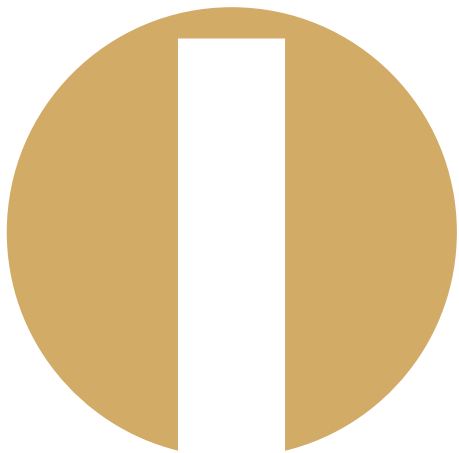

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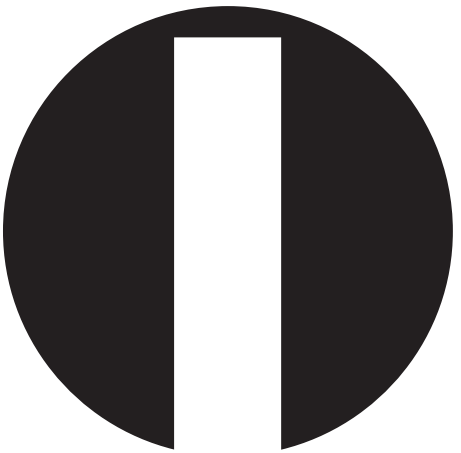

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EDITORIAL NOTE

The Harmonius Editorial Board is proud to present the first issue of the *Journal of Legal and Social Studies in South East Europe*. This journal aims at fostering and promoting harmonization of law in the SEE region with EU law and with general principles of international law, whilst providing a forum for the exchange of ideas and scholarly work of young scholars from the region and beyond.

In accordance with the mission of the journal, as well as with the main objectives of the Harmonius association, the first issue of the journal features seven articles on important topics submitted by young scholars from Croatia, Poland, and Serbia. This issue also contains a brief report from the recently organized Post-Doctoral Colloquium for young scholars from the SEE region and a translation of the CISG Advisory Council Declaration No. 1 - *The CISG and Regional Harmonization*, a document of significant importance for the future of harmonization of the contract law both on European and on the global level. Furthermore, it presents a draft of the Law on Chambers of Commerce which is currently being considered by the Serbian government and open for public debate. Last but not least, the section on international cooperation includes an important article by the IRZ on its contribution to the legal harmonization in the region and beyond.

The members of the Editorial Board are particularly grateful to the *IRZ – Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit e.V.*, who have recognized the importance of our project and offered generous support to the publication of this journal. We are also indebted to the distinguished scholars who, despite of their busy schedules, accepted to be the reviewers of the articles submitted for this issue. Finally, the Editorial Board wishes to thank all the contributors without whom the publication of this issue would not have been possible.

We strongly believe that the contributions contained in this issue will be of ample interest to the wide-ranging public in South East Europe. We also hope that this issue will enhance the interest for publishing in this journal in the future, and that it will attract authors from numerous jurisdictions, thus leading to the full accomplishment of our mission.

Editors-in -Chief

FOREWORD BY THE IRZ

The foci of activity of the German Foundation for International Legal Cooperation (in short: IRZ), which is introduced in detail in the article "The IRZ and its Contribution to Legal Harmonisation in Present and Future EU Member States", are on providing support to its partner countries in the transformation of their legal system towards a law harmonised with the EU aquis as well as on promoting young legal professionals. Moreover, a particular concern of the IRZ in South East Europe is the promotion of cross-border regional contacts between law experts, but also between legal scholars and practitioners of related disciplines.

Against this background, there is actually no need to go into further detail as to why the IRZ supports the work of the HARMONIUS network of young legal scholars in South East Europe in general and the publication of the HARMONIUS Journal of Legal and Social Studies in South East Europe and cooperates intensively with it. For this reason, it should only be mentioned in this context that it was in particular the composition of the network and its supporters, apart from the well-developed concept for its planned activities submitted by HARMONIUS, which has convinced the IRZ to cooperate with HARMONIUS. Quite a few of the people involved and their work were well-known to the IRZ from its own activities in South East Europe, which it took almost one and a half decades ago.

The IRZ wishes the HARMONIUS network of young legal scholars in South East Europe every success in its activities.

Furthermore, the IRZ would like to thank the network as a whole, in particular, however, its direct contact partner Dr. Nataša Hadžimanović, Vice-President of HARMONIUS and Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg for the good cooperation. The IRZ would also like to express its particular thanks to the German Federal Ministry of Justice, which has been supporting the IRZ in general, as well as to the Federal Foreign Office, which has been supporting the IRZ's activities

in South East Europe with funds form the Stability Pact for South East Europe and has thus made a cooperation like this possible. The ongoing support of initiatives like HARMONIUS from the German federal budget (and thus from contributions of the German taxpayers) shows Germany's sustained commitment to the region of South East Europe, with which Germany has traditionally maintained multifaceted relations.

The signatory furthermore would like to personally thank Assessor Nicole Schrödel LL.M. (Capetown) and Assessor Dragana Radisavljevic most sincerely for their competent and committed organisation of the cooperation with HARMONIUS in their function as project managers in the IRZ's project section "South East Central".

Dr. Stefan Pürner, attorney at law
Head of Section for "South East Central"
(Bosnia and Herzegovina, Macedonia, Montenegro and Serbia)
of the IRZ

NAUČNI ČLANCI
I RASPRAVE

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Mihaela Braut Filipović[*]
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PRECONTRACTUAL LIABILITY IN EU AND CROATIAN LAW

Precontractual liability is not harmonised in EU law. Authors shall explore different models adopted in EU countries, EU soft law and compare that to the current state of Croatian law, especially after the adoption of the new Croatian Obligations Act in 2006. The article explores legal nature, scholarly writings, judicial practice and especially the extent of damages which may be awarded to the injured party based on precontractual liability in EU countries and under Croatian law. The crucial issue is whether a party can seek compensation of the reliance interest (negative interest) only or of the expectation interest (positive interest) as well.

Key words: *Culpa in contrahendo.– Precontractual liability.– Reliance interest.– Expectation interest*

1. INTRODUCTION

Precontractual liability or *culpa in contrahendo* differs in national laws and it is not harmonized until now in European Union (hereinafter: EU) countries. Authors shall examine whether Croatian legislature regulated precontractual liability, and conditions for its application. Special focus of the work is the extent of damages which a claimant may ask based on the precontractual liability. More precisely, authors shall seek the answer in judicial practice and legal literature whether claimant is entitled to ask recovery of damages for reliance interest and expectation interest. Reliance interest corresponds to negative interest of the party, where damage covers only expenses and loss caused

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to the injured party by its reliance on the misrepresentation, promise, or undertaking in question. Positive interest corresponds to expectation interest of the injured party that a contract shall be concluded and properly fulfilled. Possible solutions and proposal for further practice in Croatian law shall be explored based on EU legal sources which deal with issue of precontractual liability. Namely, authors shall compare solutions adopted in the Principles of European contract law (further in text: PECL),[1] Model Rules of Draft Common Frame of Reference (further in text: DCFR)[2] and Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (further in text: CESL).[3]

2. LEGAL NATURE OF PRECONTRACTUAL LIABILITY

While most of the EU civil law countries recognize precontractual liability in various models, common law countries traditionally do not.[4] The issue of precontractual liability is not harmonised until now in EU countries. It depends on the applicable national law which of the different mechanisms of parties' protection shall apply.

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1 Prepared by the Commission on European Contract Law, 1999, *http://frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm*, last visited 10 July 2012.

2 Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Outline Edition, prepared by Study Group on a European Civil Code and The Research Group on EC Private Law (Acquis Group), *http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf*, last visited 11 July 2012.

3 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 11. 10. 2011., *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF*, last visited 10 July 2012.

4 J. Cartwright, M. Hesselink, *Precontractual liability in European Private Law*, Cambridge 2008, 457–461. For arguments that common law countries adopted mechanisms which have the same functions as the concept of precontractual liability see F. Kessler, E. Fine: „Culpa in contrahendo, bargaining in good faith, and freedom of contract: a comparative study", 77 *Harv. L. Rev.*, 401. Authors argue that concepts of the increased duty to disclose, the concept of estoppel, the notion of an implied subsidiary promise, the colourful doctrine of „instinct with an obligation," all impose similar rights and obligations for the parties in negotiations as the culpa in contrahendo doctrine.

The origin of precontractual liability in EU civil law countries is the fundamental work of German author Jhering in 1861.[5] His doctrine lies on the thought that although no contract between the parties exists in the stage of negotiations, they are still in some sort of legal relationship. This liability is routed in the principle of *good faith* and duty of care which is required from the parties not only in performing contractual duties, but also in the stage of negotiations and formation of the contract. Jhering's theory can be divided into two main premises. The first is that precontractual liability falls in the sphere of contract, where a party in breach commits contractual fault.[6] It means that the injured party must prove that it suffered damage due to the *culpa* of the party in breach, where the degree of guilt is negligence.[7] The second is that rules of tort liability should apply on the rules for recovering of damages, but that it should be restrained solely on the party's negative, i.e. reliance interest.[8] Thus, Jhering's theory combines elements of contract and tort, both with defined limits.

Due to its immense influence on civil law countries, Jhering's theory resulted in different and often confusing solutions in EU countries. There are three predominant doctrines in EU national laws[9] which define legal nature of the precontractual liability as: contractual,[10] extra-contractual (tort)[11] or as a separate, third ground for civil liability.[12] However, only some jurisdictions actually adopted provisions which deal with precontractual liability,[13] while many derive this doctrine from the general principles of law and apply it as a judge-

5 R. Jhering, „Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen", *Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts*. 4 1861.

6 Y. Ben-Dror, „The Perennial Ambiguity of Culpa in Contrahendo", 27 *Am. J. L. Hist.*, 142, 193.

7 Ibid., 147.

8 On Jhering's theory see F. Kessler, E. Fine, *op. cit. fn. 4,* 404; N. A. Nedzel, „A comparative study of good faith, fair dealing, and precontractual liability" 12 *Tul. Eur. & Civ. L.F.* 97, 113; Y. Ben-Dror, *op. cit.* fn. 6, 149.

9 J. Cartwright, M. Hesselink, *op. cit.* fn. 6, 459.

10 For example Germany and Austria. See generally J. Cartwright, M. Hesselink, *op. cit.* fn. 4.

11 *Ibid.* For example France and Spain.

12 *Ibid.* For example Greece.

13 *Ibid.* For example Germany (from 2001), Italy, Portugal and Greece.

made doctrine.[14] The most restrictive law on precontractual liability is considered to be English law since it does not recognize this type of liability at all, while the most expansive law is considered to be Dutch law, which under certain conditions even allows the compensation of expectation interest of the injured party.[15]

As to the extent of damages which may be rewarded, civil law countries are also greatly influenced by Jhering's doctrine. Almost all EU countries adopted in their judicial practice that the injured party may seek solely the recovery of reliance interest.[16] Exception is Dutch law.[17]

In addition to the precontractual liability, a plaintiff could seek the remedy based on the unjust enrichment, misrepresentation, specific promise, general obligation of fair dealing and other.[18] It is the same situation in Croatian law. However, boundaries between these liabilities are not always clear. For example, a party may choose to invoke precontractual liability or it can try to avoid precontractual liability by claiming pure tort liability. This would for example be the case where claimant would try to prove that the defendant had the intention to cause damage by conducting mock negotiations. Such a claim differs

14 *Ibid.* For example Austria, Switzerland, Denmark, Norway and Sweden.

15 J. Cartwright, M. Hesselink, *op. cit.* fn. 4, 461–470.

16 For example: Austria, Germany, France, Greece, Italy etc. See generally J. Cartwright, M. Hesselink, *op. cit.* fn. 4.

17 M. W. Hesselink, G. J. P. de Vries, *Principles of European Contract Law*, Hague 2001, 128. Landmark case decision for precontractual liability in Netherland is Dutch Supreme Court 18 June 1982, Nederlandse Jurisprudentie 1983, 723 (*Plas/Valburg*). In further cases (Dutch Supreme Court 23 October 1987, Nederlandse Jurisprudentie 1988, 1017 and 31 May 1991, Nederlandse Jurisprudentie 1991, 647) Dutch Supreme Court developed a special doctrine which recognizes three different stages of negotiations which have different legal consequences for the parties involved in negotiations. The specific solution of Dutch law is that in the so called third stage of negotiations the parties are no longer free to break-off the negotiations, and consequently, if a party in breach refuses to conclude the contract, the injured party may seek the compensation of the positive interest, i.e. the expectation interest. In order to be considered that negotiations are in this third stage, it is necessary that the injured party was entitled to expect that a contract which was bargained shall be concluded between the parties.

18 See generally in: E. A. Farnsworth, „Precontractual liability and preliminary agreements: fair dealing and failed negotiations", 87 *Colum. L. Rev.*, 217; J. Cartwright, M. Hesselink, *op. cit.* fn. 4.

from precontractual liability because beside the allegation that the defendant conducted negotiations without the intention to conclude a contract it contains an additional claim that the defendant had an intention to cause damage (e.g. loss of profit). If claimant succeeds in invoking pure tort liability it may be able to seek both reliance interest and expectation interest, which can be much more favourable for him/her. However, these other grounds of liability fall outside the scope of this work.

3. PRECONTRACTUAL LIABILITY UNDER EU LEGAL SOURCES

Since Croatia belongs to the circle of civil law-based EU countries, authors shall examine whether EU legal sources and practice of the European Court of Justice (further in text: ECJ) provide any guide for unifying the approach for precontractual liability. Notably, EU legal sources which cover the issue of precontractual liability have non-obligatory legal nature, which means that they shall be applied solely if parties agree on their application. In addition, authors shall examine solutions adopted in CISG.

3.1. Precontractual liability under PECL

PECL is the first attempt to create common set of general principles of private law in EU countries, which greatly influenced the creation of DCFR.[19] Precontractual liability is adopted in PECL as a particular application of the general principle of good faith.[20] As the main rule, PECL confirms that parties are free to negotiate without obligation to conclude the contract.[21] However, PECL recognized exemptions from this rule, and it divided grounds for precontractual liability on liability for negotiations contrary to good faith in article 2:301 and on

19 See more in N. Jansen, R. Zimmermann, „Contract formation and mistake in European contract law: A genetic comparison of transnational model rules", 31 *Oxford J. Legal Stud.*, 625.

20 H. Flechtner:, „Comparing the general good faith provisions of the PECL and the UCC: appearance and reality", 13 *Pace Int'l L. Rev.* 295, 306.

21 PECL explicitly provides that a party in negotiation „*[...] is not liable for failure to reach an agreement*." (article 2:301/1 of PECL).

liability for breach of the confidentiality in the course of negotiations in article 2:302.

Article 2:301 of PECL deals with situations where parties entered into negotiations but the contract was not concluded. In that case the party shall be liable if it conducted negotiations or broke off negotiations contrary to good faith.[22] As a presumption, it is considered that a party acted in bad faith if it entered or continued negotiations „*[...] with no real intention of reaching an agreement with the other party*."[23]

The extent of damages based on this ground of precontractual liability is not precisely defined. PECL only provides that a party acting in bad faith is „*[...] liable for the losses caused to the other party*".[24] Commentary of PECL, however, explicitly states that the injured party could ask solely the compensation of the reliance interest (negative interest), and in no way the expectation interest (positive interest).[25] Commentary decisively excluded the application of the article 9:502 of PECL on the negotiations,[26] which deals with general measures for damages where the compensation for the loss of profit, i.e. the expectation interest is included as well. Although expectation interest is excluded, extent of damages under the reliance interest is set broadly. It

22 Article 2:301/2 of PECL.

23 Article 2:301/3 of PECL.

24 Article 2:301/2 of PECL.

25 The Commission on European Contract law, O. Lando, H. Beale, *The Principles of European Contract Law, Parts I and II,* Hague 1999, 191. Also in D. Busch, E. Hondious, H. van Kooten, H. Schelhaas, W. Schrama (eds.), *The Principles of European Contract Law and Dutch law: A Commentary*, Nijmegen 2002, 130. For the commentary which supports that PECL does not allow to the injured party to seek expectation interest, but makes the comparison with Dutch law which allows the compensation of expectation interest if the parties entered into so-called third stage of negotiations see M. W. Hesselink, G. J. P. de Vries, *op. cit.* fn 17, 128. The same solution was already provided in UNIDROIT Principles of international Commercial Contracts which served as a role-model for PECL. See *UNIDROIT: Principles of international Commercial Contracts*, Rome 1994, 51. Two subsequently amendments of the UNIDROIT Principles with their official commentaries confirm this standpoint. For UNIDROIT Principles see generally R. Zimmermann, „The UNIDROIT Principles of international commercial contracts 2004 in comparative perspective", 21 *Tul. Eur. & Civ. L.F.* 1, 5; E. A. Farnsworth, „Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws", 3 *Tul. J. Intl. & Comp. L.* 47, 51 1995, 56.

26 The Commission on European Contract law, O. Lando, H. Beale, *op. cit*. fn 25, 191.

includes incurred expenses, work performed, loss of transactions made because of reliance that the contract shall be concluded and even the loss of opportunity.[27]

Article 2:302 of PECL regulates situations where party disclosed confidential information[28] which were given in the course of negotiations or used them for its own purposes, regardless of whether the contract was subsequently concluded or not. Legal nature of this duty is considered to be contractual,[29] as it is expressly set by PECL. If not, the injured party would have to prove that there was an oral or written agreement between the parties not to disclose or use information which were considered as confidential. In each case, parties in negotiations should pay attention on defining which set of information are confidential, in order to avoid arguments that other party was not aware that certain information fall within the confidentiality requirement.[30]

Remedy for the breach of confidentiality in the course of negotiations can include *„[...] compensation for loss suffered and restitution of the benefit received by the other party.*"[31] Restitution of the benefit is a specific remedy, on which the injured party is entitled even in cases when no actual damage occurred.[32]

3.2. Precontractual liability under CISG

CISG is the most important source today for international commercial sales contracts. However, CISG does not expressly govern the precontractual liability. Also, the predominant opinion of legal scholars

27 *Ibid.*

28 See generally about the need for protection of confidentially in the course of negotiations in: G. Forbin, „How is confidential information to be managed during precontractual negotiations?", *I. B. L. J.*, 4/5 1998, 477–493; M. Fontaine, „Confidentiality clauses in international contracts", *I. B. L. J.*, 1 1991, 3–94.

29 O. Lando, „The common core of European Private Law and the Principles of European Contract Law", 21 *Hastings Int'l & Comp. L. Rev.* 809, 815.

30 However, it is argued that a party should be able to recognize which information should be kept as confidential, based on the judgment of the character of the given information and party's professional status, even if the other party did not expressly define it as confidential. See more in The Commission on European Contract law, O. Lando, H. Beale, *op. cit.* fn 25, 194

31 Article 2:302 of PECL.

32 The Commission on European Contract law, O. Lando, H. Beale, *op. cit.* fn 25, 194.

is that precontractual liability is not within the scope of the CISG.[33] The issue of existence, scope and extent of damages in precontractual liability are left for domestic law applicable to the contract.[34] It must be noted that there was a proposal for introducing the *culpa in contrahendo* into CISG, but the draftsmen of the CISG explicitly refused to incorporate it.[35]

3.3. Precontractual liability in the practice of European Court of Justice

The practice of the ECJ is very scarce in the area of precontractual liability. The most relevant decision in this area was brought on 17 September 2002, C– 334/00 *Taccony v Wagner* [2002] ECR I–7357. The parties negotiated to conclude a contract for the delivery of a moulding plant but this never occurred allegedly due to the defendant's breach of his duty to negotiate honestly and in good faith. The Italian court referred to the ECJ with a preliminary question whether an action for precontractual liability falls under the regime of the Brussels I Regulation,[36] i.e. whether the precontractual duty falls under tort or

33 P. Schlechtriem, I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford 2005, 182; A. H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Hague* 1994, *http://cisgw3.law.pace.edu/cisg/biblio/kritzer2.html#contract*, last visited 23 July 2012. For the detailed analysis of differing views on whether CISG covers the pre-contractual liability see L. Spagnolo, „Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG", 21 *Temp. Int'l & Comp. L.J.*, 261. For the opposite opinion see D. M. Goderre, „International negotiations gone sour: precontractual liability under the United Nations Sales Convention", 66 *U. Cin. L. Rev.* 257. Author argues that precontractual liability is triggered under the doctrine of detrimental reliance in article 8(3) of the CISG.

34 For differing opinion see M. J. Bonell, „The UNIDROIT Principles of international commercial contracts and the harmonisation of International Sales Law", 36 *R.J.T.* 335, 349; A. M. Garro, „The gap-filling role of the UNIDROIT Principles in international sales law: some comments on the interplay between the Principles and the CISG", 69 *Tul. L. Rev.* 1149, 1169. Authors argue that the gap in CISG concerning the precontractual liability should be fulfilled by the application of the UNIDROIT Principles which govern the precontractual liability as previously described.

35 P. Schlechtriem, I. Schwenzer (eds.), *op. cit*. fn 33, 183.

36 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal L 12, 16.1.2001, p. 1–23.*

contractual disputes in purpose of determining competent jurisdiction which should resolve the dispute (Italian or German court). ECJ qualified precontractual liability as a non-contractual obligation arising out of tort or delict for the purpose of determining jurisdiction.[37]

Further, Rome II Regulation[38] puts precontractual liability in the sphere of non-contractual obligations as well. Besides the rule for determining the applicable law, [39] Rome II Regulation stipulates in paragraph 30 of the preamble that *culpa in contrahendo* should be treated as an autonomous concept and should not be necessarily interpreted within the meaning of national law. Although Rome II Regulation recognizes the specifics of precontractual liability, trying to detach it from the strict rules of national law, it is highly questionable that judges shall prefer some non-defined EU standards over national law, especially if the national law provides the rules for precontractual liability. Thus, the final outcome of the dispute depends heavily on the national law and its substantive rules on *culpa in contrahendo*.

3.4. Precontractual liability under DCFR and CESL

Final academic DCFR contains principles, definitions and model rules of European contract law. Legal nature of DCFR is ambiguous and legal authors dispute whether it is actually a draft for a European civil code or it is just a academic research which should facilitate in drafting such a code.[40] Three main purposes of DCFR are defined as: a possible model for a political Common Frame of Reference, legal science, research and education and as a possible source of inspiration.[41] Regardless of its legal nature, parties can choose the application

37 C– 334/00 *Taccony v Wagner* [2002] ECR I–7357, para 26, 27

38 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *Official Journal L 199, 31.7.2007, p. 40–49.*

39 As the main rule for determining the applicable law to the dispute, Article 12 of Rome II Regulation provides: „*The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.*"

40 For the dispute on the legal nature of DCFR see generally N. Jansen, R. Zimmermann, „„A European civil code in all but name": discussing the nature and purposes of the draft common frame of reference", *C.L.J.*, 69(1) 2010, 98–112.

41 Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Outline Edition, *op. cit*. fn 2, 6–8.

of model rules on their contract, and thus, it is necessary to see how DCFR regulates precontractual liability.

DCFR regulates liability for negotiations in II.–3:301 and duty of confidentiality in negotiations in II.–3:301. These provisions have substantially the same approach as PECL and UNIDROIT Principles on precontractual liability. When comparing, it should be noted that DCFR contains some additional mechanisms for parties' protection. It is, thus, expressly stated that parties are not allowed to exclude or limit the liability for negotiations in bad faith.[42] Also, in the duty of confidentiality, DCFR inserted definition on what should be considered as confidential information, where it is important that confidentiality of the information is presumed not only when one party expressly defined it as confidential, but also whenever *„[...] from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party*."[43] Additionally, DCFR explicitly gave the right to injured party to obtain a court injunction in order to prohibit the party in breach to disclose the confidential information.[44] DFCR are equally ambiguous as to the extent of damages,[45] though it is considered it includes the compensation of the reliance interest solely.[46]

Although it was expected that DCFR shall serve as a starting point and a source of inspiration for new legislative proposals in the area of consumer law, as it is the current CESL, it has been argued that due to significant differences between them, *„[...] there has been no, or very little, interaction between the two projects*".[47] In addition, the actual link between DCFR and CESL has officially not been clarified.

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42 II.–3:301/2 of DCFR. The same approach is taken in PECL and UNIDROIT Principles, but DCFR explicitly inserted this provision in the wording of model rules.

43 II.–3:302/2 of DCFR.

44 II.–3:302/3 of DCFR. Again, commentators on PECL and UNIDROIT Principles consider that parties have this right, but DCFR explicitly provided for it, thus leaving no room for differing opinions.

45 M. J. Hesselink, „The common frame of reference as a source of European private law", *Tul. L. Rev.*, 83 2009, 919, 952.

46 See in M. J. Doris, *Dispute Avoidance and European Contract Law: Dealing with divergence*, Groningen 2008, 49–52.

47 R. Zimmermann, „The present state of European private law", 57 *Am. J. Comp. L.* 479, 487.

The goal of CESL is to create a single horizontal instrument for the protection of consumers which would connect earlier directives on consumer protection.[48] CESL is currently in the phase of proposal, and it is still to be seen whether it shall finally be adopted.[49] If adopted, its application will be optional, i.e. it shall be applied on the contract solely by parties' choice.[50] The area of application is further defined by territorial, material and personal scope. As to territorial scope, CESL is applied to contracts with cross-border element, where at least one party has its habitual residence in one of the Member States.[51] As to the personal scope, CESL can be applied to contracts between traders, and to consumer contracts.[52] Finally, material scope of the application of CESL is restricted to the sale of goods contracts, contracts for the supply of digital content and their related services contracts.[53]

CESL has no explicit provision for conducting negotiations in good faith or for breach of duty of confidentiality concerning the information given in the course of negotiations. Although precontractual liability is frequently mentioned in the wording of CESL, it relates exclusively to matters of which information is one trader obliged to provide to other trader or to consumer before concluding the contract,[54] which is particularly important in distant sales contracts. Consequently, if parties choose CESL as the set of rules applicable to their contract, national laws shall apply on the issue of existence, scope and damages which can be awarded for precontractual liability, unless otherwise agreed by the parties.

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48 *Ibid.*

49 Proposal consists of three main parts: regulation, Annex I which contains the contract law rules and Annex II which contains standard information notice.

50 Article 3 of CESL.

51 Article 4 of CESL.

52 Article 1 of CESL.

53 Article 5 of CESL.

54 Sets of information which a trader is obliged to provide to a consumer before conclusion of a distant contract are provided from articles 13 – 21 of Annex I of CESL. These information include main characteristics of the goods, the total price and additional charges and costs, the identity and address of the trader, the contract terms, the rights of withdrawal etc. These articles have mandatory nature in the meaning that if the application of CESL is chosen, parties cannot derogate from these provision to the detriment of the consumer (Article 21 of Annex I of CESL). Sets of information which a trader is obliged to provide to another trader before conclusion of a contract are provided in article 23 of Annex I of CESL.

4. PRECONTRACTUAL LIABILITY UNDER CROATIAN LAW

Croatia adopted the concept of precontractual liability in Croatian Obligations Act (further in text: COA)[55] in the article 251. Current solution on precontractual liability is in force since 1st January 2006, and it was made on basis of article 2:301 and 2:302 of PECL.[56] However, the concept of precontractual liability is in Croatia adopted much earlier, although with narrower application, in former Obligations Act.[57] It provided only two situations which could trigger the liability, and these were if the party entered into negotiations without real intention to conclude the contract, and if the party broke-off the negotiations without justified reason.[58] In the COA currently in force, as it shall be demonstrated, liability can be triggered not just in these two cases, but whenever one party negotiates contrary to good faith. Liability for breach of confidential information given in the course of negotiations is in Croatian law inserted by the new COA in 2006.

4.1. Legal nature of precontractual liability

There are different opinions on the legal nature of precontractual liability in Croatia. Some authors consider that precontractual liability is a part of extra-contractual, i.e. tort liability,[59] while others consider that precontractual liability forms a separate ground of civil liability.[60] However, regardless the legal nature, Croatian legal scholars agree that the rules for extra-contractual liability apply as *lex generalis*

55 Official Gazette of the Republic of Croatia, No. 35/05, 41/08, 125/11.

56 I. Crnić, *Zakon o obveznim odnosima*, Zagreb 2005, 82; V. Gorenc (*et. al.*), *Komentar Zakona o obveznim odnosima*, Zagreb 2005, 347.

57 Sl.1. 29/78, 39/85, 57/89; Official Gazette of the Republic of Croatia, No 53/91, 73/91, 58/93, 111/93, 3/94, 107/95, 7/96, 112/99, 129/00, 88/01. It was in force until 1st of January 2006.

58 Article 30 of the former Obligations Act.

59 R. Knez, „Predugovorna odgovornost", *Pravo u gospodarstvu*, 35 1996, 868; J. Barbić, *Sklapanje ugovora po Zakonu o obveznim odnosima*, Zagreb 1980, 14; V. Gorenc (*et. al.*), *op. cit.* fn. 56, 347.

60 M. Vedriš, P. Klarić, *Građansko pravo*, Zagreb 2008, 606; M. Baretić, „Predugovorna odgovornost", *Zbornik Pravnog fakulteta u Zagrebu*, 49 1999, 54; O. Jelčić, „Pravni učinci pregovora i ponude", *Zbornik Pravnog fakulteta u Rijeci*, 20 (2) 1999, 599.

on all issues which are not covered in the provisions on precontractual liability.[61] The most important issue not covered by the article 251 of the COA dealing with precontractual liability is the extent of damages which should be awarded to the injured party. Since general provisions on tort liability provide the right of the injured party to claim both for the compensation of reliance and expectation interest,[62] authors shall explore impact of this fact on the answer whether the extent of damages incurred by precontractual liability includes both reliance and expectation interest.

4.2. Conditions for precontractual liability

Conditions which must be met for invoking precontractual liability are regulated in article 251 of the COA. There must exist: 1) persons in obligatory relationship of damage liability, 2) conduct of negotiations and damaging act, 3) illegality, 4) causal link, 5) damage.[63] Liability may be invoked if these conditions cumulatively exist.

4.2.1 Persons in obligatory relationship of damage liability

In a precontractual relationship these persons are the negotiating parties. Damage liability will primarily be incurred by the person who caused the damage.[64]

4.2.2. Conduct of negotiations and damaging act

Croatian legislature adopts fundamental principle that the parties are free to negotiate without obligation to conclude the contract.[65] However, if a party negotiated or broke-off negotiations contrary to the principle of good faith, it is responsible for the damage caused to the

61 R. Knez, *op. cit.* fn 59, 878; J. Barbić, *op.cit.* fn. 59, 14; M. Baretić, *op. cit* fn. 60., 61; M. Vedriš, P. Klarić, *op.cit.* fn. 60, 609; O. Jelčić, *op. cit* fn. 60., 599; G. Mihelčić, „Ugovorna i predugovorna odgovornost za neimovinsku štetu prema novom Zakonu o obveznim odnosima", *Informator* 5356–5357/2005, 17.

62 Article 1046 of the COA.

63 I. Crnić, J. Matić, *Odštetno pravo*, Zagreb 2008, 4, 5.

64 *Ibid.*, 4.

65 Article 251/1 of COA.

other party.[66] It is presumed that a party negotiated in bad faith if it negotiated without real intention to conclude the contract.[67]

Importantly, it is considered that a party did not break-off negotiations contrary to good faith if it concluded the contract with another offeror, i.e. if it simultaneously negotiated with more than one party.[68] This is because the party intended to conclude the contract, although it turned out with another offeror, thus not falling under the accusation that it negotiated without real intention to conclude the contract.

Criterion for determining whether negotiations between the parties existed at all are discussed in a 2007 court decision of the Supreme Court of Croatia.[69] In that case one party claimed damages, i.e. expenses for legal representation, stating that the other party conducted negotiation without real intention of concluding the contract. Supreme Court rejected plaintiff's claim finding that no actual negotiations occurred between the parties. It stated that in order for negotiations to exist, it is necessary that parties exchange information and standpoints on the content of the future contract, that they are involved in mutual correspondence whether in person or by representatives, that they are acquainted with legal and economic consequences of the future contract for each party and etc.

Duty of confidentiality is inserted by the new COA in 2006, also in correspondence to the PECL. It provides that parties are obliged not to disclose confidential information given in the course of negotiations or use them for their own purposes, unless otherwise agreed.[70]

4.2.3. Illegality

The claimant must prove that the defendant broke the principle of good faith during negotiations or that the defendant had no intention to conclude a contract. The general rule and principle in Article 8 of the COA forbids causing damage.[71] Illegality will always exist when

66 Article 251/2 of COA.

67 Article 251/3 of COA.

68 Decision of the Regional Court in Zagreb, Gž–560/05, from 7 February 2006.

69 Decision of the Supreme Court of the Republic of Croatia, Rev 1151/06–2, from 30 October 2007.

70 Article 251/4 of COA.

71 I. Crnić, J. Matić, *op. cit.* fn. 63, 6.

a person negligently or intentionally acts contrary to a legal rule. In order that precontractual liability is triggered, injured party must prove both the breach of the rule and the fault of the party in breach.

Simple fault will exist when the damaging party did not use the attention which would have been used by a careful person (the attention of a good businessman).[72] The general rule on damage liability stipulated in COA states that simple fault (*culpa levis*) is presumed.[73] However, precontractual liability is an exception from this rule. In precontractual liability cases, fault (simple or grave) must be proven by the claimant (the injured party).[74]

Simple fault will exist when the damaging party did not use the attention which would have been used by a careful person (the attention of a good businessman).[75] In precontractual liability, the injured party will prove that fault exists if it proves that the damaging party negotiated or broke-off negotiations contrary to the principle of good faith.[76] Simple fault or carelessness is objectified and the court compares the behaviour of the damaging party to the behaviour of another person in equal or similar circumstances.[77] The yardstick for fault is objective negligence. In cases of precontractual liability the careful person would probably be an honest businessman who acts in good faith and shares all relevant information with the other party. If the claimant succeeds to show that the defendant acted below the set standard of care, fault will exist.

Further, it is presumed that a party negotiated in bad faith if it negotiated without real intention to conclude the contract.[78] It will be hard to prove for the injured party that there was no real intention because that is the inner connection between the damaging party and the cause of damage or the absence of such connection. For example, the lack of real intention will be held to exist if the damaging party was insolvent for conclusion of the contract which it negotiated.[79] Grave fault (*culpa lata*) is practically equal to intent in consequences.

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72 V. Gorenc (*et. al.*), *op. cit.* fn. 56, 347; Article 10 of COA.

73 Article 1045/2 of COA.

74 M. Vedriš, P. Klarić, *op.cit.* fn. 60, 610.

75 V. Gorenc (*et. al.*), *op. cit.* fn. 56, 347; Article 10 of COA.

76 M. Vedriš, P. Klarić, *op.cit.* fn. 60, 608.

77 *Ibid.*, 599; V. Gorenc (*et. al.*), *op. cit.* fn. 56, 1624.

78 Article 251/3 of COA.

79 V. Gorenc (*et. al.*), *op. cit.* fn. 56, 347; Article 251/3 of COA.

4.2.4. Causal link

The definition of causal link does not exist in Croatian law. Causal link must exist between the damaging act and damage. There is no method which the courts might use to determine its existence between the damaging act and damage. If this element does not exist, liability will not be incurred. The resulting damage must be a consequence of the damaging act.[80] The behaviour of the damaging party is crucial. Claimant must prove that the defendant breached the good faith principle which directly resulted in damage. Causal link is a chain of consequences which must not be broken by some other human act (for example a faulty act of the claimant). If it is, the defendant will not be held liable.

However, damage may be caused by many different causes known as factual causes. The defendant will try to prove that the damage resulted due to functioning of the market, overall business crisis or bad business organisation of the claimant. The judge makes a selection between all of these causes by choosing only those which are legally relevant or the principal cause of damage. This is done by the application of the adequacy theory.[81] Only those causes which according to the normally expected course of events could have caused such damage will be accepted. That is, only the typical causes which lead to such damage. It is uncertain how wide should be the observing field, the judge sets that. But the narrower the observing field which serves as a standard for comparison, the closer the judge gets to the case at hand and the objective circumstances which are observed and tested become more adequate to the original case.

The judges rarely analyse it in their judgments, they mostly conclude a causal link (or adequate causal link) exists or if it does not they explain why.[82] Scholarly writings mostly neglect this element of non-contractual liability. However, if adequate causal link is sought after, then causality must be determined in a two-step analysis – first factual causation and second adequate causation. This first test helps to estab-

80 Stipulated in Article 1045/1 of COA.

81 I. Crnić, J. Matić, *op. cit.* fn. 63, 6; B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, Knjiga 2., Zagreb 1978., 675.

