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KOPAONIČKE ŠKOLE PRIRODNOG PRAVA

No. 1/2020
BEOGRAD

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SLOBODAN PEROVIĆ

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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 1/2020 / Godina II/ BEOGRAD

REČ UREDNIKA

Ovo izdanje *Revije Kopaoničke škole prirodnog prava* okuplja naučne radove posvećene različitim pitanjima iz široke sfere imovinsko-pravnih odnosa. Sa aspekta sistematike Heksagona prirodnog prava, radovi po svojoj tematskoj sadržini ulaze u oblast katedre *Pravo na imovinu* Kopaoničke škole prirodnog prava – Slobodan Perović. Broj sadrži šest radova raspoređenih u tri sekcije: Međunarodni privredni ugovori/Arbitraža (I), Bankarstvo i osiguranje (II) i Privredna društva (III).

U prvoj sekciji, *prof. dr Burghard Piltz* u članku *Incoterms® 2020*, čini pregled strukture *Incoterms® 2020*, analizira pravila utvrđena od strane Međunarodne trgovinske komore u Parizu za svaku od jedanaest klauzula *Incoterms® 2020* i čitaocima pruža smernice za njihovu pravilnu primenu. U drugom radu sekcije, *Applicable Law to the Arbitration Agreement in General Conditions of Sale Available on Seller's Website – A Pro-Arbitration Approach in the Jurisprudence of the Supreme Court of the Federation of Bosnia and Herzegovina* autora *prof. dr Zlatana Meškića*, analizira se merodavno pravo za arbitražni ugovor sadržan u opštim uslovima na internet stranici prodavca. U fokusu analize je slučaj iz 2019. godine u kome je Vrhovni sud Federacije Bosne i Hercegovine odlučio u korist arbitraže. Sekcija se zaključuje radom *Ex Aequo et Bono in International Arbitration* koji su napisali *Milan Lazić, Giulio Palermo i Srđan Dragićević*. Analiza odlučivanja *aequo et bono* u međunarodnoj arbitraži u ovom radu učinjena je sa stanovišta odgovarajućih rešenja uniformnih pravila i nacionalnih zakona iz oblasti arbitraže, pravilnika međunarodnih arbitraža, stavova doktrine i arbitražne prakse.

Druga sekcija posvećena je bankarstvu i osiguranju. Iz oblasti bankarstva, rad *Valutna klauzula: ekonomsko-finansijske posledice* autora *prof. dr Dejana Šoškića* bavi se analizom negativnih ekonomskih i finansijskih posledica korišćenja valutne klauzule u privrednom sistemu Srbije. Iz domena osiguranja, *prof. dr Tatjana Rakonjac-Antić* i *dr Marija Koprivica* napisale su rad *Specifičnosti privatnih izvora finansiranja zdravstvene zašite*. Putem analize specifičnosti dobrovoljnog zdravstvenog osiguranja i direktnog plaćanja troškova zdravstvene zaštite, u radu su identifikovani faktori koji opredeljuju njihovu zastupljenost i učinjene su preporuke za povećanje obuhvata stanovništva zdravstvenom zaštitom.

Prof. dr Vuk Radović autor je rada *Nevoljni prestanak privrednog društva zbog blokade i ugnjetavanja manjine* koji ulazi u treću sekciju, posvećenu oblasti privrednih društava. Polazeći od toga da srpsko kompanijsko pravo daje članovima privrednih društava pravo da zahtevaju od suda da naloži pokretanje pos-

tupka likvidacije, *prof. Radović* analizira razloge za prestanak društva, pre svega blokadom društva i ugnjetavanjem manjine. Rad ima za cilj da objasni suštinu svakog od razloga za prestanak privrednog društva po ovom osnovu, sa posebnim osvrtom na njihovo razumevanje u uporednoj sudskoj praksi.

Poseban prilog ovom izdanju učinila je *prof. dr Gordana Ilić-Popov* putem *Prikaza* monografije Dejana Popovića, redovnog profesora Pravnog fakulteta Univerziteta u Beogradu, pod naslovom *"Unifikacija poreskog prava u prvoj jugoslovenskoj državi",* koja je početkom 2020. godine objavljena u izdanju Pravnog fakulteta Univerziteta u Beogradu.

Prateći naučni rad i aktivnosti Kopaoničke škole prirodnog prava – Slobodan Perović, izdanje zaključujemo objavljivanjem usmene reči koju je predsednica Kopaoničke škole, prof. dr *Jelena S. Perović Vujačić* održala na otvaranju Trideset drugog susreta Kopaoničke škole "*Pravo i snaga umnosti – Posvećeno Osnivaču Kopaoničke škole prirodnog prava akademiku prof. dr Slobodanu Peroviću"* održanom 13–17. decembra 2019. godine. Ovu usmenu reč, originalno izloženu na srpskom jeziku, objavljujemo u prevodu na engleski jezik, pod naslovom *"UNIVERSITAS IURIS NATURALIS COPAONICI – THIRTY-TWO YEARS OF LIFE AND WORK"*.

* * *

Na putu razvoja i stalnog usavršavanja jednog naučnog časopisa, svako novo izdanje predstavlja značajan korak. Kad je reč o ovom, drugom po redu izdanju *Revije,* taj korak je utoliko značajniji ako se imaju u vidu teške okolnosti i vanredno stanje u kojima je ono nastajalo tokom proleća 2020. godine. Iz tih razloga, posebnu zahvalnost dugujemo autorima koji su pisali za ovaj broj, čime su omogućili kontinuitet u izlaženju našeg časopisa i doprineli ispunjenju visokih naučnih standarda priloga koje objavljuje.

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

PRVA SEKCIJA

MEĐUNARODNI PRIVREDNI UGOVORI / ARBITRAŽA

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BURGHARD PILTZ

INCOTERMS® 2020

The importance of the Incoterms® for trade practice is enormous. According to ICC/Paris findings, the Incoterms® clauses are used in 90% of all international sales contracts and have established themselves as a widespread international standard.[1] *The new Incoterms® 2020 are valid as of 1 January 2020. This paper seeks to give an overview on the structure of the Incoterms® 2020, examines the rules set up by the ICC/Paris for each of the eleven clauses of the Incoterms® 2020 and gives some guidance on its correct application.*

Key words: *Incoterms, sales contract, delivery, trade practices, import, export, documented credit*

OVERVIEW

After several years of preparatory work, international conferences in Beijing and London and the evaluation of more than 3,000 comments from trade practice,[2] in autumn 2019 the International Chamber of Commerce (ICC), Paris, presented an updated version of the rules for the interpretation of internation-

Prof. Dr. Burghard Piltz, Ahlers & Vogel, Hamburg, University of Bielefeld, Germany, e-mail: *piltz@ahlers-vogel.de*. The author, as a member of the nine-member Drafting Group set up internationally by ICC/Paris, has been directly involved in the development of the new Incoterms® 2020 in the past four years.

[1] Incoterms® 2020 video, */www.incoterms2020.de/*, 20.03.2020.

[2] For more details see Christoph Radtke, "Incoterms® 2020", *ICC Germany-Magazin,* No. 8, 2019, 38 ff.

ally used trade terms under the name Incoterms® 2020.[3] The Incoterms® 2020 do not represent a revolution, but rather an evolution. In effect the Incoterms® 2020 adapt the previous version of the Incoterms to current developments and the needs of business practice by restructuring, supplementing and streamlining the previous rules and by formulating many of them more clearly than before. One major aim of the revision was to make working with the Incoterms easier and more accessible to practitioners. The comprehensive "*Introduction to Incoterms® 2020*" by Charles Debattista also serves this purpose by providing information on working with the Incoterms clauses which spans all clauses, as well as "*Explanatory notes for users*" for each clause with graphic illustrations. In addition, the ICC offers free of charge an app that contains diagrams of the clauses and further information.[4]

The Incoterms® 2020 continue the structure created in 2010 using the previous classification features. They begin with the presentation of those seven clauses, which can be used independently of the means of transport by which the goods sold are transported and also in a combined multimodal way (EXW, FCA, CPT, CIP, DAP, DPU and DDP). Then follow the clauses exclusively intended for transport by sea or inland waterway (FAS, FOB, CFR and CIF). This separation is to prevent the clauses specifically designed for transport by waterway from being used with other modes of transport.[5] The waterway clauses presuppose that both the place of delivery and the transport destination are a port and should not be used if the seller delivers the goods in a container.[6]

The previous terms and abbreviations have also been essentially continued, except for the clause DAT (Delivered at Terminal). DAT replaced DEQ (Delivered ex Quay) Incoterms 2000, was only introduced in 2010 and has now become DPU (Delivered at Place Unloaded). Apart from the removal of the term "*terminal*" no further changes have been made to its substance. As was previously the case with the DAT clause, the only difference to the clause DAP (Delivered at Place) is that the seller must make the goods available to the buyer at the place of destination

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[3] *Incoterms® 2020 by the International Chamber of Commerce (ICC)*, ICC-Publication.

[4] Available in the App-shop under "*Incoterms 2020*".

[5] *E.g.* "*FOB airport …*", *cf.* Corinne Widmer Lüchinger, "Art. 31 Inhalt der Lieferpflicht und Ort der Lieferung", *Kommentar zum UN-Kaufrecht (CISG)*, (Eds. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 19; for more details see Werner Grüske, *INCOTERMS® 2010 – Praxishandbuch*, Torgau, 2011, 42.

[6] For more details see further down under *Guidance on the correct application of the Incoterms*, second bullet-point.

unloaded,[7] whereas the DAP clause does not oblige the seller to unload.[8] This difference has been repeatedly misunderstood in practice, which clings to the term "*terminal*" and wrongly[9] derives from it that when the DAT clause is used the destination of the delivery must be a terminal in the sense of a technical facility ("*terminal building*").[10] As before, the Incoterms® 2020 contain rules of interpretation for the obligations of the seller (A1 - A10) and the buyer (B1 - B10) associated with the respective clause using ten headings which are identical for all clauses. However, in addition to linguistic adjustments, there have been changes in the order of the headings and in the assignment of the rules to the headings.[11]

GROUPS OF INCOTERMS® 2020 CLAUSES

Following methodical-dogmatic criteria, four main groups can be identified, each marked by a different first letter of the English language version (E-F-C-D). Within each group, the responsibility for the transport of the goods and the associated risks and costs are based on the same principle. The duties of the seller increase progressively from the E, F, C to the D group, while the responsibility of the buyer is reduced accordingly.

– E group: The only clause in this group (EXW - Ex Works) requires the seller to make the goods available for collection by the buyer, packed and marked, but not loaded. The transport of the goods as well as customs clearances including export clearance are the responsibility of the buyer.

– F group: According to the F group clauses (FCA - Free Carrier, FAS - Free Alongside Ship, FOB - Free On Board) the buyer remains responsible for the main transport of the goods. Unlike in the case of the EXW clause, however, the seller is obliged to transport the goods to the named place of delivery and, depending on the circumstances, also to load them and to clear them for export at his own expense. The buyer must take over the goods at the place of delivery, organise and pay for the further transport and is responsible for transit through

[7] Charles Debattista, "Introduction to the Incoterms® 2020", *Incoterms® 2020*, (Ed. ICC), Paris, 2019, para. 74–75.

[8] See also Burghard Piltz, Jens Bredow, *Incoterms*, München, 2016, D-101.

[9] Emily O'Connor (Ed.), *Incoterms 2010 Q&A*, Paris, 2013, 84 f.

[10] Especially clearly Niclas Pirrong, "Die aktuelle Reformdiskussion zu den Incoterms 2020", *Zeitschrift für Vertriebsrecht*, München, 2019, 219, 222; Roberto Bergami, "INCOTERMS 2010: Comments on the new Revisions of Delivery Terms", *The Vindabona Journal*, Melbourne, 2011, 157, 166.

[11] For more details see further down under "*The rules on the clauses*".

third countries and import clearance into the country of destination. Unlike the clauses FAS and FOB, the clause FCA is designed for all types of transport and in particular for deliveries of goods in containers.

– C group: The clauses CFR (Cost and Freight) and CIF (Cost Insurance and Freight) are intended for maritime and inland waterway transport. The clauses CPT (Carriage Paid To) and CIP (Carriage and Insurance Paid To) can be used for any type of transport and are suitable for deliveries of goods in containers. As a common feature of all C-clauses, the seller must clear the goods for export and, unlike in the F group, arrange the transport to the named place of destination at his own expense. Contrary to the F clauses, the buyer does not have to take over the goods at the place of delivery, but only at the named place of destination. However, as with the F group, risks pass to the buyer as soon as the goods are handed over to the carrier at the place of delivery. In contrast to the other groups of clauses, the C clauses are characterised by different interfaces for the place of delivery and transfer of risks on the one hand and the place of taking over the goods and transfer of costs on the other hand[12] (so-called two-point clauses).

– D group: As a typical characteristic of all clauses of the D group (DAP - Delivered at Place, DPU – Delivered at Place Unloaded and DDP – Delivered Duty Paid), the Seller shall bear all costs and, in contrast to the C clauses, also all risks until the goods arrive at the named place of destination. The named place of destination is the place of delivery and the place where the buyer is to take delivery of the goods. However, the buyer remains responsible for clearing the goods for import. The D clauses therefore largely form the reverse rule to the F group. Only in the case of the DDP clause does the exporter also have to arrange for import clearance. The DDP clause can therefore be used as a counterpart to EXW if it is structured accordingly.

THE RULES ON THE CLAUSES

A1/B1 General obligations

A1/B1(1) confirm, as before, essential basic elements of each sales contract. The statements expressly refer to the contract of sale and have only declaratory significance.[13] The basis for the buyer‘s claim for delivery and the seller‘s claim

[12] Oberlandesgericht Hamm (Germany), 26.03.2012, beck-online. RECHTSPRECHUNG, 2012, 11809.

[13] Jan Ramberg, *ICC Guide to Incoterms 2010*, Paris, 2011, 64.

for payment is therefore the sales contract and not an Incoterms clause.[14] In contrast to the Incoterms 2000 which only addressed transport documents and the Incoterms® 2010 which addressed the documents mentioned in A1-A10 and B1-B10,[15] according to A1/B1(2) Incoterms® 2020 all documents to be provided on the basis of the sales contract can now be considered for electronic procedures.

A2/B2 Delivery / Taking delivery

A2/B2 contain basic statements for understanding the different Incoterms clauses. A2 and the place to be added by the parties[16] determine the place where the seller has to carry out the delivery action incumbent upon him (place of delivery). The C clauses, on the other hand, do not indicate the place of delivery, but the place of destination[17] to which the seller has to ship the goods by means of the transport contract which is to be concluded in accordance with A4. If the parties do not additionally agree on a place of delivery when using a C clause, the seller is largely free to decide where to hand over the goods to the carrier for transport to the place of destination.[18] The buyer takes over the goods only at the place of destination, i.e. the place of delivery and the place of taking delivery do not coincide,[19] whereas according to B2 of the E, F and D clauses the buyer has to take delivery of the goods at the place of delivery, i.e. the place of delivery and the place of taking delivery do coincide[20] thereby constituting at the same time

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[14] Regarding the right of the buyer to receive an invoice see Burghard Piltz, "Rechnung, Umsatzsteuer und Kaufpreisfälligkeit nach UN-Kaufrecht", *Internationales Handelsrecht*, München, 2012, 192, 193; Christoph Oertel, "INCOTERMS® 2010", *Commercial Law*, (Ed. Peter Mankowski), München, 2019, 50. To the extent the invoice is necessary for customs clearance see the obligation of the seller to assist set out under A7 b).

[15] See Incoterms® 2010 under A8.

[16] The E, F and D clauses expect the parties to specify the place of delivery, for example "*FCA Frankfurt Incoterms® 2020*" or "*DPU Atlanta Incoterms® 2020*".

[17] For example "*CIP Buenos Aires Incoterms® 2020*".

[18] Christoph Graf von Bernstorff, *Incoterms® 2020*, Köln, 2020, par. 658. Mistaken by Corinne Widmer Lüchinger, "Art. 32 – Verpflichtungen hinsichtlich der Beförderung der Ware", *Kommentar zum UN-Kaufrecht (CISG)*, (Ed. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 5.

[19] Oberlandesgericht Düsseldorf (Germany), 25.01.2018, *Internationales Handelsrecht,* München, 2018, 209 ff.; Oberlandesgericht Hamm (Germany), 26.03.2012, BeckRS 2012, 11809; ICC Arbitration Case No. 17020, *Yearbook Commercial Arbitration XL,* 2015, 294, 314.

[20] Landgericht Saarbrücken (Germany), 27.06.2018, *Recht der Transportwirtschaft,* München, 2019, 270 ff.; Bundesgerichtshof (Germany), 07.11.2012, *Internationales Handelsrecht,* München, 2013,

a place of jurisdiction in terms of Art. 7 No. 1 b) Brussels Ib-Regulation.[21] Under the E and F clauses, however, the place of delivery is located before and in the case of the D clauses after the main transport. The four waterway clauses assume that both the place of delivery and the destination are ports.[22] In addition to the name of the place of delivery or destination, the specific point of delivery or point of destination should also be named, for example in the form of a postal address. In the absence of an agreement between the parties or commercial practice specifying the point of delivery / destination, it may be determined by the seller.[23] Under the F clauses, however, the buyer has an initial opportunity to determine the relevant point of delivery.

Just like Art. 31 CISG, A2 distinguishes between the delivery-alternatives of "*handing over*" and "*placing at the disposal*". The placing on board provided for in the ship clauses FOB, CFR and CIF is to be understood as the handover to the shipper.[24] According to FCA 3.a), FOB and the C clauses the seller has to hand over the goods to the carrier or the person designated by the buyer. The obligation to hand over generally includes the seller's obligation to load the goods onto the collecting means of transport. The transported goods are loaded as soon as their physical position on the means of transport is independent of the loading device; a more extensive securing of the goods is not necessary under sales law[25] – although this may be different under transport or traffic law. Loose fillings and bulk goods are loaded on completion of the filling process. In the case of EXW, FCA 3.b) and FAS, however, the seller's delivery action is reduced to mere-

15, 17; Bundesgerichtshof (Germany), 22.04.2009, *Neue Juristische Wochenschrift,* München, 2009, 2606 ff.

[21] See among others Oberlandesgericht Naumburg (Germany), 24.04.2019, *Zeitschrift für Internationales Wirtschaftsrecht,* München, 2019, 276 f.; Oberlandesgericht Stuttgart (Germany), 07.08.2017, *Zeitschrift für Vertriebsrecht,* München, 2018, 131 f.; Oberlandesgericht Celle (Germany), 29.01.2015, *Internationales Handelsrecht,* München, 2015, 247, 249; Oberlandesgericht Köln (Germany), 29.02.2012, beck-online. RECHTSPRECHUNG, 2012, 18430; European Court of Justice, 09.06.2011, *Neue Juristische Wochenschrift,* München, 2011, 3018 f; Bundesgerichtshof (Germany), 22.04.2009, *Neue Juristische Wochenschrift,* München, 2009, 2606 ff.; C. Oertel, op. cit., No. 67; differing view C. Widmer Lüchinger, op. cit., par. 90 and partly differing Christop Graf von Bernstorff, "Fehlende Gerichtsstandsvereinbarung – Incoterms als Auslegungshilfe für den Vertrag", *Außenwirtschaftliche Praxis*, Köln, 2019, 320 ff.

[22] See above text on footnote 6.

[23] Regarding the C and D clauses regulated under A4.

[24] *Cf.* R. Bergami, op. cit., 169

[25] Oberlandesgericht Nürnberg (Germany), 22.02.2017, *Transportrecht,* Köln, 2017, 382 ff.; R. Bergami, op. cit. 169; *cf.* Carole Murray, David Holloway, Daren Timson-Hunt, *The Law and Practice of International Trade*, London, 2012, 27.

ly placing the goods at disposal ready for being taken over, without the seller being responsible for loading them onto the collecting means of transport. The D-clauses also stipulate that the seller must only place the goods at the disposal of the buyer,[26] but DPU obliges the seller to first unload the goods from the incoming means of transport. In contrast to many national laws,[27] no clause of the Incoterms® 2020 stipulates an obligation of the seller to hand over the goods to the buyer. Instead of delivery, the procurement of already delivered goods may also be sufficient to fulfil the delivery obligation thereby taking into account handling in supply chains in particular.

Regarding the time of delivery A2 refers to the agreement of the parties, which also decides on the significance of an agreed delivery time.[28] An agreed delivery time always refers only to the seller's delivery activity and therefore does not regulate the date of the arrival of the goods at the place of destination when a C clause applies.[29] If a delivery period has been agreed and the delivery date is now to be determined within this period, the F clauses grant the buyer this right of determination. In the case of the other clauses, the right to specify the delivery date in more detail is not derived from the Incoterms but stems from the relevant sales law,[30] such as Art. 33 CISG.

The subject of the delivery action of the seller is the sold goods including packaging. Irrespective of the assessment under other set of rules, if the seller loads a container just for one buyer and the carrier takes it over for carriage to the buyer,[31] the container and its contents are the object to be delivered and the container is not merely a means of transport.[32] The extent to which the Incoterms ap-

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[26] *Cf.* Oberlandesgericht Brandenburg (Germany), 01.06.2011, *Transportrecht,* Köln, 2013, 29 ff. and ICC Arbitration Case No. 12365, CISG-online no. 2143.

[27] *Cf.* § 1061 ABGB (Austria); § 433 BGB (Germany); Art. 7:9(2) Burgerlijk Wetboek (Netherlands); Art. 1604 Code Civil (France); Art. 1476(1) Codice Civile (Italy); Art. 1462(1) Código Civil (Spain).

[28] *Cf.* Patrick Ostendorf, "Noch einmal: Führt die Vereinbarung einer CIF-Klausel zum Fixgeschäft?", *Internationales Handelsrecht*, München, 2009, 100 ff.

[29] Misunderstood by W. Grüske, op. cit., 21.

[30] Differing view C. Graf von Bernstorff, op. cit., par. 720, 749, 787, 816, 849.

[31] FCL or FCL/FCL (Full Container Load).

[32] Klaus Ramming, *FCL- und LCL-Verschiffungen*, *Recht der Transportwirtschaft*, München, 2019, 401 ff.; B. Piltz, J. Bredow, op. cit., F-146; C. Graf von Bernstorff, op. cit., par. 602. Differing view Koen Vanheusden, *Leveringsvoorwaarden in international overeenkomsten, Incoterms anders bekeken*, Antwerpen, 2013, 178, 234.

ply to liquids or physically intangible goods such as computer software[33] is sometimes discussed but in fact does not need to be discussed, as it is ultimately the parties who decide in which contracts Incoterm clauses apply.[34]

A3/B3 Transfer of risks

A3/B3 link the transfer of risks, unlike the legal systems which link transfer of risks to the time of the conclusion of the contract[35] or the transfer of ownership,[36] to the completion of the delivery action and thus essentially correspond to Art. 67 ff. CISG and sections 446, 447 of the German Civil Code (BGB) without, however, as provided for under section 446 BGB, the transfer of risks being dependent on the buyer taking over the goods. Risks include circumstances which are neither attributable to the seller nor to the buyer and which lead to the physical loss or damage of the goods,[37] but do not include sovereign acts such as export or import restrictions.[38] If the CPT or CIP clauses are used for transport which does not solely requires, but includes carriage by ship, this can lead to an advance shift of the place of delivery and thus of the transfer of risks compared with the CFR or CIF clauses, because the handing over to the carrier is not bound to a port.[39] All clauses provide, that risks pass to the buyer upon expiry of the delivery time, irrespective of the completion of the seller‘s delivery action, provided the goods are sufficiently specified and the seller cannot carry out the delivery action incumbent upon him due to circumstances listed in B3 which are ultimately attributable to the buyer‘s area of responsibility - for example, because the buyer does not determine the ship in the case of FOB. In the case of the D clauses the transfer of risks can also be affected independently of delivery if the buyer despite the seller‘s request does not support him in the required manner in the export and transit clearance. However, it remains unclear if at all and, if so, how the risks are transferred independently of delivery if the parties have not made any arrangements at all regarding the delivery time.[40]

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[33] See Christoph Oertel, *INCOTERMS® 2020*, *Recht der Internationalen Wirtschaft*, Heidelberg, 2019, 701, 702 and ICC, Incoterms 2000, Introduction to Incoterms 2000, no. 1.

[34] For more details see further down under *Guidance on the correct application of the Incoterms*, first paragraph.

[35] For example, Art. 185 OR (Switzerland).

[36] For example, section 20 Sale of Goods Act (Great Britain).

[37] J. Ramberg, op. cit., 76.

[38] K. Vanheusden, op. cit., 183 f.; differing view C. Graf von Bernstorff, op. cit., par. 249, 251.

[39] See above text on footnote 22.

[40] For more details see B. Piltz, J. Bredow, op. cit., F-168.

A4/B4 Carriage

A4/B4 regulate the obligation to organise the carriage of the goods. While the CISG[41] as well as national sales laws do not necessarily require the goods to be moved in order to execute the sales contract, the Incoterms only make sense if goods are to be transported. Under all clauses the seller must deliver the goods at the place of delivery.[42] From there on the buyer is responsible for their transport. Only in the case of the C-clauses, does the seller have to organise the transport of the goods to the named place of destination at his own expense in addition to fulfilling the delivery obligation at the place of delivery. With the exception of EXW, it is either expressly stated as an obligation of the buyer in the case of the F-clauses or as an obligation of the seller in the case of the C and D-clauses, to organise the transport in accordance with the requirements set out in more detail in A4/B4. However, it is not always necessary to conclude a contract with a third-party carrier. Rather, FCA allows the buyer and the D clauses allow the seller to arrange for the transport of the goods by other means as for example by employing its own means of transport. Under the C clauses the seller may procure a contract of carriage instead of concluding one.

An obligation to organise the carriage of the goods is also expressly provided for in the clauses FCA 3.b) and FAS, although the sales contract is fulfilled by the seller when he has completed the act of delivery incumbent upon him. The further handling of the goods by the buyer is legally irrelevant for the seller.[43] However, this provision is comprehensible in relation to the clause FCA 3.a) where the place of delivery is at the seller‘s premises and in relation to the FOB clause, since without the means of transport to be provided by the buyer the seller cannot carry out the loading of the goods onto the means of transport for which he is responsible.[44] For the sake of a legal completeness it would also not be necessary to provide for an obligation of the seller in the D clauses to organise the carriage of the goods, as carriage to the place of destination is simply part of the seller's obligation to deliver under the D clauses.[45] This type of presentation, however, facilitates a practitioner‘s understanding of the measures to be taken.

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41 Franco Ferrari, "Art. 1 – Anwendungsbereich", *Kommentar zum UN-Kaufrecht (CISG),* (Eds. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 8.

42 See above under A2.

43 With regard to FAS see J. Ramberg, op. cit., 166.

44 See above text on footnotes 24 and 25.

45 *Cf.* Landgericht Siegen (Germany), 07.03.2007, beck-online. RECHTSPRECHUNG, 2008, 11375 with respect to clause DDU.

If one of the F clauses applies, the parties may - as is frequent in practice - agree that the seller concludes the transport contract at the buyer's expense and risk.[46] However, this does not turn the contract of sale into a sale involving carriage of the goods in terms of Art. 31(a) CISG,[47] since the place of taking delivery of the goods by the buyer is still identical with the place of delivery[48] and unlike Art. 31(a) CISG the seller has to agree to conclude the transport contract.

The "*security clearance*" introduced under the Incoterms® 2010 under A2/B2, was a reaction to 11 September 2001 and was intended to cover the controls to which commercial goods are subject in order to protect against non-operational hazards due to unlawful interference and to prevent terrorist attacks.[49] It soon became apparent that these controls are in some cases par excellence prerequisites for the transport of goods, address the carrier and therefore are transport-related.[50] As a typical example, the civil aviation security regulations in force in the EU[51] address the "*regulated agent*", the "*known consignor*"[52] and the "*account consignor*" as qualified participants to create a secure supply chain.[53] A further example are the provisions of the International Ship and Port Facility Security Code (ISPS Code),[54] which provide for measures to enhance the security of ships and port facilities. The transport-related security requirements now regulated in A4 cover these precautions which serve to secure the supply chain and prevent unlawful interference. Regulations aiming at other purposes, for example preventing cargo theft are not considered as such to be transport-related security

[46] So called "*additional services*". *Cf.* Oberlandesgericht Hamburg (Germany), 16.07.2009, *Transportrecht*, Köln, 2010, 337 (340). Mistaken by C. Graf von Bernstorff, op. cit., par. 609 f., 873, 919.

[47] *Cf.* Lauri Railas, "Incoterms® 2010 and Contracts of Transport and Insurance", *Vestnik International Commercial Arbitration Review*, Helsinki, 2011, 63 ff., 69; differing opinion C. Widmer Lüchinger, op. cit., par. 68.

[48] See FCA B2.

[49] *Cf. Incoterms® 2010 by the International Chamber of Commerce (ICC)*, ICC-Publication 715 ED, 11, 135 and E. O'Connor, op. cit., 47 ff.

[50] More in detail C. Debattista, op. cit., no. 76; B. Piltz, J. Bredow, op. cit., F-122 f.; Burghard Piltz, "Bekannter Versender – Sicherheitskontrollen bei Luftfracht", *Internationales Handelsrecht*, München, 2013, 61 ff. *Cf.* K. Vanheusden, op. cit., 97 f.

[51] Regulation (EC) No 300/2008 of 11 March 2008.

[52] More details Elmar Giemulla, "Die sichere Lieferkette und die Rechtsstellung des bekannten Versenders", *Transportrecht*, Köln, 2014, 217 ff.

[53] More details Wolf Müller-Rostin, "Die sichere Lieferkette im Luftverkehr", *Transportrecht*, Köln, 2014, 209 ff.; Erwin Abele, Jochen Boettge, "Die Haftung des Reglementierten Beauftragten und Deckung in der Verkehrshaftungsversicherung", *Transportrecht*, Köln, 317 ff.

[54] More details https://www.deutsche-flagge.de/de/sicherheit/isps, 20.03.2020.

requirements in terms of A4.[55] In principle, the seller is responsible for any transport-related security requirements of the goods until delivery and, in the case of the C and D clauses, up to the place of destination. In addition, if EXW or one of the F clauses applies, he is obliged to provide the buyer, at the latter's request, with any information in his possession, including transport-related security requirements, which the buyer needs to organize the transport of the goods.

A5/B5 Insurance

A5/B5 regulate transport insurance. In principle, each party is responsible for securing its own risks. The Incoterms do not make any statement in this respect. However, it is strongly recommended in practice to avoid fractional insurance contracts as far as possible.[56] Due to the fact that the place of delivery and transfer of risks on the one hand and the place of taking over and the transfer of costs on the other do not coincide, there is a special situation with the C clauses,[57] which the parties can take into account by agreeing on transport insurance. If the clauses CIF or CIP are agreed, the seller is then obliged to take out cargo insurance covering the transport route and amounting to 110% of the invoice value of the goods ensuring that the buyer acquires a claim directly against the insurance company. Consequently, the seller is obliged to provide the buyer with the insurance policy or other proof of insurance cover. However, whereas formerly only a minimum cover in accordance with clause (C) of the Institute Cargo Clauses was required,[58] this minimum cover under Incoterms® 2020 now only applies in the case of CIF.[59] As this cover does not usually meet the needs of companies trading in industrial products,[60] the Incoterms® 2020 now provide for cover under the CIP clause in accordance with the more far-reaching clause (A) of the Institute Cargo Clauses or other similar clauses. Other agreements between the parties or practices naturally take precedence and should be taken into consideration in particular if "*non-admitted*" countries are involved which make the insurance of risks located in their territory subject to special conditions.

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[55] Differing view C. Graf von Bernstorff, op. cit., par. 612.

[56] For more details see Burghard Piltz, "Export Contract", *Münchner Vertragshandbuch, Band 4. Wirtschaftsrecht III*, (Eds. Rolf Schütze, Lutz Weipert, Markus Rieder), München, 2018, note 66; C. Graf von Bernstorff, op. cit., par. 617, 878, 924.

[57] See above under "Groups of Incoterms® 2020 Clauses".

[58] For more details see C. Oertel, op. cit., 297 ff.

[59] See C. Debattista, op. cit., 72.

[60] J. Ramberg, op. cit., 55, 124, 200.

A6/B6 Delivery/transport document

A6/B6 deal with delivery and transport documents. As before, the modalities of handing over documents remain unregulated[61] and the buyer is not obliged to provide the seller with a document for VAT purposes.[62] The buyer is only required to provide proof if EXW applies. Rather, the seller must provide the buyer with the usual proof of delivery under the F clauses,[63] the usual transport documents under the C clauses and the documents entitling the buyer to take over the goods[64] under the D clauses. In the case of CPT and CIP, the document is only required to be sent if this is customary or requested by the buyer. In addition, the C-clauses provide for more detailed requirements regarding the content of the documents, in particular to enable the resale of goods still in transit. At the request, cost and risk of the buyer, the seller shall also assist in obtaining the transport document if an F clause is agreed upon.

There are new additional rules to FCA. These were created because the FCA clause is, from the seller's point of view, much more suitable for container shipments than FOB.[65] On the other hand, the payment of a letter of credit is frequently made dependent on the presentation of a document confirming loading on board the ship[66] and, as a rule, it is the buyer who contracts the carriage of the goods and receives the transport document. FCA B6 now provides that, on the basis of an agreement between the parties, the buyer instructs the carrier contracted by him to issue the transport document with the on-board notation to the seller. According to FCA A6 the seller is then required to send this document to the buyer – for example by submitting it to the issuing bank. Alternatively, the seller and the buyer may agree that the seller concludes the contract of carriage at the buyer's risk and expense.[67] However, even in these constellations the FCA seller does not receive the document with the on-board notation contemporaneously with the delivery of the container at the terminal, rather only after it has been loaded onto the ship. As a result, the seller continues to bear certain risks

[61] *Cf.* C. Oertel, op. cit., 245.

[62] As a rule, the prerequisite for exemption from turnover tax is proof that the goods have left the country where the seller has his place of business.

[63] *Cf.* C. Graf von Bernstorff, op. cit., par. 622, 880, 881, 926.

[64] See Oberlandesgericht Brandenburg (Germany), 01.06.2011, *Transportrecht*, Köln, 2013, 29 ff.

[65] For more details see further down under *Guidance on the correct application of the Incoterms*, second bullet-point.

[66] See for example Art. 20, 21 and 22 UCP 600. More details C. Debattista, op. cit., no. 63 ff.

[67] See above text on footnote 46.

typically associated with a container shipped under FOB terms.[68] Alternatively, the seller and the buyer may agree that the carrier is instructed to issue a Received for Shipment Bill of Lading[69] against delivery of the container to the terminal and the bank is directed to honour the letter of credit on presentation of such a document instead of an on-board notation.

A7/B7 Export/import clearance

A7/B7 summarise the rules on export, transit and import clearance.[70] Government ordered pre-shipment inspections[71] are now also addressed in A7/B7, thus covering all permits, licences, formalities, etc. required by the competent authorities for export, transit through a third country and import independent of delivery and passage of risks. The wording "*Where applicable*" makes it clear that Incoterms® 2020 are also applicable to national transactions[72] and to transactions in single markets such as the European Union, where clearances are largely unnecessary. Otherwise, if the F and C clauses apply, the seller is responsible for export and the buyer for transit and import clearance. The DAP and DPU clauses mean that the seller now also has to arrange for transit clearance and the buyer is only responsible for import clearance. In case of EXW the entire clearance is the responsibility of the buyer and in case of DDP[73] of the seller.[74] As far as "*security clearances*"[75] are associated with the customs clearance, they are now explicitly mentioned in the rules. Typical examples are the entry summary declaration (ESumA, ENS Filing),[76] Art. 127 UCC (Union Customs Code), the US Importer Security Filing (ISF) and the requirements of the Container Security Initiative (CSI). If a party is not subject to a clearance obligation, it is obliged to assist the

[68] For more details see further down under *Guidance on the correct application of the Incoterms*, second bullet-point.

[69] *Cf.* section 514(1) German Commercial Code (HGB).

[70] The significance for practice is highlighted by J. Ramberg, op. cit., 32 f.

[71] J. Ramberg, op. cit., 65.

[72] See the subtitle of ICC-Publication 723 E, 2019: *The rules for the use of domestic and international trade terms*.

[73] *Cf.* ICC Arbitration Case No. 7903 of 09/1995, *ICC International Commercial Arbitration Bulletin*, 21/2, 74 (76).

[74] For more details see further down under *Guidance on the correct application of the Incoterms*, third bullet-point.

[75] See text above on footnote 49.

[76] E. O'Connor, op. cit., 49; differing opinion Christoph Graf von Bernstorff, "Incoterms® 2010: Praxisfragen", *Außenwirtschaftliche Praxis*, Köln, 2015, 408, 409.

other party at the latter's request, risk and cost in obtaining the documents and information required for the clearance to be made by it. This support also embraces security clearances and goes beyond the support prescribed under A4.

