 and art. 900-2 Code civi-l .

[12] See art. 12(4) Code of Civil Procedure: by common accord, the parties confer a task on the court: to decide as amiable compositeur. Here, by common accord, they request the court to terminate or adapt the contract.

[13] Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, available at www.legifrance.gouv.fr, 15.08.2019.

[14] '... jouer un rôle préventif, le risque d'anéantissement ou de révision du contrat par le juge devant inciter les parties à négocier'.

[15] The idea of *favor contractus*is also present, not only in accepting judicial adaptation, but also through encouraging renegotiation.

[16] Section 1 'The Effects of Contracts between the Parties', Sub-section 1 'Binding Force'.

to the 'Introductory Provisions' of Chapter I,[17] only the title of this Sub-section refers to this 'binding force', even though that is what it is devoted to. This is unfortunate, not only because of the lack of authority accorded to the titles of sections or sub-sections in the process of interpreting a legislative text, but also because this overall design does not allow the relationship between the principle (the binding force of contracts) and its exception (revision or termination for *imprévision*) to be brought out. Yet the fact that article 1195 derogates from the binding force of contracts is not expressly referred to either by article 1195 itself or by the two preceding articles (former articles 1134(2) and 1135 Cc).[18]

By contrast, in both the PECL and the UNIDROIT Principles, the binding force of contracts and change of circumstances or 'hardship' form an indivisible whole. Article 6:111 PECL, entitled 'Change of Circumstances', begins with a paragraph (1) which states: 'A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished'. Significantly, article 6:111(2) begins 'If, *however,* ...'. Thus, the obligation to renegotiate and the power of the court to revise or terminate the contract in the absence of agreement by the parties are exceptions to the principle of binding force, expressly recalled in the text of Article 6:111.

In the UNIDROIT Principles, the 'hardship'[19] section is composed of three articles. The first, entitled 'Contract to be observed', begins by recalling that the parties are 'bound to perform [their] obligations' (article 6.2.1).[20] A definition of

[17] Art. 1103: 'Contracts which are lawfully formed have the binding force of legislation for those who have made them'.

[18] Art. 1193: 'Contracts can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorises.' Art. 1194: 'Contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation.' The reference to equity at the end of art. 1194 might even lead the interpreter to take some distance more easily from the principle of the binding force of contracts. To avoid this, it would have been helpful to introduce, at the beginning of art. 1195, the equivalent of art. 6:111(1) PECL: 'A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished'. This would also have emphasized the criterion of 'excessive onerousness', a factor which justifies invoking article 1195 in order to seek adaptation or termination. See art. 92 Avant-projet Terré, above fn 6.

[19] The term 'hardship' is not translated in the French version of the UNIDROIT Principles.

[20] cf art. III.-1:110 Draft Common Frame of Reference (DCFR), which follows a very similar structure: 'III.–1:110: Variation or termination by court on a change of circumstances: (1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has di-

'hardship' is then given, which in fact serves to lay down the conditions for its application. It is in article 6.2.3 that its effects are defined, with, first, the opening of renegotiations and then, failing agreement by the parties, the following power granted to the court by article 6.2.3(4):

'If the court finds hardship it may, if reasonable,
(a) terminate the contract at a date and on terms to be fixed, or
(b) adapt the contract with a view to restoring its equilibrium.'

Article 1195, which is composed of only two paragraphs (compare Article 6:111 PECL which, for the reasons set out above, contains three), provides:

'If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.'

At first, the *Chancellerie* did not wish to allow the court to adapt the contract (except in the case of a joint request by the parties) and granted the court, in the absence of agreement between the parties, only a power to *terminate* the contract from a date and subject to such conditions as it should determine. Under article 1195 as enacted, this power of termination is maintained and a power of revision added. The fact that the court can either revise or terminate the contract, in both cases 'from a date and subject to such conditions' as it shall determine, sho-

minished. (2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court. (3) Paragraph (2) applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred; (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.'

uld have an even greater deterrent effect for the party that would have the greatest interest in maintaining the contract as it is, and this would thereby encourage renegotiation.

Judicial revision will be all the easier to implement, and therefore justified, in that the court will have simple instruments to carry it out.[21] It will often be preferable to termination, not only for the debtor but for the whole spectrum of contracting parties who depend on the smooth running of contracts that are threatened to disappear.[22] The recent European codifications establish, if not a hierarchy between revision and termination, at least an order of preference. This emerges, albeit rather elliptically, from article III.-110(2) DCFR[23] or from article 89 CESL, which place judicial revision first before the power of the court to terminate the contract.

Could a court which is seized of a aclaim for revision terminate the contract, and vice versa? At first glance, the principle according to which it is for the parties to determine the subject-matter of civil litigation (*le principe dispositive*) seems to prohibit it.[24] However, more flexible approaches would be possible. One is to distinguish between the case where the claim comes from both parties (in which case the court's power derives from the parties and it can only act within the limits of the *principe dispositive*, article 4 of the Code of Civil Procedure) or from only one of the parties, which could give it more latitude.[25] The other is to consider that, for the operation of article 1195, the *principe dispositif* does not apply in 'all its rigour'.[26] This approach seems all the more appropriate since, in practice, the fact that the court can terminate the contract 'from a date and subject to such conditions as it shall determine' gives it so much freedom that the

[21] *Eg*. an index by which to index the price of a raw material if the parties had not done it.

[22] See Nicolas Molfessis, 'Le rôle du juge en cas d'imprévision dans la réforme du droit des contrats, Libres propos', *Juris-Classeur Périodique(JCP),* no. 1415, 1995; Mauricio Almeida Prado, 'Regards croisés sur les projets de règles relatifs à la théorie de l'imprévision en Europe', Revue internationale de droit comparé (RIDC), 2010, 863.

[23] In 2010, the members of the Expert Group appointed by the Commission on the Common Frame of Reference met stakeholders and stressed that adaptation should be provided as an alternative to the possibility of terminating the contract, which should take place only as a last resort if the contract could not reasonably be maintained: see European Commission, Synthesis of the Sixth Meeting, 28-29 October 2010.

[24] Cf G. Chantepie, M. Latina, 450; O. Deshayes, T. Genicon, Y-M. Laithier, 412.

[25] See Thierry Revet, 'Le juge et la révision du contrat', *Revue des contrats (RDC),* 2016, 373, esp 378; N. Molfessis, above fn 22.

[26] Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Droit des obligations*, 8th edn, LDGJ, Paris, 2016, 764.

boundary with 'revision' becomes blurred. If it terminates the contract and makes a significant award of damages to the claimant, is this not also a form of indirect revision of the contract, the objective being to restore the initial balance that has been lost as a result of the change of circumstances?[27]

As for 'revision' itself, there is a question whether it extends only to financial conditions or whether, in a broader sense, it could lead to other consequences, thus approaching the 'adaptation' of the contract authorised by article 1195 for the situation where the parties have requested it of the court by common agreement. If semantic rigor should suggest that we should see the use of two different terms in article 1195 as requiring us to to distinguish between two different situations (the one in which there is a common agreement and the one where there is none) in practice, the distinction between 'adaptation' and 'revision' is difficult to make.

After a reminder of the various steps which lead up to article 1195 as enacted, the links between article 1195 and other contract law issues will be examined in the light of the reform as a whole and comparative law.

ARTICLE 1195: THE OUTCOME OF A LONG PROCESS

The report to the President of the Republic, numerous academic commentaries and the various phases of the reform marked by several drafts constitute the *travaux préparatoires* missing from this reform given that it was made by *Ordonnance*. It is these that elucidate the new article 1195 of the Code civil. On the other hand, external insights from practice and comparative law show that courts in their wisdom are very cautious in their use of powers similar to those conferred by article 1195, with the result that there is no reason to fear, as some people believe, that this text will make French law lose its attractiveness.

From Article 136 of the 2008 Draft to Article 1195 of the Code Civil

We cannot undertake here a literal study of each of them, or a comparison between these texts and those of other non-governmental projects,[28] but the texts

[27] It is true that the court which revises the contract and determines the date and conditions of the revision sets himself up as an *ex post* 'co-drafter of the contract' (see T. Revet, above fn25), which goes even further.

[28] For a deeper comparative analysis, see esp Philippe Stoffel-Munck, 'L'imprévision et la réforme des effets du contrat', *RDC hors-série*, 2016.

of the previous drafts will be reproduced with, in bold type, the points which deserve attention in the light article 1195 as enacted.[29]

Draft of July 2008, art. 136:

'If a change in circumstances that was unforeseeable **and insurmountable** renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party for renegotiation but must continue to perform his obligations during renegotiation.

In the event of refusal or the failure of renegotiations, the court may, **if the parties agree,** set about the adaptation of the contract or, in the absence of agreement, put an end to it, from a date and subject to such conditions as it shall determine.'

Draft of February 2009, art. 101:

'If a change in circumstances that was unforeseeable renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party for renegotiation but must continue to perform his obligations during renegotiation.

In the event of refusal or the failure of renegotiations, the court may set about the adaptation of the contract **if the parties agree or, in the absence of agreement, put an end to it, from a date and subject to such conditions as it shall determine.'**

Draft 2010 (Technical Group) version 8 October 2010, art. 119:

'If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party for renegotiation. The first party must continue to perform his obligations during renegotiation.

In the event of refusal or the failure of renegotiations, the court may set about **the adaptation of the contract if the parties agree. In the absence of agreement, it may put an end to it, from a date and subject to such conditions as it shall determine.'**

Minister's group draft 16 February 2011, art. 117 (Change of Circumstances):

[29] On the different stages in the reform, and for an analysis by insiders of these successive drafts from 2008 to 2015, see François Ancel, Bénédicte Fauvarque-Cosson, Juliette Gest, *Aux sources de la réforme du droit des contrats,* Dalloz, Paris, 2017.

'If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party for renegotiation. The first party must continue to perform his obligations during renegotiation.

In the event of refusal or the failure of renegotiations, **the parties may ask the court to set about the adaptation of the contract. In the absence of such common request, one party may ask the court to put an end to it, from a date and subject to such conditions as it shall determine.'**

Draft of February 2015, art. 1196:

'If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party for renegotiation. The first party must continue to perform his obligations during renegotiation.

In the event of refusal or the failure of renegotiations, **the parties may by a common agreement ask the court to set about the adaptation of the contract.** In the absence of such common request, one party may ask the court to put an end to it, from a date and subject to such conditions as it shall determine.'

External Insights

Reactions of the CCI Paris Ile-de-France. – Amongst the organizations representing businesses, the *Chambre de commerce etd'industrie* (CCI) Paris Ile-de-France has been heavily involved since 2005 to put forward the voice of business. In various reports, it noted that not all businesses have the benefit of legal services sufficient to incorporate suitable clauses systematically into their contracts. It also stressed the paradox faced by economic operators caught between, on the one hand, the desire for contractual stability and legal certainty and, on the other hand, the desire for greater flexibility and adaptability in the face of economic developments, and of the fact that contractual relations are themselves becoming more and more long-term.

In 2008, the CCI Paris Ile-de-France proposed the introduction of an obligation to renegotiate the contract on the occurrence of a change of circumstances which satisfies strict conditions and, in the event of failure of the renegotiations,

to grant the court the power to adapt the contract, upon referral by either party, on the basis (as it said) of the 'legitimate expectations of the parties'.[30]

In its report following the consultation opened by the *Chancellerie* on the draft *Ordonnance* of 2015, the CCI Paris Ile-de-France, which then took for granted the requirement of the prior common agreement of the parties as a condition of revision by the court, suggested that judicial adaptation should be framed by reference to the criteria of 'legitimate expectations of the parties' and the usage and practice of the market. It made clear that judicial termination for *imprévision* should be only one 'powerof the court.[31]

European Inspiration. – The report to the President of the Republic stresses the importance of the European context: 'France is one of the last European countries not to recognize the theory of imprévision as a factor moderating the binding force of contracts. Its formal recognition, which is inspired by comparative law as well as by the European harmonisation projects, makes it possible to combat the major contractual imbalances which occur during performance, in accordance with the objective of contractual justice pursued by the *Ordonnance*.'

As regards these 'European harmonisation projects' we can mention, in addition to the PECL and the DCFR, article 89 CESL, entitled 'Change of circumstances', which allows the court to adapt the contract upon request by one of the parties (see article 89.2(a)), CESL, under certain well-defined conditions (see article 89.3 CESL).[32] Adaptation is even placed ahead of termination, which is not purely accidental but attests to a spirit already perceptible in international trade

[30] See www.cci-paris-idf.fr/sites/default/files//etudes/wysiwyg/PDF/reforme-droit-des-contrats-kli0810.pdf, 15.08.2019.

[31] See www.cci-paris-idf.fr/sites/default/files/etudes/pdf/documents/reforme-droit-des-contrats-fou1505.pdf, proposition no 6, 15.08.2019.

[32] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635, 11.10.2011, art. 89: '1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract. 2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may: (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court. 3. Paragraphs 1 and 2 apply only if: (a) the change of circumstances occurred after the time when the contract was concluded; (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and (c) the aggrieved party did not assume, and

law: the *favor contractus*, or preference for the preservation of the contract, which is no doubt considered more important for the development of the internal market than absolute respect for the principle of the binding force of contracts.

Judicial revision for *imprévision* made its entry into Belgium, first by resorting to the notion of abuse of rights,[33] then, and with international significance, by interpreting article 79(1) CISG in the light of the UNIDROIT Principles.

Article 79(1) CISG, which specifies the situations in which non-performance is excused (article 79 is headed 'Exemptions'), makes no reference to changes of circumstances. In the face of this silence, at first a restrictive interpretation prevailed.[34] However, the first Civil chamber of the Belgian Cour de cassation, in a bold judgment of 19 June 2009, adopted a 'creative' interpretation of article 79 CISG, declaring that:[35]

'With regard to contracts for the international sale of goods, changed circumstances which were not reasonably foreseeable at the conclusion of the contract and which are undoubtedly of such a nature as to increase the burden of performance of the contract may, in certain cases, constitute an impediment independent of its will exempting the party from liability for non-performance of one of its obligations.'

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cannot reasonably be regarded as having assumed, the risk of that change of circumstances. 4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal.'

[33] *See eg.* the many decisions on revision of maintenance payments: Philippe Denis, *Changement de circonstances et bouleversement de l'économie contractuelle,* Bruylant, Bruxelles, 1986; Philippe Denis, 'Le bouleversement de l'économie contractuelle en droit belge', *Revue de Droit International et de Droit Comparé (RDIDC),* no 2, 2015, 159.

[34] For summaries of decisions unfavourable to the theory of *imprévision* see www.cisg.law.pace.edu, 15.08.2019; Vincent Heuzé, *La vente internationale de marchandises,* LGDJ, Paris, 2000, esp 360, 468ff. In France, the Cour de cassation has held that 'the party must bear the risk of non-performance without having recourse to art. 79 CISG if he does not establish the unforeseeable character of the modification of the conditions of sale where, as a professional experienced in the practice of international markets, it was for him to make provision for contractual mechanisms of guarantee or of revision': Decision of Cour de Cassation of 30 June 2004, no. 01-15964, D 2005, 2281, Claude Witz, 'Droit uniforme de la vente internationale de marchandises: panorama 2004', Recueil Dalloz, 2005, Panorama, 2289.

[35] Decision of Cour de cassation of 19 June 2009, C.07.0289.N. On this decision, see esp. Denis Philippe, 'Renégociation du contrat en cas de changement de circonstances dans la venteinternationales', *RDC*, 2011, 963; C.Witz, 932; Denis Philippe, *French and Belgian reports,* in *Unexpected Circumstances in European Contract Law*, Ewoud Hondius, Hans C. Grigoleit (eds.), Cambridge University Press, Cambridge, 2011, 150.

The Court added that 'the party to the contract who invokes such changed circumstances which fundamentally undermine the contractual balance also has a right to demand a new negotiation of the contract'.

This important judgment of the Belgian Cour de cassation has helped to reinforce the idea that *imprévision* is a general principle of international trade law.[36]

IMPRÉVISION IN THE REFORM OF CONTRACT LAW: RELATED ISSUES

Imprévision and Force Majeure: What are the Differences?

In contractual practice, there is sometimes confusion between *force majeure* clauses and clauses relating to a change of circumstances which causes 'hardship', often referred to as hardship clauses. In 2003, the International Chamber of Commerce published twin model forms, one for a force majeure clause and the other for a hardship clause, thus providing greater clarity in this area.

As a matter of law, there are a number of clear differences between *imprévision* and force majeure.

Conditions for Operation. – The conditions for the operation of *force majeure* differ from those required for *imprévision*: performance of the obligation must be 'prevented' (and therefore impossible) and not simply 'excessively onerous'. In this respect, it is interesting to note that article 136 of the July 2008 draft, which gave the court a power of revision or termination only 'if the parties agree', still required a change of circumstances that was both unpredictable and insurmountable.[37]

The new article 1218(1) of the Civil Code provides the following definition of force majeure:

'In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.'

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[36] M. Prado, 863; Alejandro Garro, 'Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7), www.cisg.law.pace.edu/cisg/principles/uni79.html,15.08.2019. For discussions on the CISG see Harry M. Flechtner, 'Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more', *Journal of Law & Commerce*, no. 18,1999, 191-258, and for recent developments in this area, see Catherine Kessedjian, *Droit du commerce international,* PUF, Paris, 2013, 256.

[37] See www.cci-paris-idf.fr/sites/default/files//etudes/wysiwyg/PDF/reforme-droit-des-contrats-kli0810.pdf, 15.08.2019.

In this definition, we find the three elements traditionally required for *force majeure*: exteriority, unforeseeability and irresistibility.[38]

It was surprising that, while article 1195 requires that the change incircumstances be unforeseeable, article 1218 on *force majeure* is limited to an event which could not 'reasonably' have been foreseen.[39] Harmonizing the two provisions either by using the adverb 'reasonably' in article 1195 (to give an objective connotation to the test that the court will have to implement), or by deleting it from article 1218, would have been logical, even if, in practice, this would have had only a cosmetic function. In fact, with or without the adverb 'reasonably', the test for foreseeability leaves a large margin of appreciation to the court,[40] except that in both cases the court must place itself 'at the time of the conclusion of the contract' when it makes that assessment.[41]

The comparison of the conditions for the operation of article 1195 with those of article 1218 on *force majeure* casts a greater light on this distinctive criterion of *imprévision*: 'excessive onerousness'. This criterion, taken from the PECL, was already contained in article 1467(1) of the Italian civil code of 1942 (*eccessiva onerosità sopravvenuta*), which applies it to the act of performance (*la prestazione*) and not to performance (*l'esecuzione*) of the obligation: 'In contracts for continuing or periodic performance, or even for deferred performance, if the act of performance of one of the parties has become excessively onerous following the occurrence of extraordinary and unforeseeable events, that party may request termination of the contract, together with the effects provided for in article 1458.'[42]

The generally accepted idea is that the gap between what one party receives and what the other provides must be so great that a parallel is sometimes made, at least in the countries which admit it, with *laesio enormis*.[43] A question which

[38] cf the Report to the President of the Republic, which indicates that this definition requires only unforeseeability and irresistibility not exteriority. For further discussion, see F. Chénédé, 28.22.

[39] G. Chantepie, M. Latina, 445.

[40] Cf P. Stoffel-Munck, 33.

[41] On the difficulties posed by this condition for contracts of definite duration with implied renewal clauses, in that it requires the court to place itself at the date of the last renewal, whereas the parties at each renewal will not have reconsidered their initial view, see P. Stoffel-Munck, 33; Jean-Daniel Bretzner, in *Réforme du droit des contrats et pratique des affaires,* Philippe Stoffel-Munck (ed.), Dalloz, Paris, 2015, 84.

[42] Art. 1467(1) of the Italian civil code again requires that there should have been 'extraordinary and unforeseeable events': on this criterion, see O. Deshayes, T. Genicon, Y-M. Laithier, 385 and 394 ff.

[43] For a critical analysis of these criteria, which give the court a broad margin of appreciation, see P. Stoffel-Munck, 32ff.

has arisen, particularly in the field of energy (for example, in sectors where pollution licences exist), is whether the excessively onerous nature is assessed not only in terms of costs, but also of the lost profits or, on the other hand, the unexpected profit which the other party has derived from the contract and from which has not been shared.[44]

Although the UNIDROIT Principles are limited merely to 'more onerous' performance (article 6.2.1), they require additionally that the events which occur 'fundamentally alter the equilibrium of the contract, either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished' (article 6.2.2).

There is also another condition for the application of article 1195 which the court must establish: the risk must not have been assumed by the contracting party who claims under it.[45]

Effects and Non-mandatory Nature of the Legislative Provisions. – Force majeure permits the debtor not to perform his obligations. It is thus a genuine exemption from liability for the debtor. If the prevention is temporary, the obligation is suspended and, exceptionally, can be extinguished. If it is permanent, the contract is then 'terminated by operation of law'. Article 1218 therefore dispenses the debtor from applying to court, an approach which is consistent with solutions already adopted by a large number of European legal systems and is also close to the PECL and the UNIDROIT Principles. Above all, it draws the consequences of reforms introduced in this area, since termination for non-performance by notice is no longer treated as an exception to a general rule of termination by the court, but is instead 'treated as an independent power offered to the creditor'.[46]

The non-mandatory nature of articles 1195 and 1218 allows the parties to modify or exclude the application of their provisions. As we have seen, in contractual practice 'adaptation clauses' and 'force majeure clauses' are very widespread. The reform did not aim to call this practice into question. The *Ordonnance* says nothing about the non-mandatory nature of these provisions, but this is explained by the Report to the President of the Republic. In principle clauses of this type are valid, but they must be drafted carefully, whether their aim is to exclude the operation of article 1195 (for example, by a clause in which one of the

[44] On this debate, see T. Revet, 376; N. Molfessis, 1415.

[45] On the influence of PECL on this, see F. Chénédé, 25.62. As the commentary on the UNIDROIT Principles also explains, the term 'assumed' indicates that it is not necessary that the risks have been allocated expressly, but this may follow from the nature of the contract itself (*eg.* a speculative venture).

[46] F. Chénédé, 28.171.

parties formally assumes the risk of changes of circumstances, a possibility which the text of course envisages), or to exclude the possibility of suspending or releasing the obligations of one of the parties in the event of *force majeure* (the contracting party undertakes to fulfil its obligations even in the event of *force majeure* - and the *obligation de résultat* becomes thereby an *obligation de garantie*[47]).

These clauses are valid in bespoke contracts, but they could become routine clauses, especially in standard form contracts and would therefore run the risk of falling within the scope of the controls of unfair terms in article 1171. This would be the case, for example, if a clause provided that only the undertakings of one of the parties, in this case the undertaking of the party who accepts the other's standard form, could not be excluded in case of force majeure. On the other hand, even in a standard form contract, a clause accepting the risk of an obligation becoming excessively onerous could be upheld on the ground that it relates to the adequacy of the price in relation to the act of performance (see art. 1171(2)). Finally, for all types of contracts, including bespoke contracts, such clauses could still be excluded on the basis of the controls on contract terms in Article L 442-6, I, 2Ccom.[48]

In the 'Common Contractual Principles'[49] drawn up on the basis of the PECL and proposing a revised version in the context of preparing a draft Common Frame of Reference requested by the European Commission, French academic writers proposed the addition, immediately after article 7:101 PECL on Change of Circumstances, of a provision on risk-sharing clauses that would have led to a result similar to what Article L 442-6 I 2 Ccom would allow:

'A clause which would apportion to one of the parties the essential risks of a change of circumstances is valid only if it does not entail unreasonable consequences for that party. The clause shall not be applied where the change in circumstances is attributable in whole or in part to the party for whose benefit it was stipulated'.[50]

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[47] An 'obligation de résultat' is an obligation under which the debtor must achieve a particular result, but its non-performance is excused where performance is prevented by *force majeure*; an *'obligation de garantie*' is an obligation where the debtor must achieve a result come what may, ie even if prevented from doing so by *force majeure*.

[48] See P. Stoffel-Munck, 32ff.

[49] Association Henri Capitant and Société de législation comparée, *Projet de cadre commun de référence. Principes contractuels communs,* Société de législation comparée, Paris, 2008.

[50] *Ibidem,* art. 7:102. **In the discussions at the Commission on the draft common Europe**an sales law, consumer representatives stressed that rules on change of circumstances should not be used against the interests of consumers, who are not in a position to negotiate. The experts replied

Imprévision and Contractual Groups

Article 1186 Cc.-The acceptance of *imprévision* creates the risk of a chain reaction affecting other contracts, especially if it entails the termination as opposed to the mere adaptation of the contract. Often raised as a result of the economic crisis, this risk is acute in the context of contractual groups. This phenomenon is taken into account by article 1186(2),(3) Cc on the lapse of linked contracts, which provides that:

'Art. 1186. – A contract which has been validly formed lapses if one of its necessary elements disappears.

Where the performance of several contracts is necessary for the putting into effect of one and the same operation and one of them disappears, those contracts whose performance is rendered impossible by this disappearance lapse, as do those for which the performance of the contract which has disappeared was a decisive condition of the consent of one of its parties.

However, lapse occurs only if the contracting party against whom it is invoked knew of the existence of the group operation when he gave his consent.'

This provision deals with the frequent phenomenon of the interdependence or indivisibility of contracts, and it will supply a new textual basis for earlier case-law under which the nullity or termination of one of two or more interdependent contracts may lead to the extinction of its linked contracts, whose lapse has thus already been recognised.[51] Neither the PECL nor the UNIDROIT Principles devote a general provision to 'linked contracts' or 'ancillary contracts'.

Some commentators on the French reform ask whether, owing to the numerous questions which arise, it was not 'premature' to codify case-law that was based on foundations that remain uncertain, and note that uncertainty persists even after the reform, particularly as regards the fate of severance clauses.[52] As regards the latter, it seems logical to admit their effectiveness in principle, 'in the name of the free distribution of risk between the parties'.[53]

Towards an Obligation to Renegotiate in the Case of Contractual Groups?. – Will the fact that the contract whose performance has become 'excessively one-

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that it would be for the court to assess the circumstances and that putting the risk of a change of circumstances on the consumer alone would be an unfair term.

[51] Başak Başoğlu (ed), *The Effects of Financial Crises in the Binding Force of Contracts—Renegotiation, Rescission or Revision,* Springer, Cham, 2016.

[52] F. Chénédé, 23.491; and, on severance clauses, 23.497.

[53] F. Chénédé, 23.497.

rous', is part of a contractual group encourage courts to exercise the powers conferred on them by article 1195 even more cautiously? What safeguards could they put in place to avoid such chain reactions?

One avenue could be to impose on the parties an obligation to renegotiate as a precondition. This had been raised, but the legislator rejected it, influenced by the Cour de cassation which had pointed out that this would give rise to dispute as to the assessment of the good or bad performance of that obligation. In comparative law, there are considerable differences as regards the imposition of an obligation to renegotiate before judicial revision or termination for *imprévision* is allowed. The European (PECL) and international (UNIDROIT principles) models both require it. On the other hand, the new *Restatement of Nordic Contract Law*, published in 2016, contains an article 6-7 entitled 'Change of circumstances' which imposes no obligation to renegotiate before the court can intervene.[54] In Dutch law, not only are the parties not subject to a renegotiation obligation, but one of them can even directly request the court to adapt the contract, with retroactive effect.[55] Some authors have criticized this and suggested that a duty to renegotiate should be established on the basis of the general duty of reasonableness and fairness.[56]

While under article 1195 the parties are in principle free to refuse to renegotiate, nevertheless a refusal to do so which is found 'abusive' could be sanctioned, pursuant to article 1104 as a breach of its duty of good faith. One possible way to do this would be to consider that where the contract fits into a contractual group and the termination of the contract entails the lapse of the other contracts of the group, the parties must make special efforts to save the contract. If the renegotiation still fails, it would be for the court to prefer adaptation rather than termination of the contract insofar as only this would allow the survival of the other contracts.

Restitution –Following – Lapse of the Contract. – Where the contract lapses in the course of its performance, lapse does not take effect retroactively, but this does not prevent the operation of restitution. Thus, under article 1187, 'Lapse puts an end to the contract. It may give rise to restitution under the conditions

[54] O Lando et. al. (eds), *Restatement of Nordic Contract Law,* Djof Publishing, Copenhagen, 2016, 221.

[55] Art. 6:258 BW, in conjunction with art. 6:260.

[56] Art. 6:248 BW. See Danny Busch, Ewoud Hondius, Hugo van Kooten, Harriët Schelhaas, Wendy Schrama (eds), *The Principles of European Contract Law and Dutch Law, A Commentary,* Kluwer Law International, The Hague, 2002, 289.

provided by articles 1352 to 1352-9'. The appropriateness of restitution is therefore left to the assessment of the court.

In this respect, Chapter V of Title IV of the general regime of obligations is innovative, as this chapter on restitution brings together the main rules concerning restitution following the destruction of a contract, whether this results from annulment, lapse or retroactive termination (articles 1352 to 1352-9): it provides the general law of restitution. To this end, the established rules of law have been consolidated, in particular as regards the principle of restitution in kind (except for obligations of sums of money). However, three rules are new given the state of the earlier case-law. Thus, fruits must be restored irrespective of the good or bad faith of the person responsible for making restitution (article 1352-3); restitution includes the value of the enjoyment that the thing has provided; and finally and contrary to earlier case-law, restitutionin respect of the supply of a service is formally recognised and is stated as taking place by value, assessed at the date on which it was supplied (article 1352-8) and not according to the rules of unjustified enrichment (which implies taking the lesser of the two sums resulting from the impoverishment of one party and the enrichment of the other: article 1303).

From a Franco-English perspective, it is interesting to note that the doctrine of frustration leads to the termination of the contract and that restitutionis organised by section 1 of the Law Reform (Frustrated Contracts) Act 1943. The court seems to have a fair room for manoeuvre, because of the need to find the fairest solution. Could this not be seen as a form of judicial adaptation of the contract even if not expressed in this way?

Imprévision and Non-performance in Perspective (Articles 1221 and 1224)

Article 1195 provides for intervention by the court only after a certain period has elapsed, in order to allow time for the negotiations to succeed.[57] But what happens if the creditor immediately refuses to renegotiate on the ground that the debtor's claim is unfounded as the situation does not constitute a case of *imprévision*? This question cannot be answered without considering the relationship

[57] The last phrase of art. 1195 (the most important, which gives the court its powers) opens in these terms: In the absence of an agreement within a reasonable time, the court may ...' It has been questioned whether this is a drafting error: G. Chantepie, M. Latina, 445; or an indication of the intention of the legislator to impose preconditions, in a scheme which 'is similar to the clauses requiring prior conciliation or mediation, ignorance of which opens up the penalties of inadmissibility': T. Revet, 378.

between Section I on the effects of contracts (and therefore article 1195) and Section V of Chapter IV on the effects of contracts (and in particular its two key articles, 1221 and 1224).

Article 1195 and Article 1221 (Enforced Performance). – The new article 1221 prohibits the creditor from seeking performance in kind if performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.[58] Where a debtor who considers that the conditions of article 1195 are satisfied so as to establish a case of *imprévision*, but the creditor disagrees and refuses to renegotiate the contract, the debtor may wish to run the risk of the creditor bringing proceedings against him for enforcement under article 1221 so as then to counter that the change of circumstances means that there is a 'manifest disproportion' between the cost to him in performance and the interest of the creditor in enforcement.[59]

Here, a comparison with English law raises a few questions.

First, does the fact that specific performance is exceptional in English law make the development of a theory of *imprévision* less necessary? Indeed, since non-performance is sanctioned by damages, the court may fix their amount taking into account the circumstances and in particular the change of circumstances.

Secondly, does English law, which is said to reject judicial revision of the contract, never arrive at a result similar to that to which article 1195 may lead?[60] The routes by which this revisionis achieved are clearly diverse, each with its own special features: the idea of 'frustration of purpose',[61] misrepresentation, implied terms, force majeure or hardship clauses, etc.

Moreover, in English law, a party cannot invoke frustration where it is 'self-induced' (*ie*. caused by his own conduct). What is the use of this concept that has not been established in French law? On the other hand, frustration is gene-

[58] Art. 1221: 'A creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.'

[59] For an analysis of the links between litigation for *imprévision* and for non-performance, see O. Deshayes, T. Genicon, Y-M.Laithier, 418.

[60] Horace Yeung, Flora Huang, 'Certainty over Clemency: English Contract Law in the Face of Financial Crisis', in *The Effects of Financial Crises in the Binding Force of Contracts—Renegotiation, Rescission or Revision,* Başak Başoğlu (ed), Springer, Cham, 2016, 285.

[61] Could the parties in advance forbid the court from applying the doctrine of frustration?

rally invoked as a defence by a defendant who has not performed his obligation: what is the link with anticipatory breach (which is not admitted in French law[62])?

Under German law, something very close to *imprévision* is established by § 313 BGB, entitled 'Interference with the basis of the transaction.'[63] Ten years after the entry into force of the German reform and the codification of this rule which was previously found only in case-law, it was established that courts used their power of intervention less often than previously, since the law, while formally recognising a power which the courts had imposed on the basis of good faith, had strictly defined its parameters. One limitation on the operation of § 313 BGB is that it only applies if § 275 BGB, entitled 'exclusion of the duty of performance', is inapplicable. § 275(1) BGB provides:

"'A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person' and § 275(2) BGB states that:

"'The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee...'

It is true that § 275 BGB applies very rarely in the case of substitutable goods because the debtor is supposed to do everything possible to fulfil his obligation, including such goods elsewhere. Moreover, contrary to § 313 BGB on interference with the basis of the transaction, § 275 BGB does not provide for the adaptation of the contract by the court.

To a certain extent, by prohibiting the creditor from seeking performance in kind where performance is impossible or where there is a manifest disproportion between its cost to the debtor and its interest for the creditor, article 1221 will provide an incentive to the creditor who has received a request to renegotiate wit-

[62] On anticipatory breach, see Solène Rowan, *The New French Law of Contract*, Cambridge University Press, Cambridge, 2017.

[63] Translation from *www.gesetze-im-internet.de/englisch_bgb:* (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

hin the framework of article 1195. For where the debtor relies on article 1195, article 1221, which the report to the President of the Republic explains that 'can be analysed as a variation on the principle of abuse of right', may well prompt the creditor to exercise extreme caution before requiring enforced performance where the debtor relies on article 1195.

Article 1195 and Article 1224 (Unilateral Termination). – A creditor who establishes non-performance by the other party may apply to the court for judicial termination, which will enable the court to decide whether or not there is a change in circumstances apt to trigger article 1195, and, if so, to decide whether or not to refer it back to the parties to agree on its consequences. From now on, the creditor may also terminate the contract unilaterally by notice (article 1224) at his own risk and in accordance with a procedure defined by article 1226.

If the creditor prefers to terminate unilaterally for non-performance, the debtor can then apply to the court to challenge this (article 1226(4)) and then invoke the existence of an 'unforeseeable change of circumstances' justifying termination of the contract, but this time from a date and subject to such conditions as the court shall determine (article 1195, final words).[64] If the court considers that the conditions for the application of article 1195 are fulfilled, it will uphold the termination of the contract and, if necessary, sanction the creditor. In theory, by combining the operation of article 1226 and article 1195, a court could even order the enforced continuation of the contract while at the same time adapting it to the changed circumstances so that the debtor can perform it without excessive onerousness. However, the Civil Code does not allow a court to adapt a contract in the absence of a change in circumstances, and as a result a court could not do so unless it considers that the conditions for the application of article 1195 are fulfilled (article 1228).

CONCLUSION

Judicial revision has made a remarkable entrance into the French general contract law but it is still too early to determine whether the courts will seize the powers thus given to them, in particular the power of revision.[65]

[64] It is different where there is a termination clause: see F. Chénédé, 28.177.

[65] An 'indirect' power of judicial revision is now even established by the articles of the Code civil relating to control of the remuneration of independent service providers: where the price has been fixed unilaterally and there has been abuse, the court 'may hear a claim for damages': art. 1165; T. Revet, above n 25.

With article 1195, a new conception of the role of the court has appeared in the Civil Code, inspired by national, European and international models. In the current international context which is marked by a certain rivalry between legal families, particularly those of the common law and continental law, the imperative of legal certainty, here understood as requiring the preservation of the stability of contractual relations, is often put at the forefront. If French courts bear this imperative clearly in mind this will encourage them to exercise the powers conferred on them by article 1195 with the utmost caution, a caution which they have already shown when similar powers were conferred on them in 1975 in relation to penalty clauses. Provided that the courts use their powers with foresight and restraint, the 'classic and modern philosophy of contract law' will not be overturned.[66] In practice, the real contribution of article 1195 may lie more in the importance which it attaches to the process of renegotiation by the parties than in its acceptance as a general rule of revision of contracts for *imprévision* in private law, not least since revision already existed in special circumstances.

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DA LI REVIZIJA NA OSNOVU IMPRÉVISION POVREĐUJE NAČELO OBAVEZNE SNAGE UGOVORA

Rezime

Uvođenje izmene i raskida ugovora zbog nepredvidljivih promenjenih okolnosti – *imprévision* predstavlja jednu od najistaknutijih karakteristika reforme francuskog ugovornog prava. Cilj novog rešenja ogleda se u podsticanju stranaka da pregovorima postignu saglasnost umesto obraćanja sudu i zahteva za raskid ili sudsku reviziju. Iako sudovi generalno imaju pravo da vrše reviziju ugovora, Kasacioni sud se oslanjao na načelo obaveznosti ugovora da bi opravdao odbacivanje mogućnosti "sudske revizije zbog *imprévision*". U radu je analizirano pitanje da li će sudovi iskoristiti ovlašćenje koje im je dato u vidu prava na reviziju ugovora. Pored toga, učinjen je osvrt na istorijat i tok izrade rešenja koje se odnosi na *imprévision,* izvršena je komparativna analiza sa sličnim institutima u drugim međunarodnim izvorima prava i predstavljena relevantna sudska praksa.

Ključne reči: imprévision, nepredvidljive promenjene okolnosti, viša sila, hardship, sudska revizija

[66] See F. Chénédé, 21.81 and references cited there.

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LARRY A. DIMATTEO

RIGHT TO A CLEAN ENVIRONMENT: ROLE OF CONTRACTS AND CONTRACT LAW

This Report analyses the use of contracts and contract law to advance sustainability goals. It discusses the problem of planned obsolesence—the intentional manufacturer of products with shorter lifespans. In the area of contracts, the use and enforceability of contractual sustainability clauses is reviewed. The role of contracts in advancing sustainability is examined at different levels: government-to-government through bilateral investment treaties, public-private contracts (government procurement) and in private green contracts incentivized by government policy and programs. The Report will then offer approaches to combatting the problem of planned obsolesence. It advances the argument that warranty law offers the best and most comprehensive approach to improving product durability.

Key Words: *Bilateral Investment Treaties (BITs), circular economy, duty to repair, government procurement, green contract, implied warranty of durability, planned obsolesence, right to self-repair, sustainability, warranty law*

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INTRODUCTION

Contracts, both—private and public-private—and contract law can play a major role in the sustainability movement. For purposes of the Report, sustainability relates to the reduction of waste in the use and reuse of natural resources in the production of goods and products. This area of sustainability includes both the processes of production and the end products of those processes. In the area of production processes the major issue analyzed is the sustainability of the world supply chains, while the focus of product outcomes will be on the issue of the durability and reuse of products. This Report will concentrate on the later of the two areas—production of durable goods. In sum this Report, will focus on how contracts have been used to advance greater product durability through the minimization of waste. More importantly, this Report will propose ideas as to how contracts and contract law can more effectively be used to improve the efficient use of natural resources through the reduction of waste, re-use of materials, and increased product durability.

Interrelated with the issue of sustainability are the areas such as fairness, justice, human rights, and intellectual property rights. These issues often relate to one another directly and indirectly. For example, something may be sustainable but also cause injustice from a distributive justice perspective when sustainability benefits only a minority of the population. Another example is presented by the intersection between human rights and intellectual property rights.[1] Often these types of rights are seen in conflict, such as when a company's intellectual property rights prevent medicines or scientific innovation from reaching people most in need. In other ways, the two types of rights can be seen as co-existent or complimentary. In cases, were governments do not recognize or protect the rights of inventors and artists, then such rights can be interpreted as basic human rights. From the perspective of sustainability, innovation is essential to most effective use of resources, by reducing waste and protecting the environment. Failure to recognize intellectual property rights in these areas will limit the development of new means to sustainability. In the end, the protection of intellectual property rights and limits to those protections directly effects basic human rights such as the right to work, right to life, right to education, right to health, and the right to food, along with freedom of thought and freedom of expression as reco-

[1] See Peter K. Yu, "Intellectual Property, Human Rights, and Methodological Reflections", *Texas A & M School of Law Research Paper*, No. 18-36, 2018, available at *https://ssrn.com/abstract=3247346*, 8.10.2018.

gnized in the Universal Declaration of Human Rights (UDHR)[2] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

Contract law also plays a role in the protection of such rights and in the promotion of justice and fairness, especially in the area of government procurement and public-private ventures. In seeking justice and fairness, public policy as reflected in international conventions and regional initiatives may restrict freedom of contract in order to serve societal goals. For example, European Union law allows restrictions of freedom of establishment and free marketing of services on grounds of public policy, public security and public health. Other public interests that can justify restrictions on freedom of contract include: environmental protection,[4] keeping an agricultural community in place and combating excessive land speculation,[5] land-use planning,[6] consumer protection,[7] and protection of workers. Thus, communal interests can restrict private parties' freedom *to* contract, such interests (including justice and fairness), they can also place immutable rules and principles into contract law. In such cases, private parties do not have freedom *from* contract (unenforceability of certain contract terms; general policing doctrines like the duty of good faith or the doctrine of unconscionability). The Report examines both the freedom of contracting parties to incorporate sustainability factors into their contracts and the law's ability to impose sustainability requirements on private contracts.

USE OF CONTRACTS TO ADVANCE SUSTAINABILITY

This Part will examine the use and enforceability of contractual sustainability clauses. It also provides examples of the use of public procurement contracts, government-to-government contracts (bilateral investment treaties), and private green contracts to advance sustainability goals.

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[2] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[3] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force January 3, 1976).

[4] C-400/08 Commission v Spain (prohibition of shopping malls in Catalonia).

[5] C-370/05 Festersen, ECLI: EU: C:2007: 59 para. 27.

[6] C-213/04 Ewald Burtscher v Josef Stauderer, ECLI: EU: C: 2005: 731 para. 46 (limitations on secondary residences).

[7] C-342/14 X-Steuerberatungsgesellschaft, ECLI: EU.

Enforceability of Sustainability Clauses

There is an almost endless array of sustainability standards and goals that can be used to construct contractual sustainability clauses. This is an important method to convert soft law standards to enforceable hard law. An analogy can be found in intellectual property protection. Some countries are notorious for failing to enforce intellectual property laws; some of this is due to the lack of expertise in their national court systems. This incentivizes licensors of technology to write extremely one-sided pro-licensor licensing contracts, which includes transplanting protections provided by law into their contracts. The logic being that some national courts may not be able to deal with the nuances of intellectual property law, but they are capable of handling breach of contract litigation. Although damages may be difficult to prove in breaching contractual sustainability clauses, the breach does allow the non-breaching party to terminate the contract and such breaches cause negative reputational effects on the breaching party.

It is important for sustainability clauses to use words of obligations such as the supplier "will," "required to," or "must" and avoid merely referential language (such as, "according to the UN Global Compact"), as well as avoiding aspirational language, such as you should strive to comply.[8] In the latter case, passive language may be construed as non-enforceable guidance or merely placed in the contract for public relations value. Additionally, the level of vagueness f these types of terms lead most courts to disregard them due to the indefiniteness of the clause. Also, sustainability clauses may be incorporated into the general conditions or standard terms part of a contract. The enforceability of standard term provisions in a contract or terms in other documents incorporated by reference varies among national legal systems. Some courts, especially in the civil law tradition, may be disinclined to recognize such terms as part of the contract. The enforceability of sustainability clauses is dependent on the drafting and the placement of the clauses in the contract. Thus, enforceability increases when the obligations of the other contracting party are highly specified instead of be placed as a simple recital to general principles (incorporation by reference). The placement of the clauses in the body of the contract and not incorporated into general conditions, the use of specifically worded clauses, and the use of words of promise or obligation increase the likelihood of enforceability.

[8] Kasey McCall Smith, Andreas Rühmkorf, "From national law to international law: The opportunities and limits of contractual CSR supply chain governance", *Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap* (editors Vibe Ulfbeck, Alexandra Hanhov, Katerina Mitkidis), Routledge, London, 2019, Ch. 2.

Inter-Government Contracts

Bilateral Investment Treaties (BITs) establish the terms and conditions for private investment or FDI by nationals and companies of one country in another country. BITs have evolved over the decades from pure investment protection to areas such as human rights, labor rights, environmental protection, and sustainability.[9] In 2012, the United States published a new Model Bilateral Investment Treaty. The Preamble states that:

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards and *desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.[10]

This provision makes clear that growth and investment for the sake of economic development is to be tempered by concerns with issues of safety and health, environmental harm, and labor rights.[11] Implicit in protecting the environment is sustainability, which is the minimization of the use of natural resources and the development of means of production that are environmentally friendly. A country that is party to a BIT that is concerned with practices of the other party or a country receiving foreign investment is allowed under the Model BIT to the appointment of "one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party."[12] The investment country receiving parties are also authorized to regulate such investments: "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[13] Thus, domestic regulations aimed at enhancing sustainability,

[9] Larry A. DiMatteo, *International Business Law and the Legal Environmental: A Transactional Approach*, Routledge Publishing, New York, 2017, 601.

[10] U.S. Model Bit (2012), Preamble.

[11] The Model Bit defines environmental harm as follows: "[Environmental law are those whose] primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the: (a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; (b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or (c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas."

[12] Article 32 Expert Reports (Arbitration).

[13] Annex B Appropriation, Section (4)(b).

which are enacted subsequent to the signing of a BIT, would apply to BIT investments. On the other hand, investment-receiving countries are not allowed to decrease environmental protections in order to attract foreign investment.[14] In sum, BITs are government-to-government contracts that can be modified to advance sustainability goals.

Public-Private Contracts: Government Procurement and Concession Agreements

Numerous concerns, interests, and objectives need to be balanced in developing a sustainable public procurement policy:[15] "'Green procurement' has traditionally been given a greater role within European procurement mechanisms."[16] The 2014 EU Public Procurement Directive[17] has been used to make the "case for sustainable public procurement linking minimisation of social and environmentalrisk with enhanced organisational image, cost saving (predicated on life-cycle costing methodologies), and the creation of markets for products and services that enrich sustainability."[18] Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth.[19] The importance of the Directive, as well as soft law standards, to contracts is that they can be used in the drafting of sustainability-friendly contracts. The relevant obligations can be mirrored in contract clauses.

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[14] In the area of workers or labor rights, the countries to the BIT obligate themselves to obeying the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work. Labor rights include the areas of freedom of association; effective recognition of the right to collective bargaining; elimination of all forms of forced labor; effective abolition of child labor; elimination of discrimination in respect to employment; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

[15] These competing concerns include: "a range of environmental, economic, and social issues, including social policy concerns over equality and worker rights, ideas about ethical trade and social justice, 'green' product and service areas, and economic aspects related to innovation and supplier diversity". Eleanor Fisher, "The Power of Purchase: Addressing Sustainability through Public Procurement", *European Procurement & Public Private Partnership Law Review*, Vol. 2, 2013, p. 3.

[16] *Ibidem.*

[17] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (Public Procurement Directive).

[18] E. Fisher, p. 2.

[19] European Commission, Communication of 3 March 2010, Europe 2020, a strategy for smart, sustainable and inclusive growth.

Public or government procurement provides the opportunity to experiment with contract terms that promote sustainability goals. One commentator asserts that: "Public procurement is emphasised as a unique opportunity to promote awareness of and respect for human rights and the terms of contracts are described as a tool."[20] Sustainable public procurement is: "a process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising damage to the environment."[21] Contract provisions requiring sustainable use of materials need to include additional provisions directed at managing (operationalizing those requirements or obligations), as well as installing a monitoring process to ensure compliance.

A concession agreement is a negotiated contract between a company and a government that gives the company the right to operate a specific business within the government's jurisdiction, subject to certain conditions. For example, a government that is looking to attract mining companies to an impoverished area may offer significant inducements, such as tax breaks and a lower royalty rate. The term concession agreement is used in two slightly different ways in the business world. Both refer to a type of negotiated contract, which gives a company the right to do business, with some specific requirements. In one sense, it refers to a contract between a foreign company and a government in which the government guarantee certain conditions, such as no changes in the income tax rate applicable to the foreign company, in order to attract the foreign company to invest in its country. In a second sense, this type of agreement may include the foreign company (concessionaire) the exclusive right to do business in a particular area or venue in exchange for some carefully negotiated terms.[22] The government may also insert sustainability clauses into these contracts. The government could provide incentives (lower taxes; lower royalty rights) in return for the company agreeing to follow sustainability methods related to mining, growing, manufacturing, and so forth.

Another area to promote sustainability is the implementation of government policies and programs that incentivize private contractors to make con-

[20] Asa Edman, Peter Nohrstedt, "No Socially Responsible Public Procurement without Monitoring the Contract Conditions", *European Procurement & Public Private Partnership Law Review*, Vol. 12, 2017, pp. 352, 353.

[21] Department of Environment, Food and Rural Affairs, Procuring the Future, Sustainable Procurement National Action Plan: Recommendations from the Sustainable Procurement Task Force, DEFRA, London 2006, p. 10.

[22] Larry A. DiMatteo, pp. 605–06.

tracts that take into account sustainability goals. These include government programs to incentivize the construction of energy efficient or green buildings. The criteria for earning such certifications include the use of locally sourced sustainable materials, reduction in water usage, energy efficiency, quality of indoor air, and minimization of environmental pollution. In addition, the use of products constructed with recycled materials should be encouraged. Such criteria should be included in public and private contracts. Contract clauses that require the use of sustainable processes and materials can be required in the construction of public buildings and infrastructure. In private contracts, government incentives and education on the long-term profitability obtainable through green construction is needed to persuade owners in private construction.

ADVANCING SUSTAINABILITY THROUGH WARRANTY LAW

This Part examines the problem of manufacturers' designing products to fail (planned obsolesence). Instead of producing reasonably durable products, many manufacturers' produce goods that are less durable from a state of art and design perspective. This strategy is employed to increase profits by selling repair parts and to sell new replacement products. Sustainability goals are dependent on the production of products that are durable and that can be re-used or re-cycled when they do fail. This Part examines the use of more robust warranty laws to combat the manufacturers' production of products with short lifespans.

Problem of Planned Obsolesence

The idea of planned obsolescence has been around for a while, traceable to at least the Great Depression.[23] For example, the charge has been made that appliances today are not made to last, but are instead made to fail in a shorter period of time than the state of the art allows without any prohibitive increase in production costs.[24] A notorious case of planned obsolesence is the 1920s "Phoebus cartel"[25]

[23] *See* Bernard London, *Ending the depression through planned obsolescence*, 1932, p. 1; Giles Slade, *Made to break: technology and obsolescence in America*, 2006, p. 5.

[24] *See Planned Obsolescence*, The Economist, Mar. 23, 2009, *www.economist.com/news/2009/03/23/planned-obsolescence;* G. Slade, p. 5.

[25] *See, e.g.,* Jürgen Reuß, Cosima Dannoritzer, *Kaufen für die Müllhalde: Das Prinzip der Geplanten Obsoleszenz*, Orange Press, 2013, p. 13; Jana Valant, *Planned Obsolescence: Exploring the Issue*, 2016, available at *www.europarl.europa.eu/RegData/etudes/BRIE/2016/581999/EPRS_BRI%282016%29581999_EN.pdf*, 23.09.2019. ("One of the last remaining examples of the old bulb, the Centennial Light Bulb, manufactured by the Shelby Electric Company and installed in 1901, still continues to function 24 hours a day in 2016.").

or"Phoebus agreement"[26] – which involved an agreement between manufacturers on limiting the lifetime of light bulbs to a maximum of 1,000 hours of operation.[27] The revelation of the Phoebus cartel initiated a debate on the interrelationship between increasing profits, producing eco-friendly and sustainable goods, and consumers' interests in being able to buy goods that will last as long as technologically possible.[28] More recent times have witnessed an increasing number of additional, less economic-focused reports that indicate the existence of obsolescence strategies.[29] Environmental concerns linked to sustainable production and use of goods has intensified the planned obsolescence debate.

Unfortunately, private law and government regulation has been slow in responding to the problem of planned obsolesence. The only significant case in the United States involving planned obsolescence is *Tatum v. Chrysler Group*,[30] which involved a class action suit against Chrysler in the sale of the Dodge Journey crossover vehicle. The plaintiff alleges that the brakes on the vehicle required frequent and costly repairs. Chrysler's "advertisements, which touted the Journey as safe, durable and reliable."[31] Chrysler claimed that: "the brakes routinely outlasted their sales warranty, and that the advertising was not intended to create a literal representation, but was merely puffery."[32] A stronger case of misrepresentation would be available under most European advertising laws, which see such statements as factual in nature. The court rationalized that the statement of pro-

[26] *See, e.g.*, Monopolies & Restrictive Practices, *Commission's Report on the Supply of Electric Lamps*, at pp. 141–142.

[27] Markus Krajewski, *The Great Lightbulb Conspiracy*, IEEE Spectrum, 2014, *https://spectrum.ieee.org/tech-history/dawn-of-electronics/the-great-lightbulb-conspiracy,* 23.09.2019.

[28] *See* J. Valant.

[29] *See, e.g.* Centre Européen de la Consommation & Zentrum für Europäischen Verbraucherschutz e. V., *L'Obsolescence Programmée ou les Dérives de la Société de Consommation,* 2013, p. 3, *www.cec-zev.eu/fileadmin/user_upload/eu-consommateurs/PDFs/publications/etudes_et_rapports/Etude-Obsolescence.pdf*; 23.09.2019; Taiwo K. Aladeojebi, "Planned Obsolescence", *The International Journal of Scientific & Engineering Research*, No, 4, 2013, pp. 1504, 1505–06; Stefan Schridde, *Murks? Nein Danke! Was wir tun können, damit die Dinge besser warden*, 2014; Adrian Porter, *Are Washing Machines Built to Fail? We Chart the Rise of the Throwaway Appliance*, Which? News, 2015, *www.which.co.uk/news/2015/06/are-washing-machines-built-to-fail-406177,* 23.09.2019.

[30] *Tatum*, 2011 U.S. Dist. LEXIS 32362. Another case in which planned obsolescence was discussed in dissent is not relevant to the current analysis because it involved the assessment of property; further, this case involved an unpublished opinion and under Michigan Court of Appeals Rules, has no precedential value. *See* Danse Corp. v. City of Madison Heights, No. 215486, 2001 Mich. App. LEXIS 1058, p. 1 (Ct. App. Mar. 23, 2001).

[31] *See Tatum*, 2011 U.S. Dist. LEXIS 32362, p. 2.

[32] *Ibidem*.

ducts durability and reliability is not a misrepresentation by placing the failure of the braking system in the context of the automobile as a whole. Since it is a single component of many in the vehicle, then braking failure does not contradict the claim of durability and reliability.[33]

Unfortunately, the court granted summary judgement determining that there was not a sufficient factual record to decide the case on its merits. However, in dictum, the court addressed the issue of planned obsolescence as the basis for a claim, but dismissed the idea out of hand: "Planned obsolescence, either deliberately or accidentally engineered, is not actionable, and if the brakes outlasted their sales warranty even by a day or a mile, there would be nothing rising to the level of a design flaw for Defendants to warn of."[34] Thus, the court equates planned obsolescence with the express warranty: as long as the product works properly during the period of the warranty, then any planned obsolescence that results in failures soon after the expiration of the warranty is not actionable. The court goes further by reasoning that there is no claim in products liability for defects of design since there is no such patent defect if the product lasts through the warranty period. This is an unusually narrow interpretation of products liability.

Europe has been equally slow in responding to the issue of product durability and the problem of planned obsolesence. However, more recently, the problem has taken on a higher profile and there is a trend to combat the problem. The first, indirect references are found in environmental directives and regulations that address the issue of reducing waste in general. Examples include the Waste Electrical and Electronic Equipment Directive[35] and the Waste Framework Directive.[36] Others, such as the Ecodesign Directive[37] and the Energy Labelling

[33] As to the claims of misrepresentation durability and reliability in Chrysler's advertisements, the court suggests that "to the extent that any warranty of reliability and durability could be teased from the advertising, durability and reliability may be based on multiple factors, not just one element of the car, albeit a vitally important one. Absent specific claims as to the braking system, Defendant's general advertising was puffery [hyperbole] as that is understood in the law." *Ibidem,* pp. 13–14.

[34] *Ibidem,* p. 10.

[35] *See* Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on the Waste Electrical and Electronic Equipment (WEEE), 2003 O.J. (L 37) 24.

[36] *See* Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives, 2008 O.J. (L 312) 3.

[37] *See* Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Related Products, 2009 O.J. (L 285) 10.

Directive[38] are aimed to provide consumers with information on ecologically relevant information to allow for informed decision-making by buyers interested in purchasing eco-friendly products.

More importantly, warranty law has been recognized as a vehicle for combatting planned obsolesence and waste through greater product lifespans. The European Economic and Social Committee (EESC) adopted an opinion on planned obsolescence.[39] The EESC referred to planned obsolescence broadly as "a form of industrial production that relies on a minimum renewal rate for its products," leading to consumer abuse.[40] The committee highlighted different advantages of sustainable production, ranging from positive influences on the environment to greater economic innovation.[41] With respect to guarantees (warranties), the EESC suggested an enhanced system to "curb . . . out the most flagrant cases."[42] The Committee suggested that greater sustainability could be achieved by the introduction of "a minimum operating period, during which the cost of any repairs should be borne by the producer."[43]

The initial work by the EU Commission and the EESC was followed by additional investigations by other European institutions and committees aimed at evaluating ways to ensure product durability and to improve the disclosure of information with respect to product lifetimes. The Influence of Lifespan Labelling on Consumers Study (2016 EESC Study) concluded that the introduction of lifespan labeling would likely have a positive effect in terms of the purchase of sustainable products.[44] First, a significant number of consumers would have an interest in obtaining information on product lifespans. Second, comprehensible information would increase the sale of sustainable products.[45]

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[38] *See* Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the Indication by Labelling and Standard Product Information of the Consumption of Energy and Other Resources by Energy-related Products, 2010 O.J. (L 153) 1, 2.

[39] *See generally Opinion of the European Economic and Social Committee and the Committee on "Towards More Sustainable Consumption: Industrial Product Lifetimes and Restoring Trust through Consumer Information",* 2013 O.J. (CCMI 112) 1.

[40] *Ibidem*.

[41] *Ibidem*, pp. 5–6.

[42] *Ibidem*, p. 1.

[43] *Ibidem*, p. 3.

[44] *ILLC Study: The Influence of Lifespan Labelling on Consumers*, Eur. Econ. & Soc. Comm. 2, 84 (Mar. 2016), www.eesc.europa.eu/resources/docs/16_123_duree-dutilisation-des-produits_complet_en.pdf, 23.09.2019.

[45] *Ibidem*, p. 2. "The results of the test show that lifespan labelling has an influence on purchasing decisions in favour of products with longer lifespans. On average, sales of products with a label showing a longer lifespan than competing products increased by 13.8%." *Ibidem*.

Warranty Law and Product Durability

The existing law that seems best suited for the task of increasing product durabilityis warranty law. It can be generalized that the idea behind every warranty regime is to guarantee that purchasers receive products of a quality, which they are reasonably entitled to receive.[46] In cases of planned obsolescence the purchaser receives a product that is not of the quality owed under the contract (fails to meet mutually agreed quality standards) or because the product fails to perform for the reasonably expected (implied) lifetime. The premature end of a product's lifetime, if regarded as substantial in nature, should be classified as a physical defect recognizable under warranty law.

As for the question of what purchasers may reasonably expect regarding the lifespan of a product, a two-staged approach is warranted. First, groups of comparable products need to be identified and a product group benchmark of durability developed to measure acceptable durability deviations (reasonable margin of tolerance). Parameters such as the product price, product presentation, and product design influence whether a respective product reaches the threshold of the reasonable expectation of durability. Second, significant deviations from expected lifespans that go beyond an acceptable range of tolerance should result in planned obsolescence being recognized as a material defect under warranty law.

Arguably the "simplest" strategy to maximize the potential of warranty law is to introduce longer or extended warranty periods. This approach can be found, for example, in Ireland and the United Kingdom, which adopted six year-warranty periods[47] and Sweden with a three year-period. Belgium has a prescription period of ten years,[48] limited to latent defects as defined by Article 1641 of the Belgian Civil Code.[49] Although some of these extended warranty periods

[46] This expectation may vary based upon the price charged, the state of the art in the given industry, and historical views of durability.

[47] Scotland, however, provides of a five-year period.

[48] Article 2262bis of the Belgian Civil Code.

[49] Note, for other cases of physical defects the purchaser can "only" refer to the narrower warranty scheme of Articles 1649bis-1649octies of the Belgian Civil Code that, in principle, implemented the CSD regime. For details see European Commission, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU – Country fiche: Belgium (2015)* 8 and Germany Trade & Invest, Gewährleistungsrecht Belgien (2015) 2, available at *www.gtai.de/GTAI/Navigation/DE/Trade/Recht-Zoll/Wirtschafts-und-steuerrecht/Produkte/Dienstleistungsrecht/Portal21/Laender/Belgien/Rechtsrahmen/Zivilrecht/gewaehrleistunsgrecht.html*, 23.09.2019.

were not originally directed at cases of latent defects, they should be of considerable help in attempts to regulate planned obsolescence.[50]

A greater impact on the problem of planned obsolescence can be seen in the revision of French law relating to latent defects – the "*garantie des vices caches*" (warranty for latent defects). This scheme is enshrined in Articles 1625 et seq. of the French Civil Code with a group of key provisions found in Articles 1641 to 1649. Under the basic rule of Article 1641, the seller has to warrant that goods are free from latent defects, which makes the purchased good unfit for the intended purpose or generally impairs the purchaser's reasonable expectation of usability.[51] If a physical defect can be classified as a latent defect in the meaning of Article 1641, purchasers may be in a better position to win a claim of planned obsolescence.

Article 7:23 of the Dutch Civil Code (*Burgerlijk Wetboek*) provide a purchaser-friendly rule. Studies point out that the Dutch system is particularly suitable to cover incidents of shortened product lifetimes, because it puts a greater emphasis on the importance of lifespans.[52] Products that do not reach a reasonably expectable lifetime are considered to be defective. The combination of the flexible warranty claim prescription period and the recognition of shortened product life spans as a defect benefits purchasers in cases of planned obsolescence. The European Consumer Centres Network (ECC-Net) characterizes the Finnish system as incorporating a "reasonably expectable lifespan" assessment tool, under which the Finnish Consumer Disputes Board has the competence to issue (non-binding) lifespan standard ranges for different product categories.[53] If a product falls significantly short of the applicable target, a warranty relevant (durability) defect, as in the case of the Netherlands, is presumed. It has to be added that the

[50] This understanding rests on the assumption that respective cases of not reaching reasonably expectable product lifetimes constitute warranty relevant physical defects.

[51] Article 1641 of the French Civil Code: "A seller is bound to a warranty on account of the latent defects of the thing sold which render it unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have given a lesser price for it, had he known of them". Translation by Georges Rouhette and Anne Rouhette-Berton available at *www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf,* 23.09.2019.

[52] See, e.g. ECC-Net, *Commercial Warranties* 17; European Commission, *Consumer market study on the functioning of legal and commercial guarantees for consumers in the EU – Final report* (2015) 22.

[53] ECC-Net, *Commercial Warranties* 17.

possibility to file a warranty claim itself lapses after three years from the objective detectability of the defect.[54]

PLANNED OBSOLESENCE FROM A WARRANTY LAW PERSPECTIVE

This Part offers a number of law reform recommendations that provide means to address the problem of product durability through changes in warranty law. The recommendations include: (1) extending limitation periods to accommodate delayed cases of planned obsolescence; (2) recognizing planned obsolesence as a latent defect under warranty law by introducing tailor-made period designs; (3) mandatory durability or lifespan disclosure requirements; (4) enactment of an implied warranty of durability; (5) prioritizing the remedy of repair over that of replacement, and (6) recognition of a consumer's right to repair.

Mandatory Product Warranty Periods

The problem presented by planned obsolescence is that the shortened lifespan of the product often appears after the running of the statute of limitations (limitation periods). This is because planned obsolescence is mostly latent in nature. It also because statute of limitations can be relatively short in length.[55] One approach is to simply extend the statutory warranty period based upon some expectation of product durability. Another approach is to recognize lack of durability as a latent defect in which the limitation period begins at the time of discovery. Planned obsolescence warranty relevant defects are constituted if products fail to perform for the reasonably expectable lifetime of a product. In this context, planned obsolescence should be recognized as a latent defect in the sense that they are not visible at the time of delivery, but manifest later, in many cases significantly later. An alternative approach, discussed in the next section, is to recognize a new warranty—the warranty of durability, which would not be disclaimable in a contract.

The manufacturer should be offered two defenses—state of art and disclosure of durability. Tort (delict) or products liability law recognizes the state of the art defense. There are two variations of the state of the defense—one asser-

[54] This solution follows the general prescription rule for contract based claims enshrined in Articles 5 and 7 of the Finnish Act on limitations on debts. Finnish law does not know a specific rule for warranty claims.

[55] The law of Pennsylvania limitation periods provides for two years for injury to person or property related to defects of products. Penn. Stat. Title 42 § 5524.

ting that the manufacturer followed "industry-wide standards to which the [manufacturer] had conformed" and the other arguing that the manufacturer could not have produced a safer durable product "within the current limits of scientific knowledge."[56] The start of art defense is most useful in the case of design defects. Planned obsolescence is often an outcome of a poor design, as well as the use of poor manufacturing materials or component parts.

The state of the art defense should be modified in cases of planned obsolescence. First, industry standards may allow for planned obsolescence, since the same incentive structure (creating a market for repair parts and increasing future sales of products to replace obsolescent products) often persist throughout the major manufacturers in a given industry. Second, the use of the current limits of scientific knowledge standard is a better fit for safety defects and not issues of durability. A more appropriate affirmative defense would require the manufacturer to show that it used an appropriate design and materials that would ensure a durable product (expected lifespan of a reasonable consumer). Cost constraints are often prohibitive in obtaining optimal durability. Thus, the standard is not absolute durability but reasonable durability.

Disclosing information regarding the durability of products can be considered as part of the solution. The idea of durability diverges between manufacturers and buyers mostly due to informational asymmetry. The manufacturer retains inside information of the durability of a product as engineered and produced. The buyer, working without such information, often expects that the product will function beyond the period of the manufacturer's planned obsolescence. In order to encourage manufacturers to disclose information on products' likely lifespans, a disclosure of durability defense should be recognized. Providing buyers with information on expected product lifetimes increases transparency and facilitates informed decision-making.

Implied Warranty of Durability

Previously, it was argued that planned obsolescence under normal circumstances could be regarded as part of warranty law. Usually parties do not explicitly integrate the expected lifetime in the contract. But the durability notion is widely considered to be an expression of implied quality standards at least in consumer sale (B2C) situations. Some jurisdictions–Armenia, Australia, the Canadian provinces of British Columbia and Quebec, Hong Kong, Mongolia and South Africa–

[56] James T. Murray, Jr., "The State of the Art of Defense in Strict Liability", *Marquette Law Review*, Vol. 57, 1974, pp. 649, 651, 652.

go one step further and explicitly list statutory durability parameters as warranty law relevant quality criterion. The laws correctly classify durability as within the scope of warranty law, by applying reasonable expected lifetime standards. The durability standards are recognized based on product group durability benchmarks that indicate reasonably expected product group lifetimes. If the lifespan of a product is not within an acceptable range of tolerance from such standards, durability shortfalls may result in a claim of breach of warranty.

Identifying product group benchmarks and defining acceptable ranges of deviation is admittedly a difficult task. But the Finnish example shows that it is possible. As discussed earlier, the Finnish Consumer Disputes Board has the competence to issue lifespan standard ranges for different product categories. If a product falls significantly short of the applicable target, a warranty relevant defect is assumed. The advantage of such an approach can be seen in its objectivity and comprehensiveness. Standard ranges set minimum durability limits. At the same time, however, they allow producers to design their products quite "autonomously" in the sense that falling short of the average durability of comparable products does not necessarily constitute a warranty defect. Defects are assumed only if the durability deviation is considered substantial and unacceptable.

Manufacturer's Duty to Repair

In order to prevent waste, the manufacturer-seller should be required to make a prompt repair of faulty products. Only after a good faith effort to make repair should replacement be used as a remedy. Most countries provide a menu of remedies or cascade remedial schemes. Repair and replacement enjoy priority over secondary remedies, in most cases over price reduction and rescission (termination). From an environmental perspective, the consequences of repair and replacement differ widely. The negative impacts of replacement on the environment outweigh those of repair. This is due to the fact that replacement creates considerably greater waste than does repair. Considering the differentiation in environmental or sustainability costs between repair and replacement, remedial schemes found in the United States and other countries should be reformed to prioritize the repair over replacement remedy.

Currently, the law at the EU level–Article 3(3) of the Consumer Sales Directive (CSD), and non-EU jurisdictions that follow the CSD, give the choice to the buyer to receive repair or replacement. It can be argued

that this is an improvement, because consumer choice overcomes the bargaining power disparities that previously allocated the choice to the seller. Under the American scheme the choice to repair or replace lies with the seller.

From an environmental perspective either solution (leaving the choice to the buyer or the seller) might not be the best possible solution. Environmentally friendly purchasers and sellers would be inclined to choose a resource-efficient way of bringing the defective good into contractual conformity by opting for repair instead of replacement. However, less environmentally friendly purchasers and sellers are likely to choose replacement despite a product being repairable. A better or more sustainable model would be to take the choice away from either party by obligating the seller to promptly repair. The content of such a model would include the use of replacement when repair is cost prohibitive, replacement after a maximum number of repairs have been reached, and a purchaser right to a temporary substitute product in cases of unduly long periods of repair.

In sum, even if it may be easier to replace a product, repair should be made the preferred remedy unless repair proves to be cost prohibitive or otherwise unreasonable.[57] Additionally, the law, especially where the product has been heavily used, could allow the seller to replace with refurbished goods. This would a more environmentally friendly form of replacement by reducing as waste (through reuse) and would increase the incentive to recycle obsolescent products.

Buyer's Right to Self-Repair

There are two distinct movements whose goal is to provide consumers a right to repair. One is embedded in consumer protection rationales. Consumers should be allowed to repair their own products rather than be forced to seek more expensive alternatives (higher costs of repair in manufacturer-certified repair shops or to purchase a new product). The parallel movement relates to sustainability goals of governments and international instruments aimed at reducing waste and pollution in response to climate change.

[57] Sustainability goals also require in cases of replacement that the manufacturer also be obligated to mine the goods being replaced for reusable materials. The idea of recognizing post-replacement obligations of a manufacturer has been suggested previously: "Extended Producer Responsibility (EPR) is a policy that shifts responsibility for collection and recycling of post-consumer goods from governments to producers." Conrad B. MacKerron, "Moving toward to Sustainable Consumption in Electronics Design, Production, and Recycling", *The Utah Environmental Law Review*, Vol. 31, 2011, p. 117.

In the area of consumer protection there is now a model law[58] recognizing a consumer's right to self-repair and the reciprocal duties of manufacturers. The four parts of the model law include: "(1) mandating disclosure of information that will allow repairs; (2) mandating the availability of parts and tools to facilitate repairs; (3) mandating disclosure of information to allow security protections to be reset; and (4) forbidding any contracting-around of such provisions in [contract] terms between authorized repair providers and the original equipment manufacturers."[59] Examples of designs that make self-repair difficult include affixed or glued batteries in electronic products and the Apple screw that prevents opening and repairing of Apple products with ordinary types of screwdrivers. In order to make self-repair possible, companies should be required to make available the manuals needed to effectuate self-repair, along with maintaining an inventory of repair parts.

From the perspective of warranty law, the right to self-repair has is relevant. The key point of intersection or conflict relates to classifying the lifetime-ending irreparability of a product as a planned obsolescence defect. As discussed earlier, planned obsolescence refers to cases in which the usability of a product is prematurely ended (as the result of a manufacturer's strategy). The question arises whether cases of irreparability fall under this definition. A parallel can be drawn from defining planned obsolescence as a latent defect. The latent defect is described as a product's failure to perform for a reasonably expected lifetime. Irreparability can be classified as planned obsolescence if it is, at least partially, the reason why a product did not meet expectable lifetime standards. However, irreparability itself cannot be regarded as warranty law relevant. Under warranty law, a product's failure to meet its expected product lifetime relates to the end of usability regardless of the question whether the defective product can be repaired or not. Hence, irreparability can be evidence of planned obsolescence, but in itself would not be a violation of current warranty law.

The question whether or not products are repairable could be treated autonomously in a warranty law context. This is particularly the case if it can reasonably be expected that a product is repairable. This is a separate issue than that of planned obsolescence. In this scenario it is not so much a question of defect due to durability than a question of irreparability. However, the simplest way to recognizing the right to self-repair is to incorporate it into warranty law. In sum,

[58] See Repair. Org., Legislative Template, *https://repair.org/s/Right-to-repair-Model-state-law-7-24-18.docx,* 9.01.2019.

[59] Leah Chan Grinvald, Ofer Tur-Sinai, "Intellectual Property Law and the Right to Repair", *Suffolk University,* Legal Research paper No. 19-4, p. 15, available at *http://ssrn.com/abstract=3317623*, 09.02.2019.

warranty law should be expanded to include protection against actual defects and a separate duty of reparability.

Circular Economy and Servitization

Ultimately, sustainability depends on the efficient use and re-use of sources and materials. A circular economy focuses on the dematerialization of the economy by the diminishment of dependency on scarce resources. This process involves numerous techniques and approaches to material use and the production of waste. Examples include the changing of perspectives from replacing the purchase of products with the sharing of products. The share economy allows people to share their homes (Airbnb) and to share rides (Uber). The next generation of sustainability products would involve the conversion from buying basic goods to sharing or leasing of goods. "Servitization" seeks to replace ownership of things with the leasing or sharing of things.[60] This would entail converting purchase contracts to service contracts. For example Phillips (lighting manufacturer) offers a program that instead of buying their light bulbs a company may enter into a service contract in which Phillips maintains, repairs, and replaces the company's lighting system.

Servitization incentivizes a manufacturing to make longer lasting products. When selling light bulbs a company is incentivized to limit their lifespans so as to generate additional sales in the future. In a service contract scenario, the incentives are reversed in that the company wants to reduce the costs of servicing by producing longer lasting bulbs. Another, type of dematerializing is to replace the common warranty of repair and replacement with a repair warranty. One suggestion would remove the buyer's right to demand repair or replacement and substitute it with a seller's right to repair. To bolster the ability to repair goods, law should require that the seller and its distributors maintain an adequate supply of repair parts for a reasonable period of time.

CONCLUSION

Many consumers are now motivated to seek out goods that were produced using environmentally friendly processes and that advance the goals of sustainability. For example, the EU Ecolabel criteria take a lifecycle approach that assesses he production cycle from the extraction and use of natural resources, the produc-

[60] Much of the material presented here was borrowed by a talk given by Prof. Dr. Evelyne Terryn, "Consumer Protection and Circular Economy," Research European Private Law Conference, Osnabruck, Germany, October 17, 2018.

tion process, the products lifecycle, the use of recycling of reusable materials, and methods to use any waste in a productive way.[61] Ultimately, sustainability depends on the efficient use and re-use of sources and materials. In addition, longer lasting products reduce the need for natural resources and decreases waste. From a consumer perspective, many products do not last as long as a purchaser may have reasonably expected. In recent years, environmental concerns linked to sustainable production and use of goods has intensified the planned obsolescence debate. Increasing the durability or functionality of products is a core sustainability goal.

This Report makes the argument that contract law and contracts can be used creatively to advances sustainability goals, whether in the private or public sectors. It reviews different types of contracts, such as government-to-government, government procurement, and private contracts. The Report also discusses the use of green building contracts. It recommends the greater use of sustainability clauses in public and private contracts. In the area of contract law it discusses the creation of an implied warranty of sustainability that promotes the sustainable production of goods and the recognition of planned obsolesence as a latent defect in warranty law to encourage the production of durable products.

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PRAVO NA ČISTO OKRUŽENJE: ULOGA UGOVORA I UGOVORNOG PRAVA

Rezime

U radu se analizira značaj ugovora i ugovornog prava za ostvarivanje ciljeva održivosti. Autor izlaže problem planiranog veka trajanja u slučaju kad prema nameri proizvođača proizvod ima kraći vek trajanja. Posebna pažnja posvećena je pitanju primene i izvršivosti klauzula o održivosti ugovora, sa stanovišta opštih pravila ugovornog prava. Uloga ugovora u unapređenju održivosti u radu je analizirana na različitim nivoima: u ugovorima između dve države – bilateralnim investicionim sporazumima, u javno-privatnim ugovorima (javna nabavka) i privatnim zelenim ugovorima stimulisanih javnom politikom i strategijom. U zaključnim delovima rada predložena su rešenja u pogledu problema planiranog veka trajanja, pri čemu se pravo po osnovu garancije ističe kao optimalno sredstvo zaštite potrošača.

Ključne reči: bilateralni investicioni sporazumi (BIT), cirkularna ekonomija, obaveza popravke, javna nabavka, zeleni ugovor, podrazumevana garancija trajnosti, planiran vek trajanja, pravo na (samo)popravku, održivost, pravo potrošača po osnovu garancije

[61] See European Commission, "Ecolabel for Consumers", available at *http://ec.europa.eu/environment/ecolabel/eu-ecolabel-for-consumers.html*, 23.09.2019.

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CONTRACT INTERPRETATION CONTRA PROFERENTEM ACCORDING TO THE CROATIAN OBLIGATIONS ACT

The aim of contract interpretation according to the Croatian Obligations Act is to ascertain and give effect to the common intent of the parties. This general principle informs contract interpretation in all circumstances, including the proper application of the contra proferentem maxim under Article 320(1) of the Croatian Obligations Act. The contra proferentem rule is a corollary of both the principle of good faith and the principle of party autonomy: when interpreting contractual language, one should resist possible attempts by the drafter to abuse his position so as to write the contract in a way which does not reflect the actual agreement of the parties. Nonetheless, the contra proferentem rule of Article 320(1) of the Obligations Act applies only when the following requirements are met: (a) the contractual term at issue is unclear, (b) the contract was prepared and proposed by one party and (c) the contract was made on the basis of a pre-printed form or otherwise involves the possibility of the drafter abusing his position to advance his own interests when drafting the contracts.

Key words: *contract interpretation, interpretation contra proferentem, Croatian Obligations Act*

INTRODUCTION

In most developed legal systems, the aim of contractual interpretation is to ascertain the common intent of the parties regarding the meaning of their contract. In order to assist the interpreter in achieving this purpose, many jurisdictions, particularly those belonging to the civil law family, codifyin their laws certa-

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in general canons of contractual interpretation. Under the approach prevailing in comparative law, these canons are not an end in and of themselves. They are merely interpretative tools that are applicable only insofar as they can assist courts or tribunals in ascertaining the common intent of the parties.

The purpose of this paper is to discuss one of such canons of interpretation, namely interpretation *contra proferentem,* according to the Croatian Obligations Act.[1] At the outset, the paper will identify and explain thegeneral principles of contract interpretation in Croatian law under Article 319 of the Croatian Obligations Act, as they are necessary to understand and properly apply Article 320(1) which deals with the *contra proferentem* doctrine. It will then address the meaning and purpose of Article 320(1) and take stock of its application in court practice.

The Croatian Obligations Act is largely based on the Yugoslav Obligations Act, which was adopted in 1978. While important amendments have been made in the Croatian Obligations Act, especially in the field of torts, its provisions are in many respects the same or substantially the same as those of the 1978 Obligations Act. Case law and scholarly writings developed under that Act may therefore be consulted when interpreting the Croatian Obligations Act.

This paper does not discusses the principles of contract interpretation under other statutes, such as the Consumer Protection Act,[2] which have precedence over the Obligations Act.

GENERAL RULES OF CONTRACTUAL INTERPRETATION

Article 319(1) of the Obligations Act: the "Clear Wording" Rule

According to Article 319(1) of the Obligations Act, "*contractual terms shall be applied as they read.*" This provision codifies the maxim according to which, where the language of a contractual term is clear,the term is not to be subject to interpretation ("*in claris non fit interpretatio*").[3]

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[1] *Narodne novine Nos* 35/2005, 41/2008, 125/2011, 78/2015, 29/2018.

[2] *Narodne novine Nos* 41/2014, 110/2015, 14/2019.

[3] Slobodan Perović, Dragoljub Stojanović, *Komentar Zakona o obligacionim odnosima*, Kulturni centar, Gornji Milanovac, Pravni fakultet, Kragujevac, 1980, vol. I, p. 354; Vilim Gorenc, *Komentar Zakona o obveznim odnosima*, RRIF, Zagreb, 2014, p. 509; Borislav T. Blagojević, Vrleta Krulj, *Komentar Zakona o obligacionim odnosima,* Vol. I, Savremena administracija, Beograd, 1983, pp. 313–314; Stojan Cigoj, *Komentar obligacijskih razmerij*, Vol. I, Uradni list, Ljubljana, 1984, p. 345.

While Article 319(1) of the Obligations Act does not expressly state that it applies only to clear terms, it emerges from the published decisions of Croatian courts that this is indeed how the provision is to be understood.[4]

Croatian courts view Article 319(1) of the Obligations Act as a corollary of the fundamental principle of party autonomy, codified in Article 2 of the Obligations Act: to interpret a contract contrary to its clear wording would be to substitute the parties' common intent with that of the interpreter.[5]

The "clear wording rule" of Article 319(1) of the Obligations Act has its counterparts in many developed legal systems. Among civil law jurisdictions in which such a rule applies, as a canon or maxim of interpretation, are for example, France and Germany.

The French *Cour de cassation* has developed a doctrine known as *clauses claires et précises*, according to which when written terms of a contract are "clear and precise" there is an irrebutable presumption that they reflect the intention of the parties.[6] As of 2016, when the Code Civil underwent a major reform, this doctrine has received legislative approval in France.[7]

Similarly, German courts have long applied the "unambiguity rule" (*Eindeutigkeitsregel*) according to which unambiguous terms are to be applied as they

[4] Supreme Court, Judgment No. Rev 698/2006-02, 26 July 2006; High Commercial Court, Judgment No. Pž 2531/05-4, 9 May 2007; High Commercial Court, Judgment No. Pž-2610/04-5, 28 August 2007; High Commercial Court, Judgment No. Pž-3825/05-3, 18 June 2008; High Commercial Court, Judgment No. Pž 4765/07-3, 5 September 2008; Supreme Court, Judgment No. Rev 1369/2007-2, 1 April 2009; Supreme Court, Judgment No. Rev 1422/2009-2, 18 May 2011; Supreme Court, Judgment No. Rev x 515/2011-2, 29 November 2011; Supreme Court, Judgment No. Revt 165/2011-2, 22 May 2012; Supreme Court, Judgment No. Rev x 179/2009-2, 24 October 2012; Supreme Court, Judgment No. Revt 47/2012-2, 9 April 2013; Supreme Court, Judgment No. Revt 133/2009-2, 26 June 2013; Supreme Court, Judgment No. Revt 107/2012-2, 18 September 2013; Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013; Supreme Court, Judgment No. Rev x 806/2013-2, 21 May 2014; Supreme Court, Judgment No. Revr 985/2012-2, 3 September 2014.

[5] "*Kada su riječi pisane isprave jasne, ne može se dokazivati da je volja sastavljača bila drukčija, jer se tumačenje jasnih ugovornih odredbi protivi pojmu i smislu tumačenja. Time bi bilo povrijeđeno osnovno načelo slobodnog uređivanja obveznih odnosa.*" High Commercial Court, Judgment No. Pž 2531/05-4, 9 May 2007; High Commercial Court, Judgment No. Pž 3825/05-3, 18 June 2008; High Commercial Court, Judgment No. Pž 4765/07-3, 5 September 2008. See Gorenc, op. cit., p. 509.