82 E.g. the decision of the County Court in Dubrovnik number Gž–2447/06 from 11 September 2008.

lish all the possible causes of damage. However, these can be plentiful. The second step narrows this variety down. Adequacy serves to limit liability to only legally relevant causes. It determines the scope of liability. It is undisputable the injured party must prove causation.[83] More precisely, in the frame of the two-step causal inquiry, claimant must prove the factual causation while adequate causation is determined by the court based on the given factual proof. The judge must determine whether the damage that occurred is indeed a typical consequence of such damaging act or whether it was highly probable to occur.

„*According to the adequacy theory, the relevant cause among many different events which could be considered as causes of a certain consequence is only that one which is typical for creation of certain damage. The typical cause is the one which regularly leads to certain damage. It is that event for which the experience of life shows that when it appears, the occurrence of certain consequence may be commonly expected together with it. According to that theory all other accidental occasions which intervene with regular events and have thus entered the group of causes preceding the damage but which are not typical for it, should be excluded.*"[84] That is why it seems that judges determine the existence of causal link based on the circumstances of the case and laws of nature. The truth is adequate causal link is a legal question which depends on the assessment and conviction of the judge.[85]

The causal inquiry differs if the damaging party acted with intent or with simple fault. When damage was caused by intent then causal adequacy does not have to be examined at all because all intentionally caused damage is automatically adequate to the damage.[86] Therefore, if the claimant has succeeded in proving that the defendant negotiated without the real intention to conclude the contract (as stipulated in Article 251/3 COA) adequate causal link will not have to be proven.

83 Decision of the Supreme Court of the Republic of Croatia, Rev 1216/06–2 from 11 July 2007.

84 Decision of the Constitutional Court, U-III / 49 / 2008 of 24 June 2008, published in *Official Gazzette of the Republic of Croatia* 78/08, para 5.

85 Decision of the Supreme Court of the Republic of Croatia, Rev 1216/06–2 from 11 July 2007.

86 This is so for example in Germany but it is a purely logical explanation applicable in Croatia as well. See Palandt Bürgerliches Gesetzbuch/ Ch. Grüneberg, *Beck'sche Kurz Kommentare Vorb v § 249*, Band 7, 69. Auflage, Verlag C.H. Beck 2010, 276, para 27.

If this is a link between the damaging act and damage, then obviously the damaging act or illegality of it as well as damage must be proven first. This will also facilitate the finding of the causal link because fault and causation are proportional. The faultier certain act is, the easier it will be to establish causal link.

4.2.5. Damage

Article 251 of COA does not stipulate the extent of damages which an injured party can seek. Thus, it is left to legal scholars and judicial practice to answer whether the injured party is entitled to reliance interest only or to compensation of expectation interest as well.

As to legal scholars, the majority argues that an injured party is entitled to seek only the compensation of reliance, but not the expectation interest.[87] Available judicial practice based on the former[88] Obligations Act supports this standpoint. In particular, High Commercial Court of Croatia confirmed that the injured party is not entitled to request for the conclusion of the contract or the compensation of the expectation interest, but it can only seek reliance interest.[89] Thus, we can conclude that in Croatia the compensation of expectation interest based on precontractual liability is excluded by the majority of legal scholars and current judicial practice. This standpoint is com-

87 V. Gorenc (*et. al.*), *op. cit.* fn. 56, 348; M. Vedriš, P. Klarić, *op.cit.* fn. 60, 609; R. Knez, *op. cit.* fn 59, 878; J. Barbić, *op.cit.* fn. 59, 18; O. Jelčić, *op. cit* fn. 60., 603; G. Mihelčić, *op.cit.* fn. 61, 17. For opposite opinion see generally M. Baretić, *op. cit.* fn. 60.

88 To the best knowledge of authors, there is no relevant judicial practice based on the article 251 of new COA until now.

89 Decision of the High Commercial Court of the Republic of Croatia, Pž–1881/00 from 14 November 2000. In particular, the Court found that the party is not entitled to seek the formation of the limited liability company. That could be claimed solely on the basis of the preliminary agreement, which in particular case was not concluded. Earlier decisions which support this standpoint are: Municipal Court in Zadar, GŽ–864/91 from 06 November 1991, *Pregled sudske prakse* – 52/72; Supreme Court of the Republic of Croatia, Rev–70/88 from 28 February 1989, *Pregled sudske prakse* –46/66; An example of reliance interest upon which the party is entitled to ask is the restitution of the amount of money received by the other party to make preparations for the future contract.

pletely in accordance with the basic principle of the freedom of contract.[90] The threat of expectation interest would impede this freedom.

Duty of confidentiality during negotiations provides that parties are obliged not to disclose confidential information or use them for their own purposes, unless otherwise agreed.[91] Remedies for the breach of the duty of confidentiality include compensation of damages and restitution of benefit received by the other party.[92]

As to the costs of negotiations Article 251/6 of COA provides that each party pays its own costs while mutual costs are divided between the parties, if nothing else is agreed.

5. CONCLUSION

Precontractual liability is not harmonised in EU law. German author Jehring had the immense influence on the development of precontractual liability doctrine. Almost all EU countries adopt precontractual liability, with the only exception of common law countries. However, models adopted greatly differ in defining the legal nature of the precontractual liability while an overall majority agrees that the extent of damages should only cover reliance interest. The only exception is Dutch law which considers that expectation interest should also be awarded. Analysed non-obligatory legal sources PECL and DCFR adopted substantially the same rules for precontractual liability. These texts carefully left outside the explicit answer as to whether parties may seek reliance and expectation interest. It is left to legal doctrine to answer this question and for now it is considered that only reliance interest may be sought. Croatian law complies with these findings. Both judicial practice and legal scholars agree that only reliance interest can be compensated. Differences arise solely as to the issue of legal nature. Some scholars consider it as a part of tort liability and others as a separate and special ground of civil liability. To conclude, Croatian law in this respect completely complies with the current trends in EU law.

90 Article 251/1 COA.

91 Article 251/4 of COA.

92 Article 251/5 of COA.

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PREDUGOVORNA ODGOVORNOST U PRAVU EU I HRVATSKOM PRAVU

Sažetak

Predugovorna odgovornost nije harmonizirana unutar prava Europske Unije. Autorice će ispitati različita rješenja o predugovornoj odgovornosti u državama članicama EU i usporediti ih sa prihvaćenim rješenjem u hrvatskom pravu, posebice nakon usvajanja novog Zakona o obveznim odnosima u siječnju 2006. U članku se ispituje pravna narav, sudska praksa i stajališta pravnih stručnjaka te posebice opseg naknade štete koju se može potraživati temeljem povrede predugovornih obveza vođenja pregovora, čuvanja poslovne tajne i drugo. Postavlja se ključno pitanje može li oštećena strana tražiti samo naknadu stvarne štete ili je ovlaštena potraživati i naknadu izmakle dobiti.

Ključne riječi: *Culpa in contrahendo.– Predugovorna odgovornost.– Stvarna šteta.– Izmakla dobit.*

UDK 347.77:004.4

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THE CONTROVERSY OVER PATENT PROTECTION OF COMPUTER PROGRAMS IN THE EU

In the ongoing debate on the impact and relevance of intellectual property rights one of the main questions is whether computer programs can be patented in the actual state of the law and whether they should be patentable at all. In Europe, on the legislative level, there is a clear-cut orientation towards copyright protection through the Directive on the Legal Protection of Computer Programs and the Article 52 (2)(c) of the EPC which formally forbids patents of computed programs „as such". However, the practice of the European Patent Office of progressively adopting a less restrictive attitude has opened the doors to patents of „computer implemented inventions" which in many cases have been perceived to drift from the exception provided in the EPC. As the controversy extends to questions of policy, the justification of patent protection is also considered.

Key Words: *Software Patents.– Computer-implemented inventions. Open Source Software.*

1. INTRODUCTION

Computer programs have given rise to a highly dynamic, profitable and constantly expanding information technology (IT) industry which provides key facilitating technologies for the growth of today's knowledge-based economies. Their role as a backbone of contemporary global economy makes it imperative that their development and distribution is encouraged. Intellectual property rights (hereinafter: „IPRs") are a legal concept designed with precisely this function in mind – their primary purpose being to stimulate innovative activity, which is assumed, on its part, to increase competitiveness and eco-

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nomic welfare in general. As „socially rooted" rights, however, the existence of intellectual property rights and their scope must always be analysed in relation to their function, which they must fulfil so as not to lose their legitimacy.

Courts and legislatures have over the past few decades struggled to encourage innovation in software development while, at the same time, attempting to avoid undesirable monopolies. Such constant and contentious balancing resulted in computer software being labelled „somewhat of a problem child for intellectual property law".[1] A particularly disputed issue which has become the focus of one of the most controversial debates in patent law is whether computer programs can be patented in the actual state of the law and, more importantly, whether they should be patentable in the first place.

In an attempt to answer these questions, the basics of the two relevant forms of IPR shall firstly be laid out, after which the existing law and practice in Europe will be showcased. Finally, the issue will be tackled from a policy perspective, having in mind the basic functions of patent law and analysing viewpoints of key players in the software industry. Although the questions have global relevance, the analysis will focus on the European software industry and the controversies surrounding patent protection within the European legal framework.

2. DIFFERENT LEGAL REGIMES OF PROTECTION OF COMPUTER PROGRAMS

2.1. Introduction

Before analyzing and delineating legal protection of computer programs it is important to define the subject matter of protection. There are various definitions of computer programs and the somewhat wider category of software, the terms which shall be used interchangeably in this paper. The European Patent Organisation usefully explains that a „computer program is a sequence of computational steps which may be effectively performed by a digital computer", that „the steps of a computer program are written in a systematic notation known

1 J. D. Lipton, „IP's Problem Child: Shifting the Paradigms for Software Protection" *Hastings Law Journal*, Fall 2006, 1.

as a programming language", and that „a computer program is often termed as the 'code'."[2]

The classification of computer programs into one legal category most adequate for protection is difficult as they are composed of several elements that could fall within different categories of protection. Their characteristics are unique among protected intellectual creations and present particular difficulties for those drawing analogies with existing legal subjects. This has resulted in efforts to classify software under copyright, patents, both, trade secrets or even under a *sui generis* software right. Trade secrets, although a viable means of protection, are not an intellectual property right *per se*, but rather, a factual relationship and, as such, will not be analysed in this paper.

Prior to analysing the law and practice with respect to software patents in the European Union (hereinafter: „EU"), the basic notions and means of obtaining copyright protection, as the globally predominant legal protection granted to software, shall be laid out, followed by a basic explanation of patent protection, with concluding remarks on their differences.

2.2. *Copyright*

Copyright is an intellectual property right which grants legal protection to the form in which certain types of creativity are expressed. It aims to contribute to human creativity by giving creators of literary and artistic works incentives in the form of ***recognition*** and ***fair economic rewards*** through granting of a set of exclusive rights for a limited period of time. Under this system of rights, right holders ***may prevent unauthorized reproduction*** of the work, its public performance, recording, publishing, adaptation,[3] etc. These economic rights are limited in time, running within the lifetime of the author and an additional ***70 years after his/her death***,[4] irrespective of when and if the

2 EPO e-learning centre, Patentability of computer-implemented inventions at the EPO – Module I, https://e-courses.epo.org/wbts/cii1_en/player.html, last visited 1 September 2012.

3 Berne Convention for the Protection of Literary and Artistic Works, Paris 1971 (Berne Convention).

4 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ EU, no. L 372/12, Article 1.

work is lawfully made available to the public. Copyright additionally bestows upon the author a bundle of inalienable moral rights.

The granted rights are in principle territorial, although the existing system of international agreements, the most notable of which is the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: „Berne Convention"), practically enables international protection from the moment when the work that qualifies for protection is created, with requirements and extent for protection varying to some extent from country to country. As copyright law aims to strike a correct balance between access and incentives, the exclusive rights it grants are limited when they conflict with an overriding public interest. Thus, various exceptions and limitations to copyright exist,[5] whether explicitly listed or placed under the umbrella of the common law „*fair use*" doctrine.

If we define software as a „set of instructions to a computer that bring about a certain result", the manner in which those instructions are expressed should indicate the type of intellectual property protection which should be provided. These instructions are initially expressed as „*source code*" – lines of instructions in a computer language. Because the source code is expressed in written form, software may logically be defined as being subject to copyright protection as a literary work.[6] However, copyright has its shortcomings, which will be elaborated in the following sections.

2.3. *Patent Protection*

Most broadly put, patents are a form of intellectual property rights which grant an inventor or the right holder a set of exclusive rights for a limited period of time, usually ***20 years***, in exchange for the public disclosure of the inventions.[7] In most jurisdictions, the ex-

5 Berne Convention, *op. cit.* fn 4, Article 10.

6 A. G. González „The Software Patent Debate", *Journal of Intellectual Property Law & Practice*, Vol. 1, No. 3/2006, 3: However, software is not only source code and to be able to operate in a computer, it is translated i.e. „compiled" into object code— machine-readable instructions that can be directly executed by the computer. Nonetheless, as the object code is a direct result of the source code it should arguably be linked to its fate.

7 W. M. Landes, R. A. Posner, *The Economic Structure of Intellectual Property Law* 2003, 294. Posner and Landes argue that „patent law combats this incentive [to keep an innovation as a trade secret]" by requiring disclosure.

clusive right granted to a patent holder is the right to prevent others from ***making, using, selling, or distributing*** the patented invention, i.e. the „***right to exclude others from using the claimed products or processes***."[8]

Patents are ***national*** in character and an inventor must file patent applications in all jurisdictions in which he/she expects to require patent protection— jurisdictions which very well might have different requirements and procedures for granting patents.[9] However, such multinational application procedures are eased by the possibility of filing a single international application under the WIPO Patent Cooperation Treaty (hereinafter: „PCT"),[10] which can then give rise to patent protection in most countries. On the European regional level, greater integration has been achieved by the harmonisation of the grant process through the Munich Convention on the Grant of European Patents of 1973[11] (hereinafter: „European Patent Convention", or simply, „EPC") by which the European Patent Office (hereinafter: „EPO") was instituted.

The actual protection the patent confers is delimited by its ***specification***, which consists of two parts: the ***description of the invention*** and the ***list of claims***.[12] As the claims determine the breadth of the patent, in order to ensure that they are not excessive they must be consistent with the description of the invention. An invention is only patentable if its description meets three criteria, which are substantively the same throughout the world.[13] For example, the EPC's patentability requirements for an invention are:

- ***novelty,***
- ***inventive step****, and*
- ***susceptibility of industrial application****.*

8 A. Grosche, „Software Patents – Boon or Bane for Europe?" *International Journal of Law and Information Technology*, Vol. 14, Issue 3/2006, 258.

9 *Ibid.*, 258.

10 WIPO Patent Cooperation Treaty (PCT), Washington, June 19 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001.

11 The European Patent Convention as revised by the Act revising the EPC of 29 November 2000 entered into force on 13 December 2007, (Article 8(2) Revision Act).

12 A. Grosche, *op. cit.* fn 8, 259.

13 F. Lévêque, Y. Ménière „The Economics of Patents and Copyright", *The Berkley Electronic Press,* 2004, 30–31.

It may be added that sufficient disclosure is an additional, formal, condition. The 2000 revision of the EPC[14] additionally supplemented this provision, stating that European patents shall be granted for any inventions, ***in all fields of technology***[15], if they fulfil the said criteria. The scope of the patent is initially determined through patent examination, in which the criteria are evaluated, as well as the consistency between the claims and the description of the innovation. Such patent scope may be ***confirmed***, ***invalidated*** or ***redefined*** in subsequent administrative or judicial proceedings.[16]

National laws generally also indicate certain categories of inventions that cannot be patented. These exclusions are provided in Article 52 and 53 of the EPC.[17] In that respect, programs for computers are not regarded as inventions as such.[18]

2.4. *Qualitative Differences between Patents and Copyright in the context of Protection of Computer Programs*

Copyright and patent law both have their strengths and weaknesses as legal rights. In the context of protection of computer programs, the most important difference between the two rights is that of the subject matter and breadth of protection they offer.

Considering computer programs as subject matter of protection, a particular shortcoming of copyright is precisely in the fact that it only protects expression against activities related to unauthorized reproduction (copying) of a protected work and therefore does not prevent independent reinvention of a work, nor does it prohibit the creation of a

14 EPC 2000 entered into force on 13 December 2007.

15 Art. 52 (1) EPC.

16 F. Lévêque, Y. Ménière, *op. cit.* fn 13, 31.

17 US law does not contain such exclusions. The US Supreme Court has excluded laws of nature, natural phenomena and abstract ideas from protection (Diamond v. Diehr, 450 U.S. 175, 186 (1981)), but these restrictions are loose in comparison to those of the EPC: see R. Hilty, C. Geiger, „Towards a New Instrument of Protection for Software in the EU? Learning the Lessons from the Harmonization Failure of Software Patentability", *Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11–01* 2011,9, fn 30.

18 EPC Article 52(3).

product that functions similarly to the original, but uses a different literal expression— a situation not uncommon in the software industry. Indeed, such a limited scope of protection has recently been confirmed by the Court of Justice of the European Union, in the case filed by SAS Institute Inc. against World Programming Ltd.[19]

These limits in protecting the underlying methodologies have created the perceived need for patent protection. The rights granted by patents have a much more powerful scope— so powerful that they can be enforced against all, including independent inventors, and as such can render software copyright useless. However, as software technology is such that one software program may embody a large number of patented elements and, moreover, the software development process is characterised by a set of specific features and the exponential adoption of the Open Source model, controversies as to the legitimacy of patent protection of software abound.

3. PATENT PROTECTION OF COMPUTER PROGRAMS— EUROPEAN LAW AND PRACTICE

3.1. Introduction

The constant expansion of the technical and economic dimensions of the computer industry has lead to the particular interest of the European Union to intervene in this field, harmonizing and elevating legal protection. However, the first decisive step towards shaping the direction of legal protection of computer programs was in fact made in 1973 outside of the framework of the European Community, by the European Patent Convention and its Article 52(2) and (3), which exclude computer programs „*as such*" from patentability. Therefore, in Europe, as opposed to other jurisdictions such as the USA, software patentability has been from the outset prevented by law,[20] i.e. a mul-

19 ECJ C–406/10 2.5.2012, found at: *http://curia.europa.eu/juris/document/document.jsf?text&docid=122362&pageIndex=0&doclang=EN&mode=lst&dir&occ=first&part=1&cid=115060*, last visited 22 July 2012. The case has made an important contribution to legal certainty, making it clear that software companies cannot rely on copyright to prevent rivals from „reverse engineering" computer programs to create another program with the same functionality.

20 Analysis of software patentability in Europe (François Pellegrini) *http://www.labri.fr/perso/pelegrin/papers/swpat_europe_20061030.pdf*, last visited 22 April 2012 (Pellegrini).

tilateral treaty, although such exclusion, mainly motivated by political and economic reasons, was not categorical, and patentability was not entirely excluded.

Nonetheless, when the question was raised by which legal instrument computer programs were to be protected, the exclusion contributed to copyright being chosen as the means of protection for computer programs,[21] resulting in the enactment of the Directive on the legal protection of computer programs. This directive to date presents the EU's only framework for protection of computer programs, although an attempt for an alternative solution was made.

3.2. *Computer Programs as Inventions under the EPC— Article 52*

The question of patentability of computer programs under the European Patent Convention is a question whether such programs can be inventions in the scope of patent law, i.e. whether they can be protectable subject matter at all, and, if the answer is affirmative, whether such an invention fulfils the general patentability criteria – novelty, inventive step, and industrial applicability.

Under Article 52(2c), "*programs for computers*" are not regarded as inventions. However, this EPC exclusion is narrowed and its clarity is „*severely muddled*" by the language of Article 52(3), which limits the exclusion to [computer programs] „as such."[22]

The words „***as such***" have been a cause of a great deal of difficulty to patent applicants, attorneys, examiners, and judges since the EPC came into force. It is clear that a patentable invention can be based on a computer program for its implementation,[23] in which case the program constitutes a step in the functioning of the invention, i.e. a „component to an otherwise patentable invention".[24] However, since the first deci-

21 T. Prime, *European Intellectual Property Law*, Ashgate 2000, 247–248.

22 R. Hilty, C. Geiger, *op. cit.* fn 17, 5.

23 *Ibid*., 11, fn 35: „The classic case is the one of a computer working a machine which, in combination with the machine, can be patented as an invention. The jurisprudence of the EPO has long admitted this (*see* especially EPO, TBA, May 21, 1987, 1988 OJ EPO 18 – *Koch and Sterzel*, concerning radiological equipment vested with a data processing unit operated by a program) and patentability is no longer queried."

24 A. Grosche, *op. cit.* fn 8, 257–309.

sion in 1986, the EPO has taken an expansive view of these inventions' patent eligibility, with a progression of narrowing the scope of what is excluded from patent subject matter and a more liberal, although highly divergent and sometimes even contradictory, granting of patents. It is understood that the EPO has been motivated to progressively adopt a less restrictive attitude by a desire not to hinder European companies competing on a global market with American counterparts who were by 2002 granted approximately 100,000 software patents by the USPTO,[25] with a fear that such grants would „solidify American hegemony"[26] in the IT industry.

Such lack of clarity of the wording of the EPC has opened the door to wide defining through interpretation. The prevailing understanding as defined in the practice of the EPO Boards of Appeal is that an invention is a „***technical solution to a technical problem***".[27] This „technical subject matter" requirement has come to be at the heart of European substantive patent law,[28] as opposed to that of the USA, but has proved to be a difficult legal concept to define. The debate has therefore shifted to the question what is considered technical and what is not, with jurisprudence and legal doctrine oscillating in defining what „technical character" is.

The current EPO „Guidelines for Examination",[29] (hereinafter: „Guidelines") which entered into force on June 20th, 2012, define programs for computers as „a form of 'computer-implemented invention', an expression intended to cover claims which involve computers, computer networks or other programmable apparatus whereby *prima facie* one or more of the features of the claimed invention are realised by

25 F. Lévêque, Y. Ménière, *op. cit.* fn 13, 47; A. G. González, *op. cit.* fn 6, fn 25.

26 R. Hilty, C. Geiger, *op. cit.* fn 17, 5, fn 15.

27 *Ibid.*, 10; T 154/04, (Estimating sales activity / DUNS LICENSING ASSOCIATES) of 15.11.2006, *Official Journal of the European Patent Office* 2008.

28 S. Marsnik, R. E. Thomas, „Drawing a Line in the Patent Subject Matter Sands: Does Europe Provide a Solution to the Business Method and Software Patent Problem?", *Boston College International and Comparative Law Review* 2011, 43.

29 It must be emphasised that the Guidelines do not constitute „law" – they can be, and have been in the past overturned by the EPO Boards of Appeal: R. Bakels, P. B. Hugenholtz, „The patentability of computer programs: Discussion of the European-level legislation in the field of patents for software" (Study for the Committee on Legal Affairs and the Internal Market of the European Parliament), *Working Paper JURI 107 EN* April 2002, 9.

means of a program or programs."[30] Such claims may e.g. take the form of a method of operating a programmable apparatus, the apparatus set up to execute the method, a readable medium carrying a program[31] or, following T 1173/97 (IBM/Computer Programs),[32] the program itself. Moreover, following the decision T 769/92 (General-purpose management system/SOHEI), the requirement for technical character may be satisfied if technical considerations are required to carry out the invention.

Therefore, the Guidelines clearly assert that although „programs for computers" are included among the items listed in Article 52(2), if the claimed subject-matter has a technical character it is not excluded from patentability. Nonetheless, it has been ruled that a computer program is not excluded from patentability only if it is capable of bringing about, when running on a computer, a ***further technical effect***[33] [*emph. added*] which goes beyond the normal physical interactions between the program and the computer (i.e. the flow of electrical currents). Such a further technical effect may be found e.g. in faster communication between two mobile phones with improved quality of voice transmission,[34] enhancing a graphic display, controlling data storage between memories, and routing diverse calls through a telephone exchange in response to demand.[35] It is important to note that technical character is assessed without regard to the prior art[36] and, what it more, this further technical effect may be known in the prior art.

Even though most of the existing rulings share common elements, the real life application of these tests, arguments, and justifications has varied from case to case, as is often the case with vague and ill-defined legal concepts, with the delimitation between patentable

30 Guidelines for Examination in the European Patent Office, *European Patent Office* Munich 20 June 2012, G-II 3.6 Programs for computers (not yet published in the EPO Official Journal; may be accessed at: Guidelines, *http://www.epo.org/law-practice/legal-texts/guidelines.html*, last visited 20 July 2012, hereinafter: EPO Guidelines 2012.

31 T 424/03 (Clipboard formats I/MICROSOFT).

32 T 1173/97 (Computer program product/IBM) (OJ 10/1999, 609).

33 T 1173/97 (Computer program product/IBM) (OJ 10/1999, 609).

34 R. Osterwalder *ed.*, *Patents for software? Law and practice at the European Patent Office*, European Patent Office, Munich, Germany 2012, 16–17.

35 *Ibid.*, 21.

36 See T 1173/97 (Computer program product/IBM), confirmed by G 3/08.

and non-patentable inventions by different EPO decisions seeming rather arbitrary.[37] It is precisely this lack of clarity and legal certainty that prompted the European Commission to propose the Directive on the patentability of computer-implemented inventions (hereinafter: the CII Directive).[38] The proposal brought about one of the most controversial legislative processes the European Union has seen to date and, in a wider view, one of the most contentious intellectual property law policy discussions of recent years. Following several years of debate and numerous conflicting amendments to the proposal, the proposal was rejected in 2005 by an overwhelming majority in the European Parliament.[39]

3.3. *Conditions for Patentability*

The patentable subject matter test of Article 52(2) and (3) EPC i.e. testing whether the subject matter is an invention in the scope of patent law is only the first step towards patentability. In order for a patent to be granted, an invention must be new, it must not be obvious i.e. must include an inventive step, and must also be susceptible of industrial application. i.e. must be „made or used in any kind of industry." The first two conditions are assuming greater importance as the requirement of the patentable subject matter focussing on the technical character widens and its function as an exclusion from patentability thereby, to a certain degree, weakens.[40] The last requirement is *prima facie* met by all patent applications in the technical field of computing.

Pursuant to Article 54(1) EPC, an invention is considered to be new if it is not contained in the „state of the art". Article 54(2) specifies that the state of the art consists of anything that has been made accessible to the public before the date of the patent application. However, discerning the state of the art of computer programs is not easy to realise. On the contrary, it is particularly difficult to find software code

37 See: R. Bakels, P. B. Hugenholtz, *op. cit.* fn 29, 7–8.

38 Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions, *COM/2002/0092 final – COD 2002/0047* (Commission Proposal 2002).

39 European Commission: Patentability of computer-implemented inventions *http://ec.europa.eu/internal_market/indprop/comp/index_en.htm*, last visited 8 May 2012.

40 R. Hilty, C. Geiger, *op. cit.* fn 17, 16.

(source code, unless written as open source software, is not available), and information on programs is not published in journals and other publications as often as is with traditional inventions. Further, the patent office examiner has limited resources to look for all possible references, quite possibly resulting in non-novel patents being granted.

Even when the claimed invention is novel and involves technical considerations, this is not enough to be granted a patent. The invention must not be obvious to a person skilled in the art— a computer engineer. The decision T 154/04 (Estimating sales activity/Duns Licensing Associates) is an exemplary[41] which summarises the approach taken by the EPO when examining computer-implemented inventions. The decision confirms the latest practice of the EPO, according to which only technical features can establish novelty and inventive step. Therefore, the 'art' cannot be a field of business or administration, resulting in it being possible to take into account „only elements of the solution falling within the competence of a technically skilled person".[42]

It has been asserted that it is precisely the criterion of inventive step that has been the basis of the errors of certain patent offices, particularly the USPTO, which have granted patents for processes already known and, moreover, evident to any computer programmer. In this respect, it can be concluded that the EPO to date has conducted a notably better job in ensuring the novelty and inventiveness of the inventions being granted a patent, in comparison to the USPTO. This can best be shown by Amazon's notorious „One-click" payment system patent application, one of the most controversially discussed software inventions to date,[43] which has been denied by the EPO but granted by its American counterpart, albeit with a reduced number of claims.

The EPO in 2012 firmly defends its practice, stating that it „does not grant patents for computer programs or computer-implemented business methods that make no technical contribution."[44] Despite this

41 R. Osterwalder *ed.*, *Patents for software? Law and practice at the European Patent Office*, European Patent Office, Munich, Germany 2012, 18–19.

42 Amazon's One-Click Patent in Europe and Elsewhere *http://blog.ksnh.eu/en/2011/08/06/amazons-one-click-patent-in-europe-and-elsewhere/,* last visited 22 July 2012.

43 *Ibid*.

44 N. Shemtov, *The Characteristics of Technical Character and the Ongoing Saga in the EPO and English Courts,* 4(7) J. INTELL. PROP. L & PRAC 2009.

assertion, a study conducted in 2000[45] indicates that the vast majority of software patent applications up to that time „proceed through the EPO without objection and the vast majority of appeals are granted, provided that the claims are appropriately drafted."[46] Thus, much of legal doctrine and many critical voices in the industry consider that even if the EPO still refuses to admit it expressly, it has admitted in its practice the patentability of programs „as such."[47]

Therefore, the strict application of the patentability criteria is essential for restriction of such software patents, or at least for restriction of the scope of such patents. A proper application of the inventive step criterion in particular could play the role of a highly selective filter in determining which „computer-related inventions" deserve patent protection, especially having in mind that progress in computer science consists more in 'small steps' than in real breakthroughs".[48]

4. PATENT PROTECTION OF COMPUTER PROGRAMS — A POLICY PERSPECTIVE

4.1. Introduction

The question of patentability of software––whether software patents should be allowed at all, what should qualify, and whether they are used to stifle or encourage innovation is a policy issue that cannot be answered by law 'in isolation', but necessitates consideration

45 Keith Beresford 2000: Patenting Software Under the European Patent convention, *http://eupat.ffii.org/papri/beresford00/beresford00.en.pdf*, last visited 6 June 2012. The way a patent claim is worded is often decisive, as demonstrated in the case T59/93 in which EPO held that a method for interactive rotation of displayed graphical objects was sufficiently technical. Initially the application was rejected, but after redefinition of the claims it was accepted (Beresford 2000, Chapter 3).

46 S. Marsnik, R. E. Thomas, *op. cit.* fn 28, 55.

47 R. Hilty, C. Geiger, *op. cit.* fn 17, 12; Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions, *COM/2002/0092 final – COD 2002/0047*, Explanatory Memorandum, at 7; The Commission admitted this clearly in its CII Directive Proposal, refusing to follow „the practice of the EPO in permitting claims to computer program products either on their own or on a carrier, as this could be seen as allowing patents for computer programs 'as such'" (Explanation of Art. 5).

48 R. Hilty, C. Geiger, *op. cit.* fn 17, 17.

of research in economics and opinions of the experts in the technical field in which its scope is considered, i.e. the consideration of the actual experiences and opinions of the IT industry, in all its segments. In this context it is important to note that for the last decade, there has been a sharp debate, mainly placing large multinational software companies against small and medium-sized software developers as well as the open source software community, as to whether the American and Japanese approach to software patents should be adopted in Europe. An escalation of arguments on the topic achieved its peak in the legislative process of the proposed CII Directive and to date the debate has not been resolved. The policy debate over software patents has thus far lacked consequential empirical analysis. Nonetheless, some conclusions may be drawn.

4.2. *Do Software Patents fulfil the Primary Function of Patent Law?*

It has been is stressed that the primary function of patent law is to stimulate inventive activity by the grant of temporary exclusivity to exploit an invention. Patents are conceived to benefit the inventor by allowing him/her to recoup their investment in research and development (hereinafter: R&D). Society, in turn, obtains access to information on how the invention may be worked.

The „information" function of patents aims to disseminate knowledge and facilitate follow-up inventions. However, it cannot be denied that the IT industry has developed through decades of scientific and industrial application of computer programs without patents, i.e. during which no prior art had been registered. What is more, studies show that even today a negligible amount of awareness exists of the possibilities to use patents as a source of technical information.[49] On the other hand, openness is readily obtained through the use of alternative development models such as open source software as well as by the proliferation of non-proprietary standards and standard-setting bodies[50] that establish a common framework for development.[51]

49 R. Hilty, C. Geiger, *op. cit.* fn 17, 20.

50 C. Shapiro, „Navigating the Packet Thicket: Cross Licenses, Patent Pools, and Standard Setting", in *Innovation Policy and the Economy 1* Jaffe, Lerner, & Stern, eds. 2001, 119.

51 A. G. González, *op. cit.* fn 6, 10.

As opposed to other areas of technological innovation, such as the chemical and pharmaceutical sector where it would be nearly impossible to stimulate investments in R&D without the possibility of patent protection, there is not enough empirical evidence to prove a relationship between innovation in the software industry and patents, nor that they generate an incentive for innovation. It is perceived that the extension of patentability of computer programs provides no economical benefit to the majority of its potential users, i.e., Small and Medium Enterprises (SMEs).[52]

The success of open source software[53] (hereinafter: FLOSS), community consisting of thousands of developers who innovate without the incentive of patent protection and even explicitly against it also serves to question the need for patent's basic functions. FLOSS is a method of development and distribution which has become an important alternative to the traditional proprietary or „closed software" platforms. While „closed source" companies keep source code unavailable and inaccessible in order to maintain proprietary control over their products, FLOSS distributes the „human-readable" source code so that it can be studied, improved, modified, and, in some cases, redistributed by other programmers. The free access[54] to source code plays essentially the same role as patent disclosure. On the other hand, FLOSS developers produce new programs without counting on a return on investment through the exploitation of a patent right.

4.3. *An Altered Function of Software Patents*

The general sentiments of the players in the software industry towards patentability (from rather positive for large companies, very reserved for SMEs, and openly hostile for individual programmers and the FLOSS community) may not come as a surprise if one considers studies of a wider scope which show that patent protection has a nega-

52 Pellegrini, *op. cit.* fn 20

53 The idea emerged in the 1980s and was pioneered by Richard Stallman, founder of the Free Software Foundation.

54 The concept of „free," however, is understood as „publicly available" or „accessible without restraint", not necessarily in the sense of lacking a price tag Richard Stallmen is frequently cited as saying that the „free" in FLOSS should be understood as „freedom" not „free beer" nor „free cocaine" (first time is free).

tive effect for the dynamics of a sector if its players rely strongly on the input from previous innovative activities.[55] Theoretical economics literature argues that when innovations are sequential and cumulative, patents may impose more than the typical „exclusion-period costs".[56] If one considers the fact that the software development process is characterised by a set of specific features— sequentiality, interoperability, and short development cycles,[57] it becomes clear why such a phenomenon, metaphorically labelled a „patent thicket", is a threat to the software industry.[58]

The software technology is such that one software program may embody a large number of patented elements. Such patents encompass a wider range of software applications and they are more difficult to circumvent by rewriting the code. When small pieces of software that can be used in a multitude of applications are patented, it becomes increasingly likely that each complex program will infringe a patent. Companies thus have incentives to patent for strategic reasons, some being commercial— in order to gain leverage in cross-licensing negotiations as an „exchange currency", others judicial— to sue infringers, and even overtly hostile ones— to deter competitors from a certain field of activity by creating impenetrable portfolios.[59] Conversely, if the patent is not used in an aggressive manner, it may be used for defensive goals, as protection in case of an „attack" from a competitor. The end result is that patents are increasingly fulfilling a function which was not originally assigned to them.

Moreover, there is a growing concern that patenting is itself becoming an impediment to the innovation process. Smaller players are faced with frightening patent thickets on core technologies, which they do not have the resources to equal, or to (cross-) licence, let alone

55 K. Blind, „Intellectual Property in Software Development: Trends, Strategies and Problems", *Review of Economic Research on Copyright Issues* 2007, vol. 4(1), 16.

56 C. Shapiro, *op. cit.* fn 50, 119.

57 K. Blind, *op. cit.* fn 55, 16.

58 D. Evans, A. Layne-Farrar, „Software Patents and Open Source: The Battle Over Intellectual Property Rights", *SSRN* 2004, 37. The most frequently used phrase „patent thicket" is coined by Carl Shapiro and defined by him as a „a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology".

59 R. Hilty, C. Geiger, *op. cit.* fn 17, 27.

challenge. The freedom of action in R&D is constrained (reduction of the software „commons"), likely hindering start-ups from entering or thriving in the market.[60] These dangers are frequently raised in public debates on patent reform.[61] The openly hostile attitude towards patents is for the greatest part a result of fear caused by FLOSS projects terminating when the owners of patents covering aspects of a project demanded license fees that the project could not pay, or was not willing to pay, or terms of the offered licence were unacceptable, possibly even due to conflict with the free software license in use. Although the probability of inadvertent infringement might not be any higher for FLOSS than for proprietary software, with source code easily accessible for inspection, FLOSS developers are inevitably much more vulnerable to patent infringement litigation.