A8/B8 Checking/packaging/marking

A8/B8 assign without exception to the seller the checks required for delivery,[77] such as measuring, weighing and counting the goods. These checks are to be distinguished from the buyer's obligations to examine the goods after delivery, such as those stipulated in Art. 38 CISG. The latter are not addressed in the Incoterms. Unless the goods are usually transported unpackaged, the seller is also responsible for their packaging and labelling. Special packaging or labelling requirements are subject to an agreement between the parties. Otherwise, the standard for packaging and labelling is their suitability for transport.[78] If the seller knows or should have known that the goods are to be transported by air, the packaging must accordingly meet the special packaging requirements for air freight.[79]

A9/B9 Allocation of costs

A9/B9 regulate the allocation of costs between the parties to the sales contract. Customs duties, taxes and other duties and costs of assistance with regard to clearances are allocated according to the responsibilities for export, transit and import clearances or the request for assistance.[80] For the allocation of other costs, the execution of the delivery action incumbent on the seller at the relevant place of delivery is decisive.[81] In the case of FCA, the cost of providing the container is therefore borne by the seller, while the Terminal Handling Charges (THC) are for the buyer's account. The situation with regard to THC is different, however, when containers are shipped under FOB. According to the C clauses, the seller is additionally responsible for the costs of transporting the goods to the agreed destination, which result from the contract of carriage to be concluded by him, including the costs for transport-related security requirements and, in the case of CIF or CIP, the insurance costs. Insofar as the transport contract also imposes costs on the seller which would otherwise have been borne by the buyer (*e.g.* costs of un-

[77] Critical to that B. Piltz, J. Bredow, op. cit., F-200.

[78] So already K. Vanheusden, op. cit., 234.

[79] *Cf.* B. Piltz, op. cit., 61, 63.

[80] See above under A7/B7.

[81] J. Ramberg, op. cit., 114.

loading in the case of the C-clauses, DAP or DDP or costs arising during transport in the case of the C-clauses[82]), the cost burden remains with the seller. In addition, the cost of the delivery/transport documents to be procured in accordance with A6 and for support requested by the seller in accordance with B5 and B7 are for his account. All costs incurred after completion of the delivery action incumbent on the seller shall be borne by the buyer,[83] unless they have been allocated to the seller in accordance with A9.

Moreover, under B9 all clauses stipulate an obligation of the buyer to pay "*additional costs*" if he fails to perform the obligations listed there in detail and, as a result, the seller cannot perform the required delivery action as agreed provided the goods concerned are clearly identified. In the substance, this is a claim for damages by the seller, which, like the compensation for damages under the CISG,[84] but in contrast to German[85] and some further laws, is not based on fault[86] and to which, in case of doubt, Art. 74, 77 and 79 CISG should also be applied.

A10/B10 Notices

A10/B10 regulate notice obligations. According to the E, C and D clauses, the seller must provide the buyer with the information necessary for the take over of the goods. If an F or C clause is used, the seller must notify the buyer that the delivery has been effected or, in the case of FAS, FOB and FCA, also that the timely taking over of the goods has failed. The buyer is subject to special notification obligations in the case of F-clauses.[87] In accordance with the other clauses, he shall only provide the seller with details of the delivery time and the point of delivery / destination[88] if he is entitled to do so on the basis of the underlying sales

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[82] C. Oertel, op. cit., **234 (additional costs due to unforeseen events, e.g. stranding, collision, governmental events or inclement weather conditions)**; C. Graf von Bernstorff, op. cit., par. 201 (handling charges at the port of destination).

[83] ICC Arbitration Case No. 6468 of 07/1990, *ICC International Commercial Arbitration Bulletin,* 21/2, 55 (56) (FOB, operation costs occurring after the animals are loaded); ICC Arbitration Case No. 13492 of 07/2006, CISG-online no. 2141 (CFR, demurrage costs); C. Graf von Bernstorff, op. cit., par. 649 (unloading the FCL-container from the arriving means of transport).

[84] *Cf.* Ingeborg Schwenzer, "Art. 74 – Umfang des Schadensersatzes", *Kommentar zum UN-Kaufrecht (CISG)*, (Eds. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 3 ff.

[85] *Cf.* Bundesgerichtshof (Germany) 05.10.2005, *Neue Juristische Wochenschrift,* München, 2006, 47 (50) and Bundesgerichtshof (Germany), 18.10.2017, *Zeitschrift für Vertriebsrecht,* München, 2018, 22 ff.

[86] As well C. Oertel, op. cit., No. 79.

[87] For the details see B10.

[88] See above text on footnote 23.

contract.[89] It is not regulated whether the dispatch or the receipt principle applies to the notifications.[90] However, there is no doubt that these obligations are true contractual obligations, the non-fulfilment of which can be sanctioned in accordance with the applicable sales law.[91]

GUIDANCE ON THE CORRECT APPLICATION

In principle, the parties are free to agree which clause of the Incoterms they consider most suitable for their purposes. Legal restrictions or conditions are rather rare.[92] When an Incoterms clause is agreed, the rules set up by the ICC/Paris under A1 to B10 shall apply, unless a reference to these rules is not intended.[93] The following notes provide general suggestions for selecting and working with the clauses of the Incoterms® 2020:

– The clauses FAS, FOB, CFR or CIF are only useful if the goods are transported exclusively by ship, i.e. both the place of delivery and the place of destination include open, navigable water. The other clauses can be used for any type of transport, including transport by ship.

– The FAS, FOB, CFR or CIF clauses are not appropriate when using FCL containers[94] as the seller loses control over the container, both in fact and in law as soon as it is taken over by the terminal. However, if these clauses are agreed, the seller assumes responsibility to the buyer until the container is placed alongside or on the vessel.[95] Furthermore, the seller has no influence on when the loading takes place, even if he is entitled to an onboard B/L.[96] Therefore, when FCL

[89] Mistaken by C. Graf von Bernstorff, op. cit., par. 522, 720, 749, 787, 816, 849.

[90] For more details see Burghard Piltz, "INCOTERMS 2000-ein Praxisüberblick", *Recht der Internationalen Wirtschaft*, Heidelberg, 2000, 485, 487.

[91] K. Vanheusden, op. cit., 209 f.; J. Ramberg, op. cit., 90, 102, 115, 121, 130, 135, 141, 146, 153, 157.

[92] For example, Brazil does not allow the use of the DDP clause in imports, CAMEX Resolution No. 21 of 07.04.2011.

[93] *Cf.* Bundesgerichtshof (Germany), 07.11.2012, *Internationales Handelsrecht,* München, 2013, 15 (18); C. Oertel, op. cit., 37 f.; comprehensively B. Piltz, J. Bredow, op. cit., A-302 ff.

[94] C. Graf von Bernstorff, op. cit., par. 172 ff., 851 ff.; J. Ramberg, op. cit., 22; Guillermo Jimenez, *ICC Guide to Export/Import*, Paris, 2012, 56 ff.

[95] See above under A2.

[96] It is not unusual for containers being "*rolled*" meaning loaded on a later vessel than the one booked for.

containers are shipped, only the clauses EXW, FCA, CPT, CIP, DAP, DPU or DDP should be applied.[97]

– In the light of the associated customs and sales tax obligations in foreign transactions the clauses EXW or DDP should only be used after careful examination. This applies in particular to European exporters and importers,[98] since European customs law requires customs-declarations to be submitted by parties domiciled in the EU for both export and import clearance, Art. 170(2) UCC (Union Customs Code). Consequently, the fulfilment of the clearance obligations provided for by EXW for the non-European buyer or by DDP for the non-European seller may be legally difficult or even impossible.[99] VAT requirements for trade within the European Union also provide reason against the use of these clauses. Beyond EXW and DDP, the responsibility for export or import clearance as well as for the associated security clearances[100] is not a deciding criterion when narrowing down the choice because the alternatives are few. When using DAP or DPU, the parties should also be aware that the buyer may first have to clear the goods for customs before the seller can deliver them to the agreed destination.

– Cost allocation (A9/B9) should not be a decisive criterion for selection. The cost consequences ultimately associated with the clause used can be easily agreed upon differently if the parties wish to allocate cost differently to that provided for by the selected Incoterms clause in A9/B9.[101]

– Primarily the rules in A2/B2 should determine the choice of a particular clause. This applies all the more because the rules on risks in A3/B3 and on carriage in A4/B4 are based directly on the variants provided for in A2/B2 and the further rules are ultimately a consequence of the decisions made in A2/B2. As a whole, when selecting a clause, one should not strive for the clause with the least obligations. Rather, the determining factor should be which party can perform

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[97] C. Debattista, op. cit., 66; E. O'Connor, op. cit., 82; C. Murray, D. Holloway, D. Timson-Hunt, op. cit., 55.

[98] On the Australian perspective see Roberto Bergami, "Removing EXW and DDP from future Incoterms editions: An Australian perspective", *The Vindobona Journal,* Melbourne, Vol. 2, 2016, 1 ff.

[99] *Cf.* "*Explanatory Notes for Users*" no. 6 regarding clause EXW and no. 7 regarding clause DDP; C. Debattista, op. cit., 22; C. Oertel, op. cit., 417; E. O'Connor, op. cit., 36.

[100] See above under A7/B7.

[101] For example, by adding "... *THC for seller's account* ...", if the seller is nevertheless to pay the terminal handling charges when the FCA clause is agreed.

the further obligations associated with the delivery in the most cost-effective and expedient manner, particularly the transport of the goods and their insurance.[102]

– The E, F and D clauses expect the parties to specify the place of delivery (*e.g.* "*FCA airport Munich Incoterms® 2020*"). The C clauses require the place of takeover (destination) to be specified (*e.g.* "*CIP New York Incoterms® 2020*"). In addition to the place, it is recommended to specify the point at which the goods are to be delivered or taken over as precisely as possible[103] and always add the reference "*Incoterms® 2020*".

– In addition, a delivery date or delivery period should be agreed. If a delivery period but no delivery date is determined, the buyer decides when the F clauses apply, and often the seller decides when the other clauses apply.[104] If a longer period of time between conclusion of the contract on the one hand and delivery of the goods on the other hand is conceivable, the parties should arrange for appropriate precautions in case after conclusion of the contract but before delivery of the goods the export or import is subject to restrictions or completely suspended in response to changed circumstances in the country of destination or origin.[105]

– The provisions of the individual clauses are in no way mandatory. Modifications should, however, be formulated clearly and unambiguously[106] and respect the structural principles of the respective group of clauses.[107]

– The Incoterms® 2020 formulate binding obligations only for the contract between seller and buyer, but are not a sales contract, instead they presuppose one. With regard to the contract of sale, Incoterms® 2020 only regulate some of the primary obligations as well as some special secondary consequences under B3 and B9, but they do not contain, for example, any rules on the conclusion of the contract, transfer of ownership, handling of payments and, in particular, on improper performance. Therefore, the Incoterms® 2020 only supplement and mod-

[102] Ulrich Magnus, Burghard Piltz, "Chapter 10: Trade Terms and INCOTERMS", *International Sales Law,* (Eds. Larry A. DiMatteo, André Janssen, Ulrich Magnus, Reiner Schulze), Baden-Baden, 2016, 267, 283; E. O'Connor, op. cit., 37.

[103] See above text on footnote 23.

[104] See above text on footnote 30.

[105] See J. Ramberg, op. cit., 53 and B. Piltz, J. Bredow, op. cit., F-125.

[106] In the case of "*CIF landed*", for example, it is not clear whether the intention is merely to allocate the costs differently or to have more far-reaching consequences.

[107] For example, EXW is not appropriate if, according to the ideas of both parties, the seller should organize the shipment via his forwarding agent.

ify the relevant sales law, but never replace it. To a large extent, the UN Sales Law (CISG) applies in addition.[108]

SUMMARY

Incoterms® 2020 are eleven clauses for delivery of goods. The ICC/Paris has established a set of rules for each of the eleven clauses which explain in detail the obligations incumbent on the seller and the buyer when they agree on one of the eleven clauses in their contract of sale. The rules set out in A2/B2 for each clause should be given the greatest importance, as they describe the basic characteristics of the clause in question, whereas the other rules are more or less a consequence of those characteristics. Selecting and working with the clauses of the Incoterms® 2020 also requires consideration of aspects such as transport-related security requirements, reconcilement with documented credit requirements, cargo insurance and export/import clearance.

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Ključne reči: Incoterms, ugovor o prodaji, isporuka, trgovačka praksa, uvoz, izvoz, dokumentarni akreditiv

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APPLICABLE LAW TO THE ARBITRATION AGREEMENT IN GENERAL CONDITIONS OF SALE AVAILABLE ON SELLER'S WEBSITE

A PRO-ARBITRATION APPROACH IN THE JURISPRUDENCE OF THE SUPREME COURT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Supreme Court of the Federation of Bosnia and Herzegovina had to determine the applicable law to the arbitration clause contained in general conditions of sale on seller's website. The sales agreement was concluded orally and the reference to the website with general conditions of sale was made on a pro forma invoice paid by the buyer. The arbitration clause provided for ICC Rules and seat of arbitration in Amsterdam, while French law was chosen to apply to the contract. The buyer, a domestic company from Bosnia and Herzegovina, filed for damages before domestic courts, claiming that the arbitration clause was not consented to, nor was it concluded in written. The Supreme Court of the Federation of Bosnia and Herzegovina issued in the "chicken breed" case in 2019 a pro-arbitration judgment with reference to the ***New York Convention of 1958 and European Convention on International*** *Commercial Arbitration of 1961. It is a landmark decision on one of the most difficult questions of applicable law to formal and substantive validity of the arbitration agreement.*

Key words: *arbitration agreement, choice of law, New York Convention, European Arbitration Convention, Supreme Court of the Federation of Bosnia and Herzegovina*

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INTRODUCTION

The Supreme Court of the Federation of Bosnia and Herzegovina (FB&H) had to decide on the validity of the arbitration clause concluded between a Bosnian-Herzegovinian company which sells chicken and a company with its seat in France. The arbitration clause was contained in general terms and conditions of the French company. This fact does not cause legal problems, because under the Civil Procedure Act of FB&H[1] arbitration agreements concluded in general terms and conditions are valid. However, the facts of the case offer much more than this. The sales agreement between the parties was concluded orally and the reference to the general terms and conditions was on a pro forma invoice issued after the first instalment of delivered chickens. A reference was made to the website of the French company where the general terms and conditions are available with an arbitration clause and a choice of law clause. Once the company from FB&H filed a claim against the French company in front of a municipal court in FB&H, because the chicken delivered allegedly had a disease and died, the courts in FB&H had to decide on the objection raised by the French company, that the dispute needs to be brought to arbitration. The question of validity of the arbitration clause was finally decided by the Supreme Court of FB&H, because it invokes the difficult question of the applicable law to the validity of the arbitration agreement. It is fair to state that it is one of the most difficult questions of private international law related to commercial contracts. The decision of the Supreme Court of FB&H is a pleasure to read to all fans of private international law issues in commercial arbitration. For the ones familiar with the Vis moot competition, it is interesting that in the 26th competition one of the main issues were general conditions on sale concluded in a footer of pro forma invoice by reference to a website, whereas in the 27th Vis moot the problem was about the applicable law to the arbitration agreement. The Supreme Court of FB&H had to decide both issues in one case and provided good solutions to the case.

This paper will firstly present the case in more details as well as the ruling on the issue, and then follow by an analysis of the applicable law to formal and substantive validity of the arbitration agreement which both have been questioned in the proceedings. The judgment will be analysed from the comparative perspective of the most modern legal solutions to the question of validity of arbitration agreements.

[1] Civil Procedure Act of the Federation of BiH, Bosnia and Herzegovina/Federation of BiH, *Official Journal of FBiH*, Nos. 53/03, 73/05, 19/06, and 98/15.

THE "CHICKEN BREED" CASE BEFORE THE COURTS OF FEDERATION OF BOSNIA AND HERZEGOVINA

A company from FB&H "POSAVINA KOKA" concluded an oral agreement on purchase of chicken breed ISA Brown with an approximate value of 50,000 € from a French company "Institut de Sélection Animale" who delivered the chickens. All chickens delivered died after delivery because of disease. It is disputed between the parties if the disease was present at the time of delivery. The first instalment of payment was conducted based on a pro forma invoice issued by the French Company containing a sentence "on the conditions of sale you may consult our website www.isapoultry.com". This website still contains similar general terms and conditions, but it is not known if they are identical (especially it is not known if the exclusion of the applicability of CISG was already present at the time of conclusion of the contract). The general terms and conditions of the company could be found on the website and contained an arbitration clause with the following wording: "All disputes arising out of the interpretation or execution of these General Conditions shall be settled under arbitration, in accordance with the rules of the International Chamber of Commerce, by 3 arbitrators, appointed pursuant to the contents of the above mentioned rules. The arbitration shall take place in the city of Amsterdam and will be held in the English language." In addition, the general conditions also contained a choice of law clause positioned under the same section as the arbitration agreement with the following wording: "All the agreements and any legal interaction between the Seller and the Buyer shall be governed exclusively as follows: For goods invoiced by Institut de Sélection Animale S.A.S. by French law". The buyer claimed that he did not consent to the arbitration clause and filed a claim for damages before the domestic municipal court in Orašje.

The municipal court in Orašje rejected the objections raised by Respondent, namely that the courts in FB&H lack jurisdiction because of the arbitration clause and claimed that the Convention on International Sale of Goods (CISG) shall apply. Claimant relied on Art. 2 (3) of the New York Convention of 1958[2] and on the Art. 1 (II) (a) of the European Convention on International Commercial Arbitration of 1961[3] of which both France and Bosnia and Herzegovina are Member States, and contended that these articles correspond to Art. 8 of the UNCITRAL Model Law of 1985. Claimant alleged that there is no consent to the general con-

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (New York Convention).

[3] The European Convention on International Commercial Arbitration of 1961, Geneva, 21 April 1961 (European Arbitration Convention), United Nations, Treaty Series, Vol. 484, No. 7041, 364.

ditions of sale of the seller and therefore also no consent to the arbitration agreement, because the pro forma invoice was sent only with the delivery, whereas part of the payment was conducted several weeks before that. On the contrary, Respondent alleged that the consent was given with the payment of the price on the pro forma invoice.

The municipal court in Orašje found that the criteria for a valid arbitration agreement were not met. The court found that Art. 49 Private International Law (PIL) Act of FB&H,[4] which determined conditions of choice of court agreements, does not relate to arbitration agreements and therefore the gap needed to be filled by reference to Art. 435 of the Civil Procedure Act of FB&H, which requires signature by all parties of the arbitration agreement. Therefore, the municipal court interpreted the signatures to be required also for arbitral agreements contained in general conditions which are specifically regulated in Art. 436 of the Civil Procedure Act of FB&H which states that an arbitration agreement is validly agreed upon also when it is contained in general conditions of sale. Further, the municipal court used the conflict rule on transfer of technology from Art. 20 (18) PIL Act of FB&H to find that the place of the recipient of the technology, meaning law of FB&H shall be applicable. The municipal court awarded approximately 250,000 € in damages to the Claimant.

The Cantonal Court of second instance in most points agreed with the municipal court and upheld the decision. Following an appeal ("revizija") against the Cantonal Court judgment, the Supreme Court of FB&H disagreed. It announced at the beginning of its reasoning that the validity of the arbitration agreement depends on the applicable law to the arbitration agreement. The Supreme Court of FB&H started its analysis firstly by confirming that a requirement of a written form must be met, but that under the NY Convention and the European Arbitration Convention exchange of faxes and telegraphs, or in the modern age e-mail may suffice this requirement. Further it stated that under the influence of the Model Law, Art. 436 of the Civil Procedure Act of FB&H considers arbitration agreements in General Terms and Conditions to be valid. Therefore, it concluded that the requirement of the written form somehow needs to be met by incorporating general terms into a written agreement, but that it depends on the applicable law if a mere reference to a website or only a full text of the written general terms in the contract will be sufficient.

[4] Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters of 1982, *Official Journal of the Socialist Federal Republic of Yugoslavia*, Nos. 43/82 and 72/82, *Official Journal of the Republic of Bosnia and Herzegovina*, No. 2/1992, No. 13/1994; *Official Journal of the Republic of Srpska*, No. 21/1992.

The Supreme Court of FB&H further stated that under Art. II NY Convention it is possible for national states to adopt a less strict approach to the written requirement and also consider other forms, even oral arbitration agreements, to be sufficient. It went on to say that the NY Convention does not contain a conflict rule for the form of the arbitration agreement, whereas the European Arbitration Convention under Art. VI (2) refers to the conflict rules of the court. The applicable law therefore shall be found under Art. 19 PIL Act of FB&H, which follows the choice of law by the parties, or in absence of a choice, Art. 20 PIL Act of FB&H refers to the law of the seller. Therefore, the Supreme Court of FB&H considered French law to apply to the question of validity of the arbitration agreement. Finally, the Supreme Court of FB&H reminded the lower courts to apply CISG to the sale contract itself. Thereby, the Supreme Court of FB&H referred the case back to the municipal court for a new decision.

ANALYSIS OF THE "CHICKEN BREED" CASE – A QUESTION OF FORMAL OR SUBSTANTIVE VALIDITY

The dilemma raised by both the municipal and the Supreme Court of FB&H shows a full variety of possible problems related to the question of applicable law to the validity of the arbitration agreement. The technique of determining the applicable law follows the principles and theory of PIL. The understanding of the arbitration agreement is shaped by principles and theory of arbitration. The complex nature of the arbitration agreement between the procedural and contract theories does not only inspire for broad academic discussions. In practice, both substantive and procedural law will regulate certain aspects of the arbitration agreement. This was also demonstrated in the "chicken breed" case in FB&H, where the courts in FB&H naturally assumed that both procedural and substantive laws apply to the question of validity. On the other hand, the Supreme Court of FB&H seems to lean towards the opinion that the question of validity of the arbitration agreement contained in general conditions of sale and referred to in an invoice is a question of form and not a question of substance. Or at least, it is fair to say that in the decision there was not a clear distinction between the formal and substantive validity of the arbitration agreement.

Arbitration agreement between procedural and substantive law

The parties usually choose the seat of arbitration and thereby the *lex arbitri* for the procedural framework of the arbitration proceedings, which is here the

Dutch law, and substantive law which will govern the main contract which would here be the French law. Both laws are only applicable under the assumption that the general conditions of sale have been validly incorporated into the sales agreement. The most obvious solution would be to apply the *lex arbitri* to procedural questions of the arbitration agreement and the law applicable to the main contract to substantive aspects of the arbitration agreement. However, this case shows that such distinction is not always possible.

The nature of the arbitration agreement is somewhere between procedural and substantive law. This conclusion is a result of a rather long and still developing theoretical discussion,[5] but also has its important practical reflections. Namely, some aspects of the arbitration agreement are regulated by procedural law and some are regulated by substantive law. In UNCITRAL Model law countries the form of the arbitration agreement is regulated by the (procedural) arbitration law, the same applies to all countries that ratified the New York Convention. The same is true for Bosnia and Herzegovina, where Arts. 435 and 436 Civil Procedure Act regulate the question of form of the arbitration agreement. On the other hand, question of the consent to arbitrate, error, fraud etc. will mostly be regulated by (substantive) contract law. The question of validity of arbitration agreement may therefore raise difficult questions even in purely domestic cases.[6] In international arbitration cases this means that both substantive and procedural law of the applicable law determined by the conflict rules will be applicable to the arbitration agreement. Therefore, not only the *lex arbitri* will be the applicable law (to arbitration proceedings), but possibly also foreign procedural law may become applicable (to the arbitration agreement).

This fact that both substantive and procedural law might become applicable to the arbitration agreement causes several problems for PIL. This is an important exception from the PIL rule applied before courts, that always the domestic procedural law applies (*lex fori*).[7] This is probably also why the municipal court, but also to some extent the Supreme Court of FB&H naturally assumed that the requirements from the Civil Procedure Act of FB&H have to be fulfilled, regardless of the applicable law. However, the PIL does have an answer to this problem with the instruments of characterization (classification) *lex causae*. In the first step the applicable conflict rule "in toto" (so called "open referral") refers to the

[5] Gašo Knežević, Vladimir Pavić, *Arbitraža i ADR*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2010, 45.

[6] Almir Gagula, "Arbitrability of Shareholder Disputes in Bosnian Law", *Balkan Yearbook of European and International Law* (eds. Zlatan Meškić et al.), Springer, 2019, 53–69.

[7] Jan Kropholler, *Internationales Privatrecht*, Mohr Siebeck, Tübingen, 2001, 4 edn, 553.

applicable foreign law and in the second step the facts of the case are qualified once again, this time in accordance with the foreign substantive law which is applicable (*lex causae* characterization or classification).[8] Theory of characterization in two steps ("Stufenqualifikation") is today the prevailing theory of characterization in Austria,[9] Switzerland,[10] and it is also the prevailing theory of ex-Yugoslav republics.[11] Even if another version of the *lex causae* qualification and not the qualification in two steps ("Stufenqualifikation") would be accepted, with regards to the applicable law to the arbitration agreement the outcome would be the same: both procedural and substantive law of the foreign law would become applicable.[12] In the literature the qualification *lex causae* is considered to be methodologically justified, because after the foreign law is determined to be applicable in accordance with the chosen conflict rule, it is logical that the provisions of that foreign law will be applied and interpreted in accordance with the legal order they belong to (meaning *lex causae*).[13]

Therefore, the applicable law to the arbitration agreement is the exception from the rule that procedural law is always applied *lex fori*. This means that in this case the written form requirements from Art. 435 and 436 Civil Procedure Act only have to be fulfilled, if the conflict rules of FB&H do not refer to a law of a state which does not require a written requirement. In fact, this was confirmed by the ruling of the Supreme Court of FB&H, only with a different reasoning.[14] Once the applicable law is determined, its rules on the formal and/or substantive validity of arbitration agreements become applicable, regardless if they are contained in their procedural or substantive law.

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[8] Leo Scheucher, "Einige Bemerkungen zum Qualifikationsproblem", *ZfRV*, 1961, 232; Tibor Varadi, *Međunarodno privatno pravo*, Forum, Novi Sad, 1990, 67-68; Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo – opšti deo*, Službeni glasnik, Beograd, 2008, 260; Dirk Looschelders, *Die Anpassung im internationalen Privatrecht: Zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonierenden Rechtsordnungen*, Müller, Heidelberg, 1995, 147.

[9] Fritz Schwind, *Internationales Privatrecht*, Manz, Wien, 1990, 28–29; L. Scheucher, op. cit., 232; against this theory Michael Schwimann, *Internationales Privatrecht*, Manz, Wien, 2001, 25–26.

[10] Adolf Schnitzer, *Handbuch des IPR*, Basel, 1957, 102.

[11] Zlatan Meškić, Slavko Đorđević, "Bosnia and Herzegovina", *International Encyclopaedia of Laws: Private International Law* (ed. Bea Verschraegen), Kluwer, Alphenaan den Rijn, 2018, 48.

[12] Stefan Kröll, *Ergänzung und Anpassung von Verträgen durch Schiedsgerichte*, Carl Heymanns, Köln, 1998, 18.

[13] Z. Meškić, S. Đorđević, op. cit., 48.

[14] The view followed by the Supreme Court of FB&H was also expressed in Maja Stanivuković, "Merodavno pravo za arbitražni sporazum", *Pravni život*, br. 12, 1998, 313.

Arbitration agreements in general terms and conditions – a question of formal or substantive validity

The question of validity of arbitration agreements is generally divided into formal and substantive validity. While the question of classifying certain provisions within one legal system into rule of substantive or formal validity may not be of practical importance, in cases with a foreign element, this choice influences which conflicts rules will be applicable. Consequently, there is possibly a different applicable law to the formal and substantive validity of the arbitration agreement.

Formal validity of the arbitration agreement. – The Supreme Court of FB&H was correct by stating that there is no specific conflict rule for the formal validity of the arbitration agreement. Namely, the conflict rules of Art. V NY Convention and Art. VI (2) European Arbitration Convention are conflict rules on substantive validity. For the form of the arbitration agreements, Art. II (2) of the New York Convention contains a substantive maximum form requirement.[15] This means that there is no conflict rule, but a directly applicable substantive solution for the question of form. It is uniformly held that such maximum form under Art. II (2) of the NY Convention does not require a signature by the parties.[16] A conflict law analysis based on national conflict rules makes only sense if the conditions under Art. II (2) of the New York Convention are not fulfilled and the conflict rules refer to applicable law that preserves the formal validity of the agreement, following the most favorable treatment-principle under Art. VII of the New York Convention, which on this matter leads to the principle *in favorem validitatis*.[17] This confirms that the written form requirement from the Civil Procedure Act of FB&H will be applied, only if the law of FB&H is the applicable law to the form of the arbitration agreement.

The correct conflict rules to be applicable to the formal validity is Art. 7 PIL Act of FB&H, which keeps the contract formally valid if it either satisfies the law of the state where it was concluded or the law applicable to the substance of the agreement. Consequently, in addition to the law applicable to the substance of the agreement which will be elaborated further below, the Supreme Court of FB&H

[15] Gary Born, *International Commercial Arbitration*, Vol. I, Kluwer, The Hague, 2014, 617.

[16] Toni Deskoski, "Форма на спогодбата за меѓународна трговска арбитража во правниот систем на Република Македонија", *Evropsko pravo,* No. 1–2, 2012, 23; Alan Uzelac, "Forma arbitražnog ugovora: kako otjerati avet papirnate pismenosti?", *Pravo u gospodarstvu*, No. 2, 2001, 113.

[17] Rolf Trittmann, Inka Hanefeld, "Form of Arbitration Agreement", *Arbitration in Germany* (eds. Karl Heinz Böckstiegel, Stefan Michaal Kröll, Patricia Nacimiento), Kluwer, Austin/Boston/Alphen a.d. Rijn, 2007, 126, 129.

missed the opportunity to check the requirements of the law of the state where the contract is concluded. Of course, this is again in this complex case not an easy task and it reveals the flaws of the outdated connecting factor of the *lex loci contractus*. Namely, if the contract is not concluded in one place in physical presence of both parties, the question where the contract is concluded again raises the preliminary question under which law shall we assess where the contract was concluded. Especially because some states follow the principle that the contract is concluded in the place of receipt of the acceptance of the offer, whereas other follow the principle of the state from which the acceptance was sent. It seems that the Supreme Court of FB&H considers it possible that with the payment of the pro forma invoice the contract was concluded in FB&H. Under Art. 7 PIL Act of FB&H, this means that on the one hand law of FB&H would be applicable as *lex loci contractus* and on the other hand the law applicable to the substance of the contract, whichever law keeps the contract formally valid. Considering that the pro forma invoice was in written as well as the reference to the website on the invoice, the written requirement would be satisfied. An inclusion of general terms and conditions by a mere refence within the contract is valid as a matter of form under the Law of Obligations of FB&H and would therefore cause no problems.[18]

Substantive validity of the arbitration agreement. – The question that remains open is, however, if both parties consented to the inclusion of general terms and conditions. This is a question of substantive validity. The Supreme Court of FB&H was not fully correct in its assessment that the NY Convention does not contain a conflict rule for the validity of the arbitration agreement. Namely, Art. V (1) of the New York Convention subjects the validity of the arbitration agreement under the law chosen by the parties, or failing any indication thereon, under the law of the country where the award was made. The two-step test of Art. V (1) of the New York Convention, comprises of the parties' choice of law in the first step and the law of the seat in the second step. The same solution is taken over by the Art. 34 (2) (a) (i) and Art. 36 (1) (a) (i) UNCITRAL Model Law[19] and is consequently widespread in national arbitration laws. Art. VI (2) of the European Arbitration Convention referred to the Supreme Court in fact repeats the two steps from the NY Convention and adds a third step for the case that courts deciding on the validity of the arbitration agreement cannot determine the seat in the second step.

[18] Zlatan Meškić, Alaudin Brkić, "Zaštita potrošača od nepravednih ugovornih odredbi - usklađivanje obligacionog prava BiH sa Direktivom 93/13/EEZ", *Anali Pravnog fakulteta Univerziteta u Zenici,* 2010, 58.

[19] Model Law on International Commercial Arbitration 1985, UNCITRAL Model Law, UN Doc A/40/17, Annex I.

In the third step, they shall apply the conflict rules applicable in the state of that court. Therefore, the most important international legal sources have a harmonized view on the matter.

In FB&H there is no specific conflict rule for the substantive validity of the arbitration agreement in the national law, so the international legal sources apply. Notwithstanding the fact that their provisions on the applicable law to the arbitration agreement of the international instruments are designed to be applied in specific proceedings before courts, it has already been widely accepted that there is no plausible reason to hold that a different law shall apply to the arbitration agreement at different stages of the proceedings. In case there is a specific conflict rule in the national law, national courts will be bound by it. One of the prominent examples is Art. 178 (2) of the Swiss PIL Act, under which "as to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law". This provision is interesting, because it does not only follow the principle *in favorem validitatis*, but also adds the law applicable to the main contract to the usual connecting factors of the chosen law and the law of the seat.[20] It is quite different from the solution in the New York Convention, the European Arbitration Convention and the UNCITRAL Model Law, because it provides for the three connecting factors alternatively and not subsidiary. This is typical for conflict rule on the validity of legal acts, because their main aim is to preserve the validity of such acts in cross-border transactions. The Swiss provision was used as an inspiration for the newer Dutch solution in Art. 10:166 of the Dutch Civil Code, which also considers the arbitration agreement to be valid if it is valid either under the chosen law, the law applicable to the main contract or the law of the seat.[21] In absence of a specific conflict rule on substantive validity of the arbitration agreement, conflict rules of the PIL Act of FB&H on contracts contain three subsidiary connecting factors: 1. the choice of law; 2. domicile of the person performing the characteristic performance and 3. the closest connection in Art. 19 and 20 PIL Act of FB&H. Again, the choice of law is the main connection factor for the substantive validity.

Have the parties chosen the law to the arbitration agreement in the "chicken breed" case? It is not easy to answer this question, at least not as easy as it may seem. A choice of law to the arbitration agreement is allowed under any known

[20] Kurt Siehr, *Das Internationale Privatrecht der Schweiz*, Schulthess, Zürich, 2002, 715.

[21] Vesna Lazić, "Interpretation and Application of the New York Convention in The Netherlands", *Recognition and Enforcement of Foreign Arbitral Awards* (ed. George A. Bermann), Springer, 2017, 689, 700.

legal act: the New York Convention, the European Arbitration Convention, the UNCITRAL Model Law and national PIL codification which contain explicit conflict rules on the applicable law to arbitration agreements, the conflict rules on contracts of PIL codification without explicit rules on arbitration agreements, but also relevant arbitration case law such as the famous *Sulamerica case*[22] of the English courts followed, or at least taken reference to, by various courts and arbitral tribunals.[23] It goes without saying that whenever a conflict rule does not require an explicit choice of law, that the choice of law may be conducted explicitly and implicitly.[24] Usually the parties will simply make a reference in their contract which includes an arbitration clause, that the law applicable to this contract shall be the law of certain state. This is exactly what the parties have done in this case. Namely, in the general conditions of sale under the same subchapter in which the arbitration clause is contained, it is stated as follows: "All the agreements and any legal interaction between the Seller and the Buyer shall be governed exclusively as follows: For goods invoiced by Institut de Sélection Animale S.A.S. by French law".

Surprisingly, it is almost universally accepted that a choice of law for the sales agreement, which contains the arbitration clause, is not considered to be an explicit choice of law for the arbitration agreement. The separability doctrine apparently has something to do with this conclusion. From a PIL perspective this is not visible at first sight, because it is understandable even without the separability doctrine that the parties are allowed to choose a separate law for each contract clause. Therefore, the separability doctrine does not really add any value to the discussion if a choice of the applicable law to the contract is also a chosen law for the arbitration clause contained in the contract. The only valid argument is that, if the chosen law is intended to also apply to the arbitration agreement, an choice of law should explicitly mention the arbitration agreement and not just the contract. The formulation of the choice of law clause will be a decisive factor to establish if a choice of law is done also for the arbitration agreement and not just the contract. The HKIAC has therefore in the reform of its model clause included a clause for the choice of law "of the arbitration clause".[25] In the "chicken breed" case, however, the clause does not only refer to the sales agreement. It refers to

[22] Sulamerica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A. [2012] EWCA Civ 638, *www.trans-lex.org/311350/_/sulamerica-cia-nacional-de-seguros-sa-v-enesa-engenharia-sa-%5B2012%5D-ewca-civ-638/,* 26.04.2020.

[23] Alan Redfern, Martin Hunter, *International Arbitration*, Oxford, 2015, 159.

[24] Marike Paulsson, *The 1958 New York Konvention in Action*, Kluwer, 2016, 177.

[25] See www.hkiac.org/arbitration/model-clauses, 26.04.2020.

"All the agreements and any legal interaction between the Seller and the Buyer" which shall be governed by French law. Such a broad clause referring to all agreement should be interpreted in a way to encompass also the arbitration agreement. This is rather an example of a clause which is formulated in a way that it refers not just to the sales agreement, but to all agreements, and leaves little doubt that also the arbitration agreement is encompassed.