[6] The leading decision in this respect was the judgement of the Cour de Cassation in *Veuve Foucauld et Coulombe c. Pringault* of 15 April 1872. Cass. civ., 15 avr. 1872, DP 1872, 1, cited per *Droit & Patrimoine,* No 247, May 2015, p. 38**.**

[7] Article 1192 of Code Civil: "On ne peut interpréter les clauses claires et précises à peine de dénaturation." *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.*

read. According to the prevailing opinion, the rule is still applied by the German Supreme Court (*Bundesgerichtshof*) as well as the lower German courts.[8]

Article 319(2) of the Obligations Act: Ascertaining Common Intent

a) General. – Article 319(2) of the Obligations Act, like Article 319(1), reflects the fundamental principle of contractual interpretation of Croatian law: contracts are to be interpreted according to the common intentof the parties. According to Article 319(2), "*[w]hen interpreting controversial terms one is not to adhere to the literal meaning of the expressions used but rather to search for the common intention of the parties and understand the terms in a manner which complies with the principles of the law of obligations established by this Act.*"

The language of Article 319(2) corresponds almost literally to the relevant provisions of major civil law codifications.[9]

For example, §914 of the Austrian Civil Code (ABGB) provides as follows:

"When interpreting contracts one is not to adhere to the literal meaning of the expressions used but rather to search for the intention of the parties and understand the contract in a manner which complies with fair business practice."[10]

The German Civil Code provides in § 133:

"When interpreting a declaration of intent one is to search for the true intention and not to adhere to the literal meaning of the expression."[11]

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[8] BGH NJW 1984, 289, 290 ("*Voraussetzung für die Auslegung einer Willenserklärung ist deren Auslegungsfähigkeit. Bei absoluter Eindeutigkeit ist für eine Auslegung kein Raum*". (Krüger=Nieland-Zöller, in: RGRK, 12. Aufl., § 133 Rdnr. 5 m. w. Nachw. aus der Rspr. des BGH).") ["It is a requirement of any interpretation of a contract that the contract is apt for interpretation. In case of absolute clarity of a contract, there is no room for interpretation (…)"], BGH NJW 1996, 2648, 2650 ("*Auslegung setzt erst ein, wenn der Wortlaut einer Erklärung zu Zweifeln überhaupt Anlaß gibt*".) ["Interpretation can only begin when the wording of a contract raises any doubts about its meaning."], BGH NJW 2005, 2225, 2227 (*"Die Prüfung ergibt, dass die vom Ber Ger. angenommene Eindeutigkeit nicht besteht, so dass die Erklärungen der Parteien vom RevGer. selbst auszulegen sind.*") ["It is the assessment [of the Supreme Court] that the Court of First Instance was wrong in assuming clarity of the contract, so the Court of First Instance will have to interpret the contract."]**.** That the clear wording rule is, according to the prevailing opinion, still applicable in Germany is confirmed in the academic commentary. See, e.g., Palandt/Heinrichs/Ellenberger (75th ed.), § 133, para 6.

[9] See e.g. § 914 Austrian ABGB; §§ 133, 157 German BGB; Art. 18 Swiss OR; Article 1156 French *Code Civil*; Art. 1362 Italian *Codice civile*, Provisions of Civil Codes on Contract Interpretation.

[10] § 914 Austrian Civil Code (ABGB): *"Bei Auslegung von Verträgen ist nicht an dem buchstäblichen Sinne des Ausdrucks zu haften, sondern die Absicht der Parteien zu erforschen und der Vertrag so zu verstehen, wie es der Übung des redlichen Verkehrs entspricht"*.

[11] § 133 German Civil Code (BGB): *"Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften."*.

and in § 157:

"Contracts are to be interpreted in accordance with the requirements of good faith and in line with commercial usage".[12]

Article 319(2) of the Obligations Act differs from major codifications only in that it states that it applies to "*controversial terms*", and in that it refers to "*principles of the law of obligations established by this Act*", not to good faith or usages.

As it will be discussed below, these differences were not intended to create any distinctly Croatian (or, formerly, Yugoslav) solutions to the problems of contract interpretation. Rather, the principles of contract interpretation under Croatian law are the same as those prevailing in major civil law jurisdictions.[13]

b) Scope of Application of Article 319(2). – Article 319(2) of the Obligations Act applies, according to its letter, only to "*controversial*" terms. The Croatian Supreme Court has explained through its published decisions, that this expression is to be interpreted as meaning *"unclear"*terms.[14] For example, in a decision of 10 October 2013, the Supreme Court found that "*the contract does not contain any unclear clauses that need to be interpreted in accordance with [Article 99, para. 2] of the Croatian Obligations Act*" and applied Article 319(1) to the effect that the contract is to be applied as it reads even though the parties disagreed over its meaning.[15]Therefore, a mere controversy between the parties regarding the meaning of a term does not render Article 319(1) of the Obligations Act inapplicable.

c) Establishing Common Intent. – In general terms, the primary aim of interpretation under Article 319(2) of the Obligations Act is to establish the *subjective* common intent of the parties. Since in practice, however, subjective intent (a "meeting of the minds") hardly ever can be established with certainty, the analysis usually relies on an *objective* test – that is, what a reasonable person knowing the relevant circumstances in which the contract was concluded would have under-

[12] § 157 German Civil Code (BGB): "*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*"

[13] The only systematic commentary specifically on the Croatian law of obligations explains that the rules of contract interpretation under Article 319 of the Croatian Obligations Act are the same as those applicable in major civil law codifications such as the Austrian, German, Swiss and Italian ones, Gorenc, op. cit., p. 510.

[14] Supreme Court, Judgment No. II Rev 152/1994-2, 22 November 1994; Supreme Court, Judgment No. Rev 1076/1999-2, 3 July 2002; Supreme Court, Judgment No. Revr 80/2006-2, 9 January 2008; Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013; Supreme Court, Judgment No. Revt 192/2011-2, 8 January 2014. Compare to: Supreme Court, Judgment No. Rev 2429/1994-2, 27 July 1994.

[15] Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013.

stood the agreement of the parties to be. When applying the objective test, the goal is to establish *actual intent*, albeit by objective means, and not to explore the hypothetical intent of the parties.[16]

In ascertaining what a reasonable person would have understood the common intent of the parties to be, the interpreter will rely, as a starting point, on any written contract terms and analyse their language and their place in the context of the entire contract. When Article 319(2) of the Obligations Act instructs the interpreter "not to adhere to the literal meaning of the expressions used" and to search for the common intent of the parties, it does not require the interpreter to disregard the text of the contract. Indeed, the text usually remains the best evidence of the common intent of the parties. The clearer the text, the easier it is for the interpreter to ascertain the common intent.[17]

Where doing so is necessary to understand the meaning of the terms, the interpreter will consider such text and context in light of extrinsic considerations (such as the purpose and nature of the transaction, the circumstances in which the contract was concluded, the negotiations leading to the contract, the subsequent conduct of the parties, the prior dealings between them, commercial usages, etc.).

As part of the search for common intent, Article 319(2) of the Obligations Act requires the interpreter to "*understand the terms in a manner which complies with the principles of the law of obligations established by this Act.*" Under this provision, when there are several possible meanings of a contractual term, the interpreter is to opt for one that is consistent with the principles of the law of obligations rather than one that is not. For example, if due to a typing error the buyer's offer indicates a price ten times higher than one which had been actually negotiated, it would be contrary to the principle of good faith (Article 4 of the Obligations Act) for the seller to rely on the erroneous language and claim the higher price. An understanding consistent with the principle of good faith is that the price was the one referred to in the negotiations (as demonstrated through contemporaneous documentation or other evidence).

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[16] Hypothetical intent of the parties may be relevant in the process of interpretation only as part of gap-filling. When the parties have not contemplated a certain issue when negotiating the contract, courts may inquire what terms the parties would have reasonably agreed upon under the circumstances had they contemplated that issue. Given that gap-filling is not of concern in the present case, the search for hypothetical intent is not discussed further in this paper.

[17] Claus-Wilhelm Canaris, Hans Christoph Grigoleit, "Interpretation of Contracts" in: Hartkamp et al. (eds), *Towards a European Civil Code* (2011), p. 596; Stefan Vogenauer, "Interpretation of Contracts: Concluding Comparative Observations", in: A. Burrows, E. Peel (eds.), Contract Terms (2007), Oxford Legal Studies Research Paper No. 7/2007, p. 11.

It is important to note that under Article 319(2) of the Obligations Act, the principles of the law of obligations do not govern the legal relationship of the parties as such. They are used only as a yardstick in establishing common intent. This follows in particular from the phrase contained in Article 319(2) "to *understandthe terms* in a manner which is in accordance with" those principles. Article 319(2) of the Obligations Act does not allow the interpreter to substitute the terms actually agreed between the parties with the interpreter's own understanding of what terms would best fulfil the principles of the law of obligations or what terms would be fair under the circumstances. Doing so would be inconsistent with the nature of the process of contract interpretation and contrary of the principle of party autonomy.

Article 319(2) of the Obligations Act refers to the principles of the law of obligations established by the Obligations Act as a whole. It does not require that the parties' declarations in each case be measured against each individual principle of the law of obligations codified in the Obligations Act. Such a mechanical approachwould defeat the purpose of Article 319(2) of the Obligations Act. The interpreter should first inquire what possible meanings the parties, as a matter of fact, could have reasonably attached to a term and then, if any of the meanings is incompatible with the principles of the law of obligations, establish that the parties likely did not intend the contractual term to have that meaning.

ARTICLE 320(1) OF THE OBLIGATIONS ACT: INTERPRETATION AGAINST THE DRAFTER

According to Article 320(1) of the Obligations Act, *"[w]here a contract is concluded on the basis of a pre-printed content, or where a contract was otherwise prepared and proposed by one contracting party, any unclear term shall be interpreted in favour of the other contracting party"*.

The provision codifies the maxim that ambiguities are interpreted against the drafter, that is, the maxim *contra proferentem*. The provision is a corollary of the principle of good faith: a party should not be able to abuse its position as the drafter by concealing into the contractual language a term to which the other party reasonably had no opportunity to object. The *contra proferentem* rule is also a function of the principle of party autonomy; when interpreting contractual language, one should resist possible attempts by the drafter to use his position to write the contract in a way which does not reflect the actual agreement of the parties. The rule therefore does not contradict the principle of interpretation according to common intent, but is, like other canons of interpretation, an instrument of its implementation.

When applying the *contra proferentem* rule, one should take into account that, as a matter of policy, contract law should not discourage parties from recording their agreements in writing. If, as a matter of principle, contracts were to be interpreted against their drafters, nobody would agree to draft contracts. By the same token, if the non-drafting party could always benefit from an interpretation of the contract in its favour, parties would have no incentive to participate and cooperate in contract drafting. The *contra proferentem* rule, therefore, should not be applied beyond its purpose. It should rather be applied to prevent parties who, due to their bargaining power or dominant position, control the drafting of the contract, from using ambiguous expressions in order to achieve their own interests.

For those reasons, the application of Article 320(1) of the Obligations Act is subject to significant limitations which are explained below.

Scope of Application of Article 320(1)

The first limitation is that, according to its express language, Article 320(1) of the Obligations Act applies only to "unclear terms". Published jurisprudence of Croatian courts indicates that courts have consistently refused to apply Article 320(1) of the Obligations Act to clear contractual clauses.[18]

As explained in the context of Article 319(2), no party can unilaterally choose, by merely raising an issue with the meaning of a term, which provisions of substantive law govern contract interpretation. If that were allowed, Article 320 of the Obligations Act, which according to its title applies only in "Specific Cases", would be applicable whenever there is a dispute between the parties over the meaning of a term. It would, in other words, apply in all contract interpretation cases. An exception would thus become a general rule.

Article 320(1) of the Obligations Act applies only to terms that are objectively unclear. As with respect to Article 319(1), the mere fact that there is a dispute between the parties over the meaning of a term does not render Article 320 (1) applicable. In all the published cases on Article 320(1) of the Obligations Act which involved a clause that the courts considered to be clear, the courts refused

[18] High Commercial Court, Judgment No. Pž 1370/93, 15 June 1993; Supreme Court, Judgment No. Rev 1076/1999-2, 3 July 2002; High Commercial Court, Judgment No. Pž 260/06-3, 22 October 2008; Supreme Court, Judgment No. Rev x 528/2010-2, 22 September 2010; High Commercial Court, Judgment No. Pž 4915/2008-4, 3 May 2012; Supreme Court, Judgment No. Revt 107/2012-2, 18 September 2013; Supreme Court, Judgment No. Revt 89/2009-2, 10 October 2013; Supreme Court, Judgment No. Revt 192/2011-2, 8 January 2014.

to apply the provision, even though the parties were in dispute over the meaning of the clause.[19]

Contract "Prepared and Proposed" by One Party

For the *contra proferentem* rule to apply, Article 320(1) of the Obligations Act expressly requires that the contract is "prepared and proposed by one contracting party." Where all the parties participated in the drafting process, interpretation *contra proferentem*is inappropriate.[20] This will be the case, for example, when the parties exchanged drafts and were able to, and did, propose changes to the contract.

It occurs in practice that when a party drafts some but not all contract clauses, the other party contends that those clausesare to be interpreted against that party. To employ *contra proferentem* interpretation in such cases would be contrary to the clear language of Article 320(1) of the Obligations Act, according to which the provision applies when a party prepared and proposed the contract as a whole. When some contractual clauses written by one party and others by the other, it would be commercially untenable to interpret each clause against its own drafter. Such an approach to contract interpretation would result in discouraging parties from cooperating with each other to draft contracts. A non-drafting party who notices ambiguities in a draft contract would have no incentive to communicate them to the drafting party. Such an approach would also encourage litigation over whether a particular term of the contract was drafted by one or the other party. Thus, as clearly stated in Article 319(1) of the Obligations Act, the *contra proferentem* rule is applicable only when one of the parties "prepared and proposed" the contract as a whole.

On proper interpretation of Article 320(1), the *contra proferentem* maxim cannot apply where the contract as a whole was prepared by a person or an entity who is not party to the contract (such as e.g. in the case of FIDIC general conditions).

Application Only in Cases of Abuse

Published judicial decisions indicate that Croatian courts view Article 320(1) as applying primarily to contracts concluded on contract forms or on

[19] See previous footnote.

[20] The Gorenc commentary expressly states that when "both parties participated in the drafting of the contractual terms", interpretation is governed by Article 319, not by the *contra proferentem* rule of Article 320, paragraph 1 of the Croatian Obligations Act. V. Gorenc, op. cit., p. 511.

standard terms used by one of the parties.[21] Outside that context, courts have only considered the application of the principle when the drafter was in a dominant position with respect to the other party (e.g., in employment contracts).[22] Yet, even in those cases, the *contra proferentem* rule was found to be inapplicable when the contract was individually negotiated between the parties.[23]

It is submitted that there is merit to such a restrictive approach to the application of the *contra proferentem* maxim. Article 320(1) expressly uses pre-printed contracts as an example of a proper use of the *contra proferentem* principle. In accordance with the *ejusdem generis* method of interpretation, and the exceptional nature of the *contra proferentem* maxim, Article 320(1) should properly apply in scenarios comparable to the use of pre-printed contracts. It would be consistent with the purpose of Article 320(1) of the Obligations Actto limit its application to such cases, because they involve the potential for an abuse by the drafter of its position vis-à-vis the other party. For that reason, the rule should apply primarily when the contract is concluded on a pre-printed form or represents a standard set of terms used by one of the parties without scope for amendment. In other words, Article 320(1) should be applied primarily to contracts of adhesion.

According to academic commentary, even in the context of adhesion contracts, the *contra proferentem* rule applies only as a rule of last resort, if the interpreter cannot establish the common intent by other means.[24] Having in mind the nature and purpose of the maxim, it is appropriate to resort to *contra proferentem* only in the cases where the ambiguous terms are inaccessible, opaque or incomprehensible to such an extent that it is appropriate to infer that the drafter reasonably could have included them in the expectation that the other party would not be able to notice them or understand their proper meaning.

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[21] High Commercial Court, Judgment No. Pž 1682/93, 23 November 1993; High Commercial Court, Judgment No. Pž 6479/05-5, 23 December 2008; Supreme Court, Judgment No. Revt 192/2011-2, 8 January 2014 (bank guarantee); High Commercial Court, Judgment No. Pž 7283/04, 14 September 2005 (insurance policy)..

[22] Supreme Court, Judgment No. Revr 580/2011-2, 8 January 2013.

[23] County Court Zagreb, Judgment No. Gžr 814/2010-2, 17 December 2012; High Commercial Court, Judgment No. Pž 3825/05-3, 18 June 2008.

[24] S. Perović, op. cit., p. 355; V. Gorenc, op. cit., p. 511. This approach is consistent with the understanding of the *contra proferentem* maxim in the classical period of Roman law. In that period, resort to that rule was considered appropriate only if it was impossible to otherwise ascertain the common intent ("*id quod actum est*"). D. 18.1.33. Pompon 33; "*[P]rimum spectari oportet, quid acti sit; si non id appareat, tunc id accipitur, quod venditori nocet: ambigua enim Oratio est.*" See Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition,* Juta&Co, Cape Town, 1990, p. 640.

These considerations apply with even greater force to individually negotiated contracts. Having in mind the purpose of the *contra proferentem* rule, and the requirement of abuse, scenarios where the rule can apply in the context of an individually negotiated contract are difficult to imagine. Here's an example:

> A homeowner negotiates the sale of his home with a buyer who is an attorney experienced in property law. In order to save on legal costs, the homeowner, relying on the buyer's expertise and trusting that the buyer will act in good faith, agrees that the buyer prepares the text of the sales contract. Using ambiguous language and multiple cross-references within the text of the contract, the buyer inserts onerous terms which the seller, without legal advice, cannot notice and properly understand. If the seller signs the text proposed by the buyer, it is proper to find that, although the contract was not one of adhesion, the buyer abused his position as a drafter and that the ambiguous terms should be interpreted against him.

Even in exceptional scenarios, such as the above example, the *contra proferentem* rule ought not to apply to clauses over which the parties specifically negotiated. If an ambiguous clause was specifically the subject of communications between the parties during negotiations, this means that each party had a reasonable opportunity to contemplate on the meaning of the clause and was in the position to decide whether or not to agree to it. To interpret the clause in such cases against the drafter would be contrary to the principle of party autonomy and common intent.

These considerations apply with even more force with regard to contracts negotiated between commercial entities. It is submitted that the potential for the application of the *contra proferentem* to such contracts requires a nuanced approach which leaves little room for the application of the maxim. It may be possible, subject to the above requirements, to properly give effect to this rule in cases of adhesion contracts which involve a disparity in the expertise or bargaining power between the offeror and the offeree. For example, an insured commercial entity may in some cases reasonably expect to be able to invoke Article 320(1) against the insurance company which prepared the general terms of the insurance policy. On the other hand, it would be wrong to apply the *contra proferentem* rule to a set of special conditions to a construction contract prepared by the employer, given that contractors who bid on such contracts must be expected to have the expertise needed to understand and apply them. In line with the above considerations, with respect to contract terms over which commercial parties have specifically negotiated the rule ought not to be applied at all.

CONCLUSION

The aim of contract interpretation according to the Croatian Obligations Act is to ascertain and give effect to the common intent of the parties. This general principle informs contract interpretation in all circumstances, including the proper application of the *contra proferentem* maxim under Article 320(1) of the Obligations Act.

The *contra proferentem* maximis a corollary of the principle of good faith: a party should not be able to abuse its position as the drafter by concealing into the contractual language a term to which the other party reasonably had no opportunity to object. The contra proferentem rule is also a function of the principle of party autonomy; when interpreting contractual language, one should resist possible attempts by the drafter to use his position to write the contract in a way which does not reflect the actual agreement of the parties. The rule therefore does not contradict the principle of interpretation according to common intent, but is, like other canons of interpretation, an instrument of its implementation.

Article 320(1) of the Obligations Act applies only when the following requirements are met: (a) the relevant contractual term is unclear, (b) the contract was prepared and proposed by one party and (c) the contract was made on the basis of a pre-printed form or otherwise involves the possibility of the drafter abusing his position to advance his own interests when drafting the contracts.

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TUMAČENJE UGOVORA CONTRA PROFERENTEM PREMA HRVATSKOM ZAKONU O OBVEZNIM ODNOSIMA

Rezime

Cilj tumačenja ugovora, prema hrvatskom Zakonu o obveznim odnosima, jeste da se utvrdi ono značenje neke ugovorne odredbe koja odgovara zajedničkoj volji ugovornih strana. Ovo opće načelo uređuje tumačenje ugovora u svim okolnostima, uključujući i onda kada se radi o pravilnoj primjeni pravila contra proferentem prema čl. 320(1) Zakona o obveznim odnosima, tj. pravila o tumačenju ugovora na štetu one strane koja ga je sastavila. Pravilo contra proferentem izvodi se, s jedne strane, iz načela savjesnosti i poštenja, a s druge, iz načela stranačke autonomije: pri tumačenju neke ugovorne odredbe, potrebno je spriječiti pokušaje sastavljača ugovora da zloupotrijebi svoj po-

ložaj tako da sastavi ugovor na način koji ne izražava stvarni sporazum ugovornih strana. Ipak, pravilo contra proferentem, iz čl. 320(1) ZOO, s obzirom na njegov tekst i svrhu, primjenjuje se samo pod sljedećim strogim pretpostavkama: (a) ugovorna odredba je nejasna, (b) ugovor je pripremila i predložila jedna ugovorna strana, i (c) ugovor je sastavljen na unaprijed tiskanom sadržaju ili na drugi način pretpostavlja mogućnost da će sastavljač zloupotrijebiti svoj položaj kako bi nametnuo svoj interes pri sastavljanju ugovora.

Ključne riječi: tumačenje ugovora, tumačenje contra proferentem, hrvatski Zakon o obveznim odnosima

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THE ENFORCEABILITY OF SMART CONTRACTS

The development of new technologies has different effects on the existing law. Smart contracts are one of the forms of the new technologies that questions the application of the traditional contract law on commercial transactions using smart contracts. In that context, the enforceability of contractual transactions concluded in the form of smart contracts represent one of the major legal questions. Moreover, the question is whether the existing English contract law needs to be modified in order to secure the enforceability of smart contracts. These issues will be, accordingly examined in this paper with the aim to understand better the relationship of the traditional contract law, on the one side, and, smart contracts, on the other side.

Key words: *smart contracts, contract law, disruption, new technologies, AI, enforceability*

INTRODUCTION

In the recent years, businesses have started increasingly applying smart contracts for a number of diverse commercial transactions. In that context, the principal legal question is whether commercial transaction concluded through the smart contracts will be enforceable before the court. The main legal issue herein is

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to understand the relationship between the smart contracts, on the one side, and traditional contract law, on the other side.

Therefore, the main objective of this paper is to contribute to the explanation of that relationship in order to understand whether smart contracts are, from the perspective of the traditional contract law, enforceable. This topic has recently attracted a lot of attention in the United Kingdom and this paper will focus on the enforceability of smart contracts under the English law. In that sense, it will be useful to see how common law, as traditionally more business focused and commercial friendly system of rules, respond to the application of the new technologies in commercial transactions.

THE EXPLANATION OF SMART CONTRACTS

When discussing smart contracts, the first question to touch upon is the terminology and the meaning of the term. The question is whether smart contracts are really contracts at all where a smart contract is just a type of contract. In the existing scholarship, there is a tendency to draw dichotomies and lament vague and confused nomenclature or point out that the notion "smart contract" is actually a misnomer, that smart contracts are neither smart nor that they are contracts, which seems to be true. It has been remarked that "Smart Contract" is an ironic and unfortunate misnomer, and it would be better off being referred to as 'an "automated transaction manager" or "ATM", but that… has already been taken'.[1] Likewise, the mainstream thinking about smart contracts is substantially questioned, and (one may argue) rightly urges restraint in proclaiming Smart Contracts as the panacea to all inefficiencies of the legal system, rendering Law, or particularly Contract Law, obsolete. The same authors continue by pointing out how people confuse Blockchain technology with Smart Contracts and vice versa, forgetting that conceptually the two are independent of each other.[2]

Pardolesi and Davola argue that "[a]ll topics [of interpretation, arbitration, liability etc], nonetheless, deserve attention *only* if we believe that a smart contract is, at the very end, a (type of) contract: if, on the contrary, they represent mere tools susceptible to be encompassed within the (traditional) contractual practice – as part of legal scholarship defends –, then all these questions are devo-

[1] Jeffrey M. Lipshaw, "Persistence of 'Dumb' Contracts", *Stanford Journal of Blockchain Law & Po*licy, Vol. 2, 2019, p. 12, available at SSRN at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202484, 25.09.2019.

[2] Roberto Pardolesi, Antonio Davola, "What is Wrong in the Debate About Smart Contracts", *Luiss Guido Carli University Working Paper*, 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339421, 25.09.2019.

id of their primary foundations".[3] This is especially relevant in context of the above question, casting doubt on the understanding of the concept. If we are to believe that writing contract terms in code is a mere method of streamlining the performance of contracts, then the code itself will not have to be enforceable (as it will always be pegged to some other, at least implied, contract). It is submitted that, all in all, Smart Contracts, potentially will be a type of contract, rather than just an automation of contractual performance.

What seems to be the case is that legal contracts will require, at least for the near future, a blend between code and natural language.[4] These ties in with the previous point about Smart Contracts being a method of performance of parts or entire commercial transactions, rather than a contract. Together they lead to an *ad hoc* answer to the question: smart legal contract can be enforceable when it is a part of an otherwise enforceable and valid natural language contract, imposing a method of performance. That much seems obvious. If two parties agree on a method of performance the court is extremely unlikely to invalidate such a clause because it pertains to an automated coded method.

Some commentators go as far as to claim that 'smart contracts' are merely computer programmes that parties use to perform their contracts not agreements or contracts.[5] Allen's view is a riposte to the critique laid out by Pardolesi et al. arguing that: 'there is no barrier to a single instrument, written in formal language [i.e code], embodying both the contract as such and its automated mechanism of performance'[6].

Not only then is there wide divergence in views, but in terminology itself. United Kingdom JT defined "smart *legal* contracts" as 'a smart contract capable of giving rise to binding legal obligations, enforceable in accordance with its terms'; It seems more likely to understand smart contracts as a combination of the 'smart contract code' and traditional legal language in juxtaposition to a smart contract which is 'computer code'.[7]

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[3] *Ibidem*, p. 6.

[4] Mateja Durovic, Andre Janssen, "The Formation of Smart Contracts and Beyond: Shaking the Fundamentals of Contract Law?", 2018, p. 24, available at https://www.researchgate.net/publication/327732779_The_Formation_of_Smart_Contracts_and_Beyond_Shaking_the_Fundamentals_of_Contract_Law, 25.09.2019.

[5] Pierluigi Cuccuru, "Beyond Bitcoin: An Early Overview On Smart Contracts", *International Journal of Law and Information Technology*, Vol. 25, No. 3, 2017, pp. 179, 185.

[6] J.G. Allen, "Wrapped and Stacked: "Smart Contracts" and the Interaction of Natural and Formal Language" (2018) 14(4) ERCL 307, available on SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3297425>, (n), pp. 2–3.

[7] M. Durovic,A. Janssen, p. 5.

Cenkus Law instead posited that a 'smart legal contract' is: 'a particular application of that type of code [a smart contract]…used to form an organization… used to run an application or it can be used… to actually facilitate a binding legal agreement'.[8] Differently still, Madir argued that they are 'functionally made up of pieces of smart contract *code*, but critically under the umbrella of an overall relationship that creates legally enforceable rights'.[9] Hence, while everyone postulates for clarity in definitions that is far from true, complicating vastly the actual task of consensus.

As to 'pure' smart contracts – contracts fully in code the position is more difficult. 'smart [legal] contracts can, in principle, fulfill the requirements for the formation of contracts, and the problems are not unbridgeable'.[10] It should be pointed out that smart contracts are capable, by virtue of the flexibility and adaptability of the English contract law, and the very process of their formation, be capable of being formed as legally valid contracts, and thus truly "contracts".

There is a strong discrepancy when it comes to the views of the legal scholars on enforceability range from 'business as usual to predicting the end of contract law'.[11] In principle, it is still unlikely that an otherwise valid and enforceable contract would be deemed ineffective merely because expressed in code. This would be also contrary to the fundamental principle of freedom of contract under English law which entitles also freedom to choose any kind of form for contractual relationships.

There are perhaps a couple of nuances and caveats that should be made. Allen usefully remarked that:[12]

We do not need imagine two stateless castaways swapping fish for coconuts on the high seas to accept the basic proposition that while economic activity nestles within the substrate of a legal system, where one exists, it can also thrive outside the law. Trying to understand smart contracts, and how they might change the contract law of the future, is therefore not an exercise best undertaken from a perspective that puts national law indicia in the foreground. Given the fundamental challenges that Internet-based commerce

[8] Cenkus Law, 'Smart Legal Contracts: Explanation and Enforceability', available at: https://cenkuslaw.com/smart-contracts-explained-legally-binding/, 25.03.2018.

[9] Jelena Madir, "Smart Contracts: (How) Do They Fit Under Existing Legal Framework", p. 3, available on SSRN at: https://poseidon01.ssrn.com/delivery.php?ID=44 ... 104&EXT=pdf, 25.09.2019.

[10] M. Durovic, A. Janssen, p. 17.

[11] J.G. Allen, 'Wrapped and Stacked: "Smart Contracts" and the Interaction of Natural and Formal Language' (2018) 14(4) ERCL 307, available on SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3297425>, 1-2

[12] *Ibidem*, p. 11.

poses for the system of territorial-based jurisdiction as a whole, it seems disingenuous to deny at the outset that a trans-national body of norms might arise to regulate trans-national ecommerce and e-finance.

Therefore, a criticism has been made of the approach that faces off the fundamental elements of a contract in a given jurisdiction ("indicia") with the elements of a smart legal contract. It should however be noted that in answering the question in what circumstances a smart legal contract is capable of giving rise to enforceable legal obligations one has to consider the "indicia" of English contract law. Hence, the conclusion reached about the individual elements of a valid contract remains pertinent and is a strong argument in favour of perceiving smart legal contracts as valid contracts in Contract law's eyes.[13]

Perhaps we need to remind ourselves that 'the use of binary codes to incorporate and computerize parts of a contract is not a brand-new phenomenon: for example, the usage of electronic format to digitally communicate was already diffused in the product chain before internet and e-commerce got massively exploited through EDI (electronic data interchange) technologies',[14] and that 'A blockchain or distributed ledger is similar to any other IT-based message platform used to agree on transactions. Courts have already accepted that the exchange of the email messages can give rise to legally binding contracts in many jurisdictions. Automated performance is common in equities markets and algorithm trading. Existing contract laws (including e-commerce laws), therefore, may in many instances suffice in the case of the formation of smart legal contracts'.[15]

The broad consensus seems to be that 'pure' Smart Contract (a piece of computer code that encompasses all elements of the parties agreements and is self-standing and independent of any natural language document) *can* be a legally enforceable contract – if both parties have transparency and clarity (had understood, had time to consider and decided to enter into such an arrangement) as to what the code entails, the computer logic encoded in the Smart Contract, then they can be bound by the outcomes (including, in theory, other subsequent arrangements entered into by the Smart Contract autonomously), provided that the elements of the contract such as offer, acceptance, consideration and in-

[13] M. Durovic, A. Janssen, p. 24.

[14] R. Pardolesi, A. Davola, p. 17

[15] US Chamber of Digital Commerce, "Smart Contracts: Is the Law Ready?", p. 35, available at: https://digitalchamber.org/smart-contracts-whitepaper/, 25.09.2019 (hereinafter: US Chamber of Digital Commerce).

tention to create legal relations are present.[16] Thus we again return to the issue of offer, acceptance, consideration, intention to create legal relations and capacity. That these elements are capable of being satisfied using in a normal smart legal contract formation procedure seems to be undisputable.

Another point is that contract law has to remain flexible to the changing commercial circumstances without the need for major revisions of principle: it had done so throughout times adapting to other forms of remote communication such as telex[17] or email[18]. Automated performance is commonplace in algorithm trading and equities markets.[19]T here's little reason to think that smart contracts will be different.[20] Under the English law, parties are free to agree their desired form of communication of acceptance[21], and so a cryptographic signature should be sufficient.

Furthermore, parties can even specify what kind of smart contract communication will constitute acceptance[22] – is it entering the external cryptographic key (more suitable for longer term contracts, where performance is some time in the future) or simply performance of the bargain – say uploading 10 Ether to the smart contract. Once the parties have validly and voluntarily entered into the initial contract, the Smart Contract can then enter the parties into additional contracts, which would bind the parties.[23] Any avoidance of doubt could be achieved by a requirement that prior to concluding a smart contract a user is asked to accept the natural language translation of the contract terms and communicate his consent (by clicking 'I agree').[24]

Such a conclusion is not accepted by some commentators. Gonzales et al. argued that Smart Contracts 'are not contracts in the legal sense' because the 'do

[16] Ashurst LLP, "Smart Contracts – Can Code Ever Be Law?", available at: https://www.ashurst.com/en/news-and-insights/legal-updates/smart-contracts---can-code-ever-be-law/, 25.09.2019 (hereinafter: Ashurst LLP).

[17] *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327, 333 (Denning LJ).

[18] For example: *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552, [9]-[12], [20] (Ward LJ).

[19] US Chamber of Digital Commerce, p. 35.

[20] Colin Adams at Research Institute, 'Smart Contracts, Part 2: The Legality', Hackernoon, 2018.

[21] *Holwell Securities v Hughes* [1974] 1 All ER 161, 163 (Russell LJ).

[22] J. Madir, p. 8

[23] *Ibidem*, p. 8.

[24] Clifford Chance, "Smart Contracts: Legal Agreements for the Digital Age" (No 2017), available at: <https://talkingtech.cliffordchance.com/content/micro-cctech/en/emerging-technologies/smart-contracts/smart-contracts/_jcr_content/text/parsysthumb/download/file.res/Smart%20contracts.pdf>, 25.09.2019.

not necessarily facilitate or embody exchanges, which all contracts do by definition', instead arguing that Smart Contracts are 'a programming tool, that is too limited to be able to disrupt legal contract practice or deliver on its promise of self-enforcing performance, because enforcement results from a dispute through the mechanisms of the legal system'.[25] This argument, with respect, is unacceptable and can be refuted. First, it is not part of the 'legal' definition of a contract that it must 'facilitate or embody exchanges', neither is it fully true that Smart Contracts do not do that. Smart Contracts (in the narrow sense meaning computer code) are a tool that enables assets (or their digitized tokens) to change hands if a condition was satisfied – and as such they do 'facilitate' an 'exchange' of those assets. Furthermore, 'enforcement' of an agreement does not (a) result from a dispute; (b) does not have to be necessarily implemented by the State via the judicial system. Parties can self-enforce etc.

Smart Contracts can be said to be self-enforcing in the sense that once the Smart Contract has been concluded, and is stored on a blockchain, if the condition is satisfied the assets will change hands, even if the original parties to the contract no longer wish them too. They can also be said to be self-enforcing in the sense that the discretion whether or not to abide by the terms of the contract is taken away from the parties, and once they have concluded a Smart Contract they will abide by the terms (generally). Accordingly, it is submitted that this kind of broad attacks on Smart Contracts' identity as contracts can be rejected, and it cannot be stated that Smart Contracts will *never* be contracts.

Another line of argument is that 'smart contracts are… not agreements – they are technology for enforcing agreements'.[26] The argument goes that a piece of code unaccompanied by any legal terms 'may not satisfy the requirement of a legally binding contract'.[27] This objection could be met in two ways: (1) it is clear that if a smart contract is just a method of performing of one or more clauses of a natural language (traditional) contract, then the code itself will not be *the* contract; (2) a pure smart contract (without a corresponding natural language contract) will not be a valid binding contract unless the elements discussed above are satisfied. Accordingly, it is wrong to state that a smart contract will "never" be a legally-valid contract, it is right to think that some Smart Contracts will fall short of constituting a valid contract, just as a note or natural language communication

[25] Alvaro Gonzales Rivas, Mariya Tsyganova, Eliza Mik, 'Smart Contracts and Their Identity Crisis', p. 8, available at:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3319612, 25.09.2019.

[26] *See* C. Adams.

[27] *See* A shurst LLP.

may fall short of constituting a traditional contract because some defining requirement of a contract in law is missing.[28]

Lastly, a comparative, common law observation can be made. In the United States, a number of states have passed "blockchain legislation" which expressly have recognised Smart Contracts as capable of giving rise to enforceable legal obligations. In Arizona, the State Legislature has passed a law that states that 'Smart Contracts may exist in commerce. A contract relating may not be denied legal effect, validity or enforceability solely because that contract contains a smart contract term'.[29] Likewise Tennessee passed a law that states that[30]:

§ 47-10-201: (…) "Smart contract" means an event-driven computer program, that executes on an electronic, distributed, decentralized, shared, and replicated ledger that is used to automate transactions, including, but not limited to, transactions that: (A) Take custody over and instruct transfer of assets on that ledger; (B) Create and distribute electronic assets; (C) Synchronize information; or (D) Manage identity and user access to software applications.

§ 47-10-202: (a) A cryptographic signature that is generated and stored through distributed ledger technology is considered to be in an electronic form and to be an electronic signature. (b) A record or contract that is secured through distributed ledger technology is considered to be in an electronic form and to be an electronic record. (c) Smart contracts may exist in commerce. No contract relating to a transaction shall be denied legal effect, validity, or enforceability solely because that contract is executed through a smart contract.

These Acts ensure that smart contracts can be recognized as legally valid, and moreover, that they can fulfill both the "in writing" and the signature requirements, essentially extending the E-Commerce and Electronic Transactions Provisions to cover Smart Contracts. Apart from these acts, several states such as Florida[31], Maryland and Nebraska introduced State Legislation dealing with DLTs and Smart Contracts. A great overview is provided by the National Conference

[28] For example: *May and Butcher Ltd v The King* [1934] 2 KB 17, 21 (Viscount Dunedin) – incomplete agreement or *Felthouse v Bindley* (1862) 142 ER 1037, 1040 (Keating J) – no acceptance.

[29] Arizona Revised Statutes, Title 44 Trade and Commerce, § 44-7601C, available at: https://www.azleg.gov/ars/44/07061.htm, 25.09.2019.

[30] Tennessee Code, Title 47 (Commercial Instruments and Transactions), Chapter 10, § 201 as amended by Senate Bill 1662, available at: https://legiscan.com/TN/text/SB1662/2017, 25.09.2019.

[31] Florida House Bill 1357, § 7(1)(b), (2), available at: http://www.flsenate.gov/Session/Bill/2018/1357/BillText/Filed/PDF, 25.09.2019.

of State Legislatures website.[32] In relation to that zone, and as part of an experiment, the residents were granted a right to 'to carry out performance and/or execution of transactions by means of a smart contract' and, interestingly the law introduces a presumption that whoever enters into a Smart Contract understands its terms.[33] Thus if English courts were to strike down pure Smart Contracts as unenforceable, England would be lagging behind other jurisdictions – perhaps yet another reason why a court in England and Wales would be unlikely to declare that a Smart Contract can never be a Legal Contract.

The foregoing considerations point to a conclusion that a smart legal contract is capable of giving rise to enforceable legal obligations when it satisfies the traditional elements required for contract formation. As stated correctly by Lord Hodge JSC, 'so long as the operation of the computer program can be explained to judges who, like me, may be deficient in our knowledge of computer science, it should be relatively straightforward to conclude that people who agree to use a program with smart contracts in their transactions have objectively agreed to the consequences of the operation of the "if-then" logic of the program'.[34]

From a comparative law perspective, it is useful to have a look at what some of the civil law jurisdictions have done in respect of recognition of enforceability of smart contracts. In that sense, Italy seems to be the most prominent example because it is among the first European jurisdictions which, in 2019, has introduced specific smart contract legislation recognizes smart contract's full legal validity and enforceability in Italy.[35] This law has introduced a definition of Smart Contracts and has set out the legal effects of adopting such technologies. Accordingly, smart contracts are defined as "computer programs that operate on distributed registers-based technologies and whose execution automatically binds two or more parties according to the effects predefined by said parties".[36] Importantly, the same law points out that the smart contracts will satisfy the requirement of

[32] NCSL, 'Blockchain State Legislation', available at: http://www.ncsl.org/research/financial-services-and-commerce/the-fundamentals-of-risk-management-and-insurance-viewed-through-the-lens-of-emerging-technology-webinar.aspx, 25.09.2019.

[33] Decree of the President of the Republic of Belarus of December 21, 2017 No 8. On Development of Digital Economy, Art. 5.3. English Translation available at: http://law.by/document/?guid=3871&p0=Pd1700008e, 25.09.2019.

[34] Lord Hodge, "The Potential and Perils of Financial Technology: Can the Law Adapt to Cope?", p. 11, available at: www.supremecourt.uk/docs/speech-190314.pdf, 25.09.2019.

[35] Law Decree No. 135/2018.

[36] Article 8-ter(2) (Tecnologie basate su registri distribuiti e smart contract) Law Decree No. 135/2018.

the written form (*forma scritta*) of a contract if such a form is required under the Italian law and that is something that is discussed in this paper in the context of English law and written form requirements for a valid contract.

THE ISSUE OF INTERPRETATION OF SMART CONTRACTS

The interpretation of smart contracts is a particularly challenging task.[37] The standard view is that 'legal contracts are written in natural language, which is full of ambiguity, and must be interpreted subjectively by fallible humans. Smart contracts are written in programming languages, which are unambiguous and executed objectively by infallible computers' which could suggest that interpretation will be obsolete – allegedly the time of ambiguity has come to an end. This view is too good to be true.[38] However, it needs to be pointed out that even computer code can be ambiguous: yes the commands are written in straightforward <if><then> logic, but what the code means is determined by its context and conventions in the communities – which are not as straightforward and change over time. His example includes looking at different versions of Python (coding language) and demonstrating that the meaning of a symbol such as "^" for example change – leading the same code to produce different outcomes.

Hence, it is submitted that coding language is not a panacea to linguisticalambiguousness, and canons of interpretation will remain utilized. Let us first focus on a situation where the agreement between two parties (collectively the "contract") is containedin both natural language memorandum, and a smart contract code. Allen's interesting thesis is that all contractual promises are not a statement but an "intentional speech act" – namely conduct signifying something else – in the contractual sense by making an offer I am evidencing an intention to be bound on the terms of my offer. By attributing this characteristic to a contractual promise his logical conclusion is that there is no requirement for any of the contractual communication to be in natural language, since what is actually being conveyed is secondary to the intention that the conveyance evidences. Allen reasons that there is thus no obstacle for a computer code to satisfy the "intentional speech act" requirement and lead to a valid legal obligation.[39] He also argues that

[37] Michel Cannarsa, "Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?", *European Review of Private Law,* Vol. 26, No. 6, 2018, pp. 773–785.

[38] James Grimmelmann, "All Smart Contracts Are Ambiguous", *Penn Journal of Law and Innovation (Forthcoming)*, p. 2.

[39] J.G. Allen, pp. 15–16 .

a contract can be conceptualized as a "stack" which is composed of certain layers within that stack:

> A 'paper' contract, comprises (i) the spoken words through which the contractual terms were negotiated and against which the text was drafted, (ii) the written text, and (iii) legal rules implying terms and governing construction… In a smart contract, (ii) is complemented (or supplanted) by code which is also, incidentally, wholly or partially executable by a machine.[40]

Furthermore, a smart contract will be a result of some understanding between the parties which is expressed in natural language (since no humans think in computer code) and so the courts should be able to work their way backwards from the code to the objective intentions of the parties etc. This part of Allen's argument however falls when confronted with the fact that a smart contract may be capable of entering into other smart contracts with other parties and so there may be no natural language equivalent for some of the provisions. 'Some terms in the smart contract may be concerned with details that are left implicit in the natural language formulation.

On the other hand, there may be clauses in the natural language contract that are not included in the smart contract, since their automation is not necessary, possible or even desirable.'[41] Still it is likely that courts would approach the interpretation of the contract in relation to a broad equivalent of the coded term in natural language, the same way that the court deals with foreign languages by having them translated into English.[42]

If we take the principles of interpretation famously laid out famously by Lord Hoffmann in *ICS*, especially the first two principles:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything

[40] *Ibidem,* pp. 18–19.

[41] Guido Governatori, Régis Riveret, Xiwei Xu Florian Idelberger, Giovanni Sartor, Zoran Milosevic, "On Legal Contracts, Imperative and Declarative Smart Contracts and Blockchain Systems", *Artificial Intelligence Law,* Vol. 26, 2018, pp. 377, 385.

[42] For example: *United Company Rusal v Crispian Investments Ltd* [2018] EWHC 2415 (Comm), [15] (Phillips J).

which would have affected the way in which the language of the document would have been understood by a reasonable man.[43]

Accordingly, the court would have an insight into the 'background' which would include the natural language understanding of the parties (or any natural language 'wrapper' contract) and would interpret the code against that background. The only problem becomes apparent when we compare Lord Hoffmann's approach with a more recent approach endorsed by the UK Supreme Court, which stresses that the factual matrix 'should not be invoked to undervalue the importance of the language of the provision which is to be construed', and allows recourse to the background only where there is ambiguity.[44] While the difference may appear minute the significance for smart contracts is profound. As argued by Allen, a computer code, if functional (meaning capable of being run, or one that has run successfully) is by definition not ambiguous and clear[45], which leads to the paradox that 'if ambiguity is prerequisite for context to play a role in interpretation and/or construction, the court will never get to the point of asking whether the algorithm's product is really what the human parties intended—even in perverse cases'.[46]

Allen's solution is that courts will have to adapt the established canons of interpretation to look at the context more readily and develop dictionaries which would translate in meta-language the computer code to aid the court reasoning in natural language to distill meaning from computer code.

One can of course also let imagination run wild and suggest that in the not-so-distant future we will have AI or automated dispute resolution procedures, which will be able to scan the computer code, verify it through an Oracle to confirm say absence of duress, illegality etc, and then deliver a verdict. That at this point, even with the new dispute-resolution technologies already in place or being implemented seems to be more like a fancy though. This is why the English courts should be able, without a radical re-organisation of their canons of interpretation to interpret computer code via a method of translation to natural language.

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[43] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, p. 115.

[44] *Arnold v Britton* [2015] UKSC 36, [17] (Lord Neuberger).

[45] J.G. Allen, p. 26.

[46] *Ibidem,* p. 26.

THE ANONYMOUS OR PSEUDO-ANONYMOUS PARTIES AS CONTRACTUAL PARTIES

Most blockchain software do not require 'any pre-identification of the users', with the parties appearing simply as 'long strings of random numbers and letters'. Each user is equipped with a pair of cryptographic key (a public and private one) generated by independent software wallets and kept there.[47] This means that parties can enter into a smart contract without knowing anything about the counterparty except the long string of random numbers and letters that appears.

Technically there is no requirement of knowing the identity of a party with which one contracts. People are free to make an offer to the entire world which would ripen into a contract with whomever acted on it as pointed out in *Carlill v Carbolic Smoke Ball Company* more than hundred years ago.[48] This suggests that contracts can be made with parties fully anonymous to the offeror – evidently the defendant had no idea that it was in a binding contract with Mrs. Carlill until she informed them that she wants the £100 reward. Thus, normally a smart contract is capable of giving rise to pseudo-anonymous parties, subject of course to the claimant's ability to prove that (a) they entered into the contract – proof that the cryptographic key is theirs and they used it and (b) identifying who to sue, which can both form significant practical obstacles to enforcement or (more likely given their nature) revision of a Smart Contract via the judicial path. Perhaps as smart legal contracts become more ubiquitous the 'host' of the blockchain (such as Ethereum for example) would provide a mechanism to identify the parties.

Anonymity is a particular obstacle in relation to contracts subject to a statutory "in-writing" requirement[49] (discussed below). For example, under the US Statute of Frauds the 'essentials' of the contract must be in writing, and 'essentials' include names of the contracting parties.[50] Furthermore, to be valid identification of a party 'the parties [must] be described in such a manner *as that there can be no fair or reasonable dispute as to the person who is selling or buying*'.[51] Even if the parties know each other identities, but they are not sufficiently identified in the contract, the contract will be invalid.[52] While it is unlikely that an interest in land

[47] P. Cuccuru, pp. 183-184

[48] *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB, pp. 256, 268 (Lindley LJ).

[49] Law of Property (Miscellaneous Provisions) Act 1989, s 2.

[50] *Porter v Duffield* (1874) LR 18 Eq 4, pp. 6-7 (Jessel MR).

[51] *Ibidem,* p. 7 (emphasis supplied).

[52] *Jarrett v Hunter* (1886) 34 Ch D, pp. 182, 185 (Kay J).

would be transferred in a smart contract transaction (given the subsequent registration requirements, and the early stages and doubts surrounding the technology), and thus s 2 LP(MP)A 1989 is unlikely to be key, it is possible that in a contract that is subject to "in writing" requirement, and thus where parties must be identified smart contracts will fall below the required standard. After all given a string of random letters and numbers there is a possibility of a 'reasonable dispute' as to the identity of the person who is selling or buying.

A solution could be to interpret "person" to mean a public address on the blockchain – which means that parties are sufficiently identified whenever it is clear that this cryptographic key (and the person, whomever it is, behind that key) entered into the contract, even if the actual, off-line identity of the ultimate user is unknown. Tse identified flaws with such an approach, namely that (1) a public address (key) may point to a different smart contract rather than a wallet of a user and (2) the owner of the wallet remains pseudonymous. His solution to advocate for 'development of blockchain identities', which was also discussed above.[53]For most contracts, the pseudonymity will be a practical obstacle to judicial enforcement, rather than an *ex ante* obstacle to forming a binding legal relationship.

FULFILMENT OF THE SIGNATURE REQUIREMENT BY USING A PRIVATE KEY

The statutory requirement that will be discussed by way of example will be s 2 LP(MP)A 1989. The classic interpretation of the word "signed" in s 2(3) LP(MP) A 1989 imposes an ordinary, common sense, meaning on the word an act analogous to putting one's name on the document with their own hand.[54] Thus typing a name on a letter as an addressee does not constitute a signature.[55] The Court of Appeal also held that the signature must be 'obviously so as to authenticate[56] the document', and that the policy of the requirement is motivated by the desire to prevent a party to 'go behind the document and introduce extrinsic evidence to establish a contract'.[57]

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[53] Gary Tse, "Smart Contracts: A Boon or Bane For the Legal Profession", available at: https://www.taylorvinters.com/article/smart-contracts-a-boon-or-bane-for-the-legal-profession, 25.09.2019.

[54] *Goodman v J Eban Ltd* [1954] 1 QB 550, p. 555 (Denning LJ).

[55] *Firstpost Homes Ltd v Johnson* [1995] 4 All ER, pp. 355, 362 (Peter Gibson LJ).

[56] *Caton v Caton* (1867) LR 2 HL 127, pp. 142-143 (Lord Westbury).

[57] *Ibidem*, p. 365 (Balcombe LJ).

This broader proposition is central to answer the question. A cryptographic key is inputted to a smart contract precisely to authenticate the contract, but also to demonstrate assent to the Smart Contract, and prevent a contract being concocted or imposed on a party without their consent. Thus, the private key operates to fulfill the substance behind the signature requirement, and the only possible obstacle would be the form. An automated email containing a name of the party was taken to constitute a valid signature,[58] and it is submitted that an intentionally placed cryptographic key or password is only *a fortiori*.

Electronic signatures have been recognized as valid by statute[59], and given their definition[60] cryptographic keys could be recognized as valid electronic signatures without stretching the concept. In the US commentators argued that 'Blockchain-based transactional records and the digital signatures associated with these records should also satisfy the statute of fraud's writing requirements'[61], given that 'is no meaningful difference between a typewritten name [valid under US statutory signature requirements] and a digital signature affixed to a transaction triggering a smart contract using public private key cryptography, *assuming the address can be uniquely tied to the signing party*'.[62] The one remaining challenge therefore remains in tying a public address to a party.

COULD A STATUTORY "IN WRITING" BE MET IN THE CASE OF A SMART CONTRACT COMPOSED PARTLY OR WHOLLY OF A COMPUTER CODE?

In English Law the default position is that there is a lack of writing requirements. Contracts are binding (assuming the foundational elements of a contract: offer and acceptance, consideration, intention to create legal relations, capacity are satisfied) without a requirement for written memorandum of the consensus

[58] *Golden Ocean Group Ltd v Salgocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [38] (Tomlinson LJ).

[59] Electronic Communications Act 2000, s 7(1).

[60] *Ibidem,* s 7(2) defines "electronic signature" as: For the purposes of this section an electronic signature is so much of anything in electronic form as— (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and (b) purports to be used by the individual creating it to sign.

[61] Cardozo Blockchain Report, "'Smart Contracts'& Legal Enforceability",p. 14, available at: https://cardozo.yu.edu/sites/default/files/Smart%20Contracts%20Report%20%232_0.pdf, 25.09.2019.

[62] *Ibidem* (emphasis added).

ad idem.[63] Accordingly, even *if* smart contracts are deemed to be unable to meet the writing requirement it does not invalidate the claim that Smart Legal Contracts can be recognized as legally binding agreements, because the most contracts will not have a statutory writing requirement (even if most contracts can be concluded in writing for convenience).

Further, a distinction has to be made between a 'wrapped' and 'pure' Smart Contract; a 'wrapped' contract (which is governed by an overarching natural language agreement, meaning code is only part of the arrangement) will self-evidently satisfy the "in writing" requirement as it is just a part of a written contract – a method of performing few of its provisions (assuming the overarching agreement is written). The following discussion will therefore center on contracts composed wholly of computer code.

There is however a class of contracts, which, to be valid, must be in writing: contracts for sale or other disposition of land[64], bills of exchange, promissory notes, bills of sale[65], and regulated consumer credit agreements[66]. The s 2 LP(MP)A requirement definitely is of upmost importance (as the most prominent "writing" requirement), yet as it deals with land the transaction will have to abide by several other formalities including a deed[67] and registration[68].

Consequently, a smart contract dealing with land (or more likely with a digitized token representing land), presuming it is for something other than a lease of less than 3 years[69], would not be the end of the story – there would be other steps where, at least currently, the law requires conventional forms of documentation which cannot be completed online or on a blockchain (such as registration). The point that is being made is that the most stringent "in writing requirement" under s 2 LP(MP)A would seldom pertain to smart contracts, as it deals with dispositions of interests in land, which under the current regime are largely inapt to be concluded by a smart contract.

Another interesting observation to make is that s 2 LP(MP)A 1989 'applies *only* to executor contracts for the future sale or other disposition of an interest in

[63] *Halsbury's Laws of England: Contract* (2012) Vol. 22, para 220.

[64] Law of Property (Miscellaneous Provisions) 1989 (LP(MP)A), s 2(1).

[65] *Halsbury's Laws* (n), para 224.

[66] Consumer Credit Act 1974, ss 8-9.

[67] Law of Property Act 1925 (LPA 1925), s 52.

[68] Land Registration Act 2002, s 27.

[69] Short leases (leases under 3 years, taking effect in possession without a premium) do not have to be in writing and thus could be concluded orally or by a valid smart legal contract – s 54(2) LPA 1925.

land, *and does not* apply to a contract which itself effects such a disposition'.[70] The CA held further that a lease is an example of the latter type[71] (hence untouched by s 2 LP(MP)A 1989). If this is true, in my own opinion it shouldn't as s 2(5) of the 1989 Act expressly says that it does not apply to short leases, so logically it should apply to *other* leases (but that is an irrelevant point here); a smart contract of the unilateral type (an offer uploaded to a blockchain, accepted by uploading the consideration, and performed and concluded at the point of acceptance) would automatically and immediately 'effect' a disposition of an interest in land – hence under the CA's view of s 2, there would, again, be no "in writing" requirement. The only possible caveat is that as on the blockchain the interest in land (freehold, leasehold, easement etc.) would be represented by a token, the smart contract would not be a disposition of the interest, but of a token, constituting in essence a promise to transfer the actual interest at a later date observing the formalities (such as registration). If that interpretation is instead adopted, then Smart Contracts would have to abide by the "in writing" requirements.

Coming back to the main point, there is statutory authority for the proposition that "writing" includes 'typing, printing, lithography, photography *and other modes of representing or reproducing words in a visible form*'.[72] Prima facie, Solidity code, which is used for most of Ethereum Smart Contracts, would fall within 'mode of representing or reproducing words in a visible form' – it contains words although substitutes formal for natural syntax (words follow the internal logic of a computer-readable code, rather than a natural [i.e. human] language) – and thus be "writing".

An objection can be raised that computer code does not 'represent or reproduce words' – it is meant to convey a list of instructions to a computer, its ultimate objective is to be understood and performed by a machine, not to represent words. However, an IT specialist coding a smart contract has in his mind (or client instructions) a set of objectives *in human language*, that he then translates into computer code, or a Smart Contract. The Solidity Code (to continue with our example) can thus be said to 'represent' the natural language (words) in a way that render them readable to a machine. Hence, smart code could satisfy the statutory writing requirement.

[70] *Rollerteam Ltd v Riley* [2016] EWCA Civ 1291, [38] (Tomlinson LJ).

[71] *Ibidem.*

[72] Interpretation Act 1978, s 5, sch 1 (emphasis added).

Furthermore, as a string of emails was held sufficient to satisfy the "in writing" requirement,[73] a smart contract written in code (as a likewise electronic memorandum of an agreed bargain) should be recognized too. Tomlinson LJ reasoned that the point behind the "in writing requirement" was 'to ensure that a person is not held liable as guarantor on the basis of an oral utterance which is ill-considered, ambiguous or even completely fictitious'.[74] A smart contract, like an email, can also ensure that a party is not held bound by a mere oral utterance – perhaps even *a fortiori* – after all it requires much more effort to write precise computer code (evidencing a clearer intention to be bound) than just to reply 'I agree' in an email. Lastly, Tomlinson LJ urged that 'the statute must however, if possible, be construed in a manner which accommodates accepted contemporary business practice'[75]– again that seems to indicate that once (if?) smart contracts become widely accepted throughout the commercial world, the courts, to accommodate business practice, will refuse to frustrate the obligation on a formality.

Another point can be raised: the legislation on consumer contracts requires that written terms in consumer contracts 'must always be drafted in plain, intelligible language'.[76] As it has been pointed out '[t]he contractual parties are, in principle, free to choose any language for their contract which also includes "computer language"'[77] – this leads to the inevitable difficulty that Smart Contract written in code may not be 'plain' or 'intelligible' to an ordinary consumer. It is argued that:

'Does this issue lead to an a priori prohibition of smart contracting in case of business to consumer transactions? The answer to this question is negative: it does not. However, this mandatory consumer protection requirement obliges businesses to provide consumers with plain, intelligible translations of the computer code which are understandable to them. Only if this condition has been fulfilled, consumer can be bound by a smart contract, and accordingly secures legality of smart contracting in case of business to consumer transactions.[78]

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[73] *Golden Ocean Group Ltd v Salgocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [22]; dealing with Statute of Frauds 1677, s 4.

[74] *Ibidem,* [21].

[75] *Ibidem,* [22].

[76] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29, Art 5 (UCTD); Consumer Rights Act 2015, s 64(3).

[77] Mateja Durovic, Andre Janssen, *The Formation of Smart Contracts and Beyond: Shaking the Fundamentals of Contract Law?,* 2018, p. 26.

[78] *Ibidem,* p. 26.

This interesting solution to the problem would mean that if there are any discrepancies between the computer code and natural language translation provided by the trader to the consumer, the natural translation would take precedence (as that was the document the consumer understood) and also as is required by the Directive 1993/13/EEC on unfair contract terms.[79] This would undermine the viability of Smart Contracts in regulating B2C transactions – if for every smart contract a natural language translation is needed, and in effect that is the binding document (not the actual computer code), the Smart Contract is inevitably reduced to a mechanism of contractual performance, rather than being the substance of the contract. However, you seem to agree with the proposition that, in the absence of a natural language translation of the contract or wide prevalence of proficiency in C++, JavaScript, Solidity etc., a Smart Contract would fail the "plain and intelligible" writing requirement under Consumer Protection Legislation.

Certain jurisdictions have introduced legislative provisions that deal exclusively with the application of the "in writing" requirement to electronically concluded contracts. For example in the Netherlands, an electronic contract satisfies the "in writing" requirement if: (a) the agreement is and remains accessible for the parties; (b) the authenticity of the agreement is sufficiently guaranteed; (c) the moment on which the agreement was formed, can be determined with sufficient certainty, and (d) the identity of the parties can be assessed with sufficient certainty.[80] The first and the last requirements are said to pose the biggest challenge to the validity of Smart Contracts as "written" contracts.[81] First a continuous line of computer code would not be "accessible", in the sense in which that term is understood in Dutch law (which means that the parties are able to access and save its contents in order to be able to inform themselves later about the agreement)[82], as an ordinary consumer would not be able to "inform" themselves of the contents if written in formal language (code). Secondly, and as discussed above, parties to a smart contract posited on a blockchain could be difficult to assess with "sufficient" clarity.

Likewise in the US, contracts that require to be in writing under the Statute of Frauds must be signed and (a) reasonably identify the subject matter of the

[79] Article 5 Directive 1993/13/EEC on unfair contract terms.

[80] Dutch Civil Code, §6:227a. Available at: www.dutchcivillaw.com/civilcodebook066.htm, 25.09.2019.

[81] J. Madir, p. 12.

[82] *Ibidem,* p. 12.

contract (b) be sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) state with reasonable certainty the essential terms of the unperformed promises in the contract.[83] That requirement includes a requirement to reasonably identify the contracting parties.[84] This again poses a threat to the ability of Smart Contracts to satisfy the "in writing requirement" in the States. However, it has been argued that in assessing the validity the American Courts have adopted a commonsense approach looking as to whether a contract was written down incorporating the essential terms and subject matter and whether it was signed with intention to "authenticate".[85]

Crucially, under the English law, there isno statutory requirement as to what is required of electronic contracts to be considered that they are in writing. Under English law a contract must be in writing, signed by both parties and incorporating all the terms which the parties have expressly agreed.[86] A smart contract is definitely more than capable of fulfilling those requirements, subject to the discussion of "signature" above. Perhaps however, in the avoidance of doubt a legislative document should spell out the requirements that a smart contract would have to abide by to satisfy the requirement.

CONCLUSIONS

This paper examined the enforceability of smart contracts under the English contract law. What may be concluded is that, under the current English law, commercial transactions wrapped in the form of smart contracts should be enforceable as contracts before the courts if they fulfil all of the existing requirements necessary for enforcement of any kind of contract. It seems that no changes of English law need to be made to secure enforceability of smart contracts. Smart contracts are to be understood just as emanation of freedom to contracts where smart contract is agreed to be used as an instrument for execution of a promise established under a contract. This would be the case, for example, with using smart contracts to secure that a certain amount of money as a price established under the contract will be transferred to the seller once the good have been delivered to the buyer.

[83] US Restatement (Second) Contracts, §131.

[84] Cardozo Project, p. 10.

[85] *Ibidem,* p. 11.

[86] LP(MP)A 1989, s 2(1).

Moreover, in case of types of contracts for whose enforceability is required to be in writing, smart contracts composed wholly of computer code can satisfy statutory "in writing" requirement.This is because smart contracts are a method of expression that represent words in a durable medium, preventing parties from being bound by an inadvertent utterance.

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IZVRŠIVOST "PAMETNIH" UGOVORA

Rezime

Razvoj novih tehnologija je izvršio značajan uticaj i na pravo. "Pametni" ugovori (*smart contracts*) su jedan od oblika novih tehnologija koji dovodi u pitanje primenu tradicionalnog ugovornog prava na privredne transakcije koje se odvijaju putem "pametnih" ugovora. Tako, izvršivost transakcija zaključenih putem ove vrste ugovora postaje jedno od glavnih pravnih pitanja. Takođe, postavlja se pitanje da li je potrebno izmeniti postojeće englesko ugovorno pravo kako bi se osiguralo izvršenje "pametnih" ugovora. Autori će u radu potražiti odgovor na postavljena pitanja u cilju boljeg razumevanja odnosa tradicionalnog ugovornog prava, s jedne strane, i "pametnih" ugovora, s druge strane.

Ključne reči: pametni ugovori (smart contracts), ugovorno pravo, poremećaj, nove tehnologije, AI, izvršivost

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RAZGRANIČENJE UGOVORA O DELU I UGOVORA O PRODAJI

Osnovne pojavne oblike ugovora o prodaji i ugovora o delu nije teško razlikovati, pogotovo ako je reč o ugovoru gde se jedna strana obavezuje isključivo na činjenje u vidu fizičke ili intelektualne radnje (zanatski radovi, davanje saveta, opravka stvari i sl.). Međutim, postoje ugovori kod kojih se jedna strana obavezuje na izvršenje određenog rada koji za posledicu ima i nastanak određene stvari (slika, alat, uređaji, mašine, objekti, postrojenja i sl.), pa se postavlja pitanje da li je kod takvih ugovora reč o ugovoru o delu, jer pretežni element ugovora čini obaveza činjenja ili, pak, o ugovoru o prodaji, jer ugovor za krajnju posledicu ima predaju i prenos prava svojine na tako nastaloj stvari. Kriterijume za razgraničenje ovih ugovora predviđa Zakon o obligacionim odnosima[1]*, kao i Konvencija Ujedinjenih nacija o međunarodnoj prodaji robe*[2]*, dok Zakon o osnovama svojinsko-pravnih odnosa*[3] *reguliše pitanje ko postaje vlasnik stvari koje su izrađene radom poslenika. Cilj rada je da ukaže na međusobni odnos kriterijuma koji su u svakom od ovih zakona sadržani.*

Ključne reči: *ugovor o delu, ugovor o prodaji, činjenje, pravna priroda, poslenik, prodavac*

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[1] Zakon o obligacionim odnosima, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93 i *Službeni list SCG*, br. 1/2003 – Ustavna povelja (dalje: ZOO).

[2] UN Convention on International Sale of Goods, 1980; Zakon o ratifikaciji Konvencije Ujedinjenih nacija o međunarodnoj prodaji robe, *Službeni list* SFRJ – Međunarodni ugovori, br. 10–1/84 (dalje: Bečka konvencija).

[3] Zakon o osnovama svojinskopravnih odnosa, *Službeni list SFRJ*, br. 6/80 i 36/90 i *Službeni list SRJ*, br. 29/96 (dalje: ZOSPO).

U V O D

Osnovni kriterijum razgraničenja ugovora o delu i ugovora o prodaji je pravna priroda obaveza koje predstavljaju razlog obavezivanja ugovornih strana. Suštinu prodavčevog obavezivanja čini obaveza određenog davanja (lat. *dare*) u vidu obaveze da se kupcu preda određena stvar s ciljem prenosa prava svojine, dok se priroda obaveze poslenika iz ugovora o delu svodi na određeno činjenje (*facere*). U poslednjem slučaju, gde ugovor o delu ne sadrži obavezu da se obezbedi materijal, govorimo o jednostavnim oblicima ugovora o delu.

Dinamika savremenih privrednih odnosa, u kombinaciji sa širokim granicama autonomije volje i naglim tehnološkim razvojem, neprekidno razvija i unapređuje brojne hibride ugovornog prava koji nastaju povezivanjem, odnosno spajanjem dva ili više različitih ugovora u jedan pravni posao. U tom smislu, postoji veliki broj pravnih poslova čiju osnovu čini ugovor o delu, počev od tradicionalnih zanatskih usluga (krojenje, izrada obuće, izrada određenih oruđa, popravka alata, izrada slika, skulptura i drugih umetničkih dela, kućni poslovi sl.), do složenih privrednih poduhvata čije se izvršenje poverava specijalizovanim kompanijama sa određenom tehnologijom, specijalizovanim znanjem ili iskustvom (građenje, projektovanje, nadzor, inženjering, izrada i isporuka investicione opreme, proizvodnja brodova, postrojenja itd.) gde dolazi do tzv. „mešanja", odnosno povezivanja činidbi koje po svojoj prirodi pripadaju različitim tipovima ugovora.[4] Osnovu takvih ugovora pretežno čini ugovor o delu, ali on ne može uvek apsorbovati i sve ostale elemente takvog ugovora.

ODNOS UGOVORA O PRODAJI I UGOVORA O DELU

Osnovna zakonska razgraničenja

U teoriji i praksi se vodi duga polemika oko pitanja kvalifikacije i razgraničenja pravne prirode ugovora o delu od ugovora o prodaji na osnovu kriterijuma vrednosti uloženog materijala, s jedne strane, odnosno da li su ugovorne strane naročito imale u vidu poslenikov rad prilikom zaključenja ugovora, s druge strane.

Član 601 ZOO predvideo je odredbe koje treba da razreše predmetnu dilemu i regulišu odnos ova dva ugovora. Tako, ovaj član predviđa da se ugovor kod kojeg poslenik preuzima obavezu da obezbedi bitan deo materijala za izradu stva-

[4] Tako nastaju brojni imenovani i neimenovani, odnosno povezani, mešoviti i "*sui generis*" ugovori, a njihova kvalifikacija vrši se uz pomoć različitih teorija koje je uobličila pravna doktrina. v. Oliver Antić, "Imenovani i neimenovani ugovori u savremenom obligacionom pravu", *Anali Pravnog fakulteta u Beogradu,* Vol. 52, br. 1–2, Beograd, 2004, str. 95–115.

ri, u sumnji smatra ugovorom o prodaji;[5] suprotno tome, ukoliko je bitan deo materijala obezbedio naručilac posla, smatraće se da je u pitanju ugovor o delu.[6] U svakom slučaju, ugovor se smatra ugovorom o delu ukoliko su ugovarači naročito imali u vidu poslenikov rad.[7]

Kao što se vidi, ZOO u citiranim odredbama primenjuje kombinaciju kriterijuma pripadnosti materijala i kriterijuma značaja izvršenog rada, pri čemu se u krajnjem slučaju rukovodi time da li su strane naročito imale u vidu rad poslenika, odnosno njegovo znanje i stručnost za izradu stvari, čime se ostavlja po strani onaj element ugovora (pripadnost materijala) koji je manje dominantan i koji je akumuliran pretežnom obavezom.[8]

Primenom poslednjeg kriterijuma, načelno govoreći, moglo bi se doći do sledećih zaključaka: da je kod izrade jednostavnih, serijskih stvari (kancelarijski sto, prozor, odelo) reč o ugovoru o prodaji ukoliko isporučilac obezbeđuje materijal; da angažovanje radi izrade portreta ne predstavlja prodaju već ugovor o delu, bez obzira na vrednost materijala, jer je slikarsko umeće i talenat osnovni razlog ugovornog obavezivanja; da izrada mašina, uređaja ili određenih postrojenja po posebnim zahtevima i specifikacijama naručioca, takođe predstavlja ugovor o delu bez obzira na vrednost materijala, ukoliko su znanje, iskustvo, referen-

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[5] ZOO, čl. 601. st. 1.

[6] ZOO, čl. 601. st .2.

[7] ZOO, čl. 601. st. 3.

[8] Uzmimo kao primer slučaj gde naručilac kod poznatog akademskog slikara naručuje izradu porodičnog portreta, s tim da se podrazumeva da će slikar sam obezbediti platno za slikanje. Nema sumnje da je vrednost platna neznatna i zanemarljiva u odnosu na talenat, stručnost i renome slikara, te da kao takva, vrednost platna ne može biti osnovni razlog ugovornog obavezivanja strana. Primenom čl. 601. st. 3. ZOO-a lako se dolazi do zaključka da se ovakav ugovor kvalifikuje kao ugovor o delu, jer su ugovorne strane naročito imale u vidu slikarev rad, odnosno znanje, umeće i renome. Međutim, kada slikar bude završio i predao portret naručiocu, a ovaj isplatio ugovornu cenu, može se postaviti pitanje da li je između slikara i trgovca došlo do prenosa prava svojine na izrađenoj slici, tj. da li je slikar postao vlasnik slike originernim putem (time što je sliku izradio svojim radom i od svog materijala) pa je pravo svojine preneo naručiocu ili je, pak, pravo svojine nastalo u korist naručioca originernim putem, jer se slika radila po njegovom nalogu i za njegov račun; postavlja se pitanje pravila koji ugovor primeniti u ovakvoj situaciji u pogledu načina zaključenja ugovora, obaveza ugovornih strana, rokova za isticanje prigovora za nedostatke, plaćanja ugovorne cene, itd. Sve navedeno podjednako važi i za bilo koji drugi ugovor kod kojeg se jedna strana obavezuje da od sopstvenog materijala izradi određenu stvar, a posebne poteškoće nastaju upravo u privrednim odnosima, tačnije kod složenih oblika ugovora o građenju, izradi i isporuci namenske, neserijske opreme, inženjeringa, koji u najvećem broju slučajeva za osnovu imaju upravo ugovor o delu, a da se kao krajnji efekat poslenikovog rada pojavljuje novonastala stvar koju poslenik predaje naručiocu.

ce ili tehnologija isporučioca bili ključni razlog ugovornog obavezivanja strana pri zaključenju ugovora.

S druge strane, Zakon o osnovama svojinskopravnih odnosa predviđa da se svojina na stvari stiče po samom zakonu, na osnovu pravnog posla i nasleđivanjem.[9] Kada je reč o pravnom poslu kao osnovu sticanja, to mogu biti poslovi koji su usmereni na prenos prava svojine i takvo sticanje smatra se relativnim, odnosno derivativnim sticanjem svojine, jer pravo svojine sticaoca proizlazi iz prava svojine prethodnika. Drugim rečima, da bi do došlo do prenosa prava svojine na navedeni način, potrebno je da prenosilac bude vlasnik stvari čija je izrada predmet ugovora, a da zatim bude izvršena njena predaja.[10] Posledično tome, prenos prava svojine sa poslenika na naručioca bi dalje morao da ima osnovu u određenom pravnom poslu. Postavlja se pitanje da li ugovor o delu može predstavljati pravni posao koji dovodi do prenosa svojine na novonastaloj stvari ili je, pak, svaki pravni posao koji dovodi do prenosa svojine sa jednog na drugo lice apsorbovan ugovorom o prodaji.

Član 22. ZOSPO-a daje odgovor na pitanje ko postaje vlasnik stvari koju je neko napravio od sopstvenog ili tuđeg materijala, predviđajući sledeća razgraničenja: onaj ko od svog materijala i svojim radom izradi novu stvar, stiče pravo svojine na istoj; ukoliko je neko od tuđeg materijala izradio novu stvar, ona pripada vlasniku materijala, a ako je vrednost rada veća od vrednosti materijala, ona pripada posleniku ako je savestan.

U vezi sa ranije pomenutim primerima, primenom člana 22 ZOSPO dolazi se do zaključka da slikar postaje vlasnik portreta koji je stvorio svojim radom i od svog materijala, ali i portreta koji je stvorio svojim radom od tuđeg materijala, jer je značaj slikarevog rada u uobičajenim situacijama ključni razlog ugovornog obavezivanja kod takvog ugovora; da proizvođač gasne turbine postaje vlasnik iste ukoliko ju je sačinio svojim radom i od svog materijala, itd. Na osnovu navedenog, može se smatrati da kada poslenik iz ugovora o delu proizvede određenu stvar za naručioca, svaki dalji prenos prava svojine sa poslenika na drugo lice (uključujući i naručioca) bi u osnovi morao da podrazumeva prisustvo elemenata kupoprodaje.[11]

[9] ZOSPO, čl. 20.

[10] Obrad Stanković, Miodrag Orlić, *Stvarno pravo,* Nomos, Beograd, 1999, str. 64–65.

[11] Svaki ugovor koji za cilj ima prenos svojine na određenoj stvari, u zamenu za cenu koja je ugovorom dogovorena, po svojoj suštini je i prodaja, v. Roy Goode, *Contract and Commercial Law: The Logic and Limits of Harmonisation*, vol 7.4 Electronic Journal of Comparative Law, 2003, str. 205, *https://www.ejcl.org/74/art74-1.PDF*, 01.10.2019.

U praksi, takvo logiciranje može dovesti u pitanje primenu odredbe člana 601. stav 3. ZOO, prema kojoj se ugovor smatra ugovorom o delu, bez obzira na vrednost uloženog materijala ako su ugovarači naročito imali u vidu rad poslenika, jer se u takvom slučaju nameće pitanje da li ugovor o delu može biti osnov za prenos prava svojine.

Posebna zakonska razgraničenja
– Pravo zaloge na stvarima koje je poslenik izradio

Da odredbe ZOSPO i ZOO nisu u potpunom saglasju dodatno potvrđuje i član 628. ZOO-a koji predviđa da: *Radi obezbeđenja naplate potraživanja naknade za rad i naknade za utrošeni materijal, kao i ostalih potraživanja po osnovu ugovora o delu, poslenik ima pravo zaloge na stvarima koje je napravio ili opravio, kao i na ostalim predmetima koje mu je predao naručilac u vezi sa njegovim radom, sve dok ih drži i ne prestane dragovoljno da ih drži.*[12]

Navedena odredba ne stvara veće probleme kod onih slučajeva gde materijal za izrađenu stvar obezbeđuje naručilac i gde je vrednost tog materijala veća od vrednosti rada, kao i kod onih ugovora o delu koji obavezuju na opravku stvari koja već pripada naručiocu, jer se u takvom slučaju ne postavlja pitanje ko je vlasnik stvari pa i nema smetnji da isporučilac postane založni poverilac. Međutim, postavlja se pitanje kako poslenik, koji je određenu stvar izradio od sopstvenog materijala, te po osnovu člana 22. ZOSPO postao vlasnik iste, stiče pravo zaloge na izrađenoj stvari.

Nacrt Građanskog zakonika
– kodifikacija postojećeg problema

Prednacrt Građanskog zakonika[13] nije predvideo izmene u bilo kom delu gore citiranih odredbi ZOO. Tako, član 756. Prednacrta u identičnom obliku preuzima sadržinu člana 601. ZOO, što znači da kriterijumi za razgraničenje ugovora o delu i ugovora o prodaji ostaju isti.

Isti je slučaj i sa odredbom člana 783, koja zapravo preslikava član 628. ZOO, a koji se tiče prava zaloge na stvari koju je poslenik napravio ili opravio, a na ime naknade za rad i utrošeni materijal.

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[12] ZOO, čl. 628.

[13] Ministarstvo pravde Republike Srbije, *https://www.mpravde.gov.rs/files/NACRT.pdf*, 06.10.2019; Komisija za izradu Građanskog zakonika je prestala sa radom 19. jula 2019. godine, na osnovu odluke Vlade Republike Srbije od 19. jula 2019, *Službeni glasnik,* br. 51.

Ugovori s elementom inostranosti
– rešenje ili produbljenje problema

Konvencija Ujedinjenih nacija o međunarodnoj prodaji robe iz 1980. godine (dalje: Bečka konvencija) je ostvarila najširi uticaj na unifikaciju prava prodaje širom sveta, zbog čega se i kaže da predstavlja "stub unifikovanog pravnog poretka" u domenu međunarodne trgovine.[14] SFR Jugoslavija ju je ratifikovala 1984. godine donošenjem Zakona o ratifikaciji Konvencije Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe, čime postaje sastavni deo unutrašnjeg pravnog poretka.[15]

Do stupanja na snagu Bečke konvencije[16] postojao je jedinstven režim regulisanja prodaje, tako što se i na domaću i na međunarodnu prodaju primenjivao ZOO. Međutim, ratifikacijom ove konvencije nastaje dualitet propisa[17], tako da u domenu međunarodne prodaje primat dobija Bečka konvencija (kao izvor međunarodnog karaktera koji je ratifikacijom postao sastavni deo domaćeg zakonodavstva), dok se na domaće ugovore o prodaji i dalje primenjuje ZOO.[18]

Sa aspekta razgraničenja ugovora o delu i ugovora o prodaji, značaj ove konvencije se ogleda u tome što ona na isključiviji način određuje kriterijume za razgraničenje prodaje od drugih pravnih poslova. Štaviše, ona proširuje domen svoje primene i na mešovite ugovore, odnosno na one ugovore koji bi u nacionalnim zakonodavstvima država potpisnica mogli potpadati i pod ugovore o delu, s tim da se najviše problema u njenoj primeni prepoznaje kod "ključ u ruke" ugovora, koji nesumnjivo predstavljaju dominantan primer ugovora sa mešovitom osnovom.[19]

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[14] Milena Đorđević, "Konvencija UN o međunarodnoj prodaji robe u srpskom pravu i praksi – iskustva i perspektive", *Anali Pravnog fakulteta u Beogradu,* 2/2012, Beograd, 2012, str. 260 i dalje.

[15] Isto; O odnosu međunarodnih sporazuma i unutrašnjeg prava, v. Vitomir G. Popović, Radovan D. Vukadinović, *Međunarodno poslovno pravo, Opšti deo,* Banja Luka–Kragujevac, 2007, str. 42.

[16] Bečka konvencija je stupila na snagu 1988. godine.

[17] Aleksandar Goldštajn, *Konvencija Ujedinjenih Naroda o ugovorima o međunarodnoj prodaji robe, u strukturi prava međunarodne trgovine,* Zagreb, 1980, str. 57.

[18] O oblasti primene Bečke konvencije, v. Vladimir Pavić, Milena Đorđević, "Primena Bečke konvencije u arbitražnoj praksi Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije", *Pravo i privreda,* 5–8/2008, str. 568–579.

[19] V. Franco Ferrari, *Contracts for International Sale of Goods: Applicability and Application of the 1980 United Nations Convention,* Leiden, 2012, str. 109.

Potreba razgraničenja prodaje od drugih ugovora je dodatno podsticalo unifikaciju prava prodaje.[20]

Član 3 stav 1 Bečke konvencije reguliše upravo odnos prodaje sa ugovorima koji su usmereni na izradu stvari, od sopstvenog ili tuđeg materijala. Navedeni član glasi:

1) *Ugovorima o prodaji smatraju se i ugovori o isporuci robe koja treba da se izradi ili proizvede, izuzev ako je strana koja je robu naručila preuzela obavezu da isporuči bitan deo materijala potrebnih za tu izradu ili proizvodnju.*

2) *Ova konvencija se ne primenjuje na ugovore u kojima se pretežni deo obaveza strane koja isporučuje robu sastoji u izvršenju nekog rada ili pružanju nekih usluga.*

Iz formulacija citiranog člana mogu se izdvojiti sledeći kriterijumi za razgraničenje prodaje od drugih ugovora na koje se Bečka konvencija ne primenjuje: 1) kriterijum pripadnosti bitnog dela materijala za izradu stvari (engl. *substantial part*); 2) kriterijum pretežne obaveze (engl. *prepodenant part*) kod mešovitih ugovora koji za predmet imaju obavezu obavljanja posla.[21]

Kriterijum pripadnosti materijala – substantial part

Pripadnost materijala kao kriterijum za utvrđivanje domena primene Bečke konvencije proizlazi iz stava 1 člana 3 koji predviđa da se ugovorima o prodaji smatraju ugovori o isporuci robe koja treba da se izradi ili proizvede od sopstvenog materijala isporučioca, odnosno ako isporučilac obezbeđuje bitan deo materijala (*substantial part*) koji je potreban za njenu izradu. Ukoliko bitan deo materijala obezbeđuje naručilac, obaveza druge strane se svodi na činjenje, pa mesta primeni Bečke konvencije nema.

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[20] Christopher b. Gray (ed.), *The Philosophy of Law: An Encyclopedia* Volume I, New York 2012, str. 771; Značaj Bečke konvencije potvrđuje i broj država koje su njene potpisnice, a zatim i broj slučajeva u kojima je ona primenjivana, o tome v. više kod: Jelena Perović, "Selected Critical Issues Regarding the Sphere of Application of the CISG", *Anali Pravnog fakulteta u Beogradu,* vol. 59, br. 3, Beograd, 2011, str. 181.

[21] Ova pitanja su bila presudna i za pravilno određenje da li se isporuka investicione opreme smatra prodajom, jer i obaveza da se obezbedi materijal i obaveza izrade stvari pod određenim okolnostima mogu jednu istu transakciju učiniti potpuno drugačijom od prodaje, v. više u: *CISG Advisory Council Opinion no 4 – Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts,* Madrid, 2004, str. 4.