Beyond exposing individual companies to threats of litigation, from a wider perspective it may be said that software patents create a climate of legal uncertainty that is detrimental to the FLOSS community and the software industry as a whole.[62] The mere risk of infringement, together with the associated costs, might be a deterrent and an obstacle to the diffusion of FLOSS amongst companies, especially for individual programmers and SMEs, which do not have the financial means to defend themselves.[63]

5. CONCLUSION

Can computer programs be patented in the actual state of the law? In Europe, one will not receive a straightforward answer to such a simple question. The European Patent Convention forbids patents of computer programs „*as such*." However, these words have been the cause of much controversy, their vagueness allowing the European Patent Office to progressively adopt less restrictive interpretations

60 A. G. González, *op. cit.* fn 6, 13.

61 M. Noel, M. Schankerman, Strategic Patenting and Software Innovation, CEP Discussion Paper No 740, August 2006, http://cep.lse.ac.uk/pubs/download/dp0740.pdf, last visited 6 August 2012.

62 F. Lévêque, Y. Ménière, „Copyright Versus Patents: The Open Source Software Legal Battle", *Review of Economic Research on Copyright Issues vol. 4(1)* 2007, 39.

63 R. Hilty, C. Geiger, *op. cit.* fn 17, 23.

through various equally vague legal constructions. Even though the EPO still refuses to admit it expressly, many critical voices consider that it has in fact permitted the patentability of programs „*as such*", albeit under the condition that they provide a non-obvious technical solution to a technical problem.

The practice of the EPO has been noted as the cause of much legal uncertainty, augmented by disparities between the practices of different patent offices in Europe, all of which have a direct and negative effect on the proper functioning of the internal market. The proposed CII Directive aimed to remove these disparities and to place such patents under the auspices of the EU legal order. However, it was met with overwhelming protest, leading to its ultimate rejection in 2005. From the failure of the legislative attempt the issues addressed in it still have not been resolved although it can be concluded that compelling reasons exist to keep patent law within its established boundaries supported by the EPC. As the underlying issues are yet unresolved, their discussion and analysis is all the more important.

From a European perspective, the arguments against software patents are to a great extent based on the experiences and understandings of their American counterparts. Although it is true that there are not as many computer-implemented invention patents granted by the EPO as USPTO software patents, it is generally understood that the practice of patent infringement lawsuits is not widespread to date mainly due to the still existent legal uncertainty as to their enforcement. Nevertheless, the facts that more than 30,000 software patents[64] have been granted by the EPO and, moreover, that patent applications for computer-based inventions have over the past few years had the highest growth rate among all patent categories presented to the EPO[65] are evidence enough for a need of a proactive approach to be taken in creating a sounder legal system, better adapted to the needs of the industry.

Therefore, although the question of the actual state of law is important to settle for the legal certainty of all the relevant players, a more important issue is whether patent protection of software has a positive,

64 A. Grosche, *op. cit.* fn 8, 257–309: estimate of the number of patents is from 2006; F. Pellegrini (*op. cit.* fn 21) also gives the same estimate (2002).

65 EPO: Patents for Software? *http://www.epo.org/news-issues/issues/computers/software.html*, last visited 23 July 2012.

stimulating effect on its development. There is insufficient empirical evidence to prove such an assertion. Moreover, the sheer existence of the FLOSS community most blatantly questions the incentive function of patents as these developers produce new programs and wilfully disclose source code without counting on a return on investment through the exploitation of a patent right. Needless to say, the fact that criticism is expressed by creators provokes doubts on a system that is based on creation.

Nonetheless, for a true evaluation, careful empirical research needs to be conducted, upon which the EU should take the initiative to regain control over the EPO, systematically refine the existing instruments of protection to best fit the subject matter of protection, and appeal to other countries to follow its lead.

Ivana Ninčić, LL.M.

PATENTNA ZAŠTITA SOFTVERA U EVROPSKOJ UNIJI

Sažetak

U dugogodišnjoj raspravi o uticaju i značaju prava intelektualne svojine na razvoj novih softverskih tehnologija jedno od glavnih pitanja koje se postavlja je da li se kompjuterski programi mogu patentirati i pod kojim uslovima. U pokušaju odgovora na ova pitanja, ukratko su predstavljene osnove dva glavna oblika zaštite intelektualne svojine—autorskih prava i patenata, nakon čega su izloženi postojeće zakonodavstvo i sudska praksa na evropskom nivou. U Evropi na zakonodavnom nivou postoji jasno usmerenje ka zaštiti putem autorskih prava, imajući u vidu Direktivu o pravnoj zaštiti kompjuterskih programa i član 52(2)(c) Evropske patentne konvencije koji formalno zabranjuje patente kompjuterskih programa „kao takvih." Međutim, praksa Evropske patentne organizacije postepenog primenjivanja manje restriktivnih kriterijuma primenom nejasnih pravnih konstrukcija, otvorila je vrata patentiranju softverski implementiranih pronalazaka za koje se smatra da u mnogim slučajevima odstupaju od izuzetka predviđenog u članu 52(2)(c) EPK. Šta više, ne samo da praksa EPO nije jedinstvena, već se i primena odredbi EPK širom Evropske unije značajno razlikuje, zbog

čega je 2002. godine podnet predlog Direktive o patentabilnosti pronalazaka nastalih putem kompjutera a koji je posle dugotrajne i žestoke rasprave odbačen. Kako se polemika ne tiče samo tumačenja i primene pozitivnog prava, već se protstire i na šire pitanje opravdanosti patentte zaštite kompjuterskih programa kao takve, rad razmotra i pitanje da li patenti vrše svoju osnovnu funkciju, te poziva na dalje kritičko proučavanje ove oblasti sociološkom i aksiološkom metodom.

Ključne reči: *Patentna zaštita za softver.– Softverski implementirani pronalasci.– „Open Source" softver.*

UDK 346.93(4-672EU) ; 339.727.22(4-672EU)

Sonja Srećković, LL.M.[*]

THE ISSUES OF ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS IN THE POST-LISBON ERA

In the bid to become a more influential player in the global trade policy the European Union has, with the Lisbon Treaty, swiftly shifted the vertical alignment of competence to regulate foreign direct investment away from EU Member States, thereby reserving its prerogatives to determine the future course of investment promotion and protection for itself. According to the new regime, the bilateral treaty regime matrix has collapsed in favour of the EU regime. One echelon of scholars and practitioners particularly apprehensive about the implications of the Lisbon Treaty are arbitral investment tribunals. If the contemporary investment regime has dissolved under the new prerogatives of the Union, arbitral tribunals will have to tread carefully when considering what implications a new 'European' order might have on their jurisdiction and the substantive law they are obliged to interpret. After all, if tribunals err on any of these two points, any award they render could potentially be caught in the crossfire of the Union's policies and threatened with denial of enforcement.

Key words: *Foreign Direct Investment – Arbitration – Recognition and Enforcement*.

1. INTRODUCTION

Foreign Direct Investment (hereinafter FDI) is universally considered an intergral part of an open and effective international economic system and a major catalyst to development.[1] The liberalization of FDI, combined with suitable and effective trade policies, economic and

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1 OECD, Foreign Direct Investment for Development Maximizing Benefits, Minimising Costs, *http://www.oecd.org/investment/investmentfordevelopment/1959815.pdf*, last visited on 1 October 2012.

technological forces, sustain and propel the expansion of international production.

Naturally, as a consequence of the increasing importance and expansion of FDI, the need to sustain and efficiently protect it has developed in parallel.[2] This has led to the conclusion of International Investment Agreements (hereinafter ILAs) and, in particular, Bilateral Investment Treaties (hereinafter BITs).[3] Although, as authors have noted, in spite of the proximity between international trade and investment, there is disproportion in the extent and intensity of their regulation and liberalization at the multilateral level.[4] In other words, at least for now, BITs have been dominating the scene of international investment.

With the aim of ensuring the protection and promotion of foreign investments as well as developing the economies of states in which investments are made, BITs are infused with provisions covering reciprocal conditions for access of FDI between the contracting parties. These provisions contain guarantees for national treatment, fair and equitable treatment, full protection and security, prohibition of expropriation and transparency, etc. Importantly, a vast number of BITs contain specific dispute settlement provisions which enable investors to pursue claims they have against host states in breach of their treaty obligations. The plethora of BITs has created a universal system of substantive and procedural investment protection, a fundamental part of the contemporary international economic order.[5]

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2 S. Greenberg, C. Kee, J.R. Weeramantry, *International Commercial Arbitration, an Asia-Pacific Perspective*, Cambridge University Press 2011, 478.

3 S. D. Amarasinha, J. Kokott, „Multilateral Investment Rules Revisited", *Oxford Handbook of International Investment Law*, 1 2008, 124: „*[I]t would be wrong to conclude that there is no multilateral regime for foreign investment. Rather, it is a fragmented regime with a variety of contracting parties, some being bilateral, others regional or multilateral, as in the case of WTO Agreements. The result is that for each pair or group of international investment agreements (IILs), creating incentives for 'treaty shopping' by foreign investors who seek to enhance their protection even in cases where their own country has not concluded agreements that offer the same level of protection as those used by other countries. Thus there may be significant reasons for moving to a new multilateral investment regime.*"

4 *Ibid.,* 120.

5 K. Bökstiegle, An Arbitrator's Perspective of BITs and their Relation to Other International Law Obligations, *http://www.arbitration-icca.org/media/1/13202154888160/3-an_arbitrators_perspective_of_bits_.pdf*, last visited 1 October 2012.

Within the borders of the EU, Member States have, between themselves, concluded more than 1,100 BITs.[6] Furthermore, the EU accounts for more inward and outwad FDI than any other trading entity. According to a review conducted by Copenhagen Economics, over the past decades, EU firms have increased their investments outside EU borders by a factor of five.[7] By 2008, the EU27 stock of outward FDI in non-EU countries amounted to €3.3 trillion,[8] whilst the stock of FDI into the EU by non-EU investors amounted to €2.4 trillion in 2008.[9] The conclusion of the study was, inter alia, that outward FDI has led to an increase in EU GDP of more than €20 billion over the period between 2001–2006.

The coming into force of the 2009 Treaty on the Functioning of the European Union (hereinafter the Lisbon Treaty)[10] represents a milestone in how investment regulation is managed within the borders of Europe. The new Treaty, by expanding its definition of the Common Commercial Policy (hereinafter the CCP), has subsumed foreign direct investment as an area of exclusive Union competence. Although the Union's firm intentions to intervene in foreign investment policy can be traced back at least a decade, its latest attempt seems to have reaffirmed authority in the field of foreign investment by shifting the vertical allocation of competences in favour of the Union, to the loss of its Member States.[11]

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6 *See* UNCTAD, Recent Developments in International Investment Agreements (2008-June 2009),*http://unctad.org/en/docs/webdiaeia20098_en.pdf*, last visited 1 October 2012.

7 Copenhagen Economics, Impacts of EU Outward FDI, Final Report, 20 May 2010, *http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146270.pdf*, last visited 1 October 2012.

8 *Ibid.*

9 *Ibid.*

10 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *Official Journal of the European Union*, 2007/C 306/01.

11 The Union has legitimized this change in policy by purporting to level the playing field of EU investors abroad and aiming to secure external competitiveness in addition to gaining maximum leverage in negotiations with non-EU states. With regard to the latter, it seems that the EU's new powers have arrived just in time. Vested with the authority to conclude investment agreements on behalf and in the interest of its Member States, the Union may be able to negotiate advantageous positions for its investors more easily in the future. In addition, with the emergence of China as a serious new competitor

However, the Lisbon Treaty is fraught with deficiencies and ambiguity. The emphasis of this paper will lie on the analysis of these deficiencies and their potential implications for the enforcement of investment arbitral awards.

Given that the settlement of investment disputes has been predominately handled by arbitration over the past fifty years, it is important to distinguish between, firstly, the impact that EU law may have on the competence of tribunals to settle investment disputes in the future, and secondly, whether or not tribunals have the capacity to interpret and apply EU law. These issues are of critical relevance in the context of the recognition and enforcement of arbitral awards because both may be used as tools with which to challenge an arbitral award.

2. THE LISBON TREATY – A NEW INVESTMENT ORDER

As noted in the Commission's 2010 Communication, investment presents itself as a new frontier for the Common Commercial Policy (hereinafter the CCP).[12] The Lisbon Treaty provides for the Union to contribute to the progressive abolition of restrictions on FDI. The EU's task is to develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth.

Articles 206[13] and 207[14] of the Treaty set the deck to what constitutes a shift in the vertical alignment of competences between Member

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and the elaborate influence the Untied States has in the global trade order, the EU will be dealing a new hand in future trade and investment negotiations.

12 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, 2010, *http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf*, last visited 1 October 2012.

13 Article 206 of the Lisbon Treaty: „*By establishing a customs union in accordance with Articles 28 to 32, t**he Union shall contribute**, in the common interest, to the harmonious development of world trade, the **progressive abolition of restrictions** on international trade and **on foreign direct investment**, and the lowering of customs and other barriers.*" (emphasis added)

14 Article 207 of the Lisbon Treaty: „***The common commercial policy shall be based on uniform principles**, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and ser-*

States and the EU. With the inclusion FDI as one of the areas covered by the commercial policy of the Union via Article 207, the Union now has the exclusive competence to develop and protect a „common" investment policy.[15] The EU, now with greater political leverage, might be able to push for a global policy – succeeding where international organizations have failed previously. What is more, a complete European investment policy might help in the development of a more balanced investment treaty regime.[16]

Also, even though the EU accounts for more inward and outward FDI than any other trading entity, the non-existence of an EU position on investment has undermined its propensity to articulate and negotiate international negotiations on investment, whether in the OECD, WTO or in bilateral and regional trade agreements. Moreover, disparate European investment policies and BITs have, according to the Commission, created inequality amongst European investors. Whereas countries such as Germany, France, the Netherlands, etc. have been active in negotiating BITs, other Member States have not.[17] This dispar-

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vices, and the commercial aspects of intellectual property, ***foreign direct investment****, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*." (emphasis added)

15 Authorities have stated that the inclusion of FDI in the CCP is a natural progression after the Nice Treaty that declared trade in services, which under the General Agreement on Tariffs and Trade, includes the right of establishment, i.e. the entry of investments to fall within the Union's exclusive competence. Thereby remedying the discrepancy that trade in services was part of exclusive Union competence, whereas FDI in manufacturing was not. *See* A. Dimopoulos, „The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?", *Croatian Yearbook of European Law and Policy* 4/2008. Furthermore, the fragmented approach to investment policy has been branded sub-optimal, *inter alia*, because of the relationship between trade in goods and services on one hand and FDI on the other. *See* Directorate-General for External Policies, The EU Approach to International Investment Policy After the Lisbon Treaty 2010, *http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=33990*, last visited 1 October 2012.

16 *See* W. Shan, S. Zhang, „From 'South-North Contradiction' to 'Public-Private Conflict': Revival of the Calvo Doctrine and New View of International Investment Law", *Northwest Journal of International Law and Business* 27/2007, 631.

17 For example, Ireland has not concluded a single BIT.

ity between Member States' policies (or lack thereof) favours investors and economies of the latter group of states.[18]

If the EU is extending its grasp to the realm of FDI, a critical issue will be the topic of dispute settlement. Namely, the questions have arisen in the Eastern Sugar[19] and Eureko cases,[20] pertaining to the applicability of BIT dispute settlement provisions and a tribunal's capacity to interpret EU law. One should be mindful that enforcement of awards is the 'tail-end' of the problem. The legal basis for the challenge of any arbitral awards lies in the misapplication (or non-application) of applicable procedural and/or substantive law. This in mind, with the integration of investment law into European law, the latter may provide challenges to the enforcement of investment arbitration awards,[21] both from a procedural and substantive point of view.

2.1. European Law Challenges on Jurisdiction – The Applicability of BITs

To the extent the EU has not formulated and enacted its planned investment agreements, the lingering predicament of arbitral tribunals' jurisdiction will remain. As has been evidenced in the Eastern Sugar and Eureko cases, the question of jursdiction boils down to the question of validity and applicability of BITs. Host states have, in order to shield themselves from the jursidiction of arbitral tribunals, attempted to envoke the primacy of EU law which would render BITs, and therefore dispute settlement provisions contained therein, inapplicable.

In the Eureko case, the Slovak Republic put forward an argument pertaining to the alleged discriminaory nature of arbitration clauses.[22] Namely, because the EC Treaty fails to envision arbitration proceedings between Member States and investors, applying BIT arbitration clau-

18 *See* Directorate-General for External Policies, *op. cit*., fn. 15.

19 Eastern Sugar B.V. v. Czech Republic, SCC No. 088/2004, Partial Award of 27 March 2007.

20 Eureko B.V. v. the Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, 26. October 2010.

21 M. Burgstaller, „European Law Challenges to Investment Arbitration", *The Backlash against Investment Arbitration*, 2010, 456.

22 A similar argument was put forward by the Czech Republic in the *Eastern Sugar* case, although the Slovak Republic seems to have articulated this line of argument more comprehensively. .

ses would transgress on Article 12 of the EC Treaty which prohibits discrimination on the grounds of nationality. Investors from Member States which have not concluded BITs with the Slovak Republic would be descriminated against as a result of the arbitration clause.[23]

However, the Eureko tribunal rightly adopted the claimant's position, rejecting such assertions from the Slovak Republic and the Commission, by claiming that „[d]iscriminatory behaviour should be remedied by granting others a similarily favourable position, not by placing all parties in a similarly unfavourable position."[24]

The issues of jurisdiction, in both the Eureko and the Eastern Sugar cases, were decided in favour of retaining jursdiction. The tribunals concluded was that intra-EU BITs are not rendered inapplicable by way of their Member States' accession to the EU. The basis of this reasoning lies, inter alia, in the premise that obligations under BITs and EU law are not incompatible with one another.

2.2. European Law Challenges on the Merits – the Prevelance of EU Law

A further topic that demands attention is one of the applicability of EU in general, and its interpretation by arbitral tribunals in particular.

Going back to the aforementioned cases, whilst the tribunal in Eastern Sugar had been critisized for not dealing with the issue accordingly,[25] the tribunal in Eureko did attempt to reconcile the prima facia 'competing legal' orders. The Eureko tribunal correctly concluded that EU law may have bearing upon the scope of rights and

23 Eureko Award, 183. The European Commission also iterated its fear that referring questions of EU law to arbitral panels would inevitably promote competing judicial and arbitral mechanisms and would therefore increase forum shopping by litigants and contribute to the risk of further fragmentation of international law. From the perspective of the Commission, 'outsourcing' disputes concerning EU law is unacceptable from an institutional EU law perspective and misunderstands the EU judicial system.

24 Eureko Award, 123.

25 M. Burgstaller, *op. cit*. fn. 21, 468. The tribunal in *Eastern Sugar* merely averred that „international law generally applies" without adressing the question of whether it thought that international law included EU law (or vice versa, whether EU law encapsulates generally accepted principles of law) or whether it deemed EU law to be applicable at all. *Eastern Sugar* Award, 196.

obligations under the BIT by virtue of its role as applicable law under BIT Article 8(6) and German law as lex loci arbitri.[26]

First and foremost, every arbitral tribunal has an obligation to determine what the applicable law is in the case before it. If an investment tribunal finds that there are conflicting provisions contained in the applicable law, i.e. that certain obligations under the BIT clash with certain EU obligations for example, then it has to decide which legal order will prevail. It should be emphasized howeever, that the former is a question of whether a tribunal should refer to EU law at all, whereas the second is the question of the supremacy of EU law.

On the other hand, whilst tribunals may have (or will in the future) struggle with the question of supremacy of EU law (and the proper ways in which it will be applied), the European Commission has been adamant as to which law prevails.

In 2009, the ECJ rendered, for the first time, three important judgments against Sweden,[27] Austria[28] and Finland.[29] The Commission in 2004 notified Austria, Finland, Sweden and Denmark that some of their extra-EU BITs might be in conflict with certain powers reserved for the EU.[30]

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26 Article 8 (6) of the Dutch-Czech BIT reads: „[*t*]*he arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.*"

27 Case C–249/06, EC Commission v. Sweden of 3 March 2009, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0249:EN:HTML*, last visited 1 October 2012.

28 Case C–205/06, EC Commission v. Austria of 3 March 2009, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0205:EN:HTML*, last visited 1 October 2012.

29 Case C–118/07. EC Commission v. Finland of 19 November 2009, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0118:EN:HTML*, last visited 1 October 2012.

30 The most interesting aspect of the Commission's action was that it purported to eliminate any incompatibilities, even hypothetical incompatibilities, between BITs and EU law. The Commission requested that the BITs must be either brought into line with Community law or, if that proves impossible, be denounced. Member States, on the other hand, are obliged to take all appropriate measures to eliminate possible incompatibilities contained in international agreements concluded prior to their accession to the EU.

This approach not only illustrates that Community law in any case supersedes even prior international obligations of the EU Member States but, even more importantly, underlines the desire of the ECJ to ensure that no international court or arbitral tribunal finds itself in the position of interpreting or applying Community law, thereby undermining the exclusive jurisdiction of the ECJ.[31]

The ECJ ultimately sided with the Commission in its 3 March 2009 ruling, in which it argued that, should the European Community decide to restrict capital flows, it would be impractical for Sweden and Austria quickly to resolve the conflict that would arise with respect to the commitments made to foreign investors under their bilateral investment treaties. Accordingly, the ECJ ruled that Austria and Sweden had not fulfilled their obligations under Article 307 TEC.[32]

It seems as though some Member States have taken the ECJ's hint and already started amending their investment agreements with non-members. For example, Hungary terminated its BIT with Israel, the Czech Republic concluded five protocols on the amendments to original BITs signed with third countries.[33] One should be mindful however, that the amendments of BITs, as instruments of public international law, are conditioned on the mutual agreement between both contracting parties.[34] It will be interesting to see whether or not non-EU BIT counterparties will be forthcoming with regard to any modifications in their respective bilateral treaties.

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31 *See* W. Shan, S. Zhang, „The Treaty of Lisbon: Half Way Towards a Common Investment Policy", *European Journal of International Law* 21/2011.

32 Interestingly, the ECJ explicitly held that its findings were not limited to the Member State which is the defendant in the present case. This appears to be a suggestion by the ECJ that the more than 1,100 EU Member State BITs may also be deemed to be in violation of the EC Treaty to the extent that they contain similar free transfer provisions. However, even though the foregoing cases concerned extra-EU BITs, one can see the EU had already purported to question the validity of intra-EU BITs, evidenced by the Eastern Sugar and Eureko cases. It is estimated that there are nearly 200 such BITs between pairs of EU Member States.

33 For more detailed analysis *see*, UNCTAD ILA Monitor, Recent Developments in International Investment Agreements (2008-June 2009), *www.unctad.org/en/docs/webdiaeia200098_en.pdf,* last visited on 1 October 2012.

34 Article 39 of the Vienna Convention.

3. ISSUES OF ENFORCEMENT

As mentioned in the previous chapter, European law can challenge investor-state dispute settlement both on jurisdictional and substantive grounds. These observations lead one to the ultimate tail-end of the ramifications the Lisbon Treaty may have on investment issues within the EU.

If a tribunal asserts jurisdiction with regard to a dispute arising out of a BIT that has been 'displaced' or 'superseded', any rendered award could be annulled. Article V(1)(a) of the New York Convention.[35] If, on the other hand, a tribunal fails to apply, or errs in the application of substantive law (not necessarily European law), a challenge can arguably be brought against such award on the grounds of public policy, i.e. Article V(2)(b) of the New York Convention.

However, whilst the issue of jurisdiction, i.e the validity of BITs, will hardly be settled to the detriment of these agreements, at least until the EU comes up with a different solution in its tentative common investment policy, the issue surrounding the application of EU law might prove difficult for arbitral tribunals. As speculated by authorities, tribunals may misinterpret EU law and come to erroneous conclusions regarding a breach of BIT provisions, or they may simply ignore the supremacy of EU law. Thirdly, they may deprive EU law of its *effet utile*.[36]

At this point, it might be prudent to differentiate two scenarios, namely, whether investment arbitration proceedings have been initiated under the auspices of ICSID or a private forum for the settlement of disputes (by way of example, an ad hoc tribunal constituted under the UNCITRAL Rules, the ICC, etc). The relevance of this delineation lies in the fact that ICSID awards are not subject to scrutiny by domestic courts whereas awards rendered by 'private' arbitral tribunals have to pass the test of Article V of the New York Convention on the

35 „*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that...the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made...*"

36 M. Burgstaller, *op. cit*. fn. 21, 472.

Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention).[37]

On the other hand, awards that are issued by ICSID are subject to numerus clausus grounds for annulment,[38] whereas awards that are not governed by the ICSID convention may be subject to judicial review. In other words, unlike ICSID awards, any award rendered by a private tribunal will be subject to review under the arbitration law of the state where the arbitration had taken place – lex fori or scrutinized in light of Article V of the New York Convention.[39]

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37 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term „non-domestic" awards refer to awards treated as „foreign", under the law of the state under the laws of which recognition and enforcement is sought, because of a foreign element in the proceedings. The most common example of a foreign element in proceedings is the application of another State's procedural laws.

38 Article 52 of the ICSID Convention: „[e]*ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds*: (a) *that the Tribunal was not properly constituted;* (b) *that the Tribunal has manifestly exceeded its powers;(c) that there was corruption on part of a member of the Tribunal;(d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based...The Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this convention...Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state*."

39 Article 5 of the New York Convention reads: „[*r*]*ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article 11 were, under the law applicable to them. under some incapacity, or the said agreement is not valid under the law to which the parties had subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or*

However, one of the fundamental systemic shortcomings of BITs that has become apparent as a result of the dispute settlement procedures of the past decade or so concerns the lack of consistency of decisions of investment arbitral tribunals and the existing difficulties in correcting inconsistent decisions.[40] This is due to the fact that, inter alia, international investment arbitral tribunals are not bound by each other's case law or by the jurisprudence of any permanent court such as the International Court of Justice or the ECJ. In other words, each and every investment arbitral tribunal operates, in principle, completely independently and decides the case before it on the basis of what is prescribed in the BIT and in the rules of procedure.

For example, in the Eastern Sugar case, assuming the tribunal had concluded that EU law was not be applicable in that investor-state arbitration. Given the jurisprudence of the ECJ on the supremacy and

was otherwise unable to present his case; or(c) The award deals with a difference not contemplated by or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; o r(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Another critical difference between the ICSID annulment procedure and a set aside (or recognition) procedure is that an ICSID annulment is decided by an international tribunal similar to that which decided the original claim, whilst the set aside proceeding is decided by a judge of the state where the arbitration was situated. Furthermore, the grounds for setting aside are provided by the lex arbitri of the state where the set aside proceeding occurs and, in the absence of an international agreement on that matter represent a result of the unilateral assessment by the state where the arbitration took place, whilst the grounds for annulment are set forth exclusively by the ICSID convention and are agreed upon and accepted by all the signatories of the ICSID Convention. Therefore a domestic court might have to refer to the ECJ for a preliminary ruling with respect to some matters decided upon in the arbitral award, whilst the ICSID Anulment Committee, given that it is in essence another arbitral tribunal, would not be able to refer to the ECJ.

40 *See* N. Lavranos, Bilateral Investment Treaties (BITs) and EU law, *http://www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Agora/Lavranos.pdf*, last visited 1 October 2012.

effectiveness of EU law, the tribunal would probably have been fallacious, especially in view of the position taken by the ECJ in the Costa v. ENEL case.[41]

On the other hand, how any interpretation of EU law by arbitral tribunals to be reconciled with the ECJ's adamant position that national arbitral tribunals cannot be considered to be ordinary courts and tribunals in the sense of former Article 234 EC (now Article 267 TFEU) and therefore cannot request preliminary rulings from the ECJ? This is especially problematic given that arbitral awards that fail to apply Community law may not be executed by national courts of the Member States without proper examination and application of Community law.

Authorities have offered a few solutions. Burgstaller has stated that there appear to be three options to secure the correct application of EU law by investment tribunals. The first option would entail granting international investment tribunals the status of a court or tribunal within the meaning of Article 267 of the Lisbon Treaty. This way, arbitral tribunals would be able to refer to the ECJ for a preliminary ruling. On the other hand this would also entail that the ECJ would have to change its jurisprudence, because under the Court's current case law, an arbitral tribunal is not a court or tribunal within the meaning of Article 267 of the Lisbon Treaty.

It is interesting to refer back to the Eastern Sugar case where the Czech Republic, in one of its alternative arguments for its intra-jurisdictional objection requested the tribunal refer to the ECJ for a preliminary ruling. The Slovak Republic interpreted the ECJ's case law regarding Article 234 of the EC Treaty for a preliminary ruling in the case of Denuit v. Transorient. The decision cited:

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41 The integration into the laws of each Member State of provisions which derive from the community and more generally the terms and the spirit of the Treaty make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Flaminio Costa v E.N.E.L, Reference for a preliminary ruling of 15 July, Case 6–64, 1964, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:EN:NOT*, last visited 1 October 2012.

„Under the Court's case law, an arbitration tribunal is not a „court of a member State" within the meaning of Article 234 EC where the parties are under no obligation, in fact or law, to refer their disputes to arbitration..."[42]

The Czech Republic asserted that the forgoing decision must be understood to mean that only when two parties are under no obligation to refer their dispute to arbitration is an arbitral tribunal not „a court of a member state", and by contrast, where the parties are under an obligation to refer their dispute to arbitration, the arbitral tribunal may file a request for a preliminary ruling to the ECJ. In other words, because the BIT requires the Parties to go to arbitration the arbitral tribunal may request a preliminary ruling by the ECJ.[43] The tribunal quickly discarded this exotic argument by stating that there is no such thing as compuslory arbitration, parties are free to agree to arbitrate and once they have, they are bound by that agreement.[44]

The second option according to Burgstaller is to threaten tribunals with Article 258 of the Lisbon Treaty. Namely, if Member States face infrigment proceedings for complying with an investment award rendered in err of EU law, this might force tribunals to be mindful of applying EU law correctly.[45]

However, it is ubiquitously acknowledged that tribunals have to apply substantive law correctly, and their decisions are based on a careful assessment and comprehensive analysis of law that subsumes the factual matrix of each case. If it is, from the very outset, a tribunal's *duty* to properly apply substantive law, such a threat, as implied by Burgstaller, is redundant, even cynical.

The third option, according to Burgstaller, is dealing with discrepancies in arbitral awards in hindsight – namely at the enforcement stage.[46] As the ECJ in the Eco Swiss case held, a Member State faced

42 Guy Denuit and Betty Cordenier v Transorient – Mosaïque Voyages and Culture SA, Case C–125/04 of 27 January 2005, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0125:EN:NOT*, last visited 1 October 2012.

43 *Eastern Sugar* Award, 113.

44 *Ibid.*,134

45 M. Burgstaller, *op. cit*. fn. 21, 472.

46 *Ibid.*

with an application for the annulment of an arbitration award must grant that application if the award in question has failed to observe national rules of public policy.[47]

The third option, notwithstanding the fact that it deals with the predicament on a corrective – not pre-emptive basis, seems plausible. Under Article V(2)(b) of the New York Convention, national courts may justify the refusal of enforcemnt of an award if deemed incompatible with public policy. However, this option is unhelpful when it comes to ICSID awards, which have a self contained review system.

4. CONCLUSION

Needless to say, in the era of globalisation and expansion of industry and trade, the Union's move to take the regulation of FDI in its own hands, prima facia, seems like a wise strategic decision.

However if, as the ECJ has advanced in the infringement proceedings brought against Austria, Finland and Sweden, the existing extra-EU BIT regime has been superseded by EU, the Union will have to prepare to endure an uproar from the international community (along with the displeasure of its own Member States).

Furthermore, an additional area of concern is the inconsistant approach the EU takes with regard to arbitration as a means of investment dispute resolution. Whilst the Union takes issue with dispute settlement provisions stipulated in intra-EU BITs, like in the Eastern Sugar and Eureko cases, it fully endorses them in the context of extra-EU BITs. To say that there is a potential threat of discrimination solely with regard to intra-EU BITs because they give investors the option to seek arbitration, therefore putting them in a better position than inves-

47 Eco Eco Swiss China Time Ltd v Benetton International NV, Reference for a preliminary ruling of 1 June 1999, Case C–126/97: „[i]*t follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty", http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0126:EN:HTML*, last visited 1 October 2012.

tors who do not have intra-EU BIT dispute settlement provision to rely on is unpersuasive.

Taken to an extreme, this would mean that EU investors would be better off investing in a third country than they would in another EU state. Hypothetically, a German investor would be able to rely on arbitration, for example, pursuant to the dispute settlement provision in a BIT concluded with Venezuela, whereas arbitration would be off limits if a dispute were to arise from an investment in Greece. This puts investors whose principal undertakings are outside the boundaries of the EU in a better position than EU investors who invest within the Union's boundaries.

All the while, arbitral tribunals, dealing with current investment disputes, exercising their jurisdiction from BITs, are dodging various challenges to their jurisdiction and/or competence to interpret substantive law.

Unless the EU, along with a common investment policy, establishes a sui generis model for the settlement of investment disputes, arbitration is the logical destination. Not only has the international community established a sophisticated arena specializing in this field, i.e. ICSID, but arbitration, an inherently denationalized forum, has been enjoying the confidence of investors for decades. Therefore, until the day the EU furnishes its Member States and global counterparts with its common investment policy arrives, the remaining system of treaties, and dispute settlement provisions therein, should remain in force.

Arbitrators, on the other hand, when encountered with EU law, should do as their duty obliges – interpret and apply. Taking into consideration the fears of the Commission that the application of EU law by tribunals may lead to the fragmentation of the Union's legal order and that the ECJ has a monopoly on the interpretation of EU law, the tribunal in the Eureko case properly put this issue into perspective by stating that the ECJ solely has monopoly over the final and authoritative interpretation of EU law and that even domestic courts are not obliged to refer questions of EU law to the ECJ.

Sonja Srećković, LL.M.

PROBLEMI IZVRŠENJA ODLUKA INVESTICIONIH ARBITRAŽA U POST-LISABONSKOJ ERI

Sažetak

U pokušaju da postane uticajniji akter u oblikovanju svetske privredne politike, Evropska unija je, potpisivanjem Lisabonskog ugovora, značajno izmenila raspodelu nadležnosti u pogledu stranih direktnih ulaganja, oduzimajući pravo državama članicama da nadalje samostalno odlučuju o budućem toku zaštite i unapređivanju ulagačkih poduhvata u zemljama članicama EU. U skladu sa novim režimom, dosadašnji sistem zasnovan na dvostranim sporazumima se zamenjuje uspostavljanjem isključive nadležnosti EU.

Prelazak na novi sistem nadležnosti otvara neka sporna pitanja na koja ukazuju brojni autora i praktičari iz oblasti investicionog prava. Ova promena će naročite probleme stvoriti investicionim tribunalima koji će morati da se suoče sa ozbiljnim dilemama prilikom utvrđivanja sopstvene nadležnosti i određivanja merodavnog materijalnog prava. Pogrešna procena po bilo kom od ovih pitanja, potencijalno bi izložila arbitražnu odluku opasnosti da ne može da bude izvršena u Evropskoj uniji zbog suprotnosti sa odredbama zajedničke trgovinske politike EU.

Ključne reči: *Direktne strane investicije.– Arbitraža.– Priznanje i izvršenje.*

UDK 347.68

Miloš Stanković, LL.M.[*]

ALEA IACTA EST – ALEATORNOST UGOVORA O DOŽIVOTNOM IZDRŽAVANJU KAO OGRANIČENJE MOGUĆNOSTI NJEGOVOG RASKIDA ZBOG PROMENJENIH OKOLNOSTI[**]

Autor u radu postavlja dve glavne hipoteze. Prva se sastoji u tvrdnji da je mogućnost raskida ugovora o doživotnom izdržavanju zbog promenjenih okolnosti ograničena aleatornom pravnom prirodom ovog kontrakta. U cilju njenog argumentovanja, autor analizira zakonom formulisan predmet ovog ugovora, ispituje mogućnost da se određene okolnosti okvalifikuju kao izuzetne obzirom na suštinu i svrhu ugovora o doživotnom izdržavanju i njegovu aleatornost koja je već u trenutku stupanja u ugovorni odnos poznata obema ugovornim stranama, pa zaključuje da promena okolnosti koja se odnosi na podmirivanje najvažnijih egzistencijalnih potreba primaoca izdržavanja (stanovanje, hrana, odeća, obuća, a pre svega staranje, briga i troškovi u vezi sa njegovim zdravljem), može da bude pravno-relevantan razlog za raskid ugovora o doživotnom izdržavanju samo ako bi takav zahtev postavio primalac, ali ne i davalac izdržavanja.

Druga hipoteza podrazumeva da primalac izdržavanja, čiji se ekonomski položaj neočekivano i izvanredno poboljša nakon zaključenja ugovora, ima pravo da zatraži raskid ugovora zbog promenjenih okolnosti, pod uslovom da se taj ugovor u konkretnom slučaju, po strukturi međusobnih prava i obaveza ugovornika, približava po svojoj pravnoj prirodi ugovoru o doživotnoj renti. Ovo je posledica činjenice da ugovor za primaoca gubi svrhu, tj. korisnost i da ga on nikada ne bi zaključio pod novonastalim okolnostima, koje podrazumevaju i da je aleatornost naknadno „otpala".