Therefore, under Art. V (1) of the New York Convention, Art. VI (2) of the European Arbitration Convention or Art. 19 PIL Act of FB&H the applicable law to the question if there is consent of the parties would be French law. However, it is not this easy. We have to remember that we are examining if the general conditions of sales are consented to, so the choice of law contained therein is only valid if there is consent. So, may we decide on the chosen law if the law was chosen in the first place? In the PIL theory this is called the purported choice of law. It means that the question if the choice of law clause is valid will be determined by the (purportedly) chosen law. This is explicitly stated in Art. 6 Hague Principles, which state that the existence of an choice of law agreement will be determined by the law that was purportedly agreed to. This is also the prevailing view in the PIL theory of the ex-Yugoslav Republics, even though it is not explicitly regulated.[26] The reasoning behind it is that otherwise any party could by a mere objection to the validity of a choice of law endanger its validity, because another law would apply to it, possible the law which would be applicable without a choice of law. Therefore, validity of the choice of law clause will be determined by French law and if it is validly consented to under French law, then French law would apply to the substantive validity of the arbitration agreement. At the same time, under Art. 7 PIL Act of FB&H, it would also be applicable to the question of form, in addition to the *lex loci contractus*. And French law is particularly friendly towards questions of formal validity of arbitration agreements.[27]

If the choice of law clause is not valid under the purportedly chosen French law, this does not automatically mean that the arbitration agreement is invalid as well. Then, the applicable law to the substantive validity of the arbitration agreement will not be the explicitly chosen law, but either an implied choice of law, or the next subsidiary connecting factor after the choice of law which is either the

[26] Maja Stanivuković, Petar Đundić, *Međunarodno privatno pravo – posebni deo*, Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2008, 112.

[27] See Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Udruženje pravnika Jugoslavije i Spoljnotrgovinska arbitraža pri Privrednoj komori Jugoslavije, Beograd, 1998, 120 i dalje; Milena Petrović, "Punovažnost arbitražnog sporazuma", *Zbornik radova "Harmonizacija građanskog prava u regionu"*, Pravni fakultet Istočno Sarajevo, Istočno Sarajevo, 2013, 485.

seat of arbitration, domicile of the person performing characteristic performance or the closest connection.

A possible criterion to establish an implicit choice of law, might be the choice of the seat of arbitration, because it shows which procedural law the parties have chosen for the arbitration procedure.[28] Nevertheless, the threshold to meet for an implicit choice of law should be rather high.[29] The EU Rome I Regulation requires under Art. 3 (1) that "the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case". The requirement of the "clear demonstration" aims to raise the level of probability needed for the conclusion that parties did want to choose an applicable law. Namely, one of the main challenges for the arbitral tribunal or courts is to establish if the parties have ever intended for a certain legal order to be applicable.

This analysis should be strongly differentiated from the determination of the closest connection to the case. The law that the parties want to choose does not have to be in any connection to the case. The parties may want it to be applicable because of the quality of its solutions, neutrality, or because one of the parties or both (and their attorneys) are particularly familiar with the legal system. Some of these criteria are also decisive for the choice of the seat of arbitration, therefore the choice of the seat is by many authors and tribunals considered to be a strong indication for the choice of the applicable law to the arbitration agreement.

There is a great dispute among PIL scholars, as to whether the choice of jurisdiction of the courts or seat of arbitration shall be a decisive factor or no factor at all when establishing the implicit choice of law (for the arbitration agreement or even for the contract). Art. 4 of the Hague Principles on Choice of Law in International Commercial Contracts[30] explicitly states that "An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law". The official commentary of the provision clarifies that the choice of jurisdiction/seat may be used as one of the criteria for the determination of the choice of law to the contract, but it does not in itself amount to a choice of law.[31] The reason is

[28] See Mario Guliano, Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, *Official Journal of the EU*, 1980, 1–50.

[29] Zlatan Meškić, "Parties' Choice of Law Governing the Arbitration Agreement: A Curse or a Blessing?", *1st Annual Research Symposium on International Commercial Arbitration* (ed. Maria Casoria), Bahrain, 2020, 43.

[30] Opened for signature 30 June 2005 (entered into force 1 October 2015).

[31] See *www.hcch.net/en/instruments/conventions/full-text/?cid=135*, 26.4.2020.

very simple: if a choice of jurisdiction/seat would in itself amount to a choice of law, this would mean that a chosen court or arbitral tribunal would never apply foreign law. This does not (always) correspond to the will of the parties. The same provision can also be found in the Art. 7 (2) of the Mexico Convention,[32] stating that a "selection of a certain forum by the parties does not necessarily entail selection of the applicable law".

In any case, the arbitral tribunal or court should restrain from a presumed (objective) imputed choice of law and restrict itself to a real (subjective) intention of both parties.[33] It is not about the question which law the parties should have chosen to their contract, it is about the question if they actually have implicitly chosen that law. This is also the main criticism to the current arbitral practice, the discretion in determination of the applicable law seems to be confused with an analysis of the hypothetical instead of the actual will of the parties. Words are put in parties' mouth that they have expressed or even intended to express, neither expressly not impliedly.

In the "chicken breed" case, the choice of the seat of arbitration to be in Amsterdam, Netherlands, was done in the general conditions of sale. If the court would consider this as an implicit choice of law, it would have to use this as purportedly chosen law of Netherlands and apply it to establish if the choice of law clause (implicit choice of law clause) is valid. If the choice of law in the arbitration clause is valid, then the substantive validity of the same arbitration clause shall be considered under the chosen law of Netherlands. This means that in the first step the substantive validity of the same arbitration clause is considered from the perspective of the criteria to be met for a choice of law clause and in the second step for an arbitration clause. Obviously, this makes sense only if under the Dutch law there are separate criteria for the substantive validity of the choice of law and arbitration clauses.

Even if the implicit choice of law of Dutch law would be invalid or if the court follows the view expressed in this paper that the seat should not be considered as an implicit choice of law, the Dutch law would be applicable under the subsidiary connecting factor of Art. V (1) of the New York Convention, Art. VI (2) of the European Arbitration Convention. Therefore, the Dutch law would be applicable to the arbitration agreement if there is no choice of law, explicit or implicit. This paper follows the hierarchy given by Art. VI (2) of the European Arbitration Convention, meaning the conflict rules for contracts should only be ap-

[32] The Inter-American Convention on the Law Applicable to International Contracts signed in Mexico on March 17, 1994.

[33] Alex Mills, *Party Autonomy in Private International Law*, Cambridge, New York, 2018, 358.

plied if for some reason the seat of arbitration cannot be determined. The reason for such opinion is that in case there is no choice of law, the conflict rules for contracts provide for characteristic performance, usually the law of the domicile of the seller or service provider (not the buyer) to determine the applicable law.[34]

The same is true for Art. 20 PIL Act of FB&H. However, when it comes to arbitration agreements, this is not the correct approach. The specific performance when it comes to the arbitration agreement is rather connected to the arbitral proceedings than to the domicile of the seller/service provider or buyer. Consequently, the specific performance as a connecting factor in not suitable to refer to the applicable law for the arbitration agreement. Considering that this is the main connecting factor in comparative law when it comes to the law applicable to contracts in absence of a choice of law, it seems that the conflict rules for contracts in general are not suitable to be applicable to arbitration agreements. The remaining connecting factors, the choice of law and the closest connection, do not need to be taken out of specific conflict rules on contracts, because they are considered to be general principles of both international arbitration and PIL.

THE SUPREME COURT OF FB&H PROVIDES A STRONG PRO – ARBITRATION SIGNAL IN A DIFFICULT CASE

The question of the applicable law to the arbitration agreement concluded by a reference to a website in a pro forma invoice is one of the hardest questions of PIL. The analysis in this paper was not intentionally complicated to prove this point, on the contrary. The Supreme Court of FB&H certainly solved this matter in the "chicken breed" case in a manner which can be easily followed and managed to simplify it for the lower courts that have to decide on the issue again. The application of French law as proposed by the Supreme Court of FB&H is the most likely solution for the question of consent of the parties, firstly as purportedly chosen law to the arbitration agreement and then, in case such choice of law is valid under French law, as the chosen law for the arbitration agreement. Both Art. V (1) of the New York Convention and Art. VI (2) of the European Arbitration Convention support this solution. Of course, the Supreme Court of FB&H did not elaborate further what will happen in case the choice of law is not valid or the courts interpret that the choice of law does not refer to the arbitration agreement, but only to the sales agreement. But simply by following the subsidiary connecting factor of the law of the seat, the Dutch law applies in that case. In

[34] See e.g. Brooke Adele Marshall, "Reconsidering the Proper Law of Contract", *Melbourne Journal of International Law*, Vol. 13, 2012, 1, 23.

the view of the author, there is no place for the application of the conflict rules for contracts, because the specific performance of the seller is not the specific performance in the arbitration agreement, but only in the sales agreement.

The question of form of the arbitration agreement is a completely separate question and requires satisfying substantive the criteria of an agreement in writing under Art. II NY Convention. The same provision allows national states to adopt a less strict approach to the written requirement and also consider other forms, even oral arbitration agreements, to be sufficient, as rightly recognized by the Supreme Court of FB&H. Therefore, conflicts rules may be consulted to establish if the applicable law allows for a less strict requirement. In any case, a written reference to general terms and conditions on a written pro forma invoice should not cause problems to fulfill the requirements of the agreement in writing, neither under Art. II NY Convention, nor under less strict national legal standards.

The Supreme Court of FB&H set a more than solid basis for future developments on this difficult issue. In addition, it clearly sets a pro-arbitration signal to lower courts, in a case where it would have been easy to slide into the emotions of protecting the domestic company. This is even more of importance considering that arguments in favor of validity of the arbitration agreement required quite sophisticated arguments.

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MJERODAVNO PRAVO ZA ARBITRAŽNI SPORAZUM SADRŽAN U OPŠTIM USLOVIMA POSLOVANJA NA INTERNET STRANICI PRODAVCA

PRAKSA VRHOVNOG SUDA FEDERACIJE BOSNE I HERCEGOVINE U KORIST ARBITRAŽE

Rezime

Vrhovni sud Federacije Bosne i Hercegovine imao je zadatak da utvrdi mjerodavno pravo za punovažnost arbitražne klauzule sadržane u opštim uslovima poslovanja dostupnim na internet stranici prodavca. Ugovor o prodaji zaključen je u usmenoj formi, a upućivanje na internet stranicu s opštim uslovima poslovanja učinjeno je na profakturi po kojoj je kupac izvršio plaćanje. Arbitražna klauzula nalagala je primjenu Pravila Međunarodne trgovinske komore (ICC) sa sjedištem arbitraže u Amsterdamu, a u opštim uslovima poslovanja izabrano je francusko pravo kao mjerodavno za ugovor. Kupac je domaće preduzeće iz Bosne i Hercegovine, koje je podnijelo

zahtjev za naknadu štete pred domaćim sudovima, smatrajući da nije dalo saglasnost na arbitražnu klauzulu te da ista nije zaključena u pismenoj formi. Vrhovni sud Federacije Bosne i Hercegovine u predmetu "jato matičnih pilića" u 2019. godini odlučio je u korist arbitraže pozivajući se na Njujoršku konvenciju iz 1958. godine i Evropsku konvenciju o međunarodnoj trgovinskoj arbitraži iz 1961. godine. Radi se o temeljnoj odluci o jednom od najtežih pitanja mjerodavnog prava za formalnu i materijalnu punovažnost arbitražnog sporazuma.

Ključne riječi: arbitražni sporazum, izbor mjerodavnog prava, Njujorška konvencija, Evropska konvencija o međunarodnoj trgovinskoj arbitraži, Vrhovni sud Federacije Bosne i Hercegovine

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EX AEQUO ET BONO IN INTERNATIONAL ARBITRATION

The notion of ex aequo et bono is rarely entertained in international arbitration. In its basic form, it entails the application of the arbitrator's own sense of justice and good as the law governing the underlying contract or transaction, as opposed to the strict letter of an otherwise applicable set of norms anchored in a specific legal order. The notion essentially embodies the foundation and purpose of any dispute resolution mechanism, which is to provide just and equitable legal protection to interested/disputing parties, avoiding the sometimes overly strict or rudimentary statutory rules. Yet, ex aequo et bono is often challenged for the supposed dangers of uncertainty, unpredictability and subjectivism it poses, as well as the possibility of inducing arbitrariness or even abuse of powers. In this article, we seek to demonstrate that the application of ex aequo et bono is not only reasonable in certain cases and industries, but also very effective in terms of duration and costs of arbitral procedure, while preserving legal certainty and the application of the basic legal principles. Moreover, we seek to demonstrate that awards rendered ex aequo et bono are as enforceable as any other arbitral award and not riskier with respect to alleged arbitrariness or excessive discretion.

Key words: *arbitration, applicable law, legal certainty, equity, public policy*

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INTRODUCTION

Upon offering a definition of *ex aequo et bono*, we attempt to clear the scenery from the prejudices and confusion that are often associated with the same. Thereafter, we analyze how arbitrators apply and decide dispute *ex aequo et bono* in practice through an illustration of both selected case law and legislation. We then assess the pros and cons of *ex aequo at bono* vis-à-vis *ex lege* arbitration. While noting the concerns for its application, we conclude that a more frequent reliance on *ex aequo et bono* could lead to a more efficient and user-friendly adjudication of cross-border disputes in certain cases.

WHAT IT IS AND WHAT IT IS NOT – TACKLING COMMON MISCONCEPTIONS

Definition

The power to decide *ex aequo et bono* normally refers to the substance of a dispute and it does not concern the conduct of the arbitral proceedings;[1] the latter are governed by the *lex arbitri,* in *ex lege* and *ex aequo et bono* arbitrations alike.

The first fundamental conceptual distinction to be made is that a decision *ex aequo et bono* is based on considerations of what is equitable and good, while a decision *ex lege* is based on one or more specific law/s. Thus, in principle, an arbitral award decided *ex aequo et bono* consists in a decision of what is just and fair based on an individual/concrete, case-specific rule, without consideration of abstract legal provisions.[2]

The precise considerations on the basis of which arbitrators may reach a decision as to what is just and fair are addressed further below. At the present stage, it is important to first clear the scenery from a number of common misconceptions about the topic under examination.

Differences

Although *ex aequo et bono* and equity seems to have the same legal meaning, they may have slightly different implications. *Equity* usually operates as an additional and/or residual tool to decide a certain dispute while "a decision *ex*

[1] Tobias Zuberbühler, Klaus Muller, et al., *Swiss Rules of International Arbitration: Commentary*, Kluwer Law International, 2005, 299.

[2] Gabrielle Kaufmann-Kohler, Antonio Rigozzi, *Arbitrage international: droit et pratique à la lumière de la LDIP*, 2nd ed. Bern: Weblaw, 2010, para. 7.67.

aequo et bono shall not be made according to *ius* in any respect but based on *equitas*".[3]

This distinction is helpful in addressing yet another misconception, namely the often interchangeable use of the terms *ex aequo et bono* and *amiable compositeur.* To clarify, arbitrators deciding as *amiable compositeur* must apply the *lex causae,* but are then entitled to mitigate its effects if they consider its application unfair.[4] The power to act as *amiable compositeur* is therefore "a dispensation, foreseen by the law itself, from strictly applying the rules of law".[5]

Conversely, arbitrators deciding *ex aequo et bono*: (i) must exclusively focus on the factual circumstances of the case; (ii) may, but are neither requested nor bound to, consider any specific rules of law; (iii) modify the terms of the parties' agreements.

Lastly, it is noteworthy that scholars and case law[6] agree that arbitrators are not prevented from ruling *ex aequo et bono* by applying the legal rules (including *general principles of law*[7]) that they deem relevant to the case at hand.[8] As illustrated in the following sections of the present article, case law indeed shows that arbitrators have generally applied *ex aequo et bono* in a way that mirrors "*generally accepted principle*[s] *which* [are] *embodied in most legal systems*".[9]

Myth and Reality

Many authors identify uncertainty, unpredictability, excessive discretion or potential abuse of powers by arbitrators as main the concerns surrounding the conferral of *ex aequo et bono* authority to the arbitral tribunals.[10]

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[3] Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, Bern, 2015, para. 1439.

[4] B. Berger, F. Kellerhals, op. cit., para. 1448.

[5] R.H. Christie, "Amiable composition in French and English law" *Arbitration*, Vol. 58, No. 4, 1992, footnote 28, 259.

[6] FSCD 110 Ia 56 [58], VD 19.05.1999, 13: "If an arbitrator is mandated to decide as an amiable compositor and therefore decides, with the exception of the public policy provisions, ex aequo et bono, this does not prevent it from deciding on the basis of a certain law, if it considers that this is in conformity with an ex aequo et bono decision".

[7] Erika Hasler, "The Basketball Arbitral Tribunal – An Overview of Its Process and Decisions", *Yearbook of International Sports Arbitration 2015*, The Hague, 2016, 133.

[8] G. Kaufmann-Kohler, A. Rigozzi, op. cit., para. 7.71.

[9] BAT 0392/13, para. 76 (available at: https://bit.ly/2IJz8Sv, 10.04.2020.); see also BAT 0480/13, para. 88 (available at: https://bit.ly/2IL6znW, 10.04.2020.).

[10] Nobumichi Teramura, "The Strengths and Weaknesses of Arguments Pertaining to Ex Aequo Et Bono", *Asian International Arbitration Journal, Kluwer Law International,* Vol. 15, 2019, 74–78.

Risks related to the interpretation of facts and law. – The first group of reasons for concern depart from the premise that the laws and regulations provide for certainty and predictability in arbitration proceedings while *ex aequo et bono* does not. Whereas the letter of the law does bring certainty and (to a certain extent) clarity, its application to determined facts by different arbitrators certainly do not necessarily do so. The uncertainty may already begin at the phase of determination of facts (i.e. taking of evidence to determine disputable facts) which, except for public policy issues, is an exercise that falls outside of the scope of review of national courts in many jurisdictions.[11]

Moreover, although in certain jurisdictions failing to apply the chosen law constitutes grounds for setting aside,[12] it does not mean that an incorrect application of the chosen law might equally lead to setting aside/non-enforcement.[13]

Thus, depending on the applicable *lex arbitri*, the level of uncertainty and unpredictability in relation to arbitrators' interpretations of the facts and of the law is potentially the same in *ex aequo et bono* arbitrations as in other arbitrations.

Risks related to subjectivism and arbitrariness. – The second group of reasons for concern is a consequence of the view that taking *ex aequo et bono* approach necessarily entails a subjective approach of an arbitrator – it is an internal sense of what is just and correct and what is not. However, this is something that, by definition, cannot (and should not) be excluded in any arbitral proceedings – the thinking process of an arbitrator when adjudicating a case is necessarily an internal, subjective process of what an arbitrator thinks is the universally and objectively fair and correct result in a particular situation. As such, the argument that *ex aequo et bono* is more prone to excessive discretion than in other arbitrations does not stand.

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[11] Ex multis, in Switzerland 4A_474/2013 para. 5.1, or 4A_256/2013 para. 2.2. Interestingly, Switzerland is among the few jurisdictions in which also invoking public policy, whether substantive or procedural, cannot lead to a review by the Federal Tribunal of the manner in which the facts were found or the evidence assessed by the arbitrators, ex multis 4A_530/2013 para. 6.1.

[12] In Switzerland the court of annulment "*will not review, under the guise of an alleged violation of public policy, whether the determination of the applicable law was correct or whether the applicable law was correctly applied*" FSCD 4A_624/2009 c. 3.2.2, FSCD 4A_260/2009 c. 3.2.2. This is also the case when "[a] *decision rendered in equity, instead of according to the rules of law chosen by the parties [which] does not violate public policy if the application of the chosen rule of law would not have led to a fundamentally different result, which would also have been compatible with public policy*" FSCD 116 II 634 [637].

[13] *Ibidem*.

Taking the assessment of a witness evidence as an example, it all comes down to whether an arbitrator believes a certain witness or not (in addition to comparing the statement to other witness statements and putting it into context vis-à-vis other evidence). It is therefore unclear why the same level of discretion should be considered unacceptable when it comes to applying *ex aequo et bono* principles on determined facts.

Depending on the applicable *lex arbitri*, *ex aequo et bono* arbitrators are, much like *ex lege* arbitrators, obliged to provide reasons for their decision; this limits the maneuver space for abuse of powers and excessive discretion. As in *ex lege* proceedings, a potential abuse of powers or excessive discretion by an *ex aequo et bono* arbitrators also limited by: (i) issues of public policy and (ii) the scrutiny of both the co-arbitrators and arbitral institutions.

Lastly, certain jurisdictions consider that arbitrariness of both *ex aequo et bono* and *ex lege* awards (*i.e.* conclusions which are evidently wrong and contrary to the content of the file) are not per se sufficient to set aside the arbitral award.[14]

In light of the above, depending on the applicable *lex arbitri,* the factors that truly prevent arbitrators from acting arbitrarily or in breach of their powers is the same in both *ex lege* and *ex aequo et bono* proceedings.

It can therefore be claimed that unpredictability and arbitrariness are the result of a wrong choice of a certain individual as arbitrator, rather than of a given authority to decide a case *ex lege* or *ex aequo et bono*.

Risks related to the rule making process. – The third group of reasons for concernis related to the fact that *ex aequo et bono* can be considered "*more rule making than dispute settlement*".[15] This is based on the assumption that when arbitrators are empowered to decide *ex aequo et bono*, they can potentially add to or diminish the rights of the parties; this would be at odds with the very function of dispute resolution, which is a "*backwards orientated task*"[16] meant to focus on the determination of pre-existing rights.

In light of the above-described arbitrators' subjectivism and broad interpretations of the facts and of the law, it is unclear why the same criticisms would not extend to arbitration proceedings decided *ex lege*. Moreover, as explained in the following sections, the corrective equity approach to *ex aequo et bono* diminishes the relevance of such a concern.

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[14] 4P.134/2006, cons. 3, 7.

[15] Stefan M. Kroll, "Contractual Gap-Filling by Arbitration Tribunals", *International Arbitration Law Review*, Vol. 2, 1999, 12.

[16] *Ibidem*.

Lastly, case law indicates that *ex aequo et bono*'s possible rule-making function could, on the one hand, be seen as an additional element to reduce and control the above-described arbitrators' subjectivism and, on the other hand, be considered as an opportunity to promote the use of arbitration in certain industries.

WHEN IS *EX AEQUO ET BONO* APPLIED AND HOW

Ex aequo et bono applies to the merits of the dispute instead of national or international legislation, only when no choice-of-law clause has been agreed between the parties and provided that the parties have explicitly agreed (*ab initio* or once the dispute has arisen) that the arbitral tribunal can adjudicate *ex aequo et bono*.

The UNCITRAL Model law on International Commercial Arbitration recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeur.*[17] In Serbia, the relevant source of law for the application of *ex aequo et bono* is the Serbian Law on Arbitration, providing that the arbitral tribunal may decide on the basis of justice and equity (*ex aequo et bono*, *amiable composition*) only if the parties have expressly agreed so.[18] Similar provisions are contained in the rules of arbitral institutions in Serbia.[19] As such, in line with the UNCITRAL Model law, the condition under Serbian law is that the parties have expressly agreed that the arbitral tribunal may decide the case *ex aequo et bono*.

Parties rarely authorize arbitral tribunals to decide *ex aequo et bono*. The ICC has noted approximately three arbitrations per year between 2003 and 2008 where such an authority was conferred on arbitral tribunals in ICC arbitrations.[20] Gary Born notes that *ex aequo et bono* has been applied in at most 2-3% of cases per year in commercial arbitrations.[21]

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[17] UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006), Art. 28, Para. 3.

[18] Law on Arbitration, *Official Gazette RS*, No. 46/2006, Article 49, Para. 2

[19] Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia, *Official Gazette RS*, No. 101/2016, Article 42, Para. 4; Rules of the Belgrade Arbitration Centre, Article 34, Para. 4.

[20] Simon Greenberg, Christopher Kee, J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective,* New York, Cambridge University Press, 2011, 143; Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration,* Kluwer Law International, 2012, 1046.

[21] Gary B. Born, *International Commercial Arbitration,* Kluwer Law International, 2014, 2770.

Sports arbitration likely represents the sector in which *ex aequo et bono* has found its broader application. The first ever decision of the Swiss-based Court of Arbitration for Sport ("CAS") was rendered *ex aequo et bono.*[22] Despite this promising start, the vast majority of CAS' cases are decided *ex lege*. However, since 2007, another sport arbitral institution – i.e. the Basketball Arbitral Tribunal ("BAT") has adjudicated approximately 1500 *ex aequo et bono*[23],[24] owing to the fact that its arbitration rules provide that the default "Law Applicable to the Merits" is *ex aequo et bono*. As such, the present article refers extensively to BAT's case law in order to illustrate how *ex aequo et bono* has been applied in practice by arbitrators.

Apart from sports arbitration, other suitable fields for the application of *ex aequo et bono* principle may include: relationships which are not regulated by predetermined laws (e.g. unnamed contracts, such as different types of joint ventures); certain specialized disputes in different fields (e.g. IT, pharmaceutical, technology, etc.) in which the specialized knowledge and industry experience plays a vital role; certain areas of law (intellectual property, internet, media, maritime); state-investor disputes (when this is provided in the bilateral investment treaties or subsequently agreed between the parties).

An emblematic (but probably involuntary) description of the *ex aequo et bono* decision making process was provided right before his retirement by Judge Richard A. Posner, one of the most provocative figures in American law in the last half-century: "*I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you do is ask yourself – forget about the law – what is a sensible resolution of this dispute?*"[25]

How to assess what is just and fair

A useful way of understanding how arbitrators can in practice assess what is just and fair is to analyze the powers of arbitral tribunals to amend and alter par-

[22] Erika Hasler, "Back to the Future: The First CAS Arbitrators on CAS's First Award (TAS 86/1, HC X c. LSHG) and Its Evolution Since Then", *Yearbook of International Sports Arbitration 2016*, The Hague, 2018, 6.

[23] Basketball Arbitral Tribunal, available at: http://martens-lawyers.com/en/basketball-arbitral-tribunal-en/, 10.04.2020.

[24] Basketball Arbitral Tribunal, available at: http://martens-lawyers.com/en/basketball-arbitral-tribunal-en/, 10.04.2020.

[25] An Exit Interview With Richard Posner, Judicial Provocateur, available at: www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html, 10.04.2020.

ties' agreements from the perspective of, and in accordance with the standards set by, BAT case law.

Contractual wording and the circumstances of the case. – BAT's case law shows that "*the proper interpretation of an agreement is of foremost importance…* ".[26] The parties' contractual relationship[27] is always the starting point of each ruling *ex aequo et bono*, i.e. "[t]*he doctrine of pacta sunt servanda (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the [a]rbitrator will examine the merits of the claims*".[28] The arbitrators "[i]*nstead of applying general and abstract rules he/she must stick to the circumstances of the case*".[29]

This is in line with Article 28(4) UNCITRAL Model Law, as well as various arbitration acts and rules,[30] which states that arbitrators shall decide the case in accordance with the terms of the contract; and (ii) specify that arbitrators shall take into account the trade usages applicable to the transaction.[31]

By way of example, a decade of BAT case law[32] developed a robust set of interpretative principles which can be summarized as follows: (i) the meaning of the contractual language should be interpreted through the eyes of a reasonable reader; (ii) the clearer is the wording the more difficult it is to justify departing from it (i.e. *in claris non fit interpretatio*); (iii) the meaning could be further interpreted taking into account the overall factual background and general common understanding of the specific industry; (iv) *nomen iuris* is not binding for inter-

[26] BAT 0756/15, [58] (available at: https://bit.ly/2UoCZMd, 10.04.2020.).

[27] B. Berger, F. Kellerhals, op. cit., para. 1452.

[28] BAT 0650/15, [33].

[29] Concordat international sur l'arbitrage, Article 31, Para. 3.

[30] *Ex multis*, International Chamber of Commerce Arbitration Rules, Article 21, Para. 2; UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), Article 35, Para. 3; Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia, *Official Gazette RS*, No. 101/2016, Article 42, Para. 3; Swiss Rules of International Arbitration, Article 33, Para. 3.

[31] *Ex multis*, International Chamber of Commerce Arbitration Rules, Article 21, Para. 2; UNCITRAL Arbitration Rules (with new article 1, para. 4, as adopted in 2013), Article 35, Para. 3; Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia, *Official Gazette RS*, No. 101/2016, Article 42, Para. 3; Swiss Rules of International Arbitration, Article 33, Para. 3.

[32] *Ex multis*, BAT 0756/15, para. 59 (available at: https://bit.ly/2UoCZMd, 10.04.2020.); BAT 0824/16, para. 49 to 52 (available at: https://bit.ly/2Ja0y37, 10.04.2020.); BAT 0845/16, para. 37 and 38 (available at: https://bit.ly/2X3SNFv, 10.04.2020); BAT 1019/17, para. 36 (available at: https://bit.ly/2xcmyEP, 10.04.2020.).

pretation purposes; (v) the role of interpretation is not to assist an unwise party or to penalise an astute party.

Corrective equity. – Are arbitrators entitled to amend and/or disregard the parties' agreements? In principle, BAT jurisprudence observes that *"it is not an arbitrator's mandate to replace the parties' express contractual arrangements by his or her own considerations of fairness and justice…the Arbitrator's power to adjust, or even mutual consensus should be used with extreme caution*".[33]

The above does not however mean that the arbitrators are not entitled to consider other elements, or even disregard the parties' contractual relationship. BAT case law indeed specifies that (i) arbitrators can indeed rely on "*considerations of justice and fairness which may not be imminently rooted in the contractual language*";[34] (ii) "[o]*ther facts may also be taken into consideration, especially if the wording is unclear or if a literal interpretation leads to a manifestly unfair and unjust result under the specific circumstances. Only in such cases, the Arbitrator is entitled under the concept of ex aequo et bono to deviate from the wording of the contract*".[35]

The following decision further provides an effective summary of the application of role of corrective equity in BAT's proceedings"[w]*hile the principle pacta sunt servanda must be respected, the wording of the contract is an important but not the only element which must be examined and weighed to determine what the true intention of the parties was when they signed the agreement. There are indeed exceptions to the rule that the clear wording of a contractual provision must be followed, e.g. if the provision violates public policy principles or if it becomes obvious that the provision does not reflect the true intention of the parties (e.g. in case of fundamental error of a party) or if one party exploited the inexperience of the other party which resulted in a clear discrepancy between performance and consideration*".[36]

As a consequence, considerations of equity may proportionally come into play only when the strict application of the contractual wording and the circumstances of the case would produce inequitable results.[37]

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[33] BAT 1124/17, para. 48 (available at: https://bit.ly/2WVqmoE, 10.04.2020.).

[34] BAT 1158/18, [29], available at: www.fiba.basketball/en/Module/85132837-66aa-4ff3-a063-8cdfe44ea14d/50a89343-d03a-4a12-8367-0d7df0d5ebf4, 10.04.2020.

[35] BAT 0634/14, para. 70.

[36] BAT 0634/14, paras. 69–70, available at: http://www.fiba.basketball/bat/awards, 10.04.2020.

[37] Yoshifumi Tanaka, "Reflections on maritime delimitation in the Cameroon/Nigeria case", *International & Comparative Law Quarterly*, Vol. 53, 2004, 392.

Adaptation and integration of the contractual wording. – There are different opinions in theory and practice about whether an *ex aequo et bono* arbitral tribunal can go so far as to alter the terms of the contract that it deems unjust. Jarvin suggests that the terms of the contract may not be modified by an arbitrator acting as *amiable compositeur.*[38] The Paris Court of Appeal has on a number of occasions concluded that the power to act as *amiable compositeur* does not allow arbitrators to 'modify the economics of the agreement'.[39] Swiss scholars and case law[40] consider that arbitrators deciding *ex aequo et bono* are authorized to depart from the contract when the latter's application would result in an unfair, unjust or inequitable outcome.[41]

The middle view holds more validity; indeed, arbitrators should certainly not deviate from the genuine intent of the contract or change the very essence and structure of the agreement, but if a certain provision is obviously unfair or excessive or against the true intent of the parties or public policy, the arbitral tribunal should be allowed to alter the contract or bring it to its intended balance.[42]

Our understanding is substantiated by the following list of awards related to the closing of contractual gaps, mitigating the strictness of contractual provisions, adaptation of contracts, etc.

(i) Force majeure and hardship:

Certain legal systems provide that parties are entitled to invoke *force majeure* (i.e. permanent invincible obstruction to perform because of extraordinary events or circumstances that could not have been foreseen by the parties) or hardship (i.e. unforeseen events which significantly affected the initial equilibrium of the contract, by placing an excessive burden on one of the parties) only if they have contractually established this possibility and identified the events or circumstances that would trigger the application of such legal remedies. Under other le-

[38] ICC Case No. 3938, 111 *Clunet* 926 (1984); J. Waincymer, op. cit., 1052.

[39] J. Waincymer, op. cit., 1052; 6 May 1988, *Revue de l'arbitrage,* 1989, 63; 19 April 1991, *Revue de l'arbitrage,* 1991, 673 (annot. E Loquin) cited in Laurence Kiffer, "Amiable Composition in ICC Arbitration", *ICC International Court of Arbitration Bulletin* 18, No. 1, 2007, footnote 29.

[40] FSCD 19.02.1990, *ASA*, 1991, 178–179: "An arbitral tribunal which decides as amicables compositeurs, and thereby departs from a contractual clause, does not violate public policy if it had been authorised not to take into account this provision, and this even in the absence of the powers of an amiable compositeur".

[41] B. Berger, F. Kellerhals, op. cit., para. 1444; G. Kaufmann-Kohler, A. Rigozzi, op. cit., para. 7.72.

[42] ICC Case No. 3267 *Yearbook of Commercial Arbitration,* Vol. VII (1982) 96; ICC Case No. 7913 cited in L. Kiffer, op. cit., 58; Paris 6 March 1988 *Revue de l'arbitrage,* 1989, 83 cited in L. Kiffer, op. cit., footnote 33.

gal systems these remedies can be invoked on the basis of limited statutory principles.

National laws do not however have clear cut answers (or sometimes fair answers) for enforceable situations (such as for example the Covid-19 pandemic) in which parties face disproportionate difficulties or an impossibility to perform their contractual obligations. In this respect, the ICC France Working Group on *amiable composition* observed that arbitrators with the power of deciding *ex aequo et bono* may inter alia *accept a difficulty in performance as a force majeure even if it does not fulfil the required conditions.*[43]

(ii) Statute of limitation:

As explained further in this article, arbitrators are not generally bound to mandatory provisions of the national law when deciding a case *ex aequo et bono*. How should a statute of limitations (which constitutes mandatory law in the majority of legal systems) be treated by the arbitral tribunals in *ex aequo et bono* arbitrations? Should it be applied at all, and if applied, should it be measured with standard rules of national law, or usages, or different solutions in comparable laws, to arrive at the most just result?

In this respect, BAT jurisprudence identified "two prerequisites" to consider a claim time barred/estopped, when discussing a claim stemming back to 2008: (i) "*a substantial period of time has elapsed since the concerned claim fell due and* [(ii)] *the debtor has reasonable grounds to rely on the assumption that the creditor will not exercise his right in the future. The longer the period of time which has elapsed is, the easier it should (principally) be for the debtor to show that he justifiably relied on the creditor's waiver of his claims*".[44] This was the case for example when the creditor has failed to exercise its right for three,[45] five[46] or ten[47] years.

(iii) Mitigation:

BAT case law has established a general duty to take reasonable steps to mitigate the consequences of the breach[48] including in cases where the contract ex-

[43] Edouard Bertrand, "Amiable Composition: Report of the ICC France Working Group", *International Business Law Journal,* Vol. 6, 2005, 753, 762–763; N. Teramura, op. cit., 74.

[44] BAT 1262/18, para. 42 to 44 (available at: https://bit.ly/2KDuDLC, 10.04.2020.).

[45] BAT 0581; BAT 0879.

[46] BAT 0777.

[47] BAT 1262/18, para. 45.

[48] BAT 0824/16, para. 89 (available at: https://bit.ly/2Ja0y37, 10.042020.), BAT 1124/17, para. 46 (available at: https://bit.ly/2WVqmoE, 10.04.2020.).

pressly excludes such a duty on the basis that it can lead to allegedly disproportionate results.[49]

(iv) Limitation and exclusion of liability:

Exclusion clauses are generally upheld in accordance with the principle of *pacta sunt servanda* and unless they are considered abusive.[50] Their validity basically depends on the circumstances of the case, and most frequently on whether those clauses were negotiated with, and accepted by, an informed party.[51]

(v) Penalties:

It would be hard to argue that the arbitral tribunal in *ex aequo et bono* arbitration would not have the right to, for instance, reduce the excessive contractual penalty clause, when this particular authority was even given to the court by the Serbian Law on Obligations if the court finds that the penalty is unproportionally high given the value and importance of the obligation.[52] In this respect, BAT case law indicates that "*contractual clauses which apply in the context of a breach, or termination for cause, such as penalties, or liquidated damages (this is not a closed list), are subject to careful scrutiny when ruling ex aequo et bono. In particular, such a clause which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party, may be refused enforcement, or moderated in its application*".[53] In that particular case, having in mind the above-stated when deciding, the sole arbitrator found that the amount of a contractual penalty of 9% of the awarded claim was proportionate to the wrong which such a clause sought to address.[54]

(vi) Interest:

BAT arbitrators have awarded interest even in cases where it was not provided for in the contract,[55] in cases where the basketball club has failed to fulfil its contractual obligation towards a player and their manager alleging that the player

[49] BAT 1124/17, para. 46 to 50 (available at: https://bit.ly/2WVqmoE, 10.04.2020.).

[50] BAT 1124/17, para. 49 (available at: https://bit.ly/2WVqmoE, 10.04.2020.).