Smatramo da je ovakvo stanovište upitno kod više tipova ugovora o isporuci. Primera radi, postoje ugovori kod kojih isporučilac obezbeđuje i rad i materijal za izradu stvari, ali se stvar izrađuje po specifičnim zahtevima naručioca. Naručilac angažuje određenog isporučioca prvenstveno zbog njegove sposobnosti da izradi stvar po tako postavljenim zahtevima (slika, specifični uređaj i sl.), odnosno da primeni određeni intelektualni i fizički rad, znanje i iskustvo, a ne zbog sposobnosti da obezbedi materijal. Kvalifikacija takvog ugovora kao ugovora o prodaji, samo zato što je isporučilac obezbedio materijal (koji bi u konkretnom slučaju mogao da obezbedi i bilo koje treće lice), učinjeno je bez uzimanja u obzir specifičnosti i značaja obaveze činjenja koja bi u takvom slučaju mogla da bude suštinski (*substantial*) element ugovornog obavezivanja. Štaviše, ekonomska vrednost materijala koji obezbeđuje isporučilac može biti daleko veća od materijala naručioca, ali upravo znanje i veštine pri obradi materijala mogu imati presudni značaj za nastanak stvari u celini. Obaveza da se obezbedi materijal je u funkciji izrade stvari kao glavnog cilja ugovora. Takva obaveza (nabavka materijala), po pravilu, ne zahteva stručnost, znanje i tehnološko iskustvo. Materijal bi mogao da obezbedi i onaj koji stvar ne može da izradi, ali ne i obrnuto. Samim tim, osnov ugovora i razlog ugovornog obavezivanja strana, prema našem mišljenju, proističu iz obaveze činjenja – obaveze izrade stvari, pa takav ugovor u pretežnom delu ima pravnu prirodu ugovora o delu.

U svakom slučaju, postavilo se pitanje na koji način vrednovati pojam bitnog dela materijala (*substantial part*) iz člana 3 stav 1 Bečke konvencije. Pravna doktrina poznaje nekoliko različitih principa za takvo vrednovanje: 1) *economic test* (kriterijum ekonomske vrednosti), i 2) *essential criterion* (kriterijum značaja).[22] Stavovi prakse i nacionalnih prava o tome koji od ova dva principa treba primeniti, razlikuju se. Tako, postoje sudske i arbitražne odluke koje ovo pitanje regulišu na potpuno različite načine.[23] Ipak, čini se da je zastupljenije

[22] J. Perović, "Selected Critical Issues Regarding the Sphere of Application of the CISG", *Anali Pravnog fakulteta u Beogradu,* vol. 59, br. 3, Beograd, 2011, str. 185; U literaturi se pominje i tzv. *volume test* koji ukazuje na obim i dimenzije materijala u odnosu na celokupan proizvod.

[23] Uporedi odluku švajcarskog suda u Bazelu, Civil Court (Zivilgericht) Basel-Stadt od 8. novembra 2006. [P.2004.152] (Pace Database Online br. 061108s1) prema kojoj ugovor o izradi, montaži i puštanju u rad opreme za pakovanje određenih proizvoda predstavlja ugovor o prodaji; odluku apelacionog suda u Insbruku, Court of Appeal (Oberlandesgericht) Innsbruck 18 December 2007 [1 R 273/07t] (Pace Database Online: 071218a3), prema kojoj, ugovor o izradi i isporuci čelične konstrukcije prema posebnim specifikacijama naručioca ne predstavlja prodaju, već mešoviti ugovor kod kojeg je posebno izražen element rada, odnosno vršenja usluga, zbog čega se na takav ugovor konvencija ne može primeniti, a kvantitativni kriterijum kao takav nije od značaja ("... The quantitative balance does not constitute the sole requirement in respect to the question whether

ono shvatanje koje pojam bitnog dela materijala određuje prema kvantitativnom, ekonomskom principu, odnosno kriterijumu ekonomske vrednosti.[24]

Prema autorima *CISG Advisory Council Opinion No. 4,*[25] na to ukazuje i legislativna istorija Bečke konvencije, time što ona ciljno izostavlja pojam *essential* koji je do tada bio u upotrebi pod uticajem Jednoobraznog zakona o međunarodnoj prodaji robe iz 1964. godine i Jednoobraznog zakona o zaključivanju ugovora o međunarodnoj prodaji robe, takođe iz 1964. godine.[26] S druge strane, zastupnici primene kvalitativnog kriterijuma pozivaju se na francusku verziju Bečke konvencije, za koju se osnovano može reći da sugeriše upotrebu kriterijuma *essential* u kvalitativnom i funkcionalnom smislu.[27] U praksi, prevagu je svakako odneo ekonomski kriterijum, dok će se kvalitativni kriterijum (*essential*) primenjivati onda kada ekonomski kriterijum nije primenljiv.

Problem u tumačenju konvencije otvara i pitanje šta se sve smatra materijalom, odnosno da li su njime obuhvaćeni tehnologija, tehničke specifikacije, projekti, formule i crteži potrebni za izradu stvari. Praksa i pravni pisci imaju suprotstavljene stavove, a kontroverzu otvara i jedna francuska odluka koja odudara od principa sadržanih u Konvenciji. U toj odluci je zaključeno da Konvencija nije primenljiva na ugovor koji za predmet ima stvar sačinjenu prema projektu,

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the supply of services is predominant..", *http://cisgw3.law.pace.edu/cisg/text/cisg-translation-network.html,* 01.10.2019.

[24] V. sledeće odluke koje uvažavaju ekonomski kriterijum vrednovanja ugovorenih prestacija: Gerechtshof Arnhem 7 October 2008 [LJN BG2086] – (Pace Database Online: 081007n1); District Court (*Richteramt*) of Laufen, Canton Berne 7 May 1993 (Pace Database Online: 930507s1); odluka Ruskog arbitražnog udruženja 356/1999 od 30. maja 2000 (Pace Databse Online br. 000530r1.html)*;* odluku Vrhovnog suda Italije, Corte suprema di cassazione, Sezioni Unite *Jazbinsek Gmbh v. Piberplast s.p.a.* (Pace Database Online: 020606i3); odluku privrednog suda u Cirihu, Commercial Court (*Handelsgericht*) Zürich od 26. aprila 1995. [HG920670] (Pace Database Online br. 950426s1) *http://cisgw3.law.pace.edu/cisg/text/cisg-translation-network.html,* 01.10.2019.

[25] *CISG Advisory Council* predstavlja privatnu inicijativu usmerenu na promociju uniformne primene Bečke konvencije, odnosno davanje mišljenja o primeni konvencije, vid. *http://cisgac.com/,* 01.10.2019.

[26] *CISG Advisory Council Opinion no 4,* str. 5; Takav kriterijum (*essential criterion*) je polazio od kvalitativnog vrednovanja određene obaveze za ugovor u celini (bilo da je reč o obavezi da se izradi stvar, bilo da je reč o obavezi da se obezbedi određeni materijal za njenu izradu).

[27] Postoje slučajevi iz prakse, kao i pravna mišljenja, prema kojima se pojam *part essentielle* upotrebljen u francuskoj verziji Bečke konvencije odnosi na kvalitet i funkcionalnost, kao kriterijum za određenje da li se neki deo materijala smatra bitnim, s krajnjim ciljem da se akcenat stavi na kvalitativni značaj određene prestacije za ugovor u celini (v. J. Perović, "Selected Critical Issues Regarding the Sphere of Application of the CISG", *Anali Pravnog fakulteta u Beogradu,* vol. 59, br. 3, Beograd, 2011, str. 185; Bernard Audit, *La vente international de marchandises, Droit des Affaires,* Paris ,1990, str. 25; F. Ferrari, *nav. delo,* str. 115, fn. 554.

crtežima i šemama koje obezbeđuje naručilac, za čiji račun se stvar i izrađuje, što potvrđuje stanovište o dominantnom prisustvu ugovora o delu tamo gde je rad od odlučujućeg značaja za nastanak stvari.[28] Tu, dakle, presudan uticaj nije odigrao ekonomski kriterijum, već kvalitativni kriterijum – činjenica da je stvar izrađena po tehničkim specifikacijama i za račun naručioca.[29] Ovakva odluka suda u Grenoblu je kritikovana jer se većina pobornika Konvencije slaže da projekti, crteži i tehnička specifikacija predstavljaju sporedne elemente uz materijal i da se ne mogu podvoditi pod njegove fizičke i ekonomske karakteristike.[30]

Primena Bečke konvencije na mešovite ugovore – prepodenant part

Prema odredbama člana 3. stav 2. Bečka konvencija se ne primenjuje na ugovore u kojima se pretežni deo obaveza one strane koja isporučuje robu sastoji u izvršenju nekog rada ili pružanju nekih usluga.

Prema shvatanju zasnovanom na *CISG Advisory Council Opinion no. 4,* obaveza koja čini pretežni deo predmeta ugovora i u ovom slučaju će se ceniti prema njenoj ekonomskoj vrednosti, pa je kod ugovora koji objedinjuje nabavku materijala i izvršenje rada ili usluga, reč o prodaji ukoliko su rad i usluge manje vrednosti u odnosu na materijal od kojeg stvar nastaje.[31] Pri tom se, kada govorimo o obavezi izvršenja rada, ne uzima rad pri izradi stvari, već samo fizički i intelektualni rad u smislu pratećih obaveza.[32] Takvo stanovište je vladajuće i na njega uka-

[28] J. Perović, "Selected Critical Issues Regarding the Sphere of Application of the CISG", *Anali Pravnog fakulteta u Beogradu,* vol. 59, br. 3, Beograd, 2011, str. 185*;* odluka francuskog Apelacionog suda od 25.05.1993. (Pace Online Database 250593); shvatanje na kojem je zasnovana ova odluka govori u prilog tome da se, bez obzira na pripadnost materijala, ugovor o isporuci stvari koja se izrađuje prema posebnim zahtevima naručioca ne smatra prodajom, već ugovorom o delu, *http://cisgw3.law.pace.edu/cisg/text/cisg-translation-network.html,* 01.10.2019.

[29] U jednoj sudskoj odluci se navodi da je kod ugovora o izradi stvari po specifikaciji i zahtevima naručioca reč o ugovoru o delu, dok je kod ugovora o izradi standardnih proizvoda reč o prodaji, Société P Service et Société L de transport en commun v. Société F__ automatique et Société G__ et Société N__ 18 December 2003 (Pace Database Online br. 031218f1), *http://cisgw3.law.pace.edu/cisg/text/cisg-translation-network.html,* 01.10.2019.

[30] V. Fritz Enderlein, Dietrich Maskow, "International Sales Law, United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods, Commentary", *Oceana Publications*, 1992, *http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art031a*, 10.08.2014 str. 36 i dalje.

[31] V. *CISG Advisory Council Opinion no. 4,* 11.

[32] V. odluku privrednog suda u Cirihu, Commercial Court (*Handelsgericht*) Zürich od 26. aprila 1995. [HG920670] (Pace Database Online br. 950426s1), *http://cisgw3.law.pace.edu/cisg/text/cisg-translation-network.html,* 01.10.2019.

zuje gore pomenuto mišljenje, odnosno tumačenje Bečke konvencije. Međutim, činjenica je da ono sadrži suštinske nedostatke, pre svega zbog toga što prevagu odnosi ekonomsko, umesto kvalitativnog vrednovanja određene prestacije. Tako će, primenjujući ekonomski kriterijum vrednovanja, materijal koji obezbeđuje isporučilac gotovo uvek predstavljati *prepodenant part* u odnosu na rad i usluge koje on obavlja, a sledstveno tome takav ugovor biti tretiran kao prodaja. Ovakav pristup u primeni Bečke konvencije zanemaruje kvalitativni značaj činjenja, odnosno izrade stvari i izvršenja specifičnih usluga, iako one mogu biti ključni razlog ugovornog obavezivanja naručioca. Suprotno, ukoliko bi umesto ekonomskog, prevagu odneo kriterijum kvalitativnog značaja pretežne prestacije, obaveza izrade stvari bi predstavljala tzv. *prepodenant part,* bez obzira na vrednost upotrebljenog materijala, pa se ugovor ne bi mogao smatrati prodajom. O potrebi primene takvog kriterijuma vrednovanja (makar i kao alternativnog), ukazali su pojedini kritičari Bečke konvencije, kao i sudska praksa koja je u mnogim slučajevima odstupila od ekonomskog vrednovanja ugovorenih prestacija i zauzela stanovište da se ima ceniti suština i kvalitativni značaj određene prestacije za ugovor u celini.[33]

Najzad, u kontekstu stava 2. člana 3. Bečke konvencije (koji razgraničava prodaju od mešovitih ugovora), postavlja se pitanje primene konvencije kod *ključ u ruke* ugovora, što se u međunarodnoj doktrini smatra i te kako kontroverznim.[34] Tu se vide najveći nedostaci težnje da se Bečka konvencija po automatizmu primeni i na sve ugovore koji (pored isporuke materijala) podrazumevaju i obavljanje određenog rada na izradi mašina i opreme, kao i vršenje specifičnih usluga koje su sa isporukom neposredno povezane. Konkretno, za *ključ u ruke* ugovore ističe se da mesta za primenu Bečke konvencije nema, jer su elementi prodaje kod takvog ugovora u senci drugih specifičnih usluga. Takvo stanovište potvrđuje i sud-

[33] F. Enderlein, D. Maskow, "International Sales Law, United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods, Commentary", *Oceana Publications*, 1992, *http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art031a*, 10.08.2014, str. 36 i dalje; Peter Schlechtriem, Peter Butle, *UN LAW on International Sale: The UN Convention on International Sales of Goods,* Heidelberg 2009, str. 24; odluka francuskog apelacionog suda u Grenoblu, Cour d'appel de Grenoble, 21 Oct 1999, (Pace Database Online br 950426f2); odluka apelacionog suda u Insbruku, Court of Appeal (Oberlandesgericht) Innsbruck 18 December 2007 [1 R 273/07t] (Pace Database Online: 071218a3); odluka Vrhovnog suda Italije, Corte suprema di cassazione, Sezioni Unite Jazbinsek Gmbh v. Piberplast s.p.a. (Pace Database Online: 020606i3); odluka švajcarskog trgovinskog suda: Handelsgericht Zurich, Switzerland July 2009 (Pace Databse Online: 020709s1), *http://cisgw3.law.pace.edu/cisg/text/cisg-translation-network.html,* 01.10.2019.

[34] *CISG Advisory Council Opinion no 4,* 11.

ska praksa stranih sudova koja ukazuje na nemogućnost primene Konvencije na ugovor o projektovanju, izradi, ugradnji i puštanju u rad postrojenja.[35]

Bečka konvencija i ZOO (odnos čl. 3. Bečke konvencije i čl. 601. ZOO-a)

Razlike između člana 601. ZOO i člana 3. Bečke konvencije ne bi bile toliko izražene da član 601. ZOO ne sadrži stav 3. u kojem se navodi da se ugovor u svakom slučaju smatra ugovorom o delu ukoliko su ugovarači naročito imali u vidu poslenikov rad. Dakle, bez obzira na kvalitativ bitnog dela materijala, tj. ekonomski odnos materijala i rada, ugovor će se smatrati ugovorom o delu ukoliko je razlog ugovornog obavezivanja činjenje – znanje, iskustvo ili tehnologija izrade stvari kojom raspolaže određeni poslenik.

Ovakvu odredbu ne sadrži Bečka konvencija koja pravnu prirodu ugovora određuje na osnovu kriterijuma bitnog dela materijala (stav 1) i kriterijuma pretežne ugovorne obaveze (stav 2) člana 3.

FIDIC opšti uslovi ugovora – dometi ponuđenog rešenja

FIDIC opšti uslovi spadaju u norme međunarodnog autonomnog prava, s obzirom na to da nastaju pod okriljem organizacije autonomnog karaktera. Njihova rasprostranjenost navela je pojedine autore da ih smatraju normama *lex mercatoria* u domenu prava građenja.[36] Oni sadrže brojne odredbe skrojene s ciljem da se na izbalansiran način uredi realizacija kompleksnih međunarodnih građevinskih projekata, bilo da je reč o izgradnji objekata prema projektnoj do-

[35] John Honnold, *Uniform Law for International Sales Under 1980 United Nation Convention,* Hague 2009, str 69, http://www.cisg.law.pace.edu/cisg/biblio/honnold.html, 08.08.2014.; Vid. odluku švajcarskog trgovinskog suda: Handelsgericht Zurich, Switzerland July 2009 (Pace Databse Online: 020709s1) *http://cisgw3.law.pace.edu/cases/020709s1.html*, 08.08.2014. godine; pojedine arbitražne odluke kod sporova proisteklih iz ugovora *ključ u ruke,* nisu automatski isključile Konvenciju, već se prethodno moralo utvrditi da li ekonomska vrednost stvari koje su razmenjene za određen novac prevazilazi vrednost ostalih obaveza, odnosno radova i usluga na povezivanju i puštanju u rad opreme i delova postrojenja. Takvo stanovište smatramo spornim jer čini se da ovakve prestacije u najmanju ruku čine nedeljivu obavezu koja se ne može razložiti na dve zasebne, samostalne obaveze, pogotovo po kriterijumu njihove ekonomske vrednosti. One stvaraju mešoviti ugovor, za koji nema osnova primeniti Bečku konvenciju.

[36] Branko Vukmir, *Ugovori o građenju i uslugama savjetodavnih inženjera,* Zagreb, 2009, str. 47–48; B. Vukmir, *Ugovori o izvođenju investicijskih radova u inozemstvu, Međunarodni,* Zagreb, 1980, str. 44.

kumentaciji koju obezbeđuje investitor, bilo da je reč o izgradnji objekata po projektnoj dokumentaciji izvođača, bilo da je reč o *ključ u ruke* i tzv. *EPC* ugovorima kod kojih se izvođač obavezuje ne samo da izgradi objekat, već i da isporuči i montira opremu, pa čak i čitava postrojenja. Osnovu takvih složenih ugovora najvećim delom čine ugovori o delu.

U smislu predmetne tematike, interesantno je da ovi uslovi ugovora razrađuju pitanje prenosa vlasništva na materijalima i opremi koja je predmet isporuke u toku same realizacije posla, odnosno i pre nego što dođe do nastanka stvari, odnosno objekta ili postrojenja koja su predmet ugovora. Tako, član 7.7. ovih uslova predviđa da svaki deo postrojenja ili opreme, u meri u kojoj to dozvoljavaju propisi merodavnog prava, postaju vlasništvo naručioca bilo u momentu isporuke na gradilište, bilo u momentu kada su se stekli uslovi za plaćanje, šta ranije nastupi.

Citirana odredba ustanovljena je u korist naručioca, kako bi ga zaštitila od insolventnog izvođača. No, iz nje posredno proizlazi da je kod složenih ugovora koji za osnovu imaju ugovor o delu (bilo da je reč o građenju ili isporuci tehnološke opreme), materijal od kojeg nastaje određena stvar u funkciji obavljanja rada kao predominantne ugovorne obaveze i da takav materijal i oprema mogu postati vlasništvo naručioca čak i pre konačnog nastanka stvari koja je predmet ugovora. U takvoj situaciji smatramo da je reč o mešovitom ugovoru, koji povezuju dva samostalna i odvojena pravna posla, odnosno isporuku materijala (koji postaje vlasništvo naručioca), a zatim izradu stvari od materijala koji je već postao vlasništvo naručioca. Pri tome, navedena odredba *FIDIC* opštih uslova upravo govori o tome da je njena primena uvek uslovljena zakonodavnim okvirom zemlje u kojoj se ovi uslovi primenjuju, pa je iz tih razloga razgraničenje pravne prirode ugovora tesno povezano i sa načinom sticanja i prenosa prava svojine.

Uporednopravna rešenja

U stranoj literaturi zastupljeni su različiti stavovi i shvatanja o predmetnom pitanju. Tako, pravna doktrina SAD-a (kod tumačenja Jednoobraznog trgovačkog zakona) kao kriterijum razgraničenja uzima onaj element ugovornog odnosa koji je predominantan u odnosu na ostale, slično rešenju koje je prihvaćeno u ZOO-u.[37] U tom smislu, ukoliko je ugovorom predviđeno izvršenje određenog posla ili uslu-

[37] Joseph M. Lookofsky, *Understanding The CISG In The Usa*, Hague 2004, str. 18; Ronald Anderson, Ivan Fox, David P. Twomey, *Business Law, UCC Comprehensive Volume,* Cincinnati, 1987, str. 443.

ge (kod koje se predaja određenih stvari pojavljuje kao prateći, posledični efekat), takav ugovor će se svakako smatrati ugovorom o delu.[38]

Američka praksa je, međutim, usvojila različite pristupe. Većina sudova sledi pomenuto pravilo predominantne, pretežne svrhe ugovora *(predominant purpose, predominant factor)*, pa ukoliko je ugovor najvećim delom usmeren na prodaju, a samo kao prateće elemente podrazumeva i vršenje određenog posla, rada ili usluge, biće reč o ugovoru o prodaji u celini, i suprotno, ako je prodaja zastupljena kao sporedan, prateći element izvršenja određenog posla, biće reči o ugovoru o delu (*service agreement*).[39] Jedan manji broj američkih sudova zauzeo je drugačiji stav, prema kojem se primena određenog zakona prostire samo na onaj deo ugovora na koji se taj zakon odnosi, pa *predominant purpose* ne dovodi do toga da se ugovor u celini tumači prema pretežnoj svrsi, već samo u onom delu u kojem je određeni element izražen.[40]

Francuska pravna doktrina kod ovakvog razgraničenja uzima materijal kao element drugorazrednog značaja.[41] Kriterijum vrednovanja prestacija ovde nije čisto ekonomski, već se određuje kvalitativno – prema funkcionalnosti i značaju bitnog dela svake pojedinačne prestacije u odnosu na ugovor u celini (*essential part*).[42]

U vezi sa stanovištem engleskog prava, u delu koji analizira specifične slučajeve sudske prakse, interesantan je slučaj zubara koji se obavezao da svom pacijentu izradi protezu koja nije zadovoljila potrebe pacijenta, te se po pitanju odgovornosti za nedostatke postavilo pitanje da li je po sredi reč o ugovoru o prodaji ili ugovoru o delu.[43] Može se reći da je princip tumačenja i kvalifikacije ovih ugo-

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[38] R. Anderson, I. Fox, D. P. Twomey, *Business Law, UCC Comprehensive Volume,* Cincinnati, 1987, str. 443; v. Supreme Court of Wisconsin, *Insurance Co. of North America v. Cease Elect, Inc.,* No. 03-0689, dated 09.11.2004.

[39] United States Court of Appeals, Eight Circuit, *Dacota Gasification v. Pascoe Building System, A division of Amcord., Inc.,* 95/2548, dated 01.08.1996; United States Court of Appeal, Ninth Circuit, *United States v. City of Twin Hols, Idaho* 806 F 2d 862, dated 15.12.1986; sličan pristup sadržan je i u čl. 601. ZOO-a.

[40] Ovo poslednje bilo bi moguće kod onih mešovitih ugovora koji sadrže deljive ugovorne obaveze.

[41] Jelena Vilus, *Građanskopravna odgovornost izvođača i projektanta,* Građevinska knjiga, Beograd, str. 74; v. takođe i George Bricmont, *La responsaibilite des architecte et entrepreneur en droit belge et en droit francais,* Briesel 1965, str. 16–19.

[42] V. Henry Mazeaud, Leon Mazeaud, Jean Mazeaud, Francois Chabas, *Leçons de Droit civil, Tome 3, Vol. 2,* Montchrestien, 1995, str. 617; B. Vukmir, *Ugovori o građenju i uslugama savetodavnih inženjera,* str. 300, fn 562.

[43] High Court, *Lee v. Griffin* (1861) 30 L.J.Q.B. 252, *https://www.casemine.com/judgement/in/5608f983e4b0149711145157,* 01.10.2019.

vora isti, pre svega zbog činjenice da je u oba slučaja reč o ugovorima koji sadrže elemente ugovora o prodaji (davanje materijala, prenos svojine na stvari) i ugovora o delu (izrada, oblikovanje, projektovanje, i sl.). U osvrtu na međusobni odnos ovih ugovora, ne pridaje se značaj vrednosti rada i vrednosti materijala upotrebljenog za izradu stvari, već se kao ključni kriterijum uzima svrha ugovora u celini i cilj koji se njime želi postići.[44] Prema tome, ugovori koji za cilj imaju prenos prava svojine sa jednog na drugo lice, u zamenu za novac (kao ugovorenu protivčinidbu), predstavljaju ugovore o prodaji. Međutim, u engleskom pravu takve ugovore treba razlikovati od ugovora koji u sebi sadrže i obavezu isporuke materijala i izvršenja rada (engl. *contracts of labour with or without services*). I kod takvih ugovora, nema sumnje, dolazi do predaje određene stvari, ali se suština ugovora (*substance of the contract*) sastoji u obavljanju određenog posla i vršenju usluga.[45]

Međutim, engleski sudovi su lutali od jednog do drugog kriterijuma putem kojih bi se testirala pravna priroda ovih ugovora.[46] Najpre je usvojen kriterijum relativne važnosti rada i materijala za nastanak stvari (engl. *criterion of relative importance of labour and materials*), tako što se ocenjivao značaj jedne ili druge obaveze za ostvarenje svrhe ugovora u celini; zatim, kriterijum posledice koju ugovor stvara (engl. *results in production*), pa uvek kada određena transakcija ima za cilj nastanak stvari koja može biti predmet prodaje, takav ugovor ima pravnu prirodu ugovora o prodaji (engl. *given result*); najzad, kriterijum originalnosti (engl. *original test*) prema kojem se ugovor kvalifikuje kao prodaja ili ugovor o delu, u zavisnosti od toga da li suštinu ugovora čini obaveza umnog ili fizičkog rada (gde je materijal drugorazrednog značaja) ili pak obaveza da se isporuči krajnji proizvod sa ugovorenim karakteristikama (bez obzira na veštine, znanje, stručnost isporučioca).[47] Tim povodom, s pravom se u engleskoj teoriji ističe da je poslednji kriterijum – kriterijum originalnosti – od odlučujućeg značaja, ali uz precizno određenje na šta su se ugovorne strane obavezale u konkretnom slučaju, jer se i obaveze činjenja, same po sebi, razlikuju kao obligacije sredstva i obligacije cilja: 1) u prvom slučaju potrebno je da se obavi ugovoreni rad, primeni znanje,

[44] Konrad Zweigert, *International Encyclopedia of Comparative Law,* chapter 8, Leiden, 1980, str. 6.

[45] Clive M. Schmitthoff, David. A. Sarre, *Charlesworth's Mercantile Law,* London, 1984, str. 285–331, 371–373.

[46] R. Goode, *Contract and Commercial Law: The Logic and Limits of Harmonisation*, vol 7.4 Electronic Journal of Comparative Law, 2003, str. 201, *https://www.ejcl.org/74/art74-1.PDF*, 01.10.2019.

[47] *Ibidem.*

stručnost, iskustvo i veštine, bez obzira da li će oni dovesti do određenog rezultata; 2) dok je kod obligacije cilja potrebno postići rezultat (izraditi stvar) koji su ugovorne strane definisale.[48]

ZAKLJUČAK

Povezivanje i spajanje različitih ugovora u jedan pravni posao je uobičajeno u savremenom pravnom prometu. Otuda i veliki broj neimenovanih ugovora koji se svakodnevno modifikuju i dobijaju nove pojavne oblike, pogotovo kada govorimo u specifičnim ugovorima o građenju, odnosno "ključ u ruke" ugovorima, ugovorima o inženjeringu, isporuci investicione opreme i drugim poslovima koji najčešće osnovu imaju u ugovoru o delu. Utvrđivanje univerzalnog kriterijuma za razgraničenje takvih ugovora nije moguće, već se smisao pojedinačnih ugovornih obaveza i ugovora u celini moraju ceniti od slučaja do slučaja, prema cilju koji su strane u konkretnom slučaju želele postići.

Kad ugovor o izradi određene stvari u sebi sadrži više samostalnih obaveza poslenika koje su međusobno uslovljene (nabavka materijala, izrada stvari, primena znanja, transfer tehnologije, garantovanje određenih rezultata, i sl.), ali tako da je svaka od ovih obaveza samostalna i da sama po sebi predstavlja samostalan ugovorni odnos koji odgovara nekom imenovanom ugovoru (npr. prodaji ili prostom obliku ugovora o delu koji se zasniva samo na obavljanju rada), možemo reći da je reč o ugovoru o delu koji je nastao povezivanjem dva ili više samostalnih ugovora.[49] Kod takvog ugovora, prestacije po vremenskom redosledu izvršenja zavise jedna od druge, pa se najpre isporučuje materijal (koji postaje svojina naručioca), da bi se zatim vršila obrada i prepravka materijala primenom određenih znanja s ciljem stvaranja nove stvari. Tada bi se zapravo radilo o povezivanju prodaje i ugovora o delu u jedan ugovorni odnos, ali tako da svaki od njih zadržava svoju samostalnost. Primer takvog ugovora je isporuka investicione opreme koja je manje složena i manje specifična, pa je, na primer, može montirati i pustiti u rad sam naručilac ili drugo lice koje on ovlasti, a da se time ne dovede u pitanje izvršenje isporuke kao samostalne činidbe.

Otuda, po našem mišljenju, gore citirani član 7.7 *FIDIC* Opštih uslova predviđa da materijal i oprema namenjeni ugradnji postaju svojina naručioca i pre za-

[48] *Ibidem*.

[49] V. O. Antić, "Imenovani i neimenovani ugovori u savremenom obligacionom pravu", *Anali Pravnog fakulteta u Beogradu,* Vol. 52, br. 1–2, Beograd, 2004, str. 95–115; Upor. Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, *Global Sales and Contract Law*, New York 2012, str. 115.

vršetka objekta. Zaključenje svih pojedinačnih ugovora koji čine sklop povezanih ugovora je međusobno uslovljeno, ali nije nužno, jer nije reč o jednoj, već nekoliko različitih i samostalnih obaveza. Posledično tome, naručilac najpre postaje vlasnik materijala namenjenog za izradu stvari, a zatim i vlasnik stvari koja nastaje radom poslenika. Samim tim, nema smetnji da poslenik iz takvog ugovornog odnosa, po osnovu člana 628. ZOO, stekne i zalogu na stvarima koje je predao naručiocu.

S druge strane, ukoliko se ugovaranjem različitih obaveza kreira jedinstven ugovorni odnos sa nedeljivim prestacijama, odnosno tako da se one ne mogu posmatrati samostalno i da nijedna ugovorna strana nema interesa za delimičnim ispunjenjem ugovora, bilo bi reči o ugovoru o delu sa mešovitim osnovom.[50] Glavna obaveza kod ovakvog ugovora sastoji se u tome da poslenik izradi stvar od sopstvenog materijala, što znači da su u takvoj obavezi sadržane i obaveza činjenja i obaveza davanja, odnosno obaveza da se stvar izradi i preda naručiocu, ali kao jedna i jedinstvena obaveza. Takav bi bio slučaj sa ugovorom kojim se renomirani slikar obavezuje da naslika portret ili, pak, ugovor kojim se jedna strana obavezuje da isporuči i preda određenu opremu ili postrojenje koje tek nakon puštanja u rad i postizanja određenih parametara, ostvaruje svrhu i krajnji cilj koji su strane ugovorom htele postići. Primenom člana 601. stav 3. ZOO, takav ugovor bi bez obzira na svoju mešovitu osnovu, mogao da se kvalifikuje kao ugovor o delu. Pri tom, to što zakon ostavlja mogućnost da ugovor može biti ugovor o delu (zato što su strane imale naročito u vidu poslenikov rad) ili ugovor o prodaji (zato što su strane imale u vidu materijal za izradu stvari), ne isključuje postojanje elemenata onog drugog ugovora, već govori o tome koji je element dominantan. Svojinu na tako nastaloj stvari primenom člana 22. ZOSPO stekao bi poslenik, što bi dalje značilo da se predajom stvari ona prenosi na naručioca i da ugovor o delu može biti osnov za prenos prava svojine, kao što to, pored ugovora o prodaji, mogu biti i drugi ugovori (razmena, poklon, ugovor o doživotnom izdržavanju). Primena člana 628. ZOO, koji predviđa da poslenik može imati pravo zaloge na stvari koju je izradio ili opravio, ne bi bila moguća u takvom slučaju, jer je poslenik (slikar koji je naslikao sliku na sopstvenom platnu) vlasnik stvari koju je napravio, sve do njene predaje naručiocu.

[50] *Ibidem.*

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DISTINCTION BETWEEN SALE AND SERVICE CONTRACTS

Summary

It is not difficult to distinguish basic types of sale and service contracts, especially if the contract provides for obligation of one party to perform a physical or intellectual act (craft works, giving advice, repairing etc.). However, there are service contracts whereby one party undertakes to perform a particular work that results in creation of a certain object (work of art, tools, devices, machines, facilities, plant, etc.) so the question arises whether such contract is the service contract since obligation „to do" represents preponderant element of the contract or the sales contract considering the transfer of ownership as the final outcome of the contract. The Law on Contracts and Torts[51] and UN Convention on International Sale of Goods[52] provide provisions for distinguishing these contracts, while Law on Property Rights[53] regulates who is the owner of the newly created object. The purpose of this paper is to show interplay between criterias provided in these laws.

Key words: service contract, sales contract, obligation "to do" legal nature, service provider, seller

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[52] UN Convention on International Sale of Goods, 1980; Law on ratification of CISG, Official Gazette SFRY – International contracts no, 10-1/84 (hereinafter: CISG).

[53] Law on Basics of Property Rights, Official Gazette SFR of Yugoslavia, no. 6/80 i 36/90 and 36/90 and Official Gazette SR Yugoslavia no. 29/96.

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LJUBICA TOMIĆ

KLJUČNA PITANJA UGOVORA O MEĐUNARODNOJ DISTRIBUCIJI

Međunarodna prodaja robe se u svom značajnom delu odvija kao kontinuirana prodaja između ugovornih partnera na osnovu ugovora o distribuciji, kojim snabdevač i distributer utvrđuju niz obaveza koje su usmerene na to da je distributer uključen u prodajnu organizaciju snabdevača, dok prodaje robu na ugovorenoj teritoriji u svoje ime i za svoj račun. Ugovor o distribuciji, kao sui generis ugovor međunarodnog trgovačkog prava, podleže ozbiljnim restrikcijama koje nameću pravo konkurencije one države na čijoj teritoriji se sprovode akti i radnje vezane za izvršenje ugovora o distribuciji. Imajući u vidu da distributer u izvršavanju svojih obaveza razvija poslovni ugled ugovornih proizvoda, bitno je posvetiti se pitanju naknade za poslovni ugled nakon prestanka ugovora o distribuciji. Razgraničenje ugovora o distribuciji, kao okvirnog ugovora, od ugovora o prodaji, kao posebnih ugovora koji se zaključuju prilikom ispunjenja ugovora o distribuciji, značajno je i za pitanje primene Bečke konvencije o međunarodnoj prodaji robe koja se na pojedinačne ugovore o međunarodnoj prodaji robe primenjuje, dok se na okvirni ugovor o međunarodnoj distribuciji po pravilu ne primenjuje.

Ključne reči: *ugovor o distribuciji, naknada za poslovni ugled distributera, zabrana konkurisanja, Bečka konvencija*

U V O D

Međunarodna prodaja robe se danas u svom značajnom i velikom delu odvija preko struktura distributivnih mreža[1], koje se uspostavljaju između proizvo-

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[1] Danas su određene industrije koje su u celosti bazirane na strukturi distributivnih mreža, primera radi automobilska industrija, finansijske usluge, prodaja goriva/sistemi benzinskih stanica,

đača ili veletrgovaca u svojstvu snabdevača, s jedne strane, i distributera, s druge strane, a koje se u pravnom smislu zasnivaju na ugovoru o distribuciji kao *sui generis* ugovoru međunarodnog trgovačkog prava. Imajući u vidu značaj ovog ugovora, cilj ovog rada jeste da rasvetli ključna pravna pitanja vezana za ugovor o distribuciji u međunarodnoj trgovini, njegov pojam i elemente, pitanje naknade za poslovni ugled u slučaju prestanka ugovora o distribuciji, primenu Bečke konvencije o međunarodnoj prodaji na ovaj ugovor, kao i pitanja određenih ograničenja koja su nametnuta distributivnim mrežama imperativnim normama o zaštiti konkurencije.

POJAM I ELEMENTI UGOVORA O DISTRIBUCIJI

Pojam

Ugovor o distribuciji je kako u srpskom[2] pravu, tako i u većini uporednopravnih rešenja[3], neimenovan *sui generis* ugovor trgovačkog prava. Prema predloženoj definiciji Prednacrta Građanskog zakonika Republike Srbije "ugovorom o distribuciji" se jedna ugovorna strana obavezuje da drugu ugovornu stranu – distributera, *kontinuirano* snabdeva određenim proizvodima, a distributer se obavezuje da te proizvode kupuje radi njihove prodaje drugim licima, *u svoje ime i za svoj račun*."[4] Ugovorna strana, koja ima obavezu snabdevanja distributera, je ili sam proizvođač ili pak veletrgovac tog proizvođača (snabdevač, principal). Distributer vrši dalju prodaju kupljene robe samostalno, dakle, u svoje ime i za svoj račun, zarađuje na marži – razlici u ceni između nabavne i prodajne cene, ali se ipak razlikuje od običnog preprodavca jer ima *kontinuiran* odnos sa principalom i uključen je u određenoj meri i u njegovu prodajnu organizaciju.[5]

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prodaja farmaceutskih proizvoda, prodaja sportske opreme, obuće i tekstilnih proizvoda određenih robnih marki.

[2] Prednacrt srpskog Građanskog zakonika predviđa ugovor o distribuciji kao imenovan ugovor (v. član 1159–1187 Prednacrta Građanskog zakonika Republike Srbije).

[3] U većini zemalja ugovor o distribuciji ne spada u imenovane ugovore. Evropski izuzetak je Belgija, gde je ugovor o distribuciji imenovan ugovor još od davne 1961. godine.

[4] Član 1159 Prednacrta Građanskog zakonika Republike Srbije. *Kurziv u tekstu je autorov.*

[5] Primera radi, standardne su klauzule u ugovorima o distribuciji kojima se određuju obavezni godišnji volumeni prodaje; obaveze distributera u pogledu opremanja prodajnog mesta prema korporativnom identitetu snabdevača i sprovođenja snabdevačevih obavezujućih uputstava u pogledu marketinških kampanja; distributer je obavezan da učestvuje u obukama za prodaju koje organizuje snabdevač, kao i da održava određenu kadrovsku strukturu u prodaji koju određuje snabdevač.

Ugovor o distribuciji je prema dužini trajanja prestacije, ugovor sa trajnijim izvršenjem jer uvek podrazumeva kontinuirani poslovni i pravni odnos snabdevača i distributera. Prema karakteru prestacije, ugovor o distribuciji je meštovit ugovor, jer u sebi sadrži elemente više jednostavnih ugovora (po pravilu ugovora o kupoprodaji, ugovora o licenci i drugih neimenovanih ugovora kao što su servisni ugovor, konsultantski ugovor, i sl.).[6] Prema načinu zaključenja, ugovor o distribuciji koji zasniva trajnu obligaciju, predstavlja generalni ili okvirni ugovor[7] na osnovu kojeg se – tokom izvršenja te ugovorene trajne obligacije – zaključuje niz posebnih ugovora, pojedinačnih kupoprodajnih ugovora između snabdevača, s jedne strane, i distributera, s druge strane. Nemačka sudska praksa Vrhovnog saveznog suda (*Bundesgerichtshof*) je iznedrila definiciju ugovora o distribuciji koja je opšteprihvaćena u nemačkoj pravnoj teoriji i praksi,[8] a čiji su bitni elementi: a) ugovorom se zasniva *trajna* obligacija, b) ugovor je po svojoj prirodi *okvirni* ugovor, c) poslovanje distributera je samostalno, odnosno on postupa *u svoje ime i za svoje račun* i d) distributer se uključuje *u prodajnu organizaciju* snabdevača.[9]

U većini jurisdikcija industrijski razvijenih zemalja ugovor o distribuciji, samim tim što je neimenovan ugovor, predstavlja ujedno i neformalan ugovor, odnosno za punovažnost ugovora o distribuciji nije potrebna pisana forma. Ipak, u praksi treba u svakom pojedinom slučaju voditi računa o tome da ukoliko u okviru mešovitog ugovora o distribuciji postoje i elementi drugih ugovora, čija punovažnost zahteva pisanu formu, kao što je primera radi prema srpskom zakonodavstvu, ugovor o licenci, onda i ugovor o distribuciji mora biti u pisanoj formi, kako bi ugovor o licenci (npr. žiga snabdevača) bio u konkretnom pravnom odnosu punovažan.[10]

Iako zahtev za pisanom formom u većini jurisdikcija ne postoji, ugovor o distribuciji se zbog svoje složenosti i trajnosti obligacije, koja je u njemu sadrža-

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[6] O pravnim posledicama navedene podele ugovora, v. Slobodan Perovic, *Obligaciono pravo*, Službeni list SFRJ, Beograd, 1990, str. 211–217.

[7] O pravnim posledicama navedene podele ugovora, v. Slobodan Perovic, *Obligaciono pravo*, Službeni list SFRJ, Beograd, 1990, str. 229–231.

[8] Tako prof. dr Burghard Piltz, dr Mansur Pour Rafsendjani, *Internationales Wirtschaftsrecht*, C.H. Beck, München, 2017, str. 736.

[9] "*Ugovor o distribuciji je sui generis okvirni ugovor koji ima određeno trajanje, kojim se distributer obavezuje da prodaje robu proizvođača ili snabdevača u svoje ime i za svoj račun uz uključivanje u prodajnu organizaciju proizvođača, odnosno snabdevača.*" (BGH Urt. od 09.10.2002, VIII ZR 95/01 BB 2002, 25020) Presuda je dostupna na https://www.ewir-online.de/heft-12-2003/ewir-2003-587-vertragshaendlervertrag-bei-mehrfachem-jahresvertrag-mit-grosshaendler/.

[10] U srpskom pravu, pored obavezne pisane forme, ugovor o licenci se upisuje u registar Zavoda za intelektualnu svojinu i tek od tog trenutka proizvodi dejstvo prema trećim licima.

na, u praksi najčešće zaključuje upravo u pisanom obliku, i to tako što ekonomski jača strana (najčešće je to snabdevač) unapred pripremi tekst složenog ugovora o distribuciji i isti dostavi na potpis budućem distributeru. U praksi je polje za pregovore i eventualne izmene od strane ekonomski slabijeg partnera (obično distributera) po pravilu usko. Ekonomski jača strana će prihvatiti tek one izmene koje su obavezne kao zahtev imperativnog prava drugog pravnog sistema (onog u kojem radi distributer u okviru međunarodne trgovine) i stoga mogu da utiču na izvršivost ugovora na teritoriji distribucije.[11]

Činjenica da se postupak zaključenja ugovora o distribuciji između multinacionalnih kompanija kao snabdevača i lokalnih (ekonomski slabijih) distributera odvija na gore opisan način, ovo može u slučaju spora imati pravnog značaja za pitanje tumačenja ugovora o distribuciji zaključenog u pisanoj formi. U većini uporedno-pravnih sistema otvoriće se prilikom tumačenja put za primenu pravila *contra proferentem*, prema kome se ugovor ima tumačiti na štetu onoga koji ga je sastavio, a koje je kao pravilo propisano i u srpskom pravu.[12]

Elementi ugovora o distribuciji

Bitni elementi ugovora o distribuciji nisu zakonski određeni u onim jurisdikcijama u kojima je ovaj ugovor neimenovan, dakle, kako u Srbiji tako i u većini uporedno-pravnih rešenja. Ugovorne strane same ugovorom utvrđuju bitne elemente ugovora o distribuciji koji zaključuju, što je u srpskom pravu ograničeno jedino prinudnim propisima, javnim poretkom i dobrim običajima.[13] U praksi su se kao bitni elementi ugovora o distribuciji iskristalisali: 1) određenje ugovornog proizvoda; 2) određenje ugovorne teritorije; 3) pitanje ekskluzivnosti u pogledu određene teritorije i/ili određenih kupaca[14]; 4) pitanje zaštite/zabrane konkuren-

[11] Primera radi, registracija ugovora o licenci u Republici Srbiji zarad pravnog dejstva *erga omnes,* v. fusnotu br. 10.

[12] "*U slučaju kad je ugovor zaključen prema unapred odštampanom sadržaju, ili kad je ugovor bio na drugi način pripremljen i predložen od jedne ugovorne strane, nejasne odredbe tumačiće se u korist druge strane.*" član 100 Zakona o obligacionim odnosima RS ("Sl. list SFRJ", br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, "Sl. list SRJ", br. 31/93 i "Sl. list SCG", br. 1/2003 – Ustavna povelja).

[13] Autonomija volje kao osnovno načelo Zakona o obligacionim odnosima, član 10.

[14] *Ugovorom o ekskluzivnoj distribuciji* snabdevač se obavezuje da proizvodima snabdeva samo jednog distributera na određenoj teritoriji ili za određenu grupu lica. *Ugovorom o ekskluzivnoj kupovini* distributer se obavezuje da proizvode kupuje samo od snabdevača ili od lica određenog od strane snabdevača. *Ugovorom o selektivnoj distribuciji* snabdevač se obavezuje da, neposredno ili posredno, proizvodima snabdeva samo distributere odabrane na osnovu određenih kriterijuma (član 1160 Prednacrta Građanskog zakonika Republike Srbije). Ova podela ima uticaja i na određene restrikcije u okviru pravila o zaštite konkurencije, o čemu će u ovom tekstu dalje biti reči.

cije[15]; 5) pravo korišćenja robne marke/žiga i drugih prava intelektualne svojine[16]; 6) uređenje odgovornosti principala za nedostatke stvari[17], kao i pitanje garancije za proizvod; 7) cene i drugi uslovi prodaje (popusti, dospelost plaćanja, ugovoreni obim prodaje za određeni period, i sl.); 8) trajanje i raskid ugovora (uključujući detaljne odredbe o posledicama raskida, naknadi štete i plaćanje *goodwill-a* distributeru nakon raskida ugovora, načinu i rokovima postupanja sa lagerovanom robom i robnim obeležjima koja su kod distributera, i sl.), kao i 9) poslovna tajna i poverljivost.

Osim toga, u grupi obaveza distributera naći će se standardno: 1) obaveza čuvanja interesa principala; 2) obaveza uvećanja tržišnog udela; 3) obaveza izveštavanja, prikupljanja podataka o kupcima i prosleđivanje tih podataka snabdevaču[18]; 4) obaveza sprovođenja uputstava i marketinškog koncepta principala; 5) obaveza poručivanja robe i ciljevi prodaje; 6) obaveza držanja lagera robe; 7) obaveza u pogledu održavanja stručnosti, strukture i broja personala; 8) obaveze u pogledu korporativnog identiteta (prodajnog mesta, veličine i opreme poslovnog prostora, i sl.).

Na strani principala su pre svega obaveza redovnog snabdevanja distributera robom kao i kontinuirana podrška prodaji distributera (kao što je dostavlja-

[15] Ovu vrstu ugovornih klauzula uvek pažljivo treba staviti pod lupu imperativnih normi o zaštiti konkurencije, v. Zakon o zaštiti konkurencije ("Sl. glasnik RS", br. 51/2009 i 95/2013), Uredba o sporazumima između učesnika na tržištu koji posluju na različitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane ("Sl. glasnik RS", br. 11/2010), imajući u vidu drakonske kazne koje mogu iznositi i do 10% od ukupnog godišnjeg prihoda pogođenog učesnika na tržištu (snabdevača / distributera), kao i krivičnu odgovornost za zaključenje restriktivnih sporazuma (v. niže fusnota br. 32). O principima zaštite konkurencije i izuzecima predviđenim navedenom Uredbom će dalje u tekstu biti detaljnije reči.

[16] Ugovorna klauzula o licenci mora biti izvršiva u jurisdikciji na čijoj se teritoriji vrši distribucija. Zato, bez obzira na merodavno pravo ugovoreno ugovorom o distribuciji, valja uvek proveriti dodatno i imperativne norme države u kojoj posluje distributer. U Republici Srbiji je potrebna pisana forma i registracija ugovora o licenci za njegovu punovažnost *erga omnes*.

[17] Ugovorena roba će se uvek naći u prodaji na teritoriji distributera, stoga u ugovoru o distribuciji, naročito kod klauzula o isključenju odgovornosti, valja voditi računa o imperativnim normama pravnog sistema države u kojoj se vrši distribucija. O tome će nešto detaljnije biti reči kasnije u tekstu.

[18] Prilikom izvršenja ove ugovorne obaveze u međunarodnoj distribuciji, treba voditi računa o propisima o čuvanju podataka ličnosti i prenosu istih van jurisdikcije distributera. Ukoliko distributer prikuplja i obrađuje lične podatke u vezi sa aktivnostima odnosno praćenjem ponašanja pojedinaca na teritoriji Republike Srbije, pravila obrade i prenosa ličnih podataka su sadržana u Zakonu o zaštiti podataka o ličnosti. Po istom principu, ukoliko distributer prikuplja i obrađuje lične podatke u vezi sa aktivnostima odnosno praćenjem ponašanja pojedinaca na teritoriji EU, relevantna su (takođe) pravila iz *General Data Protection Regulation No. 2016/679*.

nje uputstava, reklamnog materijala, uzoraka i informacija o proizvodu, obuke i treninzi za zaposlene distributera, dostavljanje obeležja korporativnog identiteta).

Prilikom ugovaranja distribucije u međunarodnoj trgovini potrebno je imati u vidu da će se prodaja krajnjem kupcu (distribucija) odvijati na teritoriji jurisdikcije distributera. Zato distributer u pregovorima mora voditi računa i o imperativnim normama pravnog sistema, na čijoj će se teritoriji vršiti distribucija, bez obzira na to koje će se pravo ugovoriti kao merodavno pravo za ugovor o distribuciji. Naročit oprez potreban je u pogledu ugovornih klauzula kojima se isključuje ugovorna odgovornost snabdevača. Ukoliko se ovakve klauzule pažljivo ne preispitaju, distributer se u međunarodnoj trgovini može naći u nezavidnoj pravnoj i poslovnoj situaciji – da je prema imperativnim normama prava države gde vrši distribuciju odgovaran za štetu, dok je ta ista odgovornost za štetu snabdevača (prema distributeru) ugovorom o distribuciji pravno valjano isključena (u skladu sa ugovorenim merodavnim pravom). Poznato je, naime, da neki pravni sistemi dozvoljavaju isključenje odgovornosti za štetu i u slučaju krajnje nepažnje (npr. nemački pravni sistem, član 276.3 BGB), dok primera radi, srpski zakonodavac ne dozvoljava ugovorno isključenje odgovornosti za štetu u slučaju namere i krajnje nepažnje.[19] Drugim rečima, ako bi između nemačkog snabdevača i srpskog distributera bila isključena odgovornost nemačkog snabdevača za štetu usled krajnje nepažnje, ova bi odredba bila punovažna u ugovoru o distribuciji u kojem je ugovoreno nemačko pravo kao merodavno. Međutim, srpski distributer dalje u toku distribucije, u svojim ugovorima o prodaji na teritoriji Srbije, prema srpskom pravu ne bi mogao punovažno da isključi svoju odgovornost za štetu nastalu krajnjom nepažnjom.[20]

KLAUZULA KONKURENCIJE I PRAVILA O ZAŠTITI KONKURENCIJE

Prilikom formulisanja ugovornih odredbi u pogledu zabrane distributeru da se bavi konkurentskom delatnošću u toku trajanja ugovora o distribuciji, treba obratiti pažnju na imperativna pravila o zaštiti konkurencije. U međunarodnoj distribuciji moraju se imati u vidu imperativna pravila o zaštiti konkurencije, kako jurisdikcije na čijoj teritoriji se sprovode akti i radnje vezane za izvršenje ugovora o distribuciji, tako i one jurisdikcije na čijoj teritoriji ugovorne odredbe imaju ili mogu imati uticaj na konkurenciju.

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[19] Zakon o obligacionim odnosima, čl. 265.1.

[20] O klauzulama o isključenju i ograničenju odgovornosti u međunarodnim privrednim ugovorima, v. Jelena Perović, "Klauzule o isključenju i ograničenju odgovornosti u međunarodnim privrednim ugovorima", *Pravni život,* br. 11/2013, str. 237–248.

Prema srpskom pravu o zaštiti konkurencije, imperativna pravila u pogledu ugovora o distribuciji su sadržana u Zakonu o zaštiti konkurencije[21] i Uredbi o sporazumima između učesnika na tržištu koji posluju na različitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane[22] (dalje: "Uredba o izuzeću"), a koja se oslanja na rešenja i pravne principe prava konkurencije Evropske Unije.[23]

Načelna zabrana restriktivnih sporazuma (pa i onih u okviru ugovora o distribuciji) je sadržana u Zakonu o zaštiti konkurencije i široko je postavljena pravnim standardom da su "restriktivni sporazumi svi oni koji imaju za cilj ili posledicu značajno ograničavanje, narušavanje ili sprečavanje konkurencije na teritoriji Republike Srbije".[24] Navedena zabrana je sankcionisana ništavošću gore navedene vrste sporazuma i stoga se mora uzeti u obzir prilikom ocene svake klauzule u okviru ugovora o distribuciji. Međutim, opisana zabrana restriktivnih sporazuma ne se može izolovano posmatrati – dodatno valja obratiti pažnju na to da je zakon ostavio prostor za izuzeća od ove vrste zabrane koju propisuje, a koja su u pogledu ugovora o distribuciji sadržana u gore navedenoj Uredbi o izuzeću (tzv. blok izuzeće), odnosno u pravilima za individualno izuzeće restriktivnog sporazuma.

Od zabrane mogu biti izuzeti, pod određenim uslovima, samo oni restriktivni sporazumi (klauzule ili celi ugovori o distribuciji) koji ne sadrže nikakvu *"hardcore" restriktivnu odredbu*[25] i u kojima nijedan učesnik na tržištu ne prelazi granicu od 25% učešća[26] na relevantnom tržištu. Drugim rečima, ukoliko je opisana granica od 25% relevantnog tržišnog učešća prekoračena od bilo kog učesnika na tržištu, ugovor o distribuciji ne može biti predmet izuzeća na osnovu Uredbe o izuzeću.

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[21] Zakon o zaštiti konkurencije ("Sl. glasnik RS", br. 51/2009, 95/2013).

[22] Uredba o sporazumima između učesnika na tržištu koji posluju na različitom nivou proizvodnje ili distribucije koji se izuzimaju od zabrane ("Sl. glasnik RS", br. 11/2010).

[23] Naša Uredba o izuzeću je rađena po modelu *Commission Regulation (EU) 1400/2002*, dok u Evropskoj uniji postoji i kasnija *Commission Regulation (EU) 330/2010*. Dakle, naša regulativa ne drži u celosti korak sa rešenjima Evropske unije, ali se u Republici Srbiji svakako ova rešenja dodatno primenjuju kao obavezujući principi prava konkurencije Evropske unije prema Zakonu o potvrđivanju sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica sa jedne strane i Republike Srbije, sa druge strane ("Sl. glasnik RS – Međunarodni ugovori", br. 83/2008). Takođe, EU ima i posebnu industrijsku regulativu (za auto-industriju – *Commission Regulation (EU) 461/2010* koja se primenjuje na distribuciju rezervnih delova i usluge popravke i održavanja motornih vozila). Posebna regulativa za određene industrije u Srbiji još uvek ne postoji.

[24] Član 10.1 Zakona o zaštiti konkurencije (*Sl. glasnik,* br. 51/2009, 95/2013).

[25] *Hardcore restriktivne* klauzule su one koje neposredno ili posredno, samostalno ili zajedno sa drugim činiocima, pod kontrolom ugovornih strana sadrže ograničenja koja imaju za cilj neko od ograničenja definisanih članom 5.1.1-5.1.5 Uredbe o izuzeću.

[26] Član 4.1. Uredbe o izuzeću.

Kada je u pitanju klauzula o zabrani konkurisanja,[27] u oceni dozvoljenosti iste, treba pre svega poći od pravne kvalifikacije – da li je konkretan ugovor o distribuciji po svojoj pravnoj prirodi ugovor o ekskluzivnoj distribuciji ili ugovor selektivne distribucije.

Ugovor o ekskluzivnoj distribuciji je onaj ugovor kojim se snabdevač obavezuje da prodaje ugovorni proizvod samo jednom distributeru na određenom geografskom području ili određenoj grupi kupaca koja je isključivo dodeljena jednom distributeru.[28] Ukoliko je u pitanju ugovor o ekskluzivnoj distribuciji, a ugovor je prema gore navedenim kriterijumima podoban za izuzeće od zabrane, klauzula konkurencije se može ugovoriti do pet godina trajanja.[29]

Sporazumi o selektivnoj distribuciji, u smislu pravila o izuzeću od zabrane restriktivnih sporazuma,[30] su oni kojima se snabdevač obavezuje da posredno ili neposredno prodaje ugovorni proizvod samo distributerima izabranim na osnovu jasnih i objektivnih kriterijuma, a distributer se obavezuje da neće prodavati ugovorni proizvod distributerima izvan uspostavljenog sistema selektivne distribucije, ako ti sporazumi ne sadrže dopunska ograničenja koja nisu nužna za uspostavljanje sistema selektivne distribucije. Ova vrsta sporazuma ne može kao punovažnu imati klauzulu kojom se predviđa posredna ili neposredna obaveza učesnika da neće prodavati proizvode ili izvršavati usluge konkretnih i određenih konkurenata učesnika u sporazumu.[31]

Ugovorne odredbe o zabrani konkurencije, koje nisu u skladu sa pomenutim pravilima o izuzeću od zabrane konkurencije, ništave su. Osim sankcije ništavosti, potrebno je imati u vidu i izuzetno visoke novčane sankcije koje predviđa Zakon o zaštiti konkurencije i koje mogu ići do 10% ukupnog godišnjeg prihoda konkretnih učesnika na tržištu ostvarenog u Republici Srbiji. Nadalje, postoji i značajna krivično-pravna sankcija jer srpsko krivično zakonodavstvo poznaje posebno krivično delo "zaključenje restriktivnog sporazuma" koje predviđa zatvor-

[27] Zabrana konkurisanja jeste svaka neposredna ili posredna obaveza kupca (distributera) da ne proizvodi, kupuje, prodaje ili preprodaje proizvode ili usluge na istom relevantnom tržištu ili svaka neposredna ili posredna obaveza kupca da zadovolji više od 80% od ukupne količine sopstvenih potreba za tim proizvodom od određenog prodavca (snabdevača) ili nekog drugog učesnika na tržištu kojeg on odredi (član. 2.6 Uredbe o izuzeću).

[28] Član 3.1.1. Uredbe o izuzeću, u istom smislu i član 1160.1 Prednacrta Građanskog zakonika Republike Srbije

[29] Član 6.1. Uredbe o izuzeću.

[30] Član 3.1.3 Uredbe o izuzeću, u istom smislu nešto uža definicija u članu 1160.3 Prednacrta Građanskog zakonika Republike Srbije.

[31] Član 6.3. Uredbe o izuzeću.

sku kaznu.[32] Sve ovo govori u prilog tome, da se svaki ugovor o distribuciji mora staviti pod lupu prava o zaštiti konkurencije Republike Srbije, ali i svake druge jurisdikcije na čijoj teritoriji ima ili može imati uticaja na konkurenciju u okviru međunarodne trgovine.

NAKNADA ZA POSLOVNI UGLED

Ugovor o distribuciji odnosi se na trajnu obligaciju i u celosti je usmeren na kontinuiranu saradnju snabdevača i distributera u pogledu prodaje, marketinga, prikupljanja podataka o kupcima i uvećanja tržišnog udela ugovornog proizvoda koji snabdevač isporučuje za ugovoreno područje distributeru. Protokom vremena snabdevač, pod pretpostavkom da obe strane izvršavaju svoje ugovorene obaveze, dospeva u sve povoljniju poslovnu situaciju, jer mu se tržišni udeo na ugovorenoj teritoriji potencijalno povećava, njegov proizvod je pozicioniran i prepoznatljiv (prodajno i marketinški) na tržištu, dostupne su baze podataka o kupcima i potencijalnim kupcima ugovornog proizvoda na ugovorenom tržištu distributera. S druge strane, osim marže kao razlike u ceni između nabavne i prodajne cene, distributer nema nikakvu drugu naknadu za unapređenje tržišnog udela snabdevačevog (ugovornog) proizvoda. Stoga se opravdano postavilo pitanje prava distributera na naknadu za poslovni ugled[33] u slučaju prestanka ugovora o distribuciji.

Imajući u vidu da je ugovor o distribuciji u većini zemalja neimenovan ugovor, pitanje naknade za poslovni ugled u slučaju prestanka ugovora o distribuciji u većini zemalja i nije zakonom eksplicitno regulisano. Prednacrt Građanskog zakonika Republike Srbije predviđa izričito naknadu za poslovni ugled,[34] dok trenutno u Srbiji ni zakonodavac ni sudska praksa ne poznaju ovaj institut.

Na nivou Evropske unije ne postoji regulativa u ovoj materiji za ugovore o distribuciji. Međutim, još od 1986. godine postoji Direktiva (86/653/EEC)[35] u po-

[32] "*Ko u subjektu privrednog poslovanja zaključi restriktivni sporazum, koji nije izuzet od zabrane u smislu zakona kojim se uređuje zaštita konkurencije, a kojim se određuju cene, ograničava proizvodnja ili prodaja, odnosno vrši podela tržišta, kazniće se zatvorom od šest meseci do pet godina i novčanom kaznom*." (član 229, Krivični zakonik, "Sl. glasnik RS", br. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019).

[33] *Goodwill (eng.), Ausgleichsanspruch (nem.).*

[34] "Kad ugovor o distribuciji prestane iz bilo koga razloga, osim usled raskida zbog neispunjenja obaveze, distributer ima pravo na naknadu za poslovni ugled ako je, na osnovu ugovora o distribuciji, doprineo znatnom uvećanju obima poslovanja snabdevača i ako snabdevač, i nakon prestanka ugovora o distribuciji, nastavlja da ostvaruje značajne koristi iz tog poslovanja." Ugovorne strane mogu naknadu i drugačije urediti (čl. 1185).

[35] Direktiva 86/653/EEC o usklađivanju prava država članica u pogledu samostalnih trgovačkih zastupnika.

gledu usklađivanja prava država članica po pitanju trgovačkog zastupanja i naknade u slučaju prestanka ugovora o trgovačkom zastupanju,[36] te je zakonodavstvo evropskih zemalja u tom pogledu harmonizovano. Sudovi analogijom sa ugovorima o trgovačkom zastupanju, a u odsustvu izričitih zakonskih normi o naknadi u slučaju prestanka ugovora o distribuciji, mogu da primene pravila o naknadi i u slučaju prestanka ugovora o distribuciji. U Nemačkoj je sudska praksa usvojila shodnu primenu pravila o naknadi u slučaju prestanka ugovora trgovačkog zastupnika na slučajeve prestanka ugovora o distribuciji: 1) kada postoji uključivanje distributera u prodajnu organizaciju snabdevača, i 2) kada postoji pravna obaveza distributera da prenosi podatke o kupcima snabdevaču. Smatra se da postoji isti interesni položaj stranaka pri prestanku ugovora između trgovačkog zastupnika i principala kao i između distributera i snabdevača (*ubi idem ratio, ibi idem ius*).[37]

Navedena naknada ne isključuje pravo na naknadu štete distributera u slučaju prestanka ugovora.

Srpsko pravo za sada nije regulisalo ni ugovor o distribuciji ni naknadu za poslovni ugled u slučaju prestanka ugovora o distribuciji. Sudovi Srbiji nisu dosuđivali naknadu za poslovni ugled distributerima u slučaju prestanka ugovora, kada je za ugovorni odnos bilo merodavno srpsko pravo. Srpsko pravo ne daje ni osnov za analogiju sa naknadom iz imenovanog ugovora o trgovinskom zastupanju, jer Zakon o obligacionim odnosima tu vrstu naknade ne poznaje ni kod trgovinskog zastupanja.[38]

MERODAVNO PRAVO I PRIMENA BEČKE KONVENCIJE O MEĐUNARODNOJ PRODAJI ROBE

Ugovorom o distribuciji međunarodnog karaktera ugovorne strane mogu izabrati merodavno pravo koje će se primenjivati na njihov ugovorni odnos. Ukoliko merodavno pravo nije izabrano na osnovu autonomije volje, primeniće se ostali kriterijumi međunarodnog privatnog prava.

Kolizione norme prava srpskog prava predviđaju da ukoliko posebne okolnosti slučaja ne upućuju na drugo pravo, kao merodavno pravo će se primeniti

[36] Član 17–19 Direktive 86/653/EEC o usklađivanju prava država članica u pogledu samostalnih trgovačkih zastupnika.

[37] Odluka Vrhovnog saveznog suda Nemačke od 6.2.1985, I ZR 175-82, BGH NJW 1985, v. detaljnije: Burghard Piltz, dr Mansur Pour Rafsendjani, *Internationales Wirtschaftsrecht*, C.H. Beck, München, 2017, str. 739.

[38] Član 790–808 Zakona o obligacionim odnosima.

pravo mesta gde se u vreme prijema ponude nalazilo prebivalište, odnosno sedište ponudioca.[39]

U pravu Evropske unije je pitanje merodavnog prava za ugovore o distribuciji uređeno Regulativom Rim I,[40] prema kojoj se na ugovor o distribuciji primenjuje pravo države u kojoj distributer ima uobičajeno boravište.

Pomenuta pravila se odnose na ugovor o distribuciji kao okvirni ugovor. Međutim, na pojedinačne ugovore o prodaji robe, koji se zaključuju tokom ispunjenja obaveza iz ugovora o distribuciji, primenjuje se merodavno pravo koje je ugovoreno za pojedini ugovor o prodaji ili pravo na koje upućuje međunarodno privatno pravo za konkretan ugovor o međunarodnoj prodaji robe.[41] Iz toga proističe da merodavno pravo za pojedini ugovor o međunarodnoj prodaji robe može biti različito od merodavnog prava za ugovor o distribuciji. Ovde naročito treba imati u vidu "automatsku" primenu[42] Bečke konvencije[43] na ugovore o međunarodnoj prodaji robe u svim slučajevima kada nije isključena (*opting-out* princip) i kada je ispunjen teritorijalni kriterijum.[44]

Preovlađujuće je mišljenje da se Bečka konvencija ne primenjuje na ugovor o distribuciji kao okvirni ugovor u međunarodnoj trgovini robe, što potvrđuje većina dostupnih odluka sudske i arbitražne prakse.[45] Ipak, svaki ugovorni tekst, bez obzira kako je naslovljen (*ugovor o distribuciji / ugovor o prodaji),* mora biti predmet suptilne pravne analize i pronalaženja njegove istinske pravne prirode, vrste prava i obaveza koje su predmet ugovora. Primera radi, ukoliko je ugovor naslovljen kao *ugovor o distribuciji*, važno je uzeti u obzir sve okolnosti slučaja

[39] Član 20. tač. 20 Zakona o rešavanju sukoba zakona sa propisima drugih zemalja (*Sl. glasnik RS*, br. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019).

[40] Član 4. stav.1 f. Regulativa br. 593/2008 od 17. 07.2008., RIM I.

[41] Burghard Piltz, Mansur Pour Rafsendjani, *Internationales Wirtschaftsrecht*, C.H. Beck, München, 2017, str. 773.

[42] O primeni Bečke konvencije na ugovor o međunarodnoj prodaji robe, v. Jelena Perović, *Selected Critical Issues Regarding the Sphere of Appication of the CISG,* Anali Pravnog fakulteta Beograd, LIX, 2011, br. 3, str. 181–195 v. Burghard Piltz, *Internationales Kaufrecht*, C.H. Beck, München, 2008, str. 31.

[43] Konvencija UN o ugovorima o međunarodnoj prodaji robe (potpisana 11. aprila 19980. god. u Beču). SFRJ je ratifikovala ovu konvenciju još 24. decembra 1984. godine, a ista je stupila na snagu 8. januara 1985. godine.

[44] Lista zemalja koje su ratifikovale Bečku konvenciju dostupna je na sajtu UNCITRAL-a http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[45] O primeni Bečke konvencije na ugovor o distribuciji, v. detaljnije J. Perović, *ibidem*, str. 187–191; Vladimir Pavić, Milena Đorđevic "Primena Bečke konvencije u arbitražnoj praksi Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije", Pravo i privreda, br. 5–8, 2008, str. 578–579.

i pravnički opredeliti da li su predmet konkretnog ugovora prava i obaveze u pogledu međunarodne prodaje robe (u kom slučaju ima mesta primeni Bečke konvencije) ili se samo radi o okvirnom ugovoru koji određuje elemente u pogledu buduće prodaje, dok se njegovi elementi pravno "aktiviraju" pojedinačnim ugovorima (u kom slučaju na okvirni ugovor nema mesta primeni Bečke konvencije).[46] Bitno pitanje za primenu Bečke konvencije u ovom kontekstu je da li se konkretnim ugovorom sa dovoljnom određenošću definišu obaveze u pogledu isporuke robe, prenosa svojine i plaćanje cene.[47]

ZAKLJUČAK

Na osnovu izložene analize najznačajnijih pitanja koja se pokreću u kontekstu ugovora o međunarodnoj distribuciji može se zaključiti da je prilikom formulisanja odredaba ovog ugovora potrebno obratiti pažnju na niz relevantnih pitanja, koja su jednim svojim delom bila i predmet ovog rada. Iako je ugovor o distribuciji neimenovan i neformalan u većini jurisdikcija, potrebe pravne sigurnosti ugovornih strana nalažu njegovo zaključenje u pisanoj formi, kao i precizno određenje svih elemenata ugovora koji su od značaja za ugovorne strane u svakom konkretnom slučaju.

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KEY ISSUES IN INTERNATIONAL DISTRIBUTION AGREEMENTS

Summary

International sale of goods is for the most part conducted as continued sale between contractual partners, based on the distribution agreement, wherein the supplier and the distributor provide for a series of obligations in order that the distributor may be included into the supplier's sales network, while selling the goods in the contract territory in his own name and for his own account. The distribution agreement, as a sui generis contract in international trade law, is subject to serious restrictions imposed by the right of competition applicable to the state in whose territory the acts and actions related to the performance of the distribution agreement are carried out. Bearing in mind

[46] Tako, Burghard Piltz, *ibidem,* str. 35, 36; J. Perović, *ibidem,* str. 190–191.

[47] U tom smislu odluka Vrhovnog suda Poljske od 27.1.2006, dostupno na *www.cisg.law.pace.edu, citirano prema* B. Piltz, *ibidem,* str. 32.

that the distributor, in the performance of his duties, develops the business reputation of the contract goods, it is important to address the issue of the consideration for the business reputation once the distribution agreement terminates. Drawing a distinction between the distribution agreement as a framework contract and the sales contracts as specific contracts which are concluded in the course of performance of the distribution agreement, is also important for determining the issue of applicability of the Vienna Convention on International Sale of Goods, which applies to individual contracts for the international sale of goods, but is not applied as a rule in case of the framework international distribution agreement.

Key words: Distribution agreement, Condisderation the business reputation, Competition restrictions, Vienna Convention on International sale of goods

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DRUGA SEKCIJA

ARBITRAŽA, ALTERNATIVNO REŠAVANJE SPOROVA, SUDOVI

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OBLIGATIONS OF ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION

This paper seeks to address the obligations of arbitrators in international commercial arbitration. By way of introduction, it examines the legal relationship between the arbitrators and the parties governed by the contract they conclude. The central part of the analysis is devoted to the duties assumed by an arbitrator by accepting his appointment, focusing on a) principal duties of independence and impartiality and observing the fundamental principles of arbitration and b) other major obligations owed by an arbitrator, namely the duties of care, efficiency and expediency, adjudicating the dispute, the duty to disclose potential conflicts of interests and the duty of confidentiality. This is followed by an examination of possible legal consequences of breaches of arbitrators' obligations: setting aside of the award, termination of arbitrators' functions and arbitrators' civil liability. These issues are addressed in the light of the relevant solutions of uniform rules, national laws governing arbitration, rules of the leading arbitration institutions, as well as the views prevailing in the doctrine and international court and arbitration practice.

Key words: *arbitrator, obligation, arbitration, arbitration agreement, arbitral procedure*

INTRODUCTORY REMARKS

By accepting his appointment, an arbitrator undertakes the obligations required for a successful conduct and resolution of arbitration proceedings. Their

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common denominator is the requirement for an arbitrator to conduct the proceedings with due care and efficiently and to resolve the case under the final award. All arbitrator's obligations stem from the necessity to fulfil that requirement. Strict observance of arbitrator's obligations, from the moment of accepting the appointment until the dispute is resolved, is crucial for the course, and sometimes even the outcome of the arbitration proceedings. A breach of these obligations may result in setting aside of the award and may trigger the issue of arbitrator's civil liability.

A comprehensive understanding of arbitrators' obligations in international commercial arbitration requires an analysis of the legal relationship between the arbitrators and the parties, specific and individual obligations owed by arbitrators and the legal consequences of breaches of such obligations.

THE LEGAL RELATIONSHIP BETWEEN THE ARBITRATORS AND THE PARTIES

Receptum arbitrii. – The legal relationship between the arbitrators and the parties is governed by a contract they enter into.[1] It is based on this contract that the arbitrators acquire the rights and undertake the obligations relevant to the arbitration proceedings. In the arbitration law theory, such contract between the arbitrators and the parties is commonly called *receptum arbitrii*.[2]

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[1] The prevailing position in the arbitration law is that the legal relationship between an arbitrator and the parties is of contractual nature. See Emmanuel Gaillard, John Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* Kluwer Law International, The Hague, 1999, p. 599 stating "There is no longer any serious dispute as to the existence of a contract between the arbitrators and the parties. The Swiss law (doctrines and judgments of the Swiss Federal Court) embraces the stand that the legal relationship between the arbitrators and the parties is based in the contract (see for example Gabrielle Kaufmann-Kohler, Antonio Rigozzi, *Arbitrage international: Droit et practique à la lumière de la LDIP*, 2nd ed. 2010, nr. 24; Pierre Lalive, Jean François Poudret, Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, Art 179, N 6–8; Jean François Poudret, Sébastien Besson, *Comparative Law of International Arbitration,* 2nd edition, London, 2007, p. 367 ff), and the same view prevails in the doctrine and jurisprudence of most other countries of the continental legal tradition (comparative law study, Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration,* Fifth edition, Student Version, Oxford University Press, 2009, p. 329 ff). In recent national literature, see for example Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR,* Beograd, 2010, pp. 87–88; Maja Stanivuković, *Međunarodna arbitraža,* Beograd, 2013, p. 181; Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži,* Beograd, 2002, pp. 186–191.

[2] On terminology, René David, *L'arbitrage dans le commerce international*, Economica, Paris, 1982, p. 371; Thomas Clay, *L'arbitre*, Dalloz, 2001, pp. 487–489; Mathieu de Boisséson, *Le droit français de l'arbitrage interne et international,* GLN Joly, 1990, p. 175 and p. 575.

The contract between the arbitrators and the parties has seldom been the subject of a systematic scrutiny by legal doctrine.[3] The attention was mostly drawn to the issue of its legal nature,[4] generating different views on the subject – from agency agreement, to an independent contractor agreement, to an agreement for the provision of services.[5] The prevalent position on this issue, that this is a *sui generis* agreement, arises from the hybrid nature of arbitration – contractual by its source and judicial by its object, and from the specific legal relationship existing between the arbitrators and the parties. [6]

Receptum arbitrii is concluded by an arbitrator (where the dispute is decided by a sole arbitrator) or arbitrators (where the dispute is referred to the arbitral tribunal) and the parties to the dispute. It is argued in legal doctrine that an arbitrator has relationship with both parties to the dispute, regardless of being nominated by only one of the parties.[7] It bears no significance whatsoever whether the arbitrators were nominated directly by the parties to the dispute or a third party – arbitration institution, nomination body or the competent court.[8]

The contract between the arbitrators and the parties to the dispute is a bilateral contract, as it generates mutual obligations for the contractual parties.[9]

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[3] See more in J. Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži,* op. cit., p. 190 ff.

[4] Another issue under debate is whether or not it is a procedural law or a material law contract. The contemporary doctrine and case law take the view that *receptum arbitrii* is a material law contract (see Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland,* Third edition, Berne, 2015, p. 342; E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 604 ff.

[5] On legal nature of *receptum arbitrii*: E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 605–608; R. David, op. cit., pp. 371–372; P. Lalive, J.F. Poudret, C. Reymond, op. cit., p. 332; Christian Gavalda, Lucas de Leyssac, *L'arbitrage*, Dalloz, Paris, 1993, p. 43; Pierre Jolidon, *Commentaire du Concordat suisse sur l'arbitrage*, Berne, 1984, p. 231; Charles Jarrosson, *La notion d'arbitrage,* LGDJ, Paris, 1987, p. 302 ff.

[6] E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 607.

[7] See B. Berger, F. Kellerhals, op. cit., p. 343; Julian D.M. Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration,* Kluwer Law International, the Hague, 2003, p. 277. The theory considers the question whether *receptum arbitrii* is a special contract or a "tripartite" contract of arbitration (see Murray L. Smith, "Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment", *Arbitration International,* Vol. 8, no. 1, LCIA, 1992, p. 18 ff).

[8] G. Knežević, V. Pavić, op. cit., p. 88.

[9] On bilateral contracts in general, Slobodan Perović, *Obligaciono pravo*, Beograd, 1990, pp. 197–203.

Furthermore, it is an unnamed contract (*contrat inommé*)[10] and a contract of successive performance.[11] Such contract is concluded *intuitu personae* given that the choice of arbitrators is made based on their personal abilities, qualifications, experience, reputation etc. It follows that an arbitrator must personally meet his obligations and may not transfer such obligations to the third parties.[12] The performance of the obligations under this contract is carried out in full in the course of the arbitration proceedings, and arbitrator's authorities must be within the boundaries defined and allowed by the applicable arbitration law.[13] *Receptum arbitrii* as a rule expires with the issue of the final award by the arbitrators. Exceptionally, it may come to an end before the final award is made due to withdrawal of the parties from arbitration or some reason pertaining to the arbitrator himself (*e.g.* challenge, resignation, removal).[14]

The existence of *receptum arbitrii* is explicitly accepted in the jurisprudence of a number of countries. Thus, the Swiss Supreme Court recognises that the legal relationship between the arbitrators and the parties is *contractual* in character,[15] and has particularly examined the legal effects of *receptum arbitrii* in some of its judgments.[16] In England, for example, the courts have confirmed that, by accepting their appointment, arbitrators *contractually* undertake to fulfil their brief diligently, in return for remuneration[17]. The French courts have developed similar jurisprudence.[18] On the other hand, national laws as a rule do not provide special provisions to govern such contracts. The Serbian Arbitration Law contains only

[10] Not provided under the law in Serbian or other legal systems (based on the sources available to the author). On unnamed contracts in general, S. Perović, op. cit., pp. 192–194.

[11] On contracts of successive performance in general, S. Perović, op. cit., pp. 211–213.

[12] On *intuitu personae* contracts in general, S. Perović, op. cit., pp. 232–233.

[13] N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., p. 315.

[14] For details, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 602.

[15] See B. Berger, F. Kellerhals, op. cit., pp. 342–343 and relevant references underneath the text.

[16] See for example Judgments 4A_391/2010 and 4A_399/2010 of 10 November 2010 (subsequently joined) where *receptum arbitrii* was examined in the context of arbitrators' fees and Judgment 4A_490/2013 of 28 January 2014 relating to the deadline for issuing the award.

[17] *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd, (1992) I Q.B. 863; (1991) 3 All E.R. 211; (1991) 3 W.L.R. 1025; (1991) I Lloyd's Rep. 524 (C.A. 1990).* Cit. from E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 601.

[18] *Compagnie Europeene de Cereals SA v. Tradax Export S.A, (1986) 2 Lloyd's Rep. 301 (Hight Ct., Q.B. Com. Ct. 1986).* Cit. from E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 601.

a provision enjoining arbitrators to make a written statement about accepting their duties (Art 20).

"Status approach". – The common view in international arbitration law is that the legal relationship between the arbitrators and the parties rests on a *contractual* basis. Still, some authors place a strong emphasis on arbitrator's judicial powers deriving from the law; an arbitrator is authorised to *adjudicate* the dispute, which gives him a status comparable to that of a judge, while the rights and the obligations undertaken by the arbitrator fall within the domain of the public interest (so-called "status approach"[19]).[20] They take the position that the legal relationship between the arbitrators and the parties is based directly in the law as source of arbitrators' authority, regardless of whether or not there is an agreement of private law entered by and between them.[21]

This view is not unjustified, as the arbitrator, similar to any judge in a court of law, is authorised to *adjudicate* the dispute.[22] Still, unlike the judge, who is *obli-*

[19] G. Knežević, V. Pavić, op. cit., p. 88.

[20] Exponents of this "status approach" commonly referred to in literature are Mustill and Boyd (Michael J. Mustill, Stewart C. Boyd, *Commercial Arbitration*, 2nd edition, London and Edinburgh, Butterwords, 1989, p. 220 ff). For more details on this approach and its comparison to the contract theory from the viewpoint of the English law, see M.L. Smith, op. cit. (pp. 17–39), who inclines towards the contractual character of the legal relationship between the arbitrators and the parties, while declaring that addressing all issues raised by "status" and contract theory would be "a labour of Sisyphus" (p. 34 ff). Speaking of literature from the domain of the continental legal tradition, commonly quoted advocates of the "status approach" are Berger and Kellerhals who sharply criticise the contract theory and insist that the relationship between the arbitrators and the parties cannot be deemed based on contractual arrangements between them, but instead on a statutory legal relationship. In details, B. Berger, F. Kellerhals, op. cit., pp. 343–344.

[21] B. Berger, F. Kellerhals, *ibidem*.

[22] These judicial powers vested in arbitrators draw a major distinction between the arbitrators and the agents of the parties to a dispute. In that respect, the European Court of Justice found that the principal and habitual obligation of the arbitrators involves settling a dispute between two or more parties, and therefore the role of an arbitrator is different from that of an agent (Court of Justice of the European Communities, 16 September 1997, Case C-145/96, Bernd von Hoffmann see Finanzamt Trier, 1997 E.C.R. I-4857, available at: http://curia.europa.eu/juris/). At the same time, these powers are one of the key points of difference between the arbitration and some other similar methods of alternative dispute resolution. On alternative dispute resolution, see. G. Knežević, D. Pavić, op. cit., pp. 183–255, drawing a distinction between the arbitration and (other) methods of alternative dispute resolution, and pointing out that "the arbitral award, similar to a court judgment, is binding on the parties, *i.e.* produces effects of finality and enforceability, whereas other ADR methods end with agreements producing effects in terms of the law of obligations" (p. 188). However, although he adjudicates a dispute, an arbitrator may not be equated with a local judge. In detail, E.

gated to settle the case referred to him, the arbitrator, akin to a "private judge", is at a liberty in each given case to accept or turn down his appointment. While the powers of a judge derive directly from the law, the powers of the arbitrator stem above all from the concurrent wills of the parties that entrusted him with the case, and are accepted by the arbitrator as he enters into *receptum arbitrii*. By accepting the mission entrusted to him, the selected arbitrator must endeavour to justify the trust placed in him by the parties. It is exactly that trust, which is essentially a personal touch in the relationship between the arbitrator and the parties, that makes the fundamental difference with the judge in any national judiciary system.[23]

Three legal relationships. – Where the arbitration agreement[24] provides that the dispute (or disputes) shall be settled in accordance with the rules of a certain arbitration institution, the doctrine recognises three legal relationships: the contract between the parties and the selected arbitration institution, the contract between the arbitration institution and the arbitrators, and the contract between the arbitrators and the parties (*receptum arbitrii*).[25]

In the first place, the parties to the arbitration agreement enter into a contract with the selected arbitration institution. By setting and releasing the arbitration rules, the arbitration institution sends a general and standing offer (to an unidentified number of persons that may appear as parties to a dispute),[26] and the parties to the arbitration agreement identifying specific arbitration institution, essentially accede to the offer thus made.[27] The performance of the contract between the parties and the arbitration institution commences at the time of initiating proceedings before the selected arbitration institution "administering" the

Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 560 ff.