Ključne reči: *Rebus sic stantibus.– Aleatornost.– Predmet ugovora.– Raskid ugovora.– Inflacija.*

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1. POSTAVLJANJE PROBLEMA I PREDMET ISTRAŽIVANJA

Ugovorom o doživotnom izdržavanju, kao jednim od naj frekventnijih pravnih poslova u srpskoj pravnoj praksi, već smo se bavili u nekim našim prethodnim radovima.[1] Imajući u vidu složenost životnih okolnosti i relacija između davaoca i primaoca izdržavanja koje se reflektuju na njihov pravni odnos omeđen ovim kontraktom, reči je pre svega bilo o zakonskom sistemu zaštite primaoca izdržavanja prilikom nastanka i prestanka ovog pravnog posla. Osnovna i empirijski proverljiva činjenica od koje se pošlo sastojala se u tome da je primalac po pravilu lice koje se nalazi u poznom starosnom dobu, kome su potrebni tuđa briga, staranje i pomoć, ali koje ima imovinu koju je spremno da otuđi u naknadu za primano izdržavanje. Pitanje kojim ćemo se baviti u predstojećim redovima na određeni način predstavlja krunu naših prethodnih istraživanja, jer u sebi sublimira odnos aleatorne pravne prirode ugovora o doživotnom izdržavanju, njegovog predmeta i mogućnosti njegovog raskida zbog promenjenih okolnosti (*rebus sic stantibus*).

Ugovor o doživotnom izdržavanju[2] je po svojoj pravnoj prirodi aleatoran jer je moguće da davalac na ime izdržavanja da vrednosno mnogo više od onoga što će mu pripasti trenutkom primaočeve smrti, ali može da se dogodi i *vice versa,* da će koristi koje momentom smrti primaoca stekne na osnovu ovog ugovora biti mnogo veće vrednosti od izdataka koje je sam učinio u ispunjavanju ugovornih obaveza.[3] Naime, već u trenutku zaključenja ugovora je poznata visina prestacije primaoca izdržavanja, jer se ona sastoji u prenošenju tačno određenih stvari ili prava na davaoca izdržavanja, dok je vrednost prestacije davaoca izdr-

1 M. Stanković, „Ugovor o doživotnom izdržavanju u srpskom pozitivnom pravu – zaštita primaoca izdržavanja", *Pravni život*, 10 2010, 967 – 985 i M. Stanković, „Zaštita primalaca prema pravilima o prestanku ugovora o doživotnom izdržavanju u srpskom pozitivnom pravu", *Pravni život* 10/2011, 557 – 582.

2 „Ugovorom o doživotnom izdržavanju obavezuje se primalac izdržavanja da se posle njegove smrti na davaoca izdržavanja prenese svojina tačno određenih stvari ili kakva druga prava, a davalac izdržavanja se obavezuje da ga, kao naknadu za to, izdržava i da se brine o njemu do kraja njegovog života i da ga posle smrti sahrani," videti čl. 194. stav 1. Zakona o nasleđivanju Srbije, *Službeni glasnik RS*, br. 46/1995, 101/2003 (u daljem tekstu: ZONS).

3 M. Stanković (2011), *op. cit.* fn. 1, 576.

žavanja uslovljena dužinom života i zdravstvenim stanjem primaoca.[4] Na temelju ovih činjenica, profesor Panov razlikuje „subjektivnu aleatornost" koja se odnosi na dužinu trajanja života primaoca izdržavanja i „objektivnu aleatornost", koja je moguća u pogledu obima predmeta ugovora.[5]

Sud može na zahtev davaoca ili primaoca izdržavanja njihove ugovorne odnose iznova da uredi ili da raskine ugovor, ako se nakon njegovog zaključenja okolnosti toliko promene da ispunjenje ugovora postane znatno otežano (*rebus sic stantibus*), a može i pravo primaoca izdržavanja da preinači u doživotnu rentu ako se obe ugovorne strane sa tim saglase.[6] Pažljivom analizom, može da se uoči da je za primenu ovog instituta potrebno da se kumulativno ispune dva uslova: prvi, uzročni, podrazumeva da su se okolnosti promenile, a drugi, određuje obim u kome je potrebno da nastupi promena okolnosti, formulišući ga kroz posledicu koja treba da se sastoji u tome da „ispunjenje ugovora postane znatno otežano". Ipak, u Zakonu o nasleđivanju Srbije nije ni *exempli causa* izvršeno preciziranje ovog pravnog standarda. Stepen teškoće gradiran kroz potrebu da ispunjenje bude ne samo otežano, već „znatno" otežano, nam nije mnogo od pomoći, jer prethodno treba da utvrdimo parametre na osnovu kojih možemo reći da je ispunjenje ugovora otežano uopšte. To se može učiniti sublimiranjem doktrinarnih stavova i analizom sudske prakse u pogledu definisanja posledice oličene u znatno otežanom ispunjenju ugovora, ali i promenama u okolnostima koje se smatraju pravno-relevantnim a koje ovoj posledici vode. Pri tome se postavlja neminovno akcesorno pitanje da li činjenicu da je ispunjenje obaveze „znatno otežano" treba procenjivati subjektivno, odnosno kazualno, ili objektivno, tj. apstraktno?

Zahtev da ispunjenje ugovora postane znatno otežano, dovodi nas, kao što smo već mogli da naslutimo iz prethodnog izlaganja, do

4 O. Antić, *Nasledno pravo*, Beograd 2011, 358. U francuskoj nauci se element zdravstvenog stanja primaoca izdržavanja smatra kriterijumom razlikovanja doživotne rente i ugovora o doživotnom izdržavanju. A. Bénabent, *Droit civil, Les contrats spéciaux – civils et commerciaux*, Paris 2001, 613.

5 S. Panov, „O zajedničkoj svojini u braku", *Anali Pravnog fakulteta* 1–3/1998, 67, fn. 45.

6 V. čl. 202. st. 1 i st. 2 ZONS. Zakon nije odredio parametre koji će rukovoditi sud u odlučivanju za jednu od navedenih mogućnosti, osim što će sud morati da „vodi računa o svim okolnostima". K. Mesarović, „Promenjene okolnosti i izvršenje ugovora o doživotnom izdržavanju", *Glasnik Advokatske komore Vojvodine* 11/1962, 10.

predmeta ugovora o doživotnom izdržavanju. Ugovornici su slobodni da obzirom na njihove konkretne potrebe samostalno urede međusobna prava i obaveze, kako u pogledu konkretnih prestacija i njihovog obima, tako i vremena, mesta i načina njihovog izvršenja.[7] Međutim, čak i ako ne bi ništa precizirale, dispozitivnom odredbom čl. 194. st. 3. Zakona o nasleđivanju Srbije predviđeno je da „ako što drugo nije ugovoreno, obaveza izdržavanja naročito obuhvata obezbeđivanje stanovanja, hrane, odeće i obuće, odgovarajuću negu u bolesti i starosti, troškove lečenja i davanje za svakodnevne uobičajene potrebe", odnosno sve ono čime se podmiruju i štite najosnovnije primaočeve potrebe, njegova fizička egzistencija, ali i dostojanstvo.[8]

Imajući u vidu prethodno rečeno, nama se čini, i to je hipoteza koju ćemo pokušati da proverimo u ovom radu, da aleatorna pravna priroda ugovora o doživotnom izdržavanju zahteva da se nastupanje posledice u vidu znatno otežanog ispunjenja ugovora uvek proverava kroz prizmu alee koja razgraničava pravno-relevantne promene okolnosti, od onih koje to nisu, a koje su neophodan preduslov za nastupanje ove posledice. Drugim rečima, pokušaćemo da objasnimo odnos alee i promenjenih okolnosti, ili bolje reći, uticaj alee na pravno vrednovanje promenjenih okolnosti i mogućnosti raskida ugovora o doživotnom izdržavanju usled promenjenih okolnosti.

2. PROMENJENE OKOLNOSTI

Ugovor može da se raskine ili izmeni zbog promenjenih okolnosti i prema pravilima Zakona o obligacionim odnosima: „Ako posle zaključenja ugovora nastupe okolnosti koje otežavaju ispunjenje obaveze jedne strane, ili ako se zbog njih ne može ostvariti svrha ugovora, a u jednom i u drugom slučaju u toj meri da je očigledno da ugovor više ne odgovara očekivanjima ugovornih strana i da bi po opštem mišljenju bilo nepravično održati ga na snazi takav kakav je, strana kojoj je otežano ispunjenje obaveze, odnosno strana koja zbog promenjenih okolnosti ne može ostvariti svrhu ugovora može zahtevati da se ugovor raskine."[9] Kako je mogućnost raskida ugovora po ovom osnovu

7 N. Subotić-Konstantinović, *Ugovor o doživotnom izdržavanju*, Beograd 1968, 68; A. Bénabent, *op. cit*. fn. 4, 614.

8 M. Stanković (2010), *op. cit.* fn. 1, 979.

9 V. čl. 133. st. 1. Zakona o obligacionim odnosima, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 i 57/89 i *Službeni list SRJ*, br. 31/93 (u daljem testu: ZOO).

predviđena na širi, ali i precizniji način Zakonom o obligacionim odnosima nego Zakonom o nasleđivanju, kao prethodno se postavlja pitanje mogućnosti primene čl. 133. st. 1. ZOO na ugovor o doživotnom izdržavanju. Na njega je u nauci dat pozitivan odgovor, tj. prihvaćeno je shvatanje da se na raskid ugovora o doživotnom izdržavanju supsidijerno primenjuju pravila ZOO iako je on regulisan ZONS-om.[10] Isti stav je zauzet u hrvatskoj nauci, sa obrazloženjem da je ugovor o doživotnom izdržavanju po svojoj pravnoj prirodi obligacionopravni ugovor, a i da su odredbe ZOO potpunije u pogledu regulisanja ovog instituta od odredbi ZON-a.[11] Najzad, mogli bismo da dodamo i da se odredbe Zakona o obligacionim odnosima koje se odnose na ugovore primenjuju na sve vrste ugovora, osim ako za ugovore u privredi nije izričito drugačije određeno.[12] Ova činjenica je važna jer doprinosi preciziranju kriterijuma na osnovu kojih ćemo određivati pojam promenjenih okolnosti i pojam znatno otežanog ispunjenja obaveze.

Ideja raskida ugovora zbog promenjenih okolnosti je dakle u tome, da treba revidirati ugovor kod koga se nakon njegovog zaključenja pojave izvanredne i nepredviđene okolnosti koje toliko otežavaju njegovo ispunjenje, da i bez krivice stranaka ugrožavaju načelo ekvivalentnosti prestacija u dvostrano obavezujućim ugovorima.[13] Za to je neophodno ispunjenje dva uslova. Prvo, izvanredni događaj, koji to mora biti ceneći prema redovnom riziku koji ugovor određene vrste podrazumeva, ne sme sasvim da dovede do nemogućnosti ispunjenja obaveze, jer bi se tada radilo o višoj sili. Drugo, u prisustvu takvog događaja ispunjenje obaveze za jednu stranu treba da bude ili „preterano otežano" ili da joj nanese „veliki gubitak" u smislu očigledne povrede načela ekvivalentnosti prestacija.[14] Kao posledice delovanja promenjenih okolnosti treba da nastupe „otežano ispunjenje" ili „nemogućnost ostvarenja svrhe ugovora", određeni kroz pravne standarde „da je očigledno da ugovor ne odgovara očekivanjima ugovornih strana", te „da

10 O. Antić, Z. Balinovac, *Komentar Zakona o nasleđivanju*, Beograd 1996, 535.

11 V. Belaj, „Prestanak ugovora o doživotnom i ugovora o dosmrtnom izdržavanju", *Liber amicorum Nikola Gavella, Građansko pravo u razvoju*, I. Gliha i dr. (ur.), Zagreb 2007, 696. Za suprotno shvatanje videti D. Đurđević, *Institucije Naslednog prava*, Beograd 2010, 267.

12 V. čl. 25. st. 1. ZOO.

13 S. Perović, „Raskid ugovora zbog promenjenih okolnosti i načelo pravne sigurnosti", *Separat iz Naučnog pregleda*, Beograd 1974, 185.

14 S. Perović (1974), *op. cit*. fn. 13, 201–202.

bi po opštem mišljenju bilo nepravično održati ga na snazi takav kakav je". Međutim, ako su se te okolnosti mogle predvideti prilikom zaključenja ugovora, onda one ne mogu poslužiti kao osnov za raskid ili izmenu ugovora, jer su imajući ih u vidu stranke mogle da zbog njihovog mogućeg nastupanja drugačije urede sadržinu ugovora.[15] Promenjene okolnosti treba da su nastupile pre roka za izvršenje obaveze,[16] odnosno mora da postoji naknadna nemogućnost ispunjenja, jer bi u slučaju postojanja incijalne nemogućnosti ugovor bio apsolutno ništav.[17]

Profesor Antić ovaj institut objašnjava preko teorije kauze, podvlačeći da je sud prilikom ocene da li su ispunjeni uslovi za njegovu primenu dužan da vodi računa „o cilju ugovora, dakle o kauzi ugovora." Prema njegovom mišljenju, „ugovor će biti raskinut ako su promenjene okolnosti toliko uticale na kauzalno obećanje jedne ugovorne strane da ga ona pod tako izmenjenim okolnostima nikada ne bi dala, odnosno da će se izmeniti i to na onaj način ako bi pri takvoj izmeni ugovorna strana pogođena izmenjenim okolnostima ipak dala svoje kauzalno obećanje."[18]

Zaključujući ugovor, ugovornici imaju u vidu zajednički cilj koji žele da ostvare a koji je obuhvaćen njihovom saglasnošću volja. Kada taj cilj više nije moguće ostvariti, onda otpada i kauza takvog ugovora, pa je pravično takav ugovor izmeniti ili raskinuti. Dakle, potrebno je zaštititi očekivanja savesnih ugovornih strana koja su one imale u trenutku zaključenja ugovora, jer su rukovođene okolnostima i prilikama koje su tada postojale i odlučile da stupe u ugovorni odnos, računajući da se te prilike neće uopšte ili neće značajnije menjati. Međutim, imajući u sa druge strane na umu potrebu zaštite načela pravne sigurnosti i načela *pacta sunt servanda,* naše je mišljenje da u skladu sa pravilom *exceptiones sunt strictissimae interpretationis* sudovi ne bi trebalo da primenjuju institut promenjenih okolnosti kao pravilo, već kao izuzetak, što nažalost, kod nas nije slučaj.

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15 S. Perović (1974), *op. cit*. fn. 13, 204.

16 S. Perović, *Obligaciono pravo*, Beograd 1990, 429–433.

17 S. Perović (1990), *op. cit. fn*. 14, 422; S. Nikšić, „Temeljna obilježja instituta izmjene ili raskida ugovora zbog promijenjenih okolnosti", *Liber amicorum Nikola Gavella, Građansko pravo u razvoju*, I. Gliha i dr. (ur.), Zagreb 2007, 587.

18 O. Antić, *Obligaciono pravo*, Beograd 2011, 415.

Zato je ključno pitanje kvaliteta i obima okolnosti čije bi nastupanje dovodilo do raskida ugovora zbog promenjenih okolnosti.[19] Na najopštijem planu, radilo bi se o ljudskim radnjama i prirodnim događajima, jer i same promenjene okolnosti imaju karakter pravnih činjenica.[20] Međutim, stav prihvaćen u nauci da će u svakom konkretnom slučaju sud odlučiti da li će ugovor izmeniti ili raskinuti, vodeći računa o cilju ugovora, interesima ugovornih strana, trajanju i dejstvu promenjenih okolnosti i ***rizicima koje ugovor date vrste redovno sa sobom nosi*** (podvukao M.S.),[21] ukazuje da krug tih okolnosti nije neograničen ali i da se ima procenjivati *in concreto*. On je dakle, bliže određen ciljem, pravnom prirodom i predmetom ugovora o doživotnom izdržavanju, a ispitivanje „rizika koje ugovor određene vrste redovno sa sobom nosi" u pogledu ovog kontrakta po našem mišljenju znači i određivanje dometa alee na mogućnost njegovog raskida zbog promenjenih okolnosti.

Ipak, treba reći da ugovornici mogu unapred i da se odreknu pozivanja na raskid ili izmenu ugovora na osnovu promenjenih okolnosti, ali pod uslovom da to ne učine na uopšten način, već u pogledu jedne tačno određene, konkretne okolnosti i ako takva odredba u ugovoru ne bi bila suprotna načelu savesnosti i poštenja.[22]

3. PROMENJENE OKOLNOSTI NA STRANI DAVAOCA IZDRŽAVANJA

U literaturi se u promenjene okolnosti na strani davaoca izdržavanja svrstavaju kako one koje se odnose neposredno na njega (promene zdravstvenog stanja, ličnog statusa i ekonomskog položaja), tako i one koje se odnose na članove njegove uže porodice (promene zdrav-

19 Opšte uzanse za promet robe, *Službeni list FNRJ*, br. 15/1954 u čl. 56. u izvanredne događaje ubrajaju prirodne događaje (poplava, grad, suša, zemljotres), upravne mere, ekonomske pojave (npr. veliki skok ili pad cena). U nauci se ovde ubrajaju i socijalno-politički događaji (ratovi, revolucije, generalni štrajkovi). D. Pavić, „Izvršavanje ugovornih obaveza u uslovima promenjenih okolnosti", *Pravni život* 9–10/1993, 1199.

20 S. Nikšić, *op. cit. fn.* 17, 586.

21 *Komentar Zakona o obligacionim odnosima, knjiga prva*, S. Perović, D. Stojanović (ur.), Kragujevac 1980, 429.

22 Čl. 136. ZOO. S. Perović (1990), *op. cit.* fn. 14, 435; V. Belaj, *op. cit.* fn. 11, 701.

stvenog stanja i potreba za izdržavanjem), pri čemu mislimo da se krug članova uže porodice okvirno može izjednačiti sa krugom nužnih naslednika.[23]

Da bi promene u zdravstvenom stanju samog davaoca ili članova njegove porodice imale značaj promenjenih okolnosti, potrebno je da nastupe nakon zaključenja ugovora, da imaju trajan ili trajniji karakter i da preterano otežavaju ispunjenje njegovih ugovornih obaveza,[24] a mislimo i da moraju da budu posledica iznenadnog oboljenja ili pogoršanja bolesti koje se po redovnom toku stvari nisu mogle predvideti u trenutku zaključenja ugovora. Ovakvo rešenje ima svoje opravdanje u pravnoj prirodi ugovora o doživotnom izdržavanju. Kako je najčešće reč o kontraktu *intuitu personae*, to ugovorne obaveze može da izvršava samo davalac izdržavanja lično,[25] a obzirom da je svrha ugovora u mogućnosti davaoca da primaocu izdržavanja pruža brigu, pažnju, negu, ali i da se stara o njegovom zdravstvenom stanju, razumljivo je da svoje ugovorne obaveze ne može (adekvatno) da izvršava lice kome je takođe potrebna zdravstvena zaštita i staranje, ili koje po zakonu mora da se stara o članovima svoje porodice i da ih izdržava. Čini se da je u ovom slučaju pogodna analogija sa situacijom u kojoj poslovno nesposobna lica ne mogu da budu davaoci iz ugovora o doživotnom izdržavanju, jer usled psihofizičkih smetnji nisu u stanju da na odgovarajući način preuzimaju i izvršavaju obaveze koje proističu iz ovog ugovora. Slično važi i za lica delimično poslovno sposobna lica, kod kojih bi zakonski zastupnik morao da da odobrenje maloletniku ako bi procenio da je on u stanju da ispunjava dužnosti iz ovog ugovora i da je to u njegovom najboljem interesu, odnosno ako to ne bi bilo suprotno razlozima zbog kojih je jedno lice delimično lišeno poslovne sposobnosti.[26] Međutim, važno je istaći da promene u zdravstvenom

23 Za argumentaciju sa upućivanjima videti, M. Stanković, „Nasilje u porodici kao uzrok isključenja iz prava na nužni deo", *Nasilje u porodici – Zbornik radova sa naučnog skupa*, S. Panov, M. Janjić Komar, M. Škulić (ur.), Beograd 2012, 243–244.

24 S. Svorcan, *Raskid ugovora o doživotnom izdržavanju*, doktorska disertacija odbranjena na Pravnom fakultetu Univerziteta u Beogradu 1987. godine, 161–162; S. R. Vuković, *Komentar Zakona o nasleđivanju sa sudskom praksom obrascima registrom pojmova i prilogom*, Beograd 2007, 284.

25 O. Antić (2011a), *op. cit*. fn. 4, 358.

26 O. Antić (2011a), *op. cit*. fn. 4, 353; D. Šiljkut, „Postupak ovjere ugovora o doživotnom izdržavanju i poslovna sposobnost ugovarača", *Pravni život* 1/1990, 125.

stanju davaoca mogu da budu od uticaja i na otežanu mogućnost primaoca da on ispunjava svoje obaveze, što i njemu otvara mogućnost da zatraži izmenu ili raskid ugovora zbog promenjenih okolnosti.[27]

Promene u vezi sa stanjem u užoj porodici davaoca koje se mogu podvesti pod izmenjene okolnosti, odnose se na iznenadno teže pogoršanje zdravstvenog stanja, potrebu lečenja (usled čega je nužno povećano emotivno, vremensko i finansijsko angažovanje davaoca) ili na smrt nekog člana njegove porodice. Takođe, isto važi i ako se ostvare uslovi za zakonsko izdržavanje nekog člana porodice od strane davaoca, pošto je obaveza zakonskog izdržavanja uvek i moralno i zakonski prioritetna u odnosu na obavezu koja proističe iz ugovora o doživotnom izdržavanju.[28] Promena okolnosti u kontekstu obaveze zakonskog izdržavanja dovodi nas do zaključka da se i rođenje deteta ili eventualno razvod braka mogu svrstati među one pravno-relevantne okolnosti koje predstavljaju osnov za raskid ili izmenu ugovora zbog promenjenih okolnosti. Mišljenja smo i da bi zaključenje braka davaoca izdržavanja moglo da bude uzrok raskidu ili izmeni ugovora *rebus sic stantibus*, naročito ako je između njega i primaoca izdržavanja ugovorom bila zasnovana zajednica života.[29] Međutim, uz sve ove okolnosti potreban je i faktor bar delimične nepredvidivosti u odnosu na trenutak zaključenja ugovora o doživotnom izdržavanju (npr. Da već nije u toku postupak za razvod braka), što je još jedan argument u prilog tvrdnji da se svaka okolnost mora razmatrati u okviru jednog određenog ugovornog odnosa. U jednom slučaju je u sudskoj praksi kao razlog za primenu ovog instituta bio prihvaćen i odlazak primaoca na izdržavanje višegodišnje kazne zatvora.[30]

Međutim, primalac izdržavanja ne bi mogao da traži raskid ugovora po ovom osnovu i zbog ličnih svojstava davaoca izdržavanja (npr. starost, radna sposobnost), jer mu te okolnosti u trenutku zaključenja ugovora nisu mogle biti nepoznate, pa je spram njih i morao da računa na određeni način i kvalitet ispunjavanja njegovih obaveza.[31]

27 V. Belaj, *op. cit.* fn. 11, 699.

28 *Ibid*.; S. Svorcan, *op. cit.* fn. 24, 165.

29 Odluka VSJ – Rev 2788/64 i odluka VSH – Gž. 4043/78, navedeno prema D. Đurđević, *op. cit*. fn. 11, 267.

30 Presuda Vrhovnog suda Srbije, Rev. 1181/91, S. R. Vuković, *op. cit*. fn. 24, 289.

31 Presuda Vrhovnog suda Srbije, Rev. 5840/94, S. R. Vuković, *op. cit*. fn. 24, 270–271.

Najsloženije je odrediti da li se i koje promene prilika koje su u korelaciji sa ekonomskim položajem davaoca izdržavanja mogu podvesti pod institut *rebus sic stantibus*. Još je francuski Kasacioni sud povodom čuvenog slučaja Kraponskog kanala iz 1876. godine, a zasnivajući svoju odluku na čl. 1134. *Code civil,* zauzeo stanovište da sve okolnosti koje potpuno ne onemogućavaju ispunjenje obaveze, već samo narušavaju ekvivalentnost prestacija, uključujući i inflaciju, ne mogu da se podvedu pod ovaj institut.[32] Karakteristika aleatornosti ugovora o doživotnom izdržavanju podrazumeva veći rizik u pogledu ekvivalencije prestacija nego u drugim ugovorima. Kako se ovaj ugovor izvršava u dužem vremenskom periodu, to stranke moraju da računaju na „ekonomska kolebanja" koja će uticati na materijalni položaj davaoca izdržavanja.[33] Promene u cenama ne samo što su supsumirane aleatornom prirodom ovog ugovora, već je u pogledu povećanja maloprodajnih cena, visina obaveza davaoca obično praćenja povećanjem cena usluga koje on vrši, tako da ni u tom pogledu ne postoje promenjene prilike koje dovode do znatno otežanog ispunjenja ugovornih obaveza.[34]

Međutim, sasvim drugačije bi bilo ako je reč o sveukupnom porastu troškova ispunjenja koje je posledica neke druge, izuzetne okolnosti, koja je takva i tolika da dovodi do opšteg pogoršanja ekonomskog položaja davaoca i koja mu do te mere otežava ispunjenje ugovornih obaveza da one više ne odgovaraju očekivanjima ugovornih strana ili se ne može ostvariti svrha ugovora npr. usled rata, zemljotresa, poplava.[35] No, ovde u užem smislu promenjene okolnosti predstavljaju neke druge, izuzetne okolnosti (rat, elementarne nepogode, prirodne katastrofe), a promene u ekonomskom položaju njihovu posledicu, a sa druge strane, ni ove okolnosti ne smeju da budu takve prirode da potpuno onemogućavaju ispunjenje ugovora, jer bi onda ugovor prestao da proizvodi pravna dejstva po drugom osnovu, a ne usled promenjenih okolnosti.

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32 D. Pavić, *op. cit*. fn. 19, 1199.

33 S. Svorcan, *op. cit.* fn. 24, 163. U suprotnom, ako bi se dopustila izmena ili raskid ugovora zbog svake promene u vrednosti novca, to bi značilo prelazak sa načela monetarnog nominalizma na načelo monetarnog valorizma. S. Nikšić, *op. cit. fn*. 17, 584.

34 S. Svorcan, *op. cit.* fn. 24, 164.

35 S. Nikšić, *op. cit. fn*. 17, 590; S. Svorcan, *op. cit*. fn. 24, 163–164.

4. PROMENJENE OKOLNOSTI NA STRANI PRIMAOCA IZDRŽAVANJA

U delu doktrine vlada mišljenje da samo davalac izdržavanja može da traži raskid ili izmenu ugovora zbog promenjenih okolnosti, jer navodno, samo njemu i može biti znatno otežano ispunjenje ugovornih obaveza.[36]

Suprotno stanovište ne samo da je prihvaćeno u ZONS i u ZOO, već postoji i u sudskoj praksi, ali na način koji zaslužuje kritiku zbog ekstenzivnog shvatanja pojma promenjenih okolnosti. Tako su srpski sudovi raskidali ugovor o doživotnom izdržavanju po ovom osnovu i u slučajevima kada je primalac izdržavanja faktički onemogućavao davaoca da ispunjava svoju obavezu tako što je menjao mesto svog prebivališta, te uspostavljao zajednicu života sa licima sa kojima do tada nije živeo, a koja su onda preuzimala obavezu njegovog daljeg izdržavanja.[37] U jednom slučaju Okružni sud je našao da postoje promenjene okolnosti koje znatno otežavaju ispunjenje obaveza ugovornih strana, kada je primalac izdržavanja, otac ćerke koja je bila davalac doživotnog izdržavanja, po ugovoru zasnovao sa njom zajednicu života u njenom domaćinstvu, ali ju je neko vreme pred smrt napustio i vratio se svojoj kući gde je živeo sa sinom. Kako su odnosi primaočeve dece, tj. brata i sestre bili poremećeni, primaočeva ćerka kao davalac izdržavanja nije imala pristup kući u kojoj je njen otac živeo sa sinom, pa objektivno nije ni mogla da izvršava obaveze iz ugovora o doživotnom izdržavanju, te je primalac izdržavanja pre smrti podneo tužbu za raskid ugovora zbog promenjenih okolnosti.[38] Po našem mišljenju, u ovakvom i u sličnim slučajevima, ugovor ne bi trebalo raskinuti zbog promenjenih okolnosti, već zbog neizvršenja primaoca, jer je primaočeva obaveza i da omogući davaocu da bez poteškoća izvršava svoje ugovorne obaveze prema njemu, a u ovom slučaju je primalac izdržavanja očigledno prekršio ugovornu odredbu o obavezi da živi u ćerkinom domaćinstvu,

36 K. Mesarović, *op. cit. fn.* 6, 11–12.

37 Presuda Vrhovnog suda Srbije, Rev. 1860/01, od 9. maja 2002. godine, Sudska praksa 6/2003, Beograd 2003, 24; Presuda Vrhovnog suda Srbije Rev. 2201/02, od 11. septembra 2002. godine, Sudska praksa 1/2003, Beograd 2003, 26.

38 Rešenje Okružnog suda u Valjevu Gž. br. 298/03, od 20.02.2003. godine, Sudska praksa 1/2004, Beograd 2004, 24.

te je svojom krivicom doveo do njene nemogućnosti da ispunjava svoje ugovorne obaveze.[39]

Koje se onda izmenjene okolnosti na strani primaoca imaju smatrati pravno relevantnim da bi bio moguć raskid ugovora o doživotnom izdržavanju zbog promenjenih okolnosti? Način na koji ZONS dispozitivnom normom određuje predmet ugovora o doživotnom izdržavanju otvara nam prostor za negativnu definiciju. Jer ako davaočeva obaveza izdržavanja *naročito obuhvata* „obezbeđivanje stanovanja, hrane, odeće i obuće, odgovarajuću negu u bolesti i starosti, troškove lečenja i davanje za svakodnevne uobičajene potrebe", kao zakonom predviđeni minimum ali i „koncentrat" u kojem se oslikava suština ovog pravnog posla, onda sve promenjene okolnosti i potrebe primaoca koje se odnose na izvršavanje navedenih obaveza od strane davaoca, mogu da predstavljaju pravno-relevantan osnov za raskid ugovora *rebus sic stantibus* ako bi se na njih pozvao primalac, ali ne i ako bi to učinio davalac izdržavanja. Suprotno rezonovanje bi bilo protivno smislu zakonskog rešenja, jer bi dopuštalo davaocu da sa pozivom na promenjene okolnosti u svakom trenutku izađe iz ugovornog odnosa, pa čak i „u nevreme", a davaoca bi lišilo svake sigurnosti u potrazi za kojom on i zaključuje ovaj ugovor. Svako lice stupa u ugovorni odnos kao primalac izdržavanja baš zato što veruje da će mu nega, staranje, pažnja i izdržavanje biti potrebni. To zbog prirode ugovora koji zaključuje ne može da ostane nepoznato ni davaocu izdržavanja, pa vanredni troškovi i eventualne neprilike oko izdržavanja primaoca stoga i ne mogu imati karakter izvanrednih i nepredviđenih okolnosti. Međutim, imajući u vidu i tu, po njega nepovoljniju okolnost, on se ujedno sa njom saglasio i pristao i na sve one troškove koje ona podrazumeva, isto kao što se i primalac prećutno saglasio sa mogućnošću da mu doživotno izdržavanje, kao svojevrsno obezbeđenje koje sebi omogućuje neće biti potrebno, pa će ga (ili samu sigurnost da će mu ono po potrebi biti na raspolaganju) ustvari „preplatiti". Zato bi trebalo sasvim restriktivno dopustiti raskid ugovora o doživotnom izdržavanju zbog promenjenih okolnosti na zahtev davaoca izdržavanja.

Izgleda nam da se sve promenjene okolnosti na strani primaoca, koje onemogućavaju davaoca da se na njih pozove, sažimaju i prelama-

39 O negativnim posledicama ovakvog postupanja sudova po zaštitu primalaca iz ugovora o doživotnom izdržavanju, M. Stanković (2011), *op. cit.* fn. 1, 570.

ju u promeni njegovog zdravstvenog stanja, tj. odgovarajućoj obavezi davaoca da mu pruži potrebnu negu u bolesti i starosti i da plati troškove njegovog lečenja. Kako je ovo centralna, suštinska obaveza davaoca izdržavanja koja supsumira sve druge njegove obaveze, on mora da je ispuni i snosi njene troškove koliki god da su, pa makar i po vrednosti znatno premašivali vrednost primaočeve obaveze, jer je to posledica aleatorne pravne prirode ugovora o doživotnom izdržavanju.[40] Ona obuhvata troškove potrebnih lekarskih pregleda i terapija, nabavljanja lekova i medicinskih pomagala, troškove bolničkog lečenja, obezbeđivanje hrane i pića određenog kvaliteta i kvantiteta u zavisnosti od zdravstvenih potreba primaoca (a što može da ima i preventivno dejstvo u očuvanju zdravlja), održavanje higijene i zagrevanje stanja, nabavljanje odeće i obuće primerene klimatskim uslovima i posebnim potrebama primaoca, i sve to nezavisno od njihove cene, i činjenice da li je bolest nastala pre ili posle zaključenja ugovora o doživotnom izdržavanju.[41] Isto važi i za troškove sahrane, ali ne i podizanje nadgrobnog spomenika.[42] Primaoca jednako motiviše na zaključenje ugovora potreba za obezbeđivanjem materijalne egzistencije i potreba za negom, pažnjom i staranjem u bolesti i starosti i želja da bude dostojanstveno sahranjen. Stoga već u trenutku zaključenja ugovora obe stranke moraju da računaju na mogućnost da primalac izdržavanja oboli, pa se sa takvom mogućnošću saglašavaju i istovremeno implicitno pristaju da ugovor ostane na snazi i ako se to desi ili se pogorša primaočeva zdravstvena situacija, usled čega ove okolnosti i nemaju karakter izvanrednih.[43] Stoga svako moguće pogoršanje primaočevog zdravlja kao okolnost obuhvaćena saglasnošću stranaka u trenutku zaključenja ugovora ne može imati karakter pravno-relevantnih činjenica za raskid ugovora zbog promenjenih okolnosti, jer su one obuhvaćene aleom ugovora o doživotnom izdržavanju.[44] No, ako bi primalac pre zaključenja ugovora doveo u zabludu ili održavao u zabludi davaoca izdržavanja u pogledu

40 S. Svorcan, *op. cit.* fn. 24, 281, 287.

41 A. Bénabent, *op. cit*. fn. 4, 613; N. Subotić-Konstantinović, *op. cit*. fn. 7, 76; S. Svorcan, *op. cit.* fn. 24, 260–276. Navedeno naravno, ne bi važilo u pogledu zahteva primaoca za uređenjem enterijera stana ili npr. modnih zahteva u vezi sa odećom i obućom.

42 N. Subotić-Konstantinović, *op. cit*. fn. 7, 76; M. Albijanić, „Ugovor o doživotnom izdržavanju", *Pravni život* 10/1996, 494.

43 S. Svorcan, *op. cit.* fn. 24, 167; S. R. Vuković, *op. cit*. fn. 24, 284.

44 S. Svorcan, *op. cit.* fn. 24, 167; V. Belaj, *op. cit.* fn. 11, 700.

svog zdravstvenog stanja (npr. prećutavši svoje loše zdravstveno stanje ili sakrivši medicinsku dokumentaciju koja o tome svedoči), mišljenja smo da bi davalac izdržavanja u skladu sa čl. 65. st. 1. i st. 2. ZOO mogao da zahteva poništenje takvog ugovora i da traži naknadu štete.[45]

Zbog pravne prirode ovog ugovora, primalac izdržavanja bi za razliku od davaoca mogao da traži raskid ili izmenu ugovora iz razloga i u skladu sa svojim povećanim potrebama.[46] Pa i kada bi sud konvertovao doživotno izdržavanje u doživotnu rentu, opet bi mogao da povećava visinu davaočeve obaveze u zavisnosti od primaočevog zdravstvenog stanja, pri čemu se to ne bi smatralo novacijom, već prilagođavanjem načina izvršavanja ugovornih odredbi, a sve da i druge ugovorne odredbe ne bi izgledale „usiljeno".[47]

Tako se izjašnjava i sudska praksa. U jednom slučaju, zdravstveno stanje primaoca izdržavanja se posle zaključenja ugovora o doživotnom izdržavanju toliko pogoršalo da je zahtevalo stalno prisustvo trećeg lica i određenu, kuvanu hranu. Tuženi kao davalac izdržavanja nije udovoljio ovim zahtevima primaoca niti u pogledu potrebne hrane, niti u pogledu brige i nege oko primaoca jer ju je obilazio retko i jako malo vremena provodio sa njom, pri čemu se usredsredio na obradu imanja. Vrhovni sud Srbije je našao da su nižestepeni sudovi pravilno primenili materijalno pravo kada su raskinuli ugovor o doživotnom izdržavanju zbog promenjenih okolnosti, u situaciji kada je način ispunjavanja ugovora od strane davaoca izdržavanja izazvao nezadovoljstvo kod primaoca izdržavanja, što je njihove odnose bitno poremetilo usled čega primalac izdržavanja nije želeo da se njihovi međusobni odnosi iznova urede.[48]

Iz prethodnog izlaganja jasno proističe da bi primalac izdržavanja mogao da traži raskid ugovora zbog promenjenih okolnosti ako bi se njegova materijalna situacija pogoršala, a visina davaočevih obaveza ne bi više odgovarala njegovim potrebama.[49] Međutim, da li bi isto pravo imao i primalac izdržavanja čija se finansijska situacija neočekivano

45 M. Stanković (2010), *op. cit.* fn. 11, 980, fn. 55.

46 S. R. Vuković, *op. cit.* fn. 24, 264.

47 A. Bénabent, *op. cit.* fn. 4, 615.

48 Presuda Vrhovnog suda Srbije, Rev. 1166/99, od 23.06.1999. godine, Sudska praksa 11–12/2003, Beograd 2003, 18.

49 D. Đurđević, *op. cit.* fn. 11, 267.

i značajno poboljšala usled nekog izvanrednog događaja, npr. dobitkom igrama na sreću ili nasleđivanjem?[50] Pre nego što damo odgovor na ovo pitanje, smatramo korisnim da se u najopštijim crtama upoznamo sa shvatanjima u uporednom i srpskom pravu o ekonomskim promenama kao izuzetnim okolnostima.