[51] BAT 1033/17, para. 111 to 113 (available at: https://bit.ly/2WZUEGB, 10.04.2020.).

[52] Law on Obligations, *Official Gazette SFRJ*, 29/78, 39/85, 45/89 – decisions of CSY and 57/89, *Official Gazette SRJ*, No. 31/93 and *Official Gazette* SCG, No. 1/2003, Art. 274.

[53] BAT 0756/15, para. 62 (available at: https://bit.ly/2UoCZMd, 10.04.2020.).

[54] *Ibid.,* para. 85.

[55] BAT 1115/17, para. 60 (available at: https://bit.ly/2RDr7BA, 10.04.2020.); BAT 1087/17, para. 53 (available at: https://bit.ly/2X2rBXP, 10.04.2020.); BAT 0949/16, para. 155 to 157 (available at: https://bit.ly/2WZ3xQN, 10.04.2020.), BAT 0392/13, para. 75 to 77 (available at: https://bit.ly/2IJz8Sv, 10.04.2020.).

only appeared in one official game, suffered an injury and remained off the court for the rest of the season. This is a clear exception to the principle of *pacta sunt servanda*[56] which is justified by the equitable consideration that "*payment of interest is a customary and necessary compensation for late payment*".[57] Interest has not been awarded, however, in cases where both interest and penalties could amount to a "*double compensation*".[58]

Limits to the arbitrator's assessment

The most frequently raised objection to *ex aequo et bono* is lack of predictability. Be it a high-level scrutiny of an arbitral institution or public policy of a country, it nonetheless appears that, in truth, certain safeguards exist to the benefit of consistency and predictability.

Jurisprudential limitations. – BAT case law suggests that the application of *ex aequo et bono* does not necessarily sacrifice the predictability of a given outcome. Article 16 (1) of the BAT Rules states that: "[b]*efore signing the award the Arbitrator shall transmit a draft to the BAT President who may make suggestions as to the form of the award and, without affecting the Arbitrator's liberty of decision, may also draw his/her attention to points of substance. In the interest of the development of consistent BAT case law, the BAT President may consult with other BAT Arbitrators, or permit BAT Arbitrators to consult amongst themselves, on issues of principle raised by a pending case*". Moreover, the BAT organizes periodical meetings for its arbitrators in which case law is discussed collectively.[59]

This consistent decision-making process not only disproves the prejudice that *ex aequo et bono* is unpredictable, but further shows that the application of *ex aequo et bono* can in fact lead to the creation of tailormade sets of global standards in a specific industry.

Statutory limitations. – It is undisputed that an award rendered when applying *ex aequo et bono* must be rendered in accordance with provisions pertaining to *public policy.*[60] Public policy can be defined as a set of rules and principles that

[56] BAT 0392/13, para. 75 to 77 (available at: https://bit.ly/2IJz8Sv, 10.04.2020.).

[57] BAT 1115/17, para. 60 (available at: https://bit.ly/2RDr7BA, 10.04.2020.).

[58] BAT 1115/17, para. 59 (available at: https://bit.ly/2RDr7BA, 10.04.2020.); BAT 1028/17, para. 134 (available at: https://bit.ly/2LfUrg5, 10.04.2020.); BAT 1048/17, para. 92 (available at: https://bit.ly/2RyX7GU, 10.04.2020.).

[59] E. Hasler, op. cit., 105.

[60] N. Teramura, op. cit., 79; T. Zuberbühler, K. Muller, et al., op. cit., 299.

reflect the fundamental and basic public and social values of a certain country.[61] this implies that any award, including an award issued *ex aequo et bono,* must be in line with these provisions and principles.

The UNCITRAL Model Law (as well as Serbian Law on Arbitration) explicitly prescribes this as a reason for setting aside[62] or for refusing to recognize[63] an arbitral award. This is further corroborated by the Serbian Private International Law ("PIL") which prescribes that the law of a foreign country (or in this case *ex aequo et bono*) shall not be applied if it is contrary to the public policy of the Republic of Serbia.[64]

Additionally, Serbian PIL further prescribes that if the parties' intent when choosing the applicable law is to avoid the application of the laws of Serbia, the chosen law shall not be applied.[65] This provision raises the question whether *ex aequo et bono* (as the parties' applicable choice of principles for adjudication) falls under this restriction – can an award be refused recognition or annulled if the parties chose *ex aequo et bono* for the purpose of avoiding the application of domestic (Serbian) law? Jurisprudence is of the opinion that the principle of *fraus legis* entails three preconditions – intent to avoid the application of a certain law, intent to apply a different law, and the creation of an artificial "connection point" in order to avoid the application of a certain law. Notably, there is no need to have any "connection point" in order to apply *ex aequo et bono*, which is why the choice of *ex aequo et bono* as the applicable principle cannot be automatically considered as *fraus legis*. The result might be different, if the only, or main, reason to apply *ex aequo et bono* is to avoid the application of Serbian public policy provisions.

Scholars and practitioners alike make a clear distinction between *mandatory norms* and public policy. Serbian courts have heeded this distinction, stating

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[61] Judgment of 8 December 2003, XXIX Y.B. Comm. Arb. 834 (Swiss Federal Tribunal) (2004), cited in Chapter 26: Recognition and Enforcement of International Arbitral Awards in G. Born, op. cit., 3684.

[62] UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006), Article 34, Para. 2; Law on Arbitration, *Official Gazette RS*, No. 46/2006, Article 58, Para. 2.

[63] UNCITRAL Model law on International Commercial Arbitration (1985, with amendments as adopted in 2006), Article 36, Para. 1; Law on Arbitration, *Official Gazette RS*, No. 46/2006, Article 66, Para. 2.

[64] Serbian Private International Law, *Official Gazette* SFRY, No. 43/82 and 72/82, *Official Gazette* SRY, No. 46/96 and *Official Gazette RS*, No. 46/2006, Art. 4.

[65] Serbian Private International Law, *Official Gazette* SFRY, No. 43/82 and 72/82, *Official Gazette* SRY, No. 46/96 and *Official Gazette RS*, No. 46/2006, Art. 5.

that *not every violation of a mandatory norm represents a violation of public policy.*[66] In this light, it can be considered that once the parties empower the arbitral tribunal to act in accordance with *ex aequo et bono*, they essentially grant the arbitral tribunal with the power to mitigate, or even disregards, the effects of *mandatory norms of the national law.*[67]

Just as arbitral tribunals do not have the obligation to apply mandatory norms of local substantive law[68] other than the law agreed between the parties, the same applies when *ex aequo et bono* is the underlying principle. A very simple example is the case of statutes of limitations, which in most countries are considered as mandatory norms; arbitral tribunals should apply the statute of limitations rules of the chosen substantive law and not those provided in the national law of the seat of arbitration or of the enforcement of the award. The same solution is accepted in Serbian PIL.[69] *Mutatis mutandis*, arbitral tribunals should not be bound by mandatory norms of national law also in the case of *ex aequo et bono*.

Any other solution would run afoul of (i) party autonomy and (ii) the very notion of *ex aequo et bono*. If the parties explicitly vested the arbitral tribunal with the power to decide *ex aequo et bono*, with the purpose of opting out of legislation they find unsuitable for their particular business relation or dispute, but find themselves subject to the mandatory norms of said legislation, this would deny the parties their autonomy to choose *ex aequo et bono* instead of an "applicable law". Secondly, the purpose of deciding *ex aequo et bono* would be defeated. If the purpose is for arbitrators to decide upon justice and equity, essentially compelling those same arbitrators to decide in accordance with the mandatory norms effectively negates the freedom of arbitrators and the express indication of *ex aequo et bono.* As such, it appears sensible to conclude that arbitrators are not obliged to act in accordance with the mandatory norms, nor should the awards rendered be required to be in accordance with mandatory norms.

The situation is somewhat different in relation to another concept of private international law that should be taken into consideration when contemplat-

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[66] Judgement of the Serbian Commercial Court of Appeals No. Pž. 2765/2013 dated 23 January 2014.

[67] T. Zuberbühler, K. Muller, et al., op. cit., 299.

[68] With the potential exception of mandatory norms of direct application, as described in the text bellow.

[69] Serbian Private International Law, *Official Gazette* SFRY, No. 43/82 and 72/82, *Official Gazette* SRY, No. 46/96 and *Official Gazette RS*, No. 46/2006, Art. 8: "Law applicable to the substance of the matter or legal action is applicable for the statute of limitation".

ing the issue of *ex aequo et bono*, namely the application of so-called *overriding mandatory rules*.[70] For the sake of clarity, there is a difference between mandatory norms as such (which is a broader range of norms within the applicable law that cannot be changed by will of the parties) and overriding mandatory rules (a narrower range of norms within mandatory norms, which are applied directly irrespective of the law otherwise applicable, i.e. norms of direct application). These rules do not completely override the applicable or chosen law; they only do so to the extent the chosen law is contrary to its "demands".[71] These rules mostly deal with commercial, economic and financial rules of one country, such as tax and investment matters. Arguably, arbitrators should also observe the overriding mandatory rules when deciding, as these norms are much closer to public policy and in many instances can equate to public policy norms, (although this is not always the case; some of these norms are obviously not public policy).

Considering different reasons for setting aside and for refusing to recognize or enforce found in the most frequently used arbitration rules, it is clear that none of the grounds can be triggered merely because the arbitration proceedings were conducted *ex aequo et bono*. For instance, each reason for invalidity of the arbitration agreement provided in the Serbian Law on Arbitration[72] should be assessed irrespective of whether it is an *ex aequo et bono* or *ex lege* arbitration. The same goes for all other reasons which may render an award unenforceable or set aside under the Serbian Law on Arbitration.

PROS AND CONS

Theory and practice concur that *efficiency* and procedural economy is the main advantage of *ax aequo et bono* proceedings.

In the phase of the case management conference and preparation of terms of reference, the determination of the law applicable to the merits becomes a lengthy one due to the invocation of conflict of law rules. Furthermore, much of the exchange of arguments between the parties relies on different interpretations of national law provisions. Very often parties appoint legal experts to support their positions regarding the interpretation and application of national law. *Ex aequo et bono* proceedings in turn dispense with such questions. This is not to suggest that

[70] Mandatory rules of law; Norms of direct application; Lois de police; Norme neposredne primene.

[71] Jelena Stojšić Dabetić, "Overriding mandatory rules in international private law", *Pravo – teorija i praksa*, No. 4–6, Novi Sad, 2018, 49.

[72] Law on Arbitration, *Official Gazette RS*, No. 46/2006, Art. 10.

the parties do not argue and present different interpretations from the perspective of national laws in support of their respective positions; still, extensive discussions and argumentation on such issues becomes somewhat superfluous. Arbitral tribunals are absolved of the obligation to determine the content of foreign national laws, and to instruct the parties to provide different explanations and interpretations of national laws. By that fact alone, written submissions become shorter, oral presentations and arguments become more efficient, and the duration of the case shortens. Effectively, this significantly reduces the costs of the arbitration for both parties.

Finally, the *ex aequo et bono* "discretion" of arbitrators may help improve the efficiency of arbitration proceedings. In recent years, arbitrators have tended to overcomplicate and prolong the procedings, due to the so-called "due process paranoia" – a perceived reluctance by arbitral tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to fully present its case.[73] Arbitrators are therefore forced to either decide the case in accordance with the legal arguments provided by the parties or give each party the opportunity to present their respective case on legal issues (not addressed by the parties) that the arbitrators deem relevant to the outcome of the case. This exercise is not only time-consuming, but may further induce an effort by the losing party to have the award annulled on the basis of the fact that the arbitrators' legal questions would be tantamount to unequal treatment, by somehow improving the case of the opposing party. Thus, reducing the legal issues at stake enhances the arbitrators' authority to efficiently adjudicate the dispute.[74]

Another time-consuming and costly exercise is the appointment of one or more *experts* during the course of the arbitration. Arbitral tribunals tend to rely extensively on guidance given by experts in different fields. Best practices and industry standards (about which experts are best to testify), among others, become particularly useful and important for the arbitral tribunal when adjudicating the most just and fair solutions. Experts are not usually able to act as arbitrators given their lack of knowledge of the law applicable to the case. The application of *ex aequo et bono* increases the possibility of appointing an expert as an arbitrator in order to adjudicate the dispute not in accordance with the applicable law but in

[73] Queen Marry and White & Case 2015 International Arbitration Survey: *Improvements and Innovations in International Arbitration*, 2.

[74] N. Teramura, "Ex Aequo et Bono: An Overlooked and Undervalued Opportunity for International Commercial Arbitration", *Kluwer Arbitration Blog,* 2018.

accordance with what is fair and reasonable in a certain specific industry. Isn't this what users expect from arbitration?

As explained above, in *ex aequo et bono* proceedings, the focus of arbitrators, counsel and parties is taken off from interpretation and application of nationals laws to give primary focus to the facts of the case and to interpretation and application of contract concluded between the parties. Scholars observe that the outcome of the case is less and less dependent on legal issues than on the complexity of the contract, how it was concluded and implemented.[75] It therefore seems that *ex aequo et bono* permits the actors of the arbitration proceedings to focus exclusively on what matters the most.

Lastly, the application of a specific national law (i) can be unreasonably costly for parties who cannot afford to pay the legal fees of lawyers based in very expensive jurisdictions; (ii) limits the parties' right to choose the counsel of their choice; (iii) has a negative impact on arbitrator diversity. *Ex aequo et bono* permits the hiring of counsel and arbitrators who are familiar with the parties' culture and needs.

CONCLUSIONS

Ex Aequo et bono is not a particularly popular concept in international arbitration. Due to concerns of uncertainty, unpredictability and presumably excessive discretion by arbitrators, attorneys and in-house counsel have tended to avoid conferring upon tribunals the authority to decide *ex aequo et bono*. The present article has attempted to highlight that any such concerns are not *ex aequo et bono*-specific, but are rather inherent to general and universal concerns in international arbitration. They are only amplified by the fact that *ex aequo et bono* is an unknown ground for practitioners and users. As such, despite concerns that *ex aequo et bono* is unpredictable and potentially too arbitrary and subjective, a sophisticated application of *ex aequo et bono* could lead to the simplification of the dispute resolution system while ensuring a fair and predictable outcome.

As the article has set out in detail, efficiency and cost-effectiveness, focus on facts and interpretation of contracts, as well as wider freedom of selection of arbitrators and legal counsel are among the most important advantages *ex aequo et bono* offers vis-à-vis an applicable set of norms of a specific national legal order. Furthermore, *ex aequo et bono* opens the door for users to appoint industry experts as arbitrators in an attempt to obtain the most efficient and industry-adjusted resolution of their case.

[75] B. Berger, F. Kellerhals, op. cit., para. 1445.

Interestingly enough, this may be the moment in time when *ex aequo et bono* gains traction in light of the crisis generated by the COVID-19 pandemic, which more than ever calls for flexibility in resolving contentious situations. Contractual parties are currently facing difficulties in performing their obligations due to the pandemic, often relying upon *force majeure* or hardship clauses. Parties, as well as the tribunals, may seek reliance on the principles of *ex aequo et bono* in cases where the formal conditions for *force majeure* or hardship clauses to be triggered under national laws are not fulfilled, and where it would still be unfair not to acknowledge the difficulties COVID-19 poses to contractual performance. It remains to be seen whether the pandemic will at least increase the application of *ex aequo et bono* as a supplemental principle to substantive national laws.

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EX AEQUO ET BONO U MEĐUNARODNOJ ARBITRAŽI

Rezime

U radu se analizira institut *ex aequo et bono* u arbitraži, uz polazište da on ne podrazumeva nijedan dodatni rizik koji nije svojstven rešavanju sporova generalno. S druge strane, *ex aequo et bono* poseduje atribute koji bi mogli da unaprede i poboljšaju postupak rešavanja sporova, kao što su veći akcenat na činjenicama, princip tzv. "korektivne pravde" i pravična rešenja koja nisu sputana i ograničena strogim zakonskim odredbama. Iako je u određenim oblastima ili predmetima primena ovog instituta možda lakša i prirodnija (kao što je sportska arbitraža), autori smatraju da bi institut *ex aequo et bono* trebalo primeniti u mnogo širem spektru slučajeva jer bi primena ovog instituta mogla da pojednostavi, ubrza i uopšte unapredi arbitražni postupak ali i da jasnije istakne razliku između arbitraže i previše formalnog pristupa državnih sudova. Na kraju, izbor *ex aequo et bono* je izričito predviđen i dozvoljen u brojnim arbitražnim pravilima i zakonima, čineći odluke donete uz *ex aequo et bono* izvršivim u velikom broju jurisdikcija.

Ključne reči: fleksibilnost, priznanje, izvršenje, poništaj, sportska arbitraža

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DEJAN ŠOŠKIĆ

VALUTNA KLAUZULA: EKONOMSKO-FINANSIJSKE POSLEDICE

Srbija već godinama živi u de facto dvovalutnom sistemu. Dinari se koriste za većinu transakcija manjeg obima ali i kao formalno sredstvo plaćanja za transakcije obračunate u evrima, tj. sa valutnom klauzulom. Valutna klauzula se koristi za isticanje cena u realnom sektoru (robe, usluge, nekretnine, plate, zakupnine), ali i za odobravanje i vraćanje kredita u finansijskom sektoru. Valutna klauzula bi teorijski imala smisla da se koristi kao instrument kontrole rizika promene deviznog kursa za transaktore koji imaju devizne inpute, tj. troškove. Međutim, uglavnom zbog nasleđa visoke inflacije i hiperinflacije, valutna klauzula se u našoj zemlji često i neosnovano koristi na pogrešan način, tj. kao zaštita od gubitka kupovne snage domaće valute. U svrhu zaštite kupovne snage, ispravno bi bilo koristiti indeksiranje za kretanje Indeksa potrošačkih cena kao mere inflacije, a ne indeksiranje za kretanje deviznog kursa, tj. valutnu klauzulu, jer inflacija i promena deviznog kursa ne moraju, i po pravilu nisu, u perfektnoj pozitivnoj korelativnoj vezi. Uprkos tome, valutna klauzula je rasprostranjena i u realnom i u finansijskom sektoru. Ovaj rad analizira negativne ekonomske i finansijske posledice korišćenja valutne klauzule u privrednom sistemu zemlje.

Ključne reči: *valutna klauzula, monetarna politika, finansijska stabilnost*

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UZROCI NASTANKA I KORIŠĆENJA VALUTNE KLAUZULE U SRBIJI

Valutna klauzula u svojoj suštini je instrument upravljanja rizikom promene deviznog kursa (hedžingom). Teorijski je osnovano da se koristi pre svega u situaciji kada prodavac plaća svoje nabavke (inpute) u stranoj valuti, a prodaje svoj proizvod u domaćoj (ili drugoj stranoj) valuti. Prodavac tada valutnom klauzulom želi da zaštiti svoj profit u takvoj transakciji, vezujući prodajnu cenu u domaćoj valuti za promenu deviznog kursa, tj. ističući prodajnu cenu kao protivvrednost određenog iznosa strane valute u domaćoj valuti po tekućem deviznom kursu.

Valutna klauzula je, međutim, vremenom poprimila znatno šire tumačenje i upotrebu. U situaciji u kojoj je domaća valuta nestabilna i po pitanju kretanja njene kupovne snage (koja se najčešće manifestuje kroz postojanje više ili visoke inflacije) ali i po pitanju njenog deviznog kursa, najčešće se dešava da je stopa inflacije u domaćoj valuti u relativno tesnoj vezi sa stopom deprecijacije domaće valute u odnosu na čvrstu stranu valutu, tzv. "sidrenu valutu" (*Anchor Currency*) za koju se vezuje najveći broj transakcija u razmeni sa inostranstvom (najčešće Dolar u svetu, tj. evro na evropskom kontinentu, pa i u slučaju Srbije). U takvim uslovima, visoka inflacija, vrlo visoka inflacija ili hiperinflacija (u slučaju Srbije početkom 90-ih godina) postaje dominantan faktor uticaja na kretanje deviznog kursa. Otuda, u takvoj situaciji transaktori u sistemu (građani, privreda, finansijske institucije, država) mogu, sasvim pogrešno, da poistovete inflaciju, tj. smanjivanje kupovne snage domaće valute) sa deprecijacijom, tj. promenom deviznog kursa prema evru (dolaru ili nekoj drugoj tzv. "sidrenoj valuti"). U visokoj inflaciji i hiperinflaciji kroz koju je Srbija prolazila tokom 80-ih i 90-ih godina, domaća valuta je ubrzano deprecirala na slobodnom tržištu i relativno srazmerno razlici između vrlo niskih stopa inflacije u čvrstoj valuti i relativno vrlo visoke inflacije kod nas.

Otuda se donekle može i razumeti da se deprecijacija domaće valute (pad deviznog kursa) u svakodnevnom životu kod neupućenih građana poistovećivala sa inflacijom (pad kupovne snage). Ova, često spontana, zamena teza izaziva pogrešno uverenje transaktora da isticanjem cena sa valutnom klauzulom mogu da se zaštite od inflacije, tj. smanjivanja kupovne snage domaće valute, odnosno da je valutna klauzula instrument zaštite kupovne snage valute. Ovakvo shvatanje je pogrešno jer ne uzima u obzir dve važne činjenice. Prvo, da i evro tj. tzv. "sidrena valuta" najčešće ima svoju inflaciju od koje nas dinarska valutna klauzula ne štiti. Drugo, da deprecijacija domaće valute, tj. promena deviznog kursa, nije uslov-

ljena i ne odražava samo inflaciju u domaćoj valuti već i čitav niz drugih faktora kao što su kretanje domaćih i inostranih kamatnih stopa, kretanje inflacije u evru, tj. "sidrenoj valuti", slobodu kretanja novca i kapitala, kretanje produktivnosti u zemlji i inostranstvu itd. Konačno, u slučaju eventualnog fiksiranja kursa nacionalne valute, dolazimo do toga da valutna klauzula ne štiti ni od inflacije u stranoj valuti ni od inflacije u domaćoj valuti i čini korišćenje valutne klauzule kao instrumenta zaštite kupovne snage novca potpuno pogrešnim i bespredmetnim. Prava zaštita kupovne snage primljenog novca u transakciji mogla bi se obezbediti vezivanjem naplate u domaćoj valuti za kretanje inflacije u zemlji (recimo isticanje cene u dinarima uz korekciju za kretanje Indeksa potrošačkih cena do datuma naplate). Međutim, ovakva, inače adekvatna i ispravna zaštita kupovne snage novca, nije zaživela u praksi. Većina transaktora i dalje, sasvim pogrešno, veruje da je valutna klauzula garant očuvanja kupovne snage novca primljenog u dinarima u nekom budućem trenutku.

Dakle, valutna klauzula se koristi ispravno samo kao zaštita od rizika promene deviznog kursa u slučaju prodaje uvoznih roba i usluga na domaćem tržištu u domaćoj valuti, tj. šire posmatrano, kao zaštita od deviznog rizika u slučaju postojanja dinarskih potraživanja i deviznih obaveza. Svako drugo korišćenje valutne klauzule, tj. njeno korišćenje kao zaštite od rizika promene kupovne snage domaće valute, odnosno kao zaštita od inflacije, je suštinski pogrešno i izaziva niz ozbiljnih negativnih ekonomsko-finansijskih posledica.

Ako pogledamo danas i poslednjih godina situaciju sa transakcijama u Srbiji, valutna klauzula je postala vrlo rasprostranjena i koristi se za nekoliko namena:

1. za isticanje i naplatu prodajnih cena roba, usluga i nekretnina,
2. za isticanje cena i naplatu zakupa,
3. za navođenje iznosa zarada u ugovorima o radu,
4. za uzimanje i otplatu kredita i drugih finansijskih instrumenata.

Prve tri upotrebe valutne klauzule su na tržištu roba, usluga, nekretnina i rada, i uslovno se može reći da one predstavljaju korišćenje valutne klauzule u realnom sektoru privrede. Četvrta upotreba valutne klauzule je na bankarskom tržištu i možemo je nazvati upotrebom valutne klauzule u finansijskom sektoru.

VALUTNA KLAUZULA U REALNOM SEKTORU

Pogledajmo detaljnije, na početku, prve tri primene valutne klauzule. One, sve tri, direktno čine da se domaće cene i troškovi proizvodnje kreću direktno u

zavisnosti od kretanja deviznog kursa. Svaka promena deviznog kursa naniže, tj. deprecijacija domaće valute, izaziva srazmerni rast troškova i cena na domaćem tržištu. To dovodi do vrlo visokog prenosa promene deviznog kursa u domaću inflaciju (*Exchange Rate Pass Through – ERPT*)[1] u srpskom privrednom sistemu i sputava rast konkurentnosti domaće privrede nakon deprecijacije domaće valute. Normalno bi bilo da se domaće cene koriguju naviše u uslovima deprecijacije samo za iznos u kome su prisutni uvozni troškovi proizvodnje tj. inputi. Rasprostranjeno pogrešno korišćenje valutne klauzule kao instrumenta zaštite kupovne snage, međutim, dovodi do toga da se deprecijacija deviznog kursa domaće valute u neopravdano visokom nivou prenosi na domaću inflaciju. Time se odmah i u neopravdano visokoj meri gube potencijalne prednosti od smanjivanja vrednosti domaće valute. U normalnoj situaciji, tj. bez neopravdano rasprostranjene upotrebe valutne klauzule, deprecijacija domaće valute bi učinila da domaći proizvodi i usluge i na domaćem i na inostranom tržištu postanu cenovno konkurentniji u odnosu na inostrane proizvode i usluge i to bi, uz ostale neizmenjene okolnosti, imalo pozitivan efekat na trgovinski bilans i rast bruto domaćeg proizvoda i zaposlenosti u zemlji.

Normalno i opravdano bi bilo da se valutna klauzula javlja samo u svojoj prvoj formi i to samo za uvoznu robu i usluge. Ovako, uz rasprostranjeno, neopravdano i pogrešno korišćenje valutne klauzule (u njene sve tri prve gore navedene primene), ERPT tj. efekat promene deviznog kursa na inflaciju je neopravdano visok, i deprecijacija vodi u relativno srazmernu inflaciju, čime se de facto u velikoj meri odmah ostaje bez pozitivnih efekata koje slabljenje domaće valute može da ima na konkurentnost i privredni rast. Time se praktično gubi jedan značajan makroekonomski alat kojim bi se u drugačijim uslovima moglo uticati na podizanje konkurentnosti domaće privrede, smanjivanje i otklanjanje eksterne makroekonomske neravnoteže i na ubrzanje privrednog rasta bez teških i nepopularnih mera smanjivanja plata i penzija na domaćem tržištu.

Dodatno, rasprostranjeno korišćenje valutne klauzule u njene prve tri forme, za svoju posledicu ima i promenu načina uticaja instrumenata monetarne politike na inflaciju u Srbiji. Naime, normalno bi bilo da monetarna politika posredstvom tzv. kamatnog kanala, tj. uticajem na promenu kamatnih stopa putem

[1] Videti npr. Pavle Petrović, Zorica Mladenović, "Exchange Rate Pass-Through and the Frequency of Price Adjustment across Different Inflation Regimes", *Panoeconomicus,* Vol. 62, No. 4, 2015, 409–427.

određivanja referentne kamatne stope centralne banke, utiče na agregatnu tražnju, pa time i na inflaciju. Međutim, u uslovima rasprostranjenog korišćenja valutne klauzule, dolazimo do toga da uticaj na devizni kurs (intervencijama na deviznom tržištu od strane centralne banke) ima veći i direktniji uticaj u odnosu na referentnu kamatnu stopu na inflaciju i to upravo kroz opisani ERPT tj. efekat promene deviznog kursa na inflaciju. Time se menja i priroda monetarne politike u smislu da glavni instrument monetarne politike postaje neefikasan, pa time i manje važan, a sporedan instrument (uticaj na devizni kurs) postaje glavni i dominantni instrument monetarne politike.

VALUTNA KLAUZULA U FINANSIJSKOM SEKTORU

Uzroci javljanja valutne klauzule u finansijskom sektoru u Srbiji su nešto drugačiji, ali takođe u vezi sa visokom stopom inflacije i hiperinflacije i, posledično, visokom deprecijacijom (i devalvacijom) deviznog kursa.

Za razumevanje potrebe za valutnom klauzulom u bankarstvu, korisno je da se vratimo u prošlost, tj. u 60-te godine 20. veka u tadašnjoj Jugoslaviji. Tada su dozvoljeni depoziti u domaćim bankama u devizama i to je bio prvi bitan korak ka evroizaciji finansijskog sistema i potrebe za valutnom klauzulom. Dozvoljavanje deviznih depozita u bankama išla je za time da se štednja dijaspore tj. "građana na privremenom radu u inostranstvu" privuče u domaće banke i time da se podigne finansijski potencijal domaćih banaka, ali i da se omogući dodatni devizni priliv u zemlju po osnovu doznaka, potreban za pokrivanje deficita u tekućem bilansu zemlje. Iako iz ovog ugla posmatrano razumljiva odluka, ona je kreirala mogućnost štednje u devizama u domaćim bankama. To je stvorilo deviznu pasivu u bankama bez mogućnosti kreiranja devizne aktive, tj. kreditiranje banaka i dalje je bilo u dinarima. Taj valutni rizik u bankarskim bilansima bitno je doprineo propadanju domaćih banaka početkom 90-ih godina kada su u uslovima hiperinflacije i konstantne i visoke deprecijacije i/ili devalvacije dinara, domaće banke ostale bez dinarske aktive, ali sa deviznom pasivom, u stanju nesolventnosti tj. *de facto* bankrotstva. Da je tada primenjivana valutna klauzula, dobar deo imovine banaka bi bio spašen i banke bi ukupno imale znatno manje gubitke, a time bi se i poverenje u banke, lakše i brže obnovilo nakon krize.

Visoka inflacija, vrlo visoka inflacija i hiperinflacija bile su karakteristika jugoslovenskog finansijskog sistema decenijama unazad i bitno su podsticale proce-

se otklona od domaće valute, od kojih je valutna klauzula samo jedan od pojavnih oblika. Taj proces je kulminirao hiperinflacijom početkom 90-ih (vrhunac je bio januara 1994, kada je mesečna inflacija iznosila 313 miliona procenata) i tek u drugoj polovini 2000-ih inflacija je postala jednocifrena na godišnjem nivou. U takvim uslovima, kamatne stope na dinarske depozite su prečesto bile realno negativne i takva situacija je pogodovala štednji u devizama i bežanju iz dinara kad god bi se pojavio višak slobodnih finansijskih sredstava na duži rok radi izbegavanja obezvređivanja pod dejstvom inflacije (tj. inflacionog poreza) i deprecijacije deviznog kursa. To je povećavalo pritisak na kreiranje devizne pasive (izvora sredstava) u finansijskom sistemu i stvorilo je naviku nepoverenja u domaću valutu i bežanja u evro (ranije u nemačku marku) svaki put kada bi se pojavili finansijski viškovi i otvorilo pitanja očuvanja njihove vrednosti. Visoka inflacija bitno je doprinela propadanju bankarskog sistema početkom 90-ih obezvređujući dinarsku aktivu (bez valutne klauzule) ali istovremeno i bez sposobnosti obezvređivanja devizne pasive banaka.

Konačno, početkom 2000-ih dozvoljeno je plaćanje u evrima za transakcije visoke vrednosti (nekretnine) i dopuštena je (čak i u zvaničnim propisima zemlje prihvaćena) valutna klauzula i izražavanje u dinarskoj protivvrednosti evra po zvaničnom kursu.[2] Time je stvorena osnova za korišćenje valutne klauzule tj. evra i u odobravanju kredita, u ugovaranju iznosa obaveza i obračunima u privrednom i finansijskom sistemu zemlje. Valutna klauzula i evroizacija je, dakle, dobila i legalnu osnovu i omogućeno je da dinar kao lokalna valuta bude marginalizovan i u podređenom odnosu prema dominantnoj stranoj valuti – evru.

Značajno korišćenje valutne klauzule i evra u osnovnim funkcijama novca, međutim, kreira vrlo ozbiljne probleme koji se u krajnjoj instanci reflektuju na rizičnost ukupnog privrednog sistema i na sposobnost finansijskog sistema da obezbedi potrebno visoki nivo finansijske intermedijacije (u situaciji bankocentričnosti, kao u Srbiji, to znači: kreditne aktivnosti) i privrednog rasta. Rasprostranjena valutna klauzula u finansijskom sistemu zemlje ima dva osnovna negativna uticaja:

– Negativan uticaj na finansijsku stabilnost

– Negativan uticaj na monetarnu politiku

[2] Član 2. Zakona o deviznom poslovanju, *Službeni list SRJ*, br. 23/2002 i 34/2002.

Negativan uticaj valutne klauzule na finansijsku stabilnost

U Srbiji su obaveze većine dužnika u kreditnim odnosima dominantno iskazane sa valutnom klauzulom tj. indeksirane za kretanje kursa evra. U našoj zemlji je to posebno naglašeno i naš finansijski sistem spada u red onih u kojima su krediti u najvećoj meri odobreni sa valutnom klauzulom (što je *de facto* isto kao da su odobreni u inostranoj valuti, tj. najčešće u evru). Srbija spada u red najviše evroizovanih finansijskih sistema u Centralnoj, Istočnoj i Jugoistočnoj Evropi.[3] Otuda, kretanje deviznog kursa u Srbiji i drugim visoko evroizovanim (i dolarizovanim) ekonomijama zemalja u razvoju[4] može uticati na smanjivanje kreditne sposobnosti dužnika, na slabljenje kapitalizacije banaka i na ugrožavanje finansijske stabilnosti zemlje.

Učešće potraživanja u deviznom znaku (sa valutnom klauzulom i u devizama) u ukupnim potraživanjima banaka od stanovništva i privrede u Srbiji je na vrlo visokom nivou već godinama unazad (Slika 1). Nivo je stabilno visok sa blagom tendencijom opadanja poslednjih godina. Visok i stabilan nivo kredita sa valutnom klauzulom (kao najznačajniji deo kredita u deviznom znaku) vidljiv je i ako pogledamo strukturu novoodobrenih kredita (Slika 2). Činjenica da je prisutno visoko učešće evro indeksirane aktive tj. kredita sa valutnom klauzulom u bankarskom sistemu zemlje i da je naveći broj kredita stanovništvu i privredi, posebno srednjoročnih i dugoročnih, sa valutnom klauzulom tj. indeksiran za kretanje kursa, predstavlja ozbiljan izazov za finansijsku stabilnost u Srbiji. Rasprostranjena valutna klauzula u kreditiranju, naime, čini da se tržišni rizik promene deviznog kursa vrati kroz bitan i rasprostranjen kreditni rizik tj. smanjenu sposobnost izmirivanja obaveza dužnika prema bankama.[5]

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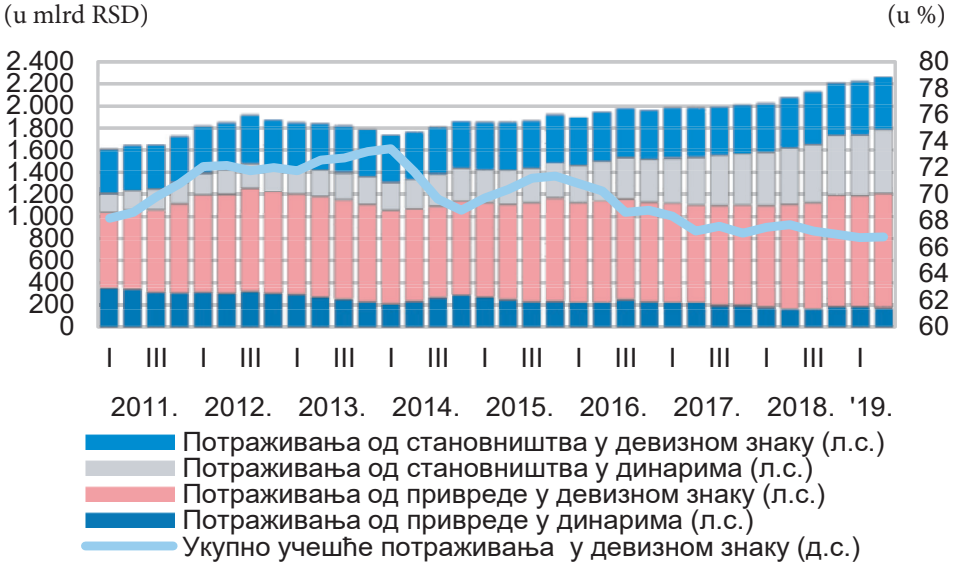
[3] O kretanju evroizacije u Centralnoj, Istočnoj i Jugoistočnoj Evropi videti redovne ankete Centralne banke Austrije OeNB Euro Survey. Posebno videti Helmut Stix, "The Euro as a Safe Haven Asset in Central, Eastern and South-Eastern Europe", *The Euro and Economic Stability: Focus on Central, Eastern and South-Eastern Europe*, (Nowotny E., Mooslechner P., Ritzberger-Grünwald D.), Cheltenham, UK/Northampton, MA: Edward Elgar, 2010.

[4] Frederic S. Mishkin, Miguel Savastano, "Monetary Policy Strategies for Latin America", *Journal of Development Economics,* Vol. 66, No. 2, 2001, 415–444.