[23] J. Perović, *Međunarodna trgovinska arbitraža*, op. cit., p. 173 ff.

[24] On arbitration agreement in general, J. Perović, *Međunarodna trgovinska arbitraža*, op. cit.; Jelena Perović, *Standardne klauzule u međunarodnim privrednim ugovorima*, Beograd, 2012, pp. 187–229.

[25] E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 602–604.

[26] This is a contract which, after the manner it is entered into, falls within the group of adhesion contracts, although the parties are able, up to a point, to depart from certain provisions of the rules or enter specific provisions they have agreed upon. On adhesion contracts in general, S. Perović, op. cit., pp. 217–225.

[27] See E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 602.

proceedings, *i.e.* performing organisational and technical tasks relevant to the initiated dispute.[28]

Furthermore, a separate contract is concluded between the arbitration institution on the one hand and each arbitrator on the other. Based on this contract, the arbitration institution undertakes to treat the nominated person as the arbitrator within its organisational and administrative competencies, and to pay to him the remuneration and cover his costs in accordance with its rules, while the arbitrator undertakes to carry out the assumed duties under the arbitration institution's aegis and in compliance with its rules.[29]

The conclusion of the above contracts does not significantly affect the legal relationship between the arbitrators and the parties However, the involvement of the arbitration institution as such affects the *manner* of exercising rights and duties arising from *receptum arbitrii*.[30]

DUTIES OF AN ARBITRATOR

Legal theory lists numerous duties owed by arbitrators grouped and classified around different criteria.[31] Without going into details of such classifications, we shall proceed to examine the principal duties of arbitrators and subsequently consider other arbitrators' duties that feature prominently, particularly in view of the legal consequences of their non-fulfilment.

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[28] The arbitration institution itself does not resolve disputes, it merely "administers" and organises dispute resolution by arbitrators in accordance with its rules. See for example Art 1(2) Rules of the International Court of Arbitration of the International Chamber of Commerce (hereinafter: Rules and ICC Court of Arbitration) which explicitly states that the ICC International Court of Arbitration does not itself resolve disputes, but rather administers the resolution of disputes by arbitrators. For details of the competencies, organisation and activities of the ICC International Court of Arbitration and its Secretariat, Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, International Chamber of Commerce ICC, Paris, 2012, p. 13–27. Herman Verbist, Erik Schäfer, Christophe Imhoos, *ICC Arbitration in Practice,* Second Revised Edition, Kluwer Law International, The Netherlands, 2016, p. 13–23.

[29] E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 604.

[30] *Ibidem.*

[31] See. for example N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., pp. 326–341, grouping the duties of an arbitrator around three categories – duties imposed by the parties, duties imposed the by law, and ethical duties. Other classifications, for example in E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 609–613; J.D.M. Lew, L. Mistelis, S. Kröll, op. cit., p. 279 ff; Toni Deskoski, *Megunarodno arbitražno pravo,* Skopje, 2016, pp. 212–214.

Principal duties

An arbitrator must be impartial and independent of the parties and the subject of dispute,[32] must treat the parties equally and give each party a full opportunity to present arguments and evidence in support of its case, and to respond to the actions and submissions of the other party.[33] These are the principal duties of an arbitrator which stem from his judicial powers and are universally accepted in the international conventions relevant to arbitration, the UNCITRAL Model Law on International Commercial Arbitration[34] (hereinafter: UNCITRAL Model Law),[35] national laws governing arbitration, particularly those modelled after the UNCITRAL Model Law,[36] the UNCITRAL Rules of Arbitration[37] (hereinafter: UNCITRAL Rules),[38] as well as the rules of all reputable arbitrations institutions. It is in the light of these principal duties of an arbitrator that we should view his other duties in arbitral proceedings.

Due care, efficiency in conducting proceedings, observing the time limit for making the award

Due care in general. – In performing his functions, an arbitrator must act with the due care required for a successful conduct and completion of the arbitration proceedings.[39] He is required to devote the necessary time to the arbitration dispute he was appointed to, as well as to apply the knowledge, expertise and

[32] For more details on the requirement for independence and impartiality of an arbitrator, Jelena Perović, "Sumnja u nezavisnost ili nepristrasnost arbitra kao osnov zahteva za njegovo izuzeće", *Pravni život* No. 11/2017, Beograd, 2017, pp. 63–78; Davor Babić, "Nezavisnost i nepristrasnost arbitara"*, Pravo u gospodarstvu (PUG),* 3/2008, Zagreb, p. 672).

[33] A breach of these fundamental principles constitutes grounds for setting aside the arbitral award and for refusing its recognition and enforcement. See the Serbian Arbitration Law (Arts 58 and 66) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereinafter: New York Convention), Art V.

[34] From 1985 as revised in 2006.

[35] Art 12.2.

[36] See the Serbian Arbitration Law (Art 19 Para 3 and Art 33).

[37] From 1976 as revised in 2010.

[38] Art 12.1.

[39] In more detail, B. Berger, F. Kellerhals, op. cit., p. 345; E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 1130; N. Blackaby and C. Partasides with A. Redfern and M. Hunter, pp. 327–334.

skills necessary in the particular case for the analysis and resolution of disputable issues. An arbitrator is required to conduct the proceedings efficiently[40] and to observe the procedural deadlines, and in particularly the deadline set for rendering the award. It is an obligation universally acknowledged in the law of arbitration, although often not explicitly provided in the sources of the arbitration law.[41] The Serbian Arbitration Law provides for this obligation in general terms, enjoining the arbitrator to perform his functions "diligently and efficiently".

Sometimes an arbitrator is unable to meet these requirements for different reasons, for example due to the lack of (or insufficient) knowledge of the applicable law,[42] or lack of familiarity with the language of the arbitration[43] or because he may not have the necessary time available to devote his attention to the dispute. In such cases, he is expected to decline the appointment.[44] On the other hand, if an appointed arbitrator fails to perform his functions with due care, he may be challenged[45] in accordance with the agreement of the parties or, in the absence of such an agreement, by the arbitration institution[46] or the competent court, upon request of a party to the dispute.[47]

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[40] Widespread in international arbitration practice are certain requirements and recommendations as to the duties of arbitrators to conduct the arbitration in an expeditious and cost-effective manner, *i.e.* to control the time and costs of the arbitration. Hence for example, the ICC Rules provide for three steps in organising the arbitration: drawing up Terms of Reference (Art 23), convening a case management conference (Art 24.1) and establishing procedural timetable (Art 24.2). More details, Jelena Perović, "Efikasnost arbitražnog postupka", *Pravo i privreda,* No. 4–6/2017, pp. 461–469.

[41] In details, see E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration, Ibidem*; for the English law see M.L. Smith, op. cit., p. 28.

[42] See Jelena Perović, "Konstituisanje arbitražnog veća u međunarodnoj trgovinskoj arbitraži", *Pravni život* No. 11/2016, Belgrade, 2016, pp. 230–231.

[43] See Jelena Perović, "Jezik arbitražnog postupka u međunarodnoj trgovinskoj arbitraži" *Liber amicorum Gašo Knežević*, Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo i informisanje, Udruženje za arbitražno pravo, Beograd, 2016, pp. 274–290

[44] B. Berger, F. Kellerhals, *Ibidem.*

[45] This is a broadly accepted rule, contained in national laws and rules of arbitration institutions. See The UNCITRAL Model Law, Art 14 (1). For the Serbian law, see the Arbitration Law (Art 25).

[46] Under the ICC Rules, an arbitrator may be replaced even upon initiative of the arbitral tribunal itself – Art 15 (2).

[47] In this regard, attention should be given to the opinion of Berger and Kellerhals that the right to challenge should not be reserved to the parties to the dispute but should also be available to other members of the arbitral tribunal (B. Berger, F. Kellerhals, op. cit., p. 345).

The ICC Rules – statement of acceptance, availability, impartiality and independence. – Under the ICC Rules[48], a prospective arbitrator must sign a statement of acceptance, *availability*, impartiality and independence before appointment or confirmation.[49] Speaking of availability, it is highlighted in the comments to the Rules that arbitrators are sometimes unable to make an objective prediction of their time schedule, and accept appointments in spite of a huge case load preventing their necessary commitment to the specific case. As a rule this results in extending deadlines in arbitration proceedings, and in particular the deadlines for rendering the award, which in the practice of the Court sometimes led to the withdrawal of the arbitrator or his replacement by the Court.[50] With the aim of arriving at the fairest possible estimate of an arbitrator's availability, the potential arbitrator is also required to indicate in the above statement the number of arbitrations he is currently involved in as arbitrator or counsel, as well as the number of currently pending court litigations. It is argued in the Comments to the ICC Rules that this statement achieves a twofold effect. On the one hand, the Court and the parties to the dispute are informed in advance of the arbitrator's availability (based on which the parties may lodge a complaint, and the Court may decide not to confirm the arbitrator's appointment),[51] while, on the other hand, the arbitrator himself is encouraged to timely consider the issue of the time he can devote to the particular arbitration, particularly in view of the requirement for conducting the proceedings efficiently.[52]

Time limit for rendering an award. – The time limit for rendering the award is set in order to ensure the most efficient possible resolution of the arbitration dispute. The parties may define such deadline directly in the arbitration agreement or indirectly, by agreeing on the rules of a particular arbitration institution, or the choice of law or the rules governing the arbitration.

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[48] The latest revision of the Rules is dated 1 March 2017.

[49] Art 11(2).

[50] J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* op. cit., p. 120 ff; H. Verbist, E. Schäfer, Ch. Imhoos, op. cit., p. 66.

[51] According to the data available to the Secretariat of the Court, between 2009 and 2011, the Court decided not to confirm the appointment of three arbitrators based on the information on their availability contained in the above statement (in one of those statements, the arbitrator indicated that he was involved in 68 and 83 arbitrations as tribunal chair and co-arbitrator respectively). In details, J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* op. cit., p. 121.

[52] J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* op. cit., p. 120; H. Verbist, E. Schäfer, Ch. Imhoos, *ibidem*.

Time limit fixed under the arbitration agreement. – When the deadline for making an award is set in the arbitration agreement itself, the arbitrators are sometimes unable to meet this obligation for objective reasons. Specifically, at the time of entering into an arbitration agreement, the parties are hardly able to gauge all the circumstances relevant to the course of the arbitration and arrive at a precise deadline for making the award. This is particularly true in case of an arbitration clause agreed upon at the time when the dispute has not yet arisen, and it was uncertain if any disputes would arise at all. In the arbitration practice, the uncertainty as to the time limit for rendering the award so fixed may arise for different reasons, given that the length of the proceedings depends above all on the complexity of the case and other relevant circumstances which vary from case to case.[53] The major problem in that regard concerns the time required to constitute the arbitral tribunal, particularly in *ad hoc* arbitration, where collaboration with the competent state courts at the seat of the arbitration is of greatest importance. For these and other justified reasons (for example the need to collect evidence), the deadline for rendering the award fixed in the arbitration agreement may as a rule be extended based on explicit or implicit agreement of the parties to the dispute.[54]

Time limit fixed in the rules of arbitration institutions. – The rules of arbitration institutions may be divided between those that set the time limit for rendering the award and those that keep silent on this point. The rules providing for a time limit vary significantly, both in terms of the time allowed and the moment in the arbitration from which such time limit starts to run. Thus for example, under the ICC Rules, the time limit for rendering the final award is six months from the date of signing the so-called *Terms of Reference*, however the Court may fix a different time limit based on the procedural timetable.[55] The Court may extend the time limit pursuant to a "reasoned request" from the arbitrators or on its own initiative should it deem necessary to do so.[56] Under the Stockholm Rules[57] the final award must be made no later than six months from the date the case was

[53] In details, N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., pp. 557–559.

[54] See N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *ibidem;* B. Berger, F. Kellerhals, op. cit., p. 338; E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 757–759.

[55] Art 31 (1).

[56] Art 31 (2).

[57] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce – *SCC Rules* (1 January 2017).

referred to the arbitral tribunal,[58] under the Milan Rules[59] the final award must be filed within six months from the constitution of the arbitral tribunal, unless otherwise agreed in the arbitration agreement,[60] and under the DIS Rules[61] arbitrators must send the final award to the DIS for review in principle within three months after the last hearing or the last authorised submission, whichever the later.[62] All of the above rules allow for extension of the time limit for rendering the award. On the other hand, the Swiss Rules of International Arbitration (hereinafter: Swiss Rules)[63] and the LCIA Rules[64] do not provide for the deadline for making the award. The Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia (SA Rules) do not contain special provisions as to the time limits for issuing the award, but rather provide in general terms that the arbitration proceedings, as a rule, must be completed within six months from the date of appointment of the arbitral tribunal or the sole arbitrator. As an exception to this rule, the arbitral tribunal or the sole arbitrator may decide, upon obtaining prior consent of the SA President, to extend the arbitral proceedings if so required in order to obtain evidence, or if the parties request so, or for other justified reasons.[65]

National laws. – The national laws governing arbitration as a rule do not provide explicitly for the deadline for making the award and the legal consequences of missing such deadline.[66] As an exemption, the Italian Code of Civil Procedure prescribes that, unless the parties have agreed otherwise, the arbitrators must render the award within 180 days upon acceptance of their appointment, and where the arbitrators did not all accept appointment at the same time, the

[58] Art 43.

[59] Arbitration Rules of the Milan Chamber of Arbitration – *CAM Rules* (1 March 2019).

[60] Art 36.

[61] Arbitration Rules of the German Arbitration Institute – *DIS Arbitration Rules* (1 March 2018) .

[62] Art 37 further provides that the Arbitration Council may reduce the fee of one or more arbitrators based upon the time taken by them to issue the award, upon consultation with the arbitrators and considering the circumstances of the case.

[63] *Swiss Rules of International Arbitration – Swiss Rules* (1 June 2012).

[64] Arbitration Rules of the London Court of International Arbitration – *LCIA Arbitration Rules* (1 October 2014).

[65] Art 38 of the Rules. A similar provision is contained in the Rules of the Belgrade Arbitration Centre – BAC Rules (Art 32).

[66] Comparative law study, N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., p. 557.

time limit starts to run from the day of the last acceptance (Art 820, Para 1).[67] The Code identifies missing the deadline for rendering the award as one of the grounds for setting it aside (Art 829 Para 6). The Code explicitly provides that the arbitrators are required to render the award within the time limit fixed by the parties or by the law, and if they fail to do so and the award is set aside on such grounds, they shall be held liable for damages (Art 813 Para 2). Under the French New Civil Procedure Code, if no time limit is fixed in the arbitration agreement for making the award, the duration of arbitrators' mandate is six months from the day the last arbitrator accepted his mandate.[68] However, this rule in France is not applicable to international arbitration, unless the parties have agreed to apply the French law to arbitration.[69] In the US law, the deadline for rendering the award varies from state to state (often 30 days from declaring the hearings closed), but may be extended subject to an agreement of the parties or by the court.[70] The Serbian Arbitration Law does not provide for the time limit for rendering the award.

Legal consequences of "late" awards. – Legal consequences of the breaches of the duty to render the award within the prescribed time limit may include arbitrator's civil liability and setting aside the award and they depend on the relevant rules of the applicable law.[71] Arbitrators' civil liability will be discussed in the section on legal consequences of the breaches of arbitrators' duties, and here we will focus on the possibility of setting aside the award over missed deadline for issuing the award.

Different approaches have been adopted in the comparative law as to the setting aside of the award rendered upon expiry of the appropriate time limit. Thus, for example, the Italian Code of Civil Procedure, as mentioned above, specifies missing the deadline for rendering the award as one of the grounds for setting it aside (Art 829 Para 6). Furthermore, under the French law, an award made after the expiration of the fixed deadline may be set aside on the gro-

[67] See Arts 820 and 821 of the Code in entirety.

[68] Art 1456.

[69] E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 755.

[70] N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *ibidem.*

[71] Comparative law study, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit. p. 613 ff. For the English law, see M. J. Mustill, S. C. Boyd, op. cit. p. 231 ff; *Russell on the Law of Arbitration*, Walton and Vitoria Eds., 20th ed., Stevens and Sons, 1982, p. 121, stating that the arbitrator may be held liable for breach of contract should he fail to render the award within reasonable time.

unds that it was made on the basis of an expired arbitration agreement.[72] Specifically, Art 1502 of the New Code of Civil Procedure lists among the grounds for setting aside the award the absence, nullity, or expiry of the arbitration agreement. If the arbitrators have rendered the award based on an expired arbitration agreement, the arbitrators no longer had the powers to render an award. Although under the *compétence–compétence* principle, the arbitrators have the power to decide themselves about their own competence, their decision on their own competence may be subject to judicial control if the procedure for setting aside the award has been set in motion. In that regard, if the parties have provided for a time limit for issuing the award (whether directly in the arbitration agreement or indirectly – by agreeing on the rules of a particular arbitration institution, or the choice of law or the rules governing arbitration), such time limit must be observed, and if missed, the award may be set aside. An award made abroad under the same circumstances could be refused recognition and enforcement in France on the same grounds.[73] A similar, albeit somewhat broader view is taken by the Swiss Code on International Private Law, which provides that the award may be challenged if the arbitral tribunal erroneously held that it had or did not have jurisdiction.[74] On the other hand, when it comes to the comparative law in general, the doctrine states that the courts of many countries are against setting aside the "late" award, particularly where the court is not authorised to extend the time limit for rendering the award on the initiative of one party alone, but only based on the mutual agreement of the parties. Thus, for example, the US courts have shown remarkable restraint as to setting aside an award issued upon expiry of the relevant deadline.[75]

View held by the Federal Supreme Court of Switzerland. – The Swiss Federal Supreme Court took a stand on this issue in a case of setting aside the award where the Appellant argued that the Sole Arbitrator rendered the award after he had resigned.

In this case, the arbitration proceedings began on 7 June 2010, and the hearing was closed on 4 May 2011. The Counsel for the Respondent received the award on 3 September 2013, and the Appellant's counsel received it on 4 September 2013. Delivery of the award was preceded by an exchange between the coun-

[72] See E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit. p. 759.

[73] Art 1502 Para 1 of the French New Code of Civil Procedure. V. E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 759.

[74] Art 190.2 (b).

[75] See N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., p. 557.

sels of the parties and the Arbitrator, with counsels of the parties inquiring about 10 times as to the status of the work on the award and demanding the date of the award to be made. At one point, the Arbitrator set the date for issuing the award at 31 May 2013. As the award was not delivered on that date, the parties demanded from the Arbitrator to resign from his functions if he should fail to deliver within one week, and the Arbitrator's reaction was to propose to resign if the award was not rendered by 30 June 2013. As the award was not delivered even by that date, the counsels of the parties extended the deadline to 2 September 2013 issuing the following ultimatum: "your resignation will be accepted and effective as of 2 September 2013 at 5:00 p.m. should no award have been issued and received in the meantime", and the Arbitrator declared his acceptance of the terms. The Counsel for the Respondent received the award on 3 September 2013, in the late afternoon. On the same date, at 6:29 pm, the Counsel for the Appellant sent the Arbitrator a fax, in which he took notice of his resignation as arbitrator, in view of his failure to deliver the award before the expiry of the time limit and asked him to confirm the termination of his functions. In his reply (dispatched at 7:24 pm) the Arbitrator stated that the delivery was attempted but failed because the office of the Counsel for the Appellant was closed. The delivery of the package containing the award to the Counsel for the Appellant finally took place on 4 September 2013, and the Counsel wrote to the Arbitrator the following: "Receipt of this package does not imply acceptance of a possible arbitral award which may be contained therein, neither the acknowledgement of any validity of such documents. Geneva, 4 September 2013, 2:42 p.m.".

In the procedure for setting aside the award before the Swiss Federal Supreme Court, the Appellant invoked Art 190 Para 2 (a) of the Swiss Code on International Private Law providing that the award may be challenged if the Sole Arbitrator was designated irregularly or the Arbitral Tribunal was constituted irregularly. Deciding on this matter, the Court found that the circumstances of the case clearly showed the joint will of both parties in the arbitral proceedings that the arbitration agreement terminates *ipso facto* on 2 September 2013, at 5:00 p.m. should either of them fail to receive the final award before this deadline, to which the Arbitrator explicitly agreed. In that regard, the Court held that the reason for the premature termination of the powers of the Arbitrator was not mere resignation by the Arbitrator or his removal by a joint decision of the two parties. To the contrary, the reason for the termination of the powers of the Arbitrator, in the view of the Court, had to be sought in a "tripartite" agreement entered into to this effect by each party with the other, on the one hand, and by both parties jointly with the Arbitrator, on the other hand. Hence the Court held that the award in dispu-

te (dated 3 September 2013) was issued *after* the Arbitrator's mission terminated (on 2 September 2013).

In the statement of reasons, the Court pointed out that the Concordat on Arbitration of 1969 explicitly stated that an award could be annulled when the arbitral tribunal decided after the expiry of the time limit given to fulfil its mission – Art 36 (g). The present Swiss law did not contain such provision, and the Swiss legal doctrine, in its vast majority, considered that to be an issue of jurisdiction *ratione temporis* falling within Art 190.2 (b) of the Swiss Code on International Private Law, which provided that the award may be challenged if the arbitral tribunal decided erroneously on the matter of its own jurisdiction. In the light of that rule, it was considered that the Arbitrator arrogated to himself a jurisdiction he no longer had by issuing the award after his mission had terminated. Considering that the Appellant in the case at hand relied on Art 190 Para 2 (a), the Court held that the position of an arbitrator deciding beyond the time limit is not similar to that of an arbitrator who was not properly appointed; this is a case of an arbitrator the appointment of whom is beyond discussion, but who disregarded the time limit set to his jurisdiction. Thus, the Court found that the appeal was admissible and set aside the award for the grounds stated in Art 190 Para 2 (b) of the Swiss Code on International Private Law.[76]

When the time limit for making the award is not provided. – When the arbitration agreement, as well as the rules of the arbitration institution and the national law are silent about the time limit for making the award, in assessing such time limit it is necessary to consider first and foremost the duty of due care which the arbitrator assumes by accepting his appointment. This care, as already argued, involves the duty of conducting the proceedings efficiently. Therefore, while considering the circumstances of each particular case, it seems necessary to be guided by the standard of *reasonable time* within which the arbitrators are required to issue the award.[77]

Adjudicating the dispute

General rule. – An arbitrator who has accepted his appointment has the duty to *adjudicate* the dispute which had been entrusted to him to resolve and decide it. This duty is narrowly related to his judicial powers; just like a judge, an ar-

[76] 4A_490/2013 of 28 January 2014, available at: www.bger.ch.

[77] See for example the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950, which adopts this standard and provides that: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art 6.1).

bitrator is duty-bound to bring the arbitration to its conclusion, *i.e.* completion by issuing a final award.[78] The duty to adjudicate the case also entails the arbitrator's power to decide himself about his own competence (*compétence-compétence* principle),[79] and his power to order interim and conservatory measures upon a motion of a party to the dispute (unless otherwise provided for under the arbitration agreement and if permissible under *lex arbitri*).[80] From the moment he has accepted his appointment, an arbitrator may not resign from the dispute without just cause.

National laws. – Some national laws contain explicit provisions to that effect. Thus for example under the French New Code of Civil Procedure, the arbitrators must proceed with their mission until it is completed and may only be removed with the parties' unanimous consent.[81] The Dutch Code of Civil Procedure provides for a similar solution, stating that an arbitrator may, at his own request, be released from his mandate only subject to a consent of both parties or, in the absence thereof, by the competent Court.[82] The Italian Code of Civil Procedure takes a step further by providing that an arbitrator shall be liable for damages if, after accepting his appointment, he should resign from office without just cause.[83]

Preventing obstructiosn in arbitration. – *Ratio* behind these rules is to prevent an arbitrator from obstructing the arbitration by resigning for unjustified causes. It is not entirely uncommon in the arbitration practice for an arbitrator, sensing that he will be outvoted by other members of the arbitral tribunal, to resign in order to prevent (or delay) the award against the appointing party. In such cases, the arbitrator as a rule should be replaced, which tends to significantly prolong the arbitration. In general, a resignation by an arbitrator before termination of the arbitration leads to serious impediments to the arbitration, and therefore the national laws and rules of arbitration institutions for the most part allow for

[78] Including a ruling based on a settlement. See Art 47 of the Serbian Arbitration Law which specifies how arbitration proceedings may be terminated, as well as Art 54 providing for a ruling based on a settlement.

[79] See Art 28 of the Serbian Arbitration Law. In details on this principle, J. Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, op. cit., p. 159 ff.

[80] See Art 15 and Art 31 of the Serbian Arbitration Law. On interim measures in arbitration in general, G. Knežević, V. Pavić, op. cit., pp. 129–133.

[81] Art 1462.

[82] Art 1029 Para 2.

[83] Art 813 Para 2.

such resignation solely for *just* causes.[84] Furthermore, some rules require the resignation to be approved by the arbitration institution.[85] Thus for example under the ICC Rules, an arbitrator may be replaced only upon acceptance of the resignation by the Court.[86] It is noted in a comment to this rule that the Court may reject a resignation by the arbitrator in case it finds that the interests of the parties would be better served if the arbitrator should remain in office.[87]

Serbian Law. – Under the Serbian Arbitration law, an arbitrator may resign from duty by a written statement if for just cause, including the grounds for challenge, he is no longer able to perform his duties.[88] The SA Rules provide that an arbitrator may resign if he becomes *de jure* or *de facto* unable to perform his duties or for other justifiable reasons fails to perform his duties within the appropriate time limit,[89] thus it may be inferred that the resignation need not be approved by the SA. The Rules of the Belgrade Arbitration Centre adopt a similar solution (BAC Rules).[90]

Proceeding with arbitration in a truncated formation. – In an endeavour to reduce the cost and time of arbitration, and to prevent *mala fidei* resignation of arbitrators, the rules of some arbitration institutions provide for a possibility that an arbitrator need not necessarily be replaced should he resign from duty, but rather, under certain circumstances, the remaining arbitrators may proceed with the arbitration (truncated arbitral tribunal). Hence, under the Stockholm Rules,

[84] In the arbitration practice, the just cause is deemed to exist in case of a conflict of interest (*e.g.* the arbitrator commenced employment with a law office that has a legal relationship with one of the parties to the dispute), illness, or personal problems of the arbitrator, acceptance by the arbitrator of a certain position or function that does not allow him to act as an arbitrator (*e.g.* he becomes a judge of the constitutional court or a public official), etc. In more details, J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* op. cit., p. 181.

[85] See for example the DIS Rules – Art 16.1 (*ii*) or the Stockholm Rules, Art 20.1 (*i*).

[86] See Art 15 (1) Rules.

[87] Between 2001 and 2010, a total of 208 resignations were tendered before this Court, five of which were rejected by the Court. In one case from the Court's more recent practice, all three arbitrators offered to resign over continued disagreement between them. Considering the consequences of the withdrawal of the entire arbitral tribunal on arbitration proceedings, the Court accepted only the resignation of the Presiding Arbitrator, intending to defuse tension between the remaining two arbitrators, bearing in mind that they are familiar with the case in dispute. See commentary to Art 15 (1), J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* op. cit., p. 181.

[88] Art 25 Para 1.

[89] Art 24 Para 1.

[90] Art 20 Para 1.

where the arbitral tribunal consists of three or more arbitrators, in case of a termination of the mandate of an arbitrator, the Board may decide that the remaining arbitrators shall proceed with the arbitration; before the Board takes such decision, the parties and the arbitrators must be given an opportunity to submit comments on the issue. In deciding, the Board takes into account the stage of the arbitration and any other relevant circumstances.[91] By the same token, under the DIS Rules, the Arbitration Council may decide that an arbitrator whose mandate has been terminated shall not be replaced if all of the parties and the remaining arbitrators so agree and after taking into account all of the circumstances. In such cases, the arbitration continues with the remaining arbitrators only.[92] A similar solution is prescribed by the ICC Rules, stating that subsequent to the closing of the proceedings, instead of replacing an arbitrator whose mandate has terminated, the Court may decide, when it considers appropriate, that the remaining arbitrators shall continue the arbitration; in making such determination, the Court takes into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.[93] Still, this rule is applicable only where the *proceedings are closed*; if the mandate of an arbitrator has terminated prior to the closing of the proceedings, under the ICC Rules such arbitrator must be replaced.[94] These and similar solutions may prove useful, particularly when the arbitrator's intent in resigning is to block the arbitration and delay the award.

Disclosure of potential conflict of interest

Independence and impartiality. – Independence and impartiality are imperative in arbitration law.[95] The international conventions, national laws on arbitration and the rules of arbitration institutes, all require an arbitrator to be and remain independent and impartial.[96] It must logically follow from the fact that an

[91] Art 21 (2).

[92] Art 16.4.

[93] Art 15 (5).

[94] See comment to Art 15 (5) of the ICC Rules, J. Fry, S. Greenberg, F. Mazza, *The Secretariat's Guide to ICC Arbitration,* op. cit., pp. 192–194; H. Verbist, E. Schäfer, Ch. Imhoos, op. cit., p. 97.

[95] In details, Jelena Perović, "Sumnja u nezavisnost ili nepristrasnost arbitra kao osnov zahteva za njegovo izuzeće", *Pravni život,* No. 11/2017, Beograd, 2017, pp. 63–78.

[96] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art 6.1). In the same vein, the

arbitrator *adjudicates* a dispute, that he must be perfectly independent and impartial of the parties and the dispute. This requirement applies to *every* arbitrator alike, to the sole arbitrator, the presiding arbitrator, and the arbitrators appointed by the parties.[97] An arbitrator must be and remain independent during the entire course of arbitration, meaning from the time of his appointment until the final award is made[98] or arbitration terminated otherwise.[99]

UN Universal Declaration of Human Rights of 1948 declares that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal," (Art 10). While it may be open to debate whether or not these conventions apply directly to arbitration, there is no doubt that both public and private jurisdictions must be guided by the fundamental principles of these conventions, and that the state courts which are subject to these conventions, will in any case be required to apply these principles when deciding in the course of judicial review of the award (see Charles Jarrosson, "L'arbitrage et la Convention européenne des droits de l'homme", *Revue de l'arbitrage*, 1989, pp. 573–607). In that regard, the view emphasized in literature is that independence and impartiality of arbitrators must essentially correspond to the fundamental standards provided under these conventions and that independence and impartiality of arbitrators are today the fundamental principles of the transnational public policy (D.Babić, op. cit., p. 672). Among the international conventions governing arbitration the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (Washington Convention – ICSID), provides for this principle stating that "Persons designated to serve shall be persons… who may be relied upon to exercise independent judgement" (Art 14.1). The requirement of independence and impartiality of the arbitrators is explicitly provided by the UNCITRAL Model Law – Art 12.2, the national laws governing arbitration, particularly those modelled on the UNCITRAL Model Law, the UNCITRAL Rules of Arbitration of 1976 as revised in 2010 in Art 12.1 (hereinafter: UNCITRAL Rules of Arbitration), as well as the rules of all reputable institutional arbitrations. Detailed comparative law study, *The Arbitral Process and the Independence of Arbitrators,* ICC Publication, No. 472, Paris 1992; Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration,* Kluwer Law International BV, The Netherlands, 2012; Aldo Berlinguer, "Impartiality and Independence of Arbitrators in International Practice", *The American Review of International Arbitration (ARIA),* Vol. 6 No. 4, 1995; Dominique Hascher, "Independence and Impartiality of Arbitrators: 3 Issues", *American University International Law Review* 27, No. 4, 2012, pp. 789–806.

[97] For more details, J. Perović, "Sumnja u nezavisnost ili nepristrasnost arbitra kao osnov zahteva za njegovo izuzeće", op. cit., p. 65 ff.

[98] Including the time required for any corrections, additions and interpretations of the award. See explanation to the General Standard 1 of *IBA Guidelines on the Conflicts of Interest in International Arbitration*, adopted on 23 October 2014, p. 4.

[99] This requirement has gained broad acceptance in comparative arbitration law by establishing the duty of an arbitrator to disclose to the parties any circumstances likely to give rise to justifiable doubts as to his impartiality or independence; the duty of disclosure exists both before and after the acceptance of appointment as an arbitrator, in other words from the time of the appointment and throughout the arbitral proceedings, where such circumstances have arisen upon his appointment. In that regard see for example the UNCITRAL Model Law, Art 12.1, the UNCITRAL Arbitration Rules, Art 11, the ICC Rules, Art 11(1), 11 (2) and 11(3), the Swiss Rules Art 9, etc. The Serbian Arbitration Law provides for this rule in Art 21 specifying the duty of a person nominated as

Independence and impartiality, as qualities required from arbitrators, do not lend themselves easily to strict definitions. Essentially, independence is a situation of fact or law capable of objective verification, while impartiality is more of a state of mind, a psychological state subjective in its nature. According to the doctrine, "it is generally recognised that (arbitrator's) "dependence" is linked solely to the issues arising from the relationship between the arbitrator and one of the parties, financial or otherwise". Hence, independence is assessed according to the objective criteria. By contrast, impartiality is connected to the obvious bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute, and is therefore a subjective and abstract concept.[100] What is essentially of greatest importance is that the arbitrator remains impartial, *i.e.* decides the dispute objectively, guided solely by the law and relevant facts of the case, and not by the bias in favour of a party.[101]

As to how this issue is addressed in the Serbian law, the Arbitration Law provides that an arbitrator must be impartial and independent of the parties and the issue in dispute.[102] Furthermore, the requirement of independence and impartiality is contained in the provisions concerning the duty of an arbitrator to disclose to the parties any facts that may justly raise doubts as to the arbitrator's independence and impartiality,[103] and the provisions concerning the challenge of arbitrators.[104] The SA Rules and the BAC Rules provide for independence and impartiality of arbitrators within the provisions concerning the acceptance of appointment and the challenge of arbitrators.[105]

Duty of disclosure. – Considering the importance of independence and impartiality of an arbitrator, the sources of arbitration law set down that an arbitrator is required to disclose to the parties and the arbitration institution or the appointing authority in *ad hoc* arbitration, any facts and circumstances that may

an arbitrator to disclose, before accepting the appointment, the facts that may justly give rise to doubts as to his impartiality or independence. Furthermore, an arbitrator is required, from the day of his appointment, to disclose without delay such facts that may arise after his appointment. A similar provision is contained in the BAC Rules in Art 19.1 and 19.2, while the SA Rules explicitly provide for the duty of disclosure only prior to accepting appointment as an arbitrator (Art 20).

[100] N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., p. 268.

[101] See D. Babić, op. cit., p. 674.

[102] Art 19.3.

[103] Art 21.

[104] Art 23.

[105] The Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia, Art 20.1 and Art 23.1, the BAC Rules, Art 19 and Art 21.1.

give rise to any doubts as to his independence and impartiality. The duty of disclosure exists both before and after the acceptance of the appointment as an arbitrator, from the date of the appointment and through entire arbitration, where such circumstances have arisen upon his appointment.[106] In case of a breach of this duty, an arbitrator may be held liable for damages, particularly, if due to the breach of this duty, certain actions already taken in the arbitration proceedings involving such arbitrator need to be repeated.[107] This issue will be further discussed in the section addressing the legal consequences of a breach of a duty of an arbitrator.

The duty of disclosure of such circumstances *prior to* accepting the appointment as an arbitrator is essentially a preventive measure allowing the parties to challenge the appointment of an arbitrator who, in their opinion, fails to meet the requirements of independence and impartiality. If an arbitrator, before accepting to serve, discloses all the circumstances that may be deemed relevant for the assessment of his independence and impartiality, and the parties fail to submit a timely objection to his appointment, the notice of his challenge based on the same grounds after his appointment as a rule should not be admissible. Hence this measure assists the parties in selecting an appropriate arbitrator and avoiding the risk of challenge in further course of arbitration.[108]

This duty is universally acknowledged in arbitration law. The UNCITRAL Model Law, for example, provides under Art 12.1 that: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his

[106] In the context of the duration of the requirement of independence and impartiality of an arbitrator, it should be noted that, in some cases, the circumstances arising *after* making the award may imply lack of independence or impartiality of an arbitrator during the arbitration proceedings. Thus, for example, the Paris Court of Appeals found in one case that an employment contract signed by an arbitrator with one of the parties one day after making his award implied that he had prior relations with the party which subsequently became his employer, which raised doubts as to his independence and impartiality (CA Paris, 9 Apr 1992, *Annahold BN v. L'Oréal*, 1996 *Revue de l'arbitrage,* 483, cit. from E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 572 and 565).

[107] B. Berger, F. Kellerhals, op. cit., p. 347.

[108] It should be noted that disclosure of such circumstances by an arbitrator does not in itself imply admission to a conflict of interest. It is assumed that an arbitrator who has declared such circumstances considers himself to be independent and impartial regardless of such circumstances; otherwise, such arbitrator would have refused his appointment. In other words, the purpose of this exercise is to allow the parties to assess the circumstances relevant to independence and impartiality of the arbitrator who has notified them thereof and to reach, in the light of such circumstances, an appropriate decision as to such arbitrator's appointment.

impartiality or independence...".[109] An almost identical rule is contained in the UNCITRAL Arbitration Rules.[110] Most national laws governing arbitration provide in a similar manner for the duty of disclosure by an arbitrator,[111] including the Serbian Arbitration Law specifying that: "A person proposed for an arbitrator is obliged to disclose, before accepting the duties of an arbitrator, the facts that may justly raise doubts as to his impartiality or independence".[112] This duty is laid down in all recent rules of institutional arbitrations.[113] By accepting the standard of "justifiable doubts" as to arbitrator's impartiality or independence, these rules essentially adopt, with slight variations, the objective criterion for identifying the circumstances an arbitrator must disclose in the context of his independence and impartiality.

In this context, the ICC Rules deserve special attention as their solution to the acceptable standard of assessing the circumstances to be disclosed differs from most other sources of arbitration law. Under the Rules, a prospective arbitrator, before his appointment or confirmation, must sign a statement of acceptance, availability, impartiality and independence. He must disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.[114] The phrasing "in the eyes of the parties" suggests that the ICC Rules in this regard apply a subjective standard, and that the circumstances relevant to independence and impartiality of an arbitrator are assessed from the standpoint of the parties.[115] Hence, in assessing the circumstances of importance to the-

[109] See comment to this rule in *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration,* p. 65 ff.

[110] Art 11.

[111] Comparative law study, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 577–580.

[112] Art 21.1. It is argued in domestic literature that the phrasing of the Law enjoining an arbitrator to disclose the facts "that may justly give rise to doubts" implies a broader duty than that required by the rules of the UNCITRAL Model Law and the UNCITRAL Rules as it covers "not only the facts "likely" to give rise to justifiable doubts, but also those vaguely likely to give rise to such doubts" (G. Knežević, D. Pavić, op. cit., p. 94).

[113] Including the SA Rules (Art 20) and the BAC Rules (Art 19.1). Detailed comparative law study of the solutions offered by the rules of international arbitrations, K. Daele, op. cit., pp. 1–63.

[114] Art 11 (2).

[115] See detailed comment to this rule in J. Fry, S. Greenberg, F. Mazza, op. cit., pp. 122–127; H. Verbist, E. Schäfer, Ch. Imhoos, op. cit., p. 65 ff.

ir independence and impartiality, arbitrators must take into account the respective standpoints of the parties.[116]

Confidentiality

Confidentiality as an advantage of arbitration. – Traditionally, confidentiality is mentioned among the major advantages of arbitration over litigation. It is exactly the confidentiality afforded by the arbitration, held unlike the litigation, "behind the closed doors", that primarily attracts business people to this method of dispute resolution. That way, they can keep away from the public the data relevant to their operations, business secrets, intellectual property and the dispute itself.[117]

Duty of confidentiality. – By accepting his appointment, an arbitrator, as a rule undertakes to keep confidential all the information and data relating to the arbitration and the award. Hence, an arbitrator must not disclose to any third parties any information about the identity of the parties, or any data related to the arbitration and the award. The duty of confidentiality may be specifically provided by the arbitration agreement or *receptum arbitrii,* although it is often set forth in the rules of arbitration institutions and the codes of ethics.[118] An arbitrator who breaches the duty of confidentiality may be held liable to the parties for damages.[119]

Rules of arbitration institutions. – The duty of confidentiality, as provided for in the rules of arbitration institutions, is often not limited to the arbitrators, but

[116] This issue is addressed in great detail by the Guidelines on Conflicts of Interest in International Arbitration adopted by the International Bar Association (IBA Rules) which, similar to the ICC Rules, adopt a subjective criterion for identifying the circumstances a prospective arbitrator is required to disclose. Under General Standard 3 of the Guidelines, if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority in *ad hoc* arbitration and other members of the arbitral tribunal, prior to accepting his appointment or thereafter, as soon as he learns of them (General Standard 3 a). Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure (General Standard 3 b).

[117] See N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., pp. 33–34 and 136–143; Jelena Perović, Milena Đorđević, "Resolution of Commercial Disputes Through Arbitration as a Contribution to Improvement of Business Environment in Serbia", *Ekonomika preduzeća*, March–April 2013, Beograd, 2013, p. 249.

[118] Study of these solutions, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 612; N. Blackaby and C .Partasides with A. Redfern and M. Hunter, op. cit., p. 136 ff.

[119] See B. Berger, F. Kellerhals, op. cit., pp. 350–351.

also applies to the parties and their counsels, as well as the arbitration institution itself.[120] On the other hand, the ICC Rules do not treat the duty of confidentiality as a general rule. They provide that the arbitral tribunal may, upon a request of any party, make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.[121] In contrast to the rules of other arbitration institutions which consider confidentiality to be a general rule, with certain variations, the ICC Rules adopt a more flexible approach, leaving it to the parties and the arbitral tribunal to decide this issue based on the circumstances of the case at hand.[122] At the ICC Court of Arbitration, the confidentiality obligation as a general rule applies only to the work of the Court.[123] Comments to these Rules acknowledge that the Court and Secretariat keep confidential all information and documents acquired in connection with the dispute, as well as the information about their own work; they will not even confirm the existence of a dispute to any parties not involved in the dispute.[124]

Confidentiality of deliberations. – The confidentiality obligation applies also to the deliberations of the arbitral tribunal, which means that an arbitrator is required not to communicate to the parties to the dispute or the third parties any information about the course and stages of deliberation, or the results of deliberations and voting. On the other hand, an arbitrator who is not in agreement with the position of the majority may submit a dissenting opinion, and the award may state if it was reached unanimously or by majority of votes. With regard to the confidentiality of deliberations of the arbitral tribunal, Swiss authors take the view that, under extraordinary circumstances, it is possible for an arbitrator to notify the parties of certain aspects of deliberations without consent of other members of the tribunal – for example of refusal by one of the arbitrators to participate in deliberations,[125] and of breaches of the rules of procedure or of

[120] See for example the Swiss Rules, Art 44.1; the Milan Rules, Art 8.1; the DIS Rules, Art 44.1 etc. The BAC Rules contain a precisely defined provision to that effect, namely that "The BAC, parties, arbitrators, witnesses and experts are required to keep the proceedings and the arbitral awards confidential to the extent this is not inconsistent with the applicable mandatory rules or the need to protect one's personal rights" (Art 9 Para 1).

[121] Art 22 (3).

[122] J. Fry, S. Greenberg, F. Mazza, op. cit., p. 235.

[123] Internal Rules of the International Court of Arbitration, Art 1.

[124] J. Fry, S. Greenberg, F. Mazza, op. cit., p. 235.

[125] See in that regard Art 30.2 LCIA Rules.

fraudulent actions by other members of the tribunal.[126] This paper supports this view, and further argues that invoking the duty of confidentiality must not serve as a protective "veil" or justification to conceal from the parties any misconduct (or omission) by the members of the arbitral tribunal. It should be noted that a breach of the obligation to keep deliberations confidential may trigger an arbitrator's liability for damages just like a breach of the duty of confidentiality in general.[127] On the other hand, the Serbian law takes the view that a breach of the duty to keep deliberations confidential as a rule does not in itself constitute grounds for setting aside the award. However, the grounds for setting aside would exist if during the arbitration, one party, due to a breach of the duty of confidentiality by an arbitrator, were placed in a privileged position, in violation of the principle of equality of the parties.[128]

Confidentiality of the award. – Arbitrators are required to keep the award confidential, *i.e.* not to disclose the award either in full or in part, unless otherwise agreed by the parties. The rules of arbitration institutions adopt a somewhat more flexible approach to the issue by allowing for the award to be published in principle subject to expunging any reference to the parties and obtaining the parties' prior approval.[129]

The Swiss Rules lay down detailed provisions to that effect, specifying that an award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: that a request for publication is addressed to the Secretriat; that all references to the parties' names are deleted; and that no party objects to such publication within the time limit fixed for that purpose by the Secretariat.[130] Speaking of confidentiality of an award made under the auspices of the ICC Court of Arbitration, a commentary to the ICC Rules states that the Court and the Secretariat do not provide the award to any natural or legal persons other than the parties, their counsels and arbitrators, while within the Court of Arbitration itself, the award is accessible only to the Secretariat staff. However, the Court may publish excerpts from the award, after having deleted the names of the parties and all references enabling their identification, unless the parties agree to exclude the possibility of publication.[131] The LCIA Rules provi-

[126] B. Berger, F. Kellerhals, op. cit., pp. 518–519.

[127] See B. Berger, F. Kellerhals, op. cit., pp. 519.

[128] See Art 33 and Art 58 Para 4 of the Arbitration Law.

[129] See for example the DIS Rules, Art 44.3, the Milan Rules, Art 8.2; the BAC Rules, Art 9 Para 2.

[130] Art 44 Para 3.

[131] See J. Fry, S. Greenberg, F. Mazza, op. cit., p. 342.

de for particularly strict provisions on publication of the award, requiring a prior consent of both the parties and the arbitral tribunal.[132] The duty of confidentiality of the award is also contained in the UNCITRAL Arbitration Rules, stipulating that an award may be made public only with the consent of all parties.[133]

LEGAL CONSEQUENCES OF BREACHES OF ARBITRATOR'S DUTIES

General division. – In very general terms, a distinction may be drawn between the legal consequences of a breach of an arbitrator's duty which affect the award and those which affect the arbitrator himself.

Setting aside an award. – A breach of a duty of an arbitrator may give rise to setting aside an award where such breach of duty constitutes grounds for setting aside the award under the applicable law in each particular case. In the Serbian law, this issue is governed by Article 58 of the Arbitration Law.

Legal consequences affecting an arbitrator. – Legal consequences affecting the arbitrator himself may include termination of his functions on the one hand and his civil liability on the other. A breach of certain duties (for example those relating to independence and impartiality) may also trigger a criminal liability of the arbitrator, which will not be addressed herein.

Termination of the mandate of an arbitrator. – The possibility of termination of arbitrators' functions due to non-performance is widely accepted in the sources of the arbitration law. Thus, under the UNCITRAL Model Law if an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from office or if the parties agree on the termination. Otherwise, if the parties fail to agree on any of these grounds any party may request the court or another competent authority to decide on the termination of the mandate of the arbitrator; no appeal is admissible against such decision. If an arbitrator withdraws from his office or the parties agree to the termination of his mandate under these rules or the rules of the challenge procedure, this does not imply acceptance of the validity of any grounds for termination of the mandate of the arbitrator.[134] The grounds for termination of arbitrators' functions are expressed in similar terms in national arbitration laws, rules of arbitration institutions, as well as the UNCITRAL Arbitration

[132] Art 30.3.

[133] See Art 34 Para 5 in full.

[134] Art 14 (1).

Rules.[135] The Serbian Arbitration Law sets down almost identical rules on termination as the UNCITRAL Model Law,[136] and the SA Rules,[137] and the BAC Rules also provide for similar solutions in that respect.[138]

Civil liability of an arbitrator. – The legal relationship between an arbitrator and the parties is governed under a contract they conclude – *receptum arbitrii*. In case of a breach of the duties which an arbitrator undertakes by accepting his appointment, the grounds for arbitrator's civil liability will be found in this contract. The key issue with regard to the civil liability of an arbitrator is whether the arbitrator should be held liable for non-fulfilment of his contractual obligations in compliance with the general rules governing contractual liability, or should be"exempt" from this kind of liability based on his judicial function. In addressing this issue, a distinction must be drawn between the duties of an arbitrator arising directly from his judicial function and other duties undertaken by an arbitrator by accepting his mandate. The issue must be viewed in the light of the applicable law in each particular case.

Principle of immunity for actions directly related to judicial powers. – Drawing on the judicial powers granted to an arbitrator to adjudicate a dispute, akin to a judge of a state court, the arbitration law widely accepts the principle that an arbitrator as a rule is not held liable for the actions directly related to the exercise of his judicial function, *i.e.* to the award he has rendered (*e.g.* for erroneous application of the substantive law or erroneous appraisal of facts).[139] This principle essentially seeks to protect an arbitrator in the exercise of his judicial function and limit the parties in bringing an action against the arbitrator *in personam,* over and above an action to set the award aside. Such conduct of the parties would have a negative impact on legal security, not only in each particular case, but also for arbitration in general.[140]

The so-called principle of immunity, whereby arbitrators as a rule are not held liable for the actions stemming directly from their judicial function, is particularly recognised in the *common law* countries. In the United States, the civil liability of arbitrators for acts committed in the course of performance of their

[135] Comparative law study, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 617–618.

[136] Art 25.

[137] Art 24.

[138] Art 20.

[139] M. Stanivuković, op. cit., p. 181.

[140] In details, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 592 ff.

functions is excluded, and the case law affords broadest protection from any actions filed against them on these grounds.[141] Under the English law, arbitrators are not held liable for the performance of their functions, unless they acted in bad faith,[142] and similar solutions have been adopted in Canada, New Zealand and Australia.[143] By contrast, in most countries of the continental legal tradition, the law is silent on this issue. In the absence of legal provisions, the issue is left to the court practice which tends to address it by applying the general rules of the law of obligations while considering the general principles of arbitration and the relevant circumstances of each particular case. However, the prevailing view in the case law and doctrine of the *civil law* countries recognises the principle of immunity with certain limitations.[144]

This principle is clearly recognised in the French case law.[145] Thus, for example, in a case before the Reims Tribunal of First Instance, a party brought an action against the arbitrators for damages it claimed to have suffered as a result of their award. Deciding in the dispute, the court dismissed the claim, stating that all of the claimant's arguments essentially amounted to the general criticism that the arbitrators reached the wrong decision. The arbitrators could incur liability only in the event of gross negligence, fraud, or bias in favour of one of the parties. Otherwise the protection, independence and authority of the arbitrators would be restricted to an extent that would be incompatible with their judicial function. The court took a further step and upheld the arbitrators' counterclaims for damages against the claimant.[146] In another case against arbitrators for damages, where the claimant alleged a breach of the applicable procedural rules, the Paris Tribunal of First Instance took a similar position, emphasizing the need to protect the arbitrators' authority and dignity. In that regard, the Tribunal found that a

[141] See N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., p. 330.

[142] The English Arbitration Act, Art 29. On immunity of arbitrators in the English law, M.L. Smith, op. cit., p. 31 ff.

[143] See N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *ibidem*.

[144] Comparative law study, *The Arbitrator's Liability Report from the Club des Juristes,* Ad hoc Commitee, June 2017, Paris, 2017, p. 22 ff; N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op, cit., pp. 330–333; E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., *ibidem*.

[145] Several judgements by the French courts in this context are referred to and examined in *The Arbitrator's Liability Report from the Club des Juristes,* op. cit., p. 23 ff.

[146] TGI Reins, 27 September 1978, cit. from E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 590–591.

party is not entitled to claim damages on the grounds of the allegations that arbitrators made a wrong award.[147]

Limits to the principle of immunity. – No national legal system allows the principle of immunity in the literal sense of the word and absolutely. In fact, legal systems recognise limitations to this principle, defining the cases where an arbitrator cannot rely on his immunity. These limitations may be grouped round two categories: general limitations where an arbitrator has wilfully violated his obligations and special limitations for breaches of the duty to disclose a conflict of interest.[148]

The principle of immunity is generally subject to limitations where the breach of duty by an arbitrator arises as a result of his deliberate fault or fraudulent conduct. Although there are some variations in the treatment of this issue in legislation, case law, and doctrine of the comparative law (focusing sometimes on the requirement for fraud, or deliberate fault,[149] or sometimes on bad faith in the sense of deliberate fault[150]),[151] there is a broad agreement that any intentional fault or fraudulent conduct of an arbitrator in the discharge of his functions will mean a breach of his duty to conduct the proceedings in good faith and treat the parties equally. In such case, the arbitrator will be exempt from the principle of immunity and held liable for the damage incurred by the parties.

On the other hand, considering the importance of independence and impartiality of an arbitrator, the sources of arbitration law, as already shown, require an arbitrator to disclose a potential conflict of interest to the parties and the arbitration institution or the appointing authority in *ad hoc* arbitration. A breach of

[147] Judgement *Castin v. Gomez*, 2 October 1985, cit. from *ibidem*.

[148] This categorisation is adopted in E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 594 ff.

[149] Certain court rulings and doctrines add gross negligence to deliberate fault. It is however open to debate whether gross negligence may lead to civil liability of an arbitrator (see E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 598–599).

[150] As already shown, the English Arbitration Act (Art 29) provides that an arbitrator is not liable for the discharge of his functions unless he acts in bad faith. The English doctrine interprets the term "bad faith" in this context as deliberate actions on part of the arbitrator. See *Mustill & Boyd,* 2nd edition, 2001 Companion, p. 300 (cit. from *The Arbitrator's Liability Report from the Club des Juristes,* op. cit., p. 111) stating: *"the concept of dishonesty (or bad faith, to use the terminology of section 29) involves, we consider, conscious and deliberate fault on the part of the arbitrator."*

[151] Detailed comparative law study, *The Arbitrator's Liability Report from the Club des Juristes,* op. cit. as a whole.

this duty will render the arbitrator liable to the parties for damages.[152] This is particularly true of the cases where the parties suffer additional costs and waste of time due to such breach, for example when certain steps in the arbitration proceedings need to be repeated[153] or the procedure for setting aside the award is set in motion.

Liability for contractual obligations of an arbitrator. – Although an arbitrator enjoys a degree of immunity as concerns the award he makes, he is liable for failure to perform the contractual obligations he assumed by accepting his appointment.[154] These are the duties relating to the manner of conducting the arbitration, that have been addressed herein. In this context, an arbitrator who fails to perform his obligations as agreed (directly in the arbitration agreement or indirectly – by accepting the rules of an arbitration institution or selecting an applicable law or a set of rules), is held liable for damages within the meaning of the general rules of the law of obligations, except where such liability is excluded under the contract.

The national laws governing arbitration are usually silent on the matter of civil liability of arbitrators. An exemption in that regard is the Austrian Code of Civil Procedure, which sets down that an arbitrator who does not fulfil the duty assumed by acceptance of the appointment, or does not fulfil it in a timely manner, *shall be liable* towards the parties for all damage caused by his culpable refusal or delay.[155] Along the same lines, the Italian Code of Civil Procedure, whose solutions have been discussed herein, provides that the arbitrators shall be held liable for damages not only in case of resigning without just cause, but also if their award was set aside due to the missed time limit.[156] However, in spite of the absence of explicit legal provisions, case law and doctrine in most countries take a firm view that arbitrators may incur civil liability[157] due to a breach of duties rela-

[152] See relevant judgements of the French courts, E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., pp. 594–597.

[153] For example, in cases of removal of an arbitrator.

[154] This view is widely accepted in comparative law. See *The Arbitrator's Liability Report from the Club des Juristes,* op. cit., p. 33 ff; B.Berger, F.Kellerhals, op. cit., p. 351; *Russell on the Law of Arbitration*, Walton and Vitoria Eds., 20th ed., Stevens and Sons, 1982, op. cit., p. 121 ff; E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 619; N. Blackaby and C. Partasides with A. Redfern and M. Hunter, op. cit., p. 331 ff.

[155] Art 594 Para 4.

[156] Art 813 Para 2.

[157] In this context, certain authors suggest that a distinction must be drawn between the obligations owed by an arbitrator that belong to the obligations of result - *obligations de résultat* and those considered to be the obligations of means - *obligations de moyens* (on distinction betwe-

ting to the conduct of arbitration.[158] Hence, arbitration institutions are increasingly introducing clauses on exemption or limitation of liability of arbitrators and arbitration institutions themselves.[159]

CONCLUSION

The examination of the duties of arbitrators made herein points to several conclusions. In the first place, the legal relationship between an arbitrator and the parties is governed by a contract entered into by and between them. It is based on this agreement that the arbitrators acquire rights and assume obligations relevant to the arbitration. An arbitrator must be independent and impartial of the parties and the subject matter of the dispute and must comply with the basic principles of the arbitration proceedings. These are the principal and universally acknowledged duties of arbitrators stemming from their judicial powers, the breach of which will result in setting aside the award. By accepting the appointment, an arbitrator assumes a series of other duties in arbitration. The most important of these include:

1) *due care* involving the duty of an arbitrator to devote sufficient time to the dispute he was appointed to, as well as to apply the knowledge, expertise and skills required of him for the analysis and resolution of disputable issues in the case at hand. An arbitrator must conduct the arbitration efficiently and observe the procedural time limits, and in particularly the time limit set for rendering the award;

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en the obligations of result and the obligations of means in general, S. Perović, op. cit., pp. 90–94). Thus, for example, an arbitrator who has resigned without just cause, or has failed to meet or extend the deadline for issuing the award, has breached the obligation of result, and should be liable for damages due to the failure to achieve the result intended in assuming the obligation. As for the obligations owed by an arbitrator that belong to the obligations of means, an arbitrator may incur liability only for failing to perform such obligations with due care (see E. Gaillard, J. Savage (editors), *Fouchard Gaillard Goldman On International Commercial Arbitration,* op. cit., p. 621). This approach, however, has been criticized in the doctrine, the argument being that the above distinction between obligations may not be successfully translated from the classical law of obligations to arbitration, above all because in arbitration it is difficult to draw a clear distinction between the obligations of result and the obligations of means (see. *The Arbitrator's Liability Report from the Club des Juristes,* op. cit., p. 33).

[158] Comparative law study in that respect, *The Arbitrator's Liability Report from the Club des Juristes, ibidem*.

[159] See for example the ICC Rules, Art 41, the LCIA Rules, Art 31, the Stockholm Rules, Art 52, the DIS Rules, Art 45, etc.

2) *adjudication of the dispute*, which means that an arbitrator is required to bring the arbitration to its conclusion, *i.e.* termination by issuing a final award. From the time of accepting the appointment, an arbitrator may not resign from the dispute without just cause. This principle, intending first of all to prevent an arbitrator from obstructing the proceedings by resigning for unjustified causes, is widely accepted in the rules of arbitration institutions;

3) *disclosure of a potential conflict of interest* stemming from the universally accepted requirement for independence and impartiality of an arbitrator. Sources of arbitration law require an arbitrator to disclose to the parties and the arbitration institution or the appointing authority in *ad hoc* arbitration, all the facts and circumstances that may give rise to any doubts as to his independence and impartiality. The duty of disclosure exists both before and after the acceptance of appointment as an arbitrator, from the date of the appointment and through entire arbitration, where such circumstances have arisen upon his appointment;

4) *confidentiality* which means that an arbitrator, by accepting the appointment, as a rule undertakes to keep confidential all the information and data relating to the arbitration and the award. An arbitrator must not disclose to any third parties any information about the identity of the parties to the dispute, or any data related to the arbitration and the award. The duty of confidentiality may be explicitly provided into the arbitration agreement or *receptum arbitrii,* although it is often set forth in the rules of arbitration institutions and the codes of ethics.

Legal consequences of breaches of arbitrator's duties may be divided into those affecting the award and those affecting the arbitrator himself. A breach of an arbitrator's duty may give rise to setting aside an award where such breach of duty constitutes grounds for setting aside of an award under the applicable law. The legal consequences affecting the arbitrator himself may include termination of his function on the one hand and his civil liability on the other.

The key issue with regard to the civil liability of an arbitrator is whether an arbitrator should be held liable for the non-fulfilment of his contractual obligations in line with the general rules of the law of obligations governing contractual liability, or should be "exempt" from this kind of liability based on his judicial function. In addressing this issue, a distinction is drawn between the duties of an arbitrator arising directly from his judicial function and other duties undertaken by an arbitrator by accepting his mandate. The arbitration law widely accepts the principle that an arbitrator as a rule is not held liable for the actions directly related to the exercise of his judicial function, meaning the award he made (the principle of immunity). This principle, however, is subject to significant limitations, particularly where a breach of duty by an arbitrator arises as a result of his delibe-

rate fault or fraudulent conduct. On the other hand, an arbitrator is liable for the failure to perform the contractual obligations he assumed by accepting his appointment, relating to the manner of conducting the arbitration. In this context, the prevailing view is that an arbitrator who fails to perform his obligations as agreed is held liable for damages within the meaning of the general rules of the law of obligations, except where such liability is excluded under the contract.

The duties owed by arbitrators and the legal consequences of their breaches examined herein will determine to a great degree the course of arbitration and the grounds for any appropriate court actions following the issue of the award.

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OBAVEZE ARBITARA U MEĐUNARODNOJ TRGOVINSKOJ ARBITRAŽI

Rezime

Predmet rada predstavlja analiza obaveza arbitara u međunarodnoj trgovinskoj arbitraži. U uvodnom delu učinjen je pogled na pravni odnos između arbitara i strana u sporu uređen ugovorom koji se između njih zaključuje. Centralni deo analize posvećen je obavezama koje arbitar preuzima prihvatanjem svog imenovanja. U tom kontekstu, pažnja je usmerena na: a) osnovne obaveze koje se ogledaju u zahtevu da arbitar bude nezavisan i nepristrasan i da poštuje osnovna načela arbitražnog postupka, i b) druge najznačajnije obaveze arbitra: dužna pažnja, efikasnost i poštovanje roka za donošenje arbitražne odluke, obaveza presuđenja spora, obaveza obaveštenja o mogućem sukobu interesa i obaveza poverljivosti. Nakon analize obaveza arbitara, razmatrane su moguće pravne posledice njihove povrede: poništaj arbitražne odluke, prestanak dužnosti arbitra i građanskopravna odgovornost arbitra. Analiza pomenutih pitanja učinjena je sa stanovišta odgovarajućih rešenja uniformnih pravila i nacionalnih zakona iz oblasti arbitraže, pravilnika vodećih arbitražnih institucija, kao i stavova doktrine i međunarodne sudske i arbitražne prakse.

Ključne reči: arbitar, obaveza, arbitraža, arbitražni ugovor, arbitražni postupak

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MILENA PETROVIĆ

MEĐUNARODNA TRGOVAČKA ARBITRAŽA I MEĐUNARODNO PRIVATNO PRAVO

Zavisnost arbitraže od međunarodnog privatnog prava se manifestuje kroz celi njen životni ciklus, počev od arbitražnog sporazuma, preko arbitražnog postupka, do momenta kada se arbitražna odluka nađe pred sudom zbog poništaja ili priznanja i izvršenja. Budući da je spor o kome arbitraža treba da odluči sa međunarodnim obeležjem, te da je vezan najmanje za dve različite države, opravdano je očekivati da nema aspekta arbitraže za koji se ne bi moglo postaviti pitanje merodavnog prava. Već na prvi pogled to bi se moglo odnositi na pitanja merodavnog prava za sposobnost stranaka da zaključe arbitražni sporazum, merodavnog prava za arbitražni sporazum, merodavnog prava za arbitražni postupak, merodavnog prava za rešenje merituma spora, kao i prava koje reguliše priznanje i izvršenje strane arbitražne odluke. Ako se ovome doda da se na određena pitanja moraju primeniti imperativna pravila države sedišta arbitraže, jasno je da arbitraža predstavlja veliki izazov za arbitre, ali isto tako i za sudove.

Budući da je izbor merodavnog prava nužan i da se to mora činiti primenom kolizionih pravila, jasno je da je međunarodnoprivatopravna snalažljivost arbitara od fundamentalnog značaja za valjano sprovođenje postupka i donošenje valjane odluke sposobne da bude izvršena.

Ključne reči: a*rbitraža, merodavno pravo, koliziona pravila*

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U V O D

U svetu međunarodnog privatnog prava čini se da nema oblasti u kojoj se njegova pravila ispituju i primenjuju toliko kontinuirano i sveobuhvatno kao što je to slučaj sa međunarodnom trgovačkom arbitražom. Zavisnost arbitraže od međunarodnog privatnog prava se zapravo manifestuje kroz celi njen životni ciklus, počev od arbitražnog sporazuma, preko arbitražnog postupka, do momenta kada se arbitražna odluka nađe pred sudom zbog poništaja ili priznanja i izvršenja. Budući da je spor o kome arbitraža treba da odluči sa međunarodnim obeležjem te da je vezan najmanje za dve različite države, opravdano je očekivati da nema aspekta arbitraže za koji se ne bi moglo postaviti pitanje merodavnog prava. Već na prvi pogled moglo bi se identifikovati bar pet pitanja koja traže odgovore, a to su: 1) merodavno pravo za sposobnost stranaka da zaključe arbitražni sporazum; 2) merodavno pravo za arbitražni sporazum; 3) merodavno pravo za arbitražni postupak; 4) merodavno pravo za rešenje merituma spora; i 5) pravo koje reguliše priznanje i izvršenje strane arbitražne odluke. Ako se ovome doda da se na određena pitanja moraju primeniti imperativna pravila države sedišta arbitraže, jasno je da arbitraža predstavlja veliki izazov za arbitre, ali isto tako i za sudove.

Za razliku od sudova za koje je očekivano da se u primeni međunarodnog privatnog prava lakše snalaze, arbitri međunarodne trgovačke arbitraže moraju pronaći svoj put kroz šumu kolizionih normi od kojih su mnoge imperativne, pa o njima moraju voditi računa po službenoj dužnosti. Na putu istraživanja koje pravo treba primeniti, i sud i arbitražu vode multiplicirani izvori prava. Međutim, mora se priznati da je za arbitre situacija znatno složenija. Naime, za razliku od suda koji ima ograničenu funkciju u sprovođenju arbitražnog postupka i arbitražne odluke, arbitri imaju zadatak da sprovedu proceduru i reše spor. U tom postupku oni primenjuju i materijalna i procesna pravila koja su sadržana u stranačkom ugovoru, institucionalnim arbitražnim pravilima, arbitražnim zakonima, međunarodnim ugovorima, relevantnim nacionalnim pravima, kao i obilje pravila koja čine *soft law.* Uz to, za pojedina pitanja se mogu primeniti različite kolizione tehnike u odabiru merodavnog prava (direktne i indirektne – *voie directe* i *voie indirecte*) što sam arbitražni proces čini još složenijim. Otuda se čini potpuno jasnim da je međunarodno privatnopravna snalažljivost arbitara od fundamentalnog značaja za valjano sprovođenje postupka i donošenje valjane odluke sposobne da bude izvršena.

Razmišljanje o svemu ovome ne može dovesti do drugačijeg zaključka do da su arbitri pred teškim zadatkom. No, da li je u arbitražnoj praksi to baš tako. Da li su arbitri zaista zavisni od međunarodnog privatnog prava, da li i koje koli-

zione norme oni zapravo moraju primeniti. Odgovorima na ova pitanja upravo je i posvećen ovaj rad.

DA LI, ZAŠTO I ČIJE KOLIZIONE NORME ARBITRI MOGU ILI MORAJU DA PRIMENJUJU

Svaka arbitraža daje povoda za brojna kolizionopravna pitanja čija rešenja mogu biti manje ili više kompleksna. Potencijalna kompleksnost proizlazi iz činjenice da nije svaki aspekt arbitraže nužno podvrgnut istom pravu. Otuda ne čudi da se u kontekstu međunarodnog privatnog prava arbitraža opisuje kao "forenzičko minsko polje",[1] što se može čuti da njen postupak postaje sve više i više nalik sudskom postupku, a manje koncilijacija,[2] kao i da je arbitraža izgubila svoj duh.[3] Ako se arbitraža ovako vidi i ako se kolizione norme smatraju komplikovanim i zato nepoželjnim, onda se opravdano postavlja pitanje da li ih arbitri moraju primenjivati.

Razlog za primenu kolizionih normi je opravdan jer se radi o sporu sa stranim elementom, a u tom slučaju bar dve države pretenduju da se primeni njihovo pravo ili da njihovi sudovi imaju kontrolu nad arbitražnim postupkom i odlukom. Dakle, u svakom slučaju treba izvršiti izbor između potencijalno merodavnih prava ili pravnih pravila, a takav izbor je nemoguće učiniti bez kolizionopravne analize i kolizionopravne odluke utelovljene u nekoj od kolizionih normi. Ta odluka će se uvek bazirati na nekom kriterijumu koji ukazuje na vezu između izabranog prava i spornog odnosa, stranaka ili sedišta arbitraže, i takav izbor treba da bude priznat i prihvaćen od strane arbitražnih zakona i arbitražnih pravila relevantnih država.

Budući da se arbitraža temelji na principu autonomije volje, stranke su prve pozvane da učine izbor merodavnog prava. Tako, one same mogu odabrati prava ili pravna pravila (zavisno od toga koji aspekt arbitraže je u pitanju) po kojima će se ceniti punovažnost arbitražnog sporazuma, po kome će arbitraža odlučiti o predmetu spora ili po kome će se sprovesti arbitražni postupak. Ovlašćenje za takvo postupanje stranke crpe iz kolizione norme koja se temelji na autonomiji volje kao tački vezivanja (*lex voluntatis*), koja je opštepriznata i prihvaćena i pred-

[1] Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration,* London, 1991, p. 72.

[2] Filip De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", *Northwestern Journal of International Law & Business*, Vol. 12, 1991. p. 50.

[3] Yves Derains, "New Trends in the practical Application of the ICC Rules of Arbitration", *Northwestern Journal of International Law & Business*, Vol. 3, Issue 1, 1981, p. 44–45.

stavlja opšti princip prava. Ukoliko stranke propuste da izvrše izbor merodavnog prava, to će učiniti arbitri i to opet na osnovu kolizionih normi. One mogu biti različito formulisane i u tom smislu arbitrima davati manju ili veću slobodu u njihovom tumačenju i primeni. Tako, one mogu biti jasan i nedvosmislen nalog za postupanje, као на primer, "sud može poništiti arbitražnu odluku ako utvrdi da stranke nisu sposobne za zaključenje tog ugovora po *zakonima koji se primenjuju na njih*", ili, mogu biti fleksibilnije i ostavljati arbitrima više prostora u odabiru merodavnog prava, kao na primer, "...arbitražni sud će primeniti pravo na koje uputi koliziona norma za koju *smatra da odgovara konkretnom slučaju*". U svakom slučaju, ma kako formulisane, kolizione norme su neminovne kad god je potrebno izabrati jedno od više mogućih merodavnih prava i ta činjenica je dovoljna za konstataciju da je arbitraža zavisna od međunarodnog privatnog prava odnosno, uglavnom, njegovih kolizionih normi. Zbog navedene funkcije, kolizione norme uostalom i postoje. One se ne upuštaju u materijalnopravno rešavanje spornog slučaja, već kao neutralne, na temelju načela najbliže veze, načela univerzalnosti i načela ravnopravnosti obezbeđuju kolizionopravnu pravičnost, budući da mogu uputiti na pravo bilo koje države.[4] Na kraju, ma ko da vrši izbor prava i preko ma koje kolizione norme, mora imati vlast da to čini, a nju obezbeđuje i osigurava država kroz sopstvene zakone i ratifikovane međunarodne konvencije.

U odgovoru na pitanje čije kolizione norme arbitri primenjuju, nacionalne, anacionalne ili neke treće, mora se poći od dva suprotstavljena stava o samoj arbitraži.

Prema tradicionalnom shvatanju, nijedna arbitraža ne postoji u nekakvom pravnom vakumu. Naprotiv, svaka je jasno ukorenjena u državi u kojoj se nalazi njeno sedište i regulisana je pravom te države (*lex loci arbitri*), u smislu postupka koji sprovodi, ali i zakonskog i sudskog nadzora pod kojim se nalazi. Ona dakle, postoji isključivo zahvaljujući tome što je neko pravo dozvoljava, pa je tom (nacionalnom) pravu i podvrgnuta.[5] Drugim rečima, *lex arbitri* na određen način upravlja arbitražom kao eksterni korpus pravila, kako procesnih, tako i materijalnih. U procesnom smislu, on postavlja granice u okviru kojih stranke mogu oblikovati postupak, uređuje pitanja koje stranke nisu odredile, pomaže arbitraži u izvođenju određenih procesnih radnji, ali i vrši kontrolu arbitražne odluke. U materijalnopravnom smislu odredbe *lex arbitri* određuju arbitrabilnost spora, formu i materijalnu punovažnost arbitražnog sporazuma, kao i druga pitanja koja

[4] V. Slavko Đorđević, Zlatan Mekšić, *Međunarodno privatno pravo I – opšti deo,* Kragujevac, 2016, str. 33.

[5] F.A. Man, "*Lex Facit Arbitrum*", u *International Arbitration: Liber Amicorum for Martin Domke* (ed P. Sanders), The Hague, 1967, p. 158, 160.

ulaze u javni poredak zemlje sedišta arbitraže. Na ovom stavu nije bazirana samo doktrina, već i praksa međunarodne arbitraže koja je oslonac našla najpre u čl. 2. Ženevskog protokola o arbitražnim klauzulama iz 1923. godine, kao i čl. V(1)(d) Njujorške konvencije (u daljem tekstu NYK).[6] Budući da se može reći da ovako shvaćen *lex arbitri* predstavlja svojevrsni *lex fori* arbitraže, onda se može reći i da sedište arbitraže predstavlja tačku vezivanja na osnovu koje se određuju: 1) kolizioni sistem koji arbitri moraju da primene; 2) merodavno pravo za arbitražni postupak; 3) nadležnost sudova za kontrolu arbitražnog postupka ili pomoć arbitraži u toku postupka; i 4) poreklo arbitražne odluke značajno za postupak priznanja i izvršenja.[7]

Ovaj pristup je već 60-ih godina prošlog veka naišao na snažnu kritiku u arbitražnoj doktrini koja je primarno bazirana na praktičnim teškoćama u određivanju sedišta arbitraže, a naročito na činjenici da je sedište arbitraže veoma arbitrarno za rešavanje sukoba zakona (kao tačka vezivanja) jer u mnogim slučajevima ni stranke, a ni sam spor nemaju dovoljno značajnu vezu sa zemljom u kojoj se nalazi sedište arbitraže.[8]

Sa prvim kritikama krenula je i emancipacija arbitraže od kolizionih normi i međunarodnog privatnog prava generalno. Ona se razvila i traje kroz teoriju delokalizacije arbitraže (*de-localisation theory*) koja potiče iz francuskog prava, posebno iz francuske sudske prakse. Prema ovoj teoriji arbitraža nije ukorenjena ni u jednom posebnom nacionalnom pravu, što znači da nije ukorenjena ni u pravu države u kojoj se nalazi njeno sedište. Ovo dalje znači da arbitri nisu vezani kolizionim i procesnim normama države sedišta arbitraže, da se mogu odreći klasičnog kolizionog metoda za iznalaženje merodavnog prava za arbitražni sporazum ili meritum spora, ali i da lokalni sudovi mogu izgubiti kontrolu nad arbitražnom odlukom.[9] Kao opravdanje za navedeni stav pristalice ove teorije ističu dva argu-

[6] Prema čl. 2. Ženevskog protokola "Arbitražni postupak, uključujući i konstituisanje arbitražnog suda, određuje se voljom stranaka i zakonom zemlje na čijoj se teritoriji održava arbitraža. Države ugovornice se obavezuju da će olakšati radnje postupka koje treba da se izvrše na njihovoj teritoriji, shodno odredbama kojima se, prema njihovom zakonodavstvu, reguliše postupak arbitraže", a prema čl. V(1)(d) NYK, "priznanje i izvršenje strane arbitražne odluke biće odbijeni ako konstituisanje arbitražnog suda ili arbitražni postupak nije bio u skladu sa ugovorom stranaka ili, ako ne postoji ugovor, nije bio u skladu sa zakonom zemlje u kojoj je obavljena arbitraža".

[7] F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", *Northwestern Journal of International Law & Business*, Vol. 12, 1991, p. 61.

[8] *Ibidem, p*. 61.

[9] William Park, "The *Lex Loci Arbitri* and International Commercial Arbitration", 32 *ICLQ*, p. 24–25.

menta: prvi polazi od toga da je međunarodna trgovačka arbitraža dovoljno regulisana svojim sopstvenim pravilima, a drugi polazi od toga da kontrolu arbitražnog postupka treba vršiti samo prema pravu mesta izvršenja arbitražne odluke.[10] Prema prvom argumentu, arbitraža dakle, samu sebe reguliše (*self-regulating*) i to je dovoljno. Prema drugom, praktično se ispoljava ideja da umesto dvostruke kontrole, prvo od strane *lex arbitri,* a onda od strane prava zemlje u kojoj se traži izvršenje arbitražne odluke, treba da postoji samo jedna kontrola i to u državi izvršenja. Shodno ovom stavu, sedište arbitraže, u pravnom smislu, postaje irelevantno. U skladu sa ovim može se čuti da je međunarodna arbitraža "skrojena" tako da pluta (*floating*) po površini prava različitih država, ne dodirujući ni jedno od njih, služeći primarno interesima međunarodne trgovine[11], da je sama po sebi "nadnacionalna", "a-nacionalna", "transnacionalna" i kao takva, da ne duguje poslušnost nacionalnim pravima. Pošto je "delokalizovana", ona duguje poslušnost samo strankama budući da je autonomija volje stranaka ključni, najvažniji i najznačajniji princip na kome počiva. Iako pojam "delokalizacije" dobija na popularnosti, naročito u arbitražnoj doktrini, istinska delokalizacija arbitraže međutim, još uvek se smatra dalekim ciljem.[12]

Istina je negde na sredini, u smislu mešovite teorije o pravnoj prirodi arbitraže, koja uvažava kako ugovorne, tako i procesne aspekte i dejstva arbitražnog sudovanja. U tom smislu, postoje predlozi da u određivanju merodavnog prava arbitri ne treba da primenjuju kolizione norme zemlje sedišta arbitraže, već da koriste druge tehnike kao što su: 1) autonomna koliziona pravila; 2) opšti principi sukoba zakona; 3) kumulativna primena kolizionih pravila; i 4) direktan izbor merodavnog prava.[13] U određenoj meri, ovakav pristup ima podršku u međunarodnim ugovorima, nacionalnim zakonima i arbitražnim pravilima, ali ima ograničeno polje primene. Naime, uglavnom se odnosi na određivanje merodavnog

[10] Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p. 90–91.

[11] A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p. 90; Jan, Paulsson, "Arbitration Unbound: An Award Detached From the Law of the Country of Origin", *ICLQ*. 30, 1981, str. 358; Više o delokalizaciji arbitraže u našoj pravnoj literaturi: Gašo, Knežević, *Međunarodna trgovačka arbitraža – osnovna pitanja i problemi,* Beograd, 1999, str. 62–63.

[12] W. Park, "The *Lex Loci Arbitri* and International Commercial Arbitration", 32 *ICLQ,* 21 (1983), cit. prema: Dejan Janićijević, *Delocalization in International Commercial Arbitration,* Facta Universitatis, Series: Law and Politics Vol. 3, No1, 2005. p. 63; Michael Mustill, "The *New Lex Mercatoria*: The First Twenty Five Years", 4 *Arb. Int"l*, 1988, p. 86.

[13] Umesto svih, F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", *Northwestern Journal of International Law & Business*, Vol. 12, 1991, p. 63.

prava za meritum spora. Sva ostala pitanja zbog kojih treba odrediti merodavno pravo i dalje su uglavnom u domenu kolizionih pravila zemlje sedišta arbitraže.

MERODAVNO PRAVO ZA ARBITRAŽNI SPORAZUM

Nijedna diskusija o merodavnom pravu za arbitražni sporazum ne može da otpočne bez osvrta na opštepriznatu i prihvaćenu doktrinu *autonomije arbitražnog sporazuma* (*separability doctrine*) prema kojoj se arbitražna klauzula nikako ne može tretirati kao i svaka druga klauzula glavnog ugovora.[14] Ona je, shodno ovoj teoriji, samostalna i nezavisna od glavnog ugovora, što znači da njena pravna sudbina nije vezana za pravnu sudbinu glavnog ugovora, niti od nje zavisi. Čak i kada se nalaze u istom pismenu, glavni ugovor i arbitražni sporazum se analiziraju odvojeno kao dva samostalna ugovora. Jedna od posledica ove teorije jeste i to da merodavno pravo za ocenu punovažnosti arbitražnog sporazuma može biti drugačije od merodavnog prava za glavni ugovor[15], što znači da je pretpostavka da će merodavno pravo za glavni ugovor uvek regulisati i arbitražni sporazum, potpuno nesigurna.

Pitanje merodavnog prava za arbitražni sporazum je od izuzetnog značaja jer je sam arbitražni sporazum od vitalne važnosti za svaki arbitražni postupak. On je osnov nadležnosti arbitraže i izvor ovlašćenja arbitara, pa se na samom početku svakog arbitražnog postupka njegova punovažnost analizira kao prethodno pitanje. Po kom pravu se ta analiza vrši generalno je kompleksno pitanje budući da se analiza odnosi na sve aspekte sporazuma (postojanje, punovažnost, tumačenje), da je vrše različiti forumi u različitim fazama arbitražnog postupka (arbitraža u postupku zasnivanja njene nadležnosti, a državni sudovi ili u postupku zasnivanja njihove nadležnosti, ili kasnije, u postupcima sudske kontrole arbitražne odluke (poništaj) ili njenog priznanja i izvršenja) i da nisu sva pitanja arbitražnog sporazuma podvrgnuta istom pravu. Svaki od navedenih aspekata sporazuma mora biti u skladu sa pravilima merodavnog prava jer u suprotnom, arbitražni

[14] Teorija autonomije arbitražnog sporazuma je široko prihvaćena u teoriji, uporednom arbitražnom pravu i institucionalnim arbitražnim pravilnicima. V. Gary Born, *International Commercial Arbitration,* Kluwer Law International, 2nd Ed, 2014, p. 360; Gašo, Knežević, Vladimir, Pavić, *Arbitraža i ADR,* Beograd, 2010, str. 54. i sl; engleski Zakon o arbitraži (1996), čl. 7; švajcarski ZMPP, čl. 178(3); ICC Pravilnik (1998), čl. 6(4); LCIA Pravila čl. 23; srpski Zakon o arbitraži, *Službeni glasnik,* br. 46/2006 (u daljem tekstu: ZOA) čl. 28.

[15] Tako se u odluci engleskog suda u slučaju *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia* (2012) EWCA Civ 638 at (11) (CA, UK), izričito navodi "da je već dugo prihvaćeno da u principu, merodavno pravo za arbitražni sporazum koji predstavlja deo materijalnog ugovora može biti različito od merodavnog prava za taj (glavni) ugovor.

postupak se ne bi mogao sprovesti, ili ukoliko se to i učini, arbitražna odluka bi mogla biti poništena ili bi joj se moglo uskratiti priznanje i izvršenje.

Opšta je saglasnost da je pored opštih uslova koji se zahtevaju za svaki drugi ugovor, za punovažnost arbitražnog sporazuma neophodno i ispunjenje zahteva koji se tiču arbitrabilnosti, forme i materijalne sadržine ovog sporazuma.[16] U pitanju su "međunarodnopravni zahtevi" koji počivaju na Njujorškoj konvenciji kao najznačajnijem stubu na kome počiva arbitraža i arbitražno pravo.[17] Imajući u vidu da za formu arbitražnog sporazuma važi međunarodni standard postavljen čl. II(1) i II(2) Njujorške konvencije, koji nalaže "maksimalne" formalne zahteve za punovažnost, koji države članice ne mogu da ignorišu, te da je on materijalnopravne prirode zbog čega se ne postavlja pitanje merodavnog prava, analiza merodavnog prava za arbitražni sporazum biće usmerena na arbitrabilnost i materijalnu punovažnost pa će o ovim pitanjima i biti reči.