O značaju „ekonomske nemogućnosti" za izvršenje ugovora, odnosno situaciji kada je ugovor moguće fizički izvršiti, ali uz očiglednu nesrazmeru u ekvivalentnosti prestacija govori „teorija nedostižnosti činidbe ili davanja" koja se razvila u austrijskom pravu. Njena glavna ideja se sastoji u tome da će se pod nemogućnošću ispunjenja smatrati i situacija u kojoj bi radi ispunjenja ugovora jedna ugovorna strana žrtvovala svoj interes koji je u privrednom smislu nesrazmerno veći od interesa druge ugovorne strane.[51]

Slično tome, u anglosaksonskom pravu postoji „teorija o osujećenju cilja ugovora", koja se primenjuje ako sud u konkretnom slučaju utvrdi da su se relevantne okolnosti za ispunjenje ugovora nakon njegovog zaključenja toliko promenile da bi dužnik ispunjavanjem ugovorene prestacije ispunio nešto na šta uopšte nije računao kada se na to obavezao, tj. nešto na šta se ustvari i nije obavezao.[52] Reč je o tome da postoji „nerazumnost ispunjenja", jer je osnovni uslov za primenu doktrine o osujećenju svrhe ugovora da postoji faktička ili pravna mogućnost ispunjenja. U daljem preciziranju šta se ima smatrati „svrhom ugovora", pored ovog potrebno je da se ispune još tri uslova. Najpre, svrha ugovora ne sme da bude neposredni cilj ugovaranja, već dalji, „posredni cilj koji se na ovaj nadovezuje"; svrha ugovora ne može biti cilj koji samo jedna ugovorna strana želi da ostvari, ako on nije poznat i drugoj ugovornoj strani; ako se cilj makar i delom ostvario, neće postojati pravo oslobađanja daljeg izvršenja ugovora za ugovornu stranu.[53]

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50 Ovde bi naročito dolazio u obzir slučaj „nasmejanih naslednika", odnosno „smešećeg nasleđa", mada se sticanje subjektivnog naslednog prava nikada ne može smatrati sasvim izvesnim, što proističe i iz činjenice da nasledna nada ne uživa pravnu zaštitu.

51 S. Perović (1974), *op. cit.* fn. 13, 198.

52 S. Perović (1974), *op. cit.* fn. 13, 199.

53 M. Đurđević, „Pravičnost i raskid ugovora zbog promenjenih okolnosti", *Pravni život* 11–12/1994, 1560–1561.

Nemački sudovi su, iako Nemački građanski zakonik ne sadrži odredbe o raskidu ugovora zbog promenjenih okolnosti, dopuštali prevashodno izmenu, a izuzetno i raskid ugovora pozivajući se na „teoriju o otpadanju osnove posla".[54] Zahtev za „neostvarenjem svrhe ugovora" koji postavlja naš ZOO ima veoma sličnu osnovu kao pomenute engleska i nemačka doktrina.[55] U tom smislu, u delu naše nauke se kaže da se neostvarenje svrhe ugovora ne može tumačiti u smislu neostvarenja kauze ugovora kao onog objektivnog cilja koji je karakterističan za svaki ugovor određene vrste, već u smislu neostvarenja pojedinačnog cilja one ugovorne strane koja pogođena promenjenim okolnostima više nije u stanju da ga ostvari.[56] Stoga se ističe da „neostvarivanje svrhe ugovora" treba tumačiti u smislu „nekorisnosti ugovora", tj. tako da je usled dejstva promenjenih okolnosti ispunjenje za poverioca izgubilo korisnost.[57] Dakle, vodeći računa o tekstu ZOO, svrha ugovora je onaj individualni cilj sa kojim jedna ugovorna strana i stupa u ugovorni odnos a koji je poznat i drugoj ugovornoj strani, a koji se konkretizuje kroz korisnost koju ta ugovorna strana očekuje da će dobiti ispunjenjem obaveze druge ugovorne strane. Ako se tako promene okolnosti da je izvršenje obaveze faktički i pravno i dalje moguće, ali sam cilj postane neostvariv, odnosno „nesvrsishodan" ili „beskoristan", smatraće se da nije moguće ostvariti svrhu ugovora, koja može biti i ekonomska svrha.[58]

No, radi zaštite prava i interesa i druge ugovorne strane, a kao manifestacija ideje pravičnosti, nije dovoljno da ugovor izgubi korisnost samo za jednu ugovornu stranu, već je kao dodatni uslov neophodno i da je usled toga poremećena ekvivalencija uzajamnih prestacija u dvostranom ugovoru u meri koja nije prihvatljiva „sa opšteg stanovišta".[59] Ovde dakle, uvodimo jedan objektivizovan kriterijum, proverljiv kroz cilj, kauzu ugovora određene vrste. Po prirodi stvari, na

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54 D. Pavić, *op. cit.* fn. 19, 1200.

55 *Komentar Zakona o obligacionim odnosima, knjiga prva*, *op. cit.* fn. 21, 430; D. Pavić, *op. cit.* fn. 19, 1204; M. Đurđević, *op. cit.* fn. 53, 1559.

56 M. Đurđević, *op. cit.* fn. 53, 1563.

57 M. Đurđević, *op. cit.* fn. 53, 1564–1565.

58 To je naročito zastupljen stav u nemačkoj i austrijskoj teoriji. *Komentar Zakona o obligacionim odnosima, knjiga prva, op. cit.* fn. 22, 432; M. Đurđević, *op. cit.* fn. 53, 1565; S. Nikšić, *op. cit.* fn. 17, 594.

59 M. Đurđević, *op. cit.* fn. 53, 1565.

promenu okolnosti koja dovodi do gubitka svrhe (korisnosti) može da se pozove samo poverilac u ovakvoj obligaciji, koji usled promenjenih okolnosti ne može da upotrebljava stvar ili raspolaže njome na način na koji je to očekivao i zbog čega je i stupio u ugovorni odnos.[60] Dok se u engleskom pravu na ovaj razlog za prestanak ugovora mogu pozvati samo poverioci koji potražuju predaju stvari, a ne i poverioci novčanih obaveza, stav u srpskoj nauci je da bi u našem pravu i ova druga vrsta poverilaca mogla da se pozove na ovaj institut u slučaju inflacije, odnosno pada kupovne vrednosti novca, pod uslovom da je dužnik znao za cilj koji poverilac očekuje od ispunjenja.[61]

Zato nam se potvrdan odgovor na postavljeno pitanje čini mogućim. Ako se pod izvanrednim događajima podrazumevaju i ozbiljniji ekonomski poremećaji,[62] mislimo da se to odnosi i na „poremećaje" u pozitivnom smislu, odnosno iznenadno poboljšanje materijalne situacije jednog lica,[63] jer bi time ugovor o doživotnom izdržavanju po pravilu gubio korisnost i svrhu za primaoca izdržavanja, ali bi istovremeno otpala njegova kauza, pa bi bilo protivno načelu savesnosti i poštenja održavati ga na snazi. Situacija u kojoj bi naknadno bila stvorena disproporcija u ekvivalenciji prestacija, mogla bi da dovede i do naknadnog nestanka aleatornosti (npr. primaocu više nisu potrebna novčana davanja od strane davaoca izdržavanja, a obzirom da je dobrog zdravstvenog stanja, briga, pažnja i nega kao nematerijalne činidbe koje treba da mu pruža davalac su minimalne, dok se sa druge strane on obavezao da na davaoca izdržavanja trenutkom svoje smrti prenese nepokretnost značajne vrednosti, pa dolazi u situaciju da „preplaćuje" svoje izdržavanje), zbog čega ugovor ne bi mogao da bude poništen jer je aleatornost u trenutku njegovog zaključenja postojala, ali kako primalac „kauzalno obećanje pod takvim uslovima nikada ne bi dala, onda ugovor treba da bude raskinut."[64] To bi međutim, bilo moguće

60 M. Đurđević, *op. cit.* fn. 53, 1566.

61 M. Đurđević, *op. cit.* fn. 53, 1567; S. Nikšić, *op. cit.* fn. 17, 590.

62 O. Antić (2011b), *op. cit.* fn. 18, 416.

63 Pod izuzetnim okolnostima se podrazumeva i nagli ili veliki pad ili skok cena. *Komentar Zakona o obligacionim odnosima, knjiga prva*, *op. cit.* fn. 21, 427.

64 O. Antić (2011b), *op. cit.* fn. *18,* 415. V. čl. 135. ZOO: „Pri odlučivanju o raskidanju ugovora, odnosno o njegovoj izmeni, sud se rukovodi načelima poštenog prometa, vodeći računa naročito o cilju ugovora, o normalnom

samo ako su njegove potrebe takve da ovaj ugovor približavaju ugovoru o doživotnoj renti (a što nije retko u praksi), tj. ako bi potrebe primaoca izdržavanja u trenutku zaključenja ugovora bile isključivo ili u najvećem delu novčane, odnosno materijalne prirode, jer davaocu ne bi moglo da ostane nepoznato da primalac taj novac iskorišćava za zadovoljenje svojih egzistencijalnih potreba, dok bi bio izmenjen ako bi primaočevo stanje zahtevalo i značajniju negu, brigu i staranje. Čini se da je ovo stanovište tim pre opravdano što bi davalac izdržavanja imao pravo na naknadu pravičnog iznosa štete koju bi pretrpeo usled raskida ugovora.[65]

I kada postoji aleatornost, mora da postoji makar približna ravnomernost vrednosti uzajamnih činidbi ili mogućnost takve ravnomernosti, jer kada takve srazmernosti nema, kada je na početku jasno da je jedna činidba značajno vrednija od druge, onda upravo i nema aleatornosti. „U slučaju očigledne i ugovorene nesrazmere u pogledu ravnoteže prestacija ugovornih strana u ovom ugovoru", treba uzeti da je ugovor o doživotnom izdržavanju simulovan, a ugovor o poklonu sa nalogom izdržavanja disimulovan pravni posao.[66] Sve što po vrednosti prevazilazi vrednost prestacija davaoca izdržavanja u odnosu na vrednost obaveze primaoca kao protivnaknade za takvo izdržavanje, trebalo bi smatrati ugovorom o poklonu i vrednošću iz koje bi se mogli namiriti i nužni naslednici.[67] I u praksi Vrhovnog suda Makedonije se vodi računa o srazmernosti uzajamnih obaveza ugovornih strana iako je reč o aleatornom pravnom poslu, pa je uzeto da takve nesrazmernosti nema ako je ugovor izvršavan duže od tri godine, jer u vrednost davaočevih prestacija treba uračunati i poštovanje, pomaganje, negu, pažnju i staranje koje on pruža primaocu izdržavanja, a koje se veoma

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riziku kod ugovora odnosne vrste, o opštem interesu, kao i interesima obeju strana."

65 V. čl. 133. st. 5. ZOO. Da bi ovi stavovi imali čvršće uporište, mišljenja smo da bi i norma Zakona o nasleđivanju koja reguliše raskid ugovora o doživotnom izdržavanju zbog promenjenih okolnosti u nekoj budućoj kodifikaciji mogla biti preuređena i definisana na način na koji to čini Zakon o obligacionim odnosima u čl. 133. st. 1.

66 N. Stojanović, „Contracts of obligations law of particular importance for inheritance law and exigent share", *Thirty years of the Law on Obligations – de lege lata and de lege ferenda – Collection of reports*, R. Vukadinovic (ed.), Belgrade 2009, 495.

67 *Ibid.*

teško mogu ekonomski izraziti.[68] To je i suština rešenja o poništenju ovog ugovora zbog nedostatka aleatornosti.[69]

Međutim, ako aleatornost otpadne u toku izvršavanja ugovornih obaveza, onda njihovo dalje ispunjavanje na isti način može biti nepravično po jednu ugovornu stranu, u ovom slučaju primaoca izdržavanja. Obzirom da u francuskom pravu ugovor o doživotnoj renti (a koji je po svojoj prirodi veoma sličan ugovoru o doživotnom izdržavanju u srpskom pravu) predstavlja modalitet ugovora o kupoprodaji, smatra da se da nedostatak alee postoji i u slučaju nesrazmere vrednosti međusobnih davanja ugovornih strana, tj. slučaja kada je visina rente manja od vrednosti kupljenih dobara.[70] Naime, ugovorne strane su slobodne da samostalno odrede cenu kod ovakvog ugovora jer ona zavisi od okolnosti konkretnog slučaja, tj. godina i zdravlja poverioca rente, ali to nipošto ne znači da davanja dužnika mogu biti u nesrazmeri sa vrednošću kupljene stvari, upravo zato što u takvoj situaciji ne bi bilo aleatornosti![71] Aleatornost se u francuskoj nauci kod ugovora o doživotnoj renti definiše i time „što se svaka od ugovornih strana oseća ravnopravnom usled nesigurnosti"[72]

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68 Načelen stav na Vrhovniot sud na Makedonija, Rev. Br. 156/79 od 20.07.1979. godine. Slično i u Odluci Vrhovnog suda Vojvodine, Gž. 190/62. Lj. Spirović Trpenovska, D. Micković, A. Ristov, *Nasleduvanjeto vo Evropa*, Skopje 2011, 394, 396. U Presudi Saveznog Vrhovnog suda, Rev. 2662/60 je istaknuto: „Kod dosuđivanja naknade za uloženi rad, posle raskida ugovora o doživotnom izdržavanju, mora se imati u vidu rizik s kojim su stranke ušle u ugovorni odnos, kao i vrednost imovine koja je bila predmet ugovora." S. R. Vuković, op. cit. fn. 24, 282; Slično i u presudi Vrhovnog suda Vojvodine-Gž. Br. 1189/71: „Protivan je dobrim običajima ugovor o doživotnom izdržavanju, kojim davalac izdržavanja iskoristi teški položaj izdržavanog zbog njegovog zdravstvenog stanja, ili drugih okolnosti, pa ugovori za sebe očigledno nesrazmerno veliku korist, s obzirom na vrednost imovine koju mu izdržavani ostavlja i daje i na očiglednu nesrazmernu malu imovinsku vrednost ugovorenog izdržavanja i usluga, koje će on trebati davati, bilo zbog dobrog imovinskog stanja primaoca izdržavanja, ili pak zbog njegove predstojeće bliske smrti." Isto i u presudi Vrhovnog suda Jugoslavije, Rev–883/65, S. R. Vuković, *op. cit*. fn. 24, 242–243.

69 V. čl. 203. st. 1. ZONS: „Na zahtev zakonskih naslednika primaoca izdržavanja, sud može poništiti ugovor o doživotnom izdržavanju ako zbog bolesti ili starosti primaoca izdržavanja ugovor nije predstavljao nikakvu neizvesnost za davaoca izdržavanja."

70 F. Lecrec, *Droit des contrats spéciaux*, Paris 2007,103.

71 P. Malaurie, L. Aynès, *Cours de droit civil, Les contrats spéciaux – Civilis et commerciaux*, Paris 1992, 545.

72 F. Lecrec, *op. cit.* fn. 70, 102.

Miloš Stanković, LLM

ALEA IACTA EST – ALEATORICISM OF LIFELONG SUPPORT CONTRACTS AS THE LIMITATION OF THE POSSIBILITY FOR THEIR CANCELLATION DUE TO REBUS SIC SANTIBUS

Summary

A contract on lifelong maintenance can be cancelled at the request of the contracting parties, if the circumstances after its conclusion change to the extent that the fulfilment of the contract becomes significantly more difficult. The different circumstances on the side of the provider of maintenance, under the condition of being extreme, can lead to the application of this institution, and are connected with the receiver's personal status, their health condition and the health condition of their family members, and also the obligations which arise according to the rules of legal maintenance. The changed circumstances on the part of the receiver which are legally valid for the cancellation of the contract due to new circumstances also relate to the changes in their health condition, which is explained by the aleatory legal nature of the contract on lifelong maintenance, and also to the extraordinary and unexpected improvement of their economic status, which is a consequence of the theory on the cancellation of the contract conditions.

It can be concluded that the amount of the provider's obligation never depends on the receiver's obligation regarding the fulfilment of the basic life needs and the essence of caring about life, health and dignity of the receiver of maintenance. In this sense, the possibility for the provider of maintenance to refer to the changed circumstances needs to be estimated, whereas the receiver can always do so.

Key words: *Rebus sic stantibus – Aleatory – Contract subject – Contract cancellation – Inflation*.

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Jarosław Szewczyk[*]

PROXY REGULATION IN VIEW OF THE IMPLEMANTION OF THE SHAREHOLDERS' RIGHTS DIRECTIVE INTO POLISH CORPORATE LAW[**]

This article discusses the process of the introduction of provisions to the Polish legal framework which enable shareholders to grant proxies to Management Board members and other company employees. The introduction of new provisions to the Polish Commercial Companies Code has given rise to many controversies. This analysis tries to address most contentious issues which came along with the implementation. The works undertaken by the European Commission constitute the starting point for the Polish regulations in this respect. In commenting on the new Commercial Companies Code provisions, the author refers directly to the Directive. The issue of voting instruction lies at the centre of this article, therefore the purpose, manner and the consequences of introducing this instrument are discussed below.

Keywords: *Voting instruction.– Proxy. – EU Directive.– Commercial law.– Conflict of interest.*

1.WORKS AT THE EU LEVEL

Closely on the heels of the corporate scandals which took place in the early 2000s, the European Commission[1] issued a document entitled: „The Plan to Move Forward". This was circulated as an official communication addressed to the Council and

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** The implementation of Directive 2007/36/EC of the European Parliament and of the Council of July 11, 2007 on exercise of certain rights of shareholders in listed companies into the Polish legal system as an initiative aimed at enhancing corporate governance and shareholders' rights in Polish public companies.

1 Henceforth, referred to as the „EC".

the European Parliament with a view of strengthening shareholders' rights.[2]

Essentially, it was an agenda of the most significant issues which should be resolved in the short, medium and long term. The plan was aimed to kick-off future actions at the EU level to promote good practices in the field of corporate governance, foster competitiveness and deepen the European single market.

The modernisation of company law was supposed to restore investors' confidence in the capital markets. The Dot-Com bubble, which burst in the early 2000s, severely undermined investors' trust in the financial markets. In the face of multifaceted actions undertaken by different financial authorities, *inter alia*, the US Securities and Exchange Commission[3], the EC decided to adopt its own plan for modernisation of company law. One of the most urgent issues discussed by the EC concerned the exercising of shareholders' rights in listed companies.

1.1. Strengthening shareholders' rights in listed companies

The EC has expressed the opinion that strengthening shareholder's rights should lie at the core of any company law policy. In the EC's view, this was essential for ensuring business efficiency and effective internal market.

One of the most crucial objectives of the future legislation was to facilitate the use of voting rights. This was of the essence, especially at the time when the EU expected the forthcoming accession of 10 new Member States (among them Poland). EU enlargement meant a further increase of the diversity of the national regulatory frameworks, thus harmonisation of the national laws in respect of voting rights appeared to be an urgent matter.

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2 Communication from the Commission to the Council and the European Parliament: „Modernizing Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward", May 21, 2003, COM (2003) 284 final, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0284:EN:NOT, last visited August 28, 2012.*

3 On the basis of the Sarbanes-Oxley Act enacted on 30 July 2002; see: L. E. Ribstein, „Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002", *Journal of Corporation Law* Vol. 28, No. 1.

There were several issues which needed to be addressed in the future legislation: the right to table resolutions, to place items on the agenda, to participate in the general meeting by electronic means and the right to proxy voting. Obviously, this could not all be done at the national level. Twenty-five distinct legal regimes called for an integrated approach, therefore, the EC proposed to cover these issues in one directive.

1.2. The basic principles of Directive 2007/36/EC

The European Parliament endorsed the EC initiative[4] and on July 11, 2007 Directive 2007/36/EC was adopted[5]. As with all EU directives, it required transposition into national laws. The deadline for implementation was set for August 3, 2009[6].

The Directive only affects those companies that have their registered offices in one of the Member States and whose shares are publicly traded. As we learn from the Directive, its aim is to promote sound corporate governance, remove obstacles discouraging investors from exercising shareholders' rights, and foster shareholders' participation in the general meetings of listed companies[7].

4 The European Parliament Resolution of April 21, 2004, OJC 104 E, 30.4.2004, 714.

5 Also called the „*Shareholders Rights Directive (SRD)*", henceforth referred to as the „**Directive**".

6 By 3 August 2009, only 11 Member States (among them Poland) had not notified the Commission of any measures transposing the Shareholder Rights Directive, and two countries have only partly completed the process.

7 K. Grabowski, „Dyrektywa o niektórych prawach akcjonariuszy i jej konsekwencje dla spółek publicznych", *Czasopismo Kwartalne HUK* 4(6)/2008, 481–550; J. Kołacz, „Dyrektywa 2007/36/WE Parlamentu Europejskiego i Rady w sprawie wykonywania niektórych praw akcjonariuszy", *Monitor Prawniczy* 9/2008, 460–469; A. Opalski, „Europejskie prawo spółek", Warszawa 2010; K. Oplustil, „Dyrektywa 2007/36/WE w sprawie wykonywania niektórych prawa akcjonariuszy i jej wpływ na prawo polskie", *Monitor Prawniczy* 2/2008 (part. I), 63–70, and *Monitor Prawniczy* 3/2008 (part II), 119–125; M. Romanowski, „W sprawie przyszłości europejskiego prawa spółek", *Studia Prawa Prywatnego* SPP/2011/2, Legalis; A. Opalski, „Stan i perspektywy europejskiego prawa spółek a rozwój polskiego prawa spółek", *Studia Prawa Prywatnego,* SPP/2008/1, Legalis; J. Kołacz, „Dyrektywa 2007/36/WE Parlamentu Europejskiego i Rady w sprawie wykonywania niektórych praw akcjonariuszy, *Monitor Prawniczy,* MoP/2008/9, Legalis.

As noted by M. Romanowski and A. Opalski, although the Directive applies to all kinds of shareholders, in fact its primary goal was to strengthen the position of small (minority) shareholders[8]. According to M. Romanowski and A. Opalski: „Due to an insubstantial share of the capital [owned by small shareholders – author's note], they are rarely interested in the exercise of their voting rights and remain passive. They see the remedy for abnormalities in selling their shares, which the public stock market clearly makes easier."[9]

Resignation by small shareholders of exercising their voting rights, often leads to a distortion of the company control mechanism. The company becomes controlled not by the owners, i,e., the general meeting, as it should be, but by the governing body – the Management Board (or the Board of Directors). According to A. Opalski and M. Romanowski: „Such situation is dangerous both in companies with dispersed ownership (the Management Board then gains excessive power), as well as in companies with a strategic shareholder (this increases the risk of abuses on the part of such shareholder)."[10]

1.3. Facilitating proxy voting

The Directive required the Member States to approximate their laws in several aspects. One of the most important aspects contemplated by the Directive concerned proxy voting[11]. According to point 10 of the Directive's preamble: „Good corporate governance requires a smooth and effective process of proxy voting. Existing limitations and constraints which make proxy voting cumbersome and costly should therefore be removed."

However, the Directive did not postulate the removal of all restraints completely. It was acknowledged that good corporate governance calls for adequate safeguards against possible misuse by the proxy. The Directive points out voting instruction as the instrument which

8 M. Romanowski, A. Opalski, „Nowelizacja Kodeksu spółek handlowych w sprawie wykonywania niektórych praw akcjonariuszy spółek notowanych na rynku regulowanym", *Monitor Prawniczy*, No 7/2009 (suplement, 1–20).

9 M. Romanowski, A. Opalski, *op. cit*. fn. 8, author's own translation from Polish.

10 *Ibid*.

11 Other topics were: obtaining information prior to the general meetings, placing new items on the general meeting's agenda, electronic participation in the general meeting and correspondence voting.

could and should ensure proper exercise of voting rights by a proxy holder. „The proxy holder should (...) be obliged to observe any instructions he may have received from the shareholder"[12]. The Member States were given leeway to introduce such measures as they considered sufficient to guarantee that the proxy holder pursue exclusively the interest of the proxy grantor.

The Directive also brought up the issue of entities which professionally deal with rendering voting services on behalf of shareholders. As indicated by K. Oplustil, „The Directive aimed to remove obstacles to achieve the Anglo-Saxon model of proxy voting in the rest of Europe, in which the agent may represent not one, but many shareholders."[13] The Member States were advised to regulate this activity in such a way so as to ensure the adequate degree of their reliability. Finally, only a few countries decided to regulate this field (Poland did not).

From the very beginning, it was clear that the Directive would not impose any liability on companies to check whether the proxy cast the vote in compliance with the voting instruction. According to the EC, companies should not be charged with the obligation to verify the proxy's right to vote in any particular way. It was decided that the proxy's compliance with the obtained instruction should be ensured solely by a national law (and sanctions provided for by it).[14]

2. IMPLEMANTION OF THE DIRECTIVE INTO POLISH CORPORATE LAW

Directive 2007/36/EC was implemented in Poland by enacting the Act of December 5, 2008 on Amendment of the Law – the Commercial Companies Code[15] and the Act on Trading in Financial instruments.[16] In substance, the ImplAct came into force on August 3, 2009.[17]

12 Point 10 of the Preamble of the Shareholders' Rights Directive.

13 K. Oplustil, *op. cit.* fn. 7, 123, author's translation from Polish.

14 *De lege ferenda* proposals were presented by K. Oplustil, *op. cit.* fn. 7, 123.

15 The Act of 15 September 2000 – the Commercial Companies Code (J.L. No 94, item 1037), henceforth referred to as the „**CCC**".

16 Journal of Laws 2009 No. 13, item. 69, henceforth referred to as the „ImplAct", see also P. Sokal, „Zmiany w zakresie wykonywania praw korporacyjnych w spółce publicznej – cz. I", *Monitor Prawniczy* 13/2010, 721.

17 Apart from Art. 1 (17)–(19) which entered into force 30 days following the publication of the ImplAct, i.e., on 28 February 2009.

As already mentioned, the Directive only applies to listed companies, and to be precise to those whose shares are floated on the regulated market – in the meaning of Article 4(1) point 14 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

In Poland's case, it meant that the ImplAct had to apply at least to all companies floated on the Polish main market (the Warsaw Stock Exchange) or any alternative market (e.g., NewConnect). However, in Poland the crucial distinction refers to public companies, not to companies listed and unlisted.

Article 4 point 20 of the Public Offering Act[18] contains a legal definition of the public company. According to it, the public company is a company in which at least one share was dematerialised.[19] Under Polish law, only those companies are allowed to be admitted to trading on the regulated market. Therefore, it was not necessary to extend the application of the ImplAct to all joint-stock companies (*spółek akcyjnych*) and limited joint-stock partnerships (*spółek komandytowo-akcyjnych*).

On the other hand, the legislator could have restricted the scope of ImplAct's application just to listed companies. It should be noted that only a part of all public companies are listed on the stock exchange. There are companies which are public (because their shares are dematerialised), but the shares of which have never been floated. The Polish legislator decided that the changes should apply to all public companies. Therefore, the changes concerned more companies than was required under the Directive.

It is also worth mentioning that the standards contemplated by the Directive constitute „the minimum standards". According to Article 3 of the Directive: „This Directive shall not prevent Member States from imposing further obligations on companies or from otherwise taking further measures to facilitate the exercise by shareholders of the rights referred to in this Directive".

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18 The Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organized Trading, and Public Companies dated July 29, 2005 (J.L. 2005 No. 184 item 1539), henceforth referred to as the „Public Offering Act".

19 To be precise: „public company: – shall mean a company in which at least one share is dematerialized within the meaning of the Act on Trading in Financial Instruments, with the exception of the company whose shares are registered under Article 5a section 2 of the Act on Trading in Financial Instruments.

This meant that the Polish legislator was free to introduce further measures for shareholders' protection and regulate all those aspects which were not covered by the Directive. However, during the works it was resolved that the future act should not extend beyond the minimum standards. It was decided that possible advantages would be rather modest while the costs for shareholders would be quite hefty. Similarly, it was decided that although some problems discussed in the Directive concern companies which are not public as well, any possible benefits are not worth the expenses.

2.1. Amendments to the Commercial Companies Code

The ImplAct introduced several amendments into Polish corporate law. The most crucial were those introduced to the CCC. Other relevant acts actually remained unaffected. The ImplAct brought in amendments to Articles 412–413 of the CCC and introduced some new provisions, i.e., Article 411^3, and 412^1–412^2 of the CCC. Taking the opportunity of introducing changes to the CCC, the legislator decided to modify the provisions which were until then debatable. As a result the following changes, among others, were made:

1) It was confirmed that any restrictions on the shareholder's right to appoint proxies are proscribed.[20] It is however true that the translation of the Directive into Polish was not accurate. Unfortunately, the mistake was repeated during the Directive's implementation. According to the Directive, the law should not restrict the eligibility of persons to be appointed as proxy holders. It does not require eliminating all restrictions.[21]

2) The legal position of proxies at the general meeting was equalized with the position of the shareholder (proxy grantor)[22];

20 Article 412 § 2 of the CCC – It is forbidden to restrict the right of establishment of a proxy at the general meeting and the number of proxies. [In the original Polish version: „Nie można ograniczać prawa ustanawiania pełnomocnika na walnym zgromadzeniu i liczby pełnomocników."].

21 K. Oplustil, *op. cit.* fn. 7.

22 Article 412 § 3 of the CCC – A proxy may exercise all rights of the shareholder at the general meeting, unless stated otherwise in the proxy document. [In the original Polish version: „Pełnomocnik wykonuje wszystkie uprawnienia akcjonariusza na walnym zgromadzeniu, chyba że co innego wynika z treści pełnomocnictwa."].

3) It was allowed to vote differently from shares of various shareholders[23]; and

4) It was cleared up that the proxy holder can grant a further proxy.[24]

The above-mentioned changes were introduced to align the Polish corporate law to Article 10 (1) of the Directive. According to Article 10 (1): „Every shareholder shall have the right to appoint any other natural or legal person as a proxy holder to attend and vote at a general meeting in his name. The proxy holder shall enjoy the same rights to speak and ask questions in the general meeting as those to which the shareholder thus represented would be entitled."

2.2. Granting proxies to Management Board members

Probably the most important change concerned enabling shareholders to grant proxies to Management Board members (or to their subordinates) (the so-called „in-house representative"). This facilitated the process of proxy granting and allowed the shareholders to reduce or even eliminate the costs of the proxy holder's services.

The new Article 412^2 § 2 of the CCC expressly provided that the restrictions relating to appointing proxies on the general meetings do not apply to public companies. Such solution is in line with paragraph 10 (3) of the Directive, which provides that: „Apart from the limitations expressly permitted in (...), Member States shall not restrict or allow companies to restrict the exercise of shareholder rights through proxy holders for any purpose other than to address potential conflicts of interest between the proxy holder and the shareholder, in whose interest the proxy holder is bound to act (...)".

The introduction of this possibility engendered a contentious debate.[25] Due to the conflict of interest between the shareholders' in-

23 Article 412 § 5 of the CCC – A proxy may grant a further proxy, provided that it is allowed by the initial proxy document. [In the original Polish version: „Pełnomocnik może udzielić dalszego pełnomocnictwa, jeżeli wynika to z treści pełnomocnictwa."].

24 Article 412 § 5 of the CCC – A proxy may represent more than one shareholder and vote differently from the shares of each shareholder. [In original: „Pełnomocnik może reprezentować więcej niż jednego akcjonariusza i głosować odmiennie z akcji każdego akcjonariusza."].

25 See *inter alia:* K. Bilewska, „Pełnomocnictwo do udziału w walnym zgromadzeniu spółki publicznej w świetle konfliktu interesów pełnomocnika i akcjona-

terests and the interests of the managing directors, prior to the amendment it was forbidden to grant a proxy to in-house representatives. The risk that shareholders' interests could be unduly influenced by the interests of people who run the company was deemed so serious that such possibility was excluded altogether. The legislator wanted to avoid situations in which, e.g., a Management Board member would vote on approval of its managerial duties or determination of its annual remuneration (or option plan).

2.3. Preventing a conflict of interest

According to the Directive, the entire exclusion of the possibility to grant a proxy to people who may be involved in a conflict of interest is not needed. There are other measures which can be taken to head off examples of the undue impact of secondary interests. Therefore, it was decided that the entire exclusion constitutes a solution which is neither necessary nor proportionate to achieve the shareholders' protection.

This does not mean that the Directive skips over the issue of the conflict of interests. The Directive indicates the requirements which may be imposed to address the issue of potential conflicts of interest. Measures that can be taken to safeguard the interests of shareholders were exhaustively listed in Article 10 (3) of the Directive. Pursuant to this section, the Member States could not do anything other than:

1) Require a proxy to disclose facts which may be relevant for a shareholder in assessing the risk of the conflict of interest (*disclosure duty*);

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riusza", *Monitor Prawniczy* 13/2009, 695–698; J. Jastrzębski, „Pełnomocnictwo do udziału i głosowania na walnym zgromadzeniu spółki publicznej po nowelizacji kodeksu spółek handlowych (zagadnienia ogólne z wyłączeniem konfliktu interesów)", *Przegląd Prawa Handlowego* 9/2009, 9; A. Kamińska, „Instrukcja do głosowania – uwagi na tle art. 412[2] § 4 KSH", *Monitor Prawniczy*, No. 22/2010, 1222–1227 *et seq*.; K. Oplustil, „Pełnomocnictwo do występowania na walnym zgromadzeniu akcjonariuszy spółki publicznej po nowelizacji kodeksu spółek handlowych ustawą z 5.12.2008 r.", *Przegląd Prawa Handlowego* 11/2009, 4 *et seq*., Lex 104593; M. Romanowski, A. Opalski, *op. cit.* fn. 8; J. Stadnik-Jędruch, „Pełnomocnik na walnym zgromadzeniu – analiza nowelizacji przepisów KSH", *Monitor Prawniczy* 21/2009, 1149 *et seq.;* J. Krukowska-Korombel, „Pełnomocnictwo do udziału w walnym zgromadzeniu oraz do wykonywania prawa głosu", PPH 3/2012, 25.

2) Restrict or exclude the exercise of the shareholder's rights through proxy holders without specific voting instructions for each resolution in respect of which the proxy holder is to vote on behalf of the shareholder (*voting instruction*). Blank proxy forms could be forbidden;

3) Restrict or exclude the transfer of the proxy to another person.

2.4. Instances of a conflict of interest

The Directive does not define the term 'conflict of interest'. It does however single out the most notorious examples of it. According to the Directive, a conflict of interest may arise in particular where the proxy holder:

(i) is a controlling shareholder of the company, or is another entity controlled by such shareholder;

(ii) is a member of the administrative, management or supervisory body of the company, or of a controlling shareholder or controlled entity referred to in point (i);

(iii) is an employee or an auditor of the company, or of a controlling shareholder or controlled entity referred to in (i);

(iv) has a family relationship with a natural person referred to in points (i) to (iii).

The Polish legislator decided to define the group otherwise. The group of people which may be involved in the conflict of interest was specified by indicating the position which the given person occupies in the structure of the company.

Under Article 412^2 § 3 of the CCC, the conflict of interest may concern: (1.) members of the management board; (2,) liquidators, (3,) employees; (4,) members of the company's bodies, employees of a subsidiary company or subsidiary cooperative.

It was decided that in Polish market circumstances it is not needed to further extend that list. Consequently, certain definitely important groups of people were omitted. Namely, controlling shareholders of the company (officers and other employees of such company), people who exercise control over the company, i.e., members of the supervisory board, auditors, and relatives thereof.