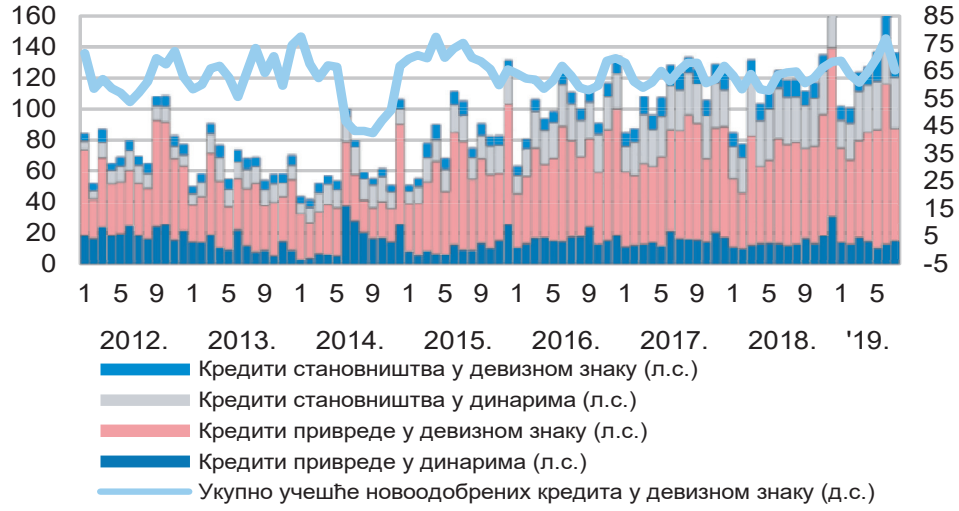
[5] Videti Miloš Božović, Branko Urošević, Boško Živković, "On the Spillover of Exchange Rate Risk into Default Risk", *Economic Annals*, Vol. 183, 2009, 32–55.

Slika 1. Učešće potraživanja u deviznom znaku u ukupnim potraživanjima banaka od privrede i stanovništva u Srbiji



Izvor: NBS, Tromesečni pregled kretanja finansijske stabilnosti, II tromesečje 2019, 13.

Slika 2. Učešće kredita u deviznom znaku u novoodobrenim kreditima u Srbiji



Izvor: NBS, Tromesečni pregled kretanja finansijske stabilnosti, II tromesečje 2019, 13.

Takav rast kreditnog rizika zbog promene deviznog kursa u uslovima visoke primene valutne klauzule je mnogo rasprostranjeniji od normalnog širenja klasičnog kreditnog rizika kroz bankarski sistem, jer zahvata sve teritorije, sve privredne grane i sve profesije dužnika bankarskog sistema. Otuda u uslovima rasprostranjene valutne klauzule klasične mere diversifikacije radi zaštite od kreditnog rizika dužnika, imaju vrlo ograničeno dejstvo. Dakle u uslovima rasprostranjene primene valutne klauzule finansijski sistem je vrlo ranjiv. Iz toga proističe da i regulativa bankarskog sistema mora biti konzervativnija (tj. skuplja) radi očuvanja finansijske stabilnosti, a to direktno utiče na cenu finansiranja (visinu kamatne stope), time i na rast ekonomske aktivnosti i zaposlenosti.

Istovremeno, dinarsko iskazivanje kapitala banaka (bez valutne klauzule) u uslovima visoko rasprostranjene valutne klauzule u aktivi banaka, kao što je slučaj u Srbiji, čini da promena deviznog kursa obara deviznu protivvrednost kapitala u odnosu na aktivu i to može bitno smanjiti kapitalizaciju banaka i bez rasta problematičnih kredita. Ovo, sledstveno, zahteva visoku kapitalizovanost banaka, što obara njihovu efikasnost poslovanja i, takođe, utiče na viši nivo kamatnih stopa. Više kamatne stope, opet, po pravilu, vode nižim stopama privrednog rasta i zaposlenosti u zemlji.

Negativan uticaj valutne klauzule na monetarnu politiku

Rasprostranjena primena valutne klauzule bitno utiče i na monetarnu politiku. Već smo, u okviru diskusije o valutnoj klauzuli u realnom sektoru, pomenuli da valutna klauzula utiče na način uticaja na monetarne politike na inflaciju i time na snagu i rang pojedinih instrumenata monetarne politike.

Generalno možemo reći da je u uslovima rasprostranjene upotrebe valutne klauzule, u uslovima monetarnog režima ciljanja inflacije, monetarna politika manje efikasna i manje precizna. Ovde ima nekoliko bitnih aspekata.

Prvo. Svako podizanje referentne kamatne stope trebalo bi da podiže cenu kredita i smanjuje agregatnu tražnju. Međutim, podizanje referentne kamatne stope od strane NBS utiče samo na cenu dinarskih finansijskih instrumenata (bez valutne klauzule) i time samo na agregatnu tražnju koja se finansira dinarima, dakle ne i na dominantni deo kreditima podstaknute agregatne tražnje koja se finansira evro indeksiranim kreditima, tj. sa valutnom klauzulom. Uz to, rast

kamatne stope trebalo bi da stimuliše štednju i smanjuje potrošnju. Međutim, rastom referentne kamatne stope NBS stimuliše se dodatna štednja samo u dinarima ali ne i u evrima, što je dominantni oblik štednje stanovništva.[6] Otuda kretanje referentne kamatne stope ima mnogo manji uticaj na agregatnu tražnju i čini nužnim da referentna kamatna stopa bude viša da bi ostvarila potreban uticaj ali i da se više menja tj. da bude nestabilnija.

Drugo. Činjenica da je dominantan deo kredita sa valutnom klauzulom tj. indeksiran za evro, čini da referentna kamatna stopa ECB[7] i kretanja na EURIBOR[8] tržištu praktično više utiču na cenu kredita u zemlji od kretanja referentne kamatne stope NBS.

Treće. Gore već pomenuto, rasprostranjeno korišćenje valutne klauzule povećava uticaj kretanja deviznog kursa na nivo cena.[9] Time se potencijalno može smanjiti prostor za relaksaciju monetarne politike koja cilja inflaciju jer smanjivanje referentne kamatne stope u dinarima smanjuje i kamatni diferencijal između RSD i EUR što može da izazove povlačenje investitora iz RSD u EUR uz deprecijaciju kursa i, posledično, višu inflaciju. Otuda je monetarna politika restriktivnija nego što bi mogla biti da valutna klauzula nije rasprostranjena u iskazivanju cena u realnom sektoru, što opet može imati negativnog uticaja na privredni rast i zaposlenost u zemlji.

Četvrto. Podizanje referentne kamatne stope NBS, bez promene uslova finansiranja u evrima, utiče na rast kamatnog diferencijala između dinara i evra i daje dodatni podsticaj uzimanju evro indeksiranih kredita što je u suprotnosti sa interesima stabilnosti finansijskog sistema.[10]

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[6] Oko 90% štednje građana je devizna štednja. Videti *Izveštaj o finansijskoj stabilnosti NBS 2019*.

[7] Evropska centralna banka.

[8] Kamatna stopa u evrima formirana na međubankarskom tržištu u Frankfurtu koja se koristi kao reper u formiranju kamatnih stopa na kredite sa valutnom klauzulom.

[9] Jer su i mnoga plaćanja u zemlji indeksirana za kretanje kursa (poslovni prostor, stambeni prostor, plate, repromaterijali...).

[10] Kao odgovor na ovaj problem NBS je 2010. i 2011. dovela u red instrument obavezne rezerve uz pomoć koga može promenom nivoa i strukture devizne obavezne rezerve uticati na cenu EUR indeksiranih kredita. Time je otvorena mogućnost da se paralelno sa promenama referentne kamatne stope kojom se vrši uticaj na cenu RSD kredita, promenom nivoa i strukture devizne obavezne rezerve pokuša da napravi odgovarajući uticaj i na cenu kredita sa EUR valutnom klauzulom.

Istraživanja su pokazala da u uslovima visoke evroizacije finansijskog sistema u Srbiji, u okviru koga su krediti sa evro valutnom klauzulom značajan deo tog sistema, transmisioni mehanizam monetarne politike se suštinski narušava, tj. da klasični kanali monetarne transmisije ne deluju,[11] i devizni kurs postaje zapravo dominantan kanal uticaja na inflaciju,[12] pa i cilj za sebe.[13]

Na bazi svega navedenog ne treba da čudi da NBS nije precizna u ciljanju inflacije i da je inflacija zapravo uglavnom izvan inflacionog cilja (Slika 3), te da je nekoliko poslednjih godina u kontinuitetu pre spuštanja inflacionog cilja bila van okvira inflacionog cilja.

Slika 3. Kretanje inflacije u Srbiji

(mg. stope rasta u %)

Izvor: NBS, Tromesečni pregled kretanja finansijske stabilnosti, II tromeečje 2019, 56.

[11] Milan Aleksić, Ljiljana Đurđević, Mirjana Palić, NikolaTasić, "Interest Rate Transmission in a Dollarized Economy: The Case of Serbia", National Bank of Serbia, *Working Papers Series,* No. 15, 2008; Srđan Kujundžić, Dragiša Otašević, "The bank lending channel in an euroised economy: the case of Serbia", National Bank of Serbia, *Working Papers Series*, No. 24, 2012.

[12] Diana Dragutinović, "Power and Weakness of Monetary Policy in Striking a Balance Between Balance of Payments and Inflation Related Objectives", National Bank of Serbia, *Working Papers Series*, No. 12. 2008.

[13] Pavle Petrović, Aleksandra Nojković, "Monetary policy rule in inflation targeting emerging European countries: A discrete choice approach", *Journal of Policy Modeling*, Vol. 37, No. 4, 2015, 577–595.

ZAKLJUČAK

Smanjivanje posebno neopravdane, a rasprostranjene upotrebe valutne klauzule u kontekstu ukupne de-evroizacije i jačanje uloge dinara (bez valutne klauzule) tj. tzv. dinarizacije, vrlo je bitno, kako za finansijsku stabilnost u zemlji, tako i za efikasnost monetarne politike i nižu i stabilniju inflaciju u okviru inflacionog cilja. Bez postepenog i kontinuiranog rasta učešća dinara u domaćim transakcijama bez valutne klauzule, nije moguće očekivati ozbiljnije opadanje rizika u finansijskom sistemu i realan i zdrav pad kamatnih stopa. Smanjivanje kreditiranja sa valutnom klauzulom, videli smo, predstavlja bitnu komponentu, po većem broju osnova, stvaranja preduslova za jačanje finansijske stabilnosti, podizanja efikasnosti monetarne politike, rasta ekonomske aktivnosti i zaposlenosti u zemlji.

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FOREIGN CURRENCY CLAUSE: ECONOMIC AND FINANCIAL CONSEQUENCES

Summary

For years now, Serbia *de facto* lives in a dual currency system. Local currency is being used for most of the transactions with relatively small amounts. Alongside with that, local currency is being used as a formal means of payment for transaction accounted in Euros, i.e. with FX clause. FX clause is being used to express prices in real sector (goods, services, real estate, salaries, rents), but also for lending and repayment purposes in financial sector. FX clause, from theoretical perspective, would make sense as means of controlling the risk of FX rate movement in future, but only for agents with FX inputs, i.e. expenditures. However, mainly due to high inflation and hyperinflation heritage, FX clause is being used often and basically wrong, as an instrument to control risk of loss of purchasing power due to inflation. For this purpose it would be appropriate to use indexing for changes in Consumer Price Index, as a measure of inflation, and not indexing for changes in FX rate, i.e. FX clause. This because inflation and movement in FX rate do not have to be, and in most cases are not, perfectly correlated. Despite this, FX clause is widespread in use in both real and financial sectors. This paper is analyzing negative economic and financial consequences of widespread FX clause usage for an overall economic system of a country.

Key words: FX clause, monetary policy, financial stability

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TATJANA RAKONJAC-ANTIĆ
MARIJA KOPRIVICA

SPECIFIČNOSTI PRIVATNIH IZVORA FINANSIRANJA ZDRAVSTVENE ZAŠTITE

Dobrovoljno zdravstveno osiguranje (eng. "voluntary health insurance") i direktno plaćanje troškova zdravstvene zaštite (eng. "out of pocket payment", tzv. "plaćanje iz džepa") od strane korisnika predstavljaju dva osnovna privatna izvora finansiranja zdravstvene zaštite. Usled permanentnog rasta troškova zdravstvene zaštite, ova dva izvora se koriste ili kao dopuna javnim oblicima finansiranja, ili kao preovladavajući izvori finansiranja zdravstvene zaštite. Sagledavanje osnovnih karakteristika privatnih izvora finansiranja zdravstvene zaštite je od značaja, između ostalog, i zbog odabira adekvatne kombinacije izvora finansiranja ovog važnog sistema koji utiče na zdravstveno stanje stanovništva. Na osnovu analize specifičnosti dobrovoljnog zdravstvenog osiguranja i direktnog plaćanja troškova zdravstvene zaštite, u radu su identifikovani faktori koji opredeljuju njihovu zastupljenost i date su preporuke za povećanje obuhvata stanovništva zdravstvenom zaštitom.

Ključne reči: *zdravlje, zdravstvena zaštita, privatni izvori finansiranja, dobrovoljno zdravstveno osiguranje, direktno plaćanje troškova zdravstvene zaštite*

U V O D

Zdravstvena zaštita predstavlja značajan faktor očuvanja i unapređenja zdravlja stanovništva. Maksimalna obuhvaćenost stanovništva zdravstvenom za-

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štitom je cilj kojem teže mnoge države sveta. Najčešći izvori finansiranja zdravstvene zaštite su: doprinosi u okviru sistema socijalnog obaveznog zdravstvenog osiguranja, budžet, premije dobrovoljnog zdravstvenog osiguranja, direktno plaćanje zdravstvenih usluga od strane korisnika zdravstvene zaštite, sredstva koje akumulira zajednica, donacije, sredstva inostrane pomoći itd. Osnovni privatni izvori finansiranja zdravstvene zaštite su dobrovoljno zdravstveno osiguranje i direktno plaćanje zdravstvenih usluga od strane korisnika. Ovi izvori, u državama koje primenjuju budžetski način finansiranja ili se oslanjaju na socijalno obavezno zdravstveno osiguranje, uglavnom predstavljaju dopunske izvore finansiranja zdravstvene zaštite, a u pojedinim državama sveta su dominantni izvori finansiranja. Predmet rada je analiza specifičnosti dobrovoljnog zdravstvenog osiguranja i direktnog plaćanja zdravstvenih usluga, kao često korišćenih privatnih izvora finansiranja zdravstvene zaštite. Cilj rada je da se, na osnovu analize, izdvoje faktori koji utiču na (ne)zastupljenost navedenih izvora i ukaže na njihov doprinos većem obuhvatu stanovništva zdravstvenom zaštitom.

OSNOVNA OBELEŽJA I NIVOI ZDRAVSTVENE ZAŠTITE

Zdravlje predstavlja "fizičko, mentalno (psihičko) i socijalno blagostanje, a ne samo odsustvo bolesti ili nemoći"[1] i ono je jedna od najznačajnijih pretpostavki uspostavljanja procesa kvalitetnog življenja stanovništva i ekonomskog razvoja država. Stepen razvijenosti država se, između ostalog, izražava kroz nivo zdravlja stanovništva. Visok je stepen odgovornosti i stanovništva i društvene zajednice, kao i zdravstvenih službi (zdravstvene ustanove i zdravstveni radnici i saradnici), u pripremi i sprovođenju akcija sa ciljem očuvanja i unapređenja zdravlja stanovništva u okviru zdravstvene zaštite.[2]

Zdravstvena zaštita obuhvata širok spektar mera koje se sprovode u segmentima promocije zdravlja, preventive, dijagnostikovanja, lečenja i rehabilitacije stanovništva. Za funkcionisanje sistema zdravstvene zaštite neophodna je mobilizacija i adekvatna raspodela finansijskih sredstava, obezbeđenje zdravstvenih resursa (bolnice, domovi zdravlja, laboratorije, instrumenti, oprema, lekovi itd.), zdravstvenih radnika svih specijalizacija, širok spektar pružanja zdravstvenih usluga, ulaganje u zdravstvena istraživanja i razvoj, administrativno osoblje itd. Pružanje zdravstvene zaštite se može realizovati u okviru primarnog (domo-

[1] Videti www.who.int/disabilities/world_report/2011/chapter3.pdf, Chapter 3, "General health care", 57, 20.03.2020.

[2] Tatjana Rakonjac-Antić, *Penzijsko i zdravstveno osiguranje,* Centar za izdavačku delatnost, Ekonomski fakultet Univerziteta u Beogradu, Beograd, 2018, 168.

vi zdravlja, apoteke itd.), sekundarnog (opšte bolnice, specijalne bolnice itd.) i tercijarnog nivoa (kliničko-bolnički centri itd.). Primarna zdravstvena zaštita je osnovni nivo koji funkcioniše sa ciljem obezbeđenja fizičkog, mentalnog i socijalnog blagostanja pojedinaca, porodica i generalno članova jedne društvene zajednice u toku njihovog života.[3] Ovaj nivo zdravstvene zaštite bi trebalo da omogući visok stepen dostupnosti članovima društvene zajednice i usmeri posebnu pažnju na prevenciju.

Na osnovu prethodno navedenog može se reći da su učesnici u sistemu zdravstvene zaštite: pružaoci usluga zdravstvene zaštite, korisnici usluga zdravstvene zaštite, subjekat ili subjekti koji upravljaju sistemom zdravstvene zaštite. Od učesnika u sistemu zdravstvene zaštite, načina finansiranja i upravljanja sredstvima zavisi funkcionisanje i rezultati ovog sistema zaštite stanovništva. Sistem finansiranja uključuje mobilizaciju i objedinjavanje ("udruživanje") sredstava, kao i alokaciju sredstava pružaocima različitih oblika zdravstvene zaštite sa ciljem njenog efikasnog funkcionisanja.[4] Izvor, ili kombinacija različitih izvora finansiranja zdravstvene zaštite, imaju veliki uticaj na dostupnost i pravednost sistema zdravstvene zaštite.[5]

IZVORI FINANSIRANJA ZDRAVSTVENE ZAŠTITE

Finansiranje zdravstvene zaštite se može obavljati: 1. korišćenjem akumuliranih doprinosa od strane zaposlenih i poslodavaca kroz sisteme socijalnog zdravstvenog osiguranja, 2. upotrebom sredstava iz budžeta, 3. uplatama premija osiguranja u okviru dobrovoljnog zdravstvenog osiguranja, 4. direktnim plaćanjem troškova zdravstvene zaštite od strane korisnika (eng. "*out of pocket payment*"), 5. sredstvima koje obezbeđuje zajednica, 6. korišćenjem donacija, 7. sredstvima inostrane pomoći itd. Prethodno navedeni izvori finansiranja se mogu podeliti u tri grupe, i to u: javne izvore finansiranja (sredstva doprinosa, budžetska sredstva, sredstva zajednice), privatne izvore finansiranja (dobrovoljno zdravstveno osiguranje i direktno plaćanje troškova zdravstvene zaštite od strane korisnika) i eksterne izvore finansiranja (donacije, sredstva inostrane pomoći).[6] Dva najčešće korišćena javna izvora finansiranja zdravstvene zaštite su doprinosi u

[3] Videti www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(uhc), 20.03.2020.

[4] Videti www.who.int, 20.03.2020.

[5] Andrzej Wojtczak, *Global Perspectives in health – Encyclopedia of Life Support Systems,* EOLSS, 2001, 2.

[6] Michael Cichon, William Newbrander, Hiroshi Yamabana, Axel Weber, Charles Normand, David Dror, Alexander Preker, *Modelling in health care financing (A compendium of quantitative techniques for health carefinancing)*, ILO, Geneva, 1999, 38, 39.

okviru modela socijalnog zdravstvenog osiguranja i budžetska sredstva u okviru modela finansiranja nacionalne zdravstvene službe. Osnova oba prethodno navedena modela je poštovanje principa solidarnosti. Kao što je već u Uvodu navedeno, ukoliko se akumulirana sredstva doprinosa i budžetska sredstva koriste kao osnovni izvori finansiranja zdravstvene zaštite, privatni izvori finansiranja mogu biti upotrebljeni kao dopunski izvori. S druge strane, postoji mogućnost da se kao primarni izvori finansiranja zdravstvene zaštite koriste upravo privatni izvori finansiranja.

PRIVATNI IZVORI FINANSIRANJA ZDRAVSTVENE ZAŠTITE

Poslednjih decenija došlo je do značajnog porasta troškova zdravstvene zaštite kod velikog broja država u svetu.[7] Česti uzroci porasta ovih troškova su: pojava novih bolesti, povećana ulaganja u istraživanja i pronalaženja adekvatnih sistema lečenja, veći stepen korišćenja zdravstvenih usluga usled starenja stanovništva i generalno kao posledica jačanja procesa edukacije stanovništva itd.[8] Usled rasta troškova zdravstvene zaštite, pored često preovladavajućih izvora finansiranja putem akumulacije doprinosa ili poreza, sve je izraženija uloga privatnih izvora finansiranja zdravstvene zaštite u vidu dobrovoljnog zdravstvenog osiguranja i direktnog plaćanja zdravstvenih usluga od strane korisnika (tzv. "plaćanje iz džepa").[9] Korisnici zdravstvenih usluga mogu da se opredele ili za plaćanje premije u sistemu dobrovoljnog zdravstvenog osiguranja, čime ulaze u zajednicu rizika što im omogućava korišćenje zdravstvenih usluga koje im ovaj sistem omogućava, ili mogu da izvrše plaćanje dela ili celokupne zdravstvene usluge putem direktnog plaćanja troškova.

SPECIFIČNOSTI DOBROVOLJNOG ZDRAVSTVENOG OSIGURANJA I DIREKTNOG PLAĆANJA TROŠKOVA ZDRAVSTVENE ZAŠTITE

Dobrovoljno zdravstveno osiguranje podrazumeva mogućnost izbora, kao zdravstveno osiguranje koje potencijalni osiguranici mogu da zaključe na dobrovoljnoj osnovi, ili to u njihovu korist mogu uraditi njihovi poslodavci.[10] Finan-

[7] T. Rakonjac-Antić, op. cit., 173.

[8] Anne Mills, Lucy Gilson, "Health Economics for Developing Countries: A Survival Kit", *HEFP working paper,* No. 01/88, LSHTM, 1988, 83, 84.

[9] Videti www.who.int/health_financing/topics/voluntary-health-insurance/what-it-is/en/, 20.03.2020.

[10] Marta Borda, "Voluntary health insurance as a method of health care financing in European countries", *International Journal of Economics and Finance Studies,* Vol. 3, No. 1, 2011, 120, prema Sarah Thomson, Elias Mossialos, "Private Health Insurance in the European Union", *Final report prepa-*

siranje dobrovoljnog zdravstvenog osiguranja vrši se na osnovu sredstava uplaćenih premija. Visina premije određuje se u najvećoj meri prema visini rizika osiguranika (pola, godina starosti, zanimanja, zdravstvenog stanja osiguranika itd.). Ovom vrstom zdravstvenog osiguranja se utiče na jačanje sistema zdravstvene zaštite i povećanje obuhvata stanovnika zdravstvenom zaštitom.

Karakteristike dobrovoljnog zdravstvenog osiguranja su: sloboda izbora participiranja i sloboda izbora zdravstvenih usluga, obezbeđenje raznolikosti sistema zdravstvene zaštite, stvaranje potencijala za efikasno pružanje zdravstvenih usluga, smanjenje "moralnog hazarda", tj. sprečavanje prekomernog korišćenja zdravstvenih usluga, jačanje konkurencije koja bi trebalo da utiče na jačanje kvaliteta zdravstvenih usluga, smanjenje mogućnosti stvaranja uslova za korupciju u zdravstvenom sektoru, povećanje nivoa investicija u sektoru zdravstvene zaštite itd.[11]

S druge strane, direktno plaćanje troškova zdravstvene zaštite (tzv. "plaćanje iz džepa") podrazumeva da korisnik zdravstvenih usluga u sistemu zdravstvene zaštite direktno plaća ukupne troškove ili deo troškova pružaocima zdravstvenih usluga. Plaćanje se ne vrši unapred, već kada se realizuje pružanje zdravstvenih usluga i ono ne podleže refundaciji. Za ovaj način finansiranja zdravstvene zaštite korisnici zdravstvenih usluga se odlučuju sa ciljem dobijanja kvalitetne i efikasne zdravstvene usluge. Ovaj način pokrića troškova zdravstvene zaštite pretpostavlja veće finansijsko opterećenje za stanovništvo koje ima izraženije zdravstvene rizike, a raspoložive niže sume finansijskih sredstava.

VRSTE DOBROVOLJNOG ZDRAVSTVENOG OSIGURANJA I DIREKTNOG PLAĆANJA TROŠKOVA ZDRAVSTVENE ZAŠTITE

Dobrovoljno zdravstveno osiguranje se uglavnom ispoljava kao paralelno (eng. "*duplicate*"), dodatno (eng. "*supplementary*"), dopunsko (eng. "*complementary*") i osnovno ili primarno (eng. "*primary*").[12] Paralelno dobrovoljno zdravstveno osiguranje odnosi se na zdravstvene usluge koje se pružaju i u sistemu obaveznog zdravstvenog osiguranja ili nacionalne zdravstvene zaštite, ali osi-

red for the European Commission, LSE Health and Social Care, London School of Economics and Political Science, 2009, 13.

[11] T. Rakonjac-Antić, op. cit., 199.

[12] U državama Evrope je najčešća ova klasifikacija dobrovoljnog zdravstvenog osiguranja. Videti šire u: Jelena Kočović, Tatjana Rakonjac-Antić, Vesna Rajić, "Dobrovoljno zdravstveno osiguranje kao dopuna obaveznom zdravstvenom osiguranju u Srbiji", *Ekonomske teme,* Ekonomski fakultet u Nišu, Niš, br. 3, 2013, 556, prema OECD Health Data 2012, Definitions, Sources and Methods--Private health insurance, www.oecd.org/health/healthdata, 20.03.2020.

guranik zaključenjem ovog ugovora o osiguranju ostvaruje širu mogućnost izbora između većeg broja pružalaca zdravstvenih usluga, brže pružanje zdravstvenih usluga, širok dijapazon pružanja zdravstvenih usluga itd.[13] Zdravstvene usluge koje nisu pokrivene ili su pokrivene u ograničenom obimu u sistemu obaveznog zdravstvenog osiguranja ili državnog obezbeđenja zdravstvene zaštite, dostupne su osiguranicima u okviru dodatnog dobrovoljnog zdravstvenog osiguranja.[14] Dopunskim dobrovoljnim zdravstvenim osiguranjem se omogućava osiguranicima osiguravajuće pokriće razlike do pune vrednosti zdravstvene usluge.[15] Osobama koje nisu osiguranici u sistemu obaveznog zdravstvenog osiguranja ili nacionalne zdravstvene zaštite obezbeđuje se pravo na korišćenje zdravstvenih usluga iz osnovnog paketa zaključenjem ugovora o osnovnom (primarnom) dobrovoljnom zdravstvenom osiguranju.[16]

Prisutne su i različite vrste ili oblici direktnog plaćanja troškova zdravstvene zaštite od strane korisnika. Postoji direktno plaćanje ukupnih troškova zdravstvenih usluga od strane korisnika koji ne participira u sistemu obaveznog zdravstvenog osiguranja, a moguće je da on participira u sistemu obaveznog zdravstvenog osiguranja, ali ipak plaća ukupne troškove zdravstvene zaštite kod pružaoca zdravstvenih usluga koji ne uvažava njegovo osiguranje. Takođe, u mnogim sistemima zdravstvene zaštite osiguranici učestvuju u pokriću troškova zdravstvene zaštite u vidu tzv. participacije. Participacija se koristi i kao izvor pokrića deficita u fondovima zdravstvenog osiguranja, i kao instrument kojim se može uticati na suzbijanje i ograničavanje prekomernog korišćenja usluga zdravstvene zaštite.[17] Ona može biti definisana kao "fiksna participacija" (eng. "*copayment*") (npr. za svaku posetu lekaru opšte prakse se plaća određeni novčani iznos), ili "procentualna participacija" (eng. "*coinsurance*"), koja je izražena u procentu od troškova zdravstvene zaštite. U SAD-u se koriste i tzv. "odbici" (eng. "*deductibles*"), kao iznosi koji učesnici prvo moraju da utroše na zdravstvenu zaštitu, da bi nakon tih određenih utrošenih iznosa osiguravajuća kompanija počela sa nadoknadom troškova po osnovu zdravstvenog osiguranja.

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[13] Mario Puljiz, "Dobrovoljno zdravstveno osiguranje", *O zdravstvu iz ekonomske perspektive* (ur. Maja Vehovec), Ekonomski institut, Zagreb, 2014, 113, 114.

[14] Alexander Preker, Onno Schellekens, Marianne Lindner, "Introduction: Strength in numbers", *Global marketplace for private health insurance: strength in numbers* (eds. Alexander Preker, Peter Zweifel, Onno Schellekens), The International Bank for Reconstruction and Development, The World Bank, 2010, 5, 6.

[15] T. Rakonjac-Antić, op. cit., 200.

[16] J. Kočović, T. Rakonjac-Antić, V. Rajić, op. cit., 556.

[17] T. Rakonjac-Antić, op. cit., 179.

ZASTUPLJENOST DOBROVOLJNOG ZDRAVSTVENOG OSIGURANJA I DIREKTNOG PLAĆANJA ZDRAVSTVENIH USLUGA U SVETU I U SRBIJI

Generalno posmatrano u evropskim državama preovladava obavezno zdravstveno (javno) osiguranje i nacionalna (državna) zdravstvena zaštita, dok "*out of pocket*" plaćanje i dobrovoljno zdravstveno osiguranje uglavnom predstavljaju njihovu dopunu. Kao rezultat, s jedne strane, zdravstvenih politika, i problema, s druge strane, u obezbeđenju brzog pružanja adekvatnih zdravstvenih usluga finansiranih javnim sredstvima, javlja se tendencija da se jednim delom teret finansiranja zdravstvene zaštite prebaci na stanovništvo kroz njihova privatna plaćanja.[18] Pri tome su, u većini država Evrope veća izdvajanja stanovništva za "*out of pocket*" plaćanje u odnosu na dobrovoljno zdravstveno osiguranje. Na primer, u 2017. godini u Španiji su "*out of pocket*" troškovi iznosili 24%, a izdaci za dobrovoljno zdravstveno osiguranje 5% od ukupnih zdravstvenih troškova. U Poljskoj prva kategorija izdataka je iznosila 26%, a druga 6%, u Portugalu 28% i 5%, u Grčkoj 35% i 4%, Švajcarskoj 29% i 7% itd. Izuzetak su predstavljale dve države, Slovenija i Republika Irska. U Sloveniji je iste godine učešće troškova dobrovoljnog zdravstvenog osiguranja u ukupnih troškovima iznosilo 14%, a "*out of pocket*" 12%, a u Republici Irskoj 13% i 12% respektivno.[19] Dobrovoljno zdravstveno osiguranje ima prostora za razvoj upravo kroz usmeravanja "*out of pocket*" plaćanja u sopstvene tokove.[20]

Globalno posmatrano, "*out of pocket*" izdvajanja za zdravstvenu zaštitu u ukupnim troškovima zdravstvene zaštite učestvuju sa 18,6%. U državama sa visokim dohotkom ovo učešće iznosi 13,8%, sa gornjim srednjim dohotkom 35,9%, donjim srednjim dohotkom 56,1% i sa nižim dohotkom 42,4%.[21] Na primer, u Indiji, na "plaćanje iz džepa" odnosilo se u 2017. godini 65% od ukupnih troškova zdravstvene zaštite, a na dobrovoljno zdravstveno osiguranje svega 2%, a u Meksiku, prva navedena kategorija je iznosila 41%, a druga 6%, u Brazilu 27% i 28%, u Australiji 18% i 10%, Kanadi 15% i 13%, Južnoafričkoj Republici 8% i 49%, Čileu 34% i 6%, Novom Zelandu14% i 5% itd.[22]

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[18] M. Borda, op. cit., 122.

[19] OECD Health Statistics 2019.

[20] Omar Paccagnella, Vincenzo Rebba, Guglielmo Weber, "Voluntary private health insurance among the over fifties in Europe", *Health economics,* 2013, 3–6.

[21] Global Burden of Disease Health Financing Collaborator Network, "Past, present, and future of global health financing: a review of development assistance, government, out-of-pocket, and other private spending on health for 195 countries, 1995–2050", *The Lancet*, Vol. 393, 2019.

[22] OECD Health Statistics 2019.

Dobrovoljno zdravstveno osiguranje u odabranim državama Evrope

Slovenačko tržište je, prema podacima OECD-a, u 2017. godini bilo jedno od četiri najveća tržišta dobrovoljnog zdravstvenog osiguranja u Evropi (pored Republike Irske, Francuske i Švajcarske). Od ukupnih troškova zdravstvene zaštite, kao što je već prethodno navedeno, 14% se odnosilo na dobrovoljno zdravstveno osiguranje (72% se odnosilo na javno zdravstveno osiguranje, 12% na "*out of pocket*" plaćanje i 2% na ostale izvore finansiranja).[23] Dobrovoljno zdravstveno osiguranje je u Sloveniji implementirano 1993. godine sa ciljem diverzifikacije izvora finansiranja zdravstvene zaštite (na osnovu Zakona o zdravstvenoj zaštiti i zdravstvenom osiguranju – 1992,[24] Zakona o zdravstvenim uslugama – 1992, Zakona o farmaciji – 1992. itd.).[25] Krajem 1999. godine Zavod za zdravstveno osiguranje Slovenije je prebacio usluge dobrovoljnog zdravstvenog osiguranja (slo. "prostovoljno zavarovanje") na osiguravača Vzajemnu.[26] U 2019. godini, premija dobrovoljnog zdravstvenog osiguranja u ukupnoj premiji osiguranja je iznosila 22,3%, a u premiji neživotnog osiguranja 31,2%.[27] Najzastupljenije je dopunsko (komplementarno) dobrovoljno zdravstveno osiguranje. Prisutna su dodatna plaćanja za zdravstvene usluge koje nisu u potpunosti obuhvaćene obaveznim zdravstvenim osiguranjem. Dopunsko osiguranje je namenjeno svima koji imaju obavezno zdravstveno osiguranje za pokriće do pune cene zdravstvenih usluga, osim deci, omladini do 26 godina na školovanju, osetljivim kategorijama stanovništva, za posebne bolesti itd. Ukoliko ima zaključen ugovor o dopunskom zdravstvenom osiguranju, osiguranik neće direktno plaćati recimo za osnovne zdravstvene usluge 20% od ukupne cene, za bolničko lečenje 20–30% od ukupnih troškova itd. jer je to obuhvaćeno dobrovoljnim dopunskim zdravstvenim osiguranjem. Dopunskim osiguranjem se finansiraju: kupovina lekova (38%), specijalističke usluge u bolnicama (21%), specijalističke usluge vanbolničke nege (12%), stomatološke usluge (12%), zdravstvene usluge u primarnoj zdravstvenoj zaštiti (11%) i troškovi banja (6%).[28]

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[23] *Ibidem*.

[24] Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju, *Uradni list RS,* št. 9/92 z dne 21.2.1992.

[25] Videti www.zzzs.si/ZZZS, 20.03.2020.

[26] Videti www.vzajemna.si/sl/o-vzajemni, 20.03.2020.

[27] Videti https://xprimm.com/STATISTICS-SLOVENIA-1H2019-Health-insurance-total-market-share-reached-22-3-articol-2,10,28-14175.htm, 20.03.2020.

[28] Videti www.zzzs.si/ZZZS, 20.03.2020.

U Republici Irskoj, u 2017. godini, kao što je prethodno navedeno, oko 13% ukupnih troškova zdravstvene zaštite bilo je obezbeđeno preko dobrovoljnog zdravstvenog osiguranja (oko 73% obezbeđivalo se kroz javno zdravstveno osiguranje, 12% korišćenjem "*out of pocket*" plaćanja i 2% upotrebom ostalih izvora finansiranja).[29] Najzastupljenija vrsta dobrovoljnog zdravstvenog osiguranja je paralelno dobrovoljno zdravstveno osiguranje, koje uključuje bolničku negu, vanbolničku negu, ambulantne usluge itd. U pružanju usluga dobrovoljnog zdravstvenog osiguranja izdvajaju se tri privatne osiguravajuće kompanije: Voluntary Health Insurance Board (VHI) (osnovana 1957. godine, sa tržišnim učešćem u 2015. godini oko 53%), Quinn Direct I Aviva Health.[30]

Oko 7% od ukupnih troškova zdravstvene zaštite se u Francuskoj, u 2017. godini, odnosilo na dobrovoljno zdravstveno osiguranje (oko 83% se odnosilo na javno zdravstveno osiguranje, 9% na "*out of pocket*" plaćanje[31] i 1% na ostale izvore finansiranja).[32] Komplementarno zdravstveno osiguranje je najzastupljenija vrsta dobrovoljnog zdravstvenog osiguranja, koja se obezbeđuje osiguranicima uglavnom kroz uzajamne fondove (MGEN, La Mutuelle Générale, Harmonie Mutualite, MNH) i privatne osiguravajuće kompanije (Covéa, Axa, Groupama, Swiss Life, Macif, Alliancz).[33] Uzajamni fondovi obuhvataju oko 56% tržišta dobrovoljnog zdravstvenog osiguranja, a privatni osiguravači oko 27%. U proseku, oko 70% troškova osnovnog lečenja i oko 80% troškova bolničkog lečenja se nadoknađuje u okviru sistema obaveznog zdravstvenog osiguranja, a preostali iznos troškova kroz komplementarno zdravstveno osiguranje. Oko 96% osiguranika u obaveznom zdravstvenom osiguranju je u 2015. godini imalo zaključene ugovore o dobrovoljnom komplementarnom zdravstvenom osiguranju.[34]

U Švajcarskoj se finansiranje zdravstvene zaštite, u 2017. godini, obezbeđivalo oko 7% korišćenjem dobrovoljnog zdravstvenog osiguranja (oko 62% kroz javno zdravstveno osiguranje, 29% sa "*out of pocket*" plaćanjem i 2% upotrebom ostalih izvora finansiranja). Najzastupljenije je bilo suplementarno (dodatno) do-

[29] OECD Health Statistics 2019.