Merodavno pravo za arbitrabilnost

U najširem značenju, arbitrabilnost se određuje kao podobnost predmeta spora za rešavanje arbitražom (*capable of settlement by arbitration*). Drugim rečima, arbitrabilnost određuje koje se vrste sporova mogu rešavati arbitražom, a koje vrste ulaze isključivo u delokrug državne jurisdikcije.[18] Ovo razlikovanje je opravdano i prisutno u svim nacionalnim arbitražnim pravima jer arbitraža predstavlja privatno pravosuđe koje ima javnopravne posledice. Sa aspekta međunarodnog privatnog prava značajna je razlika koja se pravi između subjektivne arbitrabilnosti (*ratione personae*) koja se odnosi na sposobnost stranaka da zaključe arbitražni sporazum i objektivne arbitrabilnosti (*ratione materiae*) koja se tiče predmeta spora, s obzirom na činjenicu da su kolizione norme različite, a posledica je primena različitih prava.

Merodavno pravo za subjektivnu arbitrabilnost. – Valjanost arbitražnog sporazuma, kao i svakog drugog ugovora, zavisi od toga da li su strane bile sposobne da ga zaključe. Šta se pod sposobnošću tačno podrazumeva, te da li su stranke u tom smislu sposobne da zaključe arbitražni sporazum, određuje *pravo koje se*

[16] G. Knežević, *Međunarodna trgovačka arbitraža – osnovna pitanja i problemi,* Beograd, 1999, str. 39; Krešimir, Sajko, "On Arbitrability in Comparative Arbitration – An Outline", *Zbornik PFZ*, 60, (5), 2010, str. 961; A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p 138.

[17] A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p. 138.

[18] *Ibidem,* str. 148.

na te stranke primenjuje. Ovo je eksplicitno određeno čl. V(1)(a) NYK i čl. VI(2) i IX(1) Evropske konvencije o međunarodnoj trgovačkoj arbitraži (1961) (u daljem tekstu EK) u kojima se ističe da će priznanje i izvršenje odluke biti odbijeno ako stranke iz ugovora o kome je reč, na osnovu zakona koji se na njih primenjuje, nisu sposobne, odnosno, da će sudovi, po prigovoru u pogledu nadležnosti ili u postupku za poništaj, razmotriti valjanost arbitražnog sporazuma u pogledu sposobnosti stranaka po zakonima koji se na njih primenjuje.[19] Odredbe o sposobnosti stranaka su kogentne prirode pa stranke ne mogu svojom voljom određivati pravo po kome će se prosuđivati njihova sposobnost. Međutim, navedena konvencijska pravila ne određuju koji su to zakoni, već samo upućuju da će se ovo pitanje regulisati po pravu merodavnom za lica u pitanju. Drugim rečima, konvencije se nisu opredelile za jedan od dominirajućih kriterijuma po kojima se utvrđuje merodavno pravo za prosuđivanje sposobnosti stranaka, već su to pitanje ostavile kolizionim normama njihovih nacionalnih prava.[20] Međutim, jedinstvenih i opšte usvojenih kolizionih normi koja regulišu ova pitanja nema. Za sposobnost fizičkih lica merodavno je njihovo personalno pravo bazirano na državljanstvu ili domicilu, dok se kolizione norme za sposobnost pravnih lica baziraju na kriterijumu inkorporacije ili stvarnog sedišta. Prema našem pravu, za fizička lica važi princip državljanstva, dok za pravna lica važi princip inkorporacije, korigovan principom stvarnog sedišta, pa će se prema ovim kriterijumima odrediti merodavno pravo i u skladu s njim, procenjivati sposobnost stranaka za zaključivanje ove vrste sporazuma.[21]

Arbitražna i sudska praksa pokazuju da se pristupi u određivanju merodavnog prava za sposobnost stranaka međusobno razlikuju. Kao primer, navodimo dva pristupa na kome su bazirane odluke švedskog i engleskog suda. U slučaju *State of Ukraine v Norsk HydroASA*,[22] švedski Apelacioni sud je potvrdio poništaj odluke arbitraže u Stokholmu nalazeći, između ostalog, da je pravo Ukrajine merodavno za sposobnost ukrajinske strane, bez obzira što je ugovor sadržao klauzulu prema kojoj je švedsko pravo bilo određeno kao merodavno.[23] Švedski

[19] Na istim pozicijama je i UNCITRAL Model Zakon (1985). V. čl. 34(2)(a)(i); čl. 36(1)(a)(i).

[20] V. Aleksandar Goldštajn, Siniša Triva, *Međunarodna trgovačka arbitraža,* Zagreb, 1987, str. 325; G. Knežević, *Međunarodna trgovačka arbitraža – osnovna pitanja i problemi,* Beograd, 1999, str. 39.

[21] V. čl. 14. i čl. 17. Zakona o rešavanju sukoba zakona sa propisima drugih zemalja, *Sl. list SFRJ*, br. 43/82 i 72/82 – ispr., *Sl. list SRJ*, br. 46/96 i *Sl. glasnik RS*, br. 46/2006 – dr. Zakon, u daljem tekstu: ZMPP

[22] *State of Ukraine v Norsk Hydro ASA*, Svea Hovratt, 17 December 2007, T 3108-06

[23] U pitanju je bio akcionarski ugovor koji je sadržao arbitražnu klauzulu, koji su potpisala dva službenika ukrajinske strane pored linije za potpis koja je ostala prazna za potpis Predsednika.

Vrhovni sud je odbio žalbu na ovu odluku i time indirektno potvrdio da se sposobnost stranke za zaključenje arbitražnog sporazuma određuje prema pravu te stranke.[24] Očito da je švedski sud bazirao svoju odluku na klasičnom međunarodnoprivatnopravnom pristupu koji je potpuno objektivan i predvidiv i ne ostavlja prostor za bilo kakvu diskreciju.

S druge strane, engleski *High Court* je koristio drugačiji pristup. U slučaju *Dallah Real Estate* on je odbio da prizna i izvrši odluku ICC arbitraže zbog nepunovažnosti arbitražnog sporazuma.[25] Stranka koja se protivila izvršenju je bila Vlada Pakistana koja je isticala da je odnosni arbitražni sporazum ne obavezuje jer je glavni ugovor koji je sadržao arbitražnu klauzulu potpisao trast koji je pakinstanska Vlada osnovala kao posebno pravno lice. Vlada Pakistana jeste učestvovala u pregovorima, ali taj ugovor nije potpisala. Postupajući po čl. 103(2)(b) engleskog arbitražnog zakona, sud je konstatovao da se izvršenje arbitražne odluke može odbiti ukoliko arbitražni sporazum nije punovažan po pravu kome su ga stranke sporazumno podvrgle, ili ako to nisu učinile, po pravu države gde je odluka doneta. Budući da stranke nisu odabrale pravo po kome će se ceniti arbitražni sporazum, sud je primenio francusko pravo kao pravo mesta donošenja arbitražne odluke. Polazeći od toga da se navedena odredba o nepunovažnosti arbitražnog sporazuma primenjuje i na pitanje da li je neko strana ugovora, sud je na to pitanje primenio francusko materijalno pravo, a ne međunarodno privatno pravo i konstatovao da ono ima širok pristup o tome koji sve elementi moraju da se uzmu u razmatranje kada se ocenjuje da li postoji zajednička namera strana za zaključenje ugovora. Ta analiza je dovela sud do razmatranja pakinstanskog prava prema kome je trebalo da se utvrdi da li je postojala volja ili namera pakistanske strane za zaključenje ugovora. Saznanja do kojih je sud u tom istraživanju došao, bila su negativna,[26] pa je odbio izvršenje arbitražne odluke. Engleski

Predsednik tužene ukrajinske strane nije potpisao ugovor pa je Sud zaključio da je arbitražni sporazum bio bez dejstva za tuženog. Sud je istraživao da li su dva potpisa službenika mogla da obavežu principala i to kroz pravo i vladajuću praksu ukrajinske jurisdikcije, a ne na osnovu merodavnog prava za ugovor. Po žalbi na ovu odluku odlučivao je švedski Vrhovni sud koji ju je odbio, indirektno potvrđujući da se sposobnost stranke za zaključenje arbitražnog sporazuma određuje prema pravu te stranke. Više: Giuditta Cordero Moss, "Legal Capacity, Arbitration and Private International Law", u: *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* ("eds" Katharina Boele-Woelki, T. Einhorn, Daniel Girsberger & Symeon Symeonides), 2010, p. 620. i dalje.

[24] Case no T 339-08, Decision dated 2 June 2008.

[25] *Dallah Real Estate & Tourism Holding Co v Minisrty of Religious Affairs, Government of Pakistan* (2008) EWHC 1901 (Comm).

[26] Sud je ustanovio da pakistanski ustav sadrži različita ograničenja zaključenja ugovora koji bi obavezivali državu, odnosno da ugovor mora biti zaključen u ime Predsednika i sa njego-

sud je bazirao svoju odluku na oceni namere stranaka da zaključe arbitražni sporazum, koja prema pravilima međunarodnog privatnog prava spada u domen pitanja zaključenja ugovora za koje je merodavan ugovorni statut. U navedenom slučaju to je bilo francusko pravo koje je engleski sud tumačio tako da ono dozvoljava sudu da proširi istraživanje na vlastito pravo stranke kako bi utvrdio postojanje namere za zaključenje sporazuma. U svakom slučaju, pristup engleskog suda je komplikovan, zahteva nekoliko koraka (najpre treba utvrditi merodavno pravo za arbitražni sporazum, onda istražiti kriterijume na bazi kojih se utvrđuje punovažnost sporazuma, a onda istražiti i u kojoj meri pravo stranke utiče na nameru da zaključi sporazum), fleksibilan je, daje sudu velika diskreciona ovlašćenja, pa su očekivanja što se odluke tiče nesigurna i nepredvidiva.[27] Svako ko se zalaže za predvidivost i sigurnost, morao bi pledirati za klasičnu primenu objektivne kolizione norme.

Opšte je usvojen stav da strane arbitražnog sporazuma mogu biti i fizička i pravna lica, ali je za arbitražu veoma važno pitanje da li strana takvog ugovora može da bude država, njeni organi ili kompanije koje su u celosti ili delimično u vlasništvu države. Najveći broj arbitražnih prava ovu mogućnost izričito predviđa. Tako, prema čl. 5, st. 2 Zakona o arbitraži Srbije[28] (u daljem tekstu: ZOA), svako fizičko i pravno lice može da ugovori arbitražu, uključujući i državu, njene organe, ustanove i preduzeća u kojima ona ima svojinsko učešće. Navedeno rešenje je u skladu sa čl. II(1) EK prema kome se pravnim licima koja su ovlašćena da zaključuju arbitražne sporazume smatraju i pravna lica javnog prava, i može se naći u velikom broju arbitražnih zakona.[29] Međutim, treba istaći da postoje prava koja u potpunosti ili delimično ograničavaju pravo države da bude strana arbitražnog sporazuma ili pak, za to zahtevaju prethodnu dozvolu nadležnog organa.[30] Zbog

vim ovlašćenjem.Sud nije smatrao da treba da ispita da li je to pravilo mandatorno ili ne, već da je samo njegovo postojanje dovoljno da uveri sud da nije bilo subjektivne namere da se obaveže država. V. G. C. Moss, "Legal Capacity, Arbitration and Private International Law", u: *Convergence and Divergence in Private International Law - Liber Amicorum Kurt Siehr* ("eds" Katharina Boele-Woelki, T. Einhorn, Daniel Girsberger & Symeon Symeonides), 2010, p. 623.

[27] V. G. C. Moss, "Legal Capacity, Arbitration and Private International Law", u: *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* ("eds" Katharina Boele-Woelki, T. Einhorn, Daniel Girsberger & Symeon Symeonides), 2010, str. 626. i dalje.

[28] *Službeni glasnik RS*, br. 46/2006

[29] V. na primer čl. 177(2) švajcarskog ZMPP; čl. 143A Zakona o međunarodnoj arbitraži Singapura (2002). Više: A. Goldštajn, S. Triva, *Međunarodna trgovačka arbitraža,* Zagreb, 1987, str. 135–136.

[30] Tako npr. odredbom čl. 132. iranskog Ustava (1979) podvrgavanje arbitraži sporova koji se tiču državnog vlasništva moguće je uz prethodnu dozvolu Saveta ministara. Takođe, prema čl.3 Kraljevskog dekreta Saudijske Arabije (1983), Vladina tela koja ugovaraju arbitražu moraju pret-

ovakvih situacija veoma je važno pitanje da li država ili javno preduzeće koje je potpisalo arbitražni sporazum može kasnije, koristeći ova pravila, da se pozove na svoju nesposobnost i oslobodi obaveze podvrgavanja arbitraži. Budući da danas dominira teorija restriktivnog imuniteta, generalni je stav da država u trgovačkim poslovima (*iure gestionis*) može ugovoriti arbitražu. Taj ugovor državu obavezuje kao i svaku drugu stranku, pa se ona ne može pozivati na sopstveno pravo, kao na pravo koje bi je oslobodilo te obaveze.[31]

Merodavno pravo za objektivnu arbitrabilnost. – Objektivna arbitrabilnost u najširem smislu označava podobnost određene vrste spora za rešavanje arbitražom[32], što istovremeno označava mogućnost stranaka da vlastitom voljom takav spor izuzmu iz sfere državne jurisdikcije. Poslednjih decenija arbitrabilnost postaje aktuelna posebno zbog pomaka u pravcu širenja zone arbitrabilnosti, ali i zbog nastojanja na međunarodnom nivou da se ujednači ili barem približi globalno poimanje o tome šta se može, a šta ne može rešavati arbitražom. Ujednačavanje u ovoj oblasti ipak nije jednostavno jer se arbitrabilnost tradicionalno uglavnom izvodi iz pojma javnog poretka, što upućuje na to da svaka država o arbitrabilnosti određene vrste spora odlučuje na osnovu sopstvene političke, socijalne i ekonomske politike.

Uporedno arbitražno pravo pokazuje da se objektivna arbitrabilnost u najvećem broju slučajeva određuje tako što se generalnom klauzulom određuje krug sporova koji se mogu rešavati arbitražom, da bi se potom posebnim korektivnim mehanizmima tako određen krug sporova širio ili sužavao. Moderna arbitražna prava arbitrabilnost uglavnom određuju veoma široko, obuhvatajući sve sporove imovinske prirode, odnosno sporove koji uključuju ekonomske (finansijske) interese i imovinu.[33] U istom smislu, druga prava kao objektivno arbitrabilne određuju sporove o pravima kojima stranke mogu slobodno raspolagati ili sporove o kojima stranke mogu zaključiti poravnanje.[34] Široko određenu zonu arbitrabilnosti

hodno da dobiju dozvolu Predsednika Saveta ministara. Više: Bernard Hanotiau, "The Law applicable to arbitrability", *Singapore Academy of Law Journal* 26 SAcLJ, 2014, p. 876.

[31] Izričitu odredbu o tome sadrži švajcarski ZMPP (čl. 177(2), prema kojoj "stranka koja je država, preduzeće kojim ona upravlja ili organizacija koju ona kontroliše ne može se pozivati na sopstveno pravo kako bi osporila svoju sposobnost da bude stranka pred arbitražom ili kako bi osporila podobnost spora za arbitražno sudjenje".

[32] Njujorška konvencija (čl. II(1) i čl.V(2)(a)) i Model zakon (čl. 34(2)(b)(i) i čl. 36(1)(b)(i)) su polje svoje primene ograničili na sporove koji su podobni (*capable*) da se rešavaju arbitražom.

[33] V. čl. 177 (1) švajcarskog Zakona o međunarodnom privatnom pravu; čl. 1030(1) nemačkog ZPO; čl. 582(1) austrijskog Zakona o parničnom postupku.

[34] V. čl. 5(1) srpskog ZA; čl. 2(1) španskog ZA; čl. 1. švedskog ZA; čl. 4. mađarskog ZA; čl. 3(1) hrvatskog ZA.

nacionalna zakonodavstva mogu suziti i to najčešće čine kroz kriterijum nadležnosti suda (*ratione iurisdictionis*).[35] U pitanju su sporovi u stvarima za koje postoji javni interes pa države za njih zadržavaju monopol sudske nadležnosti i time ih tretiraju kao nearbitrabilne. Tako, na primer, naše pravo kao nearbitrabilne određuje one sporove za koje je predviđena isključiva nadležnost suda.[36] Između ostalih, na istim pozicijama su na primer, mađarsko i nemačko pravo.[37] Istovremeno, mnoge države danas proširuju zonu arbitrabilnosti na one sporove za koje se tradicionalno smatralo da su u isključivoj nadležnosti državnih sudova. Tako su postali arbitrabilni sporovi nelojalne konkurencije, licencni sporovi, sporovi oko povrede prava industrijske svojine, sporovi koji se vode protiv firmi u stečaju, itd.[38] Postojeće razlike u nacionalnim zakonodavstvima mogle bi se ublažiti ako bi svaka država arbitrabilnost određivala na osnovu balansa koji bi napravila između unutrašnjih potreba i interesa da pojedine predmete rezerviše samo za sopstvene sudove, i opšteg, javnog interesa usmerenog na unapređenje međunarodne trgovine i poslovanja.

Kao što se može videti, države uglavnom veoma široko određuju arbitrabilnost, pa precizna određenja ovog pojma variraju od jednog do drugog pravnog sistema zbog čega postaje izuzetno važno pitanje merodavnog prava po kome će se ceniti da li je spor arbitrabilan ili ne, odnosno da li je arbitražni sporazum u tom pogledu valjan ili ne. U arbitražnim izvorima i to na mestima gde se govori o arbitrabilnosti, izričitih odredbi o merodavnom pravu za ovo pitanje uglavnom nema. Međutim, to ne znači da koliziona pravila o ovome ne postoje. No, pre nego što vidimo koja su to pravila, mora se istaći da se pitanje merodavnog prava za arbitrabilnost može postaviti u različitim fazama arbitražnog postupka: pred arbitražnim tribunalom; pred sudom u postupku u kome se osporava arbitražni sporazum; pred sudom u postupku za poništaj arbitražne odluke; i konačno, pred sudom u postupku za priznanje i izvršenje strane odluke.

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[35] Razlozi za sužavanje zone arbitrabilnosti su različiti, ali se svi oni svode na interes države da se za zaštitu određenih prava ne može derogirati sudski građanski postupak i garantije koje on pruža, bez obzira što se radi o potpuno dispozitivnim pravima.

[36] Čl. 5(1) ZA. Prema našem ZMPP, isključiva nadležnost sudova je rezervisana uglavnom za porodičnopravne i naslednopravne sporove, kao i sporove o stvarnim pravima na nepokretnostima.

[37] V. čl. 4. mađarskog Zakona o arbitraži i čl. 1030(2) i (3) nemačkog ZPO. Nemačko pravo u navedenim odredbama eksplicitno navodi da izuzetak od opšteg principa arbitrabilnosti važi za ugovore o zakupu stambenog prostora koji se nalazi u Nemačkoj i za radne sporove, što znači da je za njih predviđena isključiva nadležnost nemačkih sudova (ostali propisi o isključivoj nadležnosti sudova se nalaze u posebnim zakonima).

[38] V. više G. Knežević, *Međunarodna trgovačka arbitraža – osnovna pitanja i problemi,* Beograd, 1999, str. 54. i sl.

Za državne sudove ne postoji problem određivanja merodavnog prava ni u jednom od nabrojanih postupaka u kojima se ovo pitanje postavlja. Oni polaze od kolizionih normi *lex fori,* a one ih mogu dovesti do različitih prava, zavisno od njihove sadržine.

U postupcima koji se pokreću prigovorom nenadležnosti suda zbog postojanja arbitražnog sporazuma, sud će prilikom donošenja odluke razmotriti valjanost takvog sporazuma, između ostalog i po pitanju arbitrabilnosti, po jednom od sledećih zakona: 1) po zakonu kome su stranke podvrgle svoj arbitražni sporazum (*lex voluntatis*); 2) u odsustvu upućivanja na takav zakon, po zakonu zemlje u kojoj odluka treba da se donese (*lex arbitri*); ili 3) u slučajevima koji ne odgovaraju navedenim situacijama, po zakonu zemlje na koji ukažu kolizione norme zemlje suda pred kojim je pokrenut spor (*lex fori*).[39] Ako se ima u vidu da stranke u praksi veoma retko određuju posebno merodavno pravo za arbitražni sporazum, to su najčešće u primeni pravila *lex arbitri* (ako je prigovor nenadležnosti dostavljen sudu države sedišta arbitraže), odnosno *lex fori* suda koji o prigovoru odlučuje. U literaturi je izražen stav da ovakav pristup nema opravdanja u slučajevima kada mesto arbitraže nema bilo kakvih teritorijalnih veza sa predmetom spora i strankama (na primer, jedna stranka je iz SAD, druga iz Japana, a ugovorena je arbitraža u Nemačkoj).[40] Navedeni stav se bazira na pristupu da pravila o arbitrabilnosti imaju dejstvo pravila o sukobu nadležnosti, te da arbitrabilnost treba određivati u kontekstu procesnih pravila. U navedenom primeru, nemački sud uopšte ne bi trebalo da ispituje arbitrabilnost ako predmet spora koji je podvrgnut arbitraži ne dovodi u pitanje isključivu nadležnost nemačkih sudova. Ovo pitanje, prema navedenom shvatanju, sud bi trebalo da prepusti arbitražnom tribunalu. Poenta je dakle, da kada ne postoji sukob nadležnosti između arbitraže i lokalnih sudova, odnosno kad je spor za te sudove neutralan, onda nema razloga da ti sudovi primenjuju svoj *lex fori* (kako bi zaštitili nadležnost sopstvenih sudova). Praktično, *lex arbitri* će biti značajan samo kad postoji sukob nadležnosti.[41]

[39] V. čl. VI (2) Evropske konvencije (1961). Tačke vezivanja su postavljene prema prioritetu. Navedena odredba je konzistentna sa Njujorškom konvencijom (čl. II.1) i predstavlja evoluciju rešenja postavljenog Ženevskim protokolom iz 1923. (čl. 1) prema kome se arbitrabilnost imala utvrđivati prema svakom relevantnom nacionalnom međunarodnom privatnom pravu.

[40] Stavros, Brekoulakis, "Law Applicable to Arbitrability: Revisiting the Revisited *Lex fori*", *Queen Mary University of London, School of Law, Legal Studies Research Paper* No. 21/2009, p. 99. i dalje. Navedeno mišljenje je rezultat jurisdikcione teorije o pravnoj prirodi arbitraže budući da se na više mesta naglašava da je arbitrabilnost procesno, a ne materijalnopravno pitanje, te da se ovim pravilima vrši alokacija nadležnosti između nacionalnih sudova i arbitraže za određene vrste sporova. str. 112; 119.

[41] *Ibidem,* p. 106.

Nema sumnje da je navedeno mišljenje interesantno i da bi se u određenim segmentima moglo braniti, međutim, pragmatični razlozi su doveli do preovlađujućeg stava da se arbitrabilnost ima ceniti prema *lex arbitri.* Nije potreban nijedan drugi razlog za to do činjenice da se arbitražna odluka može poništiti ako se arbitražni sporazum odnosi na predmet koji nije arbitrabilan po pravu zemlje sedišta arbitraže.[42]

U postupcima za poništaj arbitražne odluke, sudovi će arbitrabilnost procenjivati prema istim kolizionim pravilima. To znači da će najpre konsultovati pravo kome su stranke podvrgle arbitražni sporazum ili, ako se o tome uopšte nisu izjasnile, prema zakonu zemlje suda (*lex fori*) koji se poklapa sa *lex arbitri* budući da se može poništiti samo domaća arbitražna odluka pa je nadležan sud zemlje u kojoj se nalazi sedište arbitraže.[43] Što se tiče priznanja i izvršenja stranih arbitražnih odluka, oni će biti odbijeni ukoliko sud zemlje u kojoj se traži priznanje i izvršenje odluke ustanovi da prema zakonu te zemlje (*lex fori*) predmet spora nije podoban za rešavanje arbitražom.[44]

Određivanje merodavnog prava za arbitrabilnost spora je mnogo veći problem za arbitre nego za sud budući da arbitraža nema oslonac u *lex arbitri* u meri u kojoj sudovi imaju oslonac u *lex fori.* Po kom pravu oni treba da ocene da li je arbitražni sporazum u tom delu valjan ili ne, ako postoji interakcija relevantnih prava različitih zemalja o kojima arbitri treba ili moraju da vode računa? Arbitri su dužni da odgovore na ovo pitanje ili na sopstvenu inicijativu, utvrđujući svoju nadležnost, ili u slučaju osporavanja arbitrabilnosti od strane jedne od stranaka u sporu. U traženju odgovora, oni će obično razmatrati alternativno nekoliko prava koja se generalno poklapaju sa merodavnim pravima do kojih dolazi i sud, o čemu je već bilo reči, ali su pred njima i neke druge mogućnosti koje proizilaze iz privatne prirode same arbitraže i potrebe unapređenja međunarodnih poslovnih odnosa. U svakom slučaju, arbitri će ispitati da li su stranke već izabrale merodavno pravo za svoj arbitražni sporazum i u skladu sa njim odrediti da li je predmet spora arbitrabilan ili ne.[45] Kako stranke ovo izuzetno retko čine, oni će konsultovati pravila o arbitrabilnosti *lex arbitri,* jer su u pitanju materijalna pravila koja su imperativna po prirodi i arbitre obavezuju. Tako se na primer, čl. 177(1) švajcar-

[42] V. čl. 58(1) srpskog ZA; čl. 1059(2) nemačkog ZPO; čl. 36(2)(a) hrvatskog ZA.

[43] V. čl. 34 (2) (a) (i) MZ.

[44] V. čl. V (2)(a) NYK.

[45] Prema mišljenju Sajka, ovo rešenje ne treba prihvatiti jer ono ne uzima u obzir da je pravilo o arbitrabilnosti *lex arbitri* strogo pravilo koje ima za cilj da ograniči autonomiju volje stranaka. K. Sajko, "On Arbitrability in Comparative Arbitration – An Outline", *Zbornik PFZ*, 60, (5), 2010, str. 967.

skog ZMPP tumači u smislu da će svaka arbitraža sa sedištem u Švajcarskoj arbitrabilnost procenjivati u skladu sa švajcarskim pravom kao *lex arbitri,* bez obzira na restriktivna pravila (1) prava koje se primenjuje na meritum spora; (2) nacionalnih prava stranaka ili (3) prava države u kojoj će se verovatno tražiti priznanje i izvršenje arbitražne odluke.[46] Ovim, međutim, nije iscrpljena lista ideja na osnovu kojih kolizionih normi, ako su one uopšte nužne, treba oceniti pitanje arbitrabilnosti, a time i mogućnost da se konkretni spor može rešiti arbitražom. Tako, prema izrazito liberalnom stavu prema arbitraži i prema nekim arbitražnim odlukama, arbitri bi pitanje arbitrabilnosti mogli posmatrati kao pitanje međunarodnog trgovačkog običaja, što bi im dalo mogućnost da primene transnacionalna pravila koja favorizuju veoma širok pojam arbitrabilnosti.[47] Međutim, mora se istaći da bi arbitri i u toj situaciji vršili izbor merodavnog prava na osnovu ovlašćenja koje im osigurava pravo sedišta arbitraže i to na osnovu kolizione norme koja nije izričita, već skrivena.

Imajući sve ovo u vidu, proizlazi da je lepeza kolizionih normi na osnovu kojih bi se odredilo merodavno pravo i na osnovu njega dao odgovor na pitanje da li je konkretan spor moguće rešiti arbitražom, zaista široka. Međutim, ono što potvrđuju uporedno arbitražno pravo, sudska praksa i pravna literatura, jeste to da je oslonac na *lex arbitri* veoma široko prihvaćen i da se smatra preovlađujućim rešenjem ovog pitanja.

Merodavno pravo za materijalnu punovažnost arbitražnog sporazuma

Po kom pravu će se ceniti materijalna punovažnost arbitražnog sporazuma u mnogome zavisi od pravnog okruženja, odnosno nacionalnog sistema i foruma u kome se ocena vrši, pa rezultati mogu biti različiti.[48] Na to ukazuje činjenica da pojedina prava sadrže posebna koliziona pravila o materijalnoj punovažnosti arbitražnog sporazuma, druga se klone kolizionih normi i umesto njih primenjuju materijalna pravila koja se oslanjaju na međunarodni javni poredak (*regle de droit international prive materiel*), dok treća na materijalnu punovažnost arbitražnog sporazuma primenjuju kolizione norme koje generalno važe za ugovore.

[46] Daniel Girsberger, Nathalie Voser, *International Arbitration in Switzerland,* 2nd edition, Zurich, Basel, Geneva, 2012, p. 87.

[47] Laurence Craig, William Park, Jan Paulsson, *International Chamber of Commerce Arbitration,* 2nd edition, 1990, p. 81.

[48] V. G. Knežević, V. Pavić, *Arbitraža i ADR,* Beograd, 2010, str. 54.

Kolizionopravni pristupi u rešavanju ovog pitanja su različiti, tokom vremena su menjani, da bi se danas u potpunosti oslanjali na temeljna načela međunarodnog privatnog prava izraženog u autonomiji volje stranaka i u stavu da pravni odnosi treba da budu regulisani onim pravom koje je sa odnosom u najbližoj vezi. Istorijski posmatrano, najranije arbitražne odluke, posebno u *common law* jurisdikcijama, bile su bazirane na primeni prava države u kojoj se tražilo priznanje i izvršenje arbitražne odluke. Opredeljenje za ovu kolizionu normu oslanjalo se na negativan stav prema arbitraži generalno, a posebno na negativna dejstva arbitražnog sporazuma izražena u derogiranju nadležnosti sudova.[49] Ovakav kolizionopravni pristup je nužno vodio primeni različitih nacionalnih prava u različitim forumima (stranke su mogle da vode parnicu pred sudovima koji bi inače bili nadležni da nije bilo arbitražnog sporazuma),[50] što se tokom vremena pokazalo kao nezadovoljavajući pristup i bilo je očigledno da će postati predmet kritike.

Savremena zakonodavstva i praksa se zato baziraju na drugačijim kolizionim pristupima. Oni su brojni i različiti, ali se mogu svesti na primenu sledećih kolizionih pravila: *lex voluntatis* – pravo koje su stranke izabrale; *lex loci arbitri* – pravo sedišta arbitraže; *lex causae* – pravo merodavno za glavni ugovor; *closest connection* ili *most significant relationship* – pravo koje je u najbližoj ili najznačajnijoj vezi sa arbitražnim ugovorom. Pored nabrojanih, savremeno arbitražno pravo karakterišu još pristup baziran na principu *in favorem validitatis,* ali i pristup koji ignoriše kolizionu tehniku i rešenje problema traži u materijalnim pravilima međunarodnog arbitražnog prava i međunarodnog javnog poretka. Mnoštvo pristupa u rešavanju ovog pitanja dovoljno ukazuje na njegovu kompleksnost, a različiti rezultati konačne odluke o tome koje je pravo merodavno i da li je arbitražni sporazum prema njemu valjan, upućuje na nedostatak predvidivosti i sigurnosti da će moći da se utemelji nadležnost arbitraže.

Primena *lex voluntatis* se ne dovodi u pitanje. Naprotiv, u pitanju je međunarodni standard koji je prihvaćen u svim nacionalnim pravima.[51] Stranke imaju pravo da arbitražni sporazum podvrgnu pravu koje sporazumno odrede. To može biti pravo koje su odredile kao merodavno za glavni ugovor, ali može biti i neko drugo pravo s obzirom na autonomnost arbitražnog sporazuma. U svakom slučaju, taj izbor mora biti eksplicitan jer će samo tada proizvoditi dejstvo. Ukoliko

[49] Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective", *Singapore Academy of Law Journal*, 26 SAcLJ, 2014, p. 822.

[50] V. B. Foerster, "Arbitration Agreements and the Conflict of Laws: A Problem of Enforceability", 21 *Arb J* 129, 1966, p. 132.

[51] V. na primer, čl. V(1)(a) NYK, čl. VI(2)(a) EK, članove 34(2)(a) i čl. 36(1)(a)(i) MZ, čl. 48. švedskog Zakona o arbitraži, čl. 178(2) švajcarskog ZMPP, čl. 58. st. 1(1) i čl. 66. st. 1(1) srpskog ZA, čl. 1059(2)(a) nemačkog ZPO.

stranke naprave takav izbor, svaka arbitraža i svaki sud ga mora poštovati, čak i ako bi on doveo do neželjenog rezultata, odnosno do nepunovažnosti arbitražnog sporazuma.[52] Ovo pravo, kako praksa pokazuje, stranke ipak retko koriste, naročito ako je arbitražni sporazum u formi arbitražne klauzule, tako da izbor merodavnog prava prelazi na arbitre.

U slučajevima kada stranke nisu izričito odredile pravo merodavno za arbitražni sporazum, ali su odredile merodavno pravo za glavni ugovor, prema savremenoj arbitražnoj praksi, arbitri i na arbitražni sporazum najčešće primenjuju to izabrano pravo (*lex causae*). Opravdanje za ovaj način rezonovanja nalazi se u činjenici da poslovni ljudi prilikom zaključenja ugovora očekuju da će pravo koje izaberu za glavni ugovor, biti merodavno i za arbitražnu klauzulu koja je u njemu sadržana.[53] Drugim rečima, arbitražna klauzula koja čini deo glavnog ugovora, trebalo bi da bude podvrgnuta istom pravu ili pravnim pravilima kao i druge odredbe tog ugovora, osim ako se stranke ne sporazumeju drugačije, što znači da domašaj eksplicitnog izbora merodavnog prava obuhvata ceo ugovor.[54] Ovakav pristup se može naći u brojnim arbitražnim i sudskim odlukama posebno engleske jurisprudencije, ali i u odlukama drugih, ali ne samo *commom law* zemalja,[55] a očito je izraz shvatanja da je arbitražni sporazum najtešnje povezan sa glavnim ugovorom. Isključivom fokusu na izabrano pravo za glavni ugovor mnogi ipak prigovaraju argumentima da je automatska primena *lex causae* neprikladna u mnogim slučajevima, da se ovakvim pristupom nipodaštava princip separabilnosti i namera stranaka da izaberu neutralan forum u kome će rešiti svoj spor, kao i da on nije u skladu sa čl. V(1)(a) NYK i čl. 34. i 36. UNCITRAL Model zakona (udaljem tekstu MZ) koji predviđaju primenu prava sedišta arbitraže u odsustvu izričitog stranačkog izbora merodavnog prava.[56]

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[52] A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p. 158. Švajcarsko arbitražno pravo, kao i neke odluke engleskih sudova pokazuju međutim, da se od ovoga može odsupiti sa osloncem na princip *in favorem validitatis.*

[53] Gary Born, *International Commercial Arbitration,* Kluwer Law International, 2nd Ed, 2014, p. 580.

[54] A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p.157.

[55] Tako se na primer, u odluci engleskog suda u slučaju *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia* (2012) EWCA Civ 638 at (26) (CA, UK), izričito navodi da "eksplicitan izbor merodavnog prava za glavni ugovor funkcioniše kao jaka indikacija namere stranaka i u pogledu arbitražnog sporazuma". Više, G. Born, "The Law Governing international arbitration agreements: an international perspective", *Singapore Academy of Law Journal,* 26 SacLJ, 2014, p. 828.

[56] G. Born, *International Commercial Arbitration,* Kluwer Law International, 2nd Ed, 2014, p. 72–73 i 499. i 526.

Ukoliko stranke ne odaberu merodavno pravo za svoj ugovor, arbitri mogu odlučiti da ocenu punovažnosti arbitražnog sporazuma izvrše u skladu sa pravom države u kojoj se nalazi sedište arbitraže (*lex loci arbitri*). Ovaj kolizionopravni pristup predstavlja preovlađujući stav današnje arbitražne prakse, a bazira se na međunarodnoj i nacionalnoj legislativi, pre svega NYK i MZ, kao i nacionalnim zakonima koji su na njima bazirani.[57] Njegova suština je u shvatanju da je arbitražni sporazum u najbližoj i najstvarnijoj vezi sa pravom mesta arbitraže koje su stranke izabrale i da zato ovo pravo reguliše i arbitražni postupak i poništaj arbitražne odluke.[58] Tako se u jednoj odluci engleskog suda navodi: "Arbitražni sporazum kojim je određena arbitraža u Londonu nesumnjivo je podvrgut engleskom pravu; on ima najbližu i najstvarniju vezu sa Engleskom jer je sedište arbitraže u njoj".[59] Argumenti kojim se opravdava ovaj pristup su da sedište arbitraže jeste centar njenih aktivnosti, centar njene pravne "gravitacije" i da pravni sistem te zemlje arbitraži daje pravnu snagu i kontroliše njen rad.[60] Međutim, i za ovaj pristup ima kontraargumenata. Tako se ističe da se primena prava sedišta arbitraže isključivo fokusira na procesne aspekte arbitraže ignorišući ugovorni karakter arbitražnog sporazuma i da ne uzima u obzir prisnu vezu (tekstualnu i funkcionalnu) između arbitražnog sporazuma i glavnog ugovora.[61]

Praktično, oba koliziona rešenja, i *lex causae* i *lex loci arbitri*, predstavljaju rezultat kolizionog pristupa koji se bazira na *najtešnjoj i najstvarnijoj vezi* arbitražnog sporazuma i prava određene države. Činjenica da se dva navedena prava mogu smatrati merodavnim pravom, ukazuje na fleksibilnost najbliže veze kao tačke vezivanja, što svakako može biti dobro kada je arbitraža u pitanju (naročito ako bi vodila primeni onog prava prema kome bi arbitražni sporazum bio punovažan). Međutim, koja će činjenica, sedište arbitraže ili stranački izbor merodavnog prava za glavni ugovor, biti jača ili ubedljivija za postizanje kvaliteta najbliže veze? Ovo je naročito važno u situacijama kada je izabrana arbitraža sa sedištem u jednoj zemlji, a kao merodavno pravo za glavni ugovor izabrano pravo neke druge države. Međunarodna arbitražna i sudska praksa ukazuju da se rezultati pri-

[57] V. čl. V(1)(a) NYK, čl. VI(2)(a) EK, članove 34(2)(a) i čl. 36(1)(a)(i) MZ, čl. 48. švedskog ZA, čl. 178(2) švajcarskog ZMPP, čl. 58. st. 1(1) i čl. 66. st. 1.(1) srpskog ZA, čl. 1059(2)(a) nemačkog ZPO.

[58] Odluka engleskog suda *C v D* (2007) EWCA Civ 1282 at (26).

[59] *Abuja International Hotels Ltd v Meridien SAS* (2011) EWHC 87 (Comm) at (20)–(24).

[60] G. Knežević, V. Pavić, *Arbitraža i ADR,* Beograd, 2010, str. 56.

[61] Umesto svih, G. Born, *International Commercial Arbitration,* Kluwer Law International, 2nd Ed, 2014, p 518.

mene ove kolizione norme razlikuju, čak i unutar jednog pravnog sistema.[62] U nekim slučajevima se prednost daje sedištu arbitraže, u drugima se daje izabranom pravu za glavni ugovor. Ovakvo stanje sigurno nije dobro jer vodi potpunoj nepredvidivosti. Stranke ne mogu biti sigurne da je njihov arbitražni sporazum punovažan jer ne znaju po kom pravu će se ocenjivati. Zato, da bi eliminisali ovu nesigurnost, najbolje je da same izaberu pravo za svoj arbitražni sporazum.

Nedostaci navedenih kolizionih pristupa bi mogli da se prevaziđu ako bi se u fokus analize stavila namera stranaka i njihova očekivanja. Zaključenjem arbitražnog sporazuma stranke jasno izražavaju nameru da spor izuzmu iz državne jurisdikcije i povere ga arbitraži. Njihov cilj je da taj sporazum bude punovažan i da im omogući efikasan i neutralan način da reše svoj spor. Ako se ove činjenice stave u prvi plan, onda bi arbitraže trebalo pre da primene pravo po kome bi arbitražni sporazum bio punovažan, nego pravo po kome bi on bio nepunovažan. To bi, kako se ističe, bio najbolji i jedini način da se da puno dejstvo stvarnoj nameri stranaka.[63] Ovaj pristup se očigledno zasniva na principu *in favorem validitatis* koji izražava pozitivan i prijateljski stav prema arbitraži generalno, prema pravu stranaka da na ovaj način reše svoj spor, kao i prema interesima međunarodne trgovine i međunarodne poslovne zajednice. On nije novina u arbitražnom pravu budući da je već NYK uspostavila jedinstveno međunarodno pravilo o pretpostavljenoj punovažnosti i izvršivosti arbitražnog sporazuma sa definisanim izuzecima koji su određeni opšteprimenljivim pravilima ugovornog prava, a ne nacionalnim pravima koja bi možda imala diskriminatorski odnos prema arbitražnom sporazumu.[64]

Jedna od prvih zemalja koja je u kontekstu arbitražnog sporazuma eksplicitno prihvatila princip *in favorem validitatis* jeste Švajcarska. Prema čl. 178(2) švajcarskog ZMPP, arbitražni sporazum je punovažan ako je punovažan bilo po pravu koje su stranke izabrale, po *lex causae* za glavni ugovor, ili po švajcarskom

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[62] V. Pierre Karrer, "The Law Applicable to the Arbitration Agreement (A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel", *Singapore Academy of Law Journal* 26 SacLJ, 2014, p. 859–868.

[63] G. Born, "The Law Governing international arbitration agreements: an international perspective", *Singapore Academy of Law Journal,* 26 SacLJ, 2014, p. 835.

[64] Prema čl. II(1) NYK, "svaka država *priznaje* pismeni ugovor kojim se stranke obavezuju da stave u nadležnost arbitraži sve sporove ili neke od sporova što nastanu ili bi mogli nastati između njih po određenom pravnom odnosu, ugovornom ili neugovornom, koji se odnosi na pitanje koje je prikladno za rešavanje arbitražom", a prema čl. II(3), "sud države ugovornice će ...uputiti stranke na arbitražu, osim ako ustanovi da je arbitražni sporazum nepunovažan, da je bez dejstva ili neprikladan za primenu". V., G. Born, "The Law Governing international arbitration agreements: an international perspective", *Singapore Academy of Law Journal,* 26 SacLJ, 2014, p. 824.

pravu. Dakle, tri prava mogu da budu merodavna za ocenu punovažnosti arbitražnog sporazuma. Dovoljno je da arbitražni sporazum bude punovažan po materijalnim pravilima jednog, bilo kog, od navedenih prava da bi proizvodio puno dejstvo, odnosno da na bazi njega švajcarska arbitraža može prihvatiti nadležnost.[65] Dejstvo navedene odredbe je interesantno sa aspekta stranačkog izbora merodavnog prava. Ova činjenica se primenjuje i poštuje u svim forumima. Međutim, specifičnost švajcarskog rešenja je u tome što se merodavno pravo koje su stranke izabrale neće primeniti ukoliko bi arbitražni sporazum po njemu bio nepunovažan. Umesto tog prava, u skladu sa čl. 178(2) ZMPP, primeniće se *lex causae* ili švajcarsko pravo, a sve u cilju da se podrži arbitražni sporazum.[66] Očigledno da je svrha švajcarskog pristupa da se što je moguće više osigura punovažnost arbitražnog sporazuma čime se i arbitraži, kao alternativnom sudovanju daje posebna podrška.

Konačno, mora li se merodavno pravo za materijalnu punovažnost arbitražnog sporazuma odrediti kolizionim pravilima? Prema arbitražnoj i sudskoj praksi, posebno francuskoj, a u određenoj meri i SAD, do rešenja ovog pitanja može se doći i direktnom primenom međunarodnih principa. To otvara mogućnost da se sporazum koji bi bio nepunovažan po pravu koje bi inače bilo merodavno, smatra punovažnim, što predstavlja varijantu principa *in favorem validitatis*. Francuski sudovi, koji se u oblasti arbitraže generalno klone tradicionalne kolizione tehnike, su u svojim odlukama jasno izrazili stav da je arbitražni sporazum autonoman u odnosu na svaki nacionalni pravni sistem i da je s toga direktno podvrgnut opštim principima međunarodnog prava. U tom smislu je odluka francuskog Kasacionog suda u poznatom slučaju *Dalico,* u kojoj je sud usvojio princip da postojanje i punovažnost arbitražnog sporazuma, prema materijalnom pravilu međunarodnog arbitražnog prava, zavisi samo od zajedničke namere stranaka i da nije nužno to pitanje upućivati na nacionalno pravo.[67] Suština ovog pristupa je da se izbegne primena nacionalnih pravnih pravila koja bi možda bila restriktivna i prema kojima bi arbitražni sporazum bio nepunovažan. Umesto toga, a u cilju podrške arbitraži, maksimalno dejstvo treba dati nameri stranaka da spor povere ovom forumu. Ovaj pristup je imao snažne kritike koje su se oslanjale na stav

[65] V. P. Karrer, "The Law Applicable to the Arbitration Agreement (A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel", *Singapore Academy of Law Journal* 26 SacLJ, 2014, p. 854. i sl.

[66] Brojne su arbitražne i sudske odluke koje su primenile princip punovažnosti arbitražnog sporazuma i van švajcarske jurisdikcije. V. G. Born, "The Law Governing international arbitration agreements: an international perspective", *Singapore Academy of Law Journal,* 26 SacLJ, 2014, p. 839.

[67] Odluka od 20. decembra 1993, *Municipalite de Khoms El Megreb v Societe Dalico,* (1994) Rev. Arb 116 at 117.

da je teško zamisliti da sporazum crpi pravnu snagu iz sebe samog i da uslovi za punovažnost zapravo i ne postoje.[68]

MERODAVNO PRAVO ZA MERITUM SPORA

Određivanje merodavnog prava za meritum spora predstavlja najliberalniji domen međunarodne trgovačke arbitraže jer ga karakterišu autonomne tendencije u rešavanju ovog pitanja. Ovo stanje je trebalo i treba očekivati budući da se radi o oblasti koja je uglavnom regulisana dispozitivnim pravilima.

Ključni princip, uz to univerzalno prihvaćen, na osnovu koga se određuje pravo po kome će se ceniti prava i obaveze ugovornih strana, jeste autonomija volje stranaka. Oslanjajući se na njega, stranke imaju nekoliko opcija u odabiru merodavnog prava. Tako, one mogu izabrati neko nacionalno pravo (u pitanju je uvek materijalno pravo jer je *renvoi* u oblasti ugovora isključen). Takođe, one mogu izabrati i neka nenacionalna pravna pravila koja su nastala mimo i izvan državnog prava, koja na adekvatan način regulišu odnose iz međunarodne trgovine. U tom smislu, stranke svoj ugovorni odnos mogu da podvrgnu međunarodnim konvencijama, neoficijelnim kodifikacijama kao što su UNIDROIT principi, pravilima privatnih organizacija (Incoterms), opštim principima prava, mogu da izaberu *lex mercatoria* ili da odluče da se spor reši po pravičnosti. Jednom rečju, stranke mogu izabrati sva ona pravila autonomnog prava međunarodne trgovine koja smatraju primenljivim na konkretan ugovorni odnos. Ma koje pravo ili pravila da su stranke izabrale, arbitri takav izbor moraju poštovati i izabrano pravo primeniti.[69]

Ukoliko stranke nisu izričito odredile merodavno pravo po kome će se ceniti njihova prava i obaveze iz ugovornog odnosa, to će morati da učine arbitri. Prvo što bi trebalo da utvrde je da li se iz odredaba i prirode ugovora, kao i iz relevantnih okolnosti koje proizilaze iz njega, sa velikim stepenom sigurnosti može zaključiti da su stranke imale na umu primenu određenog prava.[70] U pitanju je ispitivanje prećutne autonomije volje stranaka, često prisutno u arbitražnoj prak-

[68] V. G. Knežević, V. Pavić, *Arbitraža i ADR,* Beograd, 2010, str. 57.

[69] V. čl. VII(1) EK; čl. 28(1) MZ; čl. 187(1) švajcarskog ZMPP; čl. 50. st. 1. srpskog ZMPP; čl. 46(1)(a) engleskog AA (1996); čl. 1051(1) nemačkog ZPO.

[70] V. A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, str. 129; Milena Petrović, *Rešavanje spora pred međunarodnom trgovačkom arbitražom,* Kragujevac, 1996. p. 112. i dalje.

si.[71] Ukoliko se iz bilo kojih razloga ovo ne može utvrditi, arbitri će primeniti kolizione norme i tako odrediti merodavno pravo.

U izboru kolizionih pravila, arbitrima stoji na raspolaganju nekoliko opcija koje praktično ukazuju na više različitih kolizionih tehnika. Pre nego što vidimo u čemu je njihova suština i u čemu se međusobno razlikuju, ukazujemo na izvore prava iz kojih arbitri crpe takva ovlašćenja.

Prema Evropskoj konvenciji o međunarodnoj trgovačkoj arbitraži, u slučaju da strane propuste da označe koje će se pravo primeniti, arbitri će primeniti pravo koje određuje koliziona norma za koju arbitri smatraju da odgovara konkretnom slučaju.[72] Na istim pozicijama je i čl. 28(2) MZ i čl. 35(1) UNCITRAL Arbitražnih pravila. Prema pravu Srbije, ako stranke nisu odredile merodavno pravo ili pravna pravila, arbitražni tribunal će ih odrediti na osnovu kolizionih pravila koje oceni prikladnim, što odgovara opštim tendencijama.[73] Švajcarsko i nemačko pravo takođe izričito navode kolizione norme na osnovu kojih će arbitri odrediti merodavno pravo, i to kolizione norme koje se baziraju na najtešnjoj vezi kao tački vezivanja, što znači da će arbitri spor rešiti u skladu sa pravom one zemlje za koje ocene da je najtešnje povezano sa predmetom spora.[74] Francusko pravo predviđa da će u odsustvu stranačkog izbora, arbitar rešiti spor u skladu sa onim pravilima koje smatra pogodnim okolnostima ugovora, što je izraz liberalnijeg stava jer dopušta odvajanje od kolizionih normi i nacionalnih prava generalno.[75]

Očigledno je da međunarodne konvencije, arbitražni zakoni i arbitražni pravilnici ne uspostavljaju jedinstveno, uniformno pravilo, ali da zasigurno obezbeđuju dosta široka ovlašćenja arbitrima u izboru kolizione norme koju treba primeniti. Ono što karakteriše sva ta pravila jeste činjenica da arbitri nisu obavezni prema kolizionim normama sedišta arbitraže.[76] Naravno, njihovu primenu ne treba nipošto isključiti jer i ona mogu ući u krug pogodnih kolizionih normi i najčešće to i jesu, ako se uzme u obzir da su sva moderna arbitražna prava bazirana na rešenjima međunarodnih konvencija koje uređuju arbitražu. S druge strane, široka ovlašćenja arbitara u izboru prikladnog kolizionog pravila praktično znači da arbitri mogu da kreiraju sopstvena koliziona pravila koja se u literaturi uglavnom

[71] *Ibidem*, str. 118. i dalje.

[72] V. čl. VII(1) EK.

[73] V. čl. 50. st. 3. ZA.

[74] V. čl. 187(1) švajcarskog ZMPP; čl. 1051(2) nemačkog ZPO.

[75] V. čl. 1496. francuskog Code of Civil Procedure; čl. 21(1) ICC Rules (2017); Istu odredbu sadrži i čl.1054(2) holandskog Code of Civil Procedure.

[76] Ovo rešenje neki čak smatraju anahronim. A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, str. 133.

označavaju kao autonomna.[77] Nešto preciznije su kolizione norme koje se baziraju na najtešnjoj vezi kao tački vezivanja i koje podrazumevaju da arbitri razmotre sve materijalne okolnosti spornog odnosa i da odmere sve aspekte koji imaju veze sa određenim pravom. S druge strane, liberalnija prava dopuštaju arbitrima da zaobiđu bilo koji kolizioni sistem i da direktno primene nacionalna ili nenacionalna materijalna pravila. Ovaj metod je poznat kao direktan metod (*voie directe*) i njime se, shodno okolnostima ugovora i spora direktno bira merodavno pravo. Tehnike koje arbitri koriste se međusobno razlikuju, a uglavnom ih opredeljuje postojanje stvarnog ili "lažnog" sukoba zakona. Tako, arbitri mogu kumulativno da primene koliziona pravila onih prava koja su relevantna za rešenje spora, kad god utvrde da su ona istoglaseća, odnosno da predviđaju primenu istog materijalnog prava. U suštini, sukob zakona je tada lažan, pa arbitar može da bazira izbor merodavnog prava na svim relevantnim kolizionim pravilima jer su rešenja do kojih se dolazi njihovom primenom jednaka. U slučaju da je sukob tih pravila stvaran, ovaj metod se svakako ne bi mogao primeniti, pa se izbor kolizionog pravila ipak mora izvršiti. Kod direktne primene prava, arbitri ispituju sadržinu relevantnih materijalnih prava i ukoliko ona sadrže iste ili slične odredbe, što ukazuje na lažni sukob zakona, arbitar će zasnovati odluku na materijalnim pravilima koja su identična u svim tim pravima. Situacija kod ovog pristupa je znatno jednostavnija ako se primenjuju neka nenacionalna materijalna pravila, kao što je slučaj sa *lex mercatoria.* Prema zastupnicima ove teze, nema razlike između arbitra koji primenjuje *lex mercatoria* i nacionalnog sudije koji, rešavajući spor bez elementa inostranosti, primenjuje svoje nacionalno pravo.[78]

Ma koji pristup i ma koju tehniku da primeni, arbitar u suštini primenjuje kolizionu normu. Čak i kod direktne primene materijalnog prava, arbitar u njegovom izboru mora da izvrši analizu koja će ga sigurno dovesti do onog materijalnog prava ili pravila koje je najprikladnije prirodi i okolnostima spornog odnosa, što ukazuje na kolizionu tehniku.

Ako strane arbitrima veruju da su sposobni da reše određeni spor, onda im sigurno veruju i da su sposobni da odrede pravo ili pravna pravila po kojima će taj spor i rešiti. Međutim, pošto nema jednog jedinstvenog pristupa u izboru merodavnog prava ili pravila, zbog čega krajnji rezultati mogu biti različiti ili bar neočekivani za stranke u sporu, stranke treba savetovati, u cilju njihove sigurnosti i

[77] Umesto svih, v. F. De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning", *Northwestern Journal of International Law & Business*, Vol. 12, 1991, str. 63.

[78] V. Berthold Goldman, "La *lex mercatoria* dans les contrat et l'arbitrage internationaux: realite et perspectives", 106, JDI, 475/1979, cit. prema: M. Petrović, *op. cit.,* str. 154.

predvidivosti prava koje će se primeniti, da same izvrše izbor merodavnog prava već u ugovoru o osnovnom poslu ili bar kad nastane spor.

MERODAVNO PRAVO ZA ARBITRAŽNI POSTUPAK

Za razliku od redovnih sudova u kojima sudije moraju postupati u skladu sa unapred strogo utvrđenim pravilima procedure, arbitražni postupak se može sprovoditi na različite načine jer tako strogih pravila nema. Postupak je fleksibilniji, temelji se na autonomiji volje stranaka, pa je prevashodno na strankama da odrede način na koji će se on voditi. I u proceduralnim stvarima dakle, arbitraža služi strankama. Arbitražni tribunal mora voditi postupak u skladu sa razumnim zahtevima stranaka, a ako to propusti da učini, njegova odluka može biti poništena ili joj se može uskratiti priznanje i izvršenje.[79]

Na temelju autonomije volje, stranke su slobodne da same, sporazumno odrede pravila postupka po kojima će arbitražni sud postupati. Ovo predviđaju sve relevantne međunarodne konvencije, nacionalna arbitražna prava, kao i pravilnici arbitraža.[80] Stranke mogu postupak sporazumno same kreirati, odnosno oblikovati prema svojim potrebama i potrebama datog slučaja, mada, kako arbitražna praksa pokazuje, ovo pravo ipak retko koriste.[81] Umesto toga, stranke uglavnom upućuju na *određena,* već postojeća arbitražna pravila. Konačno, prilikom izbora pravila postupka strankama je dopuštena još jedna mogućnost, a to je da izaberu primenu nekog stranog procesnog prava.[82] Ma koja pravila da su stranke izabrale, arbitri postupak moraju sprovesti u skladu sa izabranim pravilima, jer u suprotnom odluka može biti poništena ili joj se može uskratiti priznanje i izvršenje.

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[79] V. čl. 58(4) i čl. 66(4) srpskog ZA, prema kojima "će sud usvojiti tužbeni zahtev za poništaj, odnosno odbiće priznanje i izvršenje strane arbitražne odluke, ako stranka pruži dokaze da arbitražni postupak nije bio u skladu sa sporazumom o arbitraži". Ovo su rešenja koja apsolutno korespondiraju čl. 34(2)(iv) i čl. 36(1)(a)(iv) MZ, odnosno čl. V. 1(d) NYK.

[80] V. čl. 19(1) MZ; čl. V(1)(d) NYK; čl. 32. st. 1. srpskog ZA; čl. 182(1) švajcarskog ZMPP; čl. 1042(3) nemačkog ZPO; čl. 19. ICC rules.

[81] Razlozi za to su očekivani i opravdani. Naime, svako upuštanje u detaljno strukturiranje i regulisanje postupka je dodatan posao koji zahteva rad stručnih i obučenih lica, a to sigurno zahteva dodatno vreme i novac. S druge strane, potrebno je da obe stranke u tom pogledu postignu potpunu saglasnost. Konačno, teško je zamisliti da će stranke o tome razmišljati u vreme sastavljanja ugovora o osnovnom poslu, kada sastavljaju i arbitražnu klauzulu. Mogućnost da to učine je realnija u vreme kada je spor već nastao, ali da li će stranke o ovom pitanju postići bilo kakav sporazum zavisi od toga u kojoj meri se drže pozicije na kojima su.

[82] V. čl. 32 (2) srpskog ZA; čl. 182(1) švajcarskog ZMPP;

Autonomija volje stranaka na kojoj se temelji arbitražni postupak ipak nije neograničena. Naime, postupak koji stranke izaberu mora da bude u skladu sa imperativnim pravilima zakona i zahtevima javnog poretka zemlje sedišta arbitraže. Za razliku od nekih drugih aspekata arbitraže, kod procesnih pitanja, sedište arbitraže, kao tačka vezivanja, ima izuzetno značajnu ulogu.[83] S jedne strane, arbitri moraju poštovati imperativna pravila arbitražnog zakona, kao i drugih zakona relevantnih za sprovođenje arbitražnog postupka zemlje sedišta arbitraže, jer oni predstavljaju okvir u kome se može kretati stranačka autonomija. S druge strane, procesni javni poredak zemlje u kojoj je sedište arbitraže nameće standarde koje arbitri bezuslovno moraju poštovati. Takođe, pri sprovođenju postupka arbitri moraju uzeti u obzir one odredbe međunarodnih arbitražnih konvencija koje su ustanovljene sa ciljem da osiguraju pravo stranaka na pravično vođenje postupka, odnosno suđenje.[84] Pod ovim se podrazumeva prevashodno da se prema strankama treba jednako postupati i da svakoj stranci treba pružiti punu mogućnost da iznese sve razloge radi zaštite svojih prava.[85]

Ukoliko se stranke ne izjasne po kojim pravilima bi želele da se postupak vodi, arbitražni sud može voditi postupak na način koji smatra celishodnim, što znači da odluku o tome donosi sama arbitraža.[86] U svakom slučaju, arbitri mogu direktno da odrede procesna pravila po kojima će postupati ili mogu da upute na postojeći pravilnik date arbitraže, kao i arbitražni zakon zemlje sedišta arbitraže.

ZAKLJUČAK

Veza između međunarodne trgovačke arbitraže i međunarodnog privatnog prava postoji. Ona nije obična, niti sporadična. Naprotiv, međunarodno privatno pravo, posebno koliziona pravila, prožimaju sve aspekte arbitraže, kroz celi njen životni ciklus, pa se može reći da je arbitraža zavisna od ovih pravila. Počev od arbitražnog sporazuma, preko arbitražnog postupka, do momenta kada se arbitražna odluka nađe pred sudom zbog poništaja ili priznanja i izvršenja, postavlja se pitanje merodavnog prava po kome će se ceniti konkretna pitanja. Ovo je nužna

[83] Ideja da se arbitražni postupak treba sprovesti po pravu zemlje sedišta arbitraže je ukorenjena u Ženevskom protokolu (1923) koji u čl. 2. propisuje da se "arbitražni postupak, uključujući i konstituisanje arbitražnog suda, određuje voljom stranaka i zakonom zemlje na čijoj se teritoriji održava arbitraža".

[84] A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration,* London, 1999, p. 277.

[85] V. čl. 18. MZ.

[86] V. čl. 32(3) srpskog ZA; čl. 1042(3) i (4) nemačkog ZPO; čl. 34(1) engleskog ZA (1996); čl. 182(1) i (2) švajcarskog ZMPP.

posledica činjenice da arbitraža treba da odluči o sporu koji sadrži elemenat inostranosti, a u tom slučaju bar dve države pretenduju da se primeni njihovo pravo ili da njihovi sudovi imaju kontrolu nad arbitražnim postupkom i odlukom. Izbor između potencijalno merodavnih prava se mora učiniti, a to je nemoguće bez kolizionopravne analize i kolizionopravne odluke utelovljene u nekoj od kolizionih normi.

Otpor prema kolizionim normama izražen kako u delu doktrine, tako i u delu arbitražne prakse, nema ozbiljnog opravdanja. Ovo zbog toga što se koliziona pravila oslanjaju na temeljna načela međunarodnog privatnog prava – autonomiju volje stranaka i stav da pravni odnosi treba da budu regulisani onim pravom koje je sa odnosom u najbližoj vezi. Oba načela obezbeđuju predvidivost i sigurnost stranaka u izbor merodavnog prava. S druge strane, ma koliko se koliziona pravila razlikovala, ona će uvek obezbediti kolizionopravnu pravičnost zato što se temelje na principu ravnopravnosti i univerzalnosti, zato što su neutralna i zato što mogu da upute na pravo bilo koje države. Nadalje, mnoga koliziona pravila su postala fleksibilnija, zato što se oslanjaju na princip *in favorem validitatis* na primer, zato što arbitrima daju široka ovlašćenja u izboru *najprikladnijeg* kolizionog pravila, zato što dopuštaju arbitrima da direktno izaberu merodavno materijalno pravo po kome će se ceniti meritum spora. No, ne treba ignorisati činjenicu da se kod direktne primene materijalnog prava samo čini da je koliziona tehnika zaobiđena. Arbitar mora da izvrši analizu koja će ga dovesti do onog materijalnog prava ili pravila koje je najprikladnije prirodi i okolnostima spornog odnosa, što ukazuje na kolizionu tehniku. Ma kakav odnos bio prema kolizionim pravilima, ona su neophodna i nužna u arbitraži, bez obzira što je u pitanju privatno pravosuđe koje se temelji na volji stranaka.

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INTERNATIONAL COMMERCIAL ARBITRATION AND PRIVATE INTERNATIONAL LAW

Summary

Arbitration's dependence on private international law manifests itself throughout the life-cycle of arbitration, from the crafting of an enforceable arbitration agreement, through the entire arbitral process, to the time an award comes before a national court for annulment or for recognition

and enforcement. Thus international arbitration provides both arbitral tribunals and courts with constant challenges.

This paper examines the different methods of conflict of laws that arbitrators follow in order to determine the law governing the arbitration agreements, the law governing the substance of the dispute and the procedural law governing the arbitration.The foregoing discussion illustrates how and why choice of law issues arise in international arbitration.

Key words: arbitration, applicable law, choice of law rule

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NADA DOLLANI

CONSUMER ADR: THE ALBANIAN EXPERIENCE IN TRANSPOSING EU DIRECTIVE 2013/11

The consumer protection has been of paramount importance for the EU institutions with the final aim of strengthening the EU single market. At present consumer law occupies a considerable part of the EU regulatory framework. After settling the substantial law with regard to consumer rights, a stronger need for guaranteeing and enforcing those rights is observed. The EU has adopted Directive 2013/11 on Consumer ADR aiming to establish fast, efficient, low-cost and qualitative schemes of consumer redress, operative since the second half of 2015. This paper aims to outline the general requirements of Consumer ADR Directive and introduce the Albanian experience on its transposition. A minor comparative overview to the experience of other EU countries is underlined in order to evaluate the better solution.

Key words: *Consumer, Alternative Dispute Resolution, Effective Procedural Remedies*

INTRODUCTION

On 21 May 2013, the European Parliament and the Council adopted two important legal instruments concerning consumer alternative dispute resolution. The first concerns the Directive on Consumer Alternative Dispute Resoluti-

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on[1] (hereinafter: Directive on CADR or Directive), while the second concerns the Regulation on consumer Online Dispute Resolution[2] (hereinafter: ODR Regulation).

The Alternative Dispute Resolution refers to disputes, which are settled out of the court in extrajudicial proceedings. It typically describes a multitude of techniques such as arbitration, mediation, conciliation, settlement, etc. As the acronym ADR is not well known outside of the world of litigation, some scholars have proposed to use the term Consumer Dispute Resolution (CDR) to avoid confusion.[3] Consumer dispute resolution is a whole new system which is being developed alongside national court system that employs numerous approaches and techniques of dispute resolutions aimed mainly at small value complaints about goods and services that would not reach a courtroom.[4] The CADR Directive aims mainly at the law enforcement rather than informal mechanism in dispute resolution.[5] The picture of consumer ADR schemes varies considerably in EU Member States,[6] but to the date the implementing laws are in force.[7] The CADR Directive follows a functional approach and classifies three types of ADR procedures, i.e.

[1] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 63–79.

[2] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 1–12.

[3] Naomi Creutzfeldt, "Alternative dispute resolution for consumers", *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Eds. Michael Stürner, Fernando Gascón Inchausti, Remo Caponi), Sellier, Munich, 2015, p. 3–10.

[4] Naomi Creutzfedt, "An Introduction to Alternative Dispute Resolution (ADR) for Consumers in Europe", *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Eds. Caroline Cauffman and Jan Smits), Intersentia, 2016, p. 141–154.

[5] Gerhard Wagner, "Private law enforcement through ADR: Wonder drug or snake oil?", *Common Market Law Review*, No. 1, Vol. 51, 2014, p. 165–194. Recently, the European Commission attention is directed towards better enforcement of consumer rights. See, e.g. COM(2018) 183 final. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers. Brussels, 11.4.2018.

[6] Christopher Hodges, Iris Benöhr, Naomi Creutzfeldt-Banda, "The Hidden World of Consumer ADR – Redress and Behaviour", Report and analysis of a conference held at Jesus College Ship Street Centre, 28 October 2011, The Foundation for Law, Justice and Society, Oxford, 2011, available at *https://www.academia.edu/1328468/The_Hidden_World_of_Consumer_ADR_Redress_and_Behaviour*, 22.9.2019.

[7] Information available *at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32013L0011*, 21.9.2019.

amicable solution; proposed solution; imposed solution, which can be imposed only on traders or on both parties.[8]

The Regulation on consumer ODR provides for the establishment of a platform by the European Commission for so-called "Online Dispute Resolution". The platform extends to transactions entered into via the Internet by consumers. The platform functions as a "reference entity". Consumers and entrepreneurs can easily, through the platform, end up to the relevant ADR authority, which is competent to handle the dispute. The platform refers to bodies that meet the requirements of the Consumer ADR Directive. The Directive is therefore a prerequisite for the proper functioning of the platform. Basically, the Regulation is the informatisation of ADR.[9] The ODR platform has been operative since the beginning of 2016 and the EU Commission has already published two reports on functioning of the ODR.[10] According to the reports, the ODR platform has proved successful due the incentive it gives to traders to settle the consumer dispute bilaterally, out of any ADR or court procedure.

The implementation of the Regulation remains a later step in EU Candidate Countries like Albania; therefore, this paper will not treat the requirements set out by the Regulation.

Albania transposed the CADR Directive through the amendments of Consumer Protection Acts in 2018.[11] The legal amendments came as a result of some policy considerations after a regulatory impact assessment, carried out from the Ministry of Economy.[12] Although the legal act implemented the most important requirements of the Directive, still some provisions, such as the regulation of a residual CADR scheme remains to be settled through some different sub-legal acts which are on the way of adoption.

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[8] Christof Berlin, "Consumer ADR – Academia and the Field", *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice under EU Directive 2013/11* (Eds. Michael Stürner, Fernando Gascón Inchausti, Remo Caponi), Sellier, Munich, 2015, p. 67–75.

[9] N. Creutzfeldt (2013), p. 6.

[10] Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, Brussels, 13.12.2017, COM(2017) 744 final. For the second report see*: https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf*, 22.9.2019.

[11] Law No. 71/2018, *OJ RAL* No. 162/2018.

[12] Regulatory Impact Assessment on Consumer Alternative Dispute Resolution, 16 May 2016, carried out under the GIZ project "*Harmonisation of Economic and Trade Legislation with EU acquis*".

In this paper, firstly the EU CADR Directive will be outlined (Sec. 2) and secondly the Albanian experience on transposing that Directive will be elaborated (Sec. 3). By shedding light on the requirements set by the CADR Directive, one can envisage the role, rules and structure to be followed by the CADR schemes in the national system, aiming the proper implementation of EU *acquis* on way forward.

EU DIRECTIVE ON CONSUMER ADR

The Consumer ADR Directive, as a premise to the ODR Regulation appears as an act of great importance for achieving a high level of consumer protection and the proper functioning of the internal market. Although, Consumer protection legislation at EU and Member States' (MS) level has been significantly strengthened in the past decades, European consumers do not always obtain effective redress, when their rights are violated. Many disputes between consumers and traders ('C2B disputes') involve very small sums of money. They are usually so small that consumers do not bother with them (the rational apathy problem). According to the EU Commission, this is because consumers believe court proceedings to be expensive, time-consuming and burdensome. Cumbersome and ineffective proceedings and their uncertain outcome discourage consumers from even trying to seek redress. In addition, consumers are not always aware of what their rights entail in concrete terms and therefore do not seek compensation when they are entitled to it.[13]

According to the impact assessment studies carried out by the EU Commission, the lack of effective redress poses particular challenges in cross-border transactions. Naturally wary of venturing into an unfamiliar commercial environment, consumers are especially worried about something going wrong with a purchase made in another Member State. They are concerned about differences in legislation between Member States, language barriers, potentially higher costs and unfamiliar procedural rules in dispute resolution in another Member State. Consumers often give up their cases simply because they do not know where to address their dispute in another Member State. Uncertainty about securing re-

[13] Commission Staff Working Paper. Executive Summary of the Impact Assessment, *Accompanying the document*, Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR), Brussels, 29.11.2011 SEC(2011) 1409 final, C7-0454/11, available at *https://www.europarl.europa.eu/document/activities/cont/201204/20120425ATT43950/20120425ATT43950EN.pdf*, 22.9.2019, p.1-2.

dress affects consumers' confidence in shopping across borders and dissuades them from taking advantage of the Single Market. [14]

Although individuals might seem nonchalant to pursue small problems or losses, the aggregate value of multiple such issues can represent major illicit profits for traders. Such ill-gotten gains constitute serious unacceptable trading behaviour, and lead to significant distortion of competition in the market.[15]

The need to improve access to redress for consumers through alternative dispute resolution schemes drove the EU institutions to interfere for the harmonisation of ADR legislation in consumer disputes in all MS, by taking in consideration the different level of development of ADR in the Member States and the various types of existing ADR schemes. The divergent national policies in ADR schemes led to the conclusion that the best solution to the problem could be achieved only in EU level, and not by single Member States.

The Directive requires Member States to provide quality and easily accessible ADR entities to consumers. Promoting such alternative dispute resolution of consumer disputes at the European level reinforces consumer confidence and promotes thus the functioning of the internal market. The objective of the Directive can be explained in the light of three directions. Firstly, in all Member States should be free and easy access to out of court dispute resolution for all types of consumer disputes falling within the scope of the directive (coverage problem). Secondly, the quality of these disputes should be provided in all Member States on the basis of the same principles and guarantees. Thirdly, the consumers should be adequately informed by traders, about the existence of the possibility of an alternative dispute resolution concerning their dispute.[16]

The Consumer ADR Directive requires a minimum harmonisation, which means that the MS may maintain or adopt stringent provisions to ensure higher protection of consumer tailored to their national legal system. The Directive establishes harmonised quality requirements for ADR entities and ADR procedures in order to ensure that, after its implementation, consumers have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no

[14] *Ibidem*.

[15] C. Hodges, I. Benöhr, N. Creutzfeldt, "Consumer-to-Business ADR Structures: Harnessing the Power of CADR for Dispute Resolution and Regulating Market Behaviour", The Foundation for Law, Justice and Society, Oxford, 2012, available at *http://www.fljs.org/sites/www.fljs.org/files/publications/ConsumerADR-PolicyBrief.pdf*, 20.9.2019.

[16] See Christopher Hodges, Iris Benöhr, Naomi Creutzfeldt, *Consumer ADR in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 20–21; Alexandre Biard, "Towards high-quality consumer ADR: the Belgian experience", *Privatizing Dispute Resolution. Trends and Limits* (Eds. Loïc Cadiet, Burkhard Hess, Marta Requejo Isidro), Nomos, 2019, p. 81.

matter where they reside in the European Union. It leaves wide margin of appreciation for the policy choices of each MS on designation of their Consumer ADR system. Although the Directive sets out the core rules on the operation of out of court dispute resolution, it apparently does not impact the fundamental right of access to court as enshrined in Article 47 of EU Charter of Fundamental Rights, Article 6 of the European Convention of Human Rights and MS Constitutions. However, academic criticism is not absent towards the Directive on this late issue as regards impediment to the right of access to court system, jeopardy to the principle of due process of law,[17] disturbance of harmonized interpretation of consumer law and the enforcement of mandatory consumer law,[18] or even inefficency.[19] The response to criticism is the argument of balancing the principle of due process against that of proportionality, by considering what the consumer in real life want.[20] Consumers who have a simple dispute want it resolved quickly and cheaply. They are reluctant to spend time and money on simple problems and low value claims. Thus, they need user-friendly systems which deliver fast outcomes.[21] Statistics shows that consumers use the systems of CADR and in this manner the access to justice is *increased*, compared to the situation when consumer do nothing.[22]

Types of disputes subject to CADR directive

The Consumer ADR Directive shall apply to all procedures for the out of court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader and a consumer within the EU territory. Such disputes should be resolved

[17] Horst Eidenmüller, Martin Engel, "Against false settlement: Designing efficient consumer rights enforcement systems in Europe" *Ohio State Journal on Dispute Resolution*, Vol. 29, 2014, p. 261–296.

[18] See Caroline Cauffman, "Critical Remarks on the ADR Directive", *The Citizen in European Private Law: Norm-setting, Enforcement and Choice* (Eds. C. Cauffman and J. Smits), Intersentia, 2016, p. 157; Burkhard Hess, "Privatizing Dispute Resolution and its Limits", *Privatizing Dispute Resolution. Trends and Limits* (Eds. Loïc Cadiet, Burkhard Hess, Marta Requejo Isidro), Nomos, 2019, p. 33.

[19] G. Wagner, p.194.

[20] Christopher Hodges, "Consumer redress: Implementing the Vision", *The new regulatory framework for consumer dispute resolution* (Ed. Pablo Cortés), Oxford University Press, 2016, p. 359–360.

[21] *Ibidem*, p. 360.

[22] *Ibidem*.

through the intervention of an ADR entity, which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution. From such broad formulation it comes out that it is up to the MS to design the architecture of the CADR schemes, which fulfil the criteria set out by the Directive. The organisation of CADR entities may be public or private funding, based on binding or voluntary participation.

There are certain situations, procedures and disputes to which the Consumer ADR Directive shall not apply. The Directive's purpose is to regulate only the ADR procedures initiated by consumers against traders in sale and service contracts, thus the following disputes falls outside the scope of application of CADR Directive: disputes between traders; procedures initiated by a trader against a consumer; procedures before consumer complaint-handling systems operated by the trader; direct negotiation between the consumer and the trader; attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute; procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader. Likewise, the disputes resulting from the following services need not to apply the requirements of CADR Directive: disputes, which arise out of non-economic services of general interest; or health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices; disputes concerning public providers of further or higher education.[23]

Obligations of Member States to facilitate and control the ADR delivery

Chapter II of the Directive requires MS to facilitate access by consumers to ADR procedures.[24] The ADR entities available to the consumers shall comply with the requirements set out in the Directive. The ADR entities, in order to comply with the Directive's requirements, shall maintain: an up-to date website with easy access to all necessary information on the ADR procedure, which enables consumers to submit a complaint online or offline; upon request provide the parties with information on a durable medium; enable the exchange of information between the parties via electronic means or by post; accept both domestic and cross-border disputes; respect the data protection legislation. In order to facilitate

[23] Art. 2(2) of the CADR Directive.

[24] Art. 5 of the CADR Directive.

access to an ADR entity, the MS shall introduce a residual ADR, which cover all economic sectors uncovered by sector specific ADR entities. However, MS may also fulfil that obligation by relying on ADR entities established in another Member State or regional, transnational or pan-European dispute resolution entities, where traders from different Member States are covered by the same ADR entity.

The ADR entities may also establish procedural rules, which allows them to refuse to handle a certain dispute, on the grounds that: the consumer did not attempt to resolve the matter directly with the trader; the dispute is frivolous or vexatious; the dispute is being or has previously been considered by another ADR entity or by a court; the value of the claim falls below or above a pre-specified monetary threshold; the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit. However, such procedural rules shall not significantly impair consumers' access to ADR procedures, including in the case of cross-border disputes.

The Six basic principles applicable to ADR entities

The Directive requires that the ADR entities shall comply with six basic principles such as, expertise, independence and impartiality; transparency; effectiveness; fairness; liberty; and legality.

Expertise, Independence and Impartiality (Article 6 of the Directive). – The natural persons in charge of ADR shall possess the necessary expertise and should be independent and impartial. Certain guarantees are required to ensure that purpose, such as the possession of the necessary knowledge and skills, as well as a general understanding of law; duration of the office term; remuneration not depended on the outcome of the procedure; disclosure of any conflict of interests, etc. In order to enhance the expertise and professionalism of the natural persons in charge of ADR, the ADR entities shall provide trainings on the matter. The competent state authority shall monitor the training schemes established by ADR entities.

Transparency (Article 7 of the Directive). – The transparency principle lies both with regard to consumer information and to Annual Activity Report that ADR entities shall submit to the state authority designed as competent authority for monitoring purposes. On the one hand, the ADR entities shall give the consumers every bit of information in order to make the system user-friendly and trustworthy. On the other hand, the ADR entities shall submit a detailed report to the public competent authority with regard to the disputes they have handled, re-

solved, refused, suspended, broken by the parties, etc.[25] Such information is useful not only for the statistics, but also enables public authorities to design further measures for improving consumer ADR schemes.

Effectiveness (Article 8 of the Directive).- – The principle of effectiveness requires the availability of, as well as easy and costless access to an ADR procedure. The length of procedures shall not exceed 90 days from the receiving of the complete complaint file. In order to comply with the principle of effectiveness, the parties shall not be required to be represented by a lawyer, although independent advice must be available at any stage of the procedure. According to the Directive, the ADR procedures are considered effective when they are easily accessible online and offline; the parties are not obliged to retain a lawyer; the ADR is free of charge; the ADR entity serves the parties without delay.

Fairness (Article 9 of the Directive). – The Directive does not impact the fundamental right of access to court. The fairness principle mirrors some basic rules applied on the right of the fair trial. Consequently, the fairness principles comprise the adversarial nature of the proceedings; the right of representation at any stage; and the written reasoned outcome or decision. In non-binding ADR the parties are informed about the choice they have not to conform to the proposed solution; the right of seeking redress at court; the differences in outcome between the ADR and a court proceeding. The CJEU has discussed the question whether the national legislation making access to court conditional upon exhaustion of ADR remedies violates the principles of the Directive. In *Rampanelli* case[26] the CJEU following the line of reasoning in *Alassini*[27] stated that the national legal condition to use mediation remedies before reaching a court does not violate the principles of CADR Directive, given that the ADR procedures do not prevent the parties from exercising their right of access to the judicial system. However, the requirement to retain a lawyer and requirement to submit valid reasons for withdrawal from ADR proceeding are precluded under the CADR Directive.[28]

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[25] Art. 19 of the Directive on Consumer ADR.

[26] CJEU Judgment of 14 June 2017, C-75/16-*Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa*-, ECLI:EU:C:2017:457.

[27] CJEU Judgment of of 18 March 2010, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 -*Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)*- [2010] ECR I-02213, ECLI:EU:C:2010:146.

[28] For a thorough analysis on this regard see Nicola Scannicchio, "Consumer ADR and the effectiveness of the European Directive", *Legal Integration in Europe and America – International Contract Law and ADR* (Eds. Stefan Lieble, Rosa Miquel Sala), JWV 2018, p. 159–168.

Liberty (Article 10 of the Directive). – The Directive requires respect for the party autonomy to the ADR agreement, especially to the agreements with regard to an ADR that imposes a solution, i.e. arbitration. In such cases, an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded *before the dispute has materialised* and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute. According to the Directive 93/13 on unfair terms[29] and CJEU case law, arbitration clauses, contained in the standard consumer contracts pre formulated by traders to the detriment of consumers, may be considered unfair, thus invalid. In such cases the Directive 93/13 allows also for the annulment of the arbitration award if the arbitration clause is considered an unfair term.[30] Furthermore the Consumer ADR Directive requires that in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this, thus only a *post factum* agreement is valid.

Legality in binding ADR (Article 11 of the Directive). – The legality principles require that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, the mandatory norms for the protection of consumers shall prevail. The solution imposed shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State where the consumer and the trader are habitually resident. The same rule applies in cross border consumer disputes; the mandatory norms of the consumer country of habitual residence, designed for the consumer protection shall not be derogated by the application of the consumer ADR procedures. Such obligation arises out of Rome I Regulation on the law applicable to contractual obligations.[31] The principle of legality is observed only in binding ADR procedures, considering that in non-binding ADR, the consumer has the choice to withdraw from the proceedings or anyway take the case to the court. That solution provided by the Direc-

[29] Council Directive 93/13/EEC of 5. April 1993 on unfair terms in consumer contracts, *OJ L 095*, 21/04/1993*, p. 0029 – 0034. See also Annex 1(q).*

[30] CJEU Judgement of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*- [2006] ECR I-10421 ECLI:EU:C:2006:675; See also CJEU Judgment of 6 October 2009, C-40/08 – *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*- [2009] ECR I-09579 ECLI:EU:C:2009:615.

[31] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16; Art 6.

tive is criticised as threating the efficiency and uniform enforcement of consumer rights within EU.[32]

Other requirements for a well-functioning CADR system

Limitation periods/Prescription (Article 12 of the Directive). – With regard to the limitation period the Directive requires that the time spent during the consumer non-binding ADR proceedings, shall not count for the expiry of limitation or prescription periods for the relevant consumer claims. The ADR procedures shall be considered as a suspension cause of prescription. Thus, the right to initiate judicial proceedings is preserved.

Consumer Information. – Chapter III of the Directive sets forth the obligation of traders to inform consumers about the ADR entity or ADR entities by which those traders are covered, when those traders commit to or are obliged to use those entities to resolve disputes with consumers. That information shall include the website address of the relevant ADR entity or ADR entities. Such information shall be provided in a clear, comprehensible and easily accessible way on the traders' website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer. If this obligation is not fulfilled, the MS shall impose effective, proportionate and dissuasive penalties on traders. In this chapter of the Directive are also envisaged the obligation for assistance of the consumers to access ADR procedures, dissemination of information through Consumer Organisations and Business Associations, cooperation between ADR entities both domestic and cross border, etc.

Role of competent authorities. – Chapter IV of the Directive provides for the role of the competent authorities, which on the one hand shall receive information and monitor the activity of the ADR entities; and on the other shall pass such information and be a contact point to the European Commission. The competent authorities shall list on own website all ADR entities which comply with the requirements of the Directive. Such website shall be updated without delay if new information is received. The Competent authorities starting from 2018 shall submit quadrennial reports to the European Commission in order to help the improvement of the Consumer ADR functioning.

To conclude, the framework for effective ADR comprises: the six basic principles applicable to ADR entities; consumer information; the role of Competent Authorities to monitor the activity of ADR entities; and the cooperation

[32] B. Hess, p. 42-43.

in multilevel plans. Cooperation is crucial for achieving the goals of the Directive. It includes, but not limited to, cooperation between ADR entities among themselves and cross border cooperation; cooperation among ADR entities and competent authorities; cooperation among competent authorities and European Commission.