2.5. Safeguards against a conflict of interest

All measures listed in Article 10 (2)-(3) of the Directive to reduce the risk of the conflict of interest were adopted:

according to Article 412^2 § 3 of the CCC, the first sentence *in fine*: „(...) the proxy may be authorized to represent the shareholder only at one general meeting."

according to Article 412^2 § 3 of the CCC, the third sentence: „(...) it is prohibited to grant a further proxy."

under Article 412^2 § 3 CCC, the first sentence *in fine: „(...)* a proxy has a duty to disclose to the shareholder any circumstances indicating the existence or potential existence of a conflict of interest."

under Article 412^2 § 4 of the CCC: „The proxy holder is obliged to vote in line with the received instruction."

The introduction of the voting instruction was a step in the right direction, however it requires further elaboration. The Polish legislator decided to make use of this tool; however all the same, the implementation thereof leaves much to be desired.

As regards other measures, they do not raise any special concerns. The duty to disclose circumstances which may be relevant for a shareholder in assessing whether there is a risk of a conflict of interest should be interpreted in accordance with the objective of this liability; there should be no doubt that the proxy holder is obliged to advise the shareholder of the relevant circumstances at the time of the proxy granting at the latest. If this is not possible, the disclosure should take place without undue delay.[26]

The disclosure duty is in effect until the day of the general meeting at which the proxy exercises its proxy power. Should any new circumstance arise in the meantime, the proxy holder is obliged to disclose these circumstances and notify the shareholder without undue delay.[27]

The assessment of whether a particular circumstance requires a disclosure should be considered from the perspective of a model of a reasonable shareholder. If an average shareholder would consider a given circumstance as relevant, the proxy holder has a duty to disclose it.

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26 K. Bilewska, *op. cit.* fn. 25, 696 *et seq.;* A. Kamińska, *op. cit.* fn. 25, 1222.

27 K. Bilewska, *op. cit.* fn. 25, 696 *et seq.*; K. Oplustil, *op. cit.* fn. 25, Lex 104593/4.

There is also no doubt that the circumstances which are subject to disclosure are both of a legal (capital connections, other proxy relations, positions occupied in other companies) and personal nature (personal relations, friendships, acquaintanceships).

The legislator imposed the duty to disclose all circumstances indicating a potential conflict of interests but did not provide for any sanction for breach of that duty. I concur with K. Oplustil's opinion that a proxy holder who went against the disclosure duty should be held liable under the general rules of civil liability (Article 415 of the Civil Code[28]).[29] I also agree with O. Horwath that the breach of the disclosure duty may not result in the invalidity of the adopted resolutions or the votes cast. The proxy creates an internal relation between a shareholder and a proxy holder and a company cannot be obliged to check whether the proxy holder informed the shareholder about the existence of a conflict of interests.[30]

3. THE VOTING INSTRUCTION – MATTERS AT ISSUE

Under Article 412^2 § 4 of the CCC, the proxy holder, to whom there is a risk of a conflict of interest[31], shall vote in compliance with the voting instruction. This is a direct implementation of Article 10 (4) of the Directive.[32]

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28 Article 415 of the Civil Code: A person who has inflicted damage to another person by his own fault shall be obliged to redress it; Lex.

29 K. Oplustil, *op. cit.* fn 25., Lex 104593/5.

30 O. Horwath, „Komentarz do ustawy z dnia 15 grudnia 2008 r. o zmianie ustawy – Kodeks spółek handlowych oraz ustawy o obrocie instrumentami finansowymi (Dz.U.09.13.69).", LEX/el., 2010.

31 *I.e.* people referred to in 412^2 § 3 of the CCC.

32 Other Member States have introduced similar provisions to their respective corporate laws; e.g., the UK introduced to its Companies Act 2006, by enactment of the Companies (Shareholders' Rights) Regulations 2009 (*2009 No. 1632*), Article 324A according to which: „A proxy must vote in accordance with any instructions given by the member by whom the proxy is appointed."; see also: T. Bachner, K. Oplustil, O. Horwath, „Implementation of the Directive 2007/36/EC in Poland, Germany and Austria", *Krakauer Jahrbuch*, 2010, 89.

The Directive allows to introduce the duty of keeping a record of voting instructions for a defined period of time, and confirming (upon request) that the voting instruction was carried out. Such requirements were not provided for by the ImplAct[33].

3.1. The character of the voting instruction

Under the Directive, Member States could restrict or even exclude the possibility of voting by a proxy holder who does not have a voting instruction. It should then be determined whether, under Polish law, the voting instruction is mandatory, and whether or not it is necessary to provide the proxy holder with the instruction.

Only those proxy holders whose voting may be unduly influenced by secondary interests are obliged to follow the voting instruction. The obligation to vote according to the voting instructions does not however mean that there is a requirement to issue the voting instruction. It is therefore important to determine whether the issuance of the voting instruction is obligatory or merely optional.[34]

We should first consider whether the voting instruction has (1.) an external or (2.) an internal dimension, *i.e.*, whether it serves the interests of a company or a shareholder.[35] Doubts in this matter are completely unfounded. It follows directly from the Directive that the voting instruction is considered as a tool for protecting shareholders' interests. It is therefore obvious that the voting instruction has an internal character. It does not however foreclose the question of whether the issuance of the instruction is mandatory or just optional, and whether an infringement of the instruction leads only to internal consequences.

33 For *de lege ferenda* proposals please see A. Herbet, *op. cit.* fn. 33.

34 W. Popiołek, (in:) J. Strzępka (ed.), „Kodeks spółek handlowych. Komentarz", 2012[5], 1047; A. Herbet, (in:) Sołtysiński, Szajkowski, Szumański, Szwaja, Herbet, Mataczyński, Tarska, „Komentarz KSH, Suplement", 421; A. Kidyba, „Komentarz aktualizowany do art. 301–633 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych (Dz.U.00.94.1037).", LEX/el., 2012; S. Sołtysiński (in:) S. Sołtysiński (ed.), „System Prawa Prywatnego, t. 17A", 2010, 552–560; M. Spyra (in:) S. Włodyka (ed.), „System Prawa Handlowego, tom 2, Prawo spółek handlowych", 2012, 1259.

35 See: K. Bilewska, *op. cit.*, fn. 25, 696 *et seq.*; A. Kamińska, *op. cit.,* fn. 25, 1222.

If it is mandatory the following question arises: what are the consequences of the failure to provide the instruction. Two distinct positions were taken on this issue[36]:

According to the first, providing the proxy holder with the voting instruction is optional. This position is represented by, among others, K. Oplustil[37], M. Rodzynkiewicz[38], M. Korniluk and R. Kwaśnicki[39]. Quoting A. Kaminska: „ (...) in accordance with Article 412^2 § 4 of the Commercial Companies Code, the proxy is bound to vote in compliance with the instruction. It is however inappropriate to infer from this that there is a shareholder's obligation to provide the instruction. The shareholder may even resign from issuing the instruction, but it shall neither entail the invalidity of the proxy nor the invalidity of votes cast."[40]

According to the second view, the failure to issue the voting instruction should mean that the proxy was granted with violation of the law, therefore it should entail the lack of the proxy holder's authorization to vote on behalf of a shareholder. Consequently, any vote cast by the proxy would be considered void[41].

The first position is more persuasive. There is no way in which it would be possible to infer from Article 412^2 § 4 of the CCC that due to the lack of voting instruction the proxy is invalid. It is even more obvious when we peruse the legislation history. In the first draft of the ImplAct a sanction of nullity was included; however it disappeared in later stages of the works.[42]

In addition, such a far-reaching sanction should have a clear normative basis. For the silence of the ImplAct in this regard it should be stated that the provision of the voting instruction is merely optional.

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36 A. Kamińska, *op. cit*. fn 25, 1223–1224.

37 K. Oplustil, *op. cit.* fn. 25, 4 *et seq.*

38 M. Rodzynkiewicz, „Kodeks spółek handlowych. Komentarz", 2012, 851 *et seq*.

39 M. Korniluk, R. Kwaśnicki, „Praktyczne aspekty prawne pełnomocnictw do udziału w zgromadzeniach spółek kapitałowych po nowelizacji z 3.8.2009 r.", *Przegląd Prawa Handlowego* 9/2009, 16 *et seq.*

40 A. Kamińska, *op. cit.* fn. 25, 1224, author's translation from the Polish.

41 See W. Popiołek, *op. cit*. fn. 33; S. Sołtysiński, *op. cit.* fn. 34, 559.

42 See K. Oplustil, „Analiza projektu ustawy implementującej dyrektywę 2007/36/WE w sprawie niektórych praw akcjonariuszy notowanych na rynku regulowanym", *HUK* 2(5)/2008, 391–392.

3.2. The form of the instruction

Since the issuance of the voting instruction is just optional, then the way in which the instruction is provided does not really matter. It should however be mentioned that in case of infringement of the instruction the situation is far more advantageous when the instruction is included in the proxy document.[43] Shareholders are free to decide how to issue and convey the instruction to a proxy holder. Notwithstanding, it is wise to issue the instruction in a form which will enable a shareholder to present it before the court in a potential litigation.[44]

Shareholders may include the voting instruction in a proxy document but they may also produce an additional document which will be attached to the proxy.[45] The voting instruction can be conveyed to the proxy in writing, verbally, by e-mail, fax etc. It however bears emphasis that the inclusion of the instruction in the proxy document has one significant advantage (over other forms); it becomes an integral part of the proxy, and therefore is attached to the minutes of the general meeting. It gives the instruction a huge evidentiary value[46]. Accordingly, if a shareholder chooses not to provide the proxy holder with the instruction, the proxy holder shall vote at its own discretion, however in the best interests of the shareholder.

3.3. Consequences of voting against the instruction

Since the proxy is obliged to vote according to the received instruction, it is important to determine the potential consequences of noncompliance therewith. It seems that at least the following consequences are possible:

43 K. Oplustil, *op.cit.* fn. 25, 8.

44 E.g., Ireland introduced to its corporate law – *the Companies Act 1963 (No. 33 of 1963*) provisions which allow a company to verify the content of voting instructions, Section 136 (1A) (e) of the Companies Act. Likewise in the UK: section 327 (A1) (b) of *the Companies Act 2006:* „the member is not required to furnish to the company anything relating to appointment of a proxy other than reasonable evidence of — (i) the identity of the member and of the proxy, and (ii) the member's instructions (if any) as to how the proxy is to vote.".

45 See, e.g., J. Krukowska-Korombel, *op. cit.* fn. 25, 30; A. Herbet, *op. cit.* fn. 34.

46 Under Article 402^3 § 1 point 5 and § 1 point 4 of the CCC, each public company shall have its webpage on which it should place a template of the proxy document which should enable issuing the voting instruction.

It may constitute the basis for a lawsuit. *Prima facie* such conduct of the proxy is actionable. If the parties entered into an agreement, it will be a suit based on a contractual liability (Article 471 of the Civil Code *et seq.)*[47]. If such bilateral agreement does not exist, it is possible to claim damages in tort regime (Article 415 of the Civil Code)[48].

In practice, however, it may be extremely difficult to evidence the size of damage suffered and to demonstrate an adequate causal relation between the unlawful conduct of the proxy holder and the damage sustained by the shareholder[49].

Prima facie it seems that the resolution passed with the aid of the vote cast against the instruction may be deemed invalid under Article 104 of the Civil Code[50]. Since the discussed problem is not directly addressed by any provisions of Polish law, it would require the application of Article 104 of the Civil Code *mutatis mutandis.* For the resolution to be deemed null and void the conduct of the proxy would have to be treated as an example of *falsus procurator's* acting.[51]

The situation is not that simple though. Pursuant to Article 104 of the Civil Code, a unilateral legal act performed on someone's behalf without authorization or by exceeding its scope is invalid. The vote cannot however be treated as a legal act[52]. According to the Supreme Court decision dated October 7, 2004, statements made by a voting person shall not be treated *per se* as legal acts. The act of voting is a

47 Article 471 of the Civil Code: The debtor shall be obliged to redress the damage arising from non-performance or from improper performance of an obligation, unless the non-performance or the improper performance are an outcome of circumstances which the debtor shall not be liable for.

48 See fn. 28.

49 It is definitely easier to claim damages for the failure to comply with the instruction in common law countries. The general law concept of fiduciary duties enables a shareholder to sue a proxy regardless of the provisions which oblige proxies to vote in line with the instruction.

50 Article 104 of the Civil Code: A unilateral juridical act carried out on someone else's behalf with no empowerment or exceeding its scope shall be invalid. However, where the person to whom the declaration of intent on someone else's behalf had been made, agreed to an action with no empowerment, the provisions on the conclusion of a contract with no empowerment shall apply acordingly.

51 This is an opinion represented by, *i.a.,* S. Sołtysiński, *op. cit.* fn. 34, 559; M. Rodzynkiewicz, *op. cit.* fn. 38, 855. Compare: A. Herbet, *op. cit.* fn. 34, 420.

52 Z. Radwański, (in:) „System prawa prywatnego, t. II", 167.

structural component of the resolution, which put together with other votes, forms the legal act. Its validity cannot therefore be assessed in isolation from the circumstances of adopting the resolution.[53]

In addition, the second sentence of Article 104 of the Civil Code mentions „the person to whom the declaration of intent is made". However other shareholders, a chairman of the general meeting or members of the scrutiny committee cannot be treated as such person. Therefore, it is not quite sure whether Article 104 of the Civil Code should be applied at all.[54]

If however we support the opinion that Article 104 should apply *mutatis mutandis*[55], the invalidity of the resolution can be judicially stated only if a third party knew or should have known that the proxy holder voted in contravention of the received instruction. For this reason it is advisable to place the instruction in a proxy document. It will be submitted to the company at the general meeting and therefore will be known to all remaining shareholders (proxies).

In practice, however, public companies prepare templates for voting instructions which are separate from the proxy document. In addition, public companies often caveat that they will not verify whether a proxy holder voted according to the received instruction.

In theory it could also constitute the basis for a motion for setting aside passed resolutions (*judicial declaration of invalidity*)[56]. The adoption of a resolution which was passed with the participation of a proxy who voted against the voting instruction may be considered illegal. Nonetheless, challenging the resolution is possible only if:

a) we recognize that the vote cast in contravention of the instruction was invalid, and

b) the cast vote influenced the result of the voting, *i.e.,* it had an impact on the content of the resolution.

Challenging the resolution would be extremely difficult though (if not impossible). Under Article 422 § 2 of the CCC, a shareholder

53 Supreme Court decision of 7 October 2004, No II PK 35/04, OSNAPiUS No 11/2005.

54 A. Herbet, *op. cit.* fn. 34, 420.

55 See fn. 51.

56 Under Article 425 § 1 of the CCC.

who took part in a general meeting (by its proxy) but did not request (by the proxy) that his objection be recorded in the minutes, is not legitimized to file for rescission of the resolution. It is an obvious dent in the whole structure of shareholders' protection.

If the proxy infringed the voting instruction (voted against it) but did not submit an objection to the resolution, *de lege lata* the shareholder is deprived of the right to challenge it.[57] It can be assumed that the proxy who voted against the instruction will not object to the resolution. In practice, therefore, the proxy may prevent the shareholder from filing the motion for setting the resolution aside.

The Polish legislator did not provide a solution similar to the one introduced in Article 411^2 § 3 of the CCC (*correspondence voting*). Article 411^2 § 3 of the CCC provides a shareholder (who was absent from the general meeting) with the right to object to passed resolutions and therefore this enables him to challenge the resolutions in the court.

This issue calls for legislators' intervention. I concur with the opinion of A. Herbet that *de lege ferenda* a new point 5 of Article 422 § 2 of the CCC should be added. This would provide a shareholder with the right to challenge the resolution when the proxy infringed the voting instruction.[58]

4. DEFICIENCIES OF THE VOTING INSTRUCTION

To sum up the issue of voting instruction, it should be concluded that it was introduced to Polish corporate law only partially. It is difficult to determine any evident sanction for the failure to comply therewith. Additionally, we can conclude, that:

(1.) the provision of the voting instruction is just optional, therefore the lack thereof does not entail any negative impact,

(2.) the content of the instruction is not officially established, it is therefore not required to specify how the proxy should vote on any particular point of the general meeting's agenda,

57 A. Kamińska, *op. cit.* fn. 25, 1225.

58 A. Herbet, *op. cit.* fn. 34, 421, t. 13.

(3.) the issuance of the instruction does not provide a shareholder with an opportunity to effectively challenge the resolution which was passed with the aid of the proxy who acted against the instruction, and

(4.) the proxy's liability for acting against the instruction is rather illusory.

UDK 347.451(37)

Dr Vladimir Vuletić[*]

NASTANAK I RAZVOJ RIMSKE PRODAJE: TRIJUMF NAČELA KONSENSUALNOSTI

U ovom radu autor nastoji da ukaže na nastanak, pravnu prirodu i razvoj rimskog ugovora o prodaji. Analizirajući u prvom redu prodaju pretklasičnog prava, autor povlači liniju razvoja od realne mancipacijske do klasične konsensualne, pri tom suprotstavljajući oprečne stavove u literaturi posvećene ovom pitanju. Oslanjajući se na kontroverze u mišljenjima klasičnih rimskih pravnika, oličenih u pravnim školama sabinijanaca i prokuleanaca, analizirajući izvore iz Digesta, autor nastoji da razveje uvreženu doktrinu o tzv. prevelikom rimskom formalizmu. Ugovor o prodaji pravi je primer trijumfa načela konsensualizma, u kojem autor nalazi osnov za tvrdnju da je u klasičnom periodu rimsko pravo više lišeno formalizma nego li moderno pravo. Postavljenom analizom, ukazuje se, konačno, na temeljne vrednosti rimske prodaje i doprinos rimskog klasičnog prava savremenim tendencijama u regulisanju međusobnih prestacija ugovornih strana.

Ključne reči: *Ugovor o prodaji. – Rimsko pravo.– Mancipacija. – Konsensus. – Sinalagmatičnost.*

1. UVOD

Ugovor o prodaji (*emptio-venditio*)[1] je, imajući u vidu većinu definicija[2], konsensualni kontrakt *bonae fidei*, kojim se jedna stranka

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1 Premda latinski naziv ovog ugovora ukazuje da bi se on mogao prevesti kao „kupoprodaja", jer ukazuje na postojanje dve istovremene uzajamne obligacije, odnosno dve odvojene formule, nazivi ovog ugovora na svetskim jezicima, ukazuju da bi, možda, pogodniji termin bio „prodaja" (engleski – „*sale*", nemački – „*Kauf*", francuski – „*vente*", italijanski – „*vendita*", ruski – „*куūлъа*"). I naš Zakon o obligacionim odnosima (ZOO) koristi termin – ugovor o prodaji, pa je opredeljenje da se u ovom radu sledi terminologija srpskog zakonodavca.

2 *Emptio et venditio contrahitur, cum de pretio convenenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit – Gai. Inst, 3, 139.*

(prodavac, *venditor*) obavezuje da drugoj stranci (kupcu, *emptor*) trajno prepusti neki predmet (*merx*)[3], odnosno preda u mirnu (nesmetanu) državinu[4], a ova se obavezuje da mu za to plati određeni novčani iznos kao cenu *(pretium)*.[5]

Ovaj ugovor je jedan od najvažnijih u rimskom ali i u modernim pravnim sistemima. Pre svega, on je osnovni instrument ekonomskih transakcija već u prvim pravno uređenim zajednicama. Kasnije, načela razvijena na terenu ovog ugovora postaju osnova za izgradnju drugih instrumenata pravnog prometa. Potom su usavršeni mehanizmi pravnog sistema, uticali na promenu različitih elemenata ugovora o prodaji. Zbog toga je ova ustanova, gotovo redovno, u središtu evolucije privatnopravnih sistema i zbog toga ima, sa istraživačkog stanovišta, istaknuto mesto u poređenju sa drugim obligacionim ugovorima.

U okviru rimskog prava važnost ugovora je naglašena njegovim mestom u izgradnji osnovnih načela ugovornog prava – konsenzualizma, *bona fides*, ekvivalencije prestacija stranaka i ugovorne odgovornosti. Imao je vrlo široku primenu tokom čitave rimske istorije počev od najstarijih vremena do Justinijanovog prava. Bogata istorija učinila je da ovaj ugovor bude razrađen i regulisan do najsitnijih detalja. Za razumevanje pravne prirode klasične prodaje i njenog markantnog obeležja-konsensualnosti, neophodno je osvetliti istorijske okvire razvoja ovog ugovora.

2. PRETKLASIČNA PRODAJA

Pretklasična prodaja ne poznaje konsensualizam. Razmena stvari za cenu, kao osnovni cilj ovog ugovora, u pretklasičnom periodu postizana je putem tzv. realne prodaje, jednim vidom mancipacije, mada je isti ovaj cilj mogao biti postignut i tzv. korealnim stipulacijama[6], te

3 M. Milošević, *Rimsko pravo*, Beograd, 2007, 372. Termin „*merx*" označava naziv za pokretne telesne stvari prema Ulpijanu: „*Mercis appellatio ad res mobiles tantum pertinet*" – *D. 50, 16, 66. (Ulpianus libro 74 ad edictum)*

4 O. Stanojević, *Rimsko pravo*, Beograd 2003, 368.

5 Pozitivnopravna definicija je vrlo slična, uz razliku što je obaveza prodavca da prenese svojinu na kupca: Ugovorom o prodaji obavezuje se prodavac da prenese na kupca pravo svojine na prodatu stvar i da mu je u tu svrhu preda, a kupac se obavezuje da plati cenu u novcu i preuzme stvar – Zakon o obligacionim odnosima (ZOO), čl. 454, st.1, *Službeni list SRJ*, br.31/93

6 V. Arangio – Ruiz, *Instituzioni di diritti romano*, Napoli 1968, 109.

je uobičajeni naziv za prodaju pretklasičnog perioda i mancipacijska prodaja.

U izuzetnim slučajevima, kada stranke tako posebno ugovore, punovažnom je smatrana i prodaja zaključena u pisanoj formi.[7] Prodaja pretklasičnog prava bila je, u suštini, realna prodaja koja se za *res mancipi* odvijala u obliku mancipacije. Njoj je, verovatno, prethodio dogovor stranaka o predmetu i ceni, međutim, taj dogovor nije imao nikakvu pravnu važnost, a mancipacija je imala stvarnopravni a ne obligacionopravni efekat, jer se njome odmah prenosila svojina.[8]

Gajevo shvatanje mancipaciju jasno naziva „*imaginaria quaedam venditio*"[9] očigledno je poistovećujući sa nekom vrstom prividne prodaje, odnosno takvom vrstom ugovora koji ispunjenje obaveze jedne ugovorne strane uvek vezuje za novac na ime tzv. tobožnje cene (*quasi pretium*).

Simbolizuje je komadić bakra (*radusculum*) koji pribavilac (*mancipio accipiens*) dotičući vagu (*aes tenens*), predaje prenosiocu (*mancipio dans*) izgovarajući određene reči: *...hunc ego hominem ex iure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra.*[10] Prividna prodaja za jedan novčić (*imaginaria venditio nummo uno*) primenjuje se i u druge svrhe.[11] Iako je i ovoj vrsti prodaje ista

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7 U takvom slučaju stranke su, i pored postignute saglasnosti, bez štetnih posledica mogle odustati od ugovora sve do sastavljanja odgovarajuće isprave, I. Puhan, *Rimsko pravo*, Beograd 1970, 314.

8 Ima više mišljenja o tome kako je od realne prodaje došlo do konsensualne, kod koje je već sam neformalni sporazum stranaka o predmetu i ceni proizvodio osnov za utuženje. Kazer (*Kaser*) smatra da se kod mancipacijske prodaje neobavezujući prethodni dogovor stranaka odvojio od samog akta mancipacije i dobio značaj samostalnog ugovora iz kojeg nastaje obaveza, M. Kaser, *Das Römische Privaterecht, erster abschnitt (das altrömische, das vorklassische und klassische recht)*, München 1954, 414. Na ovaj način je prodaja za gotovinu, omogućila i prodaju na kredit. Horvat je mišljenja da je rimska prodaja bila najpre realni kontrakt, koji nastaje predajom stvari a da se kasnije pretvorila u konsensualni, M. Horvat**,** *Rimsko pravo II*, Zagreb 1954, 88

9 *Gai Inst, I, 119.*

10 *Ibid.* „Na taj način je u karakteru razmene, koji mancipacija nesumnjivo velikim delom ima, i koju je vrlo verovatno moguće tumačiti kao redukovani oblik ranije realne prodaje prednovčanog razdoblja, vaganja komada bakra, potom i bakrenih šipki (*gestum per aes et libram*) ipak prepoznatljiva dimenzija položaja kupca kasnijeg ugovora o prodaji.", A. Petranović, *Položaj kupca u pravnom režimu rimske kupoprodaje (dok. disertacija),* Zagreb 1996, 19.

11 Tako, na primer, imajući u vidu pravni osnov, može se govoriti o mancipaciji „*donationis causa*", „*dotis causa*", „*fidei fiduciae causa*" ili pak o ispunjenju činidbe „*dare*", B. Nicholas, *An Introduction to Roman Law*, Oxford 1962, 185.

forma u kojoj se odvija (*per aes et libram*), novčić je shvaćen simbolično i ne podrazumeva obavezu plaćanja cene od strane pribavioca i samim tim ne može da se okarakteriše kao obligacionopravni element ugovora o prodaji.

Mancipacija, kao najstariji, svečani, formalni način prenosa svojine na *res mancipi*[12], reprezent starih pravnih poslova *iuris civilis* u formi *gesta per aes et libram*, javno obavljan, pred pet svedoka, punoletnih rimskih građana i tzv. libripensa nameće izvesna ograničenja, kako u pogledu stvari nad kojima se svojina može steći, tako i u pogledu lica koje postaje vlasnik. Naime, upravo navedena ograničenja raspolaganja stvarima koje se mancipuju, *(...res sunt que per mancipationem ad alium transferuntur)*[13]strogo poštovanje odgovarajuće propisane forme i neophodnih elemenata javnosti, posredno upućuju i na ograničenja vezana za *status civitatis* pribavioca. Za razliku od rimskih građana, peregrini nisu mogli koristiti mancipaciju, pa samim tim ni sticati kviritsku svojinu nad *res mancipi*.

O vremenskoj podudarnosti čina i efekata ovoga pravnog posla starog civilnog prava svedoči način odvijanja mancipacije *„inter presentes"*, ispunjavanje zahteva forme od strane i prenosioca i pribavioca, te postupak *„manum capere"*, odnosno uzimanje u ruku mancipovane stvari. Ono što je bilo vidljivo iz ritualnog dela izgovarane formule „... *emptus esto hoc aere aeneaque libra*"[14] nije se menjalo ni kasnije, kada je vaganje bakra bilo zamenjeno simbolično predstavljenim komadićem bakra ili novčićem.[15]

12 Poznato je da je kriterijum podele na stvari koje se mancipuju i one koje se ne mancipuju u suštini privredni, pa su tako res mancipi italska zemljišta, robovi, tegleća i tovarna stoka – „quadrupedes quae collo dorsove domantur", kao i četiri najstarije zemljišne seoske službenosti (*iter, via, actus, aquaeductus vel aquaehaustus*).

13 *Gai Inst. 1, 119*

14 *Ibid.*

15 Kada je sa pojavom novca mancipacija postala svečana forma za prenos svojine, ona potiskuje značaj prethodnog sporazuma stranaka i efektivne isplate cene i pokriva ih značenjem svoje svečane forme, tako da se prodaja utapa i gubi u mancipaciji i izjednačuje se sa njom. Ona se sada nužno neposredno izvršava, jer je u aktu mancipacije sadržano zaključenje ugovora i prenos svojine i priznanje prodavca da je primio isplatu cene. Međutim, istovremeno, zbog pojave novca, učešće libripensa prestaje da bude nužno u svim situacijama prodaje, jer nije bilo potrebno meriti bakar. Promet res

Osim toga, kod mancipacijske prodaje, za razliku od konsensualne, nije moguće dodati modalitete: uslov (*condicio*), rok (*dies*) i nalog, odnosno teret (*modus*)[16].

Iako formalizam mancipacije to jednostavno ne predviđa, to ne znači da ne postoji bilo kakva mogućnost ugovaranja dodatnih obaveza. Ovde naravno nije reč o elementima civilnog pravnog posla mancipacije, nego o naknadnim sporazumima, verovatno najčešće u obliku stipulacija, koje stvaraju posebnu i samostalnu obavezu za stranke.

Kupac, to jest, pribavilac, izuzev poštovanja faza u odvijanju mancipacije, nema drugih obaveza, pa ga dodatne stipulacije obavezuju samostalnim ugovornim pravnim osnovom. S obzirom na predmet obaveze, to mogu biti stipulacije koje se odnose na plaćanje određenog iznosa novca u određenom vremenskom roku (*dare certam pecuniam*), ili na davanje neke druge određene stvari (*dare certam rem – stipulatio certa*), ili se, pak, može raditi o stipulaciji u kojoj će predmet obaveze biti neko određeno činjenje (*facere*) ili neko nečinjenje odnosno propuštanje činjenja (*non facere – stipulatio incerta*). Uobičajeno je, međutim, uz prisustvo petorice svedoka, a pre nego što pribavilac izgovori svečane reči, dati usmeni iskaz (*nuncupatio*) o osobinama stvari koje se mancipuju.[17]

Sa stanovišta kupca, odnosno pribavioca, ovo ipak predstavlja određenu modifikaciju efekata mancipacije, kao posledice striktnog poštovanja njene forme, koja je u potpunosti potiskivala značaj elemenata volje pribavioca u pogledu mancipovanja stvari određenih svojstava.

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mancipi je postao sve češći, skoro svakodnevan, a privatna svojina se nad njima potpuno učvrstila, pa nije više bilo neophodno da svakoj prodaji ovih stvari prisustvuju svedoci koji treba da je odobre. Zato se češće dešava da ljudi ne pribegavaju manicipaciji pri prodaji res nec mancipi, nego je obavljaju uz prostu saglasnost volja i prostu tradiciju stvari. Ovako D. Stojčević, *Rimsko privatno pravo*, Beograd 1975, 258, F. Schulz, *Classical Roman Law*, Oxford 1951, 244, G. Grosso, *Il sistema romano dei contratti*, Torino 1963, 311–312, E. Besta**,** *Le obligazzioni nella storia del diritto italiano*, Padova 1937, 333.

16 Savremena pravna nauka ove modalitete posmatra kao sporedne dodatke ugovora (*accidentalia negotii*).

17 To su, na primer, obaveštenja o njenoj površini (modus), ili o postojanju ili nepostojanju službenosti (*fundus uti optimus maximusque*), W. Buckland, *The Main Institutions of Roman Private Law*, Cambridge 1931, 78–80.

Tako bi odredba Zakona 12 tablica: „*Cum nexum faciet mancipiumque, uti linqua nuncupassit, ita ius esto*“[18], čini se, mogla biti tumačena kao mogućnost ugovaranja dodatnih obaveza uz mancipaciju, pogotovu u smislu prava kupca da bude obavešten o osobinama stvari koju pribavlja.

„Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferuntur: vendite vero et tradite non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. quod cavetur quidem lege duodecim tabularum...“[19]

Ovaj fragment iz Justinijanovih Institucija pominje prenos svojine tradicijom, budući da u vreme Justinijana mancipacija više ne postoji. Međutim, na osnovu njega možda se može razvijati ideja da je već prema odredbama Zakona 12 tablica, stvarnopravni efekat, tj. prenos svojine u slučaju predaje stvari, dakle za slučaj mancipacije *venditionis causa*, zavisio od plaćanja cene (*...non aliter emptori adquiruntur, quam si is venditori pretium solverit...)*, a zavisio je i od drugih načina osiguranja prenosioca (*...vel alio modo ei satisfecerit, veluti expromissore aut pignore dato.)* To je, ujedno, i osnov razlikovanja stvarnopravnih efekata mancipacijske prodaje i mancipacije kao derivativnog načina sticanja svojine (*sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur...)* koja kao posledicu podrazumeva prenos svojine, nezavisno od toga da li je cena isplaćena (*...sine dubio transferuntur...)*. [20]

18 *XII, 6, 1.*

Maks Kazer ovu odredbu Zakona 12 tablica tumači da su se prava iz mancipacije mogla ostvarivati bez sudskog postupka i bez presude, budući da se mancipacijom stvaralo strogo obavezujuće pravno stanje, ius, M. Kaser, *op. cit*. fn. 9, 496. Interesantan je i navod Cicerona i njegovo tumačenje ove odredbe, prema kojem treba učiniti ono što se izrekne tako da bi onaj koji bi to poricao putem parnice u tom slučaju bio kažnjavan na dvostruki iznos stvari, Cicero, *De officiis*, *3, 16, 65*.

Beti navodi da se mancipaciji mogu dodati i drugi sporazumi, na primer, fiducijarni (*pactum fiduciae*) kojim se pribavilac (fiducijar) obavezuje da svojinu nad založenom stvari prenese ponovo na prenosioca (fiducijanta), dakle, obavezuje se na kontra mancipaciju (remancipatio) nakon što se ispuni uslov iz fiducije, E. Betti, *Instituzioni di diritto romano II*, Padova 1947, 201.

19 *Iust. Inst. 2,1, 41.*

20 U mancipacijskoj prodaji, kod koje je, hronološki, početno postojalo vaganje bakra, prenos svojine definisan je i plaćanjem cene, kao elementom svečanog

Dakle, kupac postaje vlasnik stvari bez isplate cene, čak bez ikakve protivčinidbe prema prenosiocu. Prema Stejnu (*Stein*), kupac se može posebnim pravnim poslom, najčešće sponzijom, obavezati na protivčinidbu *dare* koja bi se sastojala u predaji novca koji odgovara tzv. ceni mancipovane stvari.[21]

Iz prethodno navedenog vidljivo je da se specifičnost mancipacije ogleda, prevashodno, u tome što se ne mogu izdvojiti klasični obligacionopravni efekti ovog pravnog posla, koji se, u fizionomiji klasičnog rimskog ugovora o prodaji, ogledaju, pre svega, u prodavčevoj obavezi predaje stvari i obezbeđenja mirne državine kupcu (*vacuam possessionem tradere*), kao i u kupčevoj obavezi da plati dogovorenu cenu (*pretium solvere*). Formalizam mancipacije u kojem *raduscul*um ritualno i simbolično zadržava fikciju tobožnje cene, nije za kupca predvideo i obavezu njenog plaćanja.

Ugovornim stranama, međutim, preostaju drugi načini kojima bi se kupac mogao naknadno obavezati na plaćanje novčanog iznosa koji odgovara ceni mancipovane stvari. Međutim, ovde se postavlja značajno pitanje da li je moguće naknadno isplaćivanje cene, s obzirom na dilemu da li u pretklasičnoj prodaji imamo prodaju na kredit ili ne. Ovaj problem, za koji je naročito zainteresovan kupac, pokazuje svu svoju životnost i učestalost u pravnom prometu.

Pringshajm (*Pringsheim*) se bavi ovim pitanjem i analizira rešenje iz grčkog prava o fikciji postojanja drugog ugovora. Želeći da posredno postigne efekat prodaje na kredit, grčko pravo poseže za efektima već pravnopriznatog kontrakta – zajma (*mutuum*). Fingira se da je kupac platio cenu, s tim što je od prodavca primio isti novčani iznos, čime se ispunjava zahtev iz ovog kontrakta da zajmodavac zajmoprimcu predaje određenu zamenljivu stvar u svojinu, a ova se obavezuje da mu vrati istu količinu iste vrste stvari i kvaliteta.[22]

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obreda odvijanjem pravnog posla sa bakrom i vagom (*gestum per aes et libram*). Kada je napušteno merenje bakra i kada je uveden simbol *aes signatum* (*nummus unus*) koji je zadovoljio formu mancipacije, do prenosa svojine faktički dolazi i bez plaćanja cene. Prenosilac predaje stvar pribaviocu bez ikakvog zahteva za protivčinidbom, budući da je iz načina odvijanja mancipacije vidljivo da se kupcu ne nameće nikakva obaveza. Tako i H. Hausmaninger W. Selb, *Römisches Privaterecht*, Berlin 1987, 88, J. Mackintosh, *The Roman Law of Sale*, Edinburg 1907, 133; P. Stein**,** *The Digest Title, De diversis regulis iuris antique, and the general principles of law*, London 1988, 142.

21 P. Stein, *op. cit.* fn. 20, 143.

22 F. Pringsheim**,** *The Greek Law of Sale*, Weimar 1950, 55.

Za razliku od rešenja grčkog prava, rimsko pravo nije posezalo za fikcijom postojanja drugog imenovanog i priznatog kauzalnog kontrakta, imajući u vidu da je isti efekat postizala i rimska apstraktna sponzija.[23]

Sponzija, odnosno *stipulatio pretii (verborum obligatio)* kao verbalna obaveza plaćanja dogovorene cene stvari, može biti korišćena za preuzetu obavezu prodavca na prenos svojine (*dare*). [24] Valja ipak istaći da ovakvu sponziju treba posmatrati isključivo kao dodatni ugovor uz mancipaciju.[25]

Imajući u vidu da se mancipacija može koristiti za *res mancipi*, značajno je analizirati problem ostvarivanja prava kupca u pretklasičnom pravu kod mancipacijske prodaje. Pri tom nije cilj raspravljanje već često diskutovanog i naglašavanog pravila o pravnim posledicama prenosa tradicijom *res mancipi* (odnosno sticanje tzv. pretorske, bonitarne svojine), već usresređenje na zaštitu prava kupca usled doloznog ponašanja prodavca koji prenosi *res mancipi*.