[30] Videti www.hia.ie/ci/health-insurance-comparison, 20.03.2020.

[31] Thomas Rice, Wilm Quentin, Anders Anell, Andrew J Barnes, Pauline Rosenau, Lynn Y Unruh, Ewout van Ginneken, "Revisting out-of-pocekt requirements: trends in spending, financial acess barriers, and policy in ten high-income countries", *BMC Health Services Research*, 2018.

[32] OECD Health Statistics 2019.

[33] Videti www.statista.com/statistics/442396/leading-private-health-insurance-companies-in-france-by-insurance-plan-owners, 20.03.2020.

[34] *Ibidem*.

brovoljno zdravstveno osiguranje.[35] U 2010. godini je oko 60% osiguranika obaveznog zdravstvenog osiguranja imalo zaključene ugovore o suplementarnom dobrovoljnom zdravstvenom osiguranju za potencijalno bolničko lečenje i oko 29% osiguranika obaveznog zdravstvenog osiguranja imalo je zaključene ugovore za potencijalno ambulantno lečenje. Dobrovoljno zdravstveno osiguranje sprovodi veliki broj osiguravajućih kompanija: Helsana, CSS, Swica, Assura, Condordia, Visana, KPT, Mutuel Assurance itd.[36]

Poslednjih godina prisutan je rast premije ove vrste zdravstvenog osiguranja u nordijskim državama. Komplementarno dobrovoljno zdravstveno osiguranje je zastupljeno u Danskoj i Finskoj, suplementarno u Norveškoj, paralelno u Švedskoj. Visoki iznosi plaćanja "*out of pocket*" su, u osnovi, uticali na korisnike zdravstvenih usluga da se preusmere na dobrovoljno zdravstveno osiguranje, što je dovelo do porasta učešća dobrovoljnog zdravstvenog osiguranja u ukupnom zdravstvenom osiguranju. U 2014. godini oko 20% stanovnika Finske, 50% stanovnika Danske, 9% stanovnika Norveške, 7% stanovnika Švedske imalo je zaključene ugovore o dobrovoljnom zdravstvenom osiguranju.[37] Pružaoci usluga dobrovoljnog zdravstvenog osiguranja u Finskoj su: OP-Pohjola group, LähiTapiola-group, Fennia, u Danskoj: Mølholm Insurance, Tryg, Danica, Skandia, u Norveškoj: Codan Forsikring, Helseassistanse, Storebrand, Helseforsikring, u Švedskoj: Trygg-Hansa, Länsförsäkringar itd.[38]

U 2017. godini, u Hrvatskoj, od ukupnih troškova zdravstvene zaštite, oko 6,5% se odnosilo na dobrovoljno zdravstveno osiguranje, oko 83% na javno zdravstveno osiguranje, 10,5% na "*out of pocket*" plaćanje.[39] Zakonom o dobrovoljnom zdravstvenom osiguranju je regulisan ovaj sistem osiguranja kojim su odobrena pružanja usluga dopunskog, dodatnog i privatnog (za one osobe koje nisu učesnici u sistemu obaveznog zdravstvenog osiguranja) dobrovoljnog zdravstvenog osiguranja.[40] Preko 60% stanovništva ima zaključene ugovore o dopunskom zdravstvenom osiguranju (uglavnom je namenjeno plaćanju participacije za pružene zdravstvene usluge) kod Hrvatskog zavoda za zdravstveno osiguranje

[35] OECD Health Statistics 2019.

[36] Videti https://krankenkasse-online-vergleich.ch/allgemein/die-groessten-krankenkassender-schweiz, 20.03.2020.

[37] Nina Alexandersen, Anders Annel, Oddvar Kaarboer, Juhani Lehto, Liina-Kaisa Tynkkynen, Karsten Vrangbek, "The development of voluntary private health insurance in the Nordic countries", *Nordic Journal of Health Economics*, Vol. 4, No. 1, 2016, 68-83.

[38] *Ibidem*.

[39] OECD Health Statistics 2019.

[40] Zakon o dobrovoljom zdravstvenom osiguranju, *Narodne novine,* br. 85/06, 150/08, 71/10.

(HZZO) ili osiguravajućih kompanija. Prisutan je i povoljan poreski tretman premija dodatnog i dopunskog dobrovoljnog zdravstvenog osiguranja.[41]

Dobrovoljno zdravstveno osiguranje u Srbiji sprovode društva za osiguranje i Republički fond za zdravstveno osiguranje. Zakonom o zdravstvenom osiguranju (Sl. glasnik 25/2019) i Zakonom o osiguranju (Sl. glasnik 139/2014) definisana su prava i obaveze koja proizlaze iz dobrovoljnog zdravstvenog osiguranja. Dopunsko, dodatno i privatno dobrovoljno zdravstveno osiguranje su prisutne vrste na tržištu dobrovoljnog zdravstvenog osiguranja. Ukupna premija osiguranja na tržištu osiguranja u Srbiji u 2018. godini je iznosila 99,9 mlrd dinara (za neživotno osiguranje 76,1 mlrd dinara).[42] Učešće premije dobrovoljnog zdravstvenog osiguranja u ukupnoj premiji osiguranja iznosilo je 3,46%, a u premiji neživotnog osiguranja 4,55%.[43] Ukupne poreske olakšice za dobrovoljno zdravstveno i dobrovoljno penzijsko osiguranje od 1.02.2020. godine iznose 5.984 dinara.[44] Poslodavci su oslobođeni od plaćanja poreza na dohodak građana i doprinosa za obavezno socijalno osiguranje, do sume doprinosa od 5.984 dinara. Uplate koje poslodavac vrši putem administrativne zabrane, obustavom i plaćanjem iz zarade zaposlenog, takođe su oslobođene plaćanja poreza na dohodak građana.[45] Osiguravači u svojoj ponudi imaju i sledeće usluge dobrovoljnog zdravstvenog osiguranja: za slučaj težih bolesti i posledica bolesti, za slučaj hirurške intervencije (operacije), komplet zdravstvenih usluga koji može uključivati, npr. jedan sistematski pregled, četiri pregleda kod lekara opšte prakse, po potrebi pregledi kod lekara opšte prakse uz popust od, npr. 25% i sl. Tokom 2017. godine izdato je 11246, a tokom 2018. godine 13743 polisa dobrovoljnog zdravstvenog osiguranja preko Republičkog fonda za zdravstveno osiguranje (RFZO). Prihodi po osnovu uplaćenih premija iznosili su u 2017. godini 14,44 miliona dinara, a u 2018. godini 16,67 miliona dinara.[46] Usluge dobrovoljnog zdravstvenog osiguranja preko Republičkog fonda za zdravstveno osiguranje mogu koristiti samo osiguranici koji su učesnici u sistemu obaveznog zdravstvenog osiguranja. Vrste usluga dobrovolj-

[41] Videti www.hzzo.hr, 20.03.2020.

[42] "Sektor osiguranja u Republici Srbiji – Izveštaj za 2018. godinu", Narodna banka Srbije, Sektor za nadzor nad obavljanjem delatnosti osiguranja, 2019, 14.

[43] Videti www.nbs.rs, 20.03.2020.

[44] Zakon o doprinosima za obavezno socijalno osiguranje, *Sl. glasnik RS,* br. 84/2004, 86/2019 i 5/2020.

[45] *Ibidem.*

[46] Videti www.rfzo.rs, 20.03.2020.

nog zdravstvenog osiguranja su: putno zdravstveno osiguranje, osiguranje stomatoloških usluga, kao i težih bolesti uz dopunske rizike.

FAKTORI KOJI UTIČU NA (NE)ZASTUPLJENOST DOBROVOLJNOG ZDRAVSTVENOG OSIGURANJA I DIREKTNOG PLAĆANJA TROŠKOVA ZDRAVSTVENE ZAŠTITE

Veliki je broj faktora koji utiču na (ne)zastupljenost dobrovoljnog zdravstvenog osiguranja i direktnog plaćanja troškova zdravstvene zaštite: mogućnost korišćenja javnih izvora finansiranja zdravstvene zaštite (doprinosi, budžetska sredstva itd.) i mogućnost obezbeđenja zdravstvenih usluga korišćenjem ovih izvora finansiranja, poštovanje principa solidarnosti ili neuvažavanje ovog principa, nivo razvijenosti ekonomije i zdravstvenog sistema države, demografska struktura stanovništva, odnos ponude i potražnje za zdravstvenim uslugama itd. U nekim državama, usled nedovoljnosti javnih izvora finansiranja zdravstvene zaštite ili neefikasnosti sistema, uključuju se dobrovoljno zdravstveno osiguranje i "*out of pocket*" plaćanje od strane korisnika. Pretpostavka je da učesnici koji koriste ove izvore finansiranja zdravstvene zaštite imaju dovoljno finansijskih sredstava koje će upotrebiti za ove oblike obezbeđenja zdravstvene zaštite.

Određeni broj država bazira svoje sisteme zdravstvene zaštite upravo na korišćenju privatnih izvora finansiranja, i to dobrovoljnog zdravstvenog osiguranja i direktnog plaćanja usluga zdravstvene zaštite. Često se diskutuje o pravednosti i o efikasnosti korišćenja ovih izvora finansiranja zdravstvene zaštite. Odluka o zaključenju ugovora o dobrovoljnom zdravstvenom osiguranju je najčešće uslovljena statusom zaposlenosti potencijalnog osiguranika, nivoom zarada, ukupnim prihodom kojim raspolaže, nivoom obrazovanja, stepenom edukacije o značaju zdravstvene zaštite, razlikom između kvaliteta pružanja zdravstvenih usluga u sistemu obaveznog i dobrovoljnog zdravstvenog osiguranja, generacijskom stvaranju sklonosti pojedinca da zaključuje ugovore o dobrovoljnom zdravstvenom osiguranju, postojećem zdravstvenom stanju pojedinca, sklonosti ka riziku itd.[47] Direktno plaćanje troškova zdravstvene zaštite bi trebalo da korisniku obezbedi kvalitetnu i brzu zdravstvenu uslugu, kao i slobodu izbora pružaoca zdravstvene usluge. Dostupno je stanovništvu koje ima dovoljan nivo raspoloživih finansijskih sredstava, a za osobe koje bi trebalo da češće koriste zdravstvene usluge

[47] Videti www.nbs.rs, 20.03.2020.

predstavlja veliko finansijsko opterećenje. Upravo zbog toga postoji intencija kod određenih država da direktno plaćanje troškova zdravstvene zaštite preusmere u dobrovoljno zdravstveno osiguranja u okviru kojeg značajnu ulogu ima zajednica rizika. Što je zajednica rizika veća, veća je i mogućnost snižavanja premije, a u određenim državama, ukoliko osiguranik u tekućoj godini ne koristi zdravstvene usluge, može se izvršiti povraćaj dela premije, ili se ona može preusmeriti u finansiranje ugovora o dobrovoljnom zdravstvenom osiguranju u narednoj godini.

ZAKLJUČAK

Dobrovoljno zdravstveno osiguranje i direktno plaćanje troškova zdravstvene zaštite (tzv. "plaćanje iz džepa") od strane korisnika predstavljaju bazične privatne izvore finansiranja zdravstvene zaštite. Ovi izvori finansiranja su u nekim državama sveta dominantni (Južnoafrička Republika, Brazil itd.), a u drugim državama predstavljaju dopunu javnim izvorima finansiranja zdravstvene zaštite (u Evropi). Cilj korisnika usluga zdravstvene zaštite upotrebom ovih izvora finansiranja je dobijanje kvalitetnih, brzo dostupnih i raznovrsnih zdravstvenih usluga (ambulantnih, bolničkih itd.). Dobrovoljno zdravstveno osiguranje predstavlja udruživanje osiguranika u zajednice rizika u okviru kojih se, na bazi uplaćenih sredstava premija, obezbeđuje zaštita usled nastupanja određenog broja zdravstvenih rizika na dobrovoljnoj osnovi. Sa većom zajednicom rizika i premije za osiguranike su niže, tj. predstavljaju manje opterećenje u odnosu na to da se zdravstvene usluge plaćaju direktno (tzv. "iz džepa"). U velikoj meri odluka pojedinaca o izboru između ove dve alternative privatnih izvora finansiranja zdravstvene zaštite zavisi od njihove spremnosti da unapred percipiraju rizike, kao i od njihovih finansijskih mogućnosti. Nekada potencijalni korisnici, ne očekujući da će imati potrebu za zdravstvenim uslugama i smatrajući uplatu premije osiguranja u toj situaciji kao nepotrebni trošak, radije se odlučuju da sačekaju i, ukoliko se pojavi potreba za zdravstvenom uslugom, direktno izvrše plaćanje. Budući da je to, sa finansijskog aspekta, nepovoljnija varijanta za korisnike zdravstvenih usluga, često se analiziraju mogućnosti preusmeravanja direktnog plaćanja troškova zdravstvenih usluga u sistem dobrovoljnog zdravstvenog osiguranja baziranog na uplatama premija osiguranja.

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SPECIFICS OF PRIVATE HEALTH CARE FINANCING SOURCES

Summary

The two most important private sources of health care financing are voluntary health insurance and out-of-pocket payments made by users. Due to the constant increase in health care costs, these two sources are used either as a supplement to public forms of financing or as a predominant source of healthcare financing. Considering the basic characteristics of private sources of health care financing is important, among other things, for making the choice of the most appropriate combination of funding sources for this important system that affects the health of the population. Based on the analysis of the specifics of voluntary health insurance and out-of-pocket payments, in this paper we identify the factors that determine their presence and make recommendations for increasing the health care coverage.

Key words: health, health care, private sources of financing, voluntary health insurance, direct payment of health care costs

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VUK RADOVIĆ

NEVOLJNI PRESTANAK PRIVREDNOG DRUŠTVA ZBOG BLOKADE I UGNJETAVANJA MANJINE

Srpsko kompanijsko pravo daje članovima privrednih društava pravo da zahtevaju od suda da naloži pokretanje postupka likvidacije. U ovom radu autor analizira materijalne uslove koji moraju biti ispunjeni da bi sud doneo ovakvu odluku. Najvećim delom rad se bavi razlozima (materijalnopravnim pretpostavkama) za prestanak, i to prevashodno blokadom društva i ugnjetavanjem manjine. Ova tema je aktuelna iz najmanje tri razloga. Prvo, u sudskoj praksi su sve češći slučajevi pokretanja ovakvih postupaka, a o mnogim spornim pitanjima još uvek nisu zauzeti zajednički stavovi. Drugo, u domaćoj teoriji se nedovoljno razume suština ovog prava članova, te se ono gotovo isključivo vezuje za prava manjinskih članova. Treće, zakonske odredbe su veoma neprecizne i široko formulisane, te omogućavaju raznovrsna tumačenja. Ovaj rad ima za cilj da objasni suštinu svakog od razloga za prestanak privrednog društva po ovom osnovu, sa posebnim osvrtom na njihovo razumevanje u uporednoj sudskoj praksi.

Ključne reči: *likvidacija, akcionarsko društvo, manjinski akcionari, blokada, ugnjetavanje manjine, standard razumnih očekivanja*

U V O D

Likvidacija privrednog društva je, po pravilu, posledica ili volje samog društva ili nekih nezakonitosti vezanih za osnivanje, poslovanje ili organizaciju

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privrednog društva. To su uobičajeni i nesporni likvidacioni razlozi, i sva razvijena kompanijska zakonodavstva ih poznaju. Između ove dve grupe razloga (voljnih i nevoljnih) neka zakonodavstva poznaju i mogućnost likvidacije na zahtev člana odlukom suda. Ovaj likvidacioni razlog ima voljni element, jer neki članovi društva žele pokretanje postupka likvidacije, ali i nevoljni element, koji se ispoljava u nepostojanju volje ostalih članova i društva u celini. Kako broj članova koji žele likvidaciju nije dovoljan za donošenje odluke o prestanku društva, to je pokretanje sudskog postupka jedina mogućnost da se ishoduje prestanak društva. Za razliku od nevoljnih razloga, koji uvek podrazumevaju postojanje nekih nezakonitosti (na primer, ništav osnivački akt ili nedostavljanje godišnjih finansijskih izveštaja), ovde akcenat nije na nezakonitostima, već na nekim unutrašnjim problemima, koji onemogućavaju nesmetano funkcionisanje i rad privrednog društva. Ovo je jedini likvidacioni razlog kod koga se ispituju odnosi unutar društva, iz kojih sud izvlači zaključak o opravdanosti ili neopravdanosti pokretanja postupka likvidacije. Neki autori prave paralelu između ovog načina prestanka društva i razvoda braka. Kao što u slučaju "beznadežno disfunkcionalnog braka",[1] postoji pravo na podnošenje tužbe za razvod braka, slično pravo ostvaruju i članovi društva kada od suda traže tzv. "korporativni razvod".[2]

POČETNA DILEMA

Opravdano se postavlja pitanje da li članovima treba dati ovo pravo. U srpskom pravu je ovo pitanje posebno aktuelno, jer pravo na pokretanje sudskog postupka za prestanak postoji kod svakog privrednog društva. Prvi problem se odnosi na primenu ovog instituta na društva lica i društvo sa ograničenom odgovornošću. Kod ovih društava članovi imaju pravo da istupe iz društva, pri čemu kod društava lica ne moraju da dokazuju ispunjenost dodatnih materijalnih uslova (tzv. neograničeno pravo na istupanje), dok je kod društva sa ograničenom odgovornošću, korišćenje ovog prava vezano za ispunjenje opravdanog razloga (tzv. ograničeno pravo na istupanje). Obezbeđivanjem članovima prava na istupanje smanjena je potreba za postojanjem prava člana da zahteva pokretanje postupka likvidacije po odluci suda. Štaviše, kod društava lica je diskutabilno u kojoj meri ovo pravo uopšte ima opravdanje. Teško je braniti tezu da neki član ima interes za prestankom društva, ako uvek može napustiti društvo i dobiti od društva iznos

[1] Terminologijom Porodičnog zakona: ozbiljne i trajne poremećenosti bračnih odnosa ili objektivne nemogućnosti ostvarivanja zajednice života supružnika. Videti čl. 41 Porodičnog zakona, *Službeni glasnik RS*, br. 18/2005, 72/2011 – dr. zakon, 6/2015.

[2] Franklin A. Gevurtz, *Corporation Law*, West Group, St. Paul (Minn.), 2000, 463.

koji bi dobio u slučaju likvidacije društva. Ovo pravo je za društva lica uvedeno aktuelnim zakonom, a do tada je postojalo samo za društva kapitala.

Kod društava sa ograničenom odgovornošću postoji veća potreba za uvođenjem ovog prava, jer pravo na istupanje postoji samo iz opravdanih razloga. Ako se uporedi zakonska definicija opravdanog razloga sa razlozima za pokretanje postupka likvidacije odlukom suda, uočava se da se oni samo jednim manjim delom preklapaju. Otuda se pravno-teorijski može braniti primena instituta likvidacije odlukom suda na društva sa ograničenom odgovornošću.

Pored prava na istupanje, kod društava lica i društva sa ograničenom odgovornošću postoji i mogućnost isključenja člana odlukom suda. U svoje ime a za račun društva, ovo pravo može da ostvaruje član koji predstavlja najmanje 5% osnovnog kapitala. Isključenje se može tražiti iz razloga određenih osnivačkim aktom ili iz drugih opravdanih razloga. Fluidan pojam opravdanog razloga navodi na zaključak da su razlozi za isključenje široko određeni, te se značajnim delom preklapaju sa nekim razlozima za pokretanje postupka likvidacije odlukom suda. Međutim, ono što nesporno ostaje van okvira instituta isključenja su razni vidovi blokade društva, a koji predstavljaju značajan osnov za traženje prestanka društva.

Likvidacija odlukom suda izvorište ima u pravu akcionarskih društava. Međutim, primena ovog instituta nema nikakav značaj kod javnih akcionarskih društava. Slobodna prenosivost akcija i berzanska trgovina omogućavaju akcionarima da prodajom akcija lako i brzo napuste društvo. Otuda bi korišćenje ovog prava u najvećem broju slučajeva predstavljalo zloupotrebu. Likvidacija odlukom suda svoj pravi domen primene nalazi kod nejavnih akcionarskih društava, i to onih koja imaju manji broj akcionara.[3] Akcionari ovih društava nemaju pravo na istupanje i pravo na isključenje, poput članova društva lica i društva sa ograničenom odgovornošću, a nemaju ni mogućnost lake prenosivosti akcija, poput akcionara javnih akcionarskih društava.

OPRAVDANJA

Davanjem prava članovima da preko suda iniciraju pokretanje postupka likvidacije privrednog društva mogu se ostvariti višestruki ciljevi. Prvi i osnovni cilj je zaštita manjinskih članova, te se ovo pravo najčešće i posmatra u kontekstu korpusa prava manjinskih članova.[4] Društva u kojima dominira drugi agen-

[3] Carlos L. Israels, "The Sacred Cow of Corporate Existance – Problems of Deadlock and Dissolution", *University of Chicago Law Reiew*, No. 19, 1952, 778.

[4] Videti Mirko Vasiljević, "Pravo manjinskih članova (akcionara) na pokretanje postupka likvidacije društva kapitala", *Pravni život,* br. 11, 2002, 11–22.

cijski problem su prirodno okruženje za primenu ovog prava. Vidovi zloupotreba većinskog člana su brojni i ispoljavaju se na različitim nivoima. Česti su slučajevi da udeli, odnosno akcije manjinskih članova postaju bezvredni zbog raznovrsnih mahinacija kontrolnog člana.[5] Manjinski članovi su tako lišeni svakog prihoda od svoje investicije, pri čemu im je onemogućeno i korišćenje glasačkih i drugih prava. U takvim situacijama, pokretanje sudskog postupka za prestanak društva se javlja kao jedino efikasno rešenje. Već sama pretnja korišćenjem ovog prava može dovesti do povoljnog ishoda za manjinske članove.[6]

Premda se ovo pravo može shvatiti i kao pravo manjine, čini se da ono prevazilazi te okvire. Naime, na osnovu korišćenja ovog prava sud može naložiti prestanak društvima koja ne mogu da funkcionišu zbog postojećeg antagonizma između članova i/ili direktora. Prema tome, ne mora se sve posmatrati kroz prizmu zloupotreba većine i potrebu zaštite manjinskih članova. Likvidacija nekih privrednih društava može biti u interesu samog društva, kao i drugih nosilaca interesa njegovog poslovanja. Tako posmatrano, prestankom društva odlukom suda mogu se ostvarivati i opštedruštveni interesi.

Posebno osetljiv problem za sudsku praksu je kako postupati u slučajevima kada društvo, protiv koga je podnet zahtev za prestanak, uspešno posluje. Kako opravdati gašenje jednog profitabilnog privrednog subjekta? Da li zloupotrebi većine ili blokadi treba dati prioritet u odnosu na korporativnu egzistenciju? Činjenica je da će profitabilnost društva i nalaganje prestanka najčešće biti u obrnutoj srazmeri (što je društvo profitabilnije, to će sudovi više oklevati da nalože prestanak).[7] Uobičajeno se u literaturi navodi stari njujorški slučaj *In re Radom & Neidorff, Inc.*,[8] u kome je sud odbio da naloži prestanak društva na zahtev jednog od dva jednaka akcionara, iako je dokazano da su akcionari bili u veoma lošim odnosima. No, i pored činjenice da je društvo uspešno, može se postaviti pitanje da li je opravdano članove društva ostaviti u bezizlaznoj situaciji, koja će se vremenom reflektovati i na društvo, jer je nerealno pretpostaviti da loši odnosi između članova neće uticati na njihovo društvo.[9] Prema tome, sudovi uvek moraju da imaju u vidu da optiranjem za opstanak sada uspešnog društva, zapravo vrše

[5] F. Hodge O'Neal, "Oppression of minority shareholders: protecting minority rights", *Cleveland State Law Review*, No. 35, 1987, 121.

[6] Arthur R. Pinto, Douglas M. Branson, *Understanding Corporate Law*, LexisNexis, 1999, 286.

[7] C. L. Israels, op. cit., 785.

[8] *In re Radom & Neidorff, Inc*, 307 N.Y. 1, 119 N.E.2d 563 (1964).

[9] Frank H. Easterbrook, Daniel R. Fischel, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge, 1996, 239.

optiranje za urušavanje društva u budućnosti. U određenim situacijama će biti opravdano ugasiti društvo danas, zarad umanjivanja budućih gubitaka.

Pretnja podnošenjem tužbe za prestanak društva predstavlja značajno "oružje" kojim raspolažu članovi društva. Zbog svoje "ubojitosti" ovo pravo nije opšteprihvaćeno u uporednom pravu.[10] Prihvataju ga, primera radi, SAD,[11] Australija, Velika Britanija,[12] Irska, Švajcarska, Francuska i Grčka. U anglosaksonskim državama sudovi tradicionalno imaju na raspolaganju široka tzv. pravična sredstva (engl. *equitable remedies*) za razrešenje sporova između akcionara (članova), a jedno od njih je i nalaganje prestanka društva.[13] Pod uticajem američkog rešenja, ovaj institut od 2004. godine postoji i u srpskom pravu, isprva samo za društva kapitala, a potom i za društva lica.[14]

Zbog dalekosežnosti, zakonodavstva na različite načine ograničavaju ovo pravo članova. Srpsko pravo to čini u četiri pravca: 1) ograničavanjem prava na pokretanje ovog postupka (minimalni procenat kapitala kao uslov za podnošenje tužbe), 2) preciznim definisanjem razloga za prestanak društva po ovom osnovu, 3) predviđanjem alternativnih mera koje sud može da izrekne u ovom postupku i 4) propisivanjem da je prestanak društva krajnje sredstvo. U daljem tekstu će biti više reči o razlozima za prestanak.

RAZLOZI ZA PRESTANAK

Osnov za prestanak privrednog društva odlukom suda je postojanje opravdanog razloga. Međutim, šta se ima smatrati opravdanim razlogom za prestanak društva može biti predmet različitih tumačenja. Kako ovaj institut ne bi stvarao prekomernu pravnu neizvesnost, opravdano je da zakonodavac precizira razloge za prestanak privrednog društva po ovom osnovu, tj. da definiše pojam oprav-

[10] Uporediti M. Vasiljević, op. cit., 11.

[11] Za oštru kritiku američkog rešenja više videti: J. A. C. Hetherington, Michael P. Dooley, "Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem", *Virginia Law Review*, No. 63, 1977, 1–77.

[12] U Velikoj Britaniji mogućnost prestanka društva postoji u okviru instituta "*unfair prejudice*". Više videti: Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th ed., Sweet & Maxwell, London, 2008, 681–708.

[13] Više videti: Holger Fleischer, "Comparative Corporate Goernance in Closely Held Corporations", *The Oxford Handbook of Corporate Law and Governance* (eds. Jeffrey N. Gordon, Wolf-Georg Ringle), Oxford University Press, Oxford, 2018, 715–718.

[14] Čl. 183, čl. 346 Zakona o privrednim društvima – ZOPD 2004, *Službeni glasnik RS*, br. 125/2004; čl. 118, čl. 138, čl. 239, čl. 469 Zakona o privrednim društvima – ZOPD 2011, *Službeni glasnik RS*, br. 36/2011, 99/2011, 83/2014 – dr. zakon i 5/2015.

danog razloga. Neka zakonodavstva, poput švajcarskog, ne postupaju na naveden način, već obuhvat pojma opravdanog razloga u celosti prepuštaju sudskoj praksi.[15] Francuska, pak, prihvata jedno mešovito rešenje, prema kome je prestanak moguć iz opravdanog razloga, a onda se navodi šta se naročito ima smatrati opravdanim razlogom.[16] Na ovaj način je olakšan posao sudskoj praksi, ali i dalje ostaje veliki prostor za kreativna tumačenja, jer se pojam opravdanog razloga ne iscrpljuje u navedenim primerima.[17]

Srbija prihvata treći sistem, prema kome su zakonom definisani razlozi zbog kojih se može zahtevati prestanak privrednog društva po odluci suda. Kod društava kapitala su precizirana četiri konkretna razloga, dok je kod društava lica navedeno da se prestanak društva određuje samo onda kada postoji opravdan razlog, koji je odmah nakon toga i definisan.

Svi razlozi za prestanak privrednog društva po odluci suda se mogu podeliti u tri grupe: prva grupa se odnosi na blokadu rada organa društva ili članova, druga na rasipanje i umanjivanje imovine društva, dok se treća grupa vezuje za protivzakonito, prevarno i nepošteno ponašanje.

Blokada

Kod društava kapitala, blokada se može ispoljiti na dva nivoa: na nivou akcionara (blokada skupštine) i na nivou direktora (blokada odbora). Suprotno tome, kod društava lica je moguća blokada samo na nivou članova. Blokada je najrasprostranjeniji i najčešće korišćen osnov za prestanak društva odlukom suda.[18]

Blokada u društvu se zakonski definiše na različite načine. Međutim, te delimično precizne definicije pokušavaju da obuhvate sve one situacije kada postoje

[15] Sudovi u Švajcarskoj retko koriste ovlašćenje da nalože prestanak društva. Navedeno prema: H. Fleischer, op. cit., 717.

[16] "...iz opravdanih razloga, a naročito u slučaju neizvršenja obaveza od strane nekog člana, ili nesaglasnosti između članova koja parališe funkcionisanje društva." Art. 1844-7(5) Code de commerce.

[17] U teoriji se smatra da u Francuskoj ne postoje jasne smernice oko obuhvata pojma opravdanog razloga. Više videti: Sandra K. Miller, "Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French Close Corporation Problem", *Cornell International Law Journal*, No. 30, 1997, 408.

[18] Harry J. Haynsworth, "The effectiveness of involuntary dissolution suits as a remedy for close corporation dissension", *Cleveland State Law Review*, No. 35, 1987, 33.

nepomirljive razlike između članova.[19] Blokada je fenomen zatvorenih društava, a kod javnih društava ne može dugo da opstane.[20]

Blokada skupštine. – Blokada skupštine nastupa onda kada zbog jednake podele glasova skupština ne može da donosi odluke iz svoje nadležnosti. U praksi se problem blokade ispoljava u situaciji kada akcionari koji poseduju 50% glasačkih prava glasaju za jedne članove uprave, dok druga polovina glasa za druge članove uprave.[21] U slučaju jednake podele glasačkih prava, ne mogu se imenovati novi članovi uprave, jer nijedan član ne može da dobije većinu glasova. Otuda i ne čudi da se u teoriji smatra da su blokade Ahilova peta privrednih društava kod kojih je vlasništvo podeljeno u srazmeri 50:50.[22] Premda nemogućnost izbora novih direktora može imati štetan uticaj na društvo, to će ređe biti slučaj. Razlog za ovakav zaključak je u sledećem: direktorima prestaje to svojstvo tek imenovanjem novog direktora, a ne istekom mandata.[23] Prema tome, ako skupština zbog blokade u odlučivanju ne može da donese odluku o imenovanju novih članova uprave, postojeći direktori nastavljaju da obavljaju svoju funkciju, čime je značajno umanjena mogućnost nastanka štete za društvo. Takođe, ne treba zanemariti ni institut kooptacije, koji omogućava preostalim direktorima da imenuju lice koje će vršiti funkciju direktora do imenovanja od strane skupštine.[24] Konačno, moguće je i da akcionarsko društvo optira za kumulativno glasanje za izbor članova uprave. Ovaj način glasanja će dovesti do imenovanja svih direktora, osim onog poslednjeg (neparnog), koji bi trebalo da dâ prevagu u odboru. Na ovaj način će se blokada skupštine preneti i na upravu. Jedino će akutna situacija nastupiti za društvo ako svim postojećim direktorima prestane to svojstvo (na primer, svi direktori poginu u avionskoj nesreći)[25] ili svojstvo direktora prestane većini direktora, tako da se ne može primeniti institut kooptacije.

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[19] James D. Cox, Thomas Lee Hazen, F. Hodge O'Neal, *Corporations*, Aspen Law & Business, New York, 1997, 381.

[20] J. D. Cox, T. L. Hazen, F. H. O'Neal, op. cit., 381.

[21] Najčešće blokada postoji u dvočlanim društvima u kojima svaki član ima 50% udela. Videti: H. Fleischer, op. cit., 714.

[22] Holger Fleischer, Stephan Schneider, "Shoot-Out Clauses in Partnerships and Close Corporations – An Approach from Comparative Law and Economic Theory", *ECFR*, No. 1, 2012, 36.

[23] Nebojša Jovanović, Vuk Radović, Mirjana Radović, *Kompanijsko pravo – pravo privrednih subjekata*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2020, 575–576.

[24] Više videti: *Ibidem*, 554–555.

[25] F. A. Gevurtz, op. cit., 467.

U srpskom pravu se prestanak društva kapitala može zahtevati onda kada su akcionari (članovi) blokirani u odlučivanju na najmanje dve uzastopne sednice skupštine, što za posledicu ima da se poslovi društva ne mogu više voditi u interesu društva.[26] Za primenu ovog osnova za prestanak moraju biti ispunjena tri uslova. Prvi uslov podrazumeva postojanje blokade akcionara (članova) u odlučivanju, koja, kao što je već rečeno, postoji prevashodno onda kada su akcionari podeljeni u dva tabora iste glasačke snage (50%-50%). Međutim, moguća je blokada i u slučaju nejednake podele glasova, a ona će biti aktuelna samo onda kada društva svojim internim aktima predviđaju neku varijantu kvalifikovane većine za odlučivanje.[27] Drugi vidovi nemogućnosti akcionara da usvajaju skupštinske odluke ne bi trebalo da budu od značaja.

Sledeći uslov se tiče trajnosti blokade. Naime, blokada treba da postoji na najmanje dve uzastopne skupštinske sednice. To mogu biti bilo koje dve sednice (na primer, jedna redovna i druga vanredna, dve vanredne ili dve redovne), samo je važno da su uzastopne. Za razliku od našeg rešenja, u američkom pravu se traži da glasačka blokada postoji na dve uzastopne godišnje sednice.[28]

Poslednji uslov je posledično orijentisan. Blokada u odlučivanju mora za posledicu imati nemogućnost vođenja poslova u interesu društva. Za razliku od prethodna dva uslova koji su jednostavni za primenu, ovaj uslov može u praksi stvoriti probleme oko načina njegovog tumačenja. Činjenica je da vođenje poslova društva nije u nadležnosti skupštine, već organa uprave. Otuda ovu odredbu i treba shvatiti tako da ona implicira da skupština ne može na dve uzastopne sednice da izabere članove odbora direktora, odnosno nadzornog odbora.[29] Ovaj uslov se primenjuje samo onda kada je prethodnoj upravi istekao mandat, a na dve uzastopne skupštinske sednice je postojala tačka dnevnog reda o imenovanju članova uprave. Međutim, treba voditi računa o tome da zakonodavac kao dodatni uslov navodi da zbog blokade poslovi društva ne mogu da se vode u interesu društva. Kao što je već rečeno, ovaj dodatni uslov često neće biti ispunjen, zbog činjenice da svojstvo direktora automatski ne prestaje istekom mandata, kao i zbog primene instituta kooptacije. Najbolje bi bilo da se on potpuno zanemari, već da se kao uslov za pokretanje postupka prestanka tretira sama nemogućnost izbora novih

[26] Čl. 469, st. 1, tač. 2 ZOPD 2011.

[27] F. A. Gevurtz, op. cit., 470.

[28] MBCA, § 14.30(2)(iii). Međutim, mnoge američke države ne prihvataju ovaj uslov. Videti: J. D. Cox, T. L. Hazen, F. H. O'Neal, op. cit., 381.

[29] Kod nas ima i širih shvatanja, prema kojima odluke koje ne mogu da se donesu treba da budu značajnije. Zlatko Stefanović, *Komentar Zakona o privrednim društvima*, Službeni glasnik, Beograd, 2019, 783.

članova uprave u situacijama kada je prethodnoj upravi istekao mandat.[30] Tačno je da stara uprava može voditi poslove društva u interesu društva, ali se ovde akcenat mora staviti na nepostojanje poverenja akcionara koji poseduju polovinu glasačkih prava u stare članove uprave. U suprotnom bi se u potpunosti izgubila veza između skupštine i uprave, a to sud ne sme da dozvoli, čak i u situaciji da uprava radi u interesu društva.