THE ALBANIAN EXPERIENCE IN TRASPOSING CADR DIRECTIVE

The grounds for transposition

First of all, Albania as a Candidate Country for accession to EU is bound by the Stabilisation and Association Agreement[33] to transpose the EU acquis into national legislations.

Secondly, the Albanian Consumer Protection Act (CPA),[34] adopted since 2008, prior to the amendments of 2018, stipulated that the consumer complaints shall be submitted, *inter alia*, before the special structures created to deal with out of court consumer dispute resolution. The regulatory framework for the establishment of special structures on consumer ADR had to be approved by the Council of Ministers Decision.[35] Until the amendments of 2018, no action was initiated, neither any sub-legal act adopted by the government.

Thirdly, the National Strategy on Consumer Protection 2014-2020 had provided for actions necessary to be taken for setting up consumer ADR entities aiming at offering an increased protection of consumers and strengthening consumer power.[36]

Prior to the amendments of CPA, only mediation as an alternative to judicial proceedings was regulated by the Mediation Act,[37] which still is in an infant

[33] See Art 70 and 76 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declarations, *OJ L 107,* 28.4.2009, p. 166–502.

[34] Law "On Consumers Protection", no. 9902 dated 17.04.2008, *OG RAL* no. 61/2008; amended by law no. 10444, dated. 14.7.2011, *OG RAL* no. 103/2011; law no. 15/2013, dated 14.02.2013, *OG RAL* no. 29/2013; law no. 71/2018, *OG RAL* no. 162/2018.

[35] Art. 56 of Albanian CPA, *ibidem.*

[36] National Strategy for consumer protection and market surveillance 2014–2020, adopted by Council of Ministers Decision no. 753, dated 16.9.2015, available at *http://kmk.ekonomia.gov.al/wp-content/uploads/2015/11/Strategjia-e-Mbrojtjes-se-Konsumatoreve-dhe-Mbikëqyrjes-se-Tregut.pdf*, 24.9.2019, p. 45.

[37] Law "On mediation on dispute resolution", no. 10 385, dated 24.2.2011, *OG RAL* no. 25/2011; amended by law no. 81/2013, *OG RAL* no. 31/2013: amended by law no. 26/2018, *OG RAL* no. 85/2018; approximated with Directive 2008/52/EC of the European Parliament and of the Co-

phase of development. In practice, mediation in Albania is applied mainly in family matters and small claims. The field of consumers claims is not yet grasped by the licenced mediators. However, the complaints of consumers in sector specific industries, i.e. energy, water supply, telecommunications, postal services, financial services, insurance, transport etc., are continuously handled by Regulatory Bodies in respective sectors.

The procedure followed

The Albanian Ministry of Economy urged by the obligations set out in the National Strategy on Consumer Protection[38] and National Action Plan for European Integration[39] with the support of GIZ,[40] started the initiative for further harmonisation of the consumer law by drafting the necessary legislation on establishment and functioning of Alternative Dispute Resolutions schemes. The new draft piece of legislation was preceded by a Regulatory Impact Assessment (RIA). The task to carry out studies and research was assigned to a working group composed of several experts in law and in economics. The RIA report[41] followed the mainstream guidelines[42] and adopted the methodology employed by the European Commission on the impact assessment of the Proposal for a Directive on consumer ADR.[43] Several documents were prepared with regard to the identification

uncil of 21 May 2008 on certain aspects of mediation in civil and commercial matters *OJ L 136,* 24.5.2008, p. 3–8.

[38] CMD 753/2015.

[39] CMD no. 74, dated 27.1.2016, *OG RAL* no. 17/2016, p. 1926.

[40] The German government has provided continuous support to Albanian Institutions on the way of European integration, through GIZ projects. GIZ (Deutsche Gesellschaft für Interantionale Zusammenarbeit) has been a continuous partner of Albanian Ministry of Economy in assisting the process of harmonisation in economic and trade law. See the latest Annual Report 2017–2018 of the Consumer Protection Commission at *http://kmk.ekonomia.gov.al/wp-content/uploads/2019/04/Raporti-vjetor-KMK-2018.pdf*, 25.9.2019, p. 12.

[41] Regulatory Impact Assessment on Consumer Alternative Dispute Resolution, 16 May 2016, carried out under the GIZ project "*Harmonisation of Economic and Trade Legislation with EU acquis*".

[42] Regulatory Impact Assessment Guidelines: A Guide to undertaking Regulatory Impact Assessment and completing the Explanatory Memorandum, Albania; prepared by the Ministry of Economy, Ministry of Integration, World Bank and Pohl Consulting & Associates, published under BERIS – Business Environment and Institutional Strengthening project, October 2010.

[43] Commission Staff Working Paper - Impact Assessment, *Accompanying the document* Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes (Directive on consumer ADR) and Proposal for a Regulation of the

of the problem and objective; the analyse of existing legislation; the legislative gap concerning consumer ADR; etc. Discussions in regard to the development of policy options were conducted with all identified stakeholders on several occasions during the research/assessment. The policy options were presented to Ministry of Economy which assigned the experts to draft the amendments of the CPA, by bringing it into alignment with the CADR Directive.

The result

The amendments on the CPA were adopted in October 2018 and the new act provides for the establishment of five sector specific CADR schemes and one residual CADR structure. The consumer ADR on the economic sectors of general interests will be carried out by special structures established under the Regulatory Bodies on those field, respectively: the Energy Regulatory Authority shall be responsible for consumer dispute resolutions in the field of energy and gas; the Electronic and Postal Communication Authority shall settle the consumer disputes in communication and postal services; the Financial Supervisory Authority shall deal with consumer disputes in the field of insurance and other financial services, other than banking services;[44] the consumer disputes resolution in air transport are assigned to the Civil Aviation Authority; and finally the consumer dispute resolutions in water supply sector are assigned to the Regulatory Authority of the Water Supply. Each of these institutions has to establish a special unit (entity) within own structure that should deal with consumer dispute resolution by respecting all other requirements set by CPA, i.e. respecting the basic principles of consumer ADR. Those structures have the authority to impose a decision on traders and in accordance with their specific laws and the kind of ADR they choose to apply, they may impose a decision on consumers, too by respecting all guaranties settled by law. All legal acts on regulatory markets are approximated with the respective EU directives, which also requires the establishments of CADR schemes on the sector, such as energy and gas; communications and postal services; insurance; air transport, etc.[45]

European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR), Brussels, 29.11.2011, SEC (2011) 1408 final.

[44] The consumer disputes resolution schemes in the banking system shall be regulated separately by the Bank of Albania.

[45] For a schematic and well-organized map of EU sectoral legislation that requires the establishment of CADR entities see Caroline Daniels, "Alternative Dispute Resolution for European Consumers", *Privatizing Dispute Resolution. Trends and Limits* (Eds. Loïc Cadiet, Burkhard Hess, Marta Requejo Isidro), Nomos, 2019, p. 267–270.

The residual CADR scheme shall be regulated by sub-legal act. Its establishment is delegated by law to the Council of Minister which by the end of 2019 shall establish an independent entity under the Ministry of Economy to carry out the duties of consumer dispute resolution in all other economic sectors on supply of goods and services, outside the regulated markets mentioned above.

To the date the Albanian picture on consumer ADR coverage is almost empty, with the exception of administrative consumer complaints units within regulated sectors, culminating at the Consumer Protection Commission. In other EU countries the ADR models differ considerably, some are more developed than others depending on the legal structures and national cultures of disputing.[46] For example, in Sweden the ADR system is comprehensive and widely developed. There is one main body called National Board for Consumer Disputes (ARN), which is a public authority that function like a court, well-known, widely used and effective. In France there is a general culture of in-house mediators, which create some confusion to the consumers as several bodies deals with consumer disputes in a given sector. The Netherlands shows a high adherence to its ADR model because of its unique structure, in which trade associations and consumer associations reach an agreement for the functioning of related sectorial ADR boards, which are then funded by trade associations.

However, this model does not guarantee the resolution of disputes with traders not belonging to any trade association. The United Kingdom has a wide ADR coverage, but there is no comprehensive sector coverage. There are some developed models like Financial Ombudsman Service or Ombudsman Services (covering energy, part of the communication and property sectors). Such model is funded by the sector in which they operate. They are usually free for consumers, but not for traders, who should pay an annual fee. A helpdesk is also created by the Consumer Advice Bureau, which help consumers and companies in identification of certified ADR entities.[47] In Germany the ADR model is in a relatively early stage, but it is developing into a confused state of diversity, albeit the Insurance Ombudsman model has been notably successful.[48] In Italy there are two main methods for resolving consumer claims: mediation, which is a condition to file civil claims before the court and representative negotiations (*conciliazione*

[46] See N. Creutzfedt (2016), p. 147–149. For a comprehensive view on various ADR schemes and models in Europe see C. Hodges, I. Benöhr, N. Creutzfeldt, p. 25 ff.

[47] See N. Creutzfedt *ibidem*, p. 148, and Pablo Cortés, "A Comparative Analysis on Consumer Dispute Resolution", *Legal Integration in Europe and America – International Contract Law and ADR* (Eds. S. Lieble, R. Miquel Sala), JWV 2018, p. 280.

[48] See N. Creutzfedt *ibidem*, p. 149.

paritetica), which serve for settling consumer complains. The representative negotiations system is decentralised, and the negotiation procedures are carried out by a representative of the consumer taking place at the trader's premises. The solution is proposed to the consumer, who is free to accept it or file civil claim at court. However, those services do not cover each sector, so the residual economic sectors are left to the Chambers of Commerce, which offer ADR services with general competences in civil and commercial matters.[49]

Looking at this comprehensive short comparative view, and considering academic recommendations in the legal literature, in order to avoid consumer confusion, the best solution is to have one ADR entity per sector, which will enable greater efficiency through economic of scales and facilitate collection of information.[50]

Apart from ADR entities, the full picture shall contain also the Competent Authorities, whose duty is to certify and monitor those entities that offer CADR services. In Albanian CPC, the role of Competent Authority is vested on Consumer Protection Commission under the Ministry of Economy. It shall certify and supervise all the CADR structures, by listing them on the webpage. The same body is supposed to serve later as a contact point for the EU Commission. Albania has followed the horizontal model of Competent Authority. There are basically two models of Competent Authorities: a *horizontal* one where one single Competent Authority is designated to certify and monitor all CADR schemes regardless of the economic sector, or a *vertical* one, where several Competent Authorities are in charge of monitoring CADR entities, usually one per sector and a separate one is designated as residual in charge for other CADR entities operating in non-regulated sectors. Usually this residual Competent Authority is also the contact point for the EU Commission.[51] Several states like France through an *ad hoc* commission on evaluation and control of consumer mediation, Luxembourg through the Ministry of Economy, Ireland through its Competition and Consumer Protection Commission, Finland through its Ministry of Justice, or Romania through its Ministry of Economy have adopted the horizontal model of a single Competent Authority. In a different manner, Italy and England have adopted the vertical model with respectively six and eight Competent Authorities.[52]

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[49] See P. Cortés, p. 273-276.

[50] P. Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution*, New York: Cambridge University Press, 2018 p. 176; C. Hodges, p. 365–367; N. Creutzfedt (2016), p. 150–151.

[51] A. Biard, p. 86. See also P. Cortés, p. 267 ff.

[52] *Ibidem*.

Albania, being a small country with little private offer on alternative dispute resolution and lack of culture on out of court proceedings in contrast to Italy, has assigned the regulatory bodies on specific sectors the duties of the CADR entity itself, and not the competences of the Competent Authorities.

The future expectations

To the date, none of the Regulatory Bodies has issued any report on the measures necessary to be taken to comply with the new amendments of CPA. The amendments were to be effective six month after the entry into force of the law,[53] therefore the Regulatory Bodies designed by law had six months to prepare the infrastructure for compliance.

The residual CADR entity is on the way of establishment. The Ministry of Economy has appointed a working group responsible for drafting the Council of Minister Decision, which shall provide the conditions and requirements for the new establishment of the general CADR entity, which shall deal with disputes falling outside the scope of specific sectors of general economic interests. The questions raised so far have been with regard to whether to maintain one central residual entity or to decentralise the structure and recognise some competences to municipal units dealing with consumer protection. Most likely, considering the policy choice of the Albanian legislator, to keep as clear as possible and as centralised as possible the scheme on CADR entities, again the choice will incline towards one centralised entity, probably by delegating only few ancillary functions to local structures. The prognosis for successful implementation of CADR Directive looks positive, considering the experience of regulatory bodies to handle consumer disputes and a general public trust on public funded entities.

CONCLUSION

The Directive on Consumer ADR adopted on 21 May 2013 aims at harmonising the quality requirements for ADR entities and ADR procedures in order to ensure that consumers can access high quality, independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. With the adoption of consumer ADR directive, the real work that needs to be done over the coming years is to develop national consumer ADR schemes so that they operate well and can deliver the regulatory/behavioural benefits of which they are capable. Although, some consumer ADR schemes might already exist, almost eve-

[53] Art. 25 (2) Albanian CPA, law no 71/2018, OG RAL no. 162/2018.

ry scheme and national system would benefit from review. The objective should be to conform to a simple model that can be easily recognizable to consumers and operate transparently. Overall, a holistic approach towards consumer dispute resolution contributes on two directions: on the one hand, discouraging traders from misbehaviour, and on the other hand encouraging consumer to seek remedy when affected. From a practical point of view, the Albanian legislator has adopted the most efficient model given the circumstances in context. From a theoretical legal view, the development must be observed on the way of concrete application of new legal rules.

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ADR U PRAVU POTROŠAČA: ISKUSTVO ALBANIJE U PRENOŠENJU EU DIREKTIVE 2013/11 U NACIONALNO ZAKONODAVSTVO

Rezime

Zaštita potrošača je od presudnog značaja za institucije EU radi ostvarivanja krajnjeg cilja – jačanja jedinstvenog tržišta EU. Potrošačko pravo zauzima značajan deo regulatornog okvira EU. Nakon što su doneti pravni propisi u oblasti potrošačkog prava, javlja se potreba za garantovanjem i sprovođenjem tih prava. EU je usvojila Direktivu 2013/11 o ADR u potrošačkom pravu u cilju uspostavljanja bržeg, efikasnijeg i jeftinijeg obezbeđivanja obeštećenja potrošača, koja je primenjiva od druge polovine 2015. godine. Rad izlaže opšte principe EU Direktive i predstavlja iskustvo Albanije u njenom prenošenju u nacionalno zakonodavstvo. Prikazan je i uporednopravni pregled analizom iskustava zemalja EU, u cilju utvrđenja optimalnog rešenja.

Ključne reči: potrošač, alternativno rešavanje sporova, efikasna pravna zaštita

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OGLEDNI POSTUPAK ILI POSTUPAK ZA RJEŠAVANJE SPORNOG PRAVNOG PITANJA

– Sličnosti i razlike –

Reformom hrvatskog parničnog procesnog prava provedenom 2019, kao novi procesnopravni institut, uveden je ogledni postupak radi rješenja pitanja važnog za jedinstvenu primjenu prava. Zakonske odredbe o oglednom postupku primjenjivat će se na slične sporove koji su pokrenuti ili se njihovo pokretanje očekuje u kraćem razdoblju, a rješenje kojih ovisi o istom pravnom pitanju koje je važno za osiguranje jedinstvene primjene prava i ravnopravnosti svih u njegovoj primjeni ili za razvoj prava kroz sudsku praksu. Nasuprot tome, u Srbiji je još 2004. uveden postupak za rješavanje spornog pravnog pitanja, koji je nedavnim pravnim shvaćanjem Građanskog odjela Vrhovnog kasacionog suda o ništavosti ugovorne odredbe o kreditu indeksiranom u švicarskom franku izazvao veliki interes javnosti. S obzirom da između oglednog postupka i postupka za rješavanje spornog pravnog pitanja, kao dvaju procesnopravnih instituta sa sličnim ciljem, postoje određene sličnosti i razlike, zadaća ovoga rada bila bi da prikaže navedene institute i ocijeniti njihovu primjenjivost u praksi.

Ključne riječi: *ogledni postupak, postupak za rješavanje spornog pravnog pitanja, jedinstvena primjena prava, presedan, vezujući učinak odluka*

OGLEDNI POSTUPAK

Ogledni postupak velika je novina kojom se u parničnom postupku nastoji ostvariti više različitih ciljeva. Jedan od njih usmjeren je na ubrzanje postupanja

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u svim postupcima u kojima je meritum stvari u odnosu na pravno pitanje isti, a koji su pokrenuti u većem broju ili se njihovo pokretanje očekuje u kraćem razdoblju. Drugi se pak, očituje u ostvarivanju ustavne zadaće Vrhovnog suda Republike Hrvatske na način da Vrhovni sud donošenjem odluke o određenom pravnom pitanju osigurava jedinstvenu primjenu prava i ravnopravnosti svih u njegovoj primjeni odnosno razvoj prava kroz sudsku praksu.[1] Pokušamo li rezimirati ciljeve oglednog postupka, riječ je o institutu koji treba doprinijeti ostvarivanju načela ekonomičnosti i suđenja u razumnom roku te istovremeno pravnoj sigurnosti, čime bi otpala i potreba da Vrhovni sud radi osiguranja jedinstvene primjene prava intervenira.

Kritika ovog procesnopravnog instituta čije se uvođenje planiralo jednim od Nacrta Zakona o izmjenama i dopunama Zakona o parničnom postupku iz 2016. godine, bila je, prije svega usmjerena na priličnu nomotehničku konfuznost i iznimnu složenost, koja je zbog takvog uređenja dovodila u pitanje uopće njegovu provedivost.[2] Neki su autori smatrali da je ustavnopravno dvojbeno, zadire li se na taj način sudovima nižeg stupnja u njihovo pravo i dužnost da sude tj. oduzima li im se, nametanjem presedana Vrhovnog suda Republike Hrvatske i preskakanjem svih razina sudovanja, pravo da odlučuju o predmetima iz svoje nadležnosti.[3] Zbog toga je, i prije nego izložimo osnovna obilježja oglednog postupka, između ostalog bitno, jesu li se odredbe o oglednom postupku kakve su bile propisane u ranijim zakonskim nacrtima u međuvremenu promijenile i dodatno razradile. Naime, ogledni postupak uveden je posljednjom reformom parničnog procesnog prava iz 2019. godine, točnije Zakonom o izmjenama i dopunama Zakona o parničnom postupku, u daljnjem tekstu: ZID ZPP 19 ili Novela ZPP-a 19.[4]

Već u odnosu na sam naziv Glave 32.b Zakona o parničnom postupku,[5] u daljnjem tekstu: ZPP (čl. 502.i–502.n) jasno je da do promjene naziva nije došlo.

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[1] Obrazloženje Konačnog prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku od svibnja 2019, str. 35.

[2] Aleksandra Maganić, "Ogledni postupak prema Nacrtu prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku 2016.", Zbornik radova s II međunarodnog savjetovanja *Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća* (urednik Jozo Čizmić et al.), Pravni fakultet Sveučilište u Splitu, Split, 2016. str. 141.

[3] Jakob Nakić, "Kritički osvrt na ogledni postupak u Nacrtu Konačnog prijedloga Zakona o izmjenama i dopunama Zakona o parničnom postupku", *Informator,* br. 6578 od 10. lipnja 2019.

[4] Zakon o izmjenama i dopunama Zakona o parničnom postupku, *Narodne novine*, br. 70/2019.

[5] Zakon o parničnom postupku, *Narodne novine*, br. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 96/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014, 70/2019.

Tako se, kao i prema ranijim nacrtima, zadržao naziv Ogledni postupak radi rješenja pitanja važnog za jedinstvenu primjenu prava, pri čemu se jezično pogrešno navodi da se radi o rješenju pitanja, a ne da je riječ o rješavanju pitanja važnog za jedinstvenu primjenu prava. Pokušaj da se ogledni postupka definira i da mu se daju određena obilježja koja bi ga trebala razlikovati od drugih postupaka ostaje na razini prilične neodređenosti. Sukladno zakonu, i dalje je riječ o načinu definiranja u kojem pretežu pravni standardi i neprecizni izrazi, za koje se možemo nadati, da će se razviti primjenom oglednog postupka u praksi.

Postupci u kojima odluka ovisi o rješavanju istog pravnog pitanja prema odredbama ove glave su slični sporovi koji su u većem broju već pokrenuti ili se njihovo pokretanje očekuje u kraćem razdoblju, a rješenje kojih ovisi o istom pravnom pitanju koje je važno za osiguranje jedinstvene primjene prava i ravnopravnosti svih u njegovoj primjeni ili za razvoj prava kroz sudsku praksu (pitanju važnom za jedinstvenu primjenu prava). Nepreciznost se odnosi na definiranje oglednog postupka kao *sličnih sporova*, jer nije jasno na čemu se temelji njihova sličnost, osim na tome da njihovo rješenje (rješavanje?) ovisi o istom pravnom pitanju. Primjedbe se moraju uputiti i drugim nomotehničkim nejasnoćama kao što je izraz *postupci čije se pokretanje očekuje u kraćem razdoblju*. Nije jasno zašto se u zakonskom tekstu, koji mora biti precizan i jasan, koriste izrazi kojima se određuje neko neizvjesno subjektivno stanje (očekivanje) i neizvjestan vremenski period (kraće vremensko razdoblje).

Ogledni postupak inicira prvostupanjski sud koji će nakon održavanja pripremnog ročišta ili sjednice sudskog odjela, dostaviti prijedlog za rješenje pitanja važnog za jedinstvenu primjenu prava sa spisom predmeta, Vrhovnom sudu Republike Hrvatske radi zauzimanja pravnog shvaćanja o tom pitanju. Prijedlog će se odmah objaviti na mrežnoj stranici e-oglasne ploče sudova (čl. 502.k, st. 1. ZPP). Objava prijedloga za rješavanje pitanja važnog za jedinstvenu primjenu prava ima višestruke posljedice. Jedna od njih je da od objave prijedloga na mrežnoj stranici e-oglasna ploča sudova, pa sve do objave okončanja oglednog postupka *stranke u oglednom postupku* ne mogu slobodno raspolagati zahtjevom u odnosu na koji je podnesen prijedlog za rješavanje pitanja važnog za jedinstvenu primjenu prava (čl. 502.k, st. 2. ZPP).

Međutim, nije jasno tko su stranke u oglednom postupku. Naime, ako je prijedlog za rješenje pitanja važnog za jedinstvenu primjenu prava podnio prvostupanjski sud pred kojim se pojavio veći broj tužbi u sličnim sporovima, odredba o zabrani raspolaganja zahtjevima u odnosu na koje je podnesen prijedlog, odnosi se prije svega na stranke u tim sporovima. Međutim, u tom se momentu (momentu objave prijedloga za rješavanje jedinstvenog pravnog pitanja na mrežnoj stranici e-oglasna ploča sudova) još uvijek ne zna postoje li slični sporo-

vi na drugim prvostupanjskim sudovima ili ne, to je nešto što predsjednik Vrhovnog suda tek treba utvrditi. Sukladno tome, nejasno je hoće li stranke u oglednom postupku na koje se odnosi zabrana raspolaganja zahtjevom biti samo stranke u sličnim sporovima koji su pokrenuti pred prvostupanjskim sudom koji je podnio prijedlog za rješavanje pitanja važnog za jedinstvenu primjenu prava ili i stranke u drugim sličnim sporovima drugih prvostupanjskih sudova, koja odluka će ovisiti o tome kakvu će odluku donijeti Vrhovni sud odlučujući o njegovoj dopuštenosti. Drugim riječima, kako će se zabrana raspolaganja zahtjevima u sličnim sporovima odnositi na zahtjeve pred drugim sudovima od momenta objave na stranicama e-oglasna ploča sudova, kada se u tom momentu ne zna ima li takvih sporova pred drugim prvostupanjskim sudovima ili ne (to će tek saznati predsjednik Vrhovnog suda RH) te kakvu će odluku o tome donijeti Vrhovni sud (hoće li prijedlog dopustiti ili ne). Dakle, nejasno je odnosi li se zabrana raspolaganja zahtjevima i na stranke u potencijalno sličnim sporovima pred drugim sudovima koje će tek naknadno saznati da je u sporovima u kojima su one stranke zabranjeno raspolagati zahtjevima, kao i stranke u sporovima koji bi bili naknadno pokrenuti (pokrenuti nakon podnošenja prijedloga za rješavanja pitanja važnog za jedinstvenu primjenu prava, a prije objave okončanja oglednog postupka) ili se zabrana raspolaganja zahtjevima odnosi i na mogućnost pokretanja takvih ili sličnih sporova uopće.

Zakon propisuje da je druga posljedica objave pokretanja oglednog postupka na mrežnoj stranici e-oglasna ploča sudova da od objave prijedloga za rješavanje pitanja važnog za jedinstvenu primjenu prava na mrežnoj stranici e-oglasna ploča sudova pa da objave okončanja oglednog postupka zastaje zastarijevanje prava na podnošenje zahtjeva[6] u odnosu na koji je podnesen prijedlog za rješavanje pitanja važnog za jedinstvenu primjenu prava, u pravnim stvarima u kojima odluka ovisi o rješavanju istog pravnog pitanja (čl. 502.k, st. 3. ZPP). Na taj način se htjelo otkloniti negativne posljedice, koje bi, za tužitelje odnosno potencijalne tužitelje u sporovima u kojima je podnesen prijedlog za rješavanje pitanja važnog za jedinstvenu primjenu prava, mogle nastati uslijed toga što u vremenu od objave prijedloga za rješavanje pitanja važnog za jedinstvenu primjenu prava na mrežnoj stranici e-oglasna ploča sudova pa do objave okončanja oglednog postupka nisu u mogućnosti raspolagati zahtjevom. Zbog toga je određen zastoj za-

[6] Zastoj zastare u čl. 235–239. uređuje Zakon o obveznim odnosima, *Narodne novine*, br. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, u daljnjem testu: ZOO. Prema čl. 238. ZOO kada zastara nije mogla teći zbog nekoga zakonskog uzroka, ona počinje teći kada taj uzrok prestane. Ako je zastara počela teći prije nego što je nastao uzrok koji je zaustavio njezin daljnji tijek, ona nastavlja teći kad prestane taj uzrok, a vrijeme koje je isteklo prije zastoja računa se u zakonom određeni rok za zastaru.

starijevanja prava koji će, sukladno čl. 238, st. 2. ZOO nastaviti teći kad prestane taj uzrok, a vrijeme koje je isteklo prije zastoja računa se u zakonom određeni rok za zastaru.

Pomalo je neobična konstrukcija u kojoj se očekuje da glavni koordinator, u prikupljanju informacija o tome da su u svezi s primitkom prijedloga za rješavanje pitanja važnog za jedinstvenu primjenu prava pred drugim prvostupanjskim sudovima pokrenuti postupci u sličnim sporovima, bude predsjednik Vrhovnog suda Republike Hrvatske. Tako je zakonom propisano da će predsjednik Vrhovnog suda Republike Hrvatske nakon primitka prijedloga za rješenje pitanja važnog za jedinstvenu primjenu prava, bez odgode zatražiti od predsjednika svih prvostupanjskih sudova da ga obavijeste o tome jesu li i u kojem broju pred njihovim sudovima pokrenuti takvi sporovi. Predsjednici prvostupanjskih sudova dužni su navedene podatke dostaviti predsjedniku Vrhovnog suda Republike Hrvatske u roku od 15 dana (čl. 502.l, st. 1. i 2. ZPP). U vezi s ovom odredbom treba napomenuti da u Hrvatskoj postoje 34 općinska suda[7] od kojih je za pretpostaviti da predsjednik Vrhovnog suda RH u svezi s oglednim postupkom koji se primjenjuje u parničnom postupku neće komunicirati s Općinskim prekršajnim sudom u Zagrebu i Splitu i Općinskim kaznenim sudom u Zagrebu. To bi značilo da bi predsjednik trebalo da komunicira s 31 općinskim sudom i 9 trgovačkih prvostupanjskih sudova – 40 sudova. Nije jasno od kojeg se vremena računa rok od 15 dana, jer zakon o tome ništa ne određuje. Ako predsjednik Vrhovnog suda RH prima prijedlog za rješavanje pitanja važnog za jedinstvenu primjenu prava koji se mora odmah (?) objaviti na mrežnoj stranici e-oglasna ploča sudova, računa li se rok od 15 dana od primitka prijedloga predsjednika Vrhovnog suda RH ili od objave prijedloga na e-oglasnoj ploči sudova? Nadalje, dvojbeno je i kakve bi pravne posljedice imao slučaj u kojem jedan ili više predsjednika prvostupanjskih sudova ne bi poslali potrebne informacije. Bi li bilo nužno (ZPP određuje da je dužan) da o tome informacije pošalje predsjednik svakog prvostupanjskog suda, te u slučaju da kasni, čekati ga dok ne pošalje obavijest o tome? Riječ je o tome da se u postupku treba poštivati vrijeme i relativno kratki rokovi, kako bi se spriječilo različito rješavanje pravnih stvari koje se temelje na istom pravnom pitanju. Ipak, s obzirom na to da je Novela ZPP-a 19 donijela novine u dijelu koji se odnosi na primjenu moderne tehnologije, posebno elektroničke komunikacije[8], nije ja-

[7] Zakon o područjima i sjedištima sudova, *Narodne novine*, br. 67/2018.

[8] U Hrvatskoj je u postupku pred trgovačkim sudovima u primjeni Pravilnik o elektroničkoj komunikaciji u postupcima pred trgovačkim sudovima, *Narodne novine*, br. 12/2018. Pravilnik je stupio na snagu 15. veljače 2018, a u odnosu na stranke pred trgovačkim sudovima 1. rujna 2019. Međutim, stupanjem na snagu Novele ZPP-a 19 1. rujna 2019. koja elektroničku komunikaciju propisuje za opću parničnu proceduru, što obuhvaća i postupke pred trgovačkim sudovima, postalo je

sno zašto se podaci o tome vode li se slični sporovi pred ostalim prvostupanjskim sudovima ne bi registrirali elektroničkim putem, kako bi se izbjegla nepotrebna i potencijalno odugovlačeća praksa komunikacije između predsjednika suda i četrdesetak sudova. Osim toga, ovaj način bilježenja sličnih sporova nema uporište ni u jednom od usporedivih komparativnih modela, koji pokazuju određene sličnosti (naravno i razlike) s novim oglednim postupkom u Hrvatskoj.[9]

Tek nakon komunikacije predsjednika Vrhovnog suda RH i 40 predsjednika prvostupanjskih sudova, koja bi trebala biti provedena u roku od 15 dana, uslijedit će odluka o dopuštenosti prijedloga za rješenje pitanja važnog za jedinstvenu primjenu prava. Prije svega, prvostupanjski sud koji podnosi prijedlog za rješenje pitanja važnog za jedinstvenu primjenu prava mora u prijedlogu određeno naznačiti pravno pitanje o kojemu predlaže zauzimanje pravnog shvaćanja Vrhovnog suda Republike Hrvatske te određeno izložiti razloge zbog kojih smatra da je ono važno za jedinstvenu primjenu prava u smislu odredbe čl. 385, st. 1. ZPP-a (čl. 502.lj, st. 1. ZPP).[10] O dopuštenosti prijedloga za rješenje pitanja važnog za jedinstvenu primjenu prava odlučuje vijeće od pet sudaca Vrhovnog suda Republike Hrvatske rješenjem u roku od 30 dana od isteka roka za obavijesti prvostupanjskih sudova o broju predmeta u kojima su pokrenuti slični sporovi (čl. 502.lj, st. 2. ZPP)[11]

Vrhovni sud RH o dopuštenosti prijedloga može odlučiti dvojako – ako odbije prijedlog, dovoljno je da se pozove na to da nisu ispunjene zakonom propisane pretpostavke za njegovo podnošenje. Iz toga proizlazi da Vrhovni sud nije

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dvojbeno što je s Pravilnikom koji uređuje elektroničku komunikaciju u postupku pred trgovačkim sudovima. On će se, po svemu sudeći, i nadalje primjenjivati, dok se ne ispune pretpostavke za elektroničku komunikaciju u parničnom postupku i pred općinskim sudovima.

[9] Opširnije v. A. Maganić, op. cit. (bilj. 2), str. 121–141.

[10] Članak 385.a, st. 1. ZPP-a primjerice navodi kada je neko pitanje važno za jedinstvenu primjenu prava i ravnopravnost svih u njegovoj primjeni ili za razvoj prava kroz sudsku praksu, dakle, osobito ako je riječ o pravnom pitanju o kojem odluka suda drugog stupanja odstupa od prakse revizijskog suda, ili ako je riječ o pravnom pitanju o kojem nema prakse revizijskog suda, pogotovo ako sudska praksa viših sudova nije jedinstvena, ili ako je riječ o pravnom pitanju o kojem sudska praksa revizijskog suda nije jedinstvena, ili ako je o tom pitanju revizijski sud već zauzeo shvaćanje i presuda se drugostupanjskog suda temelji na tom shvaćanju, ali bi – osobito uvažavajući razloge iznesene tijekom prethodnoga prvostupanjskoga i žalbenoga postupka, zbog promjene u pravnom sustavu uvjetovane novim zakonodavstvom ili međunarodnim sporazumima te odlukom Ustavnog suda Republike Hrvatske, Europskog suda za ljudska prava ili Suda Europske unije – trebalo preispitati sudsku praksu.

[11] Rok od 15 dana, za koji nije jasno računa li se od objave na mrežnoj stranici e-oglasna ploča sudova ili od kada predsjednik Vrhovnog suda RH primi prijedlog za pokretanje postupka radi rješenja pravnog pitanja važnog za jedinstvenu primjenu prava.

dužan da obrazloži zašto smatra da to pitanje nije važno za osiguranje jedinstvene primjene prava, već je dovoljno pozvati se na neispunjenje zakonom propisanih pretpostavki. Rješenje će se nakon toga objaviti na mrežnoj stranici e-oglasna ploča sudova, a prvostupanjski sud će, nakon njegove objave nastaviti s postupkom. Ako prihvati prijedlog, Vrhovni sud RH će navesti u kojem dijelu i u odnosu na koje određeno pravno pitanje se dopušta zauzimanje pravnog shvaćanja. I ovo rješenje će se objaviti na mrežnoj stranici e-oglasna ploča sudova. Protiv rješenja o dopuštenosti prijedloga pravni lijek nije dopušten (čl. 502.lj, st. 3–5. ZPP).

Sud može odrediti prekid postupaka u postupku u kojemu odluka ovisi o rješavanju istog pravnog pitanja, kad se na mrežnoj stranici e-oglasna ploča sudova objavi rješenje kojim se dopušta prijedloga za zauzimanje pravnog shvaćanja Vrhovnog suda RH u oglednom postupku radi rješenja pitanja važnog za jedinstvenu primjenu prava (čl. 213, st. 2, t. 3 ZPP). U slučaju da postupi na taj način, sud će rješenje o prekidu postupka objaviti na mrežnoj stranici e-oglasna ploča sudova te ga dostaviti strankama i umješačima u roku od 30 dana od dana objava rješenja kojim je dopušten prijedlog (čl. 213.a, st. 1. ZPP).

Zanimljivo je da je strankama i umješačima dana mogućnost da podnesu očitovanje o rješenju pitanja važnog za jedinstvenu primjenu prava, Vrhovnom sudu RH u roku od 45 dana od dana objave rješenja kojim je dopušten prijedlog te da će očitovanja podnesena nakon isteka navedenog roka Vrhovi sud RH uzeti u obzir, ako je to još moguće (čl. 213.a, st. 2. i 3. ZPP). Nije jasno koja je funkcija ovog očitovanja, koje nema nikakav učinak za Vrhovni sud, osim što se time vjerojatno htjelo ostvariti načelo saslušanja stranaka, odnosno dati mogućnost strankama da se izjasne o tome, bez mogućnosti da utječu na odluku Vrhovnog suda. Jer, podsjetimo, stranke zapravo nemaju nikakvu mogućnost utjecati na odluku koju o dopuštenosti prijedloga donosi Vrhovi sud RH. Protiv tih odluka pravni lijek nije dopušten (čl. 502.lj, str. 5. ZPP), tako da očitovanje stranaka o rješenju pitanja važnog za jedinstvenu primjenu prava, koje dolazi naknadno, ne može ozbiljno utjecati na odluku Vrhovnog suda RH. Osim toga, u svezi s prekidom postupka treba reći da su rješenja većine sličnih komparativnih modela propisala da u slučaju pokretanja postupka za rješavanje važnog pravnog ili (činjeničnog) pitanja dolazi do obvezatnog prekida postupka, ne ostavljajući sudovima mogućnost da postupe na različite načine.[12],[13] Ako je sud prekinuo postupak

[12] A. Maganić, op. cit. (bilj. 2), str. 140.

[13] I neka novija rješenja slijede takvo uređenje, primjerice Zakon o uvođenju deklaratorne tužbe u parnični model postupak, Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage v. 12.7.2018, BGBl. I 2018, S. 1151, koji je stupio na snagu 1. 11. 2018. propisuje da u slučaju kada je potrošač prije prijave u registar tužbi za model postupak pokrenuo postupak koji se odnosio

zbog rješenja istog pravnog pitanja, postupak će se nastaviti kad se objavi rješenje Vrhovnog suda Republike Hrvatske o pitanju važnom za jedinstvenu primjenu prava (čl. 215, st. 5. ZPP)

Kada donosi odluku o pitanju važnom za jedinstvenu primjenu prava, Vrhovni sud odlučuje u vijeću od pet sudaca, a rok za donošenje odluke (rješenja) je 90 dana, računajući od dana objave rješenja kojim je dopušten prijedlog. Rješenje će se objaviti na mrežnoj stranici e-oglasna ploča sudova (čl. 502.m ZPP). Sukladno tome, od objave prijedloga za rješenje pitanja važnog za jedinstvenu primjenu prava na mrežnoj stranici e-oglasna ploča sudova mora proći 15 dana za komunikaciju predsjednika Vrhovnog suda RH i predsjednika prvostupanjskih sudova, zatim 30 dana za donošenje odluke o dopuštenosti prijedloga i nakon toga, 90 dana za donošenje odluke o pitanju važnom za jedinstvenu primjenu prava – ukupno 135 dana, odnosno četiri i pol mjeseca.

Vezujući učinak pravnog shvaćanja Vrhovnog suda RH donesenog povodom pokrenutog i okončanog oglednog postupka, očituje se u tome da će sud u nastavljenim postupcima (pred prvostupanjskim sudovima) biti vezan tim pravnim shvaćanjem.[14] Velike najave o tom da se u Hrvatsku na taj način uvode presedani samo su dijelom točne[15], jer su i prije stupanja na snagu Novele ZPP-a 19 u pravnom uređenju postojali različiti oblici vezujućeg učinka odluka na hrvatske sudove. Tako čl. 394.a ZPP-a propisuje vezanost nižih sudova za pravna shvaćanja Vrhovnog suda RH, jer je sud kome je predmet vraćen na ponovno suđenje, vezan u tom predmetu pravnim shvaćanjem na kojemu se temelji rješenje revizijskog suda kojim je ukinuta pobijana drugostupanjska, odnosno kojim su ukinute drugostupanjska i prvostupanjska presuda. Pravna stajališta Ustavnog suda izražena u odluci kojom se ukida akt kojim je povrijeđeno ustavno pravo podnositelja ustavne tužbe, predstavljaju još jedan od oblika vezanosti nižih sudova.[16] Po-

na utvrđenje činjeničnog stanja značajnog za rješenje spora, sud mora prekinuti postupak. Postupak je prekinut sve do donošenja pravomoćne odluke ili drugačijeg okončanja model postupka ili povlačenja tužbe. Opširnije v. Leonid Guggenberger, Nikolas Guggenberger, "Die Musterfestellungsklage – Staat oder privat", *Multi Media und Recht*, 1/2019, str. 8–14.

[14] Čl. 502.n, st. 1. ZPP.

[15] Hrvoje Kačer, Uvođenjem "oglednog postupka" hrvatsko zakonodavstvo približava se presedanu, https://lider.media/aktualno/hrvoje-kacer-uvodenjem-oglednog-postupka-hrvatsko-zakonodavstvo-priblizava-se-presedanu-26379, 10. 10.2019.

[16] Prema čl. 77. st. 2. Ustavnog zakona o Ustavnom sudu Republike Hrvatske, *Narodne novine*, br. 99/99, 29/02, 49/02, u daljnjem tekstu: UZUS nadležno sudbeno ili upravno tijelo, tijelo jedinice lokalne i područne (regionalne) samouprave ili pravna osoba s javnim ovlastima pri donošenju novog akta (u povodu odluke Ustavnog suda da ukine akt kojim je povrijeđeno ustavno pravo) ob-

red toga, u postupku ponovljenom u povodu konačne presude Europskog suda za ljudska prava u Strasbourgu, sudovi su dužni poštivati pravna stajališta izražena u konačnoj presudi Europskog suda za ljudska prava kojom je utvrđena povreda temeljnog ljudskog prava ili slobode (čl. 428, st. 3. ZPP).[17] Sudovi su vezani i za pravna utvrđenja iz presuda kojom su prihvaćeni zahtjevi u povodu tužbe za zaštitu kolektivnih interesa i prava.[18] S obzirom na to da se fizičke i pravne osobe mogu u posebnim parnicama za naknadu štete ili isplatu, pozvati na pravno utvrđenje iz presude kojom su prihvaćeni zahtjevi u povodu tužbe za zaštitu kolektivnih interesa i prava, da su određenim postupanjem, uključujući i propuštanjem tuženika, povrijeđeni ili ugroženi zakonom zaštićeni kolektivni interesi i prava osoba koje je tužitelj ovlašten štititi. U tom slučaju sud će biti vezan za ta utvrđenja u parnici u kojoj će se ta osoba na njih pozivati (čl. 502.c ZPP).

Razlike koje postoje između raznovrsnih oblika vezivanja nižih sudova pri donošenju odluka su ogromne i mogu se odnositi na različite objekte (npr. činjenična utvrđenja ili pravna shvaćanja), različita tijela (domaća ili europska) i sl. Ipak, neovisno o njihovoj različitosti, svima je zajedničko da svojim djelovanjem ograničavaju postupanje nižih sudova, a radi osiguranja jedinstvene primjene prava, osiguranja pravne sigurnosti ili poštivanja ustavnih i ljudskih prava i sloboda.

ZPP u članku 502.n koristi izraz *nastavljeni postupci* kojim su, za pretpostaviti je, obuhvaćeni postupci koji su bili prekinuti, a koji su nakon donošenja pravnog shvaćanja Vrhovnog suda RH nastavljeni. U tim postupcima stranke će biti obaviještene o zauzetom pravnom shvaćanju Vrhovnog suda RH, a sudovi će nastojati da stranke nagodbom ili na drugi nesporni način dovrše postupak (čl. 502.n, st. 2. i 4. ZPP). Nije jasno odnose li se nastavljeni postupci samo na postupke koji su nastavljeni nakon prekida postupka ili i na naknadno pokrenute

vezni su poštovati pravna stajališta Ustavnog suda izražena u odluci kojom se ukida akt kojim je povrijeđeno ustavno pravo podnositelja ustavne tužbe.

[17] Opširnije v. Aleksandra Maganić, "Vezujući učinak presuda Europskog suda za ljudska prava", *Europska budućnost hrvatskoga građanskog pravosuđa*, (urednik Jakša Barbić), Knjiga 43, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2018, str. 79–106.

[18] Udruge, tijela, ustanove ili druge organizacije koje su osnovane u skladu sa zakonom, koje se u sklopu svoje registrirane ili propisom određene djelatnosti bave zaštitom zakonom utvrđenih kolektivnih interesa i prava građana, mogu, kad je takvo ovlaštenje posebnim zakonom izrijekom predviđeno i uz uvjete predviđene tim zakonom, podnijeti tužbu (tužbu za zaštitu kolektivnih interesa i prava) protiv fizičke ili pravne osobe koja obavljanjem određene djelatnosti ili općenito radom, postupanjem, uključujući i propuštanjem, teže povrjeđuje ili ozbiljno ugrožava takve kolektivne interese i prava (čl. 502.a, st. 1. ZPP).

slične sporove. Ako bi se prihvatilo rješenje prema kojem zauzeto pravno shvaćanje vezuje ne samo sudove u postupcima koji su nastavljeni nakon prekida postupka u povodu rješavanja pitanja važnog za jedinstvenu primjenu prava, već i druge sudove, pred kojima bi se takvi postupci mogli naknadno pokrenuti, pitanje je bi li se i kada bi se zauzeto pravno shvaćanje moglo izmijeniti.

Sudeći po odredbi ZPP-a kojom se ogledni postupak definira kao slični sporovi koji su u većem broju već pokrenuti *ili se njihovo pokretanje očekuje u kraćem razdoblju,* zauzeto pravno shvaćanje vezuje ne samo sudove u postupcima koji su već bili pokrenuti, pa nakon prekida postupka nastavljeni, već i postupke pred sudovima koji su pokrenuti u kraćem razdoblju. Što znači kraće razdoblje i kada stranke u sličnim sporovima mogu tražiti da se izmijeni zauzeto pravno shvaćanje, zakon ne određuje, već je rješavanje ove problematike prepušteno sudskoj praksi. U odnosu na zauzeto pravo shvaćanje Vrhovnog suda mogla bi se prihvatiti i ideja da ono vezuje sudove sve dok se ne promijeni, a to ne mora nužno biti u kraćem razdoblju.

U prijelaznim i završnim odredbama Novele ZPP-a 19 propisano je da će se članak 108. ZPP-a[19] primjenjivati i na sve postupke u tijeku u kojima do stupanja na snagu ovog Zakona nije održano pripremno ročište ili je održano pripremno ročište, ali nije zaključen prethodni postupak (čl. 117, st. 2).

Iz navedenog je razvidno da se zakon u pravilu ne bi trebao koristiti izrazima čija je zadaća da smanje tenzije zbog uvođenja novih procesnopravnih instituta, ali i novog postupanja sudova zbog njihove primjene u praksi. Nasuprot tome, normativno sagledano zadaća zakonskih odredbi trebala bi biti jasna i precizna poruka sudovima, ali i strankama i njihovim zastupnicima i građanima o tome koja je svrha pojedine odredbe i koje su granice dometa u njezinoj primjeni. Čini se da su zakoni sve složeniji, uslijed toga i nejasniji, te da se njima žele obuhvatiti svi potencijalni slučajevi koji bi se mogli dogoditi u praksi postupanja sudova, što svakako nije moguće.[20] Zbog toga se zakonske odredbe nepotrebno opterećuju suvišnim tekstom, koji često opet nije u stanju obuhvatiti sve moguće pojedinosti, koje se mogu dogoditi u praksi. S druge strane, sudovi bi trebali biti interpreti zakonskih tekstova, ne samo primjenjivači zakonske norme koja nije u stanju obuhvatiti silnu različitost istih ili sličnih slučajeva.

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[19] Člankom 108. Novele ZPP-a 19 dodane su odredbe Glave 32.b kojima je uređen ogledni postupak.

[20] Kritički o lošem normativnom uređenju oglednog postupka, prevelikim ovlastima Vrhovnog suda i ustavnopravnoj dvojbenosti koncepta oglednog postupka, v. Milotić, Ivan, "Ogledni postupak – novi institut u Noveli ZPP-a iz 2019. godine", *Pravo i porezi,* br. 9/2019, str. 75–76.

POSTUPAK ZA RJEŠAVANJE SPORNOG PRAVNOG PITANJA

Postupak za rješavanje spornog pravnog pitanja u parnični postupak uveden je Zakon o parničnom postupku Srbije iz 2004. godine,[21] radi ostvarivanja cilja iz čl. 6. Europske konvencije o ljudskim pravima i temeljnim slobodama[22] a u skladu s preporukom Odbora ministara Vijeća Europe R 95(5) o uvođenju i poboljšanju funkcioniranja žalbenih sustava i postupaka u građanskim i trgovačkim predmetima, Glava IV, čl. 7. točka d (uloga i djelovanje suda trećeg stupnja). Prema ovoj preporuci države članice trebaju razmotriti uvođenje sustava koji će omogućiti da sud trećeg stupnja može neposredno uzeti u razmatranje određeni predmet.[23]

Sporno pravno pitanje definira se kao sporno pitanje o pravom značenju pravne norme (materijalne ili procesne), koju treba primijeniti na konkretno činjenično stanje. Riječ je o tumačenju prava radi njegove primjene.[24] Prema uređenju ZPP-a 04 Srbije (čl. 176–180), kada se u postupku pred prvostupanjskim sudom, u većem broju predmeta, pojavila potreba da se zauzme stav o spornom pravnom pitanju koje je od prejudicijelnog značenja za odlučivanje o predmetu postupka (čl. 176, st. st. 1), sud je po službenoj dužnosti ili na prijedlog stranke bio dužan pokrenuti postupak pred Vrhovnim sudom Srbije radi rješavanja spornog pravnog pitanja.

Sadržaj zahtjeva kojim se inicirao ovaj postupak bio je određen zakonom i obuhvaćao je kratak prikaz utvrđenog stanja stvari u konkretnom predmetu, navode stranaka o spornom pravnom pitanju i razloge zbog kojih se sud obraća sa zahtjevom za rješavanje spornog pravnog pitanja. Sud je mogao iznijeti i vlastito tumačenje spornog stava (čl. 177, st. 2. ZPP 04 Srbije). Sud koji je pokrenuo postupak bio je dužan zastati s postupkom dok se ne završi postupak pred Vrhovnim sudom Srbije (čl. 176, st. 2. ZPP 04 Srbije). Vrhovni sud Srbije bio je dužan odluku o spornom pravnom pitanju donijeti u roku od 90 dana od primitka zahtjeva, a odbiti da zauzme stav o spornom pravnom pitanju, ako ono nije bilo od značaja za odlučivanje u većem broju predmeta (čl. 178, st. 1. i 2. ZPP 04 Srbije).

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[21] Zakon o parničnom postupku Srbije iz 2004. (*Službeni glasnik,* br. 125/04), u daljnjem tekstu: ZPP Srbije 04.

[22] Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda (*Narodne novine MU,* br. 18/97, 6/99 14/02, 13/03, 9/05, 1/06, 2/10), u daljnjem tekstu: Konvencija, u Republici Hrvatskoj ratificirana je 5. studenog 1997. godine, a u Republici Srbiji 3. ožujka 2004.

[23] Vesna Popović, Postupak za rješavanje spornog pravnog pitanja, http://www.vk.sud.rs/sites/default/files/attachments/POSTUPAK%20ZA%20RE%C5%A0AVANJE%20SPORNOG%20PRAVNOG%20PITANJA%20-V.Popovi%C4%87.pdf, 12.10.2019., str. 1.

[24] *Ibidem*, str. 3.

Ako je Vrhovni sud Srbije odlučio da rješava sporno pravno pitanje, odluku o tome trebao je objaviti u Biltenu Vrhovnog suda Srbije ili na drugi prikladan način. Vrhovni sud Srbije je o spornom pravnom pitanju odlučivao prema pravilima postupka za usvajanje pravnih shvaćanja (čl. 178., st. 3. i 4. ZPP 04 Srbije). U pravnom shvaćanju koje je zauzeo u povodu zahtjeva za rješavanje spornog pravnog pitanja Vrhovni sud je razmatrao sporno pravno pitanje i navodio razloge kojima je obrazlagao svoju odluku. Pravno shvaćanje dostavljalo se sudu koji je zahtjev postavio i objavljivalo u Biltenu Vrhovnog suda Srbije (čl. 179, st. 2. ZPP 04 Srbije). Stranke u postupku u kojem se postavljalo isto sporno pravno pitanje nisu imale pravo da ponovno traže njegovo rješavanje u parnici koja je u tijeku (čl. 180. ZPP 04 Srbije).

O odredbama ZPP-a Srbije 04 kojima se propisivao postupak za rješavanje spornog pravnog pitanja odlučivao je Ustavni sud Srbije u povodu postupka za ocjenu njihove ustavnosti. Podnositelji zahtjeva smatrali su da se uvođenjem toga instituta narušava načelo neovisnosti suda u donošenju odluka i načelo dvostupanjskog odlučivanja. Isticalo se da takav postupak omogućava donošenje odluka na temelju pravnih shvaćanja Vrhovnog suda Srbije i da sam naslov u zakonskom tekstu "Postupak za rješavanje spornog pravnog pitanja" upućuje da je riječ o postupku koji prethodi donošenju sudske odluke. Ustavni sud je u svojoj odluci I U 181/2005[25] odbio zahtjev za ocjenu ustavnosti odredbi čl. 176–180. ZPP 04 Srbije. U obrazloženju svoje odluke Ustavni sud naveo je da Vrhovni sud Srbije, rješavajući sporno pravno pitanje ne odlučuje i o predmetu spora, već da se odredbama o rješavanju spornog pravnog pitanja daje mogućnost Vrhovnom sudu Srbije da zauzme stav o pravnom pitanju koje se pojavi kao sporno u postupku pred prvostupanjskim sudom, pod uvjetom da se određeno pravno pitanje pojavilo kao sporno u većem broju predmeta, kao i da je ono od prejudicijelnog značaja za odlučivanje o predmetu pred prvostupanjskim sudovima. Osim toga, Ustavni sud je smatrao da odredba čl. 177, st. 1. ZPP-a 04 Srbije omogućava prvostupanjskom sudu da iznese i vlastito shvaćanje, što znači da se nije radilo o uspostavljanju precedenata, već o zauzimanju pravnog shvaćanja o određenom pravnom pitanju koje je bilo od prejudicijelnog značaja za odluku u većem broju predmeta.

Konačno, prema ocjeni Ustavnog suda Srbije odredbe čl. 176–180. ZPP-a 04 Srbije predstavljaju mehanizam kojim se kroz zauzimanje pravnog shvaćanja Vrhovnog suda osigurava pravna sigurnost i jednakost u postupcima pred nižestupanjskim sudovima kao i suđenje u razumnom roku. S obzirom na to da se tim odredbama ne isključuje mogućnost ulaganja pravnih lijekova protiv pojedinačnih odluka prvostupanjskih sudova, njima se ne narušava načelo neovisnosti su-

[25] I U 1881/2005, *Službeni glasnik RS*, br. 106/06 od 24. studenog 2006.

dova i načelo dvostupanjskog odlučivanja niti se protivno odredbi čl. 96. Ustava Republike Srbije uvodi suđenje na osnovu pravnih shvaćanja Vrhovnog suda Srbije.[26] Suprotno tome, neki autori mišljenja su da je postupak za rješavanja spornog pravnog pitanja protivan osnovnim procesnopravnim pravilima, pravilima o podjeli vlasti i organizaciji pravosudnog sustava. Tako *Salma* smatra da je rješavanje spornog pravnog pitanja od strane Vrhovnog kasacionog suda protivno pravilu *iura novit curia,* jer i prvostupanjski sudovi, kada donose odluku, sude na temelju prava i poznaju pravo. To znači da u dvojbi oko tumačenja prava ne bi trebalo pitati za mišljenje Vrhovni kasacioni sud. Neki od prigovora su i da uvođenje ovog procesnopravnog instituta narušava klasičnu podjelu vlasti na zakonodavnu, izvršnu i sudbenu, pri čemu sudovi (pa ni Vrhovni kasacioni sud) ne bi trebalo da budu kreatori pravne norme, zatim da je ugrožena neovisnost sudske vlasti, jer su nižestupanjski sudovi u pravilu vezani samo uz upute koje im u povodu izjavljenog pravnog lijeka daje viši sud, snagom argumentacije, a ne administrativne subordinacije.[27]

ZPP Srbije iz 2011.[28] donio je neke novine u odredbe o postupku rješavanja spornog pravnog pitanja. Unatoč tome što su one i dalje sadržane u Glavi XIV zakona, prema novom uređenju postupak za rješavanje spornog pravog pitanja uređen je čl. 180–185. Zakon o parničnom postupku Srbije.[29] U usporedbi s ranijim rješenjima otpala je potreba da sporno pravno pitanje bude od prejudicijelnog značaja za odlučivanje u postupku pred prvostupanjskim sudovima (čl. 180, st. 1. ZPP Srbije). Unatoč tome, neki autori mišljenja su da neovisno o novim zakonskim rješenjima faktično i objektivno sporno pravno pitanje jest od prejudicijelnog značaja za odlučivanje u većem broju predmeta, jer bi u protivnom, traženje odgovora na bilo koje drugo sporno pravno pitanje dovelo do izigravanja tog procesnog instituta.[30] Pitanje može biti i procesnopravne naravi i ticati se npr., sudske nadležnosti, ali praksa pokazuje da se najčešće radi o prejudicijelnim pitanjima odnosno da se odluka o tužbenom zahtjevu ne može donijeti bez rješenja toga pitanja, jer ono uvjetuje donošenje odluke o tužbenom zahtjevu.

U odredbama o rješavanju prethodnog pitanja od strane Vrhovnog kasacionog suda, ništa nije rečeno o materijalnopravnoj prirodi prethodnog pitanja

[26] V. Popović, op. cit. (bilj. 23), str. 4.

[27] Marija Salma, "Postupak za rešavanje spornog pravnog pitanja", *Zbornik radova Pravnog fakulteta u Novom Sadu,* br. 1, 2012, str. 290–292.

[28] Zakon o parničnom postupku Srbije, *Službeni glasnik RS*, br. 72/2011.

[29] Zakon o parničnom postupku Srbije, *Službeni glasnik RS*, br. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, u daljnjem tekstu: ZPP Srbije.

[30] *Ibidem*, str. 4–5.

o kojem treba rješavati taj sud. Smatra se da ono može biti ne samo građansko-pravno pitanje, već i kaznenopravno i upravnosudsko, dakle, svako pravno pitanje koje pripada u sudsku nadležnost. Pri tom je sporno bi li Vrhovni kasacioni sud bio ovlašten prethodno riješiti pravno pitanje koje ne pripada u sudsku nadležnosti, već nadležnost upravnog ili nekog drugog tijela. Unatoč tome što čl. 12, st. 1. ZPP-a Srbije omogućava da sud riješi pitanje iz nadležnosti nekog drugog tijela, s učinkom samo u toj parnici, može se očekivati da će Vrhovni kasacioni sud pokazati suzdržanost u rješavanju spornog pravnog pitanja koje ne spada u sudsku nadležnost.[31]

U usporedbi s rješenjima ZPP-a Srbije 04 prvostupanjski sud nema više samo mogućnost, već dužnost da zahtjevu za rješavanje spornog pravnog pitanja priloži vlastito tumačenje spornog pravnog pitanja, s tim da se zahtjev za rješenje spornog pravnog pitanja ne dostavlja strankama na izjašnjavanje (čl. 181, st. 1. ZPP Srbije). Međutim, ako je stranka pokrenula postupak za rješavanje spornog pravnog pitanja, zahtjev se može dostaviti protivnoj stranci na izjašnjavanje (čl. 181, st. 2. ZPP Srbije). Propisano je i kada će Vrhovni kasacioni sud biti ovlašten odbaciti zahtjev kao nepotpun ili nedozvoljen. Zahtjev je nepotpun ako ne sadržava sve što je propisano čl. 181, st. 2. ZPP Srbije, a nedozvoljen ako je Vrhovni kasacioni sud o tome zahtjevu već donio odluku (čl. 182. ZPP Srbije). Skraćen je rok za rješavanje spornog pravnog pitanja na 60 dana (čl. 183, st. 3. ZPP Srbije). Prema čl. 184, st. 2. ZPP Srbije odluka Vrhovnog kasacionog suda o spornom pravnom pitanju objavljuje se na internet stranici Vrhovnog kasacionog suda ili na drugi pogodan način (dakle ne više u Biltenu Vrhovnog kasacionog suda Srbije). U doktrini ne postoji jasan stav o tome je li odluka Vrhovnog kasacionog suda izvor prava. Smatra se da se radi o dva međusobno suprotstavljena interesa – potrebe za jednakom primjenom i tumačenjem prava koju osigurava Vrhovni kasacioni sud kad zauzima stav o spornom pravnom odnosu koji treba primjenjivati u svim istim pravnim situacijama, i ustavne i zakonske neovisnosti nižestupanjskih sudova od višestupanjskih sudova u tumačenju prava.[32]

S obzirom na to da Vrhovni kasacioni sud sporno pravno pitanje rješava prema pravilima za usvajanje pravnih shvaćanja (čl. 183, st. 1. ZPP Srbije), primjenjuje se Poslovnik o uređenju i radu Vrhovnog kasacionog suda.[33]

[31] Borivoje Poznić, Vesna Rakić Vodinelić, *Građansko procesno pravo*, Pravni fakultet Univerziteta Union u Beogradu i Službeni glasnik, Beograd, 2015, str. 345–346.

[32] M. Salma, op. cit. (bilj. 27), str. 293.

[33] Poslovnik o uređenju i radu Vrhovnog kasacionog suda, *Službeni glasnik RS*, br. 37/2010, 51/2014, 41/2016, 74/2018.

ZAKLJUČAK

Usporedbom oglednog postupka u Hrvatskoj i postupka za rješavanje spornog pravnog pitanja u Srbiji uočavaju se sličnosti i razlike ovih dvaju procesnopravnih instituta. Sličnosti se ogledavaju u svrsi koja se tim postupcima želi ostvariti – oba su usmjerena k ubrzanju postupka i povećanju opće djelotvornosti parničnog postupka, u uvjetima velikog broja sličnih sporova, do kojih može doći uslijed masovnih i istih povreda (npr. ugovornih odredbi) te pravnih posljedica koje zbog toga mogu nastupiti. Ipak, osiguranje jedinstvene primjene prava primarni je zadatak kojim se u oba sustava nastoje ostvariti prednosti – pravna sigurnost i predvidljivost.

Normativno promatrano – postupak za rješavanje spornog pitanja uveden je već ZPP-om Srbije 2004. godine i djelomično korigiran kasnijim ZPP-om Srbije iz 2011. Primjena ovog instituta u praksi iznjedrila je niz pravnih shvaćanja Vrhovnog kasacionog suda Srbije. Jedno od važnijih pitanja o kojima se na taj način rješavalo u Srbiji bilo je i pravno shvaćanje u svezi s primjenom valutne klauzule u švicarskom franku[34] kojom je utvrđena ništetnom odredba ugovora o kreditu o indeksiranju dinarskog duga primjenom tečaja CHF koja nije utemeljena na pouzdanom pisanom dokazu da je banka plasirana dinarska sredstva pribavila putem vlastitog zaduženja i da je prije zaključenja ugovora korisniku kredita dostavila potpunu pisanu informaciju o svim poslovnim rizicima i ekonomsko-financijskim posljedicama koje će nastati primjenom takve klauzule, pri čemu ugovori o kreditu proizvode pravne posljedice i nakon utvrđenja ništetnosti klauzule o indeksiranju duga primjenom tečaja u CHF. Nasuprot tome, u Hrvatskoj je ogledni postupak uveden odnedavno – Novela ZPP-a 19 stupila je na snagu tek 1. rujna ove godine. Dvojbeno je bi li problemi građana u svezi s primjenom valutne klauzule u švicarskom franku i ništetnošću ugovornih odredbi ugovora o kreditu u Hrvatskoj bili riješeni oglednim postupkom, da je u parničnom postupku postojao takav procesnopravni institut, osobito s obzirom na iznimnu kompliciranost ovog modela i očekivanim problemima, koji bi, zbog toga mogli nastati u njegovoj primjeni. Ipak, odluku o tom pitanju donio je Vrhovni sud RH[35], ne kao sud koji bi odlučivao u povodu oglednog postupka, već kao revizijski sud u povodu izjavljenih revizija tuženika i tužitelja u toj pravnoj stvari protiv odluke Visokog trgovačkog suda RH[36], odlučivši na sličan način.

[34] Pravno shvaćanje Vrhovnog kasacionog suda, https://www.vk.sud.rs/sites/default/files/attachments/Valutna%20klauzula_1.pdf, 12.10.2019.

[35] Odluka VS RH Rev 2221/2018-11 od 3. rujna 2019.

[36] Odluka VTS RH Pž-6632/2017-10 od 14. lipnja 2018.

Zanimljivo je da je u susjednoj Bosni i Hercegovini Vrhovni sud Federacije u povodu postupka za rješavanje spornog pravnog pitanja prema Zakonu o parničnom postupku Federacije Bosne i Hercegovine[37] također rješavao o sličnim pitanjima, našavši da je odredba Ugovora o kreditu koja se odnosi na promjenljivu kamatnu stopu koja sadrži točno određenje fiksnog i varijabilnog dijela kamatne stope dovoljno odrediva s aspekta predmeta obaveze, pa ne predstavlja ništavu odredbu u smislu čl. 47. Zakona o obveznim odnosima FBiH[38], kao i da je Zakonom o deviznom poslovanju Federacije Bosne i Hercegovine[39] predviđena mogućnost zaključenja ovakvih ugovora između domaćih fizičkih osoba i banaka, pa se ne radi o ništavom pravnom poslu u smislu čl. 103. i 105. ZOO FBiH.[40] Kada Vrhovni sud riješi sporno pitanje (odnosno u konkretnom slučaju nekoliko spornih pravnih pitanja), stranke u postupku u kojem se postavlja isto sporno pravno pitanje nemaju pravo tražiti njegovo rješavanje u parnici koja je u tijeku (čl. 61.f ZPP-a FBiH), što bi impliciralo zaključak da je sud pred kojim se pravno pitanje pojavilo (u konkretnom slučaju Općinski sud u Mostaru), vezan pravnim shvaćanjem Vrhovnog suda Federacije, kao i da stranke nisu ovlaštene tražiti rješenje pravnog pitanja na drugačiji način.

Razlike između oglednog postupka u Hrvatskoj i postupka za rješavanje spornog pravnog pitanja u Srbiji postoje u odnosu na njegovo pokretanje – tako ogledni postupak može pokrenuti samo prvostupanjski sud pred kojim se pojavilo sporno pravno pitanje (čl. 502.k, st. 1. ZPP), a postupak za rješavanje spornog pravnog pitanja prvostupanjski sud *ex officio* ili u povodu prijedloga stranke (čl. 176, st. 1. ZPP Srbije). Sud u oglednom postupku može odrediti prekid postupka (čl. 213, st. 2, t. 3 ZPP), a sud koji je pokrenuo postupku dužan je zastati s postupkom dok Vrhovni kasacioni sud ne završi s postupkom (čl. 176, st. 2. ZPP Srbije). Vrijeme potrebno za donošenje odluke znatno je dulje u oglednom postupku – najmanje 135 dana jer se odvija u nekoliko stadija (15, 30 i 90 dana), a u postupku za rješavanje spornog pravnog pitanja svega 60 dana (čl. 183, st. 3. ZPP Srbije). Radi se samo o nekim modalitetima koji, osim različitih modela koji postoje u Hrvatskoj i Srbiji ukazuju na neka od bitnih obilježja postupka.

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[37] Čl. 61.a–61.f Zakona o parničnom postupku Federacije Bosne i Hercegovine, *Službene novine Federacije BIH*, br. 53/2003, 73/2005, 19/2006, 9872015, u daljnjem tekstu: ZPP FBiH. Postupak za rješavanje spornog pravnog pitanja u parnični postupak Federacije uveden je tek posljednjim izmjenama i dopunama Zakona o parničnom postupku FBiH 2015. godine.

[38] Zakon o obligacionim odnosima Federacije Bosne i Hercegovine, *Službeni list RBiH*, br. 2/92, 13/93, 13/94 i *Službene novine FBiH,* br. 29/03 , 42/11, u daljnjem tekstu: ZOO FBiH

[39] Zakon o deviznom poslovanju, *Službene novine,* br. 47/10, u daljnjem tekstu: ZDP FbiH.

[40] Pravno shvaćanje Vrhovnog suda FBiH 58 0 P 135023 16 Spp, od 25.05.2016. http://www.bih-pravo.org/pravno-shvatanje-kreditu-svicarskim-francima-t1164.html, 14. 10.2019.

Konačno, postupak radi rješavanja spornih pravnih pitanja pred Vrhovnim kasacionim sudom u Srbiji pokazao je i dokazao svoju vrijednost brojnim pravnim shvaćanjima koja su u povodu spornih pravnih pitanja donesena. S druge strane, ogledni postupak kao novi procesnopravni institut u Hrvatskoj tek bi trebao opravdati svoje uvođenje u hrvatsko parnično procesno pravo. Hoće li to uistinu biti slučaj ili je riječ tek o jednoj od novina koje će ostati zapamćene kao odredbe koje se ne primjenjuju, odluku ćemo ipak prepustiti praksi.

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MODEL PROCEEDINGS OR PROCEDURE
FOR SOLVING CONTESTED LEGAL ISSUES
– Similarities and differences –

Summary

The amended Croatian Civil Procedure Act of 2019 introduced a new type of proceedings to solve contested issues in the interest of uniform application of law: model proceedings. New provisions will apply to similar disputes already pending or expected to come before the courts containing the same legal issue important for uniform application of the law or its development in case law. On the other hand, Serbia already in 2004 introduced so-called proceedings for solving contested legal issues, which became a matter of public interest after a recent decision of the Serbian Court of Cassation on nullity of contractual provisions involving Swiss francs. Since those two types of proceedings share similar goals, their similarities and differences will be presented and assessed in this paper.

Key words: model proceedings, proceedings for solving contested legal issues, uniform application of law, precedent, binding effect of decisions

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TRENDS IN RESPECT OF SPECIALIZATION OF COMMERCIAL DISPUTES JUDICIARY

In this paper, the authors are analyzing the trends of the development of the specialization of courts in the field of commercial disputes. Through the analysis, the authors set forth the arguments "pro" and "against" the specialization of the judiciary in this legal field. Also, the authors are analyzing the models of specialization of the judiciary. Special attention is paid to analyzing the experiences of the United States of America, United Kingdom, Germany, France, Italy, Switzerland and the Netherlands, as well as countries from the region, such as Serbia, Croatia and Montenegro. The Macedonian judicial experience in this area is analyzed in both periods of development, the period before the abolition of the commercial courts and the period after their abolition.

Key words: Court Specialization, Judiciary, Commercial Courts, Commercial Disputes

SPECIALIZATION OF JUDICIARY AND COMMERICAL DISPUTES – DEVELOPMENT AND CONTEMPORARY EXPERIENCES

The specialization of the judiciary, in a variety of shapes, is encompassing an increasingly larger segment within the judicial system. As stated in the March 2012 report by the Working Party of the Working Party of the Consultative Coun-

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cil of European Judges (CCJE): "The main reason for specialization of the judiciary is the increased specialization of the law itself and the growth of complex legal relations."[1] In addition, another reason for specialization of courts is the social context, i.e. the needs of the society for courts to show greater expertise and efficiency.[2] Also, the specialization present in the practise of law by attorneys and public prosecutor services, influences the specialization of the judiciary.[3]

The globalisation of commercial relations is also reflected in the globalisation of the judiciary in the area of commercial disputes. This refers to the creation of a specialised commercial judiciary intended to address as many foreign-related disputes as likely to be referred to an arbitration institution. Thus, such specialization represents a competition to arbitration dispute resolution. This process began in the UK and since then, has spread in France, Germany, Belgium and the Netherlands. On March 17, 2017, the French Minister of Justice requested the High Legal Committee of the Financial Market of Paris to prepare a report on the probability of establishing a specialised judicial department responsible for international commercial disputes under the Court of Appeal of Paris.[4] These specialised judicial councils in France would comprise of judges with experience in commercial law, financial law, economics, as well as English language proficiency needed to conduct the procedure.[5] A particular advantage for France, compared to Britain as its competitor after the Brexit, is the fact that France, as a member of the European Union, will benefit from the effects of automatic recognition and enforcement of judicial decisions in other EU member states.[6]

In the Netherlands, the new Dutch Commercial Court started work in 2018, whereby English and Dutch will be the languages of the proceedings, with specialization of judges, thus making the procedures more efficient and faster.[7] The first case of this Court was the case of Elavon Financial Services DAC v. IPS Holding B.V. and others in February 2019.

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[1] Heike Gramckow, Barry Walsh, *Developing Specialized Court Services – International Experiences and Lessons Learned*, The World Bank, 2013, available at: *http://documents.worldbank.org/curated/en/688441468335989050/pdf/819460WP0Devel00Box379851B00PUBLIC0.pdf,* 22.3.2018.

[2] *Ibidem,* p. 9.

[3] *Ibidem,* p. 9.

[4] Ioana Knoll Tudor, "Specialized chambers for international commercial disputes: Paris in the spotlight", Kluwer arbitration blog, 2018, available at: *http://arbitrationblog.kluwerarbitration.com/2018/02/14/specialised-chambers-international-commercial-disputes-paris-spotlight/*, 25.7.2019.

[5] *Ibidem.*

[6] *Ibidem.*

[7] *Ibidem.*

In Belgium, the International Commercial Court is envisaged to start work in Brussels, with proceedings and judgments adopted in English. The rules of procedure before this court are basically similar to those derived from arbitration rules.[8] Until now, the proceedings in Belgian courts have been conducted in the official languages of Belgium, which is considered restrictive in international context.[9] The subject of this court's proceedings would be disputes in the field of international commercial transactions. The purpose of this court is to operate in line with the principle of a one stop shop, i.e. the judgments of the court would be final without the possibility to appeal.[10] Judges of this court shall be judges coming from Belgian courts. The jurisdiction of the court will be set out by the parties in their agreements.[11]

This trend has also been observed in Germany. Starting as of 2014, a pilot project was introduced in the court of Cologne, whereby proceedings requested by parties and cases of disputes with foreign elements, are conducted bilingually in both German and English.[12] During this period, it is also envisaged for a separate department to be set up at the Frankfurt Regional Court[13] whereby the procedure, at the request of the parties, may be fully conducted in English.[14]

The United States of America have also recognised the need for judiciary specialization in commercial disputes. The so-called constitutional courts have been operating within the United States pursuant to Article 3 of the US Constitution and the so-called legislative courts pursuant to Article 1 of the US Constitution.[15] In the United States, in accordance with their powers, federal states also develop specialised commercial judiciary. Delaware's Court of Chancery is the first

[8] *Ibidem.*

[9] Carlo Persyn, "An international business court in Brussels: a modern step forward", available at: *https://www.nautadutilh.com/en/information-centre/news/2017/11/an-international-business-court-in-brussels-a-modern-step-forward/*, 10.4.2018.

[10] Charles Price, "Brussels International Business Court", available at: *https://cew-law.be/brussels-international-business-court/?lang=en*, 10.4.2018.

[11] *Ibidem.*

[12] Martin Huff, "LG Koln Goes International", available at: *https://www.lto.de/recht/hintergruende /h/modellprojekt-in-nrw-lg-koeln-goes-international/*, 04.04.2018.

[13] Christoph Just, *"A New Landmark in International Commercial Litigation? - the Frankfurt high court installed a specialized chamber for international commercial matters"*, available at: https://www.schulte-lawyers.com/schulteblog/2882017-6y2e6, 05.04.2018.

[14] I. K. Tudor, *op.cit*.

[15] Marcus Zimmer, "Overview of Specialized Courts", available at: *https://www.iacajournal.org/articles/abstract/10.18352/ijca.111/*, 20.03.2018.

court in a separate federal state within the United States to specialise in commercial judiciary, founded in 1792. Having existed for more than two centuries, this court has created abundant case law and in this regard, has taken precedence over the courts of other US states.[16] In addition, the case law that this court has developed over the years influences the content of future legislative acts that need to be adopted.[17]Commercial departments in permanent courts have been established and fully operating in New York, Chicago, North Carolina, New Jersey, Philadelphia, Pennsylvania, Reno, Las Vegas, Massachusetts, Maryland, Orlando and Florida.[18] In December 1998, Judge Kaye announced the expansion of the commercial department in Nassau, Erie and Westchester counties.[19]

In 1895, a Commercial Court was established in the United Kingdom as a specialized judicial branch of the Queen's Bench Division. This Court handles commercial disputes, banking and finance, commercial representation, managerial agreements, freight forwarding agreements, insurance and reinsurance, import and export, etc.

Judicial specialization has also been accepted in France. Namely, there are several specialised courts in France: trade courts (tribunal de commerce), labour courts (conseil de prud'hommes), agricultural courts (tribunal paritaire des baux ruraux) and social protection courts (tribunal des affaires de sécurité sociale). Commercial courts are one of the oldest specialised judicial institutions established since the Middle Ages. There are currently 135 commercial courts in France. The jurisdiction of these courts is commercial disputes are as follows: disputes between merchants, disputes arising from commercial documents, as well as bankruptcy proceedings. These courts are also in charge of maintaining court registries.

The specialization of Italy's commercial judiciary has been carried out by enhancing the competences of specialised intellectual property disputes departments by assigning additional competences in the broader area of commercial law. Namely, Article 2 of Decree No. 1 of 24 December 2012 of the Italian Parliament as part of Act No. 27 of 24 March 2012 provides for a reform in existing di-

[16] Jill E. Fisch, "The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters", University of Cincinnati Law Review, (May 2000), available at: *https://ssrn.com/abstract=219550* or *http://dx.doi.org/10.2139/ssrn.219550,* 21.04.2018.

[17] Bach Mitchell, Lee Applebaum,"A History of Creation and Jurisdiction of Business Courts in the Last Decade", (November, 2004), The Business Lawyer, p. 152, available at: *https://www.jstor.org/stable/40688264?seq=1#page_scan_tab_contents*, 27.9.2018.

[18] *Ibidem,* p. 153.

[19] *Ibidem,* p. 154.

visions of industrial property courts, their deeper specialization and widening the competencies in a broader range of areas within statutory commercial law.[20]

In Switzerland, large commercial disputes are usually settled by regular courts, but the cantons of Zurich, Bern, St. Gallen and Aargau have established specialized commercial courts that work very successfully.[21] According to the Law on Civil Procedure, cantons can establish commercial courts in their territory as first instance courts for commercial disputes.[22] The decisions of the cantonal commercial courts can only be appealed to the Supreme Court of Switzerland. Commercial disputes over which these courts have jurisdiction are disputes in which 1) the disputed matter is the business of at least one of the parties, 2) the value of the dispute is at least 30,000 Swiss francs, and 3) the parties have been registered as merchants in the Swiss Trade Register or in a similar foreign register.[23] These three conditions must be met cumulatively.[24]

REASONS FOR SPECIALIZATION IN THE TRADE DISPUTES FIELD – PROs and CONs

Court specialization is a useful and efficient mechanism seeking to solve a wide range of issues, such as the need to effectively enforce contractual obligations, improve the business environment or better protect the rights of commercial entities.[25]

Various studies conducted in the United States of America and Australia have shown that the specialization of courts can lead to reduced length of court proceedings for complex cases requiring the expertise of the decision-makers and the parties involved in the procedure, which are mostly related to the areas of Bankruptcy Law, Environmental Law, Business Law, etc.[26]

Generally speaking, the reasons for specialization of courts or special court departments include the following:

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[20] Francesca Squillante, "The Institution of the Italian "Commercial Courts" and its Impact on Antitrust Damages Actions", available at: *iar.agcm.it/article/download/9453/8658,* 22.03.2018.

[21] Urs Feller, Marcel Frey, Bernhard C Lauterburg,"*Litigation and Enforcement in Switzerland: Overview*", available at: *https://uk.practicallaw.thomsonreuters.com/1-502-1695?transitionType= Default&co ntextData=(sc.Default)&firstPage=true&bhcp=1*, 28.03.2018.

[22] *Ibidem.*

[23] *Ibidem.*

[24] *Ibidem.*

[25] H. Gramckow, B. Walsh, p. 5.

[26] *Ibidem,* p. 5.

a) Efficiency improvement. The specialization of judges as well as administrative staff in specialized courts affects the efficiency of the procedure as well as the overall case management process;

b) The establishment of specialized courts and the transfer of cases also affect the unloading of general jurisdiction courts;

c) The specialization of judges leads to better quality decisions, especially in complex cases requiring more specific knowledge. Their vast experience and expertise will lead to better decisions that will result in better outcomes;

d) The introduction of specialized courts with special jurisdiction will lead to the creation of uniform case law in the particular area of jurisdiction which is likely lead to a greater degree of predictability of court decisions and increased confidence in courts, as well as an assumption to reduce appealed cases.[27]

Some studies also note certain considerations. For example, the establishment of specialized courts is considered a privilege of the addressee group concerned, while other entities should rely on courts with regular (general) jurisdiction.[28] Some research indicates that the specialization of courts represents merely a duplication of the work of existing experts (an example of such dispute resolution mechanisms envisaged in construction disputes - *dispute boards* - composed of experts specializing in the issue), without supplementing any added value.[29] In addition, apart from the establishment of specialized courts, measures need to be taken to improve the situation in the overall justice system. It can be noted that in the short term, the transfer of cases from courts with general jurisdiction to specialized courts can have a positive impact in terms of relieving the former courts. Yet, if the change benefits only a smaller group of service users and the positive results are not transferred on to the entire judicial system, then the court's specialization process will be called into question.[30] It is also considered that it might be more prudent to exploit funds needed to set up and operate specialized courts to improve courts of general jurisdiction.[31] One observation is the fact that judges working in specialized courts may focus on a particular specialty, and at the same time narrow their view to other fields of the law, which may result in limiting their ability to take into account other parts of the law while deciding. With the specialization itself, the assumption is that judges, since they will work consistently with only a narrow circle of entities, can develop personal relationships with

[27] *Ibidem,* p. 10. Also see: M. Zimmer, p. 2.

[28] H. Gramckow, B.Walsh, p. 5.

[29] *Ibidem,* p. 11.

[30] *Ibidem,* p. 12.

[31] *Ibidem,* p. 5.

these entities thus limiting their objectivity.[32] These studies underpin that there is a risk of creating a closed circle of judges, lawyers and experts who deal only with cases under the jurisdiction of a specialized court and there is a risk of establishing informal relationships between them that can lead to special privileged relationships. Such a relationship, for some, is a risk that may affect the principle of impartiality especially for small jurisdictions.[33]

MEHTODS OF IMPLEMENTING JUDICIAL SPECIALIZATION

The specialization of courts can be conducted in various forms. The chosen model should correspond with the problem to be solved with the specialization and it can vary from country to country, depending primarily on the number of cases as well as the complexity of the cases covered by the specialization.[34]

Comparative practice shows the following models of organizational structure of specialized courts: a) the establishment of separate courts; b) the establishment of a separate judicial department or department within the existing court; c) the specialization of individual judges who will acquire special knowledge in a particular narrow area or of specialized judicial councils within an existing court.

In 1980, the United States Congress set up a Federal Courts Study Committee to investigate a number of issues and evaluate the work of specialized courts. In 1990, a special report of this Committee set out, *inter alia*, the criteria to determine when a specialized court could and should be established: 1) the subject matter of the dispute belongs to a separate area which may be divided from other law fields; 2) the area of specialization covers a large number of cases that are a burden on the existing courts and the redirection of these disputes to the specialized court will result in relieving the existing regular courts; 3) the cases cover matters of a technical and expert nature, the handling of which requires the judge to have special expertise; 4) there is uniformity in the administration of the subject area.[35]

Special criteria have also been given by Edward Cazalet who took into account the specifics of the English legal system.[36]

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[32] *Ibidem,* p. 5.

[33] *Ibidem,* p. 12.

[34] For the specialization of the judiciary in general see: Dragana Kiprijanovska, "За концептот на специјализирано судство", available at: *http://ihr.org.mk/p.php?pid=329*, 11.04.2018.

[35] *Ibidem,* p. 18.

[36] H. Gramckow, B. Walsh, p. 15.

In terms of the actual jurisdiction entrusted to specialized commercial courts, there are also different approaches and solutions. The general rule is that there should be a clear distinction between the jurisdiction of specialized courts and the courts of general jurisdiction in order not to overlap their jurisdiction, that is, to avoid a situation where those are competing with each other and there is a conflict between them. [37]

SPECIALIZATION OF JUDICIARY AND COMMERICAL DISPUTES – REGIONAL EXPERIENCES

In the Republic of Croatia, the judicial power is exercised by regular and specialized courts and the Supreme Court of Croatia.[38] The following specialized courts have also been envisaged in Croatia: Commercial Courts, Administrative Courts, the High Commercial Court, the High Administrative Court and the High Misdemeanour Court.[39] The competences of the Commercial Courts are set out in Article 21 of the Law on Courts of the Republic of Croatia. In addition, the provisions of Article 34b of the Code of Civil Procedure are also relevant.[40]

Pursuant to Article 11 Paragraph 2 of the Law on the organization of courts in the Republic of Serbia there are regular courts and courts with special jurisdictions.[41] The competences of the Commercial Courts of Serbia as courts of first instance are regulated by Article 25 of the Law on Courts.[42] The second instance court for dealing with commercial disputes is the Commercial Court of Appeal, whose jurisdiction is regulated with Article 26 of the Law on Courts.