Dobar primer je situacija u kojoj je prodavac iz mancipacijske prodaje obećao da će određenu *res mancipi* predati kupcu, međutim, uprkos tome, prenese mancipacijom stvar na treće lice. U ovoj situaciji, kupac nema zaštitu u odnosu na treće lice – kupca (pribavioca) stvari mancipacijom, nezavisno od činjenice što je prodavac učinio prevarnu radnju. Razlog ovome valja potražiti u činjenici da je za rimske građane predviđena i obavezna mancipacija kao stvarnopravni posao za prenos, to jest, sticanje kviritske svojine nad stvarima *res mancipi*.[26]

23 Iako je sponzija najstariji oblik rimske verbalne obaveze, kasnije će potpuno ustuknuti pred apstraktnom i sadržajno bitno prilagodljivijom stipulacijom, V. Arangio – Ruiz, *op. cit*. fn. 6, 96.

24 V. Arangio – Ruiz, *op. cit*. fn. 6, 97.

25 Tumačenje porekla konsensualne prodaje kroz dvostruke stipulacije *(stipulatio duplae)* umanjuje značaj uticaja peregrinskog prava *ius gentium*. Razborito je zato ovo shvatanje porekla prodaje relativizovati, jer je osnovna promena u smislu pojednostavljenja propisanih zahteva forme mancipacije na neformalni konsensus kao pravnog osnova prenosa svojine kod prodaje, u privrednim uslovima pravnog prometa sa i među peregrinima, i njihovom postepenom inkorporiranju u civilni pravni sistem, P. F. Girard**,** *Manuel élémentaire de droit romain*, Paris 1918, 570 –572.

26 U ovakvim slučajevima prodaja nije smatrana za kontrakt, jer nema posebnog sredstva zaštite. Samo pitanje zaštite posebnom tužbom nije se ni postavljalo ukoliko su obe stranke neposredno izvršile svoje obaveze, ili ako se obavlja među građanima na čiju se *bona fides* može računati. U takvim slučajevima

S obzirom na zahtev forme mancipacije (*manu capere* stvari), jasno je da stvar ili nije bila prethodno tradirana kupcu kojem je obećana, ili je bila tradirana ali je njen bonitarni vlasnik naknadno izgubio državinu.

Dolozno postupanje prodavca u ovom slučaju može se ipak povezati sa situacijom u kojoj tradicija, iako obećana, nije izvršena, pa je ista stvar mancipovana drugome.[27]

Iz svega prethodno navedenog, može se zaključiti da sporazum, konsenzus, koji se zasniva na obećanju tradicije *res mancipi* radi prenosa svojine, u pretklasičnom pravu prodaje, ne obavezuje i nema pravne posledice u smislu zaštite takvog pribavioca prema trećem licu koje je mancipacijom pribavilo stvar.[28]

Može se zamisliti i drugačiji hipotetični slučaj. Postavlja se pitanje ko ima pravo da podigne svojinsku tužbu kada je državina izgubljena, onaj ko je tradicijom prvo stekao stvar pa je izgubio, ili onaj koji ju je stakao kasnije mancipacijom, pa je takođe izgubio. Davanje prednosti pribaviocu (*mancipio accipiens*) koji je izgubio državinu

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pribegavalo se svim sredstvima za obezbeđenje koje je tadašnje pravo pružalo, npr. uzimanje zaloge putem fiducije, uzimanje ličnog jemstva, a naročito zaodevanje prodaje u apstraktne forme ekspensilacije i stipulacije, pomoću kojih se dobijala mogućnost podizanja tužbe. To se činilo ili na način što je jedna stranka izvršila svoju činidbu, a druga se stipulacijom ili ekspensilacijom obavezivala da će izvršiti kontračinidbu. Mogle su se obe stranke dogovoriti da izvrše istovremeno u nekom određenom roku svoju činidbu i tada je bilo neophodno izvršiti dve uzajamne stipulacije ili ekspensilacije. Videti opširnije B. Biondi**,** *Instituzioni di dirrito romano*, Padova 1947, 279–281, A. Watson, *The Law of Obligations in the Later Roman Republic*, Oxford Clarendon Press 1965, 65 i dalje, D. Stojčević, *op. cit*. fn. 15, 258–259.

27 Ovaj slučaj analizira i Aranđo Ruic, polemišući sa nešto drugačijim stavovima o uticaju načela prava *ius gentium* u mancipacijskoj prodaji. Objašnjavajući položaj pribavioca tradicijom, navodi da se njegova „*inferiorità giuridica*" ogleda u tome što treće lice „*mancipio accipiens*" može „*rivendicare efficemente il bene dal compratore*". To znači da"*mancipio accipiens*" koji izgubi državinu nad stvari koju je stekao mancipacijom, može od pribavioca stvari tradicijom, tražiti njeno vraćanje. Naravno, jasno je da je „*mancipio accipiens*" morao imati stvar u državini tokom same mancipacije. Reivindikacija pre tradicije trećem licu ovde ne može biti korišćena, s obzirom da sticanje stvari mancipacijom pretpostavlja držanje stvari, odnosno kosi se sa osnovnim postulatom reivindikacije – zahtev da se vrati stvar koja je u državini nevlasnika. Više o ovome V. Arangio – Ruiz, *op. cit*. fn. 6, 101–106.

28 Konsenzus, stoga, kod pretklasične prodaje ostaje samo na nivou pravnog režima pakta kao neformalne i neutužive saglasnosti volja, P. F. Girard**,** *op. cit*. fn. 25, 584.

stvari, u odnosu na pribavioca koji je stvar stekao tradicijom (*possessionem tradere*) a zatim, isto tako, izgubio državinu, minimizira značenje konsenzusa koji je prethodio tradiciji i mancipaciji. Takvo tumačenje konsenzusa, u stvari, ga podiže na uzvišenu konstrukciju zaštite kviritskog vlasnika (*dominus ex iure Quiritium*) i prati zaštitu sadržaja prava svojine kao potpune vlasti nad stvari, putem osnovne svojinske tužbe – reivindikacije.

Tek će postupnim omogućavanjem zaštite pretorskog vlasnika (kupcu, pribaviocu *res mancipi* tradicijom) i to posebno pretorskim pravnim sredstvima *exceptio doli*, *exceptio rei venditae et traditae* i *actio Publiciana*, biti izjednačen položaj kupaca koji su na osnovu sporazuma o prodaji stvari do nje došli bilo mancipacijom ili tradicijom.

3. KLASIČNA PRODAJA

Za razliku od pretklasične, prodaja klasičnog prava je potpuno konsensualna i proizvodi samo obligacione efekte. Samim ugovorom se na kupca ne prenosi svojina, pa je tako saglasnost o bitnim elementima ovog ugovora, samo pravni osnov (*causa*) za prenos stvari odnosno novca, dakle pravni osnov za tradiciju.[29]

Pravni efekti klasične prodaje zasnivaju se u potpunosti na neformalnoj saglasnosti volja, bez ikakvih dodatnih zahteva za poštovanjem forme:

Sine pretio nulla venditio est: non autem pretii numeratio, sed conventio perficit (sine scriptis habitam) emptionem.[30]

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29 „Pogodba, dakle, nema stvarnopravnog učinka, jer se kupoprodajnom pogodbom, dakle, sporazumom o predmetu i cijeni, ne prenosi ni ne zasniva stvarno pravo, nego i za prodavca i za kupca nastaje samo obvezna dužnost, da prenese na drugoga obveznu stvar, odnosno kupovnu cijenu", M. Horvat**,** *op. cit*. fn. 8, 87

Ovo je dobro poznat doktrinarni stav da se sam prenos stvari i cene vrši posebnim aktom, odnosno tradicijom, i ne spada u nastanak obligacije (što je odlika realnih ugovora) već predstavlja ispunjenje obligacije, i to bez obzira na pitanje da li je reč o instantnoj ili prodaji na kredit. Suprotno ovoj rimskoj doktrini, neki moderni evropski građanski zakonici, usvojili su suprotno rešenje: francuski i italijanski građanski zakonik predviđaju da se samim sklapanjem ugovora o prodaji stiče svojina na stvari od strane kupca, čak i bez njene predaje.

30 *D. 18.1.2.1 (Ulpianus libro primo ad Sabinum)*

In venditionibus et emptionibus consensum debere intercedere palam est: ceterum sive in ipsa emptione dissentient sive in pretio sive in aquo alio, emptio imperfecta est...[31]

Pravnu prirodu klasične prodaje neki romanisti tumače pretežno kao način za sticanje imovinske dobiti[32], pa je tako ovo klasičan teretan ugovor, dok drugi u prvi plan ističu da je ovo osnovni posao obligacionog prava.[33]

Opšte usvojeno mišljenje je da poreklo ovog ugovora treba tražiti u trampi.[34] U vreme kada Rimljani još nisu poznavali novac kao sredstvo plaćanja, tu ulogu igrala je razmena stvari za stvar, i to najčešće stoka u ulozi novca. Kasnije se razmena vrši i za sirovi metal i, konačno, za kovani novac.

Rimski pravnici nam svedoče u prilog ovoj tezi, što nedvosmisleno potvrđuje Pavle, objašnjavajući da u starom periodu nije bilo novca, već su stranke menjale ono što im nije potrebno ili ono čega imaju više, za ono što im je u tom momentu neophodno.[35]

Međutim, klasično pravo ne posmatra odnos prodaje i trampe na ovaj način. Pravi se velika razlika između ova dva instituta, a pogo-

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31 *D. 18.1.9 (Ulpianus libro 28 ad Sabinum)*

32 Takav stav imaju de Zulueta „razmena stvari za novac da bi se pribavila (imovinska) korist", F. de Zulueta, *The Roman Law of Sale*, Oxford Clarendon Press 1945, 6, B. Nicholas, *op. cit*. fn. 11, 18.

Srpski građanski zakonik, tako, na ovoj liniji, ugovor o prodaji definiše kao ugovor „kojim se stvar kakva za neku određenu platu u novcu drugome ustupa" – SGZ, § 641, dok naš Zakon o obligacionim odnosima prodaju definiše kao ugovor kojim se prodavac obavezuje da na kupca prenese pravo svojine na prodatu stvar i da mu je u tui svrhu preda, a kupac se obavezuje da mu plati cenu u novcu i preuzme stvar – ZOO, čl.454, st.1.

33 „ Najglavnija je stvar da kupac stiče potpuno vlasništvo nad stvari a prodavac imovinsku korist od prodaje, što je i predmet ovog ugovora", Ž. Perić, *O ugovoru o prodaji i kupovini*, Beograd 1920, 23. Tako i M. Kaser, *op. cit*. fn. 8, 126, F. Schultz, *Principles of Roman Law,* Oxford 1936, 75, W. Buckland, *Roman Law from Augustus to Justinian*, Cambridge 1921, 143.

34 Sve do pojave novca reč je samo o trampi, F. de Zulueta, *op. cit*. fn. 32, 9. Isto i K. Zweigert, H. Kötz, *Introduction to comparative law*, Oxford Clarendon Press 1984, 221, F. Pringsheim, 48, A. Watson, *The Law of Obligations In The Later Roman Republic*, Oxford Clarendon Press 1965, 40.

35 *Origo emendi vendendique a permutationibus coepit. olim enim non ita erat nummus neque aliud merx, aliudpretium vocabatur, sed unusquisque secundum necessitatem temprum ac rerum utilibus inutilia permutabat, quando plerumque evenit, ut quod alteri superset alteri desit, D. 18.1.1. (Paulus libro 33 ad edictum)*

tovu je učestala živa rasprava među pripadnicima dve najveće pravne škole, sabinijancima i prokuleancima, po pitanju da li se trampa može smatrati vrstom prodaje ili je reč o potpuno odvojenim institutima.

Tako Gaj, i sam pripadnik sabinijanske škole, navodi da su se sabinijanci Sabin i Kasije oslanjali na ideju da je prodaja proistekla iz trampe. Oni, veli Gaj, čak navode, potkrepljujući to i Homerovim stihovima iz Ilijade:

„*Iz tih lađa Ahajci dugokosi stanu kupovat vino, jedni za med, a drugi za blistavo gvožđe, jedni za goveđe kože, a drugi za goveda živa*, *jedni za roblje*."[36]

Čini se da su sabinijanci izgleda čak predložili identičnu prirodu prodaje i trampe i razlikovali ih samo u stepenu – prodaja je savršeniji oblik od trampe.[37]

Ima, naravno i suprotnih stavova. Rivalska prokulenaska škola odbija ovo izjednačavanje i tvrdi da je jedno trampa a drugo prodaja, jer se, u suprotnom, ne mogu razlučivati stvari tako da se vidi koja od njih je predata kao stvar a koja na ime cene, a besmisleno je obe smatrati i za stvar i za cenu.[38]

Pravnik Pavle ide i korak dalje i polemiše sa sabinijanskim argumentom iz Ilijade i navodi: „Stihovi koje mi suprotstavljaju čini mi se da označavaju razmenu a ne prodaju, kao i sledeći stihovi istog pesnika:

„*Jupiter, Saturnov sin, oduze razum Glauku, koji razmeni svoje oružje Sa Diomedom, sinom Tadeja*."[39]

Uočljivo je, imajući sve ovo u vidu, da se ugovor o prodaji jasno razlikuje od razmene, kod koje se svojina ustupa ne za novac, nego za neku drugu stvar ili pravo, iako se može prihvatiti većinski stav da je razmena neposredno prethodila prodaji sve do pojave kovanog novca.[40]

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36 *Gai Inst. 3. 141* (prev. O Stanojevića)

37 É**.** Chénon**,** *Étude sur les controverses entre les Proculéiens et les Sabiniens sous les premiers emperurs de Rome*, Paris 1881, 76

38 *D. 19.4.1. (Paulus libro quinto ad Sabinum)*

39 *Iust. Inst. 3.23.2.*

40 Perić analizira jedan paragraf Srpskog građanskog zakonika, kroz stav da se vlasništvo ustupa i za neku drugu stvar ili pravo, ili za novac, pa je tako ako je veća vrednost stvari nego novca, onda je to razmena, ako li je veća ili jednaka vrednost novca, onda je prodaja, Ž. Perić, *op. cit*. fn. 33, 24.

Međutim, pravna priroda ugovora o prodaji u klasičnom pravu, vidno se razlikuje od pretklasičnog i postklasičnog perioda njegovog razvitka.

Prodaja kakvu danas posmatramo, evoluirala je od Zakona 12 tablica do Justinijanove kodifikacije sa svim svojim specifičnostima i modalitetima. Na početku u starom pravu, i ako se prihvati stav da potiče od trampe, ona još nema pravno uređenje, jer će ga i trampa dobiti tek u postklasičnom pravu.

Razlikuje se pravni režim prodaje stvari *res mancipi* i *res nec mancipi*[41], dok u složenijim situacijama, kakve su kreditna prodaja, kao i odgovornost prodavca za pravne i fizičke nedostatke stvari, Rimljani koriste stipulaciju, čak i više njih za vrednije stvari. Pa ipak, kako navodi Dioždi (*Diosdi*), ujednačavanje i stvaranje kompaktnog sistema nije okončano, bar u formalnom smislu, ni u Justinijanovom *Corpus Iuris Civilis-u*.[42]

Mancipacija kojom se obavlja prodaja u najranijoj formi, transakcija *donnant donnant*[43], čak i dvostruko ime kontrakta *emptio venditio*, shvaćenog u osnovnom smislu kao kombinacija reči *emere*[44], i reči *venum dare*, donekle podržavaju ovaj stav.

Razvoj ugovora u velikoj meri je posledica intervencije države i njenih organa u slučajevima očigledne zloupotrebe ili nepravde, koja interveniše u odnose između prodavca i kupca. S obzirom na osobine bitnih elemenata ugovora o prodaji (pogotovu cene) i vrlo čestih situacija u kojima su prodavci, u većoj ili manjoj meri, pokušavali prevarnim radnjama da prisvoje veću korist, kao i činjenice da su se u ovoj ulozi najčešće javljali peregrini a sa druge strane rimski građani, uslovilo je reakciju države. Magistrati su imali jedan novi izazov: u okviru postojećeg pravnog poretka iznaći nova rešenja koja ga formalno neće menjati ali koja će ga, suštinski, imajući u vidu obim i radikalnost novih rešenja, prilagoditi novim potrebama društva.

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41 U slučaju *res nec mancipi* kupac je na osnovu prodaje mogao da kaže „stvar je moja“ . Takva neformalna prodaja nije bila bez pravnog značaja ali nije bila još ni obligacioni ugovor, već samo pravni osnov za sticanje svojine, M. Milošević, *op. cit*. fn. 3, 336.

42 G. Diosdi, *Contract in Roman Law – From the Twelve Tables to the Glossators*, Milano 1981, 66.

43 F. de Zulueta, *op. cit*. fn. 32, 19

44 *D.40.7.29. (Pomponius libro 18 ad Quintum Mucium)*

Mešoviti karakter *actio auctoritatis*, kao i činjenica da svojina na kupca neće preći prostom tradicijom, ako on ili ne plati cenu ili ne ostavi realno ili personalno obezbeđenje da će to učiniti[45] samo su neki od pokazatelja žive intervencije magistrata u ostvarivanju i zaštiti prava i obaveza obeju ugovornih strana.[46]

Do vremena kada su mancipacija i in jure cesija i formalno definitivno prestali da postoje (mancipacija se pominje u Konstantinovim konstitucijama)[47] ova dva načina sticanja su se vrlo često primenjivala. Njihovi ritualnost i formalizam bili su potvrda kauze predaje (*iusta causa traditionis*).

Imajući u vidu i kauzalnost prodaje, valjalo bi istaći da klasično shvatanje polazi od činjenice da je kauza cilj kome stranke teže pri sačinjavanju ugovora i preuzimanju ugovornih obaveza, tako što se jedna strana obavezuje jer se obavezuje i druga – obaveza jedne, osnov je obaveze druge strane.[48] Upravo ova činjenica u odlučujućoj meri opredeljuje postojanje dvostrano jednakih, sinalagmatičnih ugovora (*contractus bilateralis aequalis*) kakav je i prodaja.

Tako se, istovremeno, uz pravno priznati konsensualni kontrakt *emptio venditio*, sa svim osobinama perfektuiranosti sporazuma među strankama i njihovih međusobnih obavezivanja, još uvek sporadično susreću i primenjuju predkonsensualni načini odvijanja prodaje.

Štaviše, kupac je vrlo često zahtevao i prisustvo svedoka, ili čak obezbeđivanje pisane isprave, koja bi dokazivala pravni osnov tradicije.[49]

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45 *Iust. Inst. 2. 1. 41.*

46 Decemviri već kroz Zakon 12 tablica osećaju potrebu da uvedu *actio de modo agri in duplum* zbog nedostataka mancipacije, dok Gaj svedoči i o posebnom slučaju *legis actio per pignoris capionem* sa istim ciljem – *Gai Inst. 4. 28.*

47 Apstraktnost mancipacije je u ovom periodu bila pogodna i za prodaju nepokretnosti, baš zbog prikrivanja kauze davanja – *C. Th. 8, 12. 4; C. Th. 8, 12, 5; C. Th. 8, 12, 7*

48 S. Perović, *Obligaciono pravo*, Beograd 1973, 324 – 325. Tako i Antić: „Kauza u doba republike, zaslugom pretora, „silazi" u oblast *humani iuris*. Kauza dužnikove obaveze je protivčinidba druge stranke. To su bili preduslovi koji su omogućili da se sinalagmatične obligacije ne shvataju kao dve posebne, dve jednostrane obligacije, već obrnuto, kao jedna jednistvena obligacija. To je imalo kao posledicu da više nisu bile neophodne dve stipulacije u jednom ugovoru. Naprotiv, nastaje pravilo: jedan ugovor – jedna stipulacija. To su ujedno uslovi da se kauza oslobodi forme." V. više u O. Antić, *Obligaciono pravo*, Beograd 2007, 225–228.

49 U vreme kada mancipacija i in jure cesija nestaju kao načini sticanja svojine, pa i time prestaje potreba za formalnostima koje su ih pratile i koje su se mo-

Može se, stoga, zaključiti da je ugovor o prodaji u klasičnom pravu potpuno sinalagmatični, kauzalni, teretni, komutativni, konsensualni ugovor *bonae fidei,* koji obema stranama ugovornicama, od momenta kada su se saglasile o bitnim elementima ugovora, pruža osnov zaštite putem *actio empti* za kupca, odnosno *actio venditi* za prodavca.

4. POSTKLASIČNA PRODAJA

Osnovno pitanje u vezi sa prodajom postklasičnog prava je dilema da li je konsensualnost i dalje suštinsko obeležje ovog ugovora. Epitome Gaja svedoče da postklasično pravo nije odustalo od konsensualne prodaje, jasno navodeći da prostom saglasnošću volja nastaju obligacije iz kupovine i prodaje, s obzirom da se više zahteva saglasnost od nekog pismena ili svečane radnje, a ovakva obligacija može biti zaključena čak i između odsutnih, što nije moguće u drugim slučajevima.[50]

Međutim, Teodosijev Kodeks ukazuje da je prodaja zahtevala pisani podnesak, odgovarajuću pisanu ispravu da bi prodaja bila valjana:

„*Cum inter emptorem ac venditorem de mencipii pretio convenerit et fuerit conscripta venditio...*“[51]

„*Res, quae proposita actione repetitur, transferi apossidente ad alterum nullis contractibus potest; neque inde aliqua fieri scriptur a permittitur.*“[52]

Ova odstupanja od konsensualnosti prodaje u postklasičnom pravu tumače se u romanističkim stavovima pretežno kao insistiranje na predaji stvari, jednoj vrsti realnog oblika, što prodaju postklasičnog prava približava realnoj a udaljava od konsensualne.

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gle koristiti u svrhu kasnijeg dokazivanja i zaštite prava kupca u odnosu na tradensa i treće lice, kupac nije odustajao od zahteva za osiguranjem dokaza o izvršenoj neformalnoj predaji stvari, G. Diosdi, G, *op. cit*. fn. 42, 78–79. Tako i A. Petranović, *op. cit*. fn. 10, 46.

50 *Gai Ep. 2, 9, 13–14: Consensu fiunt obligations ex emptionibus et venditionibus...; quia in huiusmodi rebus consensus magis quam scriptura aliqua aut solemnitas quareitur. In quibus rebus etiam inter absentes obligatio contrahi potest, quod in aliis rebus fieri non potest. Emptio igitur et venditio contrahitur, cum de pretio inter emptorem et venditorem fuerit definitum, etiamsi pretium non fuiset numeratum, nec pars pretii aut arra data fuerit.*

51 *C. Th, 3,4,1*

52 *C. Th, 4,5,1*

Da ugovor o prodaji nije smatran zaključenim i da ne stvara obaveze za stranke pre nego i druga strana ne izvrši svoju obavezu, smatra Kazer.[53]

Dioždi je suprotnog mišljenja i navodi da je prodaja suštinski sačuvala svoju formu poznatu klasičnom pravu, da su i drugi konsensualni kontrakti potpuno opstali u postklasičnom pravu, kao što je i razvoj kontrakata u stvari linearan, od klasičnog do Justinijanovog prava.[54] Ovakav zaključak Dioždi izvodi iz svoje analize razvoja stipulacije, mada se čini da je napred citirani fragmet Gajevih Epitoma pouzdan i nedvosmislen dokaz u prilog ovoj tvrdnji, koji ovaj romanista nije analizirao prilikom zauzimanja svog stava.

Iako može delovati da, imajući u vidu ovaj Gajev fragment iz Epitoma nema ni jedne razlike između klasične i postklasične prodaje, pažljivija analiza ne može prenebregnuti neke razlike u nijansama formulacija. U delu posvećenom klasičnoj konsensualnosti, primećeno je da Gaj insistira samo na prostoj saglasnosti volja da bi prodaja nastala, međutim, u Epitomama on navodi da „se saglasnost više (podvukao V. Vuletić) zahteva od nekog pismena ili svečane radnje". Deluje da ovo ipak ukazuje da, konsensualnost, istina i dalje najvažniji element ugovora o prodaji, nije uvek i jedini: koriste se i pisane forme i svečane radnje.

Još jedan fragment iz Gajevih Epitoma ukazuje na drugačiji položaj kapare kod postklasične prodaje. Dok je kapara u klasičnom periodu razvijen i iznijansiran institut, deluje da u postklasičnom pravu nema ni izbliza takav značaj:

„*Emptio igitur et venditio contrahitur, quum de pretio emptorem et venditorem fuerit definitum: etiamsi pretium non fuerit numeratum, nec pars pretii aut arra data fuerit*"[55]

Jasno je, dakle, da prodaja nastaje u postklasičnom pravu čim prodavac i kupac odrede cenu, uprkos tome da li je cena isplaćena, u celosti ili delu, ili da li je data kapara ili ne. Iz ovih odredbi Gajevih Epitoma, smatra Magdolna Sič, vidi se težnja da se istakne uloga sagla-

53 Ovo dovodi prodaju na prethodno stanje jedinstvenog akta isplate cene i predaje stvari, što je vrlo blisko realnoj prodaji, M. Kaser, *op. cit*. fn. 8, 281.

54 G. Diosdi, *op. cit*. fn. 42, 311.

55 *Gai Ep, 9, 17, 14*

snosti volja kao bitnog elementa ugovora, nasuprot pisanoj ili svečanoj formi, kao i isplati cene ili davanja kapare.[56]

Međutim, s druge strane, Anamari Petranović, insistira na delu fragmenta Gajevih Epitoma koji dozvoljava i pisanu formu ugovora o prodaji, pa tako teži zaključku da postklasična prodaja ipak nije potpuno konsensualna i da ima dosta situacija u praksi u kojima se pisana isprava, pogotovu kada je reč o prodaji nepokretnosti, pretežno koristi.[57]

Da je formalizam izražen kod prodaje nepokretnosti u postklasičnom periodu, svedoči i odredba iz Teodosijevog Kodeksa:

„*Qui comparat, censum rei comparatae cognoscat: neque liceat alicui rem sine censu vel comparare vel vendere. Inspectio autem publica vel fiscalis esse debebit hac lege, ut, si aliquid sine censu venierit, et id ab alio deferetur, venditor quidem possessionem, comparator vero id, quod dedit pretium, fisco vindicante, perdat. Id etiam placuit, neminem ad venditionem rei cuiuslibet accedere, nisi eo tempore, quod inter venditorem et emptorem contractus solemniter explicatur, certa et vera proprietas a vicinis demonstretur; usque eo legis istius cautione currente, ut, etiamsi subsellia vel, ut vulgo aiunt, scamna vendantur, ostendendae proprietatis probatio compleatur. Nec inter emptorem et venditorem solemnia in exquistis cuniculis celebrentur, sed fraudulenta venditio penitus sepulta deperat.*“[58]

Iz ove odredbe se može videti da je deo prodajnog ugovora i plaćanje zemljišnog poreza, zatim obaveza da se izradi pisana isprava i da se svojina utvrdi pred susedima. Insistira se na ostvarivanju fiskalnih interesa države, pogotovu kada je reč o registraciji novog vlasnika nepokretnosti, kao novog poreskog obveznika. Zato se i propisuje i poseban uslov pravne valjanosti prodaje nepokretnosti: obaveza suseda da potvrdi prodavčevu svojinu na prodavanoj nepokretnosti. Ta obaveza

56 Deluje da se pomoću ovih oderbi vodi neka vrsta borbe protiv prakse u kojoj su sve ove forme veoma često korišćene. Ovu borbu je, nesumnjivo, započeo još sam Gaj i samo nastavljaju sastavljači Alarikovog Zbornika unošenjem novih odredaba, M. Feješ – Sič, *Ugovor o kupovini i prodaji prema odredbama zbornika Lex Romana Visigothorum*, (mag. teza), Novi Sad 1985, 139.

57 Ona ipak priznaje da se iz Gajevog fragmenta ne može zaključiti precizna pravna definicija stvari kao objekta prodaje u pisanoj formi i navodi da ovu nepoznanicu nije rešio ni Justinijan, A. Petranović, *op. cit*. fn. 10, 52.

58 *C. Th, 3, 1, 2.*

suseda mora biti izvršena u vreme zaključenja ugovora i oni potvrdu o prodavčevoj svojini moraju manifestovati na odgovarajući jasan i nedvosmislen način.

Čini se da je, sledstveno ovome, formalni akt potvrđivanja svojine, bitan element forme ovog ugovora o prodaji, jer, bez ispunjenja ovog uslova, kupac ne može steći svojinu nad nepokretnosti, pa se ni ugovor ne može smatrati zaključenim.

Izraz ovog fragmenta „*solemniter explicatur*", odnosno svečano zaključenje ugovora, Kazer tumači kao obavezu sastavljanja pisane isprave.[59] Premda se iz ovog fragmenta ne vidi da se zahteva *traditio corporalis*, jasno je da odgovarajuće prisustvo javnosti mora biti postignuto, upravo putem pisane isprave koju potvrđuju svedoci (susedi).[60]

Postklasična prodaja, iako nema formalnih zahteva za klasičnom tradicijom, ne može se razumeti kao odustajanje od toga da predaja stvari uopšte ne usledi. Najčešće se odvija istovremeno sa plaćanjem cene.[61]

Štaviše, prodavčeva odgovornost je direktno povezana sa kupčevom obavezom plaćanja cene. Samo na ovaj način on može postati odgovoran:

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59 Ugovor o prodaji nepokretnosti se zaključivao u prisustvu suseda koji su bili pozvani da potvrde prodavčevu svojinu, a zatim je kupac plaćao cenu, bez obzira na to što eksplicitno obaveza isplate cene nije istaknuta u fragmentu – ta se obaveza podrazumeva. Na posletku su svi ovi neophodni elementi konstatovani u pisanoj ispravi, koji potpisuju kako strane ugovornice, tako i susedi u svojstvu svedoka. Ovako zaključeni ugovor jedino je tretiran kao pravno valjanim. Vidi više u M. Kaser, *op. cit*. fn. 8, 199. i dalje.

60 Tradicija postklasičnog prava tako postaje u stvari samostalan pravni posao sa stvarnopravnim efektima, tako što iz samog dogovora i sporazuma stranaka nastaje oabveza prenosa svojine (*animus transferendi et adquirendi dominii*), P. Bonfante**,** *Instituzioni di diritto romano*, Roma 1934, 347.

Hauzmaninegr i Zelb navode da u sadržaj ugovora o prodaji, za razliku od klasičnog prava gde je postojala *iusta causa traditionis*, u postklasičnom pravu ulazi i svaki akt tradicije, koja se, u stvari, svodi samo na pisanu klauzulu isprave izvršenog prenosa svojine, H. Hausmaninger, W. Selb, *Römisches Privaterecht*, Berlin 1987, 288.

61 Pretpostavka je da bi kupac svoju obavezu plaćanja cene izvršio tek ukoliko raspolaže predmetom prodaje, pa se u postklasičnom pravu može definisati novo načelo koje je u suprotnosti sa klasičnim periodom – *emptione dominium transferentur*, koje podrazumeva stvarnopravni efekat prodaje, s tim da prava kupca nastaju tek kada on izvrši svoju obavezu, plaćanje cene. Vidi više u H. Hausmaninger, W. Selb, *op. cit*. fn. 60, 300. i dalje.

„Venditor ...pretio accepto auctoritatis manebit obnoxius: aliter enim non potest obligari."[62]

Posebno pitanje, u vezi sa pravima kupca u postklasičnoj prodaji, je situacija u kojoj jedno lice isplaćuje cenu, a drugo lice je u pisanoj ispravi označeno kao kupac stvari. U stvari, valja dati odgovor na pitanje da li plaćanje cene, na osnovu činjenice da prihvat cene od strane prodavca ujedno stvara i njegovu ugovornu obavezu i odgovornost, ima temeljnu ulogu u prenosu svojine na označenog kupca:

„Fundus eius esse uidetur, cuius nomine comoparatus est, non a quo pecunia numerate est, si tamen fundus comparatori sit traditus."[63]

Iz ovog fragmenta Pavlovih Sentencija, vidi se da zemljišna nepokretnost pripada onom licu za koje je kupljeno, a ne onom licu koje je platilo cenu, uz uslov da je zemljište predato kupcu. Vidljivo je da imenovanje kupca u pisanoj ispravi, pored tradicije stvari, određuje prenos svojine na kupca, koji je onaj i koji je imenovan i kome je stvar predata. Samim tim deluje da plaćanje cene od strane drugog lica nema poseban značaj za određivanje položaja kupca. Međutim, od plaćanja cene zavisi sama pravna valjanost ugovora. Iz ovoga, može slediti, da lice koje je isplatilo cenu (a samo nije postalo vlasnik stvari, s obzirom da je drugo lice imenovano kao kupac u pisanoj ispravi, a i njemu je izvršena tradicija stvari) može zahtevati povraćaj novca samo od novog vlasnika (imenovanog kupca) a ne od prodavca.[64]

U Justinijanovo vreme prodaja, čini se, vraća klasične osobine konsensualizma, u slučaju usmenog ugovora:

„Emptio et venditio contrahitur, cum de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit; nam

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62 *Pauli. Sent. 2, 17, 1*

Vredi napomenuti da, uprkos tome, što ovaj fragment izričito pominje tužbu za pravne nedostatke stvari *actio auctoritatis*, koja je poznata mnogo pre postklasičnog perioda, i vezana je prevashodno za prodavčevu odgovornost za evikciju, ovaj fragment se navodi kao dokaz samog postajanja odgovornosti.

63 *Pauli Sent. 2, 17, 14.*

64 Ako se pretpostavi situacija, pozivajući se na isti fragment Pavlovih Sentencija da lice, navedeno u ispravi, zaključi ugovor u ime trećeg lica koje je navedeno u pisanoj ispravi, može se zaključiti da to lice nema prava koje bi inače kupac imao. Deluje da je ovo moguće objasniti rimskim stavom da ne postoji neposredno zastupanje (*Gai Inst*, 2, 95), pa tako lice koje je ugovor sklopilo može samo imati ulogu predlagača zaključenja ugovora, a ne i samog ugovarača.

quod arrae nominee datur, argumentum est emptionis et venditionis contractae."[65]

Ukoliko strane ugovornice prodaju predvide u pisanoj formi, njegov pravni efekat će zavisiti ipak od valjanosti pisane isprave u kojoj je sačinjen:

„...in his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerunt conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta..."[66]

Imajući gore navedeno u vidu, može se istaći da postklasično pravo zaštitu prava kupca obezbeđuje alternativno ako je isplaćena cena, ili je izvršena predaja stvari, dok je analiza izvora pokazala da ima nagoveštaja da je bila dovoljna i samo delimična isplata cene. Moglo bi se, stoga, zaključiti da se ugovor o prodaji postklasičnog prava ne smatra zaključenim kada je postignut sporazum o bitnim njegovim elementima, predmetu i ceni, što je obeležje klasične prodaje, već se zahtevaju dodatni, formalni uslovi, što postklasičnu prodaju objektivno udaljava od konsensualnog kontrakta.[67]

5. ZAKLJUČAK

Prethodna analiza navodi na zaključak da odvojenost zaključenja ugovora (konsensus) i pitanja prenosa svojine potvrđuje obigacionopravni karakter klasične prodaje. Promena položaja kupca u odnosu na predkonsensualnu prodaju, posebno je naglašena u ugovornoj

65 *Iust. Inst, 3, 139*

66 *Iust. Inst, 2, 23*

67 Ni u feudalnom pravu prodaja neće moći nasatati prostom saglasnošću volja stranaka. Pored konsensusa, zahtevano je ili izgovaranje posebnih svečanih formula (*fides facta*), ili predaja stvari (*res prestita*), G. Diosdi, *op. cit*. fn. 42, 366.

Magdolna Sič, zanimljivo je napomenuti, ističe da, s obzirom na to da se postklasična prodaja tretira prevashodno kao akt razmene stvari za novac, pa se prilikom odlaganja predaje stvari ili isplate cene, rađa obaveza za drugu stranu da izvrši protivčinidbu, može konstatovati da je ovakva prodaja ugovor koji ima obeležja i neimenovanog kontrakta, Vidi više u M. Feješ-Sič, *op. cit*. fn. 56, 156 i dalje.

obavezi prodavca, koja, uostalom, i ne čini prenos svojine, nego samo obezbeđivanje mirne državine, pa se ugovor o prodaji može posmatrati kao kauza sticanja svojine putem proste tradicije.