Blokada uprave. – Drugi relevantan vid blokade, koji predstavlja osnov za pokretanje postupka prestanka društva sudskim putem, je blokada uprave. Prema pozitivnom srpskom pravu, ovaj osnov je definisan na sledeći način: organ uprave ne može da vodi poslove društva, bilo zbog međusobnog neslaganja njegovih članova ili iz drugih razloga, a skupština ne može da prekine blokadu, što za posledicu ima da se poslovi društva ne mogu više voditi u interesu akcionara.[31] Iz prikazane odredbe proizlaze tri uslova koja moraju biti ispunjena: 1) postojanje blokade, 2) nemogućnost akcionara da prekinu blokadu i 3) nemogućnost vođenja poslova društva u interesu akcionara. Na tužiocu je teret dokaza ispunjenosti svih navedenih uslova.[32]

1) *Postojanje blokade*. – Prvi uslov za prestanak društva po ovom osnovu je postojanje prave blokade uprave. Blokada uprave postoji onda kada ona ima paran broj direktora[33] podeljenih u dva jednaka tabora ili kada su članovi uprave podeljeni u više tabora, ali tako da nijedan nema većinu za odlučivanje. Prilikom utvrđivanja blokade, američka sudska praksa tretira četiri faktora kao pravno relevantna.[34] Prvi faktor se odnosi na to da su nepomirljive razlike između direktora dovele do tzv. "korporativne paralize". "Korporativna paraliza" podrazumeva da blokada za posledicu ima nemogućnost izvršavanja osnovnih nadležnosti uprave, poput zapošljavanja i davanja otkaza, formulisanja i sprovođenja korporativne strategije, plaćanje zarada, i sl. Primera radi, direktori imaju dijametralno suprotne stavove o dugoročnoj strategiji društva. Drugi faktor ukazuje na to da je blokada verovatnija u malim ili zatvorenim akcionarskim društvima, i to naročito onda kada su akcije podeljene između dva akcionara, koji su u isto vreme i direktori. Treći relevantan faktor za utvrđivanje postojanja blokada se odnosi na po-

[30] Sličnu logiku je prihvatio i Vrhovni sud Delavera u slučaju *Giuricich v. Emtrol Corp.*, 449 A.2d 232 (Del. 1982).

[31] Čl. 469, st. 1, tač. 1 ZOPD 2011.

[32] Mark D. Finsterwald, "The Supreme Judicial Court Explains Statutory Criteria for Dissolution of a Corporation Due to Director Deadlock", *Massachusetts Law Review*, No. 99, 2018, 70.

[33] Uprava u nejavnim društvima često ima paran broj direktora, što povećava verovatnoću nastanka blokade. J. D. Cox, T. L. Hazen, F. H. O'Neal, op. cit., 380.

[34] Više videti: *Koshy v. Sachev*, 477 Mass. 759 (2017).

stojanje indicije da je fabrikovana blokada. Tako će se odbaciti zahtev lica koje je bojkotovalo sednice odbora, a kasnije se poziva na nemogućnost donošenja odluka. Poslednji faktor koji treba ceniti je stepen nepoverenja i antipatije između direktora.

2) *Nemogućnost akcionara da prekinu blokadu*. – Blokada uprave ima smisla da bude osnov za prestanak društva samo ako akcionari (članovi) ne mogu da prekinu blokadu. Prirodno je da u slučaju unutrašnjeg sukoba u upravi reaguju akcionari i imenuju nove članove uprave. Međutim, ako to oni ne mogu da učine postoji prava blokada. U praksi će ovaj uslov najčešće biti ispunjen onda kada su i akcije, odnosno udeli u društvu podeljeni na jednake delove, i to između lica koja su u isto vreme i akcionari i direktori.[35] Sud u svakom slučaju mora da utvrdi da li u društvu postoji mehanizam putem koga se može otkloniti blokada. Najznačajniji mehanizmi su klauzule u osnivačkom aktu privrednog društva, kojima se problem blokade odlučivanja rešava tako što se daje pravo jednom akcionaru ili grupi akcionara da prodaju svoje akcije preostalom akcionaru, odnosno akcionarima, pri čemu se način određivanja cene i postupak prodaje unapred preciziraju.[36] Ove klauzule imaju različite pojavne oblike,[37] ali je za sve njih karakteristično da se nastali problem rešava prestankom članstva u društvu, i to prenosom akcija, odnosno udela na drugog člana.[38] Primenom ovih mehanizama se prekida blokada članova, a to će za posledicu imati i prekid blokade uprave. Pored pomenutih klauzula, u anglosaksonskoj praksi su razvijeni i brojni drugi modaliteti saniranja problema blokade odlučivanja unutar društva, poput poveravanja trećem licu rešavanja nastalog spora (medijacija ili arbitraža), prodaje akcija ili udela trećem licu, i sl.[39]

3) *Posledica*. – Poslednji uslov koji mora da bude ispunjen za određivanje prestanka društva je da se zbog blokade poslovi društva više ne mogu voditi u in-

[35] U slučaju *Goldstein v. Studley*, Vrhovni sud države Misuri je postojanje ovog uslova izveo iz činjenice da su bračni parovi *Studley* i *Goldstein* posedovali po 125 akcija društva, pri čemu je svako od njih zauzimao jednu od četiri značajne funkcije u društvu (*James Studley* je bio predsednik kompanije, njegova žena, *Eilleen Studley*, potpredsednik, *Marvin Goldstein* sekretar društva, dok je njegova žena, *Betty Goldstein*, bila blagajnik) i činili su četvoročlani odbor direktora. Videti: *Goldstein v. Studley*, 452 S.W.2d 75, 80 (Mo. 1970).

[36] Jovana Veličković, "Mehanizmi rešavanja sporova između članova privrednog društva u slučaju blokade odlučivanja", *Pravo i privreda*, br. 4–6, 2016, 235–236.

[37] Više videti: H. Fleischer, S. Schneider, op. cit. 38–40; J. Veličković, op. cit., 240–242.

[38] H. Fleischer, S. Schneider, op. cit., 37.

[39] Više videti: Jason M. Hoberman, "Practical Considerations for Drafting and Utilizing Deadlock Solutions for Non-Corporate Business Entities", *Columbia Business Law Review*, 2001, 233–235, 239–242.

teresu akcionara. Nesporno treba smatrati da je ovaj uslov ispunjen onda kada je društvo pretrpelo ili mu preti nenadoknadiva šteta. Pri tom, ne treba kao osnovni kriterijum uzimati profitabilnost društva, jer nenadoknadiva šteta može nastupiti i kod onih društava koja ostvaruju dobit.[40] Sud posebnu pažnju treba da obrati na to kakav je uticaj blokade na reputaciju i *goodwill* društva, odnose sa potrošačima, društveni moral, i sl. Takođe, nemogućnost korišćenja imovine društva bi trebalo smatrati nenadoknadivom štetom za društvo. Konačno, prilikom utvrđivanja da li društvu preti nenadoknadiva šteta ne treba se fokusirati samo na trenutno stanje u kome se društvo nalazi, već treba u analizu uključiti i razvoj društva u budućnosti.

Nemogućnost vođenja poslova društva u interesu akcionara je širi koncept od nenadoknadive štete koju je društvo pretrpelo ili će pretrpeti. Zbog oslanjanja na američko rešenje, naš zakonodavac je ovaj osnov vezao za nemogućnost vođenja poslova u interesu akcionara, i pored toga što u srpskom pravu članovi uprave treba da izvršavaju svoje obaveze u interesu društva kao celine. Štaviše, i kod blokade skupštine zakon kao uslov uvodi nemogućnost vođenja poslova u interesu društva. No, bez obzira na prikazanu nedoslednost, ovu odredbu treba shvatiti tako da se njome štite akcionari generalno, a ne samo pojedini akcionari.[41]

Prikazanom uslovu ne treba u praksi pridavati veliki značaj. Akcenat treba staviti na "duboku podelu između članova, trajanje podele, kao i nemogućnost da se podela prevaziđe".[42]

Blokada skupštine i blokada uprave su dva odvojena osnova za iniciranje sudskog postupka. Međutim, u praktičnim konsekvencama često neće biti jednostavno napraviti razliku između njih, jer blokada skupštine najčešće za posledicu ima i blokadu uprave. Kako bi se određena distinkcija ipak napravila, čini se da blokadu skupštine treba prvenstveno vezivati za one situacije kada je uprava pod kontrolom nekog akcionara, odnosno grupe akcionara, iako on sam više ne bi mogao da je imenuje, dok bi kod blokade uprave akcenat bio na potpunom paralisanju rada društva.

Blokada članova. – Kod društava lica zakon ima potpuno drugačije definisane razloge za prestanak. Sud nalaže prestanak društva lica onda kada utvrdi da postoji opravdan razlog. Zakonom je opravdan razlog definisan kao nemogućnost vođenja poslova društva zbog međusobnog neslaganja ortaka, kao i ako iz drugih razloga društvo ne može da nastavi poslovanje u skladu sa zakonom, odnosno osnivačkim aktom. Suštinskim sagledavanjem ovih uslova može se za-

[40] *Mordka v. Mordka Enterprises, Inc*., 143 Ariz. 298, 305 (Ct. App. 1984).

[41] F. A. Gevurtz, op. cit., 468.

[42] J. D. Cox, T. L. Hazen, F. H. O'Neal, op. cit., 382.

ključiti da zakonodavac ovde zapravo govori o postojanju blokade članova, a koja za posledicu ima nemogućnost vođenja poslova. Kod društava lica akcenat je na tome da se utvrdi postojanje loših odnosa između članova, koji se mogu manifestovati u otvorenom neprijateljstvu, neslozi, uzajamnom nepoštovanju, gubitku poverenja, i sl. Kako su za nastanak i opstanak ortačkih i komanditnih društava nužni dobri lični odnosi između ortaka, odnosno komplementara, njihovo narušavanje podriva osnov na kome ova društva počivaju. Zbog toga sudovi prilikom određivanja opsega primene pojma opravdanog razloga za prestanak ne treba da budu primarno fokusirani na posledicu, a to je nemogućnost vođenja poslova, zastupanja i upravljanja društvom. Naprotiv, akcenat u analizi treba da bude na narušenim odnosima i neslaganju članova. U velikom broju slučajeva, posledica će se pretpostaviti. Primera radi, ako ortačko društvo ima dva ortaka, narušeni odnosi između njih gotovo izvesno vode blokadi rada društva.

Rasipanje i umanjivanje imovine društva

Sledeći osnov za nalaganje prestanka društva je rasipanje i umanjivanje imovine društva. On ima potpuno drugačiji smisao u poređenju sa blokadom. Naime, blokada ukazuje na nepremostive prepreke u funkcionisanju društva, dok kod rasipanja imovine društvo verovatno nesmetano funkcioniše, jer nadležni organi donose odluke. Međutim, problem kod ovog osnova je u sadržini odluka koje se donose. Ako se tim odlukama rasipa imovina društva, postoji opravdanje za pokretanje postupka prestanka društva.

Srpsko pozitivno pravo zahteva da se imovina društva rasipa i umanjuje. U američkom pravu se koristi sličan, ali u određenoj meri drugačiji standard, jer se tamo kao uslov zahteva da se imovina društva rasipa ili pogrešno upotrebljava (engl. *waste or misapplication of corporate assets*). Rasipanje imovine po prirodi stvari podrazumeva njeno umanjivanje, te navođenje rasipanja i umanjivanja kao dva kumulativna uslova nema gotovo nikakav praktičan značaj. Umanjivanje imovine samo za sebe ne može predstavljati osnov za prestanak društva, jer smanjivanje imovine može predstavljati uobičajenu posledicu poslovanja jednog društva. Za razliku od toga, pogrešna upotreba imovine društva, koju poznaje američko pravo, može imati samostalan domen primene, premda i ovde treba napomenuti da rasipanje imovine najčešće podrazumeva i njenu pogrešnu upotrebu.

Najznačajniji primeri rasipanja imovine bi bili: plaćanje visokih naknada članovima uprave, isplata ličnih dugovanja članova iz imovine društva, kao i druge situacije u kojima većinski akcionar zloupotrebljava svoju poziciju u društvu za

lično bogaćenje ili bogaćenje njemu bliskih lica.[43] Prema tome, ovaj osnov će se prevashodno koristiti u društvima u kojima postoji dominantan (kontrolni) akcionar, odnosno član. Pozivanje na rasipanje imovine treba sagledavati u kontekstu zaštite manjinskih članova i kao način umanjivanja drugog agencijskog problema.

Protivzakonito, nepošteno i prevarno postupanje

Poslednji osnov za nalaganje prestanka društva je ispunjen onda kada članovi uprave deluju protivzakonito, nepošteno ili prevarno, a protivno interesima članova koji podnose tužbu. Iz sadržine ovog osnova proizlazi da postoje dva uslova za njegovu primenu. Prvi uslov se odnosi na to da su članovi uprave delovali protivzakonito, nepošteno ili prevarno. Nomotehnički posmatrano, ovaj uslov je izrazito široko formulisan. Jezička konstrukcija "protivzakonito, nepošteno ili prevarno" omogućava veliku diskreciju u tumačenju. Ona se može shvatiti tako da obuhvata brojne aktivnosti članova uprave, od blagih pa do ekstremnih vidova zloupotreba. Drugi problem ovog uslova se odnosi na činjenicu da on vezuje samo članove uprave. Nema logike da se isto pravilo ne primenjuje i na sva lica koja kontrolišu privredno društvo. Konačno, zakon govori o tome da članovi uprave "deluju" na određen način. Termin "deluju" treba razumeti na tri načina: "su delovali", "deluju" i "će delovati". Vreme vršenja radnji (prošlost, sadašnjost ili budućnost) ne treba da bude od značaja.

Drugi uslov daje potpuno novu perspektivu ovom osnovu za prestanak društva, jer delovanje članova uprave mora biti protivno interesima članova koji podnose tužbu. Na prvi pogled ovaj uslov je bio nepotreban, jer se može razmišljati u pravcu da protivzakonito, nepošteno ili prevarno ponašanje kao takvo zaslužuje da bude sankcionisano, bez potrebe da se dokazuje da je ono bilo upereno protiv interesa tužilaca. Međutim, čini se da ovaj uslov ima smisla i treba ga shvatati na sledeći način: prestanak društva se može tražiti onda kada članovi uprave ili većinski akcionari (članovi) svojim delovanjem (nezakonitim, nepoštenim ili prevarnim) ugnjetavaju manjinu u društvu.

Koncept ugnjetavanja manjine (engl. *oppression*) je veoma razvijen u anglosaksonskoj sudskoj praksi. On je nastao iz fiducijarnih dužnosti koje većinski članovi imaju prema manjinskim članovima.[44] Sudovi su godinama razvijali različi-

[43] H. J. Haynsworth, op. cit., 35.

[44] Više o pojačanim fiducijarnim dužnostima većinskih članova prema manjinskim članovima kod zatvorenih društava kapitala videti: A. R. Pinto, D. M. Branson, op. cit., 287–292.

te standarde.[45] Tradicionalno se ugnjetavanje manjine vezivalo za dokaz ozbiljnih zloupotreba lica koje ima kontrolu u društvu. Akcenat je bio na samim radnjama lica koja imaju kontrolu, a ne na uticaju tih radnji na manjinske akcionare.[46] Ovaj pristup je zagovarao suzdržanost sudova u pogledu nalaganja likvidacije, a mera prestanka je posmatrana kao svojevrsna kazna za radnje ekstremnih zloupotreba.[47] Vremenom se ovaj stav menjao, te se klatno sve više pomeralo ka uticaju radnji većinskog akcionara na manjinske akcionare. Tako se razvio tzv. *standard razumnih očekivanja manjinskih akcionara* (članova), koji i danas dominira.[48] Prema ovom standardu, ugnjetavanje postoji onda kada većinski član svojim radnjama osujeti razumna očekivanja manjinskih članova. Očekivanja članova u velikoj meri zavise od toga da li je reč o otvorenim ili zatvorenim društvima. Akcionari u otvorenim akcionarskim društvima su uobičajeno pasivni investitori, prevashodno zainteresovani za ostvarivanje dobiti od svoje investicije, i to preko dividendi ili prodaje akcija po višoj ceni.[49] Suprotno tome, članovi zatvorenih društava najčešće imaju drugačija očekivanja. Oni, po pravilu, žele da učestvuju u upravljanju društvom, bez obzira da li u svojstvu direktora ili zaposlenog, i da po tom osnovu ostvaruju permanentnu zaradu.[50] Prema tome, članovi zatvorenih društava imaju dvostruku ulogu – pored svojstva člana, oni vrše i funkciju direktora ili zaposlenog.[51] Razumna očekivanja ovih lica se najčešće vezuju za zaposlenje ili mesto u upravi, ali time spisak mogućih očekivanja nije iscrpljen.[52] Veza člana sa društvom je intenzivnija, a najčešće se zasniva na dubokim vezama sa drugim članovima. Upravo kada se ti odnosi naruše, u društvu nastupaju problemi, jer lice koje ima kontrolno kapital učešće može da iskoristi svoju glasačku do-

[45] Ovaj osnov za prestanak se pokazao kao "najplodniji osnov za kreativno pravništvo". Stephen M. Bainbridge, *Corporation Law and Economics*, Foundation Press, New York, 2002, 826.

[46] Robert W. Hillman, "The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations", *Minnesota Law Review*, Vol. 67, No. 1, 1982, 49.

[47] *Ibidem*.

[48] Nastanak i evolucija ovog standarda smatra se jednim od najznačajnijih vidova razvoja američke sudske prakse poslednjih decenija. A. R. Pinto, D. M. Branson, op. cit., 296.

[49] Linda L. Shapiro, "Involuntary Dissolution of Close Corporations for Mistreatment of Minority Shareholders", *Washington University Law Quarterly*, No. 60, 1982, 1139.

[50] F. Hodge O'Neal, "Close Corporations: Existing Legislation and Recommended Reform", *Business Lawyer (ABA)*, Vol. 33, No. 2, 1978, 884. Uporediti: Allen B. Afterman, "Statutory Protection for Oppressed Minority Shareholders: A Model for Reform", *Virginia Law Review*, No. 55, 1969, 1064.

[51] H. Fleischer, op. cit., 681.

[52] F. A. Gevurtz, op. cit., 474.

minaciju, tako što će manjinske članove isključiti iz upravljanja društvom i/ili im dati otkaz ugovora o radu.[53] Otuda, primena principa većinskog odlučivanja, klasičnog i uobičajenog u kompanijskom pravu, može voditi osujećenju razumnih očekivanja manjinskih članova.[54]

Prvi značajan slučaj, koji je uticao na primenu ovog koncepta, bio je engleski slučaj *Ebrahimi v. Westbourne Galleries Ltd.*[55] Pred Dom lordova se postavilo pitanje da li odluka većine o razrešenju jednog direktora, koji je u isto vreme bio i manjinski član, može dovesti do pokretanja postupka likvidacije. Dom lordova je pošao od toga da društvo ima svoj pravni subjektivitet, ali da to ne znači da ne postoji prostor za uključivanje u analizu i odnosa između članova. Ti odnosi se često sastoje i u opravdanim očekivanjima članova, koji ne moraju nužno proizlaziti iz opštih akata društva. Sud je zaključio da može biti pravično pokretanje postupka prestanka društva, ako članovi ne poštuju obaveze koje su preuzeli prema drugim članovima, bez obzira što one nisu sadržane u aktima društva.

Najrazvijeniju praksu primene instituta sudskog prestanka društva zbog ugnjetavanja manjine su razvili američki sudovi.[56] U pogledu promocije ovog standarda, najveći uticaj je izvršio slučaj *Kemp* & *Beatley, Inc.* iz 1984. godine.[57] Dva lica, *Dissin* i *Gardstein*, su bili akcionari i zaposleni zatvorenog akcionarskog društva *Kemp* & *Beatley*. Nakon određenih promena u društvu sa kojima se nisu slagali, *Dissin* je dao otkaz, a *Gardstein* je dobio otkaz. Društvo je posle ovih događaja nastavilo sa praksom da članovima ne plaća dividende. Međutim, u isto vreme je promenjena politika davanja bonusa, tako da ona više nije vezana za vlasništvo, već za efekte rada u društvu. *Dissin* i *Gardstein* su podneli zahtev za prestanak društva, pozivajući se na radnju ugnjetavanja. Prestankom zaposlenja oni su izgubili pravo na zaradu, a kako im se nije isplaćivala ni dividenda, njihove akcije su postale bezvredne. Društvo je u postupku isticalo da ono nikada nije isplaćivalo dividende svojim akcionarima. Društvo je zaposlenima plaćalo specifičnu kategoriju bonusa, a kako *Dissin* i *Gardstein* više nisu zaposleni, nisu ni imali pravo na bonuse. Sud je u ovom slučaju naložio prestanak društva, sa obrazloženjem da je bilo razumno da *Dissin* i *Gardstein* očekuju od akcionarskog društva da im

[53] U teoriji se smatra da je prikazan "problem zatvorenih društava" univerzalnog karaktera. Više videti: S. K. Miller, op. cit., 383–392.

[54] F. H. O'Neal, op. cit., 884.

[55] *Ebrahimi v. Westbourne Galleries Ltd*. and Others (on Appeal from In Re Westbourne Galleries Ltd), HL 3 May 1972.

[56] Delaver je izuzetak, jer se u ovoj državi prestanak društva može tražiti samo zbog postojanja blokade. Videti: F. A. Gevurtz, op. cit., 471.

[57] *Matter of Kemp* & *Beatley, Inc*., 484 N.Y.S.2d 799, 473 N.E.2d 1173 (N.Y. 1984).

plaća zaradu (sa bonusima) kao zaposlenima ili dividendu kao akcionarima. Konačno, sud je zaključio da u slučaju da manjinski akcionari imaju nerazumna očekivanja ili su dobili otkaz iz opravdanog razloga ili ako su postupali u lošoj veri, neće se smatrati da ima elemenata ugnjetavanja.

U slučaju *Meiselman v. Meiselman*,[58] Vrhovni sud Severne Karoline je zaključio da koncept razumnih očekivanja podrazumeva prethodno ispitivanje istorije odnosa između članova zatvorenog društva. Cilj tog ispitivanja je da se utvrde kakva su to razumna očekivanja nastala između tih lica, kao i da li su se ona vremenom menjala. Sud je posebno istakao da očekivanja učesnika poduhvata moraju biti poznata drugim učesnicima. Mogu se prihvatiti samo ona očekivanja koja su bila sadržana u izričitom ili prećutnom dogovoru članova. Prema tome, nije dovoljno postojanje nade jednog lica u momentu kada je odlučio da investira u određeno društvo. Bitno je da je ta nada bila razumna, da je bila odlučujuća za investiranje i da je bila poznata drugim učesnicima zajedničkog poduhvata.[59] Iz svega navedenog, sud je zaključio da tužilac treba da dokaže sledeće: 1) da je on imao jedno ili više razumnih očekivanja, koja su bila ili su morala biti poznata drugim učesnicima, 2) da su ta očekivanja bila izneverena, 3) da su očekivanja izneverena bez krivice tužioca ili su u značajnoj meri bila van njegove kontrole, i 4) da, imajući u vidu sve okolnosti slučaja, tužilac ima pravo na zaštitu.

Zatvorena društva nastaju ispunjavanjem formalnih zakonskih uslova. Međutim, nesporna je činjenica da kod ovih društava značajnu ulogu igraju i lični odnosi i dogovori između članova, iz kojih proizlaze i brojna opravdana i razumna očekivanja članova. Značajan deo tih dogovora često nije sadržan u aktima društva.[60] Štaviše, interni akti društva reprodukuju samo deo dogovora članova, dok je ostatak sadržan u njihovim, često usmenim sporazumima i obećanjima.[61] Članovi društvo osnivaju imajući u vidu celinu svojih dogovora. Upravo zbog neophodnosti postojanja prethodnog dogovora, gotovo je nerealna primena koncepta razumnih očekivanja kod velikih društava sa većim brojem članova.[62]

Svi prikazani slučajevi pokazuju da su sudovi skloni da uzimaju u obzir i lične odnose i postignute sporazume između članova prilikom odlučivanja o pre-

[58] *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983). U ovom slučaju, spor je nastao između dva brata, pri čemu je jedan imao većinsku kontrolu, dok je drugi bio manjinski član. Nakon što je kontrolni član dao otkaz svom bratu, pokrenut je postupak za prestanak društva.

[59] F. A. Gevurtz, op. cit., 472.

[60] "Ono što ovaj princip prepoznaje je da ukupnost sporazuma... između članova ne mora biti sadržana u osnivačkom aktu." P. L. Davies, op. cit., 692.

[61] F. H. O'Neal, op. cit., 886.

[62] P. L. Davies, op. cit., 693.

stanku. Kad god većinski član svojim radnjama osujeti razumna očekivanja manjinskih članova, bez obzira što je to učinjeno u okviru nadležnosti određenog organa i što ta očekivanja nisu sadržana u aktima društva, postoji mogućnost da sud sagledavanjem svih okolnosti slučaja naloži pokretanje likvidacionog postupka.[63] Prema tome, akti društva nisu i ne smeju biti jedini izvor razumnih očekivanja članova.[64]

Koncept razumnih očekivanja je promenljivog karaktera. Kada sud odlučuje o očekivanjima manjinskih članova, treba da uzme u obzir istoriju odnosa između članova, kako bi ustanovio u kojoj meri su se ti odnosi vremenom promenili, a samim tim i razumna očekivanja.[65]

Kada sud odlučuje o predlogu za pokretanje postupka prestanka, ne mora da bude odlučujuća okolnost da je radnja većinskog člana bila nedozvoljena.[66] Primera radi, moguće je da sud naloži prestanak i u slučaju da je manjinski član dobio otkaz iz opravdanog razloga.[67] Međutim, ne treba očekivati da će sudovi olako prelaziti preko dokaza lošeg učinka manjinskog člana, ta da će uvek davati prednost dokazu izneverenih razumnih očekivanja.[68]

Standard razumnih očekivanja je otvorenog karaktera, što znači da raznovrsna očekivanja mogu da se ističu i uzmu u obzir od strane suda. No, činjenica je da će najčešće očekivanje članova biti vezano za članstvo u odboru direktora.[69] Ovaj standard ne treba shvatiti kao dozvolu sudiji da nameće društvu bilo koje rešenje koje smatra pravičnim, već samo ona pravila koja su bila predmet prethodnog dogovora između članova.[70] U svakom slučaju, očekivanje mora biti objektivno razumno, imajući u vidu okolnosti slučaja, mora biti poznato ili da je moralo biti poznato većinskom članu i mora biti odlučujuće za odluku člana da investira u društvo.[71] Razumno očekivanje je znatno više od običnog razočarenja, jer

[63] Sličan zaključak je još davne 1951. godine zauzeo Vrhovni sud Viktorije u Australiji u slučaju *In re Wondoflex Textiles Pty. Ltd.* [1951] Vict. L.R. 458.

[64] Uporediti: A. B. Afterman, op. cit., 1965.

[65] A. B. Afterman, op. cit., 1964.

[66] Tužilac ne mora da dokazuje da je prekršeno neko pravno pravilo. Evanghelos Perakis, "Rights of Minority Shareholders – General Report", *Rights of Minority Shareholders* (ed. Evanghelos Perakis), Bruxelles, 2004, 44.

[67] F. A. Gevurtz, op. cit., 474.

[68] Više videti: J. D. Cox, T. L. Hazen, F. H. O'Neal, op. cit., 385–386.

[69] P. L. Davies, op. cit., 693.

[70] P. L. Davies, op. cit., 694.

[71] S. M. Bainbridge, op. cit., 826.

podrazumeva postojanje radnji većinskog člana kojima se obesmišljavaju razlozi manjinskog člana za uključivanje u zajednički poduhvat.[72]

ZAKLJUČAK

Najznačajniji razlozi za prestanak privrednog društva odlukom suda su blokada rada organa u društvu i ugnjetavanje manjine. Blokada će najčešće biti osnov za prestanak onda kada je paralisan rad organa unutar društva, tj. kada društvo ne može više da vodi poslove. Drugi značajan razlog za prestanak se vezuje za zaštitu manjinskih članova. Zapravo, kod ovog osnova sud štiti razumna očekivanja manjinskih članova, te sankcioniše radnje većinskog člana koji ta očekivanja osujeti. Ovaj rad je pokazao da su ovi standardi fluidni i da u praksi mogu biti interpretirani na različite načine. Srbija se u ovom trenutku nalazi tek na samom početku razvoja ovog instituta, iako ga zakonodavstvo poznaje više od 15 godina. Zbog toga proučavanje primene ovog prava članova u uporednoj sudskoj praksi može predstavljati značajan putokaz i za domaće sudove kako da razumeju uopštene zakonske konstrukcije.

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INVOLUNTARY DISSOLUTION FOR DEADLOCK AND OPPRESSION

Summary

Serbian company law recognizes the right of shareholders to seek judicial dissolution of the company. In this article, the author analyzes material conditions for ordering dissolution, with a special emphasis on deadlock and oppression. There are at least three reasons why this topic is very important for Serbia. Firstly, judicial cases involving dissolution request by shareholders are more often, and unfortunately at this point there are many open questions still not resolved in practice. Secondly, in domestic literature this right is almost exclusively associated with shareholders' minority rights, and that is only partially correct. Thirdly, legal norms dealing with this right are very imprecise and broadly formulated, and therefore can be interpreted in different ways. This article tries to clarify the essence of each reason for judicial dissolution of a company requested by shareholders, particularly by using experiences in comparative judicial practice.

Key words: dissolution, corporation, minority shareholder, deadlock, oppression, reasonable expectation

[72] *Ibidem.*

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GORDANA ILIĆ-POPOV

PRIKAZ MONOGRAFIJE

Dejan Popović, UNIFIKACIJA PORESKOG PRAVA U PRVOJ JUGOSLOVENSKOJ DRŽAVI, Pravni fakultet Univerziteta u Beogradu, Beograd 2020.

Početkom 2020. godine iz štampe je izašla monografija Dejana Popovića, redovnog profesora Pravnog fakulteta Univerziteta u Beogradu, pod naslovom *“Unifikacija poreskog prava u prvoj jugoslovenskoj državi”*. U predgovoru Popović ističe da se ne radi o knjizi o javnim finansijama u Kraljevini Srba, Hrvata i Slovenaca (*u daljem tekstu:* Kraljevina SHS), odnosno Kraljevini Jugoslaviji, već da je u njoj data analiza procesa stvaranja jedinstvenog poreskog prava (i materijalnog i procesnog), kojim se prevazilazi dotadašnji, nasleđeni pravni partikularizam. Naime, glavni izazov pri stvaranju nove države je bio da se izvrši unifikacija pravnog sistema Kraljevine SHS. Autor je inspiraciju i podsticaj za pisanje ovog poreskog istoriografskog dela našao prilikom istraživanja arhivske građe za svoj rad, predstavljen na naučnom skupu “Sto godina od ujedinjenja – formiranje države i prava”, koji je održan na Pravnom fakultetu Univerziteta u Beogradu krajem 2018. godine.

Stvaranje prve jugoslovenske države ujedinjenjem teritorija ukazivalo je na potrebu da se prevaziđu razlike u zatečenih šest poreskih sistema. Opšte političke i ekonomske prilike u Kraljevini SHS, odnosno Kraljevini Jugoslavije imale su

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vrlo veliki uticaj na tokove unifikacije prava. Međutim, slično kao što se to decenijama kasnije postavilo kao nužno u okvirima Evropske unije, tako je i u prvoj jugoslovenskoj državi jedinstveno unutrašnje tržište nalagalo da se, pre svega, što više ujednače posredni porezi (trošarine i fiskalni monopol). Unifikacija neposrednih poreza je mnogo sporije napredovala, jer su se brojna poreskopravna pitanja često preplitala sa političkim pitanjima, što je još više otežavalo taj proces. Ali, jedinstvena država je pretpostavljala i jedinstveni poreski sistem, pri čemu je moralo da se vodi računa o uravnoteženju dva suprotstavljena zahteva – efikasnosti i administrativnoj jednostavnosti. S jedne strane, postojala je potreba za finansijskim sredstvima za pokriće rashoda budžeta, a da pri tome efekti na privredni razvoj, kao i na poreske obveznike budu što manje nepovoljni. S druge strane, pojedini delovi države su bili vrlo nerazvijeni u svakom pogledu, uključujući i administrativni aparat, pa mnoga rešenja do kojih se dolazilo tokom poreske reforme nisu mogla da budu sprovedena.

Popović se, dakle, u ovoj monografiji bavi detaljnom analizom zatečenog i novonastalog stanja u prvoj jugoslovenskoj državi u oblastima posrednih poreza, neposrednih poreza, taksi i dobiti državnih monopola. Sem toga, predmet njegovog istraživanja je i procesnopravna dimenzija poreskog prava toga perioda. Svoju analizu bazira prevashodno na poreskopravnom pristupu, uz primenu normativnog, istorijskog, sociološkog i komparativnog metoda.

Razumevanje procesa unifikacije poreskog prava u prvoj jugoslovenskoj državi koji je Dejan Popović prikazao u monografiji može da pomogne da se bolje sagleda dalji razvoj ove naučne discipline, koja se vremenom diferencirala od nauke o (javnim) finansijama. Monografija ima 263 stranica teksta, sa blizu 1.000 fusnota, i podeljena je, uz Uvod i Zaključak, na 9 glava.

U prvoj glavi autor prikazuje na koji je način bio uređen poreski sistem u prve dve godine postojanja Kraljevine SHS, odnosno u vreme provizorijuma, te kakva je bila uloga Privremenog narodnog predstavništva, kao privremenog zakonodavnog organa u tom periodu, kao i koje mesto je imao godišnji Finansijski zakon u tadašnjem budžetskom i poreskom pravu. U vreme provizorijuma ustanovljena su dva neposredna poreza koja su se primenjivala na celoj teritoriji novonastale države – porez na ratne dobitke i invalidski porez. Popovićev zaključak je da je u vreme državnog provizorijuma subjektivno budžetsko pravo zakonodavne vlasti bilo vrlo često izlagano provizornim rešenjima koja su ga negirala, ali su te mere bile smatrane nužnim za obezbeđivanje funkcionisanja državnog aparata.

Druga glava analizira neposredne poreze, mada, da ponovimo, u prvim godinama postojanja Kraljevine SHS ujednačavanje prava neposrednih poreza nije bilo prioritet. Autor najpre ukratko prikazuje osnovne karakteristike zakona o ne-

posrednim porezima zatečenih na teritoriji novonastale države. Počev od 1. juna 1921. godine na teritoriji Kraljevine SHS funkcionisala su četiri sistema neposrednih poreza, i to: austrijski, mađarski, osmanski (reformisani) sistem, kao i srpski sistem neposrednih poreza. Popović u analizu uvodi i crnogorski sistem (brzo zamenjen srpskim), kojeg su obeležavala samo dva poreza – dacija i porez na prinos od kapitala i rada. Upoređujući karakteristike postojećih sistema neposrednih poreza, on zaključuje da razlike nisu postojale samo između poreskih sistema, već i između istovrsnih poreskih oblika, pre svega u pogledu poreskih stopa i poreskih oslobođenja, ali i načina uređivanja poreske osnovice.

Vidovdanskim ustavom iz 1921. godine označen je kraj državno-pravnog provizorijuma, ali su narednih više od sedam godina nastavila da se primenjuju četiri zatečena poreskopravna sistema koja su uređivala neposredne poreze. Postepeno se išlo putem ka unifikaciji, tako da su uvedene nove dažbine koje su imale obeležja neposrednih poreza, a koje su važile na celokupnoj teritoriji Kraljevine SHS. To su bili: vanredni prirez, vojnica, porez na prinadležnosti državnih činovnika, oficira i ostalih službenika i komorski prirez na već postojeći invalidski porez.

U nastavku svojih izlaganja, Popović se detaljno bavio reformom neposrednih poreza, ističući nekoliko razloga koji su stvorili potrebu da se ona preduzme: politički (različiti poreski sistemi su stvarali međusobnu surevnjivost pojedinih pokrajina); fiskalni (neposredni porezi su donosili vrlo male prihode budžetu); administrativni (postojeći zakoni su bili neodređeni i nejasni, što je značajno otežavalo rad poreskom administrativnom aparatu) i, prema Popovićevom mišljenju, ustavnopravni, pošto je važeći Ustav propisivao da su sve državne dažbine jednake za celu zemlju.

U okviru ove glave posebna pažnja je posvećena Zakonu o neposrednim porezima iz 1928. godine, kojim je proglašeno da se u Kraljevini SHS, kao prihod centralne države, ustanovljava neposredni porez u šest poreskih oblika – porez na prihod od zemljišta (zemljarina), porez na prihod od zgrada (kućarina), porez na prihod od preduzeća, radnji i samostalnog zanimanja (tečevina), porez na rente, porez na dobitak preduzeća obvezanih na javno polaganje računa (društveni porez) i porez od nesamostalnog rada i zanimanja (službenički porez). Popović prvo predstavlja različite projekte reforme neposrednih poreza u periodu 1922–1927. godine i zaključuje da se unifikovani sistem neposrednih poreza Kraljevine SHS, kasnije Kraljevine Jugoslavije, uređen novim Zakonom, može kvalifikovati kao cedularni, a da je Zakon o neposrednim porezima verovatno bio uopšte najznačajniji rezultat koji je bio postignut u postupku izjednačenja zakona predviđenim Vidovdanskim ustavom.