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[37] M. Zimmer, p. 5.

[38] Article 14, Paragraph 2 of the Law on Courts, [*Official Gazette (Narodne novine)*, no. 28/13, 33/15. 82/15, 82/16 and 67/18], available at: *https://www.zakon.hr/z/122/Zakon-o-sudovima*, (in Croatian), 14.9.2019 https://www.zakon.hr/z/122/Zakon-o-sudovima.

[39] *Ibidem,* Article 14, Paragraph 3,

[40] Law on Litigation Procedure [*Official Gazette (Narodne Novine)*, no. 53/91, 91/92, 112/99, 88/01, 117/03, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14 and 70/19], available at: *https://www.zakon.hr/z/134/ Zakon-o-parni%C4%8Dnom-postupku*, (in Croatian), 19.9.2019https://www.zakon.hr/z/134/Zakon-o-parni%C4%8Dnom-postupku.

[41] Law on the Organization of Courts, *Official Gazette (Službeni glasnik RS)*, no. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011, 101/2013, 106/2015, 40/2015, 13/2016, 108/2016, 113/2017, 65/2018, 87/2018, and 88/2018, available at: *https://www.paragraf.rs/propisi/zakon_o_uredjenju_sudova.html,* (in Serbian), 15.3.2019. https://www.paragraf.rs/propisi/zakon_o_uredjenju_sudova.html

[42] *Ibidem*.

The establishment of specialized commercial courts was also foreseen in the 2015 Law on Courts in Montenegro[43]. The Rules on the Specialized Commercial Court are contained in Articles 17 and 18 of the referred Law.

From the above stated, it can be concluded that in all three countries (Serbia, Croatia and Montenegro) specialized commercial courts have been established to resolve first instance commercial disputes. What is different in these countries is the second instance proceedings. Namely, in Serbia and Croatia, there is also second instance judicial specialization, while in Montenegro there is only one-instance commercial court.

SPECIALIZATION OF THE JUDICIARY AND COMMERCIAL DISPUTES IN THE REPUBLIC OF NORTH MACEDONIA

a) Development phases of the commercial judiciary in the Republic of North Macedonia

The specialization of the judiciary in the Republic of North Macedonia in any of the foregoing models is present in different areas of law (an example is the administrative judiciary). This is an indication of the advantages and the importance of specialization for the entire judiciary system.

Judicial reforms are among the key state priorities of the Republic of North Macedonia. One of the priorities listed in the "Economic Priorities Program 2018-2020", prepared by the Ministry of Finance, and published in January 2018, is the P5 priority which encompasses "strengthening the independence and capacity of the commercial courts", aimed at increasing the capacity of commercial departments within permanent courts.

The need to develop a specialized judiciary, as well as the promotion and development of alternative ways of resolving disputes have also been noted in the 2019 European Union Progress Report on EU membership for North Macedonia.[44] According to the data presented in the 2018 Progress Report on EU membership for North Macedonia, in our country there are 25 judges per 100,000 inhabitants, whereas in the European Union there are 21.5 judges per 100,000 inhabitants.[45] The fact that, on average, there are more judges working in North

[43] Law on Courts, *Official Gazette (Službeni List CG)*, no. 11/2015, available at: *https://sudovi.me/podaci/vrhs/dokumenta/2171.pdf*, (in Montenegrin), 03.09.2019.

[44] "North Macedonia 2019 Report", available at: *https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf*https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf, 02.06.2019, p. 10.

[45] *Ibidem*.

Macedonia and procedures are still slower and less efficient shows that the proper allocation of judges and resources has not been made.

As a basic *lex generalis* law, the Law on Courts provides the basis for specialization of the judiciary. In this sense, Article 12, Paragraph (1) of this Law outlines that "the work of courts shall normally be carried out in specialized court departments.[46] In addition, specialization of judges shall also be provided within the specialized judicial department.[47]

The Law on Courts provides for specialized courts in the field of administrative law.[48]

Given the fact that significant issues related to commercial relations have been delegated to first instance courts with extended jurisdiction, it is expected that first instance courts with extended jurisdiction will be directed to specialization in the area of commercial relations. Namely, the courts of first instance with expanded jurisdiction resolve: disputes in property matters, legal and other civil-legal relations of natural and legal entities, whose value is above EUR 50,000 in MK Dequivalent, unless the law provides for jurisdiction of another court; in commercial disputes in which both parties are legal entities or state bodies, as well as disputes over copyright and other related rights and industrial property rights; in bankruptcy and liquidation proceedings; in disputes for determining and ensuring enforced execution and disputes of domestic legal and foreign entities arising from their mutual commercial or trade relations.[49]

The judicial system of the Republic of North Macedonia used to practise the functioning of separate commercial courts acting as a separate judicial institution as of 1954 until the adoption of the Law on Courts in 1995, when these judicial institutions were abolished.[50] In this regard, the motives for the abolition of the commercial judiciary (the District Commercial Courts and the Commercial Court of the Socialist Republic of Macedonia) remain unclear, given the fact that these times were marked by the transition to a market economy, the creation

[46] Article 12, Paragraph (2) of the Law on Courts, *Official Gazette of the Republic of Macedonia (Службен Весник на Република Македонија)* no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018 and 198/2018 and *Official Gazette of the Republic of North Macedonia* (*Службен Весник на Република Северна Македонија)* no. 96/2019, (in Macedonian) - hereinafter "LC").

[47] Article 12, Paragraph (3) of the LC.

[48] Article 22 of the LC.

[49] Article 31, Paragraph (2) of the LC.

[50] Article 111 of the Law on Courts, *Official Gazette of the Republic of Macedonia (Службен Весник на Република Македонија)* no. 36/95, 45/95 and 64/2003.

of commercial entities by market order and the privatization of social capital. Had the specialized commercial courts with proper expertise to handle complex cases during the transition and privatization period continued to operate, the outcome of certain historical processes might have been different.

For the first time, such courts were established in accordance with the Law on Commercial Courts of the Federal People's Republic of Yugoslavia[51] of 1954, as well as the Law on Commercial Courts of the Socialist Republic of Macedonia.[52] Pursuant to Article 2 of the Law on Commercial Courts of the Federal People's Republic of Yugoslavia, the commercial judiciary was organised through District Commercial Courts, High Commercial Courts and the Supreme Commercial Court. This approach was further extended by the 1976 Law on Regular Courts of the Socialist Republic of Macedonia.[53] According to Article 31 of this Law, separate judicial institutions were envisaged as District Commercial Courts (based in Skopje, Bitola and Shtip) and a Commercial Court of Socialist Republic of Macedonia (based in Skopje).[54] The Commercial Court of Macedonia, pursuant to the Law on the Regular Courts of Socialist Republic of Macedonia, Article 47, was supposed to decide: a) within the jurisdiction established by law, upon appeals against judgments and other decisions of District Commercial Courts; b) in first instance when stipulated by law; (c) resolve disputes concerning jurisdiction between District Commercial Courts.

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[51] *Official Gazette of FPRY* no. 31/54.

[52] *Official gazette of SRM* no. 42/65.

[53] *Official gazette of SRM* no. 10/76.

[54] The jurisdiction of the District Commercial Courts under Article 45 of the Law on Regular Courts of the Socialist Republic of Macedonia provides for them: a) to adjudicate in first instance commercial and maritime disputes, disputes for damage compensation in which socio-political communities are parties; affiliated labor organizations, self-governing interest communities and other self-governing organizations and communities, regardless of the value of the subject matter in dispute; b) to conduct the proceedings and to adjudicate in first instance for commercial offenses; c) to adjudicate commercial disputes relating to the protection and use of inventions, specimens, models and marks and the right to operate a company; d) to carry out the procedure for enforced settlement and bankruptcy and the procedure for regular liquidation of affiliated labor organizations and to adjudicate disputes arising in the course of the proceedings irrespective of the value of the dispute and the nature of the parties to the dispute; e) to maintain a court register of affiliated labor organizations and other organizations provided by law; f) to carry out the enforcement of commercial court decisions in commercial disputes and commercial offenses, except for real estate; g) to settle commercial disputes between domestic legal entities and foreign natural or legal entities, as well as mutual commercial disputes of foreign natural or legal entities; h) to decide in first instance on the legality of individual acts in administrative-accounting disputes; i) to perform other activities established by law.

b) Current situation of commercial disputes in the Republic of Macedonia

Commercial Disputes by year	Unresolved cases from the previous year	Newly accepted	Total under consideration	Resolved
2018	516	382	893	414
2017	585	455	1032	516
2016	716	249	964	341
2015	929	626	1725	863

Table 1: Number of commercial disputes in the Basic Court Skopje II - Skopje (Source: Annual Report on the Work of the Basic Court Skopje II - Skopje for 2018, 2017, 2016 and 2015)

Bankruptcy	Unresolved cases from the previous year	Newly accepted	Total under consideration	Resolved
2018	348	329	677	385
2017	340	1226	1566	1218
2016	242	227	469	180
2015	597	394	997	751

Table 2: Number of bankruptcy proceedings in the Basic Court Skopje II – Skopje (Source: Annual Report on the Work of the Basic Court Skopje II - Skopje for 2018, 2017, 2016 and 2015)

From the analysis of the data contained in Tables 1 and 2 which represent the movement trends of the number of cases in the area of commercial disputes and bankruptcy in the Basic Court Skopje II in Skopje, it can be concluded that there are a significant number of cases. If these cases were assigned to specialized commercial courts, on the one hand, the Basic Court Skopje II in Skopje would be relieved, whereas on the other hand, the very fact that a specialized court would concentrate on handling these cases would improve the efficiency and certainly shorten the duration of the proceedings.

CONCLUSION

Possessing specialized knowledge and expertise of the subject matter in dispute resolution and adjudication is of great benefit to the parties in the dispute. As the parties are brought before a court with a capacity, knowledge and skills to decide complex cases, the basic precondition for effective legal protection and adjudication is provided within short time periods.

Specialization of the judiciary in various forms is present in many countries worldwide. In this regard, the modalities of introducing judicial specialization

are most often present in the model of establishing separate autonomous judicial institutions competent for resolving commercial law disputes and the model of establishing specialized judicial departments that will deal with commercial law cases. The model to be introduced shall depend on a number of general factors specific to the particular country, including the social, sociological, cultural and economic context.

It is not by accident that special interdisciplinary scientific fields have been developing, such as economic analysis of law and neo-institutionalism, whose methodological approach could help make a particular political decision as to whether, and what specialized courts are needed in one country, including the Republic of North Macedonia.

The globalisation of commercial relations has also led to globalisation of justice. There is an increasing number of examples on the establishment of specialized court departments for foreign-trade disputes, which incorporate elements of arbitration in their proceedings and, in some ways, present competition to arbitration institutions. Examples of this can be found in the UK, Germany, France, and the Netherlands.

From the above stated it can be noted that there are certain parameters that help to assess the justification for judicial specialization. Within these parameters we can specify: a) the number of subject matters encompassed with the specialization, b) the complexity of the cases, c) the length of their final settlement, d) the size of the country and the number of inhabitants, e) the capacity to implement specialization - above all, a sufficient number of specialized staff; f) the range of legal areas entrusted to the specialized judiciary, etc.

Regional experiences embrace the model of specialized commercial judiciary through the formation of separate commercial courts. Such examples in the region are present in countries larger in territory and population than North Macedonia (Serbia and Croatia), but also in smaller ones than North Macedonia (Montenegro). In these three countries, the model of establishing a separate judicial institution specialized for commercial disputes in first instance has already been accepted, while in Serbia and Croatia the establishment of a second instance specialized court disputes institution has also been envisaged. The experience of the judiciary system in the Republic of North Macedonia shows that the specialization of the courts is present in one or another model. In certain areas of law, there are special judicial instances, in first and second instance (the example of the Administrative Court and the Higher Administrative Court of the Republic of North Macedonia), or specialization in other areas of the former is organised in separate specialized judicial departments.

If we analyse the comparative experiences, as well as the generally accepted parameters that determine the need to establish a specialized court or not, in the context of our position on the formation of separate specialized commercial courts, we can conclude that:

– The establishment of a specialized commercial court will have a positive effect on the overall judiciary system in the Republic of North Macedonia and it will lead to improved efficiency in resolving commercial disputes,

It would be appropriate for such institutions to be established in first and second instance following the example of the administrative judiciary already established, which would be based in Skopje, competent for the entire territory of the Republic of North Macedonia (as a variant, the first instance commercial judiciary could be arranged with separate seats for all four appellate areas), and

–The specialized commercial judiciary would have jurisdiction over a number of cases in the area of statutory commercial law, including insolvency law, commercial agreements, securities, intellectual property rights and even labour disputes in the part of the so-called managerial agreements, given their particular legal nature.

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TRENDOVI U VEZI IZDVAJANJA PRIVREDNIH SUDOVA KAO SUDOVA POSEBNE NADLEŽNOSTI

Rezime

U radu autori analiziraju trendove razvoja sudova posebne nadležnosti u oblasti privrednog prava. Autori kroz analizu iznose argumente "za" i "protiv" specijalizacije pravosuđa u ovoj oblasti. Takođe, u radu je ukazano na forme specijalizacije pravosuđa. Posebna pažnja posvećena je analizi stanja u Sjedinjenim Američkim Državama, Velikoj Britaniji, Nemačkoj, Francuskoj, Italiji, Švajcarskoj i Holandiji i zemljama iz regiona, kao što su Srbija, Hrvatska i Crna Gora. Iskustvo Makedonije analizirano je u oba perioda razvoja, u periodu pre ukidanja *privrednih sudova i u periodu nakon njihovog ukidanja.*

Ključne reči: sudovi posebne nadležnosti, pravosuđe, privredni sudovi, privredni sporovi

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DJELOVANJE ZAJEDNICE (POOLA) PRAVA GLASA

Obrađuje se zajednica prava glasa koja se naziva i poolom prava glasa u društvu. Određuje se pojam zajednice kao društva koje je po pravnoj naravi ortaštvo. Iznose se razlozi za osnivanje takvog društva i njegov cilj. Navodi se da je cilj toga društva određivanje strategije zajedničkog djelovanja nekih ili svih članova glavnoga društva i njezino provođenje u jednome ili više glavnih društava. Ističe se da se takve zajednice najviše osnivaju u društvima kapitala s velikim brojem članova. Posebno se obrađuje ugovor kojim se osniva zajednica, njegovo sklapanje, sadržaj i izmjene. Razmatra se način rada zajednice kada su pojedinosti o tome uređene ugovorom kojim se stvara zajednica i kada to ugovor ne uređuje ili manjkavo uređuje. Posebno se raspravlja donošenje odluka, njihova obveznost za članove zajednice i ukazuje na posljedice za članove zajednice ako po njima ne postupe. Razrađuju se pojedini slučajevi nepostupanja po donesenim odlukama. Razmatra se odnos odlučivanja u zajednici i u glavnome društvu kao i učinci u glavnome društvu pri donošenju različitih odluka uz postupanje u ostvarivanju prava glasa u skladu s odlukama zajednice i protivno tome. Iznosi se i koju ulogu u tome može imati sud te sumnje u njezinu djelotvornost.

Ključne riječi: *zajednica prava glasa, ugovor o vezanju glasova, ortaštvo, odlučivanje u zajednici prava glasa, glavno društvo*

POJAM ZAJEDNICE PRAVA GLASA

Članovi u društvu pri donošenju odluka ostvaruju svoj interes korištenjem prava glasa. Usmjerenje ostvarenju zajedničkog cilja – cilja društva može biti mo-

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tivirano različitim interesima pojedinih njegovih članova. Nema li neki član društva u njemu dovoljno veliki udio da na temelju njega može, ostvarujući u društvu pravo glasa, sam odlučno utjecati na ostvarenje nekog svog interesa, mora koalirati s drugim članovima koji se nalaze u sličnom položaju. U većim društvima, naročito u društvima kapitala, to će lako biti slučaj. Dogovaranjem s drugim članovima postiže se onaj učinak koji ne bi bio moguć pojedinačnim djelovanjem. Takvo je dogovaranje moguće od slučaja do slučaja, prigodno povodom sudjelovanja na glavnoj skupštini ili skupštini društva, odnosno svugdje tamo gdje članovi društva glasovanjem ostvaruju svoje pravo u društvu. No, kada je riječ o tome da se osigura trajnije djelovanje društva onako kako to odgovara interesima nekih njegovih članova, potrebno je da se dogovaranje osigura na trajnijoj osnovi. Da bi osigurali postupanje pri ostvarivanju prava glasa onako kako se dogovore, članovi društva u vezi sa svojim pravom glasa mogu osnovati zajednicu kojoj je cilj da njezini članovi pri ostvarivanju prava glasa u društvu postupaju tako da se donose odluke koje su u njihovom zajedničkom unaprijed dogovorenom interesu. Drugim riječima rečeno, cilj zajednice je da se u njoj određuje strategija postupanja osoba koje je čine pri ostvarivanju njihovih interesa u društvu i osigura njezino provođenje.

Takva je zajednica istih osoba moguća u jednome ili u više društava. Osobe koje su članovi u više društava mogu stvarati i provoditi strategiju postupanja pri glasovanju u svim tim ili u nekima od društava u kojima su članovi. To mogu biti različiti tipovi društva. U svakome od njih sudjelovat će s pravom glasa u skladu s tipom društva i njegovim internim aktima. Tako se postiže ostvarenje interesa koji su im zajednički na širem poslovnom planu i sigurnost članova tih društava da će se provoditi dogovorena strategija djelovanja svih društava u kojima članovi zajednice ostvaruju pravo glasa, razumije se prema dometu utjecaja koji mogu imati u svakome od tih društava s obzirom na tip pojedinog društva.

Radi ostvarenja takvog zajedničkog interesa članovi društva koji pripadaju istoj interesnoj skupini (*stakeholders*) mogu sklopiti ugovor o vezanju glasova,[1] kojim se međusobno obvezuju na usklađeno djelovanje pri ostvarivanju prava glasa u društvu. Pritom valja razlikovati je li riječ o ugovoru kojim se neki član ili članovi društva od slučaja do slučaja obvezuju da će glasovati za neku odluku ako druga ugovorna strana glasuje za neku drugu odluku, kada je riječ o sinalagmatičnom obveznopravnom ugovoru, od slučaja kada neki ili svi članovi društva

[1] O ugovorima o vezanju glasova među dioničarima i članovima društva s ograničenom odgovornošću, v. u: Jakša Barbić, *Pravo društava, knjiga druga društva kapitala, sv. I. dioničko društvo*, Zagreb, 6. izd. 2013, str. 604–607 i isti autor, *Pravo društava, knjiga druga društva kapitala, sv. II.,* Zagreb, 6. izd. 2013, str. 279–283.

ugovaraju da će glasovati onako kako se dogovore pri donošenju odluka u društvu, tj. kako će odlučivati o istom sadržaju odluke. U ovom drugom slučaju riječ je o društvu koje se temelji na pravnom poslu – ugovoru o vezanju glasova.[2] Riječ je o privatnopravnoj zajednici članova glavnog društva sa zajedničkim ciljem preuzimanja utjecaja u tom društvu.[3] Ono je ortaštvo.[4] Na njega se primjenjuju odredbe hrvatskog Zakona o obveznim odnosima (ZOO) kojima se uređuje to društvo, ako ugovorom nije što drugo predviđeno.

UGOVOR O VEZANJU GLASOVA

Za ugovor kojim se vezuju glasovi i time osniva zajednica imatelja prava glasa u glavnom društvu ne traži se neki poseban oblik pa bi ga se moglo sklopiti u svakom obliku u kome se valjano izjavljuje volja pa i konkludentnim radnjama članova glavnog društva, primjerice tako da neki članovi društva započnu dogovaranje o načinu kako će postupiti pri glasovanju i po tome postupe. U praksi, naročito ako je riječ o stvaranju zajednice koja ne djeluje samo prigodno, ti se ugovori sklapaju u pisanom obliku. Ugovor je konsenzualan. On nije sastavni dio statuta ili društvenog ugovora glavnog društva ali se u njima može predvidjeti da je sklapanje takvog ugovora dopušteno, što bi bilo i onda kada se to ne bi predvidjelo, ili se može narediti da ga se sklopi.[5]

Ugovorom se uređuje:

1. tko su članovi zajednice i koji im je zajednički cilj;
2. tko i koliko prava glasa u glavnom društvu/glavnim društvima unosi u zajednicu;
3. kakva je unutarnja organizacija zajednice i kako se u njoj odlučuje;
4. koje su obveze a koja prava članova zajednice u vezi s ostvarivanjem prava glasa u glavnom društvu/glavnim društvima;
5. unose li se u zajednicu dionice i udjeli u glavnom društvu/glavnim društvima tako da čine zajedničku imovinu članova zajednice čime bi ona postala ortaštvo koje je član glavnog društva/glavnih društava (zapravo članovi zajednice kao zajednički imatelji udjela) a ne bi bila samo zajednica imatelja prava glasa u tome društvu/društvima ili oni ostaju njezinim članovima, što je u pravilu slučaj;

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[2] Tako, Lutz Weipert, u: Gummert/Weipert, *Münchener Handbuch des Gesellschaftsrechts*, Bd. 1, München, 4. izd. 2014, str. 857.

[3] Michael Martinek, *Moderne Vertragstypen*, Bd. III, München, 1993, str. 174.

[4] Tako i L. Weipert, o.c. u bilj. 3, str. 858.

[5] Karsten Schmidt, *Gesellschaftsrecht*, Köln, Berlin, Bonn, München, 4. izd., 2002, str. 617.

6. ostvaruju li članovi zajednice svaki svoje pravo glasa ili to za njih čini neki član zajednice ili treća osoba;

7. obvezuju li se članovi zajednice na davanje punomoći za glasovanje u glavnome društvu i kome, tj. osobi koja je unaprijed za to određena ili koju će odlukom odrediti članovi zajednice;

8. eventualna ugovorna kazna, *liquidated damages* i eventualne druge sankcije za povredu ugovora o vezanju glasova uključujući i pravo na naknadu štete koje bi postojalo i kada ne bi bilo predviđeno ugovorom;

9. financijska sredstva potrebna za održavanje zajednice i njihovo pribavljanje;

10. način pristupanja zajednici pa i eventualno obvezivanje njezinih članova da na pristupanje zajednici obvežu onoga kome prenose udio u glavnom društvu i izlaska iz zajednice a članove zajednice da se s time unaprijed suglase za sve slučajeve prijenosa ili da to učine kasnije odvojeno za pojedini slučaj prijenosa;

11. drugi načini prestanka članstva u zajednici i učinci toga (npr. smrt člana, statusna promjena);

12. način izmjene ugovora;

13. način rješavanja sporova među članovima zajednice u vezi s članstvom u njoj, trajanje zajednice i dr.

Nije bitno da se u ugovoru spomene zajednica, za koju se obično koristi naziv *pool* ili konzorcij, dovoljno je da se uzajamno preuzmu obveze u vezi s ostvarenjem prava glasa i predvidi način kako će se to činiti. Samim time nastaje zajednica. S obzirom na posebitosti tog ortaštva korisno ih je urediti ugovorom, kako ne bi došlo do primjene općih odredbi ZOO-a o ortaštvu ako one ne bi odgovarale volji članova zajednice i naravi toga društva.

Ugovorom o vezanju glasova kojim se stvara zajednica ne postupa se protivno odredbama čl. 631, st. 1. toč. 4. i 5. hrvatskog Zakona o trgovačkim društvima (ZTD), ako je riječ o tome da se dioničari samo obvezuju kako će glasovati na glavnoj skupštini. Tim se propisima i kaznom propisanom u st. 2. spomenutog članka, naime, sankcionira korištenje tuđih dionica radi ostvarivanja prava glasa davanjem ili obećavanjem posebne koristi ili njihovo prenošenje nekom drugom da bi se to ostvarilo uz davanje ili obećanje neke posebne koristi. Prednosti koje dioničari imaju stvaranjem zajednice, djelujući putem nje u odnosu na ono što bi ostvarili pojedinačnim odvojenim međusobno neusklađenim postupanjem pri ostvarivanju prava glasa, nisu posebna korist koja bi imala za posljedicu da bi takav ugovor bio ništetan.[6] Pod sankciju spomenutih odredbi potpada samo slučaj kada dioničar prepušta drugome ostvarenje svog prava glasa i tako ga komer-

[6] M. Martinek, o.c. u bilj. 4, str. 176.

cijalizira da samo on ima od toga posebnu korist a ne i svi članovi zajednice. Tada je riječ o kupovanju glasova koje je zbog zabrane toga ništetno.[7]

Spomenutim ugovorom ne bi se smjelo zaobilaziti ni slučajeve kada je članu zajednice isključeno pravo glasa u glavnoj skupštini odnosno u skupštini glavnog društva.[8] To bi bilo zabranjeno zaobilaženje zakonske zabrane (*in fraudem legis agere*) propisane prisilnim propisima. Takvim bi se zaobilaženjem smatrao slučaj kada bi se, ugovorom kojim se stvara zajednica, dioničaru ili članu društva s ograničenom odgovornošću za slučaj kada mu je isključeno pravo glasa dalo pravo davanja uputa o glasovanju onome tko će glasovati na temelju dionica odnosno poslovnih udjela u zajednici ili na temelju uputa koje daju članovi zajednice. Tada bi netko tko nije ovlašten glasovati zapravo to činio preko onoga kome daje upute. Ugovor bi u tome dijelu bio bez učinka.[9] Onaj tko glasuje u ime članova zajednice ne bi ni u kom slučaju mogao glasovati na temelju dionica odnosno poslovnog udjela ili udjela onog dioničara odnosno člana društva s ograničenom odgovornošću ili nekog drugog društva kome je pravo glasa isključeno u odlučivanju o nekom određenom pitanju. Glasovi koji bi eventualno bili dani protivno tome bili bi ništetni. To ne utječe na valjanost drugih glasova koji se daju na temelju dionica ili udjela onih njihovih imatelja kojima pravo glasa u konkretnom slučaju nije isključeno.

Otvara se pitanje može li dioničar, odnosno član društva kome je pravo glasa isključeno, davati upute o tome kako će se glasovati na temelju dionica odnosno poslovnih udjela ili udjela u pogledu kojih se prava glasa nalaze u zajednici, jer da bi time zapravo ostvarivao pravo glasa šire od onoga koje mu pripada na temelju njegovih dionica i poslovnih udjela odnosno udjela kada mu je to pravo inače isključeno. U tome treba razlikovati dva slučaja. Ako je takva osoba sama ovlaštena, na temelju ugovora o vezanju glasova, tj. u zajednici, davati upute za glasovanje, tako dani glasovi bili bi ništetni. Ako je pak sudjelovala u odlučivanju o davanju uputa za glasovanje, kada se za to traži neka većina određena ugovorom kojim je stvorena zajednica, pa njezin glas nije mogao utjecati na donošenje odluke, glasovi dani u skladu s dobivenom uputom, razumije se osim onih na temelju dionica odnosno poslovnih udjela te osobe, bili bi valjani. U protivnom

[7] Taj stav su zauzeli njemački sudovi.V. u M. Martinek, o.c. u bilj. 4, str. 176–177. Tako i K. Schmidt, *ibidem.*

[8] Za isključenje prava glasa dioničara v. u J. Barbić, o.c. u bilj. 2, sv. I., str. 575–581 i člana društva s ograničenom odgovornošću u J. Barbić, o.c. u bilj. 2, sv. II., 273–278.

[9] M. Martinek, o.c. u bilj. 4, str. 178; K. Schmidt, o.c. u bilj. 6, str. 617; Markus Roth, u Baumbach/Hopt, *Handelsgesetzbuch*, München, 36. izd., 2014, str. 656.

kaznilo bi se ostale članove zajednice samo zbog toga što je u odlučivanju o uputama sudjelovao član koji na to nije bio ovlašten, iako nije utjecao na odluku. Naprotiv, glasovi dani po dobivenim uputama ne bi bili valjani, ako bi sudjelovanje takvog člana bilo odlučujuće za davanje uputa.

Za izmjenu ugovora na kome se temelji zajednica potrebna je suglasnost svih članova koji je čine. To se može učiniti u bilo kom obliku pa i na konkludentan način, primjerice tako da svi članovi zajednice počnu postupati drukčije nego što je to prvotno bilo ugovoreno. Ugovorom se može olakšati ili otežati njegovu izmjenu. Olakšanje bi bilo kada bi se u ugovoru predvidjelo da se ugovor mijenja nekom većinom glasova članova zajednice, relativnom, apsolutnom od glasova svih članova, nekom drukčijom kvalificiranom većinom pa i tako da se kaže kako je potrebno da se za izmjenu izjasni neki ili izjasne neki članovi zajednice. U tome je prepuštena potpuna sloboda ugovaranja. Pritom je važno razlikovati uobičajene od neuobičajenih izmjena, tj. one o manje važnim ili o temeljnim pitanjima zajednice (ortaštva) pa olakšanje treba prihvatiti za slučajeve neuobičajenih izmjena samo ako nedvosmisleno proizlazi iz ugovora da je takvo olakšanje trebalo vrijediti i za takve izmjene. Otežanje izmjene ugovora bilo bi kada bi se njime predvidjelo da je za izmjenu potreban neki određeni oblik u kome bi se ona dogovorila, primjerice ako je ugovor bio sklopljen u usmenom obliku da je za izmjenu potreban pismeni oblik, ovjera potpisa kod javnog bilježnika i sl.

NAČIN RADA ZAJEDNICE

Djelovanje članova unutar zajednice ravna se po općim pravilima za djelovanje unutar ortaštva ako ugovorom o vezanju glasova nije što drugo predviđeno. To djelovanje mora biti usmjereno postizanju zajedničkog cilja – određivanjem kako će se koristiti pravo glasa članova zajednice u glavnome društvu i kako postići da se u tome društvu tako i postupi. Ono je važno za ostvarivanje prava članova u zajednici ali i za određenje njihovih obveza. S tim u vezi su i odgovori na pitanja kakav učinak prema glavnom društvu ima ono što se dogovori u zajednici i koje su posljedice odstupi li neki član zajednice od dogovorenoga.

S obzirom na posebitosti zajednice koja nije usmjerena na poslovanje i poslovno djelovanje prema trećima nego jedino na dogovaranje kako koristiti pravo glasa, korisno je ugovorom o vezanju glasova na kome se temelji ortaštvo urediti neke stvari kako bi se izbjegla primjena općih rješenja o tome društvu koje ulazi u odnose prema trećima. Za razliku od toga ovdje nije riječ o vanjskom nego samo

o unutarnjem društvu.[10] Zato je korisno da ugovor sadrži i neke odredbe o unutarnjoj organizaciji društva.

Prva stvar je određivanje kolika je glasačka moć pojedinih članova kada se odlučuje u stvarima zajednice. Veličina glasačke moći u glavnome društvu nije važna za odlučivanje ako se dogovori da se u zajednici odlučuje jednoglasno. Teško je prihvatiti jednoglasnost za donošenje odluka ako su različiti udjeli članova zajednice u glavnome društvu na temelju kojih tamo koriste pravo glasa. Što je ta razlika veća to je manja vjerojatnost za takvo rješenje.

Ono ipak ne mora biti isključeno ako postoje neki drugi interesi članova zajednice koji bi to mogli opravdati, primjerice kada je riječ o zajednici članova više glavnih društava s različitim udjelima i pravima glasa članova u njima tako da je, uzmu li se sva ta glavna društva kao cjelina, u prosjeku glasačka moć članova približno ista. To može biti slučaj i kada je riječ o samo jednom glavnom društvu ako je nekome od članova tog društva potrebno pravo glasa člana s manjom glasačkom moći koje mu nedostaje da bi zavladao glavnim društvom i time ostvario neki svoj poseban interes a drugom ili drugim članovima zajednice se time omogućuje ostvarenje njihovih interesa i nije moguće na drugi ih način privoljeti da uđu u zajednicu.

Pritom valja imati na umu da jednoglasnost otežava donošenje odluka. Nema li pak odluke o postupanju u glavnom društvu pri ostvarivanju prava glasa, ne može se postignuti cilj zajednice što može dovesti i do njezina prestanka (čl. 655. t. 1. ZOO). Do toga ipak ne bi došlo ne može li se taj cilj postići samo u pogledu neke ili samo nekih odluka o kojima se glasuje u glavnome društvu. No, događa li se to redovito, valjalo bi uzeti da je nastao razlog za prestanak zajednice.

Nije li riječ o jednoglasnosti, u ugovoru bi najprije trebalo odrediti kako će se pri odlučivanju u zajednici vrednovati veličine udjela pojedinih članova zajednice u glavnome društvu. Kada je riječ o društvima kapitala, najjednostavnije je to odrediti brojem glasova koje pojedini član zajednice ima u glavnome društvu za što je mjerodavan statut odnosno društveni ugovor glavnog društva. Kod zajednica u kojima se odlučuje o korištenju prava glasa u glavnim društvima koja su društva osoba, moglo bi se ugovoriti da se u zajednici ostvaruje glasačka moć prema veličini udjela članova u glavnome društvu. Tada bi trebalo odrediti i što je jedinica mjere pri vrednovanju kako veličina udjela u glavnome društvu utječe na određivanje glasačke moći u zajednici, primjerice da najmanji udio u glavnome društvu daje jedan glas a ostali udjeli toliko više koliko se puta taj udio nala-

[10] Da je tu riječ samo o unutarnjem društvu, v. Christoph Schücking u Gummert/Weipert, *Münchener Handbuch des Gesellschaftsrecht*, Bd. 1, München, 2014, str. 45; M. Roth, o.c. u bilj. 10, str. 552.

zi u nekom drugom udjelu s time da se broj zaokružuje na niže ili na više ovisno o tome prelazi li polovinu veličine najmanjeg udjela u glavnome društvu ili ne. Bilo bi najjednostavnije da se ukupnost udjela u glavnome društvu odredi kao 100% pa bi udio svakog pojedinog člana bio određen nekim postotkom. Odredi li se da 1% udjela u glavnom društvu daje pravo na jedan glas u zajednici, riješeno je pitanje određenja glasačke moći njezinih članova pri donošenju odluka u zajednici. Ne kaže li se u ugovoru ništa o načinu određivanja glasačke moći u zajednici, treba za to koristiti veličinu te moći u glavnome društvu. Drugog rješenja nema.

U ugovoru treba uz to odrediti i kojim se većinama donose odluke o temeljnim stvarima zajednice kao društva i u drugim nazovimo ih stvarima redovnog djelovanja zajednice. To može biti obična većina, tj. većina od danih glasova ili neka apsolutna većina od svih glasova članova zajednice. Može se ugovoriti i kvorum koji mora biti ispunjen da bi se mogle donositi valjane odluke. To ne treba dovoditi u vezu s eventualnim kvorumom koji se traži za donošenje odluka u glavnome društvu. Riječ je o dva društva koja su odvojeno uređena, svako autonomno samo za sebe pa rješenje spomenutog pitanja u jednome ne uvjetuje rješenje u drugome čak ni kada bi svi članovi jednog društva bili i članovi drugog.

Nema li u ugovoru o vezanju glasova rješenja o donošenju odluka, valjalo bi primijeniti pravilo iz čl. 642. st. 2. ZOO-a po kojemu se primjenjuju pravila o upravljanju stvarju u suvlasništvu. Tu treba primijeniti odredbe Zakona o vlasništvu i drugim stvarnim pravima (ZVDSP).

Kada je riječ o odlučivanju u temeljnim stvarima zajednice, primjenom odredbe čl. 41. ZVDSP odluka bi se morala donijeti jednoglasno. U zajednici to praktički znači odlučivanje o izmjeni ugovora o vezanju glasova jer bi to odgovaralo izvanrednim poslovima iz spomenute odredbe Zakona. S obzirom na narav zajednice i njezin cilj ne vidi se što bi se drugo moglo smatrati temeljnim pitanjem tog društva.

Drukčije je kada se odlučuje u stvarima redovnog djelovanja zajednice. Kako se odlučivanje o zauzimanju stajališta o korištenju prava glasa u glavnome društvu može usporediti s odlučivanjem o poslovima redovnog upravljanja, valja primijeniti odredbu čl. 40. ZVDSP što znači da bi se odluke donosile većinom glasova članova zajednice, tj. većinom u odnosu na sve članove zajednice. Spomenuta odredba Zakona govori o odlučivanju prema veličini suvlasničkih dijelova, a kako njih ovdje nema, može se samo primijeniti ono što je rečeno o veličini glasačke moći u zajednici.

Ugovorom bi bilo dobro riješiti i pitanja unutarnje organizacije zajednice. Tu je prije svega riječ o tome:

1. tko skrbi o vođenju zajednice u što prvenstveno ulazi sazivanje i vođenje sjednica na kojima se donose odluke;

2. kako će se sjednice sazivati;

3. je li za donošenje odluka potrebno ispuniti pretpostavku nekog kvoruma i kakvo se rješenje predviđa za nastavak rada za slučaj da ta pretpostavka nije ispunjena ili traži li se ispunjenje neke druge pretpostavke ili ne;

4. vodi li se zapisnik o radu sjednica i tko ga vodi a tko ga čuva;

5. mogu li se odluke donositi i izvan sjednica i kako se to čini;

6. tko utvrđuje rezultate glasovanja;

7. tko daje članovima zajednice potrebne obavijesti o stvarima od značaja za ispunjenje cilja zajednice;

8. koja su prava članova zajednice da traže obavijesti i od koga;

9. tko nadzire rad osobe koja je određena da se skrbi o vođenju zajednice;

10. što je s troškovima rada zajednice, naknađuju li se, kome i kako se naknađuju;

11. tko pridonosi i koliko zajednici za pokriće troškova njezina djelovanja i dr.

Nema li u ugovoru o tome odredbi, primjenjuju se opća pravila o tome iz ZOO-a o ortaštvu.[11]

ODLUKE ZAJEDNICE I GLAVNO DRUŠTVO

Za prosudbu kakav učinak imaju odluke zajednice kojima se dogovara postupanje njezinih članova pri korištenju prava glasa u glavnome društvu važno je odgovoriti na pitanja ima li zajednica mogućnost zahtijevati od svog člana da postupi onako kako je dogovoreno i kakav učinak na donošenje odluke u glavnome društvu ima ono što je dogovoreno u zajednici? Za odgovor na prvo pitanje valja razlikovati je li odluka o korištenju prava glasa dopustiva ili ne, drugim riječima ograničavaju li se njome neotuđiva članska prava člana zajednice u glavnome društvu koja se prosuđuju po pravilima koja važe za to društvo. Ono što nije dopušteno po pravilima kojima se uređuje glavno društvo nije dopustivo ni odlukom donesenom u zajednici.[12]

Drugo se pitanje svodi na prosudbu može li i u kojoj mjeri postupanje člana zajednice u glavnome društvu protivno onome što je u njoj dogovoreno biti razlog za pobijanje odluke donesene u glavnome društvu.[13]

[11] Više o tome u: Jakša Barbić, *Pravo društava, knjiga treća: Društva osoba*, Zagreb, 2002, str. 83–115.

[12] Tako L. Weipert, o.c. u bilj. 3, str. 861.

[13] L. Weipert, L., *ibidem*.

Kod toga treba razlikovati zajednicu članovi koje svi sudjeluju u odlučivanju u glavnome društvu, tj. u tome društvu ostvaruju svoje pravo glasa pojedinačno od zajednice u kojoj se pravo glasa svih njezinih članova u glavnome društvu ostvaruje putem onog člana zajednice koji je vodi (vodi njezine poslove) ili osobe koju zajednica odredi da to čini.

Pojedinačno ostvarenje prava glasa u glavnome društvu ne znači da član zajednice mora osobno ostvariti pravo glasa u glavnome društvu, on se pri tome može koristiti opunomoćenikom s time da taj djeluje pojedinačno u njegovo ime a ne zastupa skupinu članova glavnoga društva. Nema zapreke za to da više članova pa i svi članovi zajednice (članovi glavnoga društva) za to ovlaste istoga opunomoćenika, ali tada se u punomoći mora točno navesti koga sve opunomoćenik zastupa, koliko glasova je za svakoga od vlastodavaca ovlašten ostvarivati i eventualne upute za svakoga od njih o tome kako mora postupiti pri glasovanju. Kada svi članovi zajednice pojedinačno ostvaruju svoje pravo glasa u glavnome društvu, postupanje člana zajednice, odnosno opunomoćenika u njegovo ime protivno onome što je dogovoreno ne može utjecati na valjanost odluke donesene u glavnome društvu. Glas dan u glavnome društvu suprotno onome što je odlučeno u zajednici je valjan.[14] Jedino je pitanje kakve to posljedice ima u odnosu člana i zajednice. Ovisno o tome što je ugovoreno u ugovoru o vezanju glasova sankcija za ne postupanje po odluci zajednice može biti ugovorna kazna, *liquidated damages*, odgovornost za štetu izazvanu time drugim članovima zajednice, isključenje takvog člana iz zajednice.

Predvidi li se u ugovoru o vezanju glasova trajnije zajednice da se odluke donose jednoglasno, a to će biti uvijek ako se ugovorom ne uredi kako se u zajednici donose odluke, već i jedan član zajednice može spriječiti donošenje odluke. Nema li odluke, svaki član zajednice može koristiti svoje pravo glasa u glavnome društvu kako hoće, ali tada zbog odredbe čl. 655. t. 1. ZOO-a dolazi u pitanje opstanak zajednice. Prestanak zajednice mogao bi se spriječiti isključenjem takvog člana iz zajednice po pravilima koja važe za isključenje ortaka iz ortaštva (v. čl. 653. i 654. ZOO-a). Spomenutim bi se ugovorom moglo predvidjeti da se u takvom slučaju zabranjuje članovima zajednice korištenje pravom glasa u glavnome društvu, ali se to ne čini jer bi se time članovima zajednice nanijela šteta.[15] Kod toga valja uzeti u obzir i obvezu članova glavnog društva na lojalno postupanje prema društvu iz koje proizlazi njihova obveza da koriste svoje pravo glasa u

[14] L. Weipert, o.c. u bilj. 3, str. 863; M. Roth, o.c. u bilj. 10, str. 656.

[15] L. Weipert, o.c. u bilj. 3, str. 862.

tome društvu.[16] Donese li se u zajednici odluka kako da njezini članovi ostvaruju svoje pravo glasa u glavnome društvu, teoretski bi se moglo utužiti ostvarenje obveze člana zajednice na postupanje u skladu s takvom odlukom ali to iz praktičnih razloga nije moguće jer se u tako kratkom vremenu ne može dobiti pravomoćna sudska odluka.[17] Iako u pravilu privremena mjera ne bi bila dopuštena, jer bi se njome zapravo konačno riješilo sporno stanje,[18] ipak je treba primijeniti samo restriktivno[19] pa je dopustiti ako bi se njome spriječila prijeteća opasnost da se na protupravan način izmijeni stanje u glavnome društvu.[20]

Po naravi stvari manje je vjerojatno da će član zajednice pri korištenju prava glasa u glavnome društvu postupiti protivno jednoglasno donesenoj odluci o tome u zajednici, jer ako se u zajednici izjasnio za nešto, valja pretpostaviti da će isto tako postupiti i u glavnome društvu, premda su ekscesi uvijek mogući ali ih je ovdje teško predvidjeti. Drukčije je stanje kada je u zajednici odluka donesena većinom glasova, jer se tu može predvidjeti da će pri pojedinačnom korištenju prava glasa u glavnome društvu članovi zajednice koji su pri glasovanju u zajednici ostali u manjini u glavnome društvu postupiti protivno onome što je u zajednici zaključeno. Valja poći od toga da su članovi zajednice koji su pri glasovanju ostali u manjini obvezni glasovati u glavnom društvu onako kako je to u zajednici odlučeno glasovima većine. No, ne može ih se spriječiti da tako ne postupe. Pritom je važno utvrditi u kojim se slučajevima od manjine može zahtijevati da glasuje u skladu s tako donesenom odlukom u zajednici.

Obveza da manjina postupi po odlukama većine ne postoji ako je riječ o donošenju odluke koja se u glavnom društvu ne bi mogla donijeti a da se s njom ne suglasi član tog društva, član zajednice koji je ostao u manjini. Za to je mjerodavno ono što važi za glavno društvo, jer se ne bi moglo odlučivanjem u zajednici zaobići pravila koja vrijede za odlučivanje u glavnom društvu. Zato se pravila za odlučivanje u zajednici moraju prilagoditi onome što vrijedi u glavnome društvu,[21] jer je zajednički cilj članova zajednice ostvarenje prava glasa u glavnome društvu. Ako se u tome društvu od člana traži njegova suglasnost za donošenje neke odluke, koje pravo mu se ne može ograničiti, njegova se sloboda pri odlučivanju ne

[16] L. Weipert, *ibidem*, o spomenutoj obvezi dioničara, v. u: J. Barbić, o.c. u bilj. 2, sv. 1, str. 540–543 i obvezi članova društva s ograničenom odgovornošću u J. Barbić, o.c. u bilj. 2, sv. 2, str. 234–238.

[17] L. Weipert, o.c. u bilj. 3, str. 876; K. Schmidt, o.c. u bilj. 6, str. 620; M. Roth, *ibidem*.

[18] K. Schmidt, K., *ibidem*.

[19] M. Roth, *ibidem*.

[20] L. Weipert, *ibidem*.

[21] L. Weipert, o.c. u bilj. 3, str. 864.

može ograničiti većinski donesenom odlukom u zajednici.[22] Nije li nešto dopušteno u glavnom društvu ne može se dopustiti ni u zajednici i nametati članu zajednice da u glavnom društvu glasuje protivno svojoj volji.

Manjinu se stoga u zajednici ne bi moglo obvezati da postupi po odluci većine kada je riječ o pitanjima koja spadaju u srž članstva u društvu.[23] Tako se primjerice člana zajednice ne bi moglo obvezati da protiv svoje volje postupi po odluci većine da dade suglasnost za izmjenu društvenog ugovora glavnoga društva koje je društvo osoba.[24] Ta obveza ne postoji ni kada se propisima kojima se uređuje glavno društvo za donošenje neke odluke traži suglasnost člana toga društva. Primjer za to bila bi odluka o izmjeni društvenog ugovora društva s ograničenom odgovornošću kojom se naknadno vinkulira poslovni udio člana (ne i kada se ukida vinkulacija), ukida ili ograničava neko njegovo posebno pravo u društvu, obvezuje člana društva na ispunjenje dodatne činidbe, povećanje uloga.[25] Slični primjeri vrijede i za dioničko društvo, posebice kada je u pitanju odluka kojom se želi postupiti protivno zaštiti dioničara od nametanja nekih dodatnih obveza, primjerice kada je riječ o uvođenju obveze na dodatne činidbe, pretvaranje redovnih dionica u povlaštene, kada se obvezuje dioničare na sudjelovanje u povećanju temeljnog kapitala glavnoga društva.[26]

Stoga se u zajednici ne bi mogla većinom glasova donijeti odluka o tome kako njezini članovi moraju postupiti pri korištenju njihova prava glasa koja bi se odnosila na donošenje odluke u glavnome društvu za koju se traži suglasnost pojedinog člana društva s time da obvezuje i članove zajednice koji su ostali u manjini. No, ako bi zajednicu činili svi članovi glavnoga društva i u njoj bi bila jednoglasno donesena odluka o tome kako će postupiti pri ostvarivanju prava glasa u tome društvu, takva bi se odluka mogla valjano donijeti.[27] Ona bi obvezivala članove zajednice.

Obveza postupanja po onome što u zajednici odluči većina postoji kada se odluke u glavnome društvu, osim onih koje su ranije navedene, donose većinom glasova. Isto vrijedi i kada je riječ o odlukama koje se donose na posebnoj skupštini dioničara na kojoj oni odlučuju većinom glasova pa i onom kvalificiranom ili kada ti dioničari odvojeno odlučuju na glavnoj skupštini. Pritom se kvorum koji se zahtijeva za donošenje neke odluke u glavnome društvu ne traži i za dono-

[22] K. Schmidt, o.c. u bilj. 6, str. 622

[23] L. Weipert, o.c. u bilj. 3, str. 863; K. Schmidt, *ibidem*.

[24] L. Weipert, o.c. u bilj. 3, str. 864.

[25] Te primjere navodi L. Weipert, L., o.c. u bilj. 3, str. 865.

[26] L. Weipert, o.c. u bilj. 3, str. 866.

[27] L. Weipert, o.c. u bilj. 3, str. 866–867.

šenje odluke u zajednici o načinu korištenja prava glasa u glavnome društvu pri odlučivanju o takvoj odluci.[28] On bi bio potreban samo ako bi to bilo predviđeno u ugovoru o vezanju glasova na kome se temelji zajednica. To vrijedi i za ispunjenje dodatnih pretpostavki koje bi se tražile za donošenje odluke u statutu ili u društvenom ugovoru glavnoga društva. Primjerice ako je za donošenje neke odluke u glavnome društvu u statutu ili u društvenom ugovoru toga društva predviđeno da se o prijedlogu za njezino donošenje mora glasovati više puta u nekim vremenskim razmacima, to ne vrijedi i za donošenje odluke u zajednici o tome kako da njezini članovi postupaju pri korištenju prava glasa u takvom slučaju.

Ugovorom o vezanju glasova može se odrediti da se ovlast za vođenje poslova i zastupanje zajednice, zapravo članova zajednice u pitanjima zbog kojih je ona osnovana povjeri jednome ili više njezinih članova. Iz toga ne proizlazi ovlast takve osobe (osoba) da umjesto članova zajednice odlučuje o tome kako postupiti pri korištenju prava glasa u glavnome društvu. Ovdje se, naime, ne može primijeniti pravilo koje općenito vrijedi za vođenje poslova ortaštva, jer je bit zajednice u tome da se ona opredjeljuje za korištenje prava glasa u glavnome društvu u pogledu svake pojedine odluke u tome društvu. Položaj i ovlast spomenute osobe (osoba) ne može isključiti ostale članove zajednice od njihova prava odlučivanja u zajednici jer ostvarenje tog njihovog prava ulazi u njezinu bit, na tome se ona temelji.

Kako bi otklonilo svaku sumnju u to, korisno je ugovorom o vezanju glasova odrediti da u donošenju svake odluke zajednice o korištenju prava glasa u glavnome društvu odlučuju članovi zajednice onako kako je to ugovorom predviđeno i da osoba (osobe) o kojoj je ovdje riječ, zastupa članove pri donošenju odluka u glavnome društvu kao njihov opunomoćenik.[29] Riječ je o zastupanju članova zajednice u očitovanju njihove volje koje se čini glasovanjem pri odlučivanju u glavnome društvu. Ako o zastupanju ništa ne bi bilo rečeno, ovlast za zastupanje imao bi član zajednice kome je povjereno da vodi zajednicu (vodi njezine poslove) i u tome bi se on smatrao opunomoćenikom zajednice (čl. 643. st. 1. ZOO-a). Kako je poslanje zajednice jedino u tome da ostvari pravo glasa njezinih članova u glavnome društvu, riječ je o zastupanju u tome članova zajednice prema glavnome društvu.

Osobi koja je tako ovlaštena zastupati članove zajednice mogu se ugovorom postaviti ograničenja i odrediti da ih je ovlaštena zastupati pri glasovanju u glavnome društvu onako kako je to utvrđeno odlukom donesenom u zajednici za pojedino glasovanje u glavnome društvu. Ona bi i inače morala tako postupiti na

[28] L. Weipert, o.c. u bilj. 3, str. 867.

[29] Više o tome, L. Weipert, o.c. u bilj. 3, str. 868–869.

temelju obveze na lojalno postupanje prema zajednici, ali nije na odmet takvu obvezu predvidjeti u ugovoru na kome se temelji zajednica.

Ovlast za zastupanje prema glavnome društvu iskazuje se putem punomoći. Za nju je mjerodavno ono što vrijedi za zastupanje u glavnome društvu, tj. što je za to društvo propisano zakonom i određeno statutom, odnosno društvenim ugovorom. To vrijedi i za oblik u kome se daje punomoć.[30] Predvidi li se u statutu ili u društvenom ugovoru takvog društva da je moguće skupno zastupanje njegovih članova pri ostvarivanju prava glasa, bit će moguće i da ih se zastupa kao skupinu, u protivnom bi svaki član društva morao ovlastiti osobu koja će ga zastupati u ostvarivanju prava glasa u glavnome društvu s time da mu može dati i upute kako će glasovati. Kada je na taj način moguće skupno zastupanje članova zajednice (glavnoga društva) pri glasovanju o pitanjima o kojima se svaki član zajednice mora osobno izjasniti, za skupno je zastupanje potrebno da se svi članovi zajednice koje se tako zastupa dogovore o tome kako će se postupiti pri ostvarivanju prava glasa. Ne postigne li se dogovor, opunomoćenik može samo zastupati individualno svakog člana zajednice a ne skupinu što znači da je vezan uputama koje dobije od svakog člana zajednice.[31]

U prvom slučaju opunomoćenik (osoba koja vodi zajednicu) iskazivao bi svoju ovlast za zastupanje u glavnome društvu s ugovorom o vezanju glasova i odlukom zajednice o tome kako treba glasovati. Bitno je da se u glavnome društvu točno zna u ime koga se ostvaruje pravo glasa. Radi pojednostavljenja postupanja u glavnome društvu, naročito ako ono ima veliki broj članova, bilo bi jednostavnije da punomoć dadu članovi zajednice koje se zastupa u ostvarivanju prava glasa, jer bi se tada izbjeglo potrebu da se prvo odredi tko sve čini zajednicu, pa tko za zajednicu djeluje u ostvarenju prava glasa i konačno s koliko je glasova ta osoba ovlaštena glasovati za pojedinog člana zajednice i kako. No, zastupanje bi bilo valjano i ako se to ne učini.

U drugom slučaju, tj. ako u glavnome društvu nije predviđena mogućnost skupnog zastupanja, pojedinačno navedeni članovi zajednice morali bi dati punomoć za ostvarenje prava glasa u njihovo ime, tj. da opunomoćenik u ime članova zajednice glasovanjem očituje njihovu volju prema glavnome društvu. Naime, davanje glasa je očitovanje volje onoga tko ostvaruje pravo glasa. Tu je riječ samo o načinu provedbe odluke donesene u zajednici.

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[30] Za punomoć za ostvarivanje prava glasa u glavnoj skupštini dioničkog društva, v. u: J. Barbić, o.c. u bilj. 2, sv. 1, str. 553 i sl., 1219 i sl., a za ostvarivanje prava glasa u društvu s ograničenom odgovornošću u: J. Barbić, o.c. u bil. 2, sv. 2, str. 241–243, 269 i sl.

[31] L. Weipert, o.c. u bilj. 3, str. 873.

Kako bi se izbjegle opasnosti, bilo bi korisno da se u punomoći navedu upute kako punomoćnik mora postupiti, tj. navede da je ovlašten zastupati članove zajednice koristeći pravo glasa onako kako je za svaku odluku određeno u punomoći. Ne postupi li se tako, članovi zajednice izlažu se opasnosti da osoba koja ih zastupa postupi protivno onome što je u zajednici odlučeno. Tako dani glasovi u glavnome društvu bili bi valjani. To bi primjerice moglo biti slučaj kada je u zajednici donesena valjana odluka glasovima većine a osoba koja zastupa članove zajednice spada u manjinu koja je glasovala protivno onome kako je odlučeno pa iskoristi dobivenu ovlast za zastupanje i pravo glasa članova zajednice koristi suprotno onome što je odlučeno glasovima većine.

Propusti li se u punomoći navesti upute pojedinog člana glavnog društva, glas opunomoćenika dan u glavnome društvu bit će valjan i ako bi mu članovi društva dali interne upute kako da koristi njihovo pravo glasa a on postupi protivno tome. Oni pritom mogu postupiti kao skupina, ali bi bilo moguće i da pojedini član glavnoga društva koji je i član zajednice dade upute kako da se koristi njegovo pravo glasa. Postupi li opunomoćenik protivno interno dobivenoj uputi, odgovara za štetu koja bi time bila pričinjena osobama koje su mu dale upute. Zato je dobro u punomoći navesti upute pa i one za glasovanje na temelju pojedinog udjela člana zajednice u glavnome društvu. Glavno društvo bi tada moralo prihvatiti samo onakvo korištenje prava glasa kakvo je za pojedine udjele navedeno u punomoći. Ta se punomoć, naime, predaje glavnome društvu koje iz nje može utvrditi za kakvo očitovanje volje vlastodavaca je opunomoćenik ovlašten. Jedino tako se može postići pravna sigurnost pri donošenju odluka u glavnome društvu. Glas dan protivno tome ne bi bio valjan. Ako bi zbog priznavanja danog glasa protivno tome bila donesena neka odluka, a to bi utjecalo na njezino donošenje, to može biti razlog za pobijanje takve odluke.

Punomoć se može dati za donošenje odluka za svako odlučivanje u glavnome društvu, primjerice posebno za pojedinu glavnu skupštinu ili skupštinu društva, odnosno za odlučivanje članova izvan skupštine a moguće je to učiniti s nekim vremenskim trajanjem tako da vrijedi za svako odlučivanje u vremenu trajanja punomoći. Može ju se dati i na neodređeno vrijeme. Punomoć se u svako doba može suziti ili opozvati pa i kada se opunomoćitelj ugovorom odrekne tog prava (čl. 316. st. 1. ZOO-a) bez navođenja razloga zbog čega se to čini. S obzirom na cilj koji se postiže zastupanjem u glavnome društvu, dobro je dati punomoć za svako pojedino odlučivanje u glavnom društvu (za pojedinu glavnu skupštinu ili skupštinu glavnog društva, odlučivanje članova izvan skupštine), jer se tako mogu u njoj navesti i upute za glasovanje o odlukama iz pojedinih točaka dnevnog reda.

Kada je riječ o punomoćima danim za određeno ili za neodređeno vrijeme to nije moguće jer se u vrijeme izdavanja punomoći ne zna o donošenju kojih odluka je u glavnome društvu riječ. Jedino bi bilo moguće da se posebno za svako odlučivanje (glavnu skupštinu, skupštinu glavnog društva, odlučivanje članova izvan skupštine) doda ono što bi se inače navelo kada se punomoć daje za svako pojedino odlučivanje (obvezne upute). No, tada bi bilo dobro da se u punomoći danoj za neko određeno ili neodređeno vrijeme navede da će se za svako spomenuto odlučivanju punomoći dodati takve upute i da bez toga punomoć za takvo odlučivanje ne vrijedi. Blanko dana punomoć za neko vrijeme ili neodređeno vrijeme trajanja suviše je opasna i može biti štetna za opunomoćitelje.

Time se postiže da se provede odluka donesena u zajednici. Ovdje se upućuje na ono što je rečeno za slučajeve kada se u glavnom društvu o nečemu ne može odlučiti bez izričite suglasnosti člana društva odnosno kada se odlučuje o pitanjima koja ulaze u srž članstva u tome društvu. Pritom valja imati na umu i slučajeve kad postoji obvezno zastupanje više članova društva od strane jedne osobe. Primjer za to je ostvarivanje prava više ovlaštenika na poslovnom udjelu u društvu s ograničenom odgovornošću (čl. 417, st. 1. ZTD-a) i više ovlaštenika na dionici (čl. 228, st. 1. Zakona) koje mora zastupati zajednički zastupnik. Punomoć i upute tada mora dati svaki takav član zajednice pa i onda kada je u statutu ili u društvenom ugovoru glavnog društva predviđena mogućnost skupnog zastupanja.[32]

Obveza glasovanja u skladu s ugovorom o vezanju glasova, uz pretpostavke o kojima je bilo riječi, može se utužiti. No, to je po naravi stvari samo teoretska mogućnost. Tužbu može podići svaki član zajednice protiv osobe koja ne želi glasovati u skladu s obvezom. Njome se traži da sud naloži tuženome da dade određeni glas kao očitovanje volje usmjereno na sudjelovanje u stvaranju volje glavnog društva. Pravomoćna odluka provodi se ovrhom. Smatra se da je glas dan s danom pravomoćnosti presude (čl. 276, st. 1. Ovršnog zakona). Da bi glas bio valjano dan presuda se mora priopćiti društvu dostavljanjem predsjedniku skupštine ili upravi društva, ako je riječ o društvu osoba nekome od članova ovlaštenih za vođenje poslova društva. To, međutim, iz praktičnih razloga ne može dati rezultat koji se želi postići tužbom pa za to vrijedi ono što je o tome već rečeno za slučaj kada članovi zajednice osobno ostvaruju pravo glasa u glavnome društvu uključujući i o sankcijama za takvo postupanje spomenute osobe člana zajednice.

[32] L. Weipert, *ibidem*.

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FUNCTIONING OF THE POOL OF VOTING RIGHTS

Summary

The paper determines the concept of a pool of voting rights in a company as well as the legal nature of such a pool. It is presented that such a pool may exist among shareholders of every company and by legal terms it presents a partnership. There may be several pools in a company, depending on the preference of certain groups of shareholders who thus protect their interests in the company and do not want uncontrolled decision-making, but rather wish to implement their own will. This eliminates surprises or at least reduces them. It is formed by a voting agreement entered into by the shareholders. There is a difference between the main company, i.e. the company in which the voting rights are exercised and the pool of voting rights. The paper discusses issues related to conclusion and amendment of the voting agreement. It is directed to the difference between pool and the obligation-law relation in connection with use of voting rights. The paper determines the boundaries within which such an agreement may be validly made. The contents of such an agreement and its form are presented in the paper. Functioning of the pool, the method of works, decision-making in the pool and its decisions in relation to the main company are particulary elaborated.

Key words: pool of voting rights, voting agreement, partnership, decision-making in the pool, main company

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GIAN ANTONIO BENACCHIO

INTERPRETACIJA PRAVA IZMEĐU RAVNOTEŽE I RAZUMNOSTI U SUDSKOJ PRAKSI SUDA EVROPSKE UNIJE

Opće je poznato da sudska praksa Suda Evropske unije ima ulogu središnje važnosti u procesu evropeizacije nacionalnih prava te je neupitna važnost njezinih odluka među izvorima prava, operativnih pravila kao i općih načela prava. Evropska sudska praksa ima moć da utvrdi pravila koja se onda nameću nacionalnim pravnim poretcima, provodeći tako integraciju s rješenjima koja su ponekad i vrlo inovativna. No, ono što se želi istaći je zapravo jedan dodatni aspekt, možda manje primjetan na prvi pogled: radi se o sposobnosti evropske sudske prakse u modeliranju prema standardima razumnosti nacionalnih pravila, čija bi stroga primjena mogla dovesti do nepravednih ili manje uravnoteženih rješenja. U doba rastućeg ubrzavanja društvenih i gospodarskih pojava od središnje je važnosti interpretativno djelovanje luksemburškog Suda kojim se može pronaći ravnoteža i razumnost između starih pravila i novih problema, kao i između vrijednosti, prava i interesa koji proizlaze iz društva u stalnoj i brzoj transformaciji.

Ključne riječi: *evropeizacija, Sud Evropske unije, tumačenje, razumnost, harmonizacija*

UVOD

Sudska praksa u sustavu izvora prava

Shvaćanje prema kojem stvaranje pravila koja imaju obvezujuće sadržaje s ciljem uređenja društva, koje se nalaze u određenom sustavu, pripada tijelima

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Države zaduženih za zakonodavnu funkciju, s obvezom sastavljanja, verbaliziranja te objavljivanja istih, počiva na filozofskim, političkim i društvenim vizijama koje su procvjetale u Evropi tijekom 17. i 18. stoljeća. *Code civil des français* iz 1804, kao arhetip svih kodifikacija koje su kročile kroz 19. stoljeće, predstavlja najznačajniji primjer toga. Prava i pravila tog zakonika artikuliraju misli racionalista – *Locke, Rousseau, Leibniz, Voltaire* – koji iznova definiraju sustav izvora, kao i ulogu interpretacije te viziju Države, koju ističe *Montesquieu*, a koja definira Državu kao entitet koji predstavlja laički i demokratski poredak utemeljen na diobi vlasti[1].

U današnje je doba nesporno stajalište prema kojem se izraz *izvori prava* odnosi i dalje na skup akata sastavljenih od strane tijela za to zadužena; no, također je uvriježen stav da se ne može zanemariti uloga nekih drugih čimbenika i subjekata, među kojima se nadasve ubraja sudska praksa, a koji doprinose stvaranju obvezujućih pravila i načela koji su u stanju krojiti i usmjeravati ljudska ponašanja.

U tom smislu, bilo koji opis izvora prava koji ne uzima u obzir sudsku praksu bio bi, kako uostalom upozorava Rodolfo Sacco, lažan i varljiv[2]. Pouka je poznata pravnicima koji se bave komparacijom: "se nell'ordinamento figurano più formanti, la dottrina delle fonti non è completa se non si estende a tutte le fonti che creano i singoli formanti" (*ako u pravnom poretku postoji više pravnih formanata, doktrina izvora nije potpuna ako se ne proširi na sve izvore koji stvaraju pojedinačne formante*) [3].

Taj široki pojam izvora prava, koji obuhvaća i sudsku praksu, dobija važnu potvrdu i od strane Evropske unije kao i njezinih načela.

Ponajprije treba imati na umu kako se Rimskim ugovorom iz 1957. godine stvara nova institucija (EEZ, sada EU) koja ima moć formuliranja novih pravnih regula.

Osim što je ta institucija stvorila svoje interno pravo, koje se izravno primjenjuje, također je promovirala dodatno pravo kroz obvezujuće akte usmjerene Državama članicama, sucima i građanima, dovodeći u mnogim područjima jedinstvo i sklad tamo gdje su ranije postojale različitosti i nesklad.

U današnje doba izvori Evropske unije predstavljaju zacijelo najnapredniju komponentu pravnih sustava pojedinačnih Država članica.

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[1] Attilio Guarneri, *Lineamenti di diritto comparato*, Padova, Cedam, VI ed., 2014, str. 151 i dalje; Rodolfo Sacco, Antonio Gambaro, *Sistemi giuridici comparati*, Torino, 1996, str. 298 i dalje.

[2] Rodolfo Sacco, *Introduzione al diritto comparato*, Torino, Utet, 2011, str. 65 i dalje. Pod pojmom "formanti" ili "legal formants" smatraju se svi elementi koji utječu na primjenu pravila (tzv. living rules), a koji nisu puke zakonodavne odredbe, već proizlaze iz doktrine i sudske prakse.

[3] R. Sacco, *Introduzione al diritto comparato*, *ibidem*, 67.

Naime, pravno uređenje mnogih sektora života, koji se izravno ili neizravno tiču nas građana, kroji se u Bruxellesu. Posve je nadvladana povijesna faza koja je obilježila odnos između Država i Zajednice tijekom sedamdesetih i osamdesetih godina prošlog stoljeća. Naime, to je razdoblje u prošlosti bilo obilježenom pokušajem izbjegavanja ili barem ograničavanja učinkovitosti i primjene evropskih pravnih izvora u pojedinačnim nacionalnim sustavima.

Uslijed tog procesa *evropeizacije*, pravo pojedinačnih Država članica predstavlja u današnjici rezultat skupa normi nacionalnog prava te primarnog i sekundarnog prava EU.

No, kao što ćemo u nastavku razmotriti, pravo Država članica počiva i na sudskim odlukama Suda Evropske unije, koje često u postupku prethodnog pitanja predlažu i nameću svim sucima svih Država članica (a ne samo onim sucima koji su pokrenuli postupku prethodnog pitanja) čitav niz "interpretacija" koji zapravo prikriveno postavljaju prave obvezujuća pravila.

U mnogim pravnim područjima u sadašnjosti gotovo da nije više moguće jasno razgraničiti evropsko od nacionalnog podrijetla određenih pravnih rješenja. Naime nije više moguće identificirati podrijetlo na temelju činjenice pripada li određen propis nacionalnom ili evropskom pravnom poretku.

Posljedice su brojne i sve važne. Zakonodavci, suci, administratori, upravitelji Država članica moraju obratiti pozornost ne samo na nacionalne pravne izvore i na sudsku praksu, već i na evropske pravne izvore i sudsku prasku, čija je primjena obvezatna prema UEU-a i na temelju načela koja uređuju odnose između evropskog pravnog poretka i nacionalnih sustava (izravni učinak, primat, usklađeno tumačenje, neprimjenu, koristan učinak).

Oni moraju također kritički tumačiti nacionalna pravila te procijeniti u svakom pojedinačnom slučaju možebitan nesklad u odnosu na evropsko pravo te posljedično, ako je to potrebno, ne primijeniti nacionalno pravo i praksu, koji odmiču. Drugim riječima, pravnici moraju funkcionalno tumačiti nacionalne propise shodno ciljevima i obvezama predviđenima evropskim izvorima. Posljedično, prilikom primjene nacionalnih propisa "è sempre necessario che coloro che applicano e fanno osservare tali disposizioni si pongano il problema della compatibilità con le regole di diritto europeo" (*potrebno je da oni koji primjenjuju i jamče poštovanje tih propisa razmotre pitanje usklađenosti istih s evropskim propisima*)[4].

[4] Mario Pilade Chiti (ur.), *Diritto amministrativo europeo*, Milano, Giuffré, 2018. Onima koji se opiru pripadnosti Evropskoj uniji, jer smatraju da skup spomenutih pravila predstavlja *vulnus* samostalnosti i autonomiji u odlučivanju Država, potrebno je istaknuti da mogu intervenirati u fazi izrade normiranja europskih normi pri odgovarajućim institucijskim tijelima i tijekom preliminarnih postupaka konzultacija. Ta mogućnost predstavlja jednu od najboljih garancija Država-

SUDSKA PRAKSA SUDA EVROPSKE UNIJE KAO IZVOR PRAVA

Kao što smo već ranije isticali, sudska praksa Suda EU ima središnju ulogu u procesu *evropeizacije* nacionalnih prava[5] te je neupitna važnost njegovih odluka. Djelovanje Suda u prošlosti kao u današnjici ima tu važnu ulogu prepoznavanja operativnih pravila kao i općih načela prava te njihovog sadržaja.[6]

Možemo to lako zaključiti iz temeljnih načela koji uređuju odnose između evropskog pravnog poretka i pojedinačnih Država članica: priznanje učinkovitosti odluka Suda, obveza neprimjene nekompatibilnih nacionalnih propisa, načela evropskog primata, usklađeno tumačenje, izravna primjena, učinkovitost zaštite, itd… Radi se o načelima koja nisu kodificirana u Osnivačkim ugovorima, ali čija snaga proizlazi iz tumačenja Suda EU.

Možemo isto zaključiti i u vezi s načelima koja je Sud elaborirao kroz sveobuhvatnu i sustavnu interpretaciju evropskog pravnog poretka. Počevši od određenih tekstualnih elemenata ta se načela i primjenjuju na situacije i područja koja su i šira negoli ona na koja se doimalo da će se primjenjivati prema odredbi u Ugovoru. Tako je bilo, primjerice, s načelom uzajamnog priznavanja nacionalnih propisa, s korisnim učinkom, s lojalnom suradnjom među Državama članicama, sa solidarnošću, s dobrom vjerom, itd.

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ma radi ostvarivanja pravnih rješenja koja odgovaraju internim potrebama. Upravo u sudjelovanju u stvaranju evropskih pravnih akata može se shvatiti kako smisao Evropske unije nije u pukoj cesiji od strane pojedinačnih Država, dijela njihovog suvereniteta i moći, već u prilici dijeljenja strateških odluka s ostalim evropskim partnerima unutar globaliziranog svijeta, u kome političke granice više ne mogu oponirati kretanju tvrtki i usluga, kao ni dobara ili osoba. U toj perspektivi, bojazni prekomjernog ustupanja suvereniteta od strane pojedinačni Država članica u korist Unije, trebalo bi da se rasplinu i postanu snažne točke u postignuću zajedničkog cilja (i gospodarskog) u globaliziranom svijetu u kojem treba da deluje kroz izbore "*deljenog suvereniteta*".

[5] Pier Luigi Portaluri (ur.), *L'Europa del diritto: i giudici e gli ordinamenti*, Napoli, Edizione Scientifiche Italiane, 2012; Gian Antonio Benacchio, "La Corte di giustizia tra armonizzazione e unificazione del diritto europeo dei contratti, Rivista di diritto civile", 2006, br. 6, str. 131 i dalje; također Luisa Antoniolli Deflorian, *La struttura istituzionale del nuovo diritto comune europeo: competizione e circolazione dei modelli giuridici*, Trento, Università di Trento, 1996, str. 249 i dalje.

[6] Jürgen Basedow, "The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European judiciary", *European Review of Private Law,* 2010, br. 3, str. 443 i dalje; Guido Alpa, Mads Andenas, *Fondamenti del diritto privato europeo*, Milano, Giuffré, 2005; Urania Galetta, "Le fonti del diritto amministrativo europeo", in Mario Pilade Chiti (ur.), *Diritto amministrativo europeo*, cit., str. 102 i dalje; Daria de Pretis, "I principi nel diritto amministrativo dell'Unione europea", in Daria de Pretis, Barbara Marchetti, Maurizio Malo (ur.), *Pensare il diritto pubblico*, Trento, Università degli Studi di Trento, 2015, str. 128.

Priznati takvu ulogu evropskoj sudskoj praksi, znači priznati evropskim sucima moć definiranja regula koja se nameću u pojedinačnim Državama članicama. Na taj se način integriraju u nacionalne poretke i inovativna rješenja, koja ponekad nisu još prisutna u pravnim tradicijama Država članica.

Brojne su posljedice tog procesa. Najočitija jest ona koja se odnosi na preobrazbu procesa donošenja pravnih pravila. Ta je posljedica naročito primjetna u onim sustavima gdje taj proces počiva na parlamentarnim procedurama. U tim sustavima svjedočimo postepenom nastanku jurisprudencijalnog prava, odnosno prava koji pronalazi rješenja kako u propisima tako i u jurisprudencijalnim presedanima, prvenstveno onima Suda EU[7].

To se događa kad Sud Evropske unije tumači normu ili načelo te nametne *erga omnes* isto tumačenje i primjenu, a istovremeno se ta interpretativna slobodna oduzima Državama članicama. Primjena prava prema tumačenju evropskog Suda ne obvezuje samo onog suca koji je tražio tumačenje pravila, već se nameće *erga omnes*, barem do kada isti taj Sud ne promjeni tumačenje. No, to se doista rijetko događa. Provedena analiza sudske prakse tog Suda ukazuje na to da se ono vrlo rijetko odmiče od svojih ranijih interpretacija[8]. U tom smislu načelo/pravilo definirano od Suda zaprima vrijednost obvezujućeg presedana u odnosu na suce diljem Unije.

Također, imamo kao posljedicu da Sud ima sposobnost ostvarivati funkciju unifikacije pravila, budući da, tumačeći svi evropski suci na isti način određen propis, posljedično nameću jedinstvu primjenu određenog pravnog rješenja.

Poznato je, uostalom, kako direktive teže ka harmonizaciji pravila Država članica, dok Uredbe teže ka njihovom ujednačavanju. No, iako su pravila ujednačena, nije rečeno da se one na isti način tumače i primjenjuju od strane svih sudova svih Država članica EU. O pravoj unifikaciji evropskog prava možemo govoriti samo onda kada imamo odluku luksemburškog Suda.

Bilo putem *postupka zbog povrede obveze Države članice* (članci 258. i 259. UFEU), s ciljem utvrđivanja usklađenosti nacionalnog propisa s evropskim pra-

[7] Gianmaria Ajani, *Trapianto di norme "informato" e globalizzazione: alcune considerazioni*, in Gianmaria Ajani, Antonio Gambaro, Michele Graziadei, Rodolfo Sacco, Vincenzo Vigoriti, Michel Waelbroeck (ur.), *Studi in onore di Aldo Frignani. Nuovi orizzonti del diritto comparato europeo e transnazionale*, Napoli, Jovene, 2011, str. 33 i dalje; Michele Cozzio, "Il contributo della giurisprudenza all'evoluzione delle regole sugli appalti pubblici", in *Il diritto dell'economia*, 2013, 1, str. 147 i dalje; Id., "Effetti dei cambiamenti giuridici e dell'evoluzione dei formanti sul sistema delle fonti. Osservazioni a margine della disciplina sugli appalti pubblici, *Rivista trimestrale degli appalti*, 2017, br. 3, str. 777 i dalje.

[8] Ermanno Calzolaio, "Il valore di precedente delle sentenze della Corte di giustizia", *Rivista critica del diritto privato*, 2009, br. 1, str. 41 i dalje.

vom, bilo putem postupka o *prethodnom pitanju* (članak 267. UFEU), Sud uspijeva objedinjavati evropska pravila mnogo više negoli što može učiniti EU zakonodavac donošenjem direktive ili uredbe, budući da presuda kroz svoju interpretaciju nameće sucima jedinstvenu primjenu[9].

Preobrazbi procesa stvaranja pravila odgovara, kao dodatna posljedica, promjena kvalitete istih. Često, pravila jurisprudencijalnog podrijetla razlikuju se naspram onih pravila parlamentarne derivacije, koje pak nastaju uslijed političke rasprave. Za razliku od ovih drugih, prve ostvaruju cilj funkcionalnog tipa, a njihova je svrha rješavati, specifične situacije, izbjegavajući formalne katalogizacije.

Uostalom, upravo funkcionalnost i akcidentalnost evropskih jurisprudencijalnih *arrêts* ističu granice ovog puta u stvaranju pravila. Pojašnjenje kroz sudsku praksu pravnih instituta i pojmova zacijelo je korisno i valjano, no ne može se zanemariti značajan *deficit* u sustavnosti i pravnoj sigurnosti uslijed autonomije priznate sucima.

Ta je posljedica posebice evidentna onda kada Sud nudi specifično i kogentno tumačenje općih načela: primjerice, načelo proporcionalnosti, transparentnosti, *bona fide* i slično. Završni rezultat je preobrazba općeg načela u partikularnu normu, nudeći na taj način novo pravilo, koje djeluje izravno u sferi Država članica, "preskačući" nacionalne zakonodavce.

DISKRECIJA EVROPSKOG SUCA

Na temelju svega iznesenoga, jasno je zašto odluke Suda Evropske unije predstavljaju fantastičan *trait d'union* između prava Unije i nacionalnih sustava, kao i jedan od temeljnih elemenata stvaranja, nadziranja i inoviranja pravila. Drugim riječima, doslovno se radi o iskonskom pokretaču ("un vero e proprio motore") razvoja evropskog prava[10].

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[9] Gino Gorla, "Unificazione "legislativa" e unificazione "giurisprudenziale", in *Le nuove frontiere del diritto e il problema dell'unificazione*, Atti del Congresso internazionale organizzato dalla Facoltà di giurisprudenza dell'Università di Bari, 2–6 aprile 1975, Milano, 1979, Tom I, str. 651 i dalje; Gian Antonio Benacchio, *Diritto Privato della Comunità Europea. Fonti, modelli, regole*, Cedam, Padova, VII ed., 2016, str. 53 i dalje.

[10] Gian Antonio Benacchio, "La Corte di Giustizia tra armonizzazione e unificazione del diritto europeo dei contratti", cit., str. 133–**138; Daria de Pretis, "La tutela giurisdizionale amministrativa in Europa fra integrazione e diversità", in *Riv. ital. dir. pubbl. com*.**, 2005, br. 1, str. 28; Mario Pilade Chiti, "I signori del diritto comunitario: la Corte di Giustizia e lo sviluppo del diritto amministrativo europeo", *Riv. trim. dir. pub*., 1991, str. 783 i dalje; Antonio Tizzano, "Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario", *Dir. un. eur.*, 2009, br. 1, str. 141 i dalje; Tommaso Giovannetti, *L'Europa dei giudici. La funzione giurisdizionale nell'inte-*

Ne nedostaju kritike glede diskrecije kojom raspolažu evropski suci, naročito zbog toga što ju koriste radi formulacije općih načela i pravila[11], koja bi prema tim kritičarima trebala biti izražena na definiran način. Ovo je pitanje poznato pravnicima i ima implikacije koje se odnose na pitanja nomotehnike [12], na pitanja izricanja pravnih koncepata[13], na pitanja njihovog značaja u vremenu. Sve su to pitanja koja opravdavaju diskreciju suca (uostalom, prema učenju Rodolfa Sacca, "*praticamente non vi è diritto applicato se non precede un'interpretazione*" – praktički nema primjene prava kojoj ne prethodi interpretacija)[14].

Nadalje, potrebno je razmišljati o diskreciji evropskih sudaca također u svijetlu unifikacije pravila, a čija je svrha izbjeći nacionalizaciju evropskog prava uslijed različitih tumačenja nacionalnih sudova.

Drugim riječima, cilj je otkloniti rizik progresivne diversifikacije značaja i primjene evropskog prava kroz "nekoordinirano" djelovanje nacionalnih sudova, što bi prejudiciralo stvaranje prostora sa zajedničkim pravilima između Država Unije.

To ne znači pak negirati vrijednost pluralizma i različitih stajališta u sudskoj praksi. Naime, među elementima koji karakteriziraju interpretaciju i primjenu evropskih pravila od strane nacionalnih sudova dakako ubrajamo različitost primijenjenih rješenja. Te su različitosti dijelom opravdane na temelju drugačijih stajališta glede pitanja od evropskog interesa, a dijelom odražavaju razlike u sustavima, koje počivaju na pravnim tradicijama kojima pripadaju.

No, kao što se ranije istaklo, ako nacionalni sudac odluči primijeniti evropska pravila, čije je tumačenje zatražio ili čije tumačenje je već ranije Sud Evropske unije dalo, mora nužno slijediti upute tog Suda.

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grazione comunitaria, Torino, Giappichelli, 2009; Giuseppe Martinico, *L'integrazione silente. La funzione interpretativa della Corte di Giustizia e il diritto costituzionale europeo*, Napoli, Jovene, 2009.

[11] Cesare Salvi, *Capitalismo e diritto civile. Itinerari giuridici dal Code civil ai Trattati europei*, Bologna, Il Mulino, 2015, str. 198; Jacques Ziller, *L'armonizzazione degli ordinamenti*, Pier Luigi Portaluri (ur.), *L'Europa del diritto*, cit., str. 44 i dalje; Vittorio Italia, *Gli ingranaggi delle leggi,* Milano, Giuffré, 2013, str. 39-40.

[12] V. Italia, *Appunti su disposizioni e norma*, in *Scritti in onore di M.S. Giannini*, Milano, Giuffré, 1988, str. 25 i dalje; Mario Bertolissi, Vittorio Italia, *La semplificazione delle leggi e dei procedimenti amministrativi*, Napoli, Jovene, 2015.

[13] Rodolfo Sacco, "Riflessioni di un giurista sulla lingua (la lingua del diritto uniforme, e il diritto al servizio di una lingua uniforme)", *Riv. dir. civ*., 1996, n. 1, str. 57 i dalje; Silvia. Ferreri, *Falsi amici e trappole linguistiche. Termini contrattuali anglofoni e difficoltà di traduzione*, Torino, Giappichelli, 2010; Id., *La lingua del legislatore europeo*, Jacqueline Visconti (ur.), *Lingua e Diritto. Livelli di analisi*, Milano, Giuffré, 2011, str. 247 i dalje.

[14] R. Sacco, *Introduzione al diritto comparato*, nav. delo, str. 67.

Valja također istaknuti kako odluke Suda, baš zbog ranije iznesenih razloga, omogućavaju nacionalnim sucima da se odmaknu od prevladavajućih stajališta u domaćoj sudskoj praksi, krećući u posve novom smjeru. Na taj način, odluke evropskog Suda potiču inovaciju u nacionalnim pravnim sustavima te istovremeno ga vode ka neminovnom odnosu jedinstva i supsidijarnost s pravnim poretkom Unije.

Ova razmatranja ukazuju na specifičan aspekt evropske sudske prakse, čija interpretativna aktivnost može dovest i do popunjavanja aporija u nacionalnim sustavima te izricanja nepisanih pravila (odnosno ne izrečenih u pozitvopravnoj normi) , koristeći prostor djelovanja (i diskrecije) koja se ne mogu pronaći (izuzećem za Ustavne sudove) u sudskoj praksi Država..