Prodaja je, stoga, tipičan ugovor koji nastaje prostom saglasnošću volja, i to čak ne zahtevajući postojanje bilo svečanih reči, bilo kakvih pisanih akata. Dovoljno je samo da se stranke ugovornice saglase oko bitnih elemenata ugovora, pa se tako ovakav ugovor načelno može sklopiti i između odsutnih lica, što nije slučaj sa verbalnim kontraktima. Konsensualnost prodaje ogleda se i u vrlo važnoj okolnosti da je jedna strana drugoj dužna sve ono što se međusobno duguje na osnovu pravičnosti i jednakosti, kao što ovaj ugovor nastaje istog momenta kada se postigne saglasnost u vezi sa cenom, uprkos tome da li je cena isplaćena ili nije, ili je data kapara. Međutim, samo davanje kapare dovoljan je znak da je prodaja zaključena.

Razvoj konsensualnih kontrakata, za čiji je nastanak dovoljna samo prosta saglasnost volja obe ugovorne strane, i pravila koja se na takve ugovore odnose, jedno je od najmarkantnijih i svakako najoriginalnijih dostignuća rimske jurisprudencije. Može se, stoga, zaključiti da je ugovor o prodaji u klasičnom pravu potpuno sinalagmatični, kauzalni, teretni, komutativni, konsensualni ugovor *bonae fidei,* koji obema stranama ugovornicama, od momenta kada su se saglasile o bitnim elementima ugovora, pruža osnov zaštite putem *actio empti* za kupca, odnosno *actio venditi* za prodavca.

Dr. Vladimir Vuletić

THE ORIGINS AND DEVELOPMENT OF ROMAN SALE: THE TRIUMPH OF CONSENSUALISM PRINCIPLE

Summary

In this paper the author tries to show the origin, legal nature and development of the Roman contract of sale. By analyzing primarily the sales of pre-classical law, the author draws a line of development from real mancipatio to classical consensual contract, thereby confronting conflicting views in the literature on this topic. Relying upon

the controversy in opinions of classical Roman jurists, embodied in law schools of Sabinians and Proculeans, analyzing the sources of the Digest, the author tries to dispel the ingrained doctrine about so-called excessive Roman formalism. Contract of sale is a good example for the triumph of the principle of consensualism, in which the author finds the basis for the claim that in the classical period the Roman law was deprived of formalism more than the modern law. By the set analysis, it is, finally, pointed to the fundamental values of the Roman sales and contribution of the classical Roman law to modern tendencies in the regulation of mutual welfare of contracting parties.

Key words*:* *Contract of sale. –Roman Law.– Mancipatio.– Consensus.– Contractus bilateralis aequalis.*

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ULOGA SRPSKIH UDRUŽENJA POTROŠAČA U POSTUPCIMA ZA NAKNADU ŠTETE ZBOG POVREDA PRAVA KONKURENCIJE

Privatnopravno sprovođenje prava konkurencije u vidu tužbi za naknadu štete od strane oštećenih lica predstavlja važan aspekt sveukupnog režima prava konkurencije. Ovoj materiji je u pravu Srbije posvećen član 73. Zakona o zaštiti konkurencije što je korisno ali i nedovoljno za potpunije i svrsishodno regulisanje.

U kontekstu opštih napora na evropskom kontinentu za jačanje ovog oblika sprovođenja prava konkurencije u ovom članku iznose se ideje za poboljšanje pravnog okvira u Srbiji u domenu jačanja uloge udruženja potrošača. Ovim udruženjima bi trebalo biti omogućeno da iniciraju tužbe za nadoknadu štete koju su pretrpeli potošači i to posebno u situacijama kada su isti suočeni sa velikim preprekama u eventualnom pokretanju sopstvenih postupaka. U tom smislu se u članku iznosi skica modela koji bi mogao biti primenjen.

Ključne reči*: Pravo konkurencije.– Naknada štete.– Udruženja potrošača.*

1. UVOD

Zakon o zaštiti konkurencije iz 2009. godine[1] uneo je u srpsko pravo konkurencije između ostalog i novinu u članu 73. Ovim članom se regulišu privatnopravni postupci naknade štete prouzrokovane povredama pravila konkurencije, u situaciji kada postoji odluka o utvrđenoj povredi od strane Komisije za zaštitu konkurencije (u daljem tekstu: KZK). Ovaj oblik zaštite konkurencije u uporednom zakonodavstvu i doktrini poznat je po engleskom izrazu *follow on actions*, i

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1 Zakon o zaštiti konkurencije, *Službeni glasnik RS*, br. 51/2009 (dalje u tekstu: ZZK).

zajedno sa drugim tipom postupaka u kojima ne postoji prethodna odluka javnopravnog tela za zaštitu konkurencije (eng. *stand alone actions*) čini osnovni element privatnopravnog sprovođenja (eng. *private enforcement*) prava konkurencije. Funkcija privatnopravnog sprovođenja je dvostruka: kompenzatorna (u smislu naknade štete neposredno oštećenima) i preventivna (specijalna i generalna prevencija budućih prekršaja). Privatnopravno sprovođenje predstavlja jednu od ključnih smernica u daljem razvoju prava konkurencije u Evropskoj uniji.[2]

Ideja da se materija ovih pratećih odštetnih tužbi potpunije reguliše u članu 73. ZZK je za pohvalu. Prethodni zakon o zaštiti konkurencije iz 2005. godine[3] nije sadržavao sličnu odredbu pa je sadašnji zakon svakako iskorak u dobrom pravcu. Nažalost, sudska praksa o primeni člana 73. ZZK prema autoru dostupnim podacima i dalje praktično ne postoji.[4]

U daljem izlaganju sledi kratak osvrt na član 73. ZZK, a potom predlozi kako bi se mogla poboljšati rešenja u pogledu parničnih postupaka pokrenutih u skladu sa njim i to u pogledu njihovog pokretanja i vođenja od strane udruženja potrošača. Pomenuti predlozi odnose se u velikoj meri na materiju koja se ne reguliše pravom konkurencije već i građanskim procesnim pravom i pravom zaštite potrošača, što ukazuje da je u oblasti privatnopravnog sprovođenja potreban planski i koherentan pristup sveobuhvatnom regulisanju.

2. KRATAK OSVRT NA ČLAN 73. ZZK

Član 73. ZZK glasi:

„Naknada štete koja je prouzrokovana aktima i radnjama koje predstavljaju povredu konkurencije u smislu ovog zakona, a koja je utvrđena rešenjem Komisije, ostvaruje se u parničnom postupku pred nadležnim sudom.

2 A. Ezrachi, *EU Competition Law – An Analyical Guide to the Leading Cases*, Oxford 2010², 453–454.

3 Zakon o zaštiti konkurencije, *Službeni glasnik RS*, br. 79/2005.

4 Prema podacima dostupnim autoru, u domenu naknade štete zbog povrede prava konkurencije postoji u toku samo jedan sudski postupak, koji je uz to u zastoju dok Upravni sud ne odluči o žalbi na odluku KZK. Autor želi da se ovim putem zahvali kolegama iz beogradskih advokatskih kancelarija Karanović Nikolić, Moračević Vojnović Zdravković/Schoenherr i CMS na konsultacijama i podacima.

Rešenje Komisije iz stava 1. ovog člana ne pretpostavlja da je šteta nastupila, već se ista mora dokazivati u sudskom postupku."

Čini se da značaj ovog člana ZZK nije u inoviranju ili reformi prava konkurencije već pre svega u razjašnjavanju određenih pitanja. Ovo je svakako korisno ali verovatno nije bilo nužno. Osnovni elementi koji se mogu izdvojiti iz ovog člana su sledeći: a) posredno se konstatuje da za povredu prava konkurencije utvrđenu rešenjem KZK postoji i privatnopravni elemenat sankcije u vidu naknade štete oštećenom; b) postupak naknade ove štete je parnični i pred nadležnim sudom i v) šteta se mora dokazivati a ne pretpostavlja se samim rešenjem KZK.

Mišljenja smo da nijedan od ovih elemenata sam po sebi ne odstupa od opštih pravila i principa na kojima je zasnovano pravo Srbije i da u tom smislu suštinske potrebe za izričitim naglašavanjem pomenutih rešenja nije bilo. Mogućnost naknade štete, sa ili bez odluke KZK, ionako je predviđena širokom opštim odredbama o naknadi štete u Zakonu o obligacionim odnosima.[5] S obzirom na kontestativnu pravnu prirodu naknade štete i njen privatno pravni karakter, ostvarivanje u parničnom postupku se takođe logično nameće kao rešenje. Konačno, odredba o tome da se šteta ne pretpostavlja takođe se podvodi pod redovan pristup ovom pitanju u materiji naknade štete.[6]

I pored svega navedenog, smatramo da postoji opravdan razlog postojanja ovog člana. Izričita potvrda pomenutih rešenja i grupisanje na jednom mestu u relevantnom zakonskom tekstu nije negativno, naprotiv. U sistemu prava konkurencije koji je još uvek u povoju, poput srpskog, svaki vid razjašnjenja nedoumica je koristan. Dobrodošao je kako sudijama koji se često po prvi put susreću sa ovom materijom tako i licima koja smatraju da su oštećena. U izvesnom smislu, pored pojašnjenja, isticanje prava na naknadu štete predstavlja i svojevrsan oblik podstreka oštećenima da se tim pravom i koriste. Zbog pomenutih efekata na prevenciju to je pozitivno i za čitav sistem zaštite konkurencije u jednoj zemlji.

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5 Zakon o obligacionim odnosima, *Službeni list SFRJ,* br. 29/78, 39/85, 45/89 i dr., članovi 16., 154. i 155.

6 O. Antić, *Obligaciono pravo,* Beograd 2007, 431–432.

3. ULOGA UDRUŽENJA POTROŠAČA – RAZLOZI I MOGUĆI OBLIK DELOVANJA

Cilj koja stoji iza pratećih odštetnih tužbi je da postupak bude jednostavan i efikasan ili bar značajno jednostavniji i efikasniji nego u slučaju kada je prvo potrebno dokazivati povredu konkurencije uz krivicu prekršioca a potom i ostale potrebne elemente za naknadu štete – nastalu štetu i kauzalnu vezu između povrede konkurencije i štete. No, i pored toga ne bi trebalo biti previše uveren da uz pojednostavljenje ovaj postupak predstavlja primamljiv izbor za krajnjeg potrošača.

Zamislimo situaciju u kojoj je lanac supermarketa, koji ima nesumnjivo dominantan položaj na tržištu, taj položaj zloupotrebio nametnuvši krajnjim potrošačima nepravično visoku cenu određenog proizvoda koji spada u robu široke potrošnje u iznosu koji je 20% viši od cene koja bi bila u uslovima prave konkurencije. Ovakva povreda je trajala godinu dana, a potom je otkrivena i sankcionisana odlukom KZK. Šteta za svakog od potrošača koji je kupio navedeni proizvod je očigledna.

Ako pretpostavimo da je potrošač potpuno upoznat sa svojim pravima prema članu 73. ZZK (što je samo po sebi daleko od verovatnog) i uz to i razmatra pokretanje postupka, pred njega se postavljaju najmanje dve velike prepreke. Prva se odnosi na to da prema racionalnom ekonomskom ponašanju u ovakvim situacijama potrošač nema motiva da postupak pokrene.[7] Uopšteno govoreći, pojedinačni potrošač u zbiru pretrpi relativno mali iznos štete. Ako je, u primeru, uvećana cena proizvoda iznosila 500 dinara, kao i da je navedeni proizvod potrošač kupovao jednom mesečno, šteta koju je pretrpeo potrošač iznosi svega 1200 dinara za godinu dana (20% od 500 x 12). Uz činjenicu da samo jedan podnesak advokata prema važećoj advokatskoj tarifi košta pet puta toliko,[8] i uz dalje troškove sudskih taksi, naknade za ročišta i činjenice da spor svakako može potrajati – nameće se zaključak da potrošač jednostavno nema motiva da se u navedeni proces

7 J. Ziegel, A. Duggan, *Commercial and Consumer Sales Transactions – Cases, Text and Materials*, Toronto 2002[4], 736; M. Sittenreich, „The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions", *Fordham Law Review* 78/2010, 2706 *et seq*.

8 Tarifni broj 7 Advokatske tarife od 10.03.2012. godine, dostupno na adresi: *http://www.advokatska-komora.rs/propisi_lat/TARIFA_100312.pdf*, pristupljeno 10.09.2012.

upušta radi navedenog iznosa štete, sve i uz sasvim izvesnu mogućnost da će troškovi na kraju biti nadoknađeni.[9]

Druga prepreka za potrošača koji bi želeo da se upusti u postupak leži pre svega u mogućnosti da pretrpljenu štetu dokaže. Krajnji potrošač bi morao da ukaže na pretrpljenu štetu kroz dokaz da je navedeni proizvod zaista makar jednom i kupio. U slučaju robe široke potrošnje tako nešto nije jednostavno dokazati. Praktično, najrealnije bi bilo pružiti dokaz kroz posedovanje fiskalnog računa, ali je preterano očekivati da će potrošač fiskalni račun za robu široke potrošnje čuvati kroz duži period. To sve dovodi do situacije u kojoj potrošač nije u mogućnosti da dokaže štetu. Ni ovo nije nešto što je karakteristično samo za Srbiju. U čuvenom britanskom slučaju *JJB Sports*,[10] zbog malog broja potrošača koji su sačuvali račun za robu koja je bila predmet kartelnog dogovora (dres), pribegavalo se i dokazivanjem putem prilaganja fotografija na kojima oštećeni potrošač nosi navedeni dres. Jasno je da u većini slučajeva takvih i sličnih dokaza nema.

Dok u domenu dokazivanja pretrpljene štete nije lako predložiti rešenja, opcije za efikasnije i izvesnije pokretanje postupka su dostupne. To su kolektivne tužbe u različitim oblicima: kolektivne tužbe u pravom smislu reči gde se tuži u ime čitave klase oštećenih, kolektivne tužbe gde se više desetina ili stotina tužilaca udruže već tuže u svoje ime, kao i tužbe pokrenute od strane određenih udruženja u ime lica čije interese udruženje brani.[11]

S obzirom na okvire ovog rada, fokusiraćemo se na osnovni predlog ovog članka, a to su tužbe pokrenute od strane udruženja potrošača. Iako ove tužbe spadaju u domen privatnopravnog sprovođenja prava konkurencije, elemenat kompenzacije ovde može izostati ako potrošač ne može da dokaže pretprpljenu štetu, slično kao i u parnici. Jednostavno rečeno, ako potrošač nema dokaza da je ikada nabavio neki proizvod, postupak preko udruženja potrošača mu ne može pomoći. Ali element prevencije koji bi takođe izostao bez pokretanja tužbe od strane potrošača, ovde je prisutan. Iako možda odšteta neće

9 Zakon o parničnom postupku, *Službeni glasnik RS,* br. 72/2011 (u daljem tekstu: ZPP), član 153.

10 *The Consumers' Association v JJB Sports*, Competition Appeal Tribunal Case 1078/7/9/07, detalji dostupni na adresi: *http://www.catribunal.org.uk/237–640/1078–7–9–07-The-Consumers-Association.html*, pristupljeno 10.09.2012.

11 Za više o ovim oblicima videti, na primer G. Wagner, „Collective Redress – Categories of Loss and Legislative Options", *Law Quarterly Review* 127/2011.

stići do samog potrošača, svako ko bi razmišljao o kršenju prava konkurencije bi morao uzeti u obzir i to da bi svejedno morao da plati odštetu i to, mišljenja smo, u punom iznosu kao da je svaki porošač uspeo u tužbi.

Ovako nešto je zasad neostvarivo u srpskom pravu. Zakonodavac je u Srbiji 2010. godine doneo Zakon o zaštiti potrošača.[12] Ovaj zakon je donet skoro godinu dana posle ZZK i pružao je priliku da se svojim odredbama nadoveže na ZZK. Ipak, iako ZZP predviđa mogućnost pokretanja sporova od strane udruženja potrošača radi zaštite šrava i interesa potrošača,[13] u ta prava i interese potrošača koje ZZP nabraja[14] ne spada i pravo na uživanje u slobodnoj konkurenciji ili interes potrošača da ne budu oštećeni time što bi jedan ili više trgovaca kršilo pravila konkurencije koja su, naglašavamo to, prema ZZK *naročito tu radi koristi potrošača*![15] Ovakav nedostatak čudi ako se zna da je mogućnost pokretanja postupaka od strane udruženja potrošača u materiji prava konkurencije dobro poznata u pravima članica EU već decenijama.Tako nešto moguće je, na primer, u susednoj Rumuniji već dvadeset godina.[16]

Radi ispravljanja ove manjkavosti smatramo korisnim da se u opštim crtama predloži model koji bi mogao biti osnov za reformu i unapređenje zakona. Nećemo ovde ulaziti u materiju reprezentativnosti udruženja potrošača u Srbiji niti njihovih velikih poteškoće usled manjka institucionalnih kapaciteta.[17] Problemi u praksi ipak nisu razlog da se pravni okvir zapostavi i ne unapređuje dalje dok se ti problemi rešavaju.

Mišljenja smo da je najbolji model za ostvarivanje rezultata u Srbiji nalik *cy pres* konceptu kakav je prisutan u uporednom pravu.[18]

12 Zakon o zaštiti potrošača, *Službeni glasnik RS*, br. 73/2010 (u daljem tekstu: ZZP).

13 ZZP, član 130.

14 ZZP, član 2.

15 ZZK, član 1.

16 European Consumer Consultative Group Opinion on Private Damages Actions, 2010, 78, *http://ec.europa.eu/consumers/empowerment/docs/ECCG_opinion_on_actions_for_damages_18112010.pdf*, pristupljeno 10.09.2012.

17 Konferencija Ujedinjenih nacija za trgovinu i razvoj, Ekspertska analiza politike zaštite konkurencije: Srbija, New York-Geneva 2011, 54–56, *http:// archive.unctad.org/ru/docs//ditcclp2011d2_ru.pdf*, pristupljeno 10.09.2012.

18 Za više o ovome videti, na primer, S. Yospe, „Cy Pres Distributions in Class Action Settlements", *Columbia Business Law Review* 3/2009.

Udruženje potrošača bi imalo pravo da pokreće postupke naknade štete u ime potrošača na osnovu donetih odluka komisije i u skladu sa članom 73.ZZK. Pretrpljenom štetom bi se ovde smatrala šteta koju su pretrpeli svi potrošači koji su navedeni proizvod kupili a čije interese udruženje brani. Samim tim i dokazivanje pretrpljene štete bi se odvijalo drugačije. Na osnovu poslovnih podataka prekršioca i drugih subjekata uključenih u proces prodaje krajnjim potrošačima došlo bi se do podatka o tome koliko je proizvoda prodato po veštački podignutoj ceni u vreme trajanja prekršaja. Ta količina pomnožena iznosom za koji je podignuta cena u odnosu na onu koja bi postojala u situaciji da prekršaja nije bilo bi predstavljao iznos koji bi prekršilac bio dužan da nadoknadi kao štetu koju su potrošači pretrpeli. Jasno je da je ovakav način dokazivanja štete, iako ograničen na neposrednu štetu a ne i izgubljenu dobit, daleko jednostavniji i efikasniji od toga da svaki potrošač dokazuje svoju štetu. Ukoliko je odluka KZK pravosnažna, te time postoji *res iudicata* da je prekršilac zaista i odgovoran, ovakav sistem dokazivanja je i sasvim legitiman. Naravno, u ovom procesu postoji mogućnost teškoća u utvrđivanju količine proizvoda, opstrukcije i odugovlačenja od strane tuženika i slično. Lek za to bi mogla biti razumna upotreba člana 232. ZPP i mogućnosti slobodne ocene iznosa naknade štete u slučaju postojanja nesrazmernih teškoća u utvrđivanju tačnog iznosa.

Pitanje koje se dalje postavlja je šta učiniti sa dobijenom naknadom. Jasno je da kao takva ne pripada udruženju potrošača jer je tužba pokrenuta u cilju zaštite interesa potrošača a ne udruženja. Prva mogućnost za dobijenu naknadu štete je da svaki od potrošača koji može ipak da dokaže da je štetu pretrpeo iz dobijene odštete takođe bude obeštećen. U tom cilju bi udruženje potrošača bilo obavezano da po dobijenoj odšteti objavi javni poziv potrošačima i ostavi primeren rok (kao neki minimum čini se rok od 3 meseca) da se jave i ukoliko su u mogućnosti dokažu da su kupili proizvod u navedenom periodu. Pored toga, svakom potrošaču bi ostalo omogućeno da sam na sudu ostvari naknadu štete, nezavisno od postupka koji bi vodilo udruženje potrošača. Tako nešto bi se moglo desiti u slučaju da je potrošač nezadovoljan dobijenim iznosom ili ima nameru da dokaže i izgubljenu dobit. U slučaju pozitivnog ishoda po potrošača i isplaćenog iznosa od strane prekršioca, prekršiocu bi bilo dozvoljeno da uz dokaz o tome dobije povraćaj isplaćenog iznosa iz iznosa odštete koji je plaćen u postupku pokrenutom od strane udruženja potrošača.

Po isteku perioda za prijavljivanje, preostali iznos odštete bi trebalo da bude na raspolaganju udruženjima za zaštitu potrošača za pokretanje novih pratećih odštetnih tužbi i za aktivnosti usmerene ka poboljšanju zaštite potrošača odnosno jačanju svesti o potrebi zaštite konkurencije i prava potrošača u tom pogledu. U tom pogledu čini se da je najbolje rešenje da navedena sredstva budu na posebnom računu pod nadzorom za to određenog državnog organa (konkretnog ministarstva ili pak KZK) i odobravana po zahtevu udruženja za zaštitu potrošača za konkretne aktivnosti.

Na ovaj način pružila bi se prilika akterima koji su dobro informisani i motivisani da zaštite potrošače da to zaista i urade, ostvario bi se cilj preventivnog dejstva privatnopravnog sprovođenja prava konkurencije, cilj kompenzacije potrošača ne bi bio u potpunosti isključen a ostvarila bi se sredstva za dalju podršku ovakvog vida sprovođenja zaštite konkurencije i/ili drugim aktivnostima usmerenim ka zaštiti potrošača.

Dva moguća problema se posebno ističu i vredelo bi im posvetiti nešto više pažnje. Prvi je pitanje egzaktnog iznosa za koji je došlo do veštačkog povećanja cene. Ne mislimo ovde samo na probleme koji mogu nastati prilikom ekonomskog izračunavanja toga koja bi bila prava tržišna cena u različitim periodima trajanja prekršaja i slično, iako je to takođe ogroman problem u pravu konkurencije.[19] Ključno pitanje za ostvarivanje jednostavnosti pratećih odštetnih tužbi je da li će KZK u svojoj odluci na kojoj se bazira dalji postupak biti dovoljno (ili uopšte) precizna u određivanju u kojoj meri je i kako prekršaj doveo do povećanja cene krajnjim potrošačima. Mišljenja smo da je čitav koncept pratećih odštetnih tužbi obesmišljen ako bi udruženje potrošača moralo da dokazuje i objašnjava uzročnu vezu između prekršaja i povećanja cene krajnjim potrošačima, kao i sam iznos tog povećanja, što bi često iziskivalo velike napore u prikupljanju dokaza i kompleksnu ekonomsku analizu. KZK je inače već bila kritikovana za preterano uprošćen pristup kompleksnim pitanjima,[20] pa ostaje da se apeluje na KZK da se u donošenju odluka postupa temeljno i iscrpno, sa što više detalja i objašnjenja.

19 Videti Oxera, Quantifying antitrust damages, Brussels 2009, *http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf*, pristupljeno 10.09.2012.

20 B. Begović, V. Pavić, „Jasna i neposredna opasnost II: Čas anatomije", *Anali Pravnog fakulteta u Beogradu* 2/2010, 347–350.

Drugi problem bi mogao biti izazvan potencijalnim zloupotrebama u domenu raspodele dobijenih sredstava iz odštete koju bi prekršilac platio. Jedan vid toga je opasnost pojave navodnih oštećenih potrošača koji bi u dogovoru sa udruženjem potrošača mogli protivpravno dobiti naknade iz dobijenog iznosa. Ovo bi trebalo sprečavati, između ostalog i kroz uvođenje makar dva nezavisna nivoa provere zahteva oštećenog potrošača prema dobijenom iznosu odštete. Drugi vid problema bi mogao biti u simulovanim tužbama od strane navodnih oštećenih potrošača prema prekršiocu u kojima bi tuženik odmah priznao sve navode i navodno isplatio potrošača u cilju dobijanja povraćaja iz plaćene odštete. Mišljenja smo da bi zato bilo preporučljivo regulisati da u slučajevima tužbi pojedinačnih potrošača kada se vodi ili je završen postupak od strane udruženja potrošača, tuženik – prekršilac nema pravo slobodnog raspolaganja u vidu priznanja zahteva tužioca već da sud trebalo da u punoj meri primeni svoja prava u smislu članova 340, 3, 7, 9. i 230. ZPP.

4. ZAKLJUČAK

Privatnopravno sprovođenje prava konkurencije u vidu pratećih odšetnih tužbi važan je element zaokruženog sistema prava konkurencije u jednoj zemlji. I pored snažne podrške koja je na evropskom planu data razvoju ovog aspekta prava konkurencije, čini se da je i sa stanovišta zakonskih propisa i sa stanovišta prakse u Srbiji učinjeno malo.

Iskorak učinjen unošenjem člana 73. ZZK u srpsko zakonodavstvo se sa jedne strane može oceniti kao koristan, a sa druge kao nedovoljan sam po sebi. U praksi nije došlo do značajnijih pomaka. Ostaje naravno otvoreno pitanje da li je KZK preduzimala dovoljno u otkrivanju i kažnjavanju povreda konkurencije koje bi bile pogodne za primenu člana 73. ZZK, ali smo i mišljenja da nedovoljno razrađene odredbe u pogledu pokretanja postupaka kada su oštećeni potrošači mogu uticati na intenzitet pokretanja postupaka.

Uvođenje mogućnosti da u ime potrošača, koji su vrlo često nemotivisani da pokrenu postupak ili u nemogućnosti da pretrpljenu štetu dokažu, postupak vode udruženja potrošača predstavlja logičan odgovor na probleme i praćenje uporednopravnih rešenja. U tom pravcu su korisni i pojednostavljivanje odredbi o dokazivanju štete u ovakvim situacijama, kao i poseban i transparentan način raspodele i korišćenja

dobijene odštete. Radi optimalnog korišćenja mogućnosti koje bi bile pružene udruženjima potrošača u ovoj oblasti – potrebno je poboljšanje delovanja udruženja u praksi i njihovih kapaciteta i mogućnosti da aktivno i samostalno delaju u cilju zaštite interesa potrošača.

Preporuka za zakonodavca u Srbiji je svakako da nastavi sa razvojem prava konkurencije u skladu sa tekovinama EU. Skica modela predložena u ovom radu mogla bi da doprinese tome u oblasti primene člana 73. ZZK. Usvajanje ovakvog ili sličnog modela bilo bi značajno za širenje svesti o pravu konkurencije u privredi i kod potrošača. Sve to doprinosi daljem razvoju kulture konkurencije, što bi svakako trebalo da bude dugoročni cilj Srbije u pravnom i ekonomskom smislu.

Velimir Živković, LL.M., MJur. (Oxford)

THE ROLE OF SERBIAN CONSUMER ASOCIATIONS IN DAMAGES ACTIONS FOR BREACHES OF COMPETITION LAW

Summary

Private enforcement of competition law through damages actions by the persons who suffered them represents an important aspect of the whole regime of competition law. In Serbian law, Article 73 of the Law on the Protection of Competition is dedicated to this matter, being both useful and insufficient for complete and thorough regulation.

In the context of general efforts in Europe to strengthen this form of competition law enforcement, this article puts forward ideas for the improvement of legal framework in Serbia regarding the strengthening of the role of consumer associations. These associations should be allowed to initiate damages actions for the losses suffered by the consumers, especially in situations where these are faced with large obstacles for initiating the actions themselves. To achieve this, the article presents a sketch of a model which could be implemented.

Keywords: *Competition Law.– Damages actions.– Consumer associations.*

DOPRINOS HARMONIZACIJI

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KONVENCIJA UJEDINJENIH NACIJA O UGOVORIMA O MEĐUNARODNOJ PRODAJI ROBE I REGIONALNA HARMONIZACIJA

Izvestilac: profesor Majkl Bridž, London School of Economics, London, Velika Britanija

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1 Više o radu Savetodavnog veća za primenu Konvencije UN o ugovorima o međunarodnoj prodaji robe videti: Milena Đorđević, „Rad Savetodavnog veća za primenu Konvencije UN o ugovorima o međunarodnoj prodaji robe od 1980. godine," *Pravo i privreda* 9–12/2008, 137–145.

1. Konvencija Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe (u daljem tekstu: Bečka konvencija ili Konvencija) pokazala se kao veoma uspešan instrument harmonizacije prava. Usvojilo ju je skoro 80 država, među kojima su i one koje najviše učestvuju u međunarodnoj trgovini. Uspeh Bečke konvencije se nije izgradio preko noći. Početni koraci ka ujednačavanju prava međunarodne trgovine učinjeni su dvadesetih godina XX veka, a sadašnja Konvencija je stvorena nakon što se jedan raniji pokušaj unifikacije završio neuspehom.

2. Dostignuća Bečke konvencije u oblasti ujednačavanja prava međunarodne trgovine naročito su impresivna kada se uzme u obzir relativno mali broj rezervi koje su izjavljene u pogledu primene različitih delova Konvencije. U kontekstu napora ka harmonizaciji, naročito je važan član 94 Konvencije, koji ovlašćuje dve ili više država ugovornica koje imaju ista ili slična pravila za pitanja regulisana Konvencijom da izjave da se Konvencija neće primenjivati na ugovore o prodaji ili njihovo zaključenje kada strane imaju svoja sedišta u tim državama. Ista mogućnost predviđena je i za države ugovornice koje imaju ista ili slična pravila za pitanja regulisana Konvencijom kao jedna ili više država koje nisu potpisnice Konvencije. Jedine države koje su iskoristile mogućnost da izjave rezervu iz člana 94 Konvencije su: Danska, Finska, Island, Švedska i Norveška. Da je više država iskoristilo pravo da izjavi rezervu iz člana 94, ostvarivanje osnovnog cilja postojanja Bečke konvencije, a to je postizanje značajnog stepena ujednačenosti prava međunarodne trgovine, bilo bi u velikoj meri kompromitovano, a vreme, energija i napori uloženi u stvaranje Bečke konvencije pokazali bi se uzaludnim.

3. Sam po sebi, nacrt Zajedničkog evropskog prava (Common European Sales Law) prodaje ne zahteva da države članice Evropske unije izjave rezervu iz člana 94 Bečke konvencije, jer strane ugovornice iz ugovora o međunarodnoj prodaji robe mogu da isključe primenu Konvencije dok bi se, sa druge strane, Zajedničko evropsko pravo prodaje primenjivalo na njihov ugovor samo ako bi njegova primena bila ugovorena (tzv. „*opt in*“ – član 8 predloga Uredbe o zajedničkom evropskom pravu prodaje). Zajedničko evropsko pravo prodaje bi, međutim, moglo da utiče na širinu subjektivnog polja primene Bečke konvencije ako bi se Zajedničko evropsko pravo primenjivalo na sve ugovore o prodaji robe gde je jedna od strana malo ili srednje preduzeće, ili čak i na sve ugovore o prodaji robe ukoliko bi neka država članica Evropske

unije tako odlučila (član 13(b) nacrta Uredbe). Značajan deo pravila Zajedničkog evropskog prava prodaje bavi se pitanjima punovažnosti ugovora, što je materija na koju se, shodno članu 4(a) Konvencije, Bečka konvencija ne primenjuje. Međutim, Zajedničko ervopsko pravo prodaje ne omogućava državama na koje treba da se primenjuje da usvoje samo ona evropska pravila koja se bave punovažnošću ugovora, niti im dozvoljava da kombinuju Zajedničko evropsko ugovorno pravo i Bečku konvenciju (član 11 nacrta Uredbe).

4. Protivljenje usvajanju Bečke konvencije ponekad se opravdava argumentom da bi usvajanje Konvencije otežalo davanje pravnih saveta i povećalo transakcione troškove. U svakom slučaju, postojanje globalnog i regionalnog sistema pravila prodaje robe povrh nacionalnih prava država čiju pripadnost imaju kupac i prodavac sigurno bi dovelo do usložnjavanja pravnog režima koji se primenjuje na radnje koje prethodne zaključenju ugovora o prodaji robe. Ključno svojstvo procesa ujednačavanja i usklađivanja prava je jednostavnost. Povećanje tzv. „pravnog pluraliteta" bez sumnje odudara od tog željenog cilja i dovodi do fragmentacije, što je upravo pojava koju proces ujednačavanja i usklađivanja prava treba da izbegne. Verovatno je da regionalne inicijative za ujednačavanje i usklađivanje prava neće dovesti do boljih rezultata od globalnog procesa unifikacije i harmonizacije. Takođe je verovatno i da iza regionalnih inicijativa za ujednačavanje i usklađivanje prava ne stoji isti pripremni rad kao onaj koji su uložili brojni delegati iz različitih zemalja, okupljeni prilikom sastavljanja Bečke konvencije. Napor koji je ugrađen u inicijative kao što su Zajedničko evropsko pravo prodaje, Principi azijskog ugovornog prava, Jedinstveni akt o opštem trgovinskom pravu Organizacije za harmonizaciju poslovnog prava u Africi (OHADA) predstavljaju vredan doprinos ujednačavanju trgovinskog prava i podsticanju istraživanja uporednog prava. Ali, u meri u kojoj poništavaju dostignuća ostvarena u oblastima koje reguliše Bečka konvencija, navedene inicijative ne pomažu postizanju ciljeva harmonizacije. Sa druge strane, pak, u meri u kojoj prihvataju postojanje opšteg trgovinskog prava, navedene inicijative predstavljaju koristan doprinos ostvarenju globalnog ujednačavanja ugovornog prava. Ipak, pobornici regionalne harmonizacije treba da budu svesni jedne opasnosti. Ta opasnost je da bi države mogle da ostanu ukopane u regionalnim projektima harmonizacije, umesto da učestvuju u poslu una-

pređenja harmonizacije trgovinskog prava na globalnom nivou koji tek treba da bude obavljen kako bi se dalje promovisala dostignuća Bečke konvencije.

5. Tokom izrade nacrta Bečke konvencije i njenog usvajanja, o odredbama ovog akta su se vodile burne diskusije u kojima su učestvovali predstavnici država iz različitih delova sveta i čiji su privredni sistemi veoma raznorodni kako u pogledu odnosa resursa i proizvodnje tako i u pogledu prirode državnih političkih sistema. Ako energija u oblasti stvaranja ujednačenog prava prodaje robe ne bi bila usmerena ka Bečkoj konvenciji već bi se rasipala ka regionalnim inicijativama, javila bi se opasnost da se izgubi uticaj koji određene države vrše na dalji razvoj Bečke konvencije kroz njeno tumačenje u sudskoj praksi. Primamljivost Bečke konvencije za države koje joj još uvek nisu pristupile bi se takođe smanjila srazmerno opadanju njenog univerzalnog karaktera. Uključenost država-nečlanica u regionalne inicijative harmonizacije bi isto tako mogla da umanji njihovu zainteresovanost da usvoje Bečku konvenciju (samo tri države članice OHADA su i potpisnice Bečke konvencije).

6. Domašaj Bečke konvencije je sveobuhvatan i Konvencija već duboko zadire u neka pitanja koja bi se, iz perspektive nacionalnog prava, smatrala delom opšteg ugovornog prava. Sada je nužno da se nastavi sa procesom harmonizacije u oblastima opšteg ugovornog prava koje nisu obuhvaćene Bečkom konvencijom. Savetodavno veće za primenu Bečke konvencije veruje da je došao trenutak da se podrži predlog Vlade Švajcarske (A/CN.9/758) po kome, na prvom mestu, treba razmotriti da li je dalji rad na harmonizaciji međunarodnog trgovinskog prava poželjan i izvodljiv.

NAUČNI SKUPOVI

Dr Vladimir Vuletić[*]

FIRST SOUTH EAST EUROPEAN (SEE) POST-DOC COLLOQUIUM IN PRIVATE LAW
Zagreb, 27–28. septembar 2012.

U organizaciji *Deutsche Gesellschaft für Internationale Zusammenarbeiten* (GIZ) i *Center for South East European Law Schools* (SEELS) u Zagrebu je 27. i 28. septembra 2012. godine održan Prvi postdoktorski kolokvijum iz oblasti privatnog prava zemalja jugoistočne Evrope, čiji su pravni fakulteti članovi akademske mreže SEELS (Srbija, Hrvatska, Bosna i Hercegovina, Makedonija, Crne Gora i Albanija).

Ovom susretu je prethodio otvoreni konkurs za izbor najuspešnijih odbranjenih doktorskih disertacija iz oblasti privatnog prava u periodu od 2007. do 2012. godine. Nakon što je tromesečni konkurs zatvoren, međunarodna selekciona komisija je donela odluku da Prvom postdoktorskom kolokvijumu prisustvuje 18 najboljih mladih doktora pravnih nauka sa područja koje okuplja SEELS.

Sa Pravnog fakulteta Univerziteta