Predmet treće glave su posredni porezi, pri čemu autor ponovo naglašava da bez unifikacije zakona kojima se uređuje ta oblast oporezivanja ne bi moglo da nastane jedinstveno tržište na području novostvorene države. On se bavi carinama, ukazujući da je jedinstveno carinsko područje podrazumevalo primenu carinskih propisa Kraljevine Srbije na celoj teritoriji Kraljevine SHS (Carinskog zakona iz 1899. godine i Zakona o opštoj carinskoj tarifi iz 1904. godine, kao i trgovinskih ugovora koje je Kraljevina Srbija svojevremeno zaključivala sa drugim državama). Takođe, vrlo značajnu ulogu u oblasti posrednih poreza imaju trošarine. Fiskalni interes je, svakako, imao jednu od ključnih uloga u ubrzavanju procesa uređivanja sistema oporezivanja potrošnje. Prvi korak ka unifikaciji trošarina učinjen je donošenjem Finansijskog zakona za 1920/1921. godinu, kojim su uvedene trošarine na šećer, kafu, pirinač, ulje za jelo, pivo, fina vina, liker, rum, sveće, električno osvetljenje, plin za osvetljenje, špiritus, karbid, presovan kvasac i dr. Akcizni propisi su kasnije relativno često menjani (na primer, ukinuta je trošarina na karbid koji upotrebljavaju ribari u ribolovu; bile su ozbiljne rasprave i neslaganja između proizvođača šećerne repe i fabrikanata šećera povodom oporezivanja šećera trošarinom, koji je bio najizdašniji trošarinski predmet oporezivanja; itd.).

U četvrtoj glavi se govori o taksama, koje su predstavljale značajnu vrstu javnih prihoda u prvoj jugoslovenskoj državi, što autor objašnjava sa dva glavna razlog. Prvo, takse su se plaćale za veliki broj radnji i postupaka organa države i jedinica lokalne samouprave i, drugo, neke javne dažbine su nosile naziv "taksa", iako po svojoj ekonomskoj prirodi to, zapravo, nisu bile (već se iza tog naziva krio neki porez ili carina). Postepeno se vršilo izjednačenje taksenih zakona, ali Popović ističe da je bilo vrlo teško "snalaženje u šumi taksenih propisa". Upravo ta nepreglednost taksenog zakonodavstva primorala je nosioce poreske (taksene) politike da sudske takse urede posebnim zakonom, uviđajući njihov poseban značaj za funkcionisanje sudskog sistema države.

Dobit fiskalnih (državnih) monopola predstavljala je, takođe, jedan od vrlo važnih fiskaliteta u prvoj jugoslovenskoj državi i njima se autor bavi u petoj glavi. Državni monopoli su bili uvedeni na uvoz i proizvodnju duvana i soli, a svojevremeno i šibica, cigar-papira, petroleuma. Nekada najizdašniji monopolski predmeti (duvanski proizvodi i so za ishranu) posle Drugog svetskog rata su bili podvrgnuti najpre višoj stopi poreza na promet u maloprodaji, a kasnije akcizama kao zasebnom poreskom obliku. Danas, u pozitivnom srpskom pravu postoji samo jedan oblik fiskalnog monopola, koji se vezuje za priređivanje klasičnih igara na sreću (loto, lutrija, sportska prognoza, bingo i sl.) koje može da se ostvaruje samo putem Državne lutrije Srbije, čime joj se faktički daje fiskalni monopol, jer 30%,

odnosno 54% sredstava od bruto uplate igrača predstavlja budžetski prihod, odnosno naknadu za priređivanje tih igara na sreću.

Predmet istraživanja u šestoj glavi je način na koji je bio uređen poreski postupak u Kraljevini SHS. Poreski postupak uključuje utvrđivanje, naplatu i kontrolu poreza. U momentu nastanka Kraljevine SHS poreski postupak je bio uređen postojećim materijalnim zakonima. Popović detaljno prikazuje na koji način su se utvrđivali postojeći neposredni porezi u delovima Kraljevine SHS, u kojima se primenjivalo austrijsko poresko pravo (Slovenija i Dalmacija), mađarsko poresko pravo (Hrvatska i Slavonija, Međumurje, Prekomurje /ubrzo prebačeno u režim za Sloveniju/, Banat, Bačka i Baranja) i reformisani osmanski sistem neposrednih poreza (Bosna i Hercegovina), dok je u Srbiji (sa Crnom Gorom) primenjivan poreski postupak uređen Zakonom o neposrednom porezu iz 1884. godine. U oblasti posrednih poreza unifikacija procesnopravnih odredbi sprovedena je brzo. U tom smislu, za trošarine je poreski postupak za celokupnu teritoriju Kraljevine SHS bio uređen srpskim Zakonom o državnoj trošarini iz 1909. godine, a jedinstven postupak za taj porez obezbeđivan je i kasnijim zakonima o trošarinama. Kada su u pitanju neposredni porezi, sveobuhvatno izjednačenje poreskog postupka sprovedeno je Zakonom o neposrednim porezima iz 1928. godine. Taj zakon je predviđao dva načina utvrđivanja tadašnjih poreza – "zadržavanjem" i "po rasporedu", koje autor povezuje sa utvrđivanjem poreza u savremenom srpskom poreskom sistemu – po odbitku i rešenjem Poreske uprave. On, takođe, ukazuje da je ondašnjim zakonom bila predviđena institucija potkazivača, kojem je pripadala nagrada u iznosu od 25% naplaćene kazne za poresku utaju, ali se iz autorovog izlaganja ne bi moglo zaključiti da se zalaže za njeno uvođenje u savremeno srpsko poresko zakonodavstvo.

Ukazujući na, kako ih Popović naziva, populističke mere u tadašnjem poreskom sistemu, on čitaocima skreće pažnju na to da je država oduvek pribegavala takvim ili sličnim merama, kako bi pridobila potencijalne birače, bez obzira na gubitak poreskih prihoda zbog tolerisanja neurednog plaćanja ili neplaćanja poreza. Na osnovu svojih istraživanja, zaključuje da su se mere oprosta poreskih dugovanja ili odobravanja obročnih plaćanja (plaćanja u ratama) ili odgađanja plaćanja davala i sa ciljem da se pruži legitimna pomoć ili poreska pogodnost određenim socijalnim slojevima, naročito u periodima recesije ili depresije. Kako autor navodi, takva (šira) praksa je u Republici Srbiji nastavljena i danas, vek kasnije, sa namerom da se poreski obveznici motivišu da urednije ispunjavaju svoje poreske obaveze. Njegov zaključak je da i onda i sada te mere, ipak, nisu doprinele poboljšanju finansijske discipline, nego da su ih obveznici koristili da izbegnu

prinudnu naplatu, odnosno da nastave sa praksom neurednog plaćanja ili neplaćanja poreza.

U sedmoj glavi govori se o nagoveštaju kraja unifikovanog poreskog prava u prvoj jugoslovenskoj državi. Istraživanje unifikacije poreskog prava u prvoj jugoslovenskoj državi završava se stvaranjem Banovine Hrvatske Uredbom iz 1939. godine, na koju su, u postupku devolucije, prenete brojne državne nadležnosti, uključujući i pravo da donosi sopstvene zakone koji uređuju neposredne poreze.

Osma glava posvećena je tzv. samoupravnim finansijama. Popović određuje harmonizaciju prava samoupravnih finansija kao "postupak kojim se postiže usklađena koegzistencija više pravnih instrumenata, odnosno podzakonskih akata nižih političko-teritorijalnih jedinica, nazvanih samoupravna tela." On, dalje, smatra da takva harmonizacija "ne znači da se očekuje *uniformnost* u supcentralnom oporezivanju, već određeni *balans* između zahteva za finansiranjem lokalnih javnih dobara koja se razlikuju između samoupravnih tela i zahteva da se obezbedi jedinstvo unutrašnjeg tržišta." Autor zaključuje da se i danas modeli finansiranja lokalnih nivoa vlasti ne utvrđuju samo na osnovu argumenata ekonomske efikasnosti, već uzimajući u obzir specifičnosti date zemlje (političke, ekonomske, etničke, istorijske osobenosti, tradiciju i dr.).

Na stranicama ove glave monografije autor analizira pokušaje harmonizacije samoupravnih poreza, koja se odvijala tokom celokupnog perioda u kojem je postojala prva jugoslovenska država, zaključujući da se na tom planu najviše postiglo tridesetih godina 20. veka. U Kraljevini SHS, odnosno Kraljevini Jugoslaviji dominirao je sistem poreskog preklapanja, u kojem su supcentralne jedinice imale pravo da uvode prireze na neke, već postojeće poreze. Od sredine tridesetih godina prošlog veka uvedena je zajednica prihoda u odnosu na deo (skupnog) poreza na poslovni promet, a takođe, oblasti (kasnije, banovine), srezovi i opštine su imali vlastite prihode. U knjizi se posebno analizira proces harmonizacije samoupravnih finansija u periodu provizorijuma, tokom važenja Vidovdanskog ustava i u periodu Šestojanuarske diktature, kao i za vreme važenja Ustava iz 1931. godine. Naime, po ukidanju Vidovdanskog ustava ukinute su oblasne i sreske samouprave, te su kao samoupravne vlasti definisani gradski načelnici i opštine. Autor se posebno bavi banovinskim javnopravnim prihodima (prirezi, pristojbe i samostalne dažbine i doprinosi u novcu ili "naravi", tj. naturi) i opštinskim javnopravnim prihodima (prirezi na neposredne državne poreze, opštinske trošarine i opštinske takse). Pažnja je, na kraju, usmerena na samoupravne finansije u Stojadinovićevoj politici izlaska iz depresije. Naglasak je bio na tome da državna finansijska politika treba da se uzdržava od svih poreskih mera, koje bi mogle da ometu obnavljanje privrede, do kojeg je došlo posle perioda duge stagnacije.

Na završnim stranicama osme glave Popović zaključuje da je posleratna jugoslovenska federacija, zapravo, od svojih početaka bila socijalistička federacija, a u pogledu raspodele prihoda, u vremenskom razdoblju od 1945. do 1991. godine, ukazuje na razlikovanje sedam faza, čiji kraći opis daje u knjizi. Njegov zaključak je da je fiskalna pozicija republika bila mnogo značajnija od pozicije banovina, što objašnjava njihovim karakterom federalnih jedinica u složenoj državi, dok su banovine bile upravne i samoupravne jedinice u državi koja je bila unitarna. Federalne jedinice su, sa procesom decentralizacije, posebno posle 1971. godine, imale pun fiskalni suverenitet u oblasti neposrednih poreza i republičkih taksi, koji su bili njihovi izvorni prihodi, kao i nad republičkim porezom na promet proizvoda i usluga, a sa federacijom su učestvovale u zajednici prihoda od osnovnog poreza na promet proizvoda i usluga. Banovine su, međutim, imale ograničeno prirezno pravo i kod neposrednih poreza i kod trošarina.

U poslednjoj, devetoj glavi, analizi je podvrgnut razvoj nauke poreskog prava, kako bi se ustanovio njen uticaj na proces unifikacije poreskog zakonodavstva prve jugoslovenske države. U tom kontekstu, najpre se ukazuje na osnovne pravce razvoja te naučne discipline u Evropi toga perioda, jer su tokom treće decenije 20. veka ustanovljeni temelji savremene nauke poreskog prava. Poresko pravo se izdvojilo iz finansijskog prava, kao što se iz njega dezintegrisalo i budžetsko pravo, odnosno državno računovodstvo. Poresko pravo sadrži norme koje uređuju pravne odnose između države i pravnih i fizičkih lica, koji se tiču utvrđivanja i naplate javnih dažbina. Autor prikazuje dva glavna pristupa u pogledu odnosa između poreskog prava i nauke o finansijama: unitarni pristup, koji pretpostavlja jedinstvo finansijskog akta, koji sadrži politički, ekonomski, pravni i tehničko-operativni element, i unilateralni pristup, prema kojem se mora izvršiti razdvajanje između nauke o finansijama (nauke o porezima) i finansijskog (poreskog) prava, jer oni finansijski akt istražuju primenom različitih metoda (ekonomski, odnosno pravni).

Popović izdvaja radove iz oblasti poreskog prava koji su naučnog karaktera (sistemska dela, monografije, udžbenici) i one koji su stručnog karaktera (komentari poreskih zakona i drugih propisa i sl.), i postavlja pitanje čija je zasluga za unifikaciju poreskog prava bila veća – profesora ili poreskih stručnjaka. Prema njegovom mišljenju, važniju ulogu u uobličavanju poreskog prava su imali "praktičari", koji su u uporednom poreskom pravu nalazili određena rešenja koja su mogla da funkcionišu u heterogenom društvu, kakvo je bilo jugoslovensko.

U svojim zaključnim razmatranjima autor konstatuje da su istraživanja koja je sproveo pokazala da su se u postupcima poreske unifikacije ogledala različita obeležja društvenog i političkog života u prvoj jugoslovenskoj državi. On uka-

zuje da je postojao sukob između, s jedne strane, partikularnih interesa pojedinih socijalnih i etničkih grupa i, s druge strane, društvene elite koja je nastojala da se država modernizuje u svim segmentima i približi ondašnjoj razvijenoj Evropi. Tome je doprinela i poreska reforma koja se sprovodila, a posebno se ističe značaj i uloga ministara finansija koji su bili školovani na zapadnoevropskim univerzitetima (Momčilo Ninčić, Milan Stojadinović i Kosta Kumanudi), koji su pripremali složene poreske propise, sa osloncem na moderna uporednopravna rešenja. Autor ističe da nije teško pronaći slabosti prve jugoslovenske države (koje su se nastavile i u drugoj), ali, isto tako, ne treba apstrahovati i neke pozitivne rezultate, o čemu posebno svedoče periodi određenog prosperiteta koji je ostvaren početkom dvadesetih ili krajem tridesetih godina 20. veka u Kraljevini Jugoslaviji.

Dejan Popović je u ovoj monografiji napravio veoma dobar spoj svog poznavanja i interesovanja za srpsku poresku istoriju i vrsnog poreskog znanja, sticanog decenijama njegovog radnog veka kao prominentnog profesora na predmetu, prvo, Javne finansije i finansijsko pravo, a, potom, Poresko pravo, na Pravnom fakultetu beogradskog univerziteta. Domaće poresko zakonodavstvo je uspešno poredio s onovremenim zakonodavstvima u evropskim državama, a često je rešenja iz poreskih propisa prve jugoslovenske države dovodio u određenu vezu sa savremenim poreskim sistemom u Srbiji. Čitalac može prepoznati očigledan autorov istraživački duh, koji je pretpostavio njegova opsežna istraživanja raznovrsne arhivske građe, neposredan uvid u poreske propise i druga relevantna dokumenta tog vremenskog perioda, objavljenih u *Službenim novinama Kraljevine SHS*, odnosno u *Službenim novinama Kraljevine Jugoslavije*, kao i detaljno pregledanje stenografskih beleški sa sastanaka Narodne skupštine Kraljevine SHS. Sem toga, autor je koristio obimnu literaturu koja obuhvata 160 bibliografskih jedinica na srpskom, engleskom, italijanskom, nemačkom i francuskom jeziku, kao i 35 citiranih finansijskih zakona i propisa o privremenom finansiranju Kraljevine SHS, odnosno Kraljevine Jugoslavije.

Monografija *"Unifikacija poreskog prava u prvoj jugoslovenskoj državi"* čitalačkoj publici, na jasan i relevantnim izvorima potkrepljen način, "otvara prozor" ka srpskoj poreskoj prošlosti i omogućava da bolje sagledaju tokove razvoja poreskog prava na našem prostoru. Ne treba smetnuti s uma da je tokom poslednje decenije 20. veka, posle kolapsa socijalističkog društvenog uređenja, u Srbiji i ostalim državama nastalim iz druge jugoslovenske države indirektno sprovedena recepcija nekih poreskopravnih instituta iz poreskog prava Kraljevine SHS, odnosno Kraljevine Jugoslavije. U 21. veku poreski autori su koncentrisani na aktuelna poreska pitanja iz nacionalnog i međunarodnog poreskog prava, kao i okrenuti ka nalaženju načina da se unaprede postojeća poreska rešenja za buduće

periode. Poreska prošlost, naročito ona dalja, je, po pravilu, zanemarena u domaćoj literaturi. Zbog toga je ne samo naučni, nego i društveni značaj monografije *"Unifikacija poreskog prava u prvoj jugoslovenskoj državi"* autora Dejana Popovića utoliko veći, jer ona ovovremenim poreskim stručnjacima, ali i drugoj zainteresovanoj široj, a ne samo poreskoj, javnosti omogućava da se upoznaju sa srpskom poreskom istorijom i korenima nastanka poreskog prava u prvoj jugoslovenskoj državi.

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA – SLOBODAN PEROVIĆ

UNIVERSITAS IURIS NATURALIS COPAONICI
THIRTY-TWO YEARS OF LIFE AND WORK

Prof. Dr. Jelena S. Perović Vujačić
Chair of the Kopaonik School of Natural Law – Slobodan Perović

Address at the Opening Plenary Session of the 32nd Meeting
of the Kopaonik School
13 December 2019

Esteemed Colleagues,
Members of the large family of the Kopaonik School of Natural Law,
Distinguished guests, gathered under the high arch
of this University of Justice,
Ladies and gentlemen,
Dear friends,

The Kopaonik School of Natural Law was born thirty-two years ago. Over time, it has grown in age and space, steadily gaining in strength and developing the concept of rational natural law. Guided by this very concept, the Kopaonik School of Natural Law has always countered the evils of this world with the beauty of the good and the just – *Honeste vivere, alterum non laedere, sum cuique tribuere* – To live honourably, not to harm another, to render each his own.

The results achieved so far by the Kopaonik School of Natural Law may be grouped around three headings: scientific achievements, publishing activity, bringing domestic and international communities together.

Scientific Achievements

The most important scientific achievements of the School include:

The tripartition theory, which explores the relationship between the natural and the positive law, specifically the exemplary, subsidiary and corrective relationships.

The democratic culture as distinguished from the simulated and vulgar democracy. Professor Slobodan Perović spoke thus about the democratic culture: "In truth, a rule of majority is the first letter of the alphabet of democracy, but if one should look no further than this letter, there would be neither alphabet nor literacy. Such democracy may jeopardise the rights of minority or even turn into its own opposite – a tyranny of majority over minority. A democracy where the majority declares truths and in the name of such truths penalizes all those who think differently should be called a vulgar democracy, a totalitarian democracy or democratic tyranny. Such a democracy has no necessary attributes, other than a rule of majority. Let us remember – Socrates was judged more kindly by history than by the Athenian democracy. A state ruled by law implies a democratic culture where, in addition to the fundamental features of democracy, tolerance and responsibility are the essential attributes of a high level of collective mind".

Speaking of tolerance, the School has created a draft theory of tolerance as a subjective right proclaimed under the constitution and governed by the law. Under the principle of tolerance, no one may place themselves above another and by seizing power turn the pluralism of life into the monism or their own authority;

Furthermore, the School has acknowledged a discord between the proclaimed and non-realised human rights and identified the causes of such discord (extreme poverty, anti-legal states, misuse and politization of human rights) and pointed to possible ways out of the crisis engulfing the concept of human rights;

The School has established a theory of misuse of human rights, which occurs when human rights are put into effect contrary to the purpose of their establishment, with the aim of achieving political, financial or military strategic objectives;

It has applied the categories of commutative and distributive justice in the present-day conditions and set the criteria for distinguishing statutory non-law from the supra-statutory law;

The Kopaonik School of Natural Law has always devoted careful attention to the role and position of courts in the system of the division of power. This has led to the formulation of Twelve Tablets of Judicial Independence. The Tablets proclaim that in dispensing justice, a judge is independent of any kind of power, except the power of the legitimate law. By performing their duty, judges rule on the life and freedoms of men and thus take part in administering justice. There is no higher duty than that. In this way, the School raised its scientific and professional voice against any violence considered as opposition to wisdom and antipode of a state ruled by law and a democratic culture.

The Kopaonik School is "the birthplace of the Preliminary Draft Civil Code" and the first important steps towards drafting this Code were taken at the Kopao-

nik School of Natural Law. Academician Professor Dr. Slobodan Perović was Chair of the Commission for drafting the Civil Code of Serbia. In that regard, Professor Perović said: "As Founder and Chair of the Kopaonik School of Natural Law, I have been given the scientific honour to address to the Government an official proposal to set up a Commission for drafting the Civil Code of Serbia, delineating the main reasons and the need to adopt such Code. The proposal also identifies possible members of the Commission". The Serbian Government accepted the proposal in full and in 2006 set up a Commission for drafting the Civil Code of Serbia. Given the topicality and importance of this codification, the Preliminary Draft Civil Code was regularly discussed at the School's sessions.

Preliminary Draft Civil Code of Serbia was drawn up in the days of Professor Slobodan Perović, published and submitted for public debate. This work, produced before departure of Professor Perović, remains recorded and documented and available to the widest public. The publication of this work allows for drawing a clear line between the Preliminary Draft Civil Code written during the lifetime of Professor Slobodan Perović and anything produced following his demise.

Speaking of the fate of the Preliminary Draft, I would like to use the words of Professor Perović: "Large codifications in the realm of civil law may never cease to live. In time, through use of state authorities, they may become void of legal power but never void of power of life and scientific universe". I believe these words apply fully to the Preliminary Draft Civil Code.

A particular reflection of the School's scientific achievements is the Hexagon of Natural Rights, which grouped all legal and social disciplines round six pillars of universal civilisation (Life, Freedom, Property, Intellectual Creation, Justice, State Ruled by Law). It was in 1994 that Academician Professor Slobodan Perović, as Founder and Chair of the Kopaonik School of Natural Law, established this scientific Hexagon which is essentially an expression of the integrity of natural rights.

Publishing Activity

The publishing activity of the School is well worth mentioning. First of all, it includes publication of the papers received in response to the call for paper submission for each December meeting, addressing the general theme selected for the particular year. In the course of thirty-two years, almost 8.000 papers have been published across six chairs and 23 sections, comprising over 135 volumes.

Special mention must be made of the Final Documents, reflecting the annual messages and conclusions from the Kopaonik Meetings, as well as Bibliography of Kopaonik School of Natural Law papers.

Speaking of the School's publishing activity, the Declaration of the Kopaonik School of Natural Law (2002) stands out as a major work, a synthesis of the School's past work and a pointer for its future. Academician Professor Slobodan Perović, as Founder and Chair of the Kopaonik School of Natural Law, submitted a draft Declaration at the Closing Plenary Session in 2002, when the Declaration was adopted without entering any changes to the Draft. The Declaration was printed in one volume in six languages: English, French, German, Spanish, Russian and Chinese.

And now, allow me the pleasure of making a very special announcement. The publishing activity of the Kopaonik School of Natural Law – Slobodan Perović has since December 2019 been enlarged by a scientific journal – a *Review of the Kopaonik School of Natural Law*. As a new and independent journal of the Kopaonik School, the *Review* comes out biannually and features scientific articles, comparative studies, analyses of court judgements and arbitral awards, legal commentaries, book reviews and other scientific papers by distinguished authors.

Presenting the legal community with this journal, the Kopaonik School of Natural Law – Slobodan Perović continues to build on the edifice of its printed word, enriching it for another view of the horizon of the law whose purpose it is to serve justice. It is bound to do so by its scientific identity and integrity, and what is more, by the pivotal name of its Founder, Professor Slobodan Perović.

Bringing Legal Communities Together

The third dimension of the Kopaonik School of Natural Law is comprised of bringing together all ranks of legal community, both from the country and abroad. As for international participants, they come from over 40 different countries (Germany, France, the UK, Italy, Austria, the Netherlands, Greece, Poland, Hungary, Romania, Bulgaria, Portugal, Spain, Turkey, Switzerland, the USA, India, Russia, Belarus, China, Brazil, Lebanon, etc).

In considering the work of the School, special attention must be drawn to the fact that the School has been under the moral auspices of UNESCO since 2005 on the grounds that "the projects and publications of the Kopaonik School of Natural Law are of special interest to UNESCO and will certainly contribute to the advancement of human rights and strengthen the international law. Their goals are fully in line with the ongoing human rights process within the United Nations system" (as signed by Koitchiro Matsura, Director-General of UNESCO). UNESCO support to the School is ongoing. It is not only protocolary in character, rather, the School has been described by UNESCO as an important interna-

tional event. On the occasion of the Twentieth Meeting of the School, UNESCO addressed the following words "UNESCO presents wholehearted compliments to Professor Slobodan Perović, Founder of the School of Natural Law, for organizing this event. We consider the Kopaonik School of Natural Law to be our natural ally in the joint efforts to promote fundamental principles of respect for human rights and human dignity" (Pierre Sané, Assistant Director General of UNESCO).

* * *

An understanding of the work of the Kopaonik School of Natural Law leads us to a conclusion that a unique scientific movement has been created under the auspices of the School, a movement based on traditional philosophy of justice and rational concept of the natural law as codified by the United Nations and other peaceful associations and integrations.

This Year's Meeting

Dear colleagues, over 200 scientific and professional papers were submitted for our Meeting this year, and a total of 172 papers were published, arranged in four volumes.

In honour of its Founder, Academician Professor Dr. Slobodan Perović, the Kopaonik School had announced a call for paper competition for "Professor Slobodan Perović" Award, for the best three papers submitted by young participants of the Kopaonik School of Natural Law, addressing the theme of "Law and the Power of Mind – To Honour the Memory of the Founder of the Kopaonik School of Natural Law, Academician Prof. Dr. Slobodan Perović". A large number of young authors responded to the call – young jurists and undergraduate and postgraduate students of law. Having evaluated all submissions, the panel of experts selected three papers offering the best response to the general theme and the requirements of the call for papers. The authors of these papers are the winners of this year's "Professor Slobodan Perović" Award, and the public announcement of the winners and their addresses to the public will follow in a couple of minutes. The Kopaonik School of Natural Law has dedicated a special issue of *Legal Life* journal to the papers for the "Professor Slobodan Perović" Award, featuring the submissions received in response to the call for paper competition.

Tu sum it up, speaking of the Kopaonik School's publishing activity, this year it comprises over 3.500 pages of printed text. In that regard, I wish to thank

you for entrusting me, as Chair of the Kopaonik School and Editor-in-Chief of the special-themed issues of the journal, with editing the volumes before us.

General Conclusion

Dear colleagues, allow me to conclude this address by stating that Freedom is the first letter and the pillar of the Hexagon of the Kopaonik School of Natural Law, the pillar bearing all other natural rights. Reflecting on freedom, professor Slobodan Perović would say: "The song of freedom is not a song if not lived. It is never finished. The only question is how much we may reach out to it with a collective arm, perhaps even grasp it. Those unable to hear the song of freedom will hear the tempest of non-freedom, a desert of anti-law, the crime of the stronger. The Kopaonik School of Natural Law has banished all violence and all aggression against our natural rights to a desert island. Only the power of mind may usher us into the culture of peace and the splendour of justice as the sine qua non of eternal youth of the natural law. And with such youth, the immortal spirit of freedom will never fade".

And thus, freedom is here today, at this University of Natural Law. Freedom is here today with us and within us, it is and shall be. The Kopaonik School of Natural Law will be guided by eternal youth of Freedom and the ideas of its Founder Slobodan Perović.

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA – SLOBODAN PEROVIĆ
33. godina
obaveštava pravničku i drugu naučnu i stručnu javnost da raspisuje

KONKURS

Za prijem i objavljivanje referata povodom 33. Susreta učesnika Kopaoničke škole koji će se održati od 13. do 17. decembra 2020. godine pod stalnim naslovom «Pravda i pravo – Posvećeno osnivaču Kopaoničke škole prirodnog prava akademiku prof. dr Slobodanu Periviću».

Opšta tema ovogodišnjeg skupa je

UNIFIKACIJA PRAVA I PRAVNA SIGURNOST

U okviru opšte teme sami kandidati, shodno Heksagonu Kopaoničke škole prirodnog prava, biraju niže navedene oblasti u kojima mogu konkurisati, označavajući temu po slobodnom izboru. Tako izabrana tema se obrađuje ili sa stanovišta jedne ili više pravnih disciplina.

Prioritet u prihvatanju referata za objavljivanje imaju autori koji su prethodnih godina izlagali svoje radove na susretima Kopaoničke škole. Odluku o prijemu i objavljivanju radova donosi Uređivački odbor Kopaoničke škole.

Radovi koji ispunjavaju predviđene naučne standarde objavljuju se u odgovarajućoj naučnoj publikaciji, a broj objavljenih radova se određuje u zavisnosti od finansijskih mogućnosti.

Uslovi neophodni za uzimanje rada u razmatranje od strane Uređivačkog odbora predviđeni su Uputstvom za autore priloženim uz ovaj Konkurs.

U prijavi koja se podnosi uz rad moraju biti naznačeni **ime i prezime autora, zvanje i zanimanje, potpuna adresa, kontakt telefon i e-mail adresa.**

Krajnji rok za podnošenje rada je 25. septembar 2020. godine. Sa posebnom zahvalnošću primaju se radovi predati i pre krajnjeg roka.

Rad se dostavlja **u elektronskoj formi** na elektronsku adresu Kopaoničke škole prirodnog prava: **office@kopaonickaskola.rs** a prijem rada se može proveriti i kontaktom na elektronsku adresu: jperovic@beotel.rs.

Rad koji ne ispunjava bilo koji od navedenih uslova neće biti uzet u razmatranje.

Oblasti u kojima se može konkurisati čine tradicionalni Heksagon Kopaoničke škole:

I **Pravo na život** (život, zdravlje, ekologija,sport).

II **Pravo na slobodu** (sloboda misli i izražavanja, sloboda ličnosti, sloboda kretanja, sloboda veroispovesti, krivično-pravna i procesna zaštita ličnosti, upravno-pravna zaštita slobode).

III **Pravo na imovinu** (kodifikacije, svojina i druga stvarna prava, svojina i nasleđe, ugovor i odgovornost za štetu, porezi, privredna društva, osiguranje, međunarodne poslovne transakcije, arbitraža, banke i bankarski poslovi, radni odnosi).

IV **Pravo na intelektualnu tvorevinu** (autorsko pravo, pravo industrijske svojine, pravo učestvovanja u kulturnom životu).

V **Pravo na pravdu** (opšta značenja, sud u koneksitetu pravde, nezavisnost sudstva, sudska praksa i uloga suda, međunarodni odnosi i pravda, pravo Evropske unije).

VI **Pravo na pravnu državu** (teorija pravne države, vladavina i nevladavina prava u praksi, ustavno sudstvo)

Učesnici konkursa mogu se obavestiti o rezultatima Konkursa krajem oktobra 2020. godine.

KOPAONIK SCHOOL OF NATURAL LAW – SLOBODAN PEROVIĆ

33 years

is pleased to announce across the legal profession and the general academic and professional community

CALL FOR PAPERS

for the 33rd Meeting of the Kopaonik School, to be held between the 13th and 17th December 2020, addressing the permanent theme of "Justice and Law – Dedicated to the Founder of the Kopaonik School of Natural Law Academician Prof. Dr. Slobodan Perović".

The conference this year will explore the theme of

UNIFICATION OF LAW AND LEGAL CERTAINTY

Within this general theme and in line with The Hexagon of the Kopaonik School of Natural Law, the applicants are invited to choose themselves among the areas listed below, selecting a topic of their own choice. The topic, thus selected, is explored from the aspect of one or several legal disciplines.

Priority in selecting papers for publication will be given to the authors who presented their papers directly at the meetings of the Kopaonik School in the past years. The Editorial Board will decide about the acceptance and publication of papers.

Papers meeting scientific requirements will be featured in the relevant scientific publication and the number of published papers will be determined depending on the financial circumstances.

The paper submission requirements to be met for the Editorial Board to consider the paper are given in the Guidelines for the Authors accompanying this Call for Papers.

The application submitted together with the paper must indicate **the full name of the author, the professional title and occupation, full address, contact telephone and e-mail**.

The closing date for submissions is 25 September 2020. Early submissions will be most gratefully received.

Papers should be submitted **in an electronic form** by e-mail to the Kopaonik School of Natural Law: **office@kopaonickaskola.rs** and inquiries about receipt may be addressed to: jperovic@beotel.rs.

A paper failing to meet any of the given requirements will not be considered.

The areas in which papers are invited form the traditional Hexagon of the Kopaonik School:

I **Right to Life** (Life, Health, Ecology, Sports).

II **Right to Freedom** (Freedom of Thought and Expression, Freedom of Personality, Freedom of Movement, Freedom of Religion, Protection of Personality under Criminal Law and Procedural Law; Protection of Freedom under Administrative Law).

III **Right to Property** (Codification, Property and Other Property Rights, Property and Inheritance, Contract and Tort Liability, Tax, Companies, Insurance, International Business Transactions, Arbitration, Banks and Banking, Labour Relations).

IV **Right to Intellectual Creation** (Copyright, Industrial Property Right, Right to Take Part in Cultural Life).

V **Right to Justice** (General Concept, Court in Connexity with Justice, Independence of Judiciary, Court Practice and Role of Courts, International Relations and Justice, EU Law).

VI **Right to a State Ruled by Law** (Rule of Law in Theory, Rule of Law and Lack of Rule of Law in Practice, Constitutional Courts)

Applicants may inquire about the status of their submissions in late October 2020.

KOPAONIČKA ŠKOLA PRIRODNOG PRAVA – SLOBODAN PEROVIĆ

obaveštava pravničku i drugu naučnu i stručnu javnost da raspisuje

KONKURS

za nagradu "Profesor Slobodan Perović"

Nagrada se dodeljuje za tri najbolja rada mladih učesnika Kopaoničke škole prirodnog prava na temu

UNIFIKACIJA PRAVA I PRAVNA SIGURNOST

Dobitnicima nagrađenih radova biće uručeno pismo počasti (litteras honoris) i omogućeno da svoje radove predstave učesnicima 33. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović. Porodica osnivača Kopaoničke škole prirodnog prava, akademika prof. dr Slobodana Perovića obezbeđuje sredstva za novčani deo nagrade po ovogodišnjem konkursu. Nagradni fond za novčani deo nagrade iznosi 2.250 evra, od čega je 1000 evra namenjeno dobitniku prve nagrade, 750 evra dobitniku druge nagrade i 500 evra dobitniku treće nagrade, sve u dinarskoj protivvrednosti.

Konkurs je otvoren do 25. septembra 2020. godine do 18 časova.

Proglašenje dobitnika i dodela nagrada održaće se u okviru svečane plenarne sednice 33. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović, 13. decembra 2020. godine.

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KOPAONIK SCHOOL OF NATURAL LAW – SLOBODAN PEROVIĆ

is pleased to announce across the legal profession and the general academic and professional community

CALL FOR PAPER COMPETITION

for the "Professor Slobodan Perović" Award

Award is presented for the best three papers submitted by young participants of the Kopaonik School of Natural Law, addressing the theme of

UNIFICATION OF LAW AND LEGAL CERTAINTY

The winners of the Award will receive a *Litteras Honoris* diploma and will be able to present their papers to the participants of the 33rd Meeting of Kopaonik School of Natural Law - Slobodan Perović. The family of the founder of the Kopaonik School of Natural Law, Academician Prof. Dr. Slobodan Perović, will provide the cash prize fund of 2.250 EUR. The winners of the first, second and third prize will receive respectively the cash prize of 1000 EUR, 750 EUR and 500 EUR.

The closing time for submissions is 25 September 2020 at 6 pm.

The winners will be announced and awarded at the opening plenary session of the 33rd Meeting of the Kopaonik School of Natural Law – Slobodan Perović, on the 13th of December 2020.

The competition is open to all participants of the Kopaonik School of Natural Law whose age does not exceed 35, including undergraduate and postgraduate students of law. Papers should be submitted in Serbian or English and follow the length and other requirements as set out in the Guidelines for the Authors accompanying this Call for Paper Competition.

Papers shall be evaluated by a panel of experts composed of:

Chair: Prof. Dr. Jelena S. Perović Vujačić – Chair of the Kopaonik School of Natural Law – Slobodan Perović

Members: Academician Prof. Dr. Rajko Kuzmanović, Chair of the Academy of Sciences and Arts of the Republic of Srpska; Academician Prof. Dr. Vlado Kambovski, the Academy of Sciences and Arts of Macedonia; Academician Prof. Dr. Zoran Rašović, the Academy of Sciences and Arts of Montenegro; Prof. Dr. Gordana Vukadinović, Novi Sad University; Prof. Dr. Nikola Mojović, Law School of Banja Luka University; Prof. Dr. Nataša Delić, Law School of Belgrade University; Ms. Ljubica Tomić, Attorney-at-Law from Belgrade; Dr. Thomas Meyer, GIZ Programme Leader.

Papers should be sent in electronic format, as *Word* files, to **office@kopaonickaskola.rs** and must contain reference "for Professor Slobodan Perović Award" in the subject line. The information about the author (full name, professional title and occupation, full address, contact phone and e-mail, and for students also the number of the university record booklet and year/level of studies) should be provided in a cover letter, and no information about the author should appear in the paper itself, since a special panel shall anonymise all submissions prior to forwarding them to the panel of judges for reading and evaluation. The cover letter should indicate that the paper is submitted in response to the Call for Paper Competition for the "Professor Slobodan Perović" Award.

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