ODLUKE SUDA EVROPSKE UNIJE: ČIMBENICI RAVNOTEŽE I RAZUMNOSTI

Prerogative Suda Evropske unije glede unifikacije i inovacije prava omogućavaju spoznaju jednog dodatnog pekulijarnog aspekta njegove sudske prakse.

Mislim na sposobnost Suda da potiče, jamči i prenosi sadržaje ravnoteže i razumnosti u primjeni (evropskih) i nacionalnih pravila; sadržaji kojima inače nacionalni suci ne mogu raspolagati, budući da se moraju kretati u prostoru nadzora od strane viših instancija i supsidijarnosti u odnosu na evropsko pravo i na Sud Evropske unije.

Ako je, s jedne strane, činjenica da u sustavima koji počivaju na rimskoj pravnoj tradiciji ideje, interpretacije i nova rješenja prirodno dolaze od dna sudske piramide, s druge pak strane valja također zamijetiti kako sudovi prve instancije djeluju u kontekstu u kojem je potrebno različita tumačenja norme podvesti pod zajednički normativni okvir, a koji je u današnje doba značajno evropeiziran.

U tom pogledu pravni instrumenti kojima raspolaže nacionalni sudac su: a) prethodno pitanje (u slučaju dvojbi glede tumačenja evropske norme koju treba primijeniti), b) interpretacije nacionalne norme u skladu s evropskom c) neprimjena nacionalne odredbe koja je očito u suprotnosti s evropskom. Drugim riječima, nacionalni sudac može popuniti aporije vlastitog sustava, izgladiti proturječnosti i nedostatke, no njegovo je djelovanje uvijek usko povezano uz evropsko pravo i dijalog s evropskim Sudom.

Ta ograničenja autonomiji sudske interpretacije nisu toliko prisutna kad je u pitanju evropski sudac koji raspolaže većim moćima u balansiranju interesa i vrijednosti, kao i u kontroli proporcionalnosti evropskih propisa i, posredno, nacionalnih.

S tog kuta motrišta moguće je istaknuti sposobnost luksemburškog Suda u modeliranju nekih proturječnosti nacionalnih normi, čija bi stroga primjena dovela do rješenja koja su manje uravnotežena i ne baš racionalna.

Mnogobrojni primjeri mogu potkrijepiti ovu tvrdnju, naročito u vezi sa sudskom praksom u području ugovornog prava. Do nedavno područje ugovora počivalo je prvenstveno na nacionalnim pravilima, dok je danas uvelike izmijenjeno evropskim pravilima. Do te mjere da se danas govori o evropskom ugovornom pravu.[15]

S time u vezi, može se uzeti za primjer slučaj[16] koji se ticao gospođe *Bellone*, trgovački agent tvrtke *Yokohama SpA* na temelju ugovora o agenciji. Nakon raskida ugovora gospođa Bellone zatražila je isplatu naknade koja joj je odbijena budući da talijanski zakon[17] predviđa radi mogućnosti rada kao trgovački agent obvezu upisa u profesionalni registar. Primjena te norme od strane nacionalnog suca išla je u smjeru utvrđivanja ništetnosti ugovora o agenciji kojeg su sklopile osobe koje nisu upisane u registar te posljedično išla je u smjeru nepriznavanja tim istim osobama prava na potraživanje naknade za rad, jer ne raspolažu valjanim naslov za potraživanje te tražbine.

Sud Evropske unije, pozivajući se na direktivu 86/653/EEZ, preokrenuo je u potpunosti prethodnu postojeću talijansku sudsku praksu, tvrdeći da zaštita osoba koje su djelovale kao trgovački agenti ne može biti podređena obvezi upisa u neki registar i da takva obveza upisa u registar ne može uvjetovati valjanost ugovora o agenciji.

Brojni se primjeri mogu pronaći i u području zaštite potrošača, koje se počelo evropeizirati polovicom osamdesetih godina prošlog stoljeća.[18]

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[15] Guido Alpa, *Il contratto in generale. Fonti, Teorie e metodi*, in Antonio Cicu, Francesco Messineo, Luigi Mengoni (ur.), *Trattato di diritto civile e commerciale*, Milano, Giuffré, I, 2014; Emanuela Navarretta (ur.), *Il diritto europeo dei contratti fra parte generale e norme di settore*, Milano, Giuffrè, 2007; Giovanni De Cristofaro (ur.), *I principi del diritto comunitario dei contratti. Acquis communautaire e diritto privato europeo*, Torino, Giappichelli, 2009; Carlo Castronovo (ur.), *Principi di diritto europeo dei contratti*, Milano, Giuffré, I-II-III, 2005.

[16] Presuda Suda EU, 30 travnja 1998, C-215/97, *Barbara Bellone* v. *Yokohama SpA*, ECLI:EU:C:1998:189.

[17] Zakon od 3 maja 1985, br. 204.

[18] Guido Alpa (ur.), "I diritti dei consumatori", in Gianmaria Ajani, Gian Antonio Benacchio (ur.), *Trattato di diritto privato dell'Unione europea*, Torino, Giappichelli, 2009, Tom I i Tom II; Gian Antonio Benacchio, "Tutela delle scelte economiche consumeristiche e punti deboli del modello europeo e nazionale", *Il diritto dell'economia*, 2018, br. 3, str. 1017 i dalje; Christian Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham-Northampton, Edward Elgar Publishing, 2016; Giuseppe Cassano, Antonio Catricalà, Renato Clarizia (ur.), *Con-*

U predmetu *Mohamed Aziz*[19], Sud je utvrdio da mjere predviđene španjolskim zakonodavstvom, a koje nisu priznavale nepoštene klauzule kao osnova na temelju koje je potrošač mogao usprotiviti se ovrsi zbog neispunjena ugovornih obveza, ne jamče ciljeve efektivne zaštite potrošača postavljenima od strane evropskih pravila (direktiva 93/13/EEZ), premda u samoj direktivi se to nije nigdje izričito propisivalo. Bez intervencije Suda i uz nedostatak direktive br. 93/13 od 1992. godine, španjolskom potrošaču bi se bila nudila samo *ex post* zaštita, kojom se ne bi postigao rezultat suzbijanja korištenja takvih klauzuli.

U drugom predmetu, *Ernst Radlinger*,[20] radilo se također o direktivi 93/13. Budući da u direktivi stoji vrlo općenito da će pojedinačne Države članice morati propisati kako su eventualne klauzule između potrošača i trgovca kojima se derogira nadležnosti suda potrošača nevaljane, prilikom implementacije direktive neke države, kao primjerice Italija, zaključile su da će sankcionirati postojanje takvih klauzula njihovom ništetnošću. No, direktiva 93/13 ne propisuje tko ima aktivnu legitimaciju pokrenuti spor radi utvrđivanja ništetnosti klauzule. Budući da direktiva to ne propisuje, moglo se smatrati da je svaka Država članica mogla samostalno definirati tko, kada i na koji način bi mogao ustati tužbom tražeći utvrđivanje nevaljanosti takve klauzule. Naprotiv, spomenutom presudom *Radlinger je* definirano kako pitanje nevaljanosti klauzule kojom se derogira nadležnosti suda potrošača mora se moći također pokrenuti *ex officio* od strane suca, a ne samo na inicijativu stranke.

Na taj način Evropski sud ne samo što je uveo novo pravilo, koje nije predviđeno direktivom, s ciljem pokrića očitog normativnog nedostatka, već je uveo ne više pravilo harmonizacije, već pravilo unifikacije, budući da je interpretacija koju nudi Sud obvezujuća ne samo za suca *a quo* (u ovom specifično slučaju radilo se o prvostupanjskome sudu u Barceloni) nego i za sve nacionalne suce svih Država članica EU, koji od tada više ne mogu primjenjivati svoje nacionalno pravo na način koji nije u skladu s tumačenjem danim od strane evropskog Suda.

Sud u Luxembourgu je često pojašnjavao sadržaj obveze transparentnosti ugovornih klauzuli, koju obvezu također propisuje direktiva br. 93/13. Ta je obveza često implementirana u pojedinačnim nacionalnim sustavima bez dodat-

correnza, mercato e diritto dei consumatori, Torino, Utet, 2018; Vincenzo Cuffaro (ur.), *Codice del consumo*, Milano, Giuffré, 2019.

[19] Presuda Suda EU, 14. ožujka 2013, C-415/11, *Mohamed Aziz* v. *Caixa d'Estalvis de Catalunya*, ECLI:EU:C:2013:164; o tomu v. H.-S. Micklitz, "Unfair Contract Terms – Public Interest Litigation Before European Courts", in Evelyne Terryn, Gert Straetmans, Veerle Colaert (ur.), *Landmark cases of EU consumer law. In Honour of Jules Stuyck*, Cambridge, Intersentia, 2013, 639–652.

[20] Presuda Suda EU, 21. travnja 2016., C-377/14 C-240/98.

nih pojašnjenja i detaljiziranja. Evropski suci [21] držali su potrebnim nadopuniti oskudni opis sadržaja obveze transparentnosti tvrdeći da, kako bi se mogla poštovati ta obveza, nije dovoljno da klauzule budu čitke na gramatičkoj razini, već da moraju na isti način omogućiti potrošaču donošenje opreznih odluka, s punim shvaćanjem njihovog značaja i svjestan financijskih posljedica[22].

Na evropskoj razini efektivna zaštita potrošača se jamči također putem tzv. *Alternative Dispute Resolution* ili *ADR* [23] (medijacija, mirenje, arbitraža, *ombudsman*, itd.).

U jednoj recentnoj presudi[24], tražilo se da se Sud izjasni glede talijanskog zakona koji propisuje obvezu za stranke, prije negoli se obrate pravosuđu, da pokrenu postupak preventivne medijacije s ciljem favoriziranja izvansudskog rješavanja spora među potrošačima i trgovcima koristeći alternativne i jeftinije metode u odnosu na sudske postupke (tzv. *Alternative Dispute Resolution*), no prinuđujući pritom stranke da ih odvjetnik asistira. Oba su uvjeta (obveza korištenja ADR-a i obvezno zastupanje odvjetnika) izazvala dvojbe, naročito jer evropske odredbe ne predviđaju takvu obvezu. Štoviše minimiziraju njihovu važnost. Ipak je evropski Sud, unatoč šutnji evropskog zakonodavca, ocijenio prvu navedenu obvezu (vezana uz ADR) propisanu talijanskim zakonom u skladu s evropskim pravom, dočim je drugu (vezanu uz obveznu asistenciju odvjetnika) ocijenio neprikladnom. I u tom slučaju suci iz Luxembourga „preinačili" su talijansko zakonodavstvo na temelju ocjene oportunosti i uravnoteženosti interesa ugovornih strana, iako ne proizlaze izravno iz direktive.

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[21] Presuda Suda EU, 30. travnja 2014., C-26/13, *Árpád Kásler et al.* v. *OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282; Presuda Suda EU, 20. rujna 2017, C-186/16, *Ruxanda Paula Andriciuc et al.* v. *Banca Romaneasca SA*, ECLI:EU:C:2017:703; Presuda Suda EU, 9. srpnja 2015, C-348/14, *Maria Bucura* v. *SC Bancpost*, ECLI:EU:C:2015:447.

[22] Presuda Suda EU, 26. travnja 2012, C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság* v. *Invitel Távközlési Zrt*, ECLI:EU:C:2012:242; Presuda Suda EU, 19. rujna 2019, C-34/18, *Ottília Lovasné Tóth* contro *ERSTE Bank Hungary Zrt*, ECLI:EU:C:2019:764.

[23] Na primjer: Direktiva br. 2008/52/CE *o nekim aspektima mirenja u građanskim i trgovačkim stvarima*; Uredba EU br. 524/2013 *o online rješavanju potrošačkih sporova*. O tome: Ugo De Luca, "La nozione 'europea' di ADR", in Michele Corradino, Saverio Sticchi Damiani (ur.), *ADR e Mediazione*, Torino, Giappichelli, 2012; Mariacristina Bottino, *La nuova normativa europea in materia di risoluzione alternativa delle controversie dei consumatori*, *Contratto e impresa/Europa*, 2014, 1, str. 8 i dalje.

[24] Presuda Suda EU, 14. lipnja 2017, C-75/16, *Menini e Rampanelli* v. *Banco Popolare*, ECLI:EU:C:2017:457; više u: Gian Antonio Benacchio, "Le ADR in Italia: gli effetti controproducenti di una sovraproduzione normativa", in Uugo Mattei, Albina Candian, Barbara Pozzo, Alberto Monti, Carlo Marchetti (ur.), *Un giurista di successo. Studi in onore di Antonio Gambaro*, Milano, Giuffré, 2017, II, str. 1391 i dalje.

Nadalje, presudom *Consumer Finance SA* iz 2014[25], Sud smatra neprimjerenim francuski model zaštite potrošača kod potrošačkog kreditiranja jer, premda nije bilo u suprotnost s odredbama direktive 2008/48, on dopušta da teret dokazivanja neispunjenja obveza informiranosti na strane vjerovnika/institucija koja kreditira bude na potrošaču. Razlog ocjene neprimjerenosti temelji se na tumačenju kako je uobičajeno zaključiti da potrošač ne raspolaže sredstvima koja mu dopuštaju mogućnost iznošenja tog dokaza. Stoga bi francuski model bio u suprotnosti s načelom učinkovitosti zaštite potrošača.

Mnogi se takvi primjeri mogu ponuditi i u području *javnih ugovora* (javne nabave i koncesije), putem kojih javne uprave stječu dobra i usluge radi zadovoljavanja vlastitih potreba i potreba zajednice. Financijski entitet tog tržišta, kao i njegova važnost s ciljem integracije u jedinstveno unutarnje tržište doveli su postepeno do uvođenja uz nacionalne propise čitavog korpusa evropskih načela i pravila koje se počelo razvijati sedamdesetih godina, a koji se artikulira u zakonske odredbe i jurisprudencijalne odluke koje snažno uvjetuju uređenje i funkcioniranje nacionalnih sustava javnog ugovaranja[26].

Primjerice, sudska praksa Suda Evropske unije[27], pojašnjavajući značaj i osnovna obilježja pojma osobe koja djeluje u sklopu svoje profesionalne djelatnosti promijenila je ona stajališta sudova i onu praksu javne uprave u Italiji koja su negirala određenim subjektima (obrti, zaklade, nevladine organizacije, udruge volontera, sveučilišta, znanstveni instituti itd…) mogućnost sklapanja javnih ugovora. S ovom novom i različitom interpretacijom pojma osoba koja djeluje u sklopu svoje profesionalne djelatnosti danas je moguće, nakon sadržajne i formalne pro-

[25] Presuda Suda EU, 18. prosinca 2014., C-449/13.

[26] V. o tome: Gian Antonio Benacchio, Michele Cozzio (ur.), *Gli appalti pubblici tra regole europee e nazionali*, Milano, Egea, 2012, str. 10 i dalje; C. Bovis, "Developing public procurement regulation: Jurisprudence and its influence on law making", *Common Market Law Review*, 2006, str. 2; F. Lichere, R. Caranta, S. Treumer (ed.), *Modernising Public Procurement: the new Directives*, Djøf Publishing, 2014; Christofer Bovis (ur.), *Research Handbook on EU Public Procurement Law*, Cheltenham-Northampton, Edward Elgar Publishing, 2016; Id., Christofer Bovis, "Regulatory Trends in Public Procurement at the EU Level", *European Procurement & Public Private Partnership Law Review*, 2012, 4, str. 221–227; Roberto Caranta, *I contratti pubblici*, Torino, Giappichelli, 2012, II ed.; José Maria Gimeno Feliu, *La ley de Contratos de Sector Publico 9/2017. Sus principales novedades, los problemas interpretativos y las posibles soluciones*, Cizur Menor (Navarra), Editorial Aranzadi, 2019; J.M. Gimeno Feliu, *El nuevo paquete legislativo comunitario sobre contratacion publica. De la burocracia a la estrategia*, Cizur Menor (Navarra), Editorial Aranzadi, 2014.

[27] Presuda Suda EU, 12. veljače 2008, C-2/06, *Willy Kempter KG* v. *Hauptzollamt Hamburg-Jonas*. ECLI:EU:C:2008:78; Presuda Suda EU, 4. listopada 2012, C-502/11, *Vivaio dei Molini Azienda Agricola Porro* v. *Autorità per la Vigilanza sui Contratti Pubblici*, ECLI:EU:C:2012:613; Presuda Suda EU, 23. prosinca 2009, C-305/08, *CoNISMa* v. *Regione Marche*, ECLI:EU:C:2009:807; Presuda Suda EU, 18. prosinca 2007, C-357/06, *Frigerio L. & C. Snc* v. *Comune di Triuggio*, ECLI:EU:C:2007:818.

vjere, povjeriti djelo ili uslugu subjektima kojima nije primarni cilj ostvarivanje dobiti ili koji ne raspolažu organizacijskom strukturom pravog društva, ili čak onima koji niti ne jamče kontinuirano prisustvo na tržištu ako su u stanju ponuditi djela, proizvode i usluge javnoj upravi.

U još jednoj nedavnoj odluci[28] Sud je intervenirao kako bi ispravio pretjerani formalizam talijanskog modela u području javnih natječaja. Prema talijanskom zakon iz 2016. godine (kojim se implementirala odgovarajuća evropska direktiva) tvrtke koje nisu navele određene stavke troškovnika u ponudi koja služi natjecanju za dobivanje ugovora, bivaju automatski isključene iz natječaja bez mogućnosti naknadne nadopune nedostatka. No, prema stajalištu Suda, nije prihvatljivo isključenje onda kada nedostatak određenih stavki troškovnika proizlazi, kao u onom slučaju, iz činjenice da ponuđeni formular nije sadržavao fizički prostor za navođenje tih troškova. I u tom slučaju, dakle, strogost norme biva umjerena primjenom načela razmjernosti/proporcionalnosti i legitimnog očekivanja, nudeći tvrtkama mogućnost nadopune *ex post* i u određenim slučajevima vlastitih ponuda iako nacionalna norma to izričito onemogućuje.

ZAKLJUČAK

Izneseni primjeri su tek mali dio naspram stotina i stotina odluka donesenih od strane Suda u području ugovornog prava tijekom gotovo sedamdeset godina postojanja. A tek kad bi se spomenula i sva ostala područja uređena izvorima evropskog prava, mogle bi se navesti mnoge druge odluke.

U svakom slučaju ponuđeni primjeri su dovoljni kako bi otkrili posebnosti evropske sudske prakse glede njene sposobnosti *unifikacije, stvaranja i inovacije* pravila uslijed širokih margina autonomije puštene evropskim sucima.

Manje promatrani aspekt je onaj koji dovodi do zaključka da evropska sudska praksa ima sposobnost modeliranja primjenom načela razumnosti "proturječnosti" nacionalnih pravila, čija rigorozna primjena mogla bi dovesti do donošenja rješenja koja bi mogla biti nepravedna ili manje uravnotežena.

Ovaj poseban aspekt onoga što može činiti Sud Evropske unije prema modelu kojeg je krojila Evropska unija, nudi jasnu viziju prava poput živućeg entiteta, sačinjenog od pravila u stalnom razvoju uslijed njihove kontinuirane interpretacije.

Kut motrišta evropske sudske prakse omogućava trenutno shvaćanje dinamičnosti pravila kao i poticaje koje šalje sudac-interpretator. U doba rastu-

[28] Presuda Suda EU, 2. svibnja 2019, C-309/18, *Lavorgna Srl* v. *Comune di Montelanico*, ECLI:EU:C:2019:350.

ćeg ubrzavanja društvenih i gospodarskih fenomena/pojava, pa posljedično i nastanka pravila, ne može se ne priznati važnost interpretativnog djelovanja kojim se može pronaći ravnoteža i razumnost između starih pravila i novih problema, kao i između vrijednosti, prava i interesi koji proizlaze iz društva u stalnoj i brzoj transformaciji.

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THE INTERPRETATION OF LAW BETWEEN BALANCING AND REASONABILITY IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EU

Summary

It is a known fact that the Court of Justice of the European Union has a key role in the Europeanisation process of national law and the importance of its decisions among the sources of law is undeniable; it remains one of the main sources for the identification of concrete rules, as well as the general principles of law. Acknowledging such a key role to EU case law means recognising its power in establishing rules that then dominate in national legal systems too, integrating them with profoundly innovative solutions that are often not already present in the legal traditions of the Member states. The main aim of this contribution, however, is to underline another aspect which is often not taken into consideration as much, but focuses on the capacity of European law to shape national law according to reasonableness, given that a rigorous application would risk leading to unfair or less balanced solutions. The privileged position of European case law permits to immediately grasp the dynamism of rules. In such times, where social and economic phenomena are moving at a faster pace, it is impossible not to acknowledge the importance of the Court of Luxembourg interpretation, which is able to find balance and reasonableness among old rules and new problems and among beliefs, rights and interests emerging from a society that is constantly and rapidly changing.

Key word: Europeanization, Court of Justice, interpretation, reasonableness, harmonization

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PETA SEKCIJA

MEĐUNARODNA TRGOVINA

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PREDRAG BJELIĆ

PRAVILA O POREKLU ROBE KAO NOVA GRANICA SPOLJNOTRGOVINSKE LIBERALIZACIJE

Danas smo u međunarodnoj trgovini svedoci značajne liberalizacije režima međunarodne trgovine koji se ogleda u snižavanju carinskih stopa i necarinskih barijera. Preferencijalna trgovina nije moguća bez primene pravila o poreklu proizvoda, kojima se dokazuje nacionalnost jednog proizvoda i omogućava korišćenje tih trgovinskih preferencijala. Ipak, zahtevna i složena pravila o poreklu mogu biti prepreka odvijanju međunarodne trgovine. Zbog sve većeg značaja globalnih proizvodnih lanaca u međunarodnoj trgovini, pristupa se liberalizaciji režima pravila o poreklu proizvoda, kroz različite oblike omogućavanja kumulacije porekla proizvoda. Najbolji primer je PEM konvencija u Evropi koja stvara veliku pan-euromediteransku zonu kumulacije porekla.

Ključne reči: *pravila o poreklu, međunarodna trgovina, liberalizacija režima međunarodne trgovine, kumulacija porekla proizvoda*

U V O D

U poslednjem veku se aktivnost međunarodne trgovine značajno uvećala, uz značajnu promenu strukture predmeta kojima se globalno trguje. Značajno se uvećala i složenost pravnog regulisanja aktivnosti međunarodne trgovine, kako kao privredne delatnosti, tako i pravne regulative između različitih država, odnosno nacionalnih privreda, po pitanjima vezanim za međusobnu trgovinu. Naj-

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češće se tu misli na ugovore o preferencijalnoj trgovini koji definišu režim međusobne trgovine potpisnica, kroz primenu sniženih carinskih stopa u međusobnoj trgovini i kroz uklanjanje necarinskih barijera. Ali primenu ovakvih ugovora prati još veliki broj pravila koja obezbeđuju da se odobrene trgovinske koncesije ne zloupotrebljavaju. Takva pravila uključuju i pravila o poreklu proizvoda.

POJAM PRAVILA O POREKLU U MEĐUNARODNOJ TRGOVINI

Pod pravilima o poreklu proizvoda (eng. *Rules of origin*) Svetska trgovinska organizacija (eng. *World Trade Organization*) podrazumeva kriterijume po kojima se utvrđuje nacionalno poreklo jednog proizvoda. Utvrđivanje nacionalnog porekla proizvoda je neophodno jer se primena instrumenata spoljnotrgovinske politike razlikuje u zavisnosti od porekla proizvoda kojim se trguje.

Primena pravila porekla je neophodna zbog:

– mogućnosti primene preferencijalnih carinskih stopa;

– primene drugih mera i instrumenata spoljnotrgovinske politike, kao što su antidumping mere i mere samozaštitnog sistema;

– radi izrade statistike spoljne trgovine;

– radi primene zahteva za obeležavanjem i označavanjem proizvoda;

– u postupcima javnih nabavki.[1]

Pravila o poreklu nastaju još sa prvim preferencijalnim bilateralnim spoljnotrgovinskim sporazumima. Naime, preferencijalni uslovi trgovanja se odobravaju samo ako su ispunjeni uslovi pravila o poreklu, da je određeni proizvod tzv. domaći proizvod. Ako se proizvod dobija potpuno od domaćih sirovina onda nema dvojbe da je taj finalni proizvod "domaći" proizvod (eng. *wholly obtained*), i tu se najčešće ubrajaju proizvodi dobijeni iz zemlje, iz mora ili žive životinje.

Ali šta ako se u proizvodnji finalnog proizvoda koriste i strane sirovine i inputi? Svetska carinska organizacija (eng. *World Customs Organization*) poznaje, sem proizvoda koji su celokupno dobijeni u zemlji izvoza, i proizvode koji mogu steći domaće poreklo značajnom domaćom preradom uvoznih sirovina. To znači da se proizvod koji se uveze iz neke strane zemlje može smatrati domaćim proizvodom samo ako doživi značajnu transformaciju odnosno preradu (eng. *substantial transformation*).[2] Za ispitivanje značajne prerade može se koristiti ne-

[1] WTO, Rules of Origin, *https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm*, 15/09/2019.

[2] World Customs Organization, The International Convention on the simplification and harmonization of Customs procedures, Internet, *http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx*, 25/09/2019. Ova konvencija je origi-

koliko kriterijuma, i to: promena pozicije proizvoda u carinskoj tarifi, kriterijum određenih proizvođačkih operacija i vrednosni ili *ad valorem* kriterijum.

Ugovorom o slobodnoj trgovini se precizno određuje šta se smatra domaćim proizvodom, najčešće definisanjem procenta domaće supstance koji proizvod mora da poseduje, tzv. *ad valorem* kriterijum. Većina ugovora zahteva minimum od 50% vrednosti proizvoda kao domaće supstance, dok su retki ugovori gde je ovaj procenat 40% ili 30% vrednosti proizvoda. Osim *ad valorem* kriterijuma, primenjuju se i kriterijum promene pozicije u carinskoj tarifi (eng. *criterion of change of tariff classification*) ili kriterijum ostvarenja određenih proizvodnih odnosno prerađivačkih operacija (eng. t*he criterion of manufacturing or processing operation*). Primena pravila porekla je neophodna kako bi se onemogućilo da reeksportovani proizvodi iz neke zemlje koja nije strana ugovornica u ugovoru o preferencijalnoj trgovini ostvaruju preferencijale predviđene ugovorom.

U međunarodnom prometu ova činjenica se dokazuje Uverenjem o preferencijalnom poreklu proizvoda. Ovaj dokument izdaju po pravilu carinski organi zemlje izvoznice i njime se pred carinskim organima zemlje uvoznice dokumentuje preferencijalno poreklo, čime se omogućava korišćenje trgovinskih preferencijala, najčešće u obliku nižih (preferencijalnih) carinskih stopa. Da bi uverenje o preferencijalnom poreklu bilo izdato, carinskim organima se moraju dokumentovati svi troškovi koji su nastali u zemlji a povodom sirovina i drugih inputa za proizvode, uključujući i troškove radne snage. Ako proizvod koji se izvozi ne ispunjava ovaj zahtev za domaćim poreklom, onda se izdaje uverenje o nepreferencijalnom poreklu koje prati robu, a najčešće ga izdaju carinski organi, ali i drugi organi sa javnim ovlašćenjima, kao privredne komore i slični drugi organi.

Za svaki ugovor o preferencijalnoj (tzv. slobodnoj) trgovini se propisuje izgled dokumenta, uverenje o preferencijalnom poreklu proizvoda. Svetska carinska organizacija radi dosta na ujednačavanju propisa o pravilima o poreklu i na izradi standardizovanog dokumenta kojim bi se dokazivalo preferencijalno poreklo u svim preferencijalnim trgovinskim sporazumima. Usvojene su Preporuke Svetske carinske organizacije o sertifikaciji pravila o poreklu (eng. *WCO Guidelines on Certification of Origin*) koje propisuju kako se utvrđuje preferencijalno poreklo i koje ujednačavaju uverenja o preferencijalnom poreklu.[3]

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nalno usvojena 1974. godine u Kjotou u Japanu, a izmenjena juna 1999. godine, pa je danas poznata kao Izmenjena Kjoto konvencija (The Revised Kyoto Convention).

[3] WCO Guidelines on Certification, *http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/key-issues/revenue-package/guidelines-on-certification.pdf?db=web*, 29/09/2019.

PRAVILA O POREKLU I REŽIM MEĐUNARODNE TRGOVINE

Iako pravila o poreklu proizvoda čine ključni uslov za primenu preferencijalnih uslova trgovanja između strana potpisnica preferencijalnog trgovinskog ugovora, mnogi autori smatraju da upravo ova pravila imaju protekcionistički efekat, nazivajući to "skrivenim protekcionizmom"[4]. Na ovom stanovištu su i privredni subjekti, koji su na svetskom nivou udruženi u Međunarodnu trgovinsku komoru (eng. *International Chamber of Commerce*), i koja ističe da postoji velik broj različitih sistema pravila o poreklu, koja se značajno razlikuju od ugovora do ugovora, i da je nekada veoma teško ispuniti ove zahteve, posebno za mala i srednja preduzeća koja su uključena u međunarodno poslovanje.[5]

Pravila o poreklu deluju restriktivno na obavljanje međunarodne trgovine jer ograničavaju broj proizvoda kojima se može trgovati pod preferencijalnim uslovima.[6] Naime, proizvod koji ne ispuni zahteve preferencijalnih pravila o poreklu, ne može koristiti preferencijale koji su odobreni nekim ugovorom o preferencijalnoj trgovini, iako se proizvodi u jednoj od zemalja potpisnica. Ovo je posebno nepovoljno u uslovima kada se proizvodnja obavlja u okviru globalnih proizvodnih lanaca, a dominantan oblik međunarodne trgovine postaje trgovina poluproizvodima, delovima i sklopovima.

Iako je došlo do liberalizacije režima međunarodne trgovine u pogledu snižavanja carina i necarinskih barijera, restriktivni režimi pravila o poreklu onemogućavaju izvoznicima da koriste preferencijalne iz bilateralnih i regionalnih trgovinskih preferencijalnih sporazuma. Rezultati brojnih studija sugerišu da su upravo restriktivna pravila o poreklu razlog zbog koga se potencijali trgovine u ugovorima o preferencijalnoj trgovini ne koriste u punoj meri.[7]

U jednom od prvih radova koji je tretirao efekte pravila o poreklu na regionalnu trgovinski integraciju, autori Krišna i Kruger 1995. godine[8] ukazuju na pro-

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[4] Antoni Estevadeordal, Kati Suominen, Jeremy T. Harris and Matthew Shearer, *Bridging Regional Trade Agreements in the Americas*, Special Report on Integration and Trade, Inter-American Development Bank (IDB), New York, 2009, p. 31.

[5] International Chamber of Commerce, Business Recommendations on Rules of Origin in Preferential Trade Agreements, POLICY STATEMENT, Internet, *https://iccwbo.org/content/uploads/sites/3/2017/05/ICC-Policy-Statement-on-rules-of-origin-in-preferential-trade-agreements.pdf*, p. 2.

[6] Ivana Popović Petrović i Predrag Bjelić, *Evropska trgovinska integracija*, Univerzitet u Beogradu Ekonomski fakultet, Beograd, str. 173.

[7] Jisoo Yi, "Rules of Origin and the Use of Free Trade Agreements: A Literature Review", *World Customs Journal*, Vol. 9, No. 1, p. 43.

[8] Krishna, K & Krueger, A, 'Implementing free trade areas: rules of origin and hidden protection', *NBER Working Paper* No. 4983, National Bureau of Economic Research, Cambridge, MA, 1995.

tekcionističke efekte pravila o poreklu i zaštitne efekte ovih pravila na neefikasne proizvođače u zemlji koja je članica regionalne trgovinske integracije. Oni ukazuju da je pravila o poreklu teško jednostavno definisati, i da oni imaju različite modalitete primene pa se njihova restriktivnost po tome može razlikovati.

Očigledno je da je restriktivnost pravila o poreklu proizvoda veća što ova pravila dozvoljavaju manju upotrebu inputa van dozvoljenih izvora (iz zemlje izvoza i zemalja potpisnica ugovora o preferencijalnoj trgovini). Na ovaj način definisanu restriktivnost možemo najlakše uočiti i klasifikovati.[9]

Jedan od autora koji je najviše analizirao restriktivnost pravila o poreklu jeste Antoni Estevadeordal koji u svom radu iz 2000. godine[10] predlaže indeks restriktivnosti za merenje efekata pravila o poreklu. U zavisnosti od složenosti kriterijuma za ocenu pravila porekla, autor predlaže da vrednost indeksa može biti 1 do 7, tako da je najmanje restriktivna vrednost 1 i ona se dodeljuje kada se zahteva promena pozicije u carinskoj tarifi, i to na nivou samih proizvoda (tarifnih pozicija sa 8–10 cifara Harmonizovanog sistema). Vrednosti indeksa rastu kako se povećava broj proizvoda na koje se promena pozicije u carinskoj tarifi odnosi, jer to može biti na nivou grupa sa 6 cifara Harmonizovanog sistema, 4 cifre ili čak 2 cifre. Restriktivnost se može dodatno povećati i uključivanjem drugih kriterijuma kao što su *ad valorem* kriterijum i kriterijum tehničkih zahteva. Maksimalna vrednost indeksa restriktivnosti pravila porekla je 7, a ta vrednost se dodeljuje i u slučaju kada se zahteva da su proizvodi u potpunosti proizvedeni u zemlji izvoza. Na primer, vrednost pet znači da postoji zahtev za domaćim sadržajem od preko 50% vrednosti proizvoda, što je restriktivnije od uobičajene prakse u svetu.

Novija studija koja nastoji da meri efekte pravila porekla je grupe autora iz 2007. godine[11] ukazuje na dve najznačajnije osobine pravila o poreklu proizvoda – restriktivnost i složenost. Restriktivnost se odnosi na mogućnost ovih pravila da ograniče trgovinu robom u zoni gde je trgovina liberalizovana smanjenjem carina i uklanjanjem necarinskih barijera. Složenost se odnosi na činjenicu da pravila o poreklu imaju dosta kriterijuma i uslova, koji se često dodatno razlikuju u zavisnosti o kom proizvodu je reč.

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[9] Antoni Estevadeordal and Kati Suominen, *Gatekeepers of Global Commerce: Rules of Origin and International Economic Integration*, Inter-American Development Bank, New York, 2008, p. 39.

[10] Antoni Estevadeordal, "Negotiating Preferential Market Access: The Case of the North American Free Trade Agreement" *Journal of World Trade* Vol. 34, No.1, 2000, pp. 141–166.

[11] Estevadeordal, Antoni, Harris, Jeremy & Suominen, Kati, "Multilateralizing preferential rules of origin around the world" *Paper for the WTO/HEI/NCCR Trade/CEPR Conference* "Multilateralizing Regionalism", 10–12. September 2007, Geneva, *https://pdfs.semanticscholar.org/b9ae/a0b072bf963b25a71b4c23e81e556b336432.pdf*.

Autori Estervadeordal, Haris i Suominen u radu iz 2009. godine[12] nastoje da usavrše indeks restriktivnosti pravila o poreklu koji je Estervadeordal razvio 2000. godine. Oni sada razvijaju dva indeksa, posmatrajući i sektorski nivo, i istražujući mnogo šire različite režime pravila o poreklu koji postoje u svetu. Ono što su ustanovili je da su ovi režimi najrestriktivniji kod sektora poljoprivrede i sektora tekstila i odeće, i da je ova restriktivnost motivisana protekcionističkim namerama da se ovi sektori zaštite od strane konkurencije, za šta su takođe korišćene i carine i necarinske barijere.

Najnovija istraživanja pravila o poreklu proizvoda idu u smeru analize troškova trgovine, u sklopu istraživanja pojma olakšavanja trgovine (eng. *trade facilitation*), koje prouzrokuju razne barijere u trgovini, prvenstveno administrativne barijere trgovini.

LIBERALIZACIJA KRITERIJUMA PRAVILA O POREKLU U MEĐUNARODNOJ TRGOVINI

Liberalizacija spoljnotrgovinskih režima država, kroz smanjenje carinskih stopa i uklanjanje necarinskih barijera, značajno je doprinela opštoj liberalizaciji režima međunarodne trgovine. Bez obzira da li se radi o bilateralnim, regionalnim ili međunarodnim sporazumima, svaki od njih je korak ka uklanjanju prepreka u trgovini i značajnijem obimu međunarodne trgovine. Ali, iako zemlje deklarativno podržavaju liberalizaciju režima svetske trgovine, mnoge uvođenjem dodatnih i novih necarinskih mera nastoje da kompenzuju značajni pad carinskih stopa u svetu. U novije vreme i carine su kao instrument spoljnotrgovinske politike opet dobile na značaju, kao moćno oružje u trgovinskim ratovima. Ali barijere koje danas značajno pogađaju međunarodnu trgovinu su administrativne barijere trgovini. One potiču iz različitih i neusklađenih zakonskih regulativa država, ali i različitih administrativnih procedura koje su složene i dugotrajne. Jedan primer zloupotrebe zakonskih propisa i procedura su upravo i pravila o poreklu proizvoda. Iako ona predstavljaju neophodan instrument u obavljanju trgovine pod preferencijalnim uslovima, njihova složenost i restriktivnost, kao i komplikovana procedura primene, mogu biti administrativne barijere trgovini.

U ovom članku uglavnom razmatramo preferencijalna pravila o poreklu, ona koja su sastavni deo ugovora o slobodnoj trgovini. Osim njih postoje i ne-

[12] Antoni Estevadeordal, Jeremy Harris and Kati Suominen "Harmonizing Preferential Origin Regimes around the World." In: R. Baldwin and P. Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System*. Cambridge University Press, Cambridge, 2009.

preferencijalna pravila o poreklu. Međunarodni sporazum o harmonizaciji preferencijalnih pravila o poreklu proizvoda ne postoji. U okviru Svetske trgovinske organizacije postoji Sporazum o pravilima porekla (*WTO Agreement on Rules of Origin*) čiji je cilj harmonizacija nepreferencijalnih pravila o poreklu, kako bi se onemogućilo da ona budu nepotrebna barijera odvijanju međunarodne trgovine. Aneks 2 ovog Sporazuma određuje da će se isti principi i zahtevi za nepreferencijalna pravila o poreklu primenjivati i na preferencijalna pravila porekla, kao što su transparentnost, pozitivni standardi, administrativne procene, sudska revizija, neretroaktivnost u slučaju promena i poverljivost. Ali se Sporazum ne odnosi na preferencijalna pravila o poreklu, već je to tema razgovora u okviru nove runde multilateralnih trgovinskih pregovora pod okriljem Svetske trgovinske organizacije. Svetska carinska organizacija je dosta radila na harmonizaciji utvrđivanja preferencijalnih pravila o poreklu, ali je za sada najveći uspeh učinjen u oblasti ujednačavanja dokumenata o sertifikaciji pravila o poreklu.

U praksi međunarodne trgovine se liberalizacija režima preferencijalnih pravila porekla omogućava kroz dozvoljavanje kumulacije porekla strana potpisnica ugovora o preferencijalnoj trgovini u jedno domaće odnosno regionalno poreklo proizvoda. Da bi ovo bilo operativno u praksi, zemlje moraju imati zaključene sporazume o međusobnom prihvatanju i izjednačavanju sertifikacije preferencijalnih pravila o poreklu.

Kumulacija porekla proizvoda (eng. *Cumulation of Origin*) podrazumeva sistem koji omogućava stranama ugovornicama u ugovorima o preferencijalnoj trgovini da objedinjuju poreklo proizvoda iz država potpisnica, i tako se sirovine ugrađene iz jedne države u finalni proizvod iz druge države tretiraju domaćom sirovinom te druge države. Često to može biti više potpisnica, kada se radi na primer o regionalnim trgovinskim sporazumima, pa razlikujemo tri vida kumulacije porekla proizvoda: 1. bilateralnu kumulaciju; 2. regionalnu kumulaciju; 3. potpunu kumulaciju.

Bilateralna kumulacija porekla proizvoda (eng. *Bilater Cumulation*) podrazumeva kumulaciju (objedinjavanje) porekla proizvoda između dve zemlje potpisnice preferencijalnog trgovinskog ugovora. U ovim ugovorima, često u obliku priloga, je sadržana i protokol o pravilima porekla koji određuje uslove utvrđivanja, sertifikacije i objedinjavanja porekla proizvoda.

Regionalna kumulacija porekla proizvoda (eng. *Regional Cumulation*) podrazumeva objedinjavanje porekla proizvoda između privreda potpisnica regionalnog trgovinskog preferencijalnog ugovora, što čini da se poreklo objedinjava kod više od dve zemlje. Ovaj oblik kumulacije se primenjuje u zemljama članica-

ma koje imaju potpisane međusobne sporazume o priznanju protokola o poreklu proizvoda. Naime, pravila o poreklu igraju veoma značajnu ulogu u regionalnim trgovinskim sporazumima jer onemogućavaju da se roba koja se uvozi iz trećih zemalja reeksportuje u okviru regionalne integracije i zloupotrebe odobrene trgovinske koncesije (eng. *trade deflection*)[13].

Kada se objedinjavanje vrši između više regionalnih ekonomskih integracija tada govorimo o dijagonalnoj kumulaciji porekla proizvoda (eng. *Diagonal Cumulation*). Primer ovakve kumulacije možemo naći između Evropske unije, s jedne strane, i privreda potpisnica izmeđenog centralnoevropskog sporazuma o slobodnoj trgovini iz 2006. godine (CEFTA 2006), a preko Regionalne konvencije o pan-evro-mediteranskim preferencijalnim pravilima o poreklu, o kojoj ćemo pisati u nastavku.

Puna kumulacija porekla proizvoda (eng. *Full Cumulation*) podrazumeva da se uzimaju u obzir sve faze prerade proizvoda kao uzvoznih sirovina i priznaju kao operacije koje kvalifikuju taj sadržaj da bude prihvaćen kao domaći sadržaj, bez obzira da li ta operacija dovodi do značajne transformacije sirovine kako se zahteva većinom pravila o poreklu proizvoda. Naime, ova vrsta kumulacije porekla proizvoda omogućava najšire objedinjavanje porekla između zemalja potpisnica ugovora o slobodnoj trgovini.

Naime, dok kod bilateralne i regionalne kumulacije imamo praksu da se domaći sadržaji proizvoda objedinjuju sa domaćim sadržajem druge potpisnice odnosno potpisnica i dolazimo do povećanog domaćeg sadržaja te zemlje, kod pune kumulacije ispunjenost zahteva pravila porekla se posmatra na nivou cele zone slobodne trgovine, pa imamo i jedinstveno područje za utvrđivanje porekla. Na primer, u CEFTA 2006 sporazumu izvoznici iz Srbije mogu nabavljati sirovine u drugim stranama ugovornicama i poreklo tih sirovina kumulirati i uvećati domaće, odnosno srpsko poreklo proizvoda. U slučaju da postoji puna kumulacija porekla proizvoda onda bi se utvrđivalo ne srpsko poreklo proizvoda, u ovom slučaju, već CEFTA poreklo proizvoda. Razlika je u tome što puna kumulacija porekla proizvoda omogućava da neke sirovine iz trećih zemalja ispune uslov za značajnu transformaciju te sirovine primenom prerađivačkih operacija ako ne u jednoj zemlji uvoznici i članici zone, onda prema operacijama koje se vrše u drugim zemljama članicama te regionalne trgovinske integracije.[14]

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[13] Antoni Estevadeordal, Kati Suominen, Jeremy T. Harris and Matthew Shearer, *Bridging Regional Trade Agreements in the Americas*, Special Report on Integration and Trade, Inter-American Development Bank (IDB), New York, 2009, p. 30.

[14] More in: A User's Handbook to the Rules of Preferential Origin used in trade between the European Community, other European Countries and the countries participating to the Euro-Med-

Primena pune kumulacije porekla omogućava da se trguje sa većim brojem proizvoda pod preferencijalnim uslovima, što je posebno značajno u savremenim uslovima koji postoje u međunarodnoj trgovini, gde je proizvodnja fragmentirana u globalnim okvirima i organizuje se u okviru globalnih proizvodnih lanaca.

Jedna od mera koja se uvodi kao olakšica u primeni preferencijalnih pravila o poreklu je *de minimis* pravilo (eng. *De minimis rule*), koje propisuje šta se smatra maksimalnim nivoom do kog strani materijali mogu da se koriste a da ne utiču na domaće poreklo proizvoda. To olakšava primenu stranih inputa i širi broj proizvoda koji se mogu izvoziti. Najčešće je maksimalni nivo stranih inputa koji je dozvoljen oko 10% od vrednosti proizvoda.

LIBERALIZACIJA KRITERIJUMA PRAVILA O POREKLU U MEĐUNARODNOJ TRGOVINI U EVROPI

U savremenoj međunarodnoj trgovini dominiraju poluproizvodi kao glavni proizvodi u razmeni između zemalja, sa učešćem preko 50% u izvozu najrazvijenijih privreda sveta. To je rezultat procesa dezintegracije proizvodnje, koja se sada ne obavlja u jednoj zemlji ili u jednoj fabrici već u više fabrika, i u više zemalja. Ovakav vid proizvodnje nazivamo globalni proizvodni lanci (eng. *Global production chains*). Prema podacima Svetske trgovinske organizacije novostvorena vrednost u globalnim proizvodnim lancima je činila oko 15% ukupne novostvorene vrednosti u proizvodnji u svetu, dok je 2008. godine to učešće poraslo na 21% ukupne novostvorene vrednosti u proizvodnji u svetu. Usled svetske ekonomske krize to učešće je značajno smanjeno, ali sa oporavkom svetske privrede opet značajno raste i danas čini oko 20% ukupne novostvorene vrednosti u proizvodnji u svetu.[15]

Liberalizacija režima međunarodne trgovine je značajno doprinela razvoju mogućnosti za nastanak i razvoj globalnih proizvodnih lanaca. Budući da proces liberalizacije međunarodne trgovine danas se najefikasnije primenjuje na regionalnom nivou, svi globalni proizvodni lanci imaju regionalni karakter, i govorimo o tri svetska regiona – Zapadna Evropa, Severna Amerika i Istočna Azija. Ali ono što deluje ograničavajuće na njihov dalji razvoj je strog režim pravila o po-

iterranean Partnership, Internet, *https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/handbook_en.pdf*, 15/09/2019.

[15] World Trade Organization, *Global Value Chain Development Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World*, Geneva, 2019, p.12.

reklu koji postoji u regionalnim trgovinskim ugovorima. Ovo dodatno utiče na stimulisanje intraregionalne trgovine, ekstraregionalne trgovine (trgovine izvan regionalne trgovinske integracije).[16] Na taj način pravila o poreklu deluju slično restriktivnim carinskim stopama koje se primenjuju na spoljnu trgovinu jedne regionalne trgovinske integracije.[17]

Značajan faktor koji danas daje dinamiku međunarodnoj trgovini je liberalizacija režima preferencijalnih pravila o poreklu. Najznačajniji primer ovakve prakse je *Regionalna konvencija o pan-evro-mediteranskim preferencijalnim pravilima o poreklu* (eng. *Regional Convention on pan-Euro-Mediterranean Preferential Rules of Origin - PEM*).[18] Početkom 21. veka radilo se na stvaranju jedinstvenih pan-evropskih pravila o poreklu, koji bi uključivali Evropsku uniju (EU), zemlje članice Evropskog udruženja slobodne trgovine (EFTA) i Republiku Tursku. PEM konvencija je stupila na snagu od 1. januara 2012. godine obezbeđujući jedinstvena pravila o poreklu i mogućnost regionalne kumulacije porekla proizvoda u Evropi. Kasnije se primena ove konvencije proširuje i na arapske mediteranske države koje učestvuju u Barselonskom procesu, koji vodi ka Evro-mediteranskoj uniji, ali i na zemlje Jugoistočne Evrope koje učestvuju u Procesu stabilizacije i pridruživanja EU. Kasnije su pridodate i zemlje Istočnog partnerstva, Ukrajina i Gruzija. Danas su tako potpisnice PEM Konvencije zemlje članice EU,[19] EFTA države[20], Turska, Farska ostrva, mediteranske zemlje potpisnice Barselonske deklaracije (zemlje Severne Afrike i Bliskog istoka)[21], zemlje Zapadnog Balkana koje

[16] Kali Krishna & Anne Krueger, "Implementing free trade areas: rules of origin and hidden protection" *NBER Working Paper* No. 4983, National Bureau of Economic Research, Cambridge, MA, 1995.

[17] *Rodney Falvey* and *Geoff Reed, Rules* of *Origin* as *Commercial Policy Instruments*, *Research Paper 2000/18*, University of Nottingham, *Centre* for *Research* on Globalisation and Labour Markets *Nottingham,* 2000.

[18] COUNCIL DECISION of 26 March 2012 on the conclusion of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (2013/94/EU) *Official Journal of the European Union* No. L 54/3 of 26.2.2013, https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32013D0094, 28/09/2019.

[19] Austrija, Belgija, Holandija, Luksemburg, Francuska, Italija, Nemačka, Velika Britanija, Španija, Portugalija, Švedska, Danska, Finska, Irska, Grčka, Mađarska, Poljska, Češka, Slovačka, Slovenija, Estonija, Letonija, Litvanija, Rumunija, Bugarska, Hrvatska, Kipar i Malta. Uključene su i delimično Andora i San Marino.

[20] Švajcarska, Norveška, Lihtenštajn i Island.

[21] Alžir, Egipat, Liban, Maroko, Tunis, Jordan, Izrael, Palestinska vlast u ime Zapadne obale i Pojasa Gaze i Sirija.

učestvuju u procesu stabilizacije i pridruživanja EU,[22] i zemlje Istočnog partnerstva EU.[23]

Regionalna odnosno dijagonalna kumulacija predviđena PEM Konvencijom omogućava da se sirovine uvoze iz bilo koje zemlje potpisnice konvencije, a prilikom izvoza gotovog proizvoda te sirovine uračunavaju u preferencijalno regionalno poreklo pri izvozu u druge države potpisnice, odnosno utvrđuje im se pan-euro-mediteransko poreklo. Da bi kumulacija bila moguća, potpisnice PEM konvencije moraju imati zaključen sporazum o slobodnoj trgovini i u okviru njih ujednačene protokole o preferencijalnim pravilima o poreklu. Princip pune kumulacije porekla postoji samo za zemlje članice Evropskog ekonomskog prostora (zemlje EU, Norveška, Island i Lihtenštajn), kao i u odnosima EU i Alžira, Maroka i Tunisa.

Jedan od problema koji će se pojaviti ako Velika Britanija ove godine bude istupila iz EU neće biti samo mogućnost nekorišćenja preferencijala u okviru Internog tržišta EU, već i nemogućnost kumulacije porekla u pan-euro-mediteranskoj zoni.[24]

Zbog rasta značaja globalnih proizvodnih lanaca u svetu postaje upitno kakva je nacionalnost finalnog proizvoda, jer komponente dolaze iz čitavog sveta. To posebno podstiče liberalizacija pravila porekla, kao PEM Konvencija. Zbog toga Svetska trgovinska organizacija ima inicijativu "Proizvedeno u svetu" (eng. *"Made in the World"*) kojom želi da se proizvodi označavaju kao globalno proizvedeni.

Danas liberalizacija režima međunarodne trgovine ali i liberalizacija režima pravila o poreklu proizvoda utiče značajno na stvaranje regionalnih proizvodnih lanaca. Buduća istraživanja bi mogla dokazati da liberalizacija režima pravila o poreklu proizvoda više doprinosi rastu međunarodne trgovine u Evropi, posebno posle 2012. godine, nego odobreni trgovinski preferencijali u okviru ovog kontinenta.

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[22] Albanija, Bosna i Hercegovina, Crna Gora, Severna Makedonija, Srbija i Kosovo* (u skladu sa Rezolucijom Saveta bezbednosti UN 1244).

[23] Ukrajina i Gruzija.

[24] Brexit and the European Cumulation of Origin the Case of the Textile Industry, https://www.ictsd.org/opinion/brexit-and-the-european-cumulation-of-origin-the-case-of-the-textile-industry, 10/09/2019.

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RULES OF ORIGIN AS A NEW FRONTIER OF INTERNATIONAL TRADE LIBERALISATION

Summary

In contemporary international trade we can witness the significant liberalization of international trade regime throught tariff cuts and abolishment of non-tariff barriers. But the preferential trade is not possible without the application of Rules of Origin which testify about product nationality and make possible for preferencies to be used. But complex and burdensome rules of origin can pose a barrier to international trade. In the situation when we have more global production chains in international trade the rules of origin regime must be made more liberal. This is enabled through several types of origin cumulation practices. Best example is the PEM Convention in Europe that creates a pan-euromediteranian zone of origin cumulation.

Key words: Rules of Origin, International Trade, International trade regime, cumulation of origin

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RADOVAN KOVAČEVIĆ

PREGOVORI SAD I JAPANA O NOVOM BILATERALNOM TRGOVINSKOM SPORAZUMU

U nastojanju da smanje trgovinski deficit, Sjedinjene Američke Države (u daljem tekstu SAD ili Amerika) su tokom 2018. i 2019. posegle za uvođenjem carina na uvoz, pre svega, kineskih proizvoda. Međutim, i ostale zemlje sa kojima SAD ima trgovinski deficit našle su se pod pritiskom da pristupe uravnoteženju bilateralne robne razmene sa SAD. Među njima je i Japan. Američka administracija u bilateralnim trgovinskim pregovorima sa Japanom o potpisivanju novog trgovinskog ugovora nastoji da podstakne američki izvoz poljoprivrednih proizvoda u Japan i smanji uvoz japanskih automobila u SAD. Ukoliko trgovinski ugovor bude sadržao ograničenja na izvoz japanskih automobila na tržište SAD, to će oštetiti japanske proizvođače, ali i kupce u SAD, zbog većih troškova za kupovinu automobila. Međutim, to ne bi bilo prvi put jer je Japan, pod pritiskom SAD, 1981. godine uveo dobrovoljna izvozna ograničenja (eng. Voluntary Export Restraints – VER) na izvoz automobila u SAD, koja su ukinuta 1994. godine. Ova ograničenja su donela velike troškove kako za japanske proizvođače automobila, tako i za potrošače u SAD. Ishod trgovinskih pregovora SAD i Japana oko novog ugovora o trgovini će pokazati da li se istorija ponavlja.

Ključne reči: trgovinski ugovor, bilateralni trgovinski deficit, ograničenje uvoza automobila, carina

U V O D

U jeku trgovinskog rata SAD i Kine, SAD i Japan su započeli pregovore o sklapanju novog bilateralnog trgovinskog sporazuma. U središtu razgovora

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se našla trgovina automobilima, poljoprivrednim proizvodima i uslugama, kao i oblasti u kojima obe zemlje imaju slične ciljeve (npr. digitalna trgovina).

Posle istrage Ministarstva trgovine SAD (eng. *United States Department of Commerce*), američki predsednik Tramp je, na osnovu odeljka 232 Akta o širenju trgovine (eng. *Trade Expansion Act*) iz 1962, uvoz motornih vozila i delova iz Japana i Evropske unije (EU) označio kao pretnju po bezbednost SAD. Predsednik ima ovlašćenja, shodno navedenom članu, da uvede uvozna ograničenja (carine ili kvote) na uvoz ovih proizvoda. Pokrenuti su razgovori sa Japanom o sklapanju novog bilateralnog ugovora o trgovini, koji bi omogućio smanjivanje američkog deficita u razmeni s Japanom. Treba istaći da se Japan usprotivio nametanju carina na uvoz čelika i aluminijuma, koje je SAD uvela većim izvoznicima ovih proizvoda na njeno tržište. Među njima su EU i Japan. Uprkos ovom protivljenju, Japan nije uveo kontra mere, kao što su to uradile EU i Kina. Japan se takođe protivi pretnjama SAD o mogućem uvođenju ograničenja na uvoz japanskih automobila, jer su ovi proizvodi značajna izvozna stavka Japana. Japansko tržište je značajno za SAD, jer je trgovina s Japanom četvrta po veličini za SAD. Istovremeno, Japan je drugi najveći holder javnog duga SAD.[1]

PERFORMASE TRGOVINE SAD I JAPANA

Izvoz automobila i automobilskih delova predstavlja naglašenu stavku u bilateralnoj trgovini SAD i Japana (tabela 1).

Tabela 1.

Dominantne stavke međusobne trgovine SAD i Japana u 2018. godini
u milijardama dolara

	Izvoz SAD u Japan	Uvoz SAD iz Japana	Tgovinski bilans
Ukupno	75,0	142,6	-67,6
Poljoprivreda	12,6	0,6	12,0
Automobili i delovi	2,5	56,5	-54,0
Ostalo	59,8	85,5	-25,6

Napomena: Podaci za poljoprivredu se zasnivaju na primeni kodova 01-20 Harmonizovanog sistema. Podaci o automobilima i delovima se zasnovaju na FT900.

Izvor: Gary C. Hufbauer and Eujin Jung "Will Auto Trade Be a Casualty of US-Japan Trade Talks?", May 6, 2019, *https://piie.com/blogs/trade-investment-policy-watch/will-auto-trade-be-casualty-us-japan-trade-talks* Pristupljeno 11.06.2019.

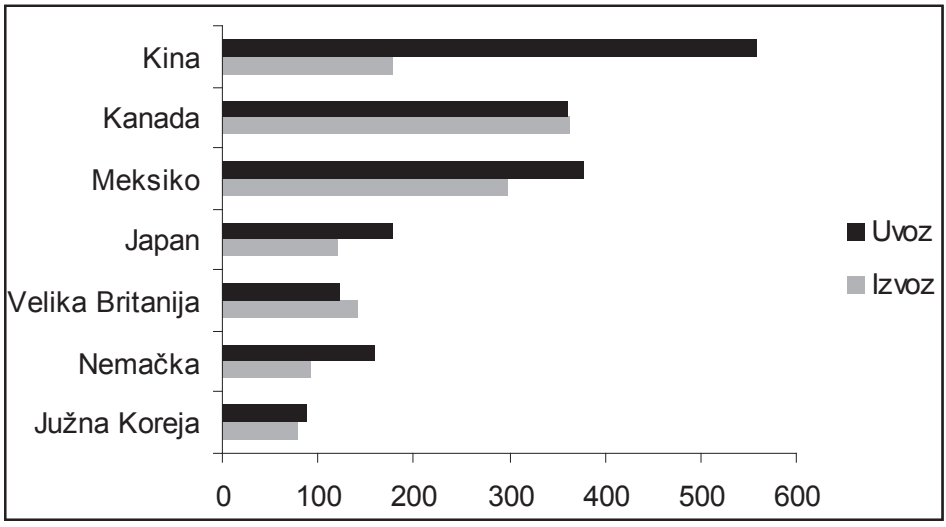
[1] *www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services*, pristupljeno 02.07.2019.

Na osnovu podataka tabele 1. uočava se da Japan ima naglašene komparativne prednosti u izvozu automobila, jer je u 2018. godini ostvario suficit u razmeni s SAD od 54 milijarde dolara. Ujedno je ovo deficit SAD, koji je motivisao predsednika Trampa da od Japana zahteva uravnoteženje razmene, uz pretnje uvođenjem carina i kvota. SAD ima trgovinski deficit i sa nekoliko drugih zemalja.

Pregled trgovine SAD sa vodećim trgovinskim partnerima daje se u grafikonu 1.

Grafikon 1.

Vodeći trgovinski partneri SAD u 2018. godini (roba i usluge)
u milijardama dolara



Izvor: Autor, na osnovu podataka BEA, *https://www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services* Pristupljeno 11.06.2019. godine.

Američki izvoz u Japan 2018. godine je dostigao 121 milijardu dolara, dok je uvoz iz Japana iznosio 179 milijardi dolara. Dakle, američki deficit u razmeni robe i usluga s Japanom u 2018. godini je iznosio 58 milijardi dolara. Ako se posmatra samo robna razmena, američki deficit je iznosio 68 milijardi dolara. Glavna stavka robnog uvoza SAD iz Japana su motorna vozila i delovi (56 milijardi dolara u 2018). Mada je japansko tržište automobila treće po veličini u svetu, japanski uvoz automobila iz SAD je neznatan (2,4 milijarde dolara u 2018). Ostvareni bilateralni robni deficit s Japanom je četvrti po veličini za SAD u 2018. godi-

ni.[2] Američka strana uzroke ovolikog robnog deficita vidi u necarinskim merama, pomoću kojih Japan štiti svoje tržište. Japan nema carine na uvoz automobila, ali američki proizvođači zameraju Japanu zbog diskriminatornog regulatornog tretmana, koji obeshrabruje američke izvoznike automobila. Američka strana u novim trgovinskim pregovorima teži da svojim proizvođačima automobila olakša pristup japanskom tržištu, što bi uticalo na porast proizvodnje i zaposlenosti u SAD. Osnaživanje pravila porekla može biti otežano s obzirom na raširene lance isporuka (eng. *supply chain links*) u SAD i Kanadi, kao i zbog rasprostranjene prakse uslužne proizvodnje (eng. *sourcing*) u Aziji, koju praktikuje Japan.[3] Američka strana se u trgovinskim pregovorima zalaže i za otvaranje visoko zaštićenog japanskog tržišta poljoprivrednih proizvoda. Opravdanje za ove zahteve nalaze u tome što su američki farmeri propustili da osiguraju pristup japanskom tržištu, jer se američka strana povukla iz Trans-Pacifičkog partnerstva (eng. *Trans-Pacific Partnership – TTP*), koji je stupio na snagu 2018. Mada SAD beleži značajan trgovinski deficit s Japanom još od 1980-ih godina, administracija predsednika Trampa je ponovo obratila pažnju na njegove razmere.

Bez obzira na to što SAD ima deficit s Japanom u razmeni automobila, Hufbauer i Jung[4] smatraju da uvođenje ograničenja na uvoz japanskih automobila nema opravdanje, i da bi ova mera naštetila ne samo proizvođačima automobila u Japanu, već i američkim potrošačima. Po mišljenju ovih autora, uvođenje ograničenja bi se odrazilo na smanjivanje japanskih investicija u privredu SAD, a time i na zaposlenost u SAD. Rezonovanje američke administracije je suprotno. Oni smatraju da bi ograničenje uvoza automobila putem kvota, ili carine od 25%, podstaklo američku proizvodnju automobila, a time i porast zaposlenosti.

Ne bi trebalo izgubiti iz vida da je Japan utvrdio svoju konkurentsku poziciju u izvozu automobila na američko tržište, zahvaljujući razvijenom inženjeringu i upravljanju u fabrikama. Sa stanovišta američkih domaćinstava, nesumnjivo je poželjnija opcija kupovine kvalitetnog a jevtinijeg japanskog automobila nego ku-

[2] Podaci su navedeni prema BEA, *www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services,* pristupljeno 11.06.2019. godine.

[3] Globalni lanci isporuka u automobilskoj industriji mogu da uključe na stotine inputa iz brojnih zemalja i podisporučilaca složenih komponenti (McKinsey *Global Institute, Globalization in Transition: The Future of Trade and Value Chains*, 2019, str. 2, *www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Innovation/Globalization%20in%20transition%20The%20future%20of%20trade%20and%20value%20chains/MGI-Globalization%20in%20transition-The-future-of-trade-and-value-chains-Full-report.ashx*, pristupljeno 05.07.2019).

[4] G.C. Hufbauer, E. Jung, str. 1.

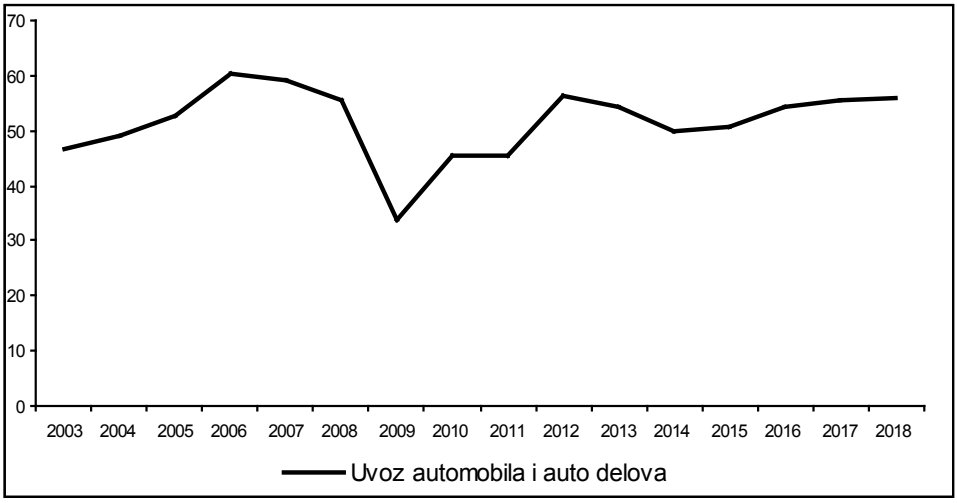
povina skupljeg a manje kvalitetnog domaćeg automobila, iz oživele proizvodnje usled zaštite tržišta. Međutim, upravo američka administracija rešenje problema trgovinskog deficita SAD s Japanom posmatra iz dioptrije carina i kvota.[5]

Japan je u 2018. godini bio treći po veličini izvoznik automobila (posle Meksika i Kanade) na američko tržište. Dinamiku američkog uvoza japanskih automobila i delova prikazuje grafikon 2.

Grafikon 2.

SAD uvoz automobila i auto delova iz Japana

u milijardama dolara



Izvor: Autor, na osnovu podataka BEA, https://www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services Pristupljeno 11.06.2019. godine.

Izvozom putničkih automobila na tržište SAD u vrednosti od oko 40 milijardi dolara, Japan je uspeo da ostvari 23% udela u ukupnom američkom uvozu putničkih automobila. Međutim, posmatrano po vrednosti, ovaj izvoz nije osetnije povećan od 2000. godine. Značajne japanske investicije u američku proizvodnju automobila u periodu posle 2000. mogu u znatnoj meri da objasne ovaj trend.

[5] Za razliku od Trampove administracije, Robert Z. Lawrence, "Focus on Trade Deficits Is Misleading", *Policy Brief 18-6*, Peterson Institute for International Economics, Washington, 2018, str. 2., *https://piie.com/system/files/documents/pb18-6.pdf*, pristupljeno 11.06.2019, smatra da trgovinski deficiti zapravo nisu nužno loši, i nisu merilo da li su spoljnotrgovinske politike ili sporazumi s drugim zemljama fer ili nepravedni.

Hufbauer i Jung[6] ocenjuju da je stok japanskih stranih direktnih investicija (SDI) u ovaj sektor američke privrede porastao sedam puta, od 6,2 milijarde dolara iz 1990. na 42,1 milijardu dolara 2017. godine, i da je to uticalo na porast proizvodnje i zaposlenosti u SAD. Isti autori navode podatak da je proizvodnja automobila u japanskim kompanijama u SAD više nego udvostručena od 1990, dostižući 3,8 miliona komada u 2017. godini. I podatak da su brendirane japanske auto kompanije u SAD direktno zapošljavale 92.710 američkih radnika u 2017. godini, skoro 30% više nego 2011.[7], služi kao dokaz koliko su za američku privredu i njenu automobilsku industriju značajne japanske SDI.

Među svoje najvažnije zadatke SAD administracija uvrstila je smanjivanje trgovinskog deficita s Japanom, koji je 2018. godine iznosio oko 68 milijardi dolara. U tom cilju SAD zahteva od Japana da carinske stope za sve industrijske proizvode svede na nulu, i transparentno prikaže necarinske barijere. Zahtevi se odnose i na poljoprivredne proizvode, gde američka strana očekuje da se carinska i necarinska zaštita ukine. SAD insistiraju na masovnom korišćenju elektronskih podataka u procesu carinjenja, kako bi se olakšala trgovina. Sa ovim je povezan zahtev da se obezbedi uravnoteženiji odnos na pragovima *de minimis* (najveća vrednost robe koja može proći carinu sa pojednostavljenim formularima, bez poreza i carina). Danas je to 10.000 japanskih jena (oko 90 američkih dolara) za Japan, odnosno 800 dolara za SAD. Takođe se može očekivati donošenje strožijih pravila porekla za uvoz japanskih automobila u SAD, kako bi se na taj način ograničio uvoz auto delova trećih zemalja zastupljenih u izvozu japanskih vozila. Time se želi podstaći proizvodnja automobila u SAD. Na spisku američkih zahteva nalazi se i liberalizacija japanskog tržišta usluga. Prosečna vrednost indeksa restriktivnosti trgovine uslugama za Japan (eng. *Services Trade Restricitiveness Index*), koji objavljuje OECD za 22 sektora usluga, iznosila je 0,205 u 2017, nasuprot SAD sa 0,232 (raspon indeksa se kreće od 0 u slučaju potpune otvorenosti, do 1 u slučaju potpune zatvorenosti).[8]

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[6] G.C. Hufbauer, E. Jung, str. 1.

[7] Thomas J. Prusa, The Contributions of Japanese-Brand Automakers to the United States Economy: 2017 Update, Prepared for Japan Automobile Manufacturers Association, 2019, str. 6, *www.jama.org/wp-content/uploads/2019/02/prusa-jama-usa-employment-study-2019-2017-data.pdf,* pristupljeno 11.06.2019.

[8] Gary Clyde Hufbauer, Zhiyao Lucy Lu, "Trump's Japan Agenda Shows the Pitfalls of His Trade Strategy", 2019, *www.piie.com/blogs/trade-investment-policy-watch/trumps-japan-agenda-shows-pitfalls-his-trade-strategy*, pristupljeno 28.06.2019.

PROIZVODNJA JAPANSKIH AUTOMOBILA U SAD

Performanse automobilske industrije su veoma važne za privredni rast zemlje i opšte stanje privrede. Proizvodnja brendiranih japanskih automobila u SAD značajan je pokazatelj performansi i rasta američke privrede. Sumarne ocene doprinosa na području zaposlenosti i dohotka u proizvodnji japanskih brendiranih automobila u privatnom sektoru SAD u 2017. godini daju se u tabeli 2.

Tabela 2.

Efekti brendirane japanske auto industrije u privredi SAD na privatni sektor u 2017. godini

		2011–2017	
		Promene	Procentualne promene (u procentima)
Zaposlenost			
Ukupno (direktna + indirektna)	342.710	+68.687	25,1
Direktna[1]	*92.710*	*+20.037*	27,6
Indirektna[2]	*250.000*	*+48.650*	24,2
Dodatna zaposlenost (eng. spin off)[3]	439.000	+87.684	25,0
Ukupna zaposlenost (direktna, indirektna i pomoćna)[4]	781.710	+156.371	25,0
Primanja (u milijardama dolara, nominalno)			
Primanja	55,55	+14,55	35,5
Umanjeno za: transferna plaćanja, socijalno osiguranje i doprinosi	(7,15)	(2,19)	(43,7)
Umanjeno za: porez na lične dohotke	(7,62)	(1,80)	31,1
Privatni raspoloživi dohodak	40,77	+10,66	35,4

Napomene: [1]Direktna zaposlenost obuhvata istraživače, inženjere, menadžere i administrativnu podršku. [2]Kategorija indirektne zaposlenosti obuhvata poslove koji omogućavaju da se realizuje tražnja materijala i usluga koji su potrebni za dizajniranje, proizvodnju, distribuciju i prodaju motornih vozila, koja se u stručnoj literaturi označava i kao "automobilska prodajna mreža" (eng. automotive supplier network); [3]Podrška direktnoj i indirektnoj zaposlenosti (u literaturi se označava kao eng. spin-off); [4]Zaposlenost predstavlja ukupan broj zaposlenih u privatnom sektoru, uvećan za samozapošljavanje (eng. self-employement). Primanja u privatnom sektoru čine isplaćene nadnice i plate, ekstra zarade i neto dohodak vlasnika privatnih i partnerskih kompanija (eng. unincorporated businesses).

Izvor: Th.J. Prusa, str. 6.

Prema podacima u tabeli 2, u 2017. godini 92.710 radnika bilo je zaposleno u proizvodnji bredniranih japanskih automobila u SAD.[9] Osim toga, veliki je broj zaposlenih u indirektnim i pomoćnim poslovima, koji su podrška u procesu proizvodnje. Ukupna zaposlenost (direktna i indirektna) iznosila je 342.710 zaposlenih. Ako se tome doda i dodatna zaposlenost, ukupan broj zaposlenih u privatnom sektoru penje se na 781.710. Primanja ukupno zaposlenih, pre odbitaka na ime poreza i doprinosa, su iznosila 55,55 milijardi dolara. Ako se uzme u obzir i dilerska mreža, broj ukupno zaposlenih u proizvodnji brendiranih japanskih automobila u SAD raste na 1.520.430, sa ukupnim primanjima u iznosu od 109,25 milijardi dolara.[10] Navedeni podaci svedoče o značaju proizvodnje japanskih automobila u SAD za zaposlenost i primanja zaposlenih u ovom sektoru. To posebno dolazi do izražaja ako se ima u vidu sporiji rast zaposlenosti u industriji SAD.

Na osnovu karakteristika novog trgovinskog sporazuma između SAD, Kanade i Meksika (eng. *The United States-Mexico-Canada Agreement or USMCA*), koji treba da zameni Severno-američki sporazum o slobodnoj trgovini (eng. *North American Free Trade Agreement – NAFTA*), mogu se nazreti okviri budućeg trgovinskog sporazuma između SAD i Japana. USMCA je definisao pravilo porekla od 75% za trgovinu automobilima između ove tri zemlje, što predstavlja oštriji zahtev u odnosu na 62,5% u okviru NAFTA sporazuma.

Japan bi mogao da od SAD očekuju sličan zahtev. Za automobilsku industriju u USMCA je karakteristično da se do 2023. godine mora postići da 40 do 45% automobilskih delova proizvode radnici koji zarađuju najmanje 16 dolara na sat.[11] Ovaj zahtev Japan bi svakako mogao da ispuni. Ukoliko SAD aktiviraju automatska ograničenja po osnovu nacionalne bezbednosti (Odeljak 232 iz *Trade Expansion Act* iz 1962), to će značiti da će biti primenjene kvote na bescarinski uvoz automobila i automobilskih delova iz Meksika i Kanade u SAD. Mada su u USMCA predviđene kvote veće od trenutnog nivoa uvoza, ako se primene, malo je verovatno da bi Japan bio izuzet od ove prakse. Ovakvi udari na slobodnu trgovinu mogu preći u naviku SAD kao vodeće ekonomske sile u svetu, što bi remetilo međunarodne tokove trgovine.

[9] Odnosi se na sledeće kompanije: Hino, Hondu, Isuzu, Mazda, Mitsubishi, Nissan, Subara i Toyota.

[10] Th.J. Prusa, str. 10, tabela 3.

[11] Jen Kirby, "USMCA, "Trump's new NAFTA deal, explained in 500 words", *www.vox.com/2018/10/3/17930092/usmca-mexico-nafta-trump-trade-deal-explained*, pristupljeno 20.06.2019.

RANIJA ISKUSTVA JAPANA SA DOBROVOLJNIM OGRANIČENJEM IZVOZA AUTOMOBILA

Ukoliko SAD nametnu Japanu ograničenje uvoza automobila na američko tržište, to se ne bi desilo prvi put. U maju 1981. godine Japan je prihvatio dobrovoljno ograničenje izvoza automobila u SAD na 1,68 miliona komada. Ograničenje je ukinuto 1994. godine. Porast uvoznih cena automobila u SAD, usled ovog ograničenja, procenjen je na oko 11% u proseku u periodu 1981–1984. godine.[12] Ovo je prouzrokovalo dodatni trošak američkim potrošačima u iznosu od 5,8 milijardi dolara u 1984. godini.[13] Pošto su se dobrovoljna izvozna ograničenja odnosila na broj automobila koje Japan izvozi na američko tržište (a ne na njihovu vrednost), japanski proizvođači automobila su se preorijentisali na izvoz skupljih i kvalitetnijih modela.[14] Prilikom ocene efekata VER na privredu Japana, treba uzeti u obzir i ovu činjenicu, jer je izvoz skupih modela omogućio veće zarade od onih koje se postižu izvozom jeftinijih modela.[15] Promena kvaliteta izvezenih automobila u SAD uticala je na zapošljavanje i blagostanje, usled uvođenja VER.

S obzirom da kupci očekuju da im automobil zadovolji određene potrebe, kvalitet ove usluge meri se veličinom automobila, njegovom snagom, elektronskom opremom, udobnošću, itd. S obzirom da je mera kvaliteta automobila sadržana u zadovoljavanju spomenutih usluga, promena cene japanskih automobilskih usluga utiče na smanjivanje blagostanja američkih potrošača. Tada dolazi do supstitucije uvoza japanskih automobila američkim modelima. Ako pretpostavimo da se usled VER poveća prosečna uvozna cena japanskih automobila u SAD

[12] Elastičnost cena američkih automobila na porast uvoznih cena japanskih automobila kretala se u rasponu od 0,3 do 0,4. To praktično znači da su cene automobila proizvedenih u SAD bile veće za 750 dolara do 1.000 dolara u periodu 1984–1985, usled kvota (Robert W. Crandall, "The Effects of U.S. Trade Protection for Autos and Steel", *Brookings Papers on Economic Activity,* Vol. 1987, No. 1, str. 276, *www.jstor.org/stable/2534518,* pristupljeno 05.07.2019).

[13] Podaci su prema Gary C. Hufbauer, Diane T. Berliner, Kimberly Ann Elliott, Trade Protection in the United States: 31 Case Studies, Peterson Institute for International Economics, Washington, 1986, str. 249–261. Navedeno prema G.C. Hufbauer, E. Jung, str. 2. Više o uticaju japanskog dobrovoljnog ograničenja izvoza automobila na profit američkih proizvođača i blagostanje kupaca automobila u SAD, v. kod Steven Berry, James Levinsohn, Ariel Pakes, "Voluntary Export Restraints on Automobiles: Evaluating a Trade Policy", *The American Economic Review*, Vol. 89, No. 3, 1999, str. 400-431.

[14] V. Jose A. Gomez-Ibanez, Robert A. Leone, Stephen A. O'Connell, "Restraining auto imports: Does anyone win?", *Journal of Policy Analysis and Management*, 1983, Vol. 2, No. 2, str. 196–219.

[15] Josef P. Daniels, David D. Van House, *Global Economic Issues and Policies*, 2nd Edition, Routledge, London and New York, 2011, str. 110.

za 10%, uz rast kvaliteta uvoza za 7%, rast cene ovog uvoza za potrošača bi iznosio samo 3%.[16] Ovaj rast od 3% bi predstavljao efektivni gubitak blagostanja američkih potrošača, koji bi opredelio obim njihove supstitucije između uvoznih japanskih modela i domaćih automobilskih brendova. Dakle, važno je imati u vidu, na osnovu prethodnog primera, da se efekti VER ocenjuju samo za razliku u ceni, a ne na ceo iznos porasta cene uvoza usled uvođenja ovih ograničenja. Pošto su evropski isporučioci automobila za američko tržište bili izuzeti od kvantitativnih ograničenja, razložno je pretpostaviti da su oni imali koristi od uvođenja japanskih VER.[17]

Značajna posledica VER programa sadržana je u činjenici da su svi japanski automobili proizvedeni u SAD bili izuzeti iz ovih ograničenja. Japanski proizvođači su reagovali na ovu okolnost tako što su povećali svoja ulaganja u američke proizvodne pogone. Ove investicije, u kombinaciji sa recesijom iz 1991. godine, bile su dovoljne da se eliminiše efekat uvedenih ograničenja posle 1990. godine. Još je važnija posledica to što je porast japanskih investicija u proizvodnju automobila u SAD tokom 1990-ih skoro onemogućio isključivanje japanskih automobila sa američkog tržišta tokom neke buduće recesije.[18]

Japanski proizvođači automobila se protive eventualnom uvođenju ograničenja na izvoz automobila na američko tržište u novom trgovinskom ugovoru. Tojota ističe da je iznenađena najavama da bi mogla biti uvedena ograničenja na uvoz japanskih automobila u SAD, jer je do sada uložila u proizvodnju u SAD oko 60 milijardi dolara, i tamo zapošljava (direktno i indirektno) više od 475.000 Amerikanaca. Ako se uvedu kvote, ističe ova kompanija, najveći gubitnici će biti potrošači, jer će plaćati više cene, uz sužene mogućnosti izbora.[19]

Američke pretnje da će uvesti carine na uvoz nemačkih automobila još uvek nisu otklonjene. Sada se na uvoz vozila iz Evrope u SAD plaća carina od 2,5%. Međutim, izvoznici automobila iz SAD u EU plaćaju carinu od 10%. Zbog ovog

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[16] Primer je naveden prema Robert C. Feenstra, "Voluntary Export Restraint in U.S. Autos 1980-81: Quality, Employment, and Welfare Effects," *The Structure and Evolution of Recent U.S. Trade Policy Volume* (Robert E. Baldwin, Anne O. Krueger, eds.), University of Chicago Press, Chicago, 1984, str. 35.

[17] Elias Dinopoulos, Mordechai E. Kreinin, "Effects of the U.S.-Japan Auto VER on European Prices and on U.S. Welfare", *The Review of Economics and Statistics*, Vol. 70, No. 3, 1988, str. 484–491.

[18] Berry, Steven, James Levinsohn, Ariel Pakes, "Voluntary Export Restraints on Automobiles: Evaluating a Trade Policy", *American Economic Review,* Vol. 89, No. 3, 1999, str. 400–430.

[19] "Toyota says Trump's latest tariff threat shows Japanese investments in US are 'not welcomed'", *www.cnbc.com/2019/05/17/toyota-says-trump-tariff-threat-shows-investments-in-us-not-welcomed.html,* pristupljeno 02.07.2019.

raskoraka, ima osnova da se pre eventualnog uvođenja dodatnih carina u SAD, razmotre mogućnosti da Evropa snizi svoje carinske stope. Jedno je izvesno, ukoliko ponovo dođe do uvođenja ograničenja uvoza automobila u SAD, američki kupci vozila svakako će trpeti dodatne troškove.

ZAKLJUČAK

U pregovorima s Japanom o zaključenju novog trgovinskog sporazuma, SAD insistiraju na smanjivanju svog trgovinskog deficita u razmeni s ovom zemljom. Osnovni generator ovog deficita je veći američki uvoz automobila i automobilskih delova iz Japana u odnosu na američki izvoz istih proizvoda na japansko tržište. Težište pregovora je upravo na ovom segmentu robne razmene. Američka strana priželjkuje rešenje koje bi omogućilo obuzdavanje japanskog izvoza automobila u SAD. Sličan zahtev Japan je prihvatio 1981. godine, kad je primenio VER. Ukoliko se u pregovorima ne pronađe obostrano prihvatljivo rešenje, američka strana nagoveštava moguće uvođenje carine na uvoz japanskih automobila u visini od 25%. Trenutna protivljenja japanske strane o eventualnom uvođenju ograničenja na japanski izvoz automobila i delova u SAD ne znače da se u novom trgovinskom ugovoru između Japana i SAD neće naći neki vid restrikcija na ove proizvode. Ako to bude novi VER ili carine od 25% na uvoz japanskih automobila, štete će pretrpeti kako japanski proizvođači, tako i kupci u SAD.

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US-JAPAN TRADE NEGOTIATIONS FOR NEW BILATERAL TRADE AGREEMENT

Summary

In an effort to reduce trade deficit, the United States has sought to introduce tariffs on imports, primarily of Chinese products. However, countries with which the United States runs large trade deficits are under pressure to negotiate about reducing the bilateral trade deficit with the United States. Among them is Japan. The US administration in bilateral trade talks with Japan toward a new bilateral trade agreement seeks to encourage US exports of agricultural products to Japan and reduce imports of Japanese cars in the US. If the trade agreement contains restrictions on the export of Japanese cars to the US market, it will damage Japanese manufacturers, but also custom-

ers in the United States, due to the higher costs of buying a car. However, it would not be the first time since Japan, under the pressure of the United States, introduced Voluntary Export Restraint (VER) in 1981 on car exports to the United States that were abolished in 1994. These restrictions have brought huge costs for both Japanese car manufacturers and consumers in the United States. The outcome of the US and Japan trade talks about a new trade agreement will show whether history repeats itself.

Key words: Trade agreement, Bilateral trade deficit, Car import restraints, Tariffs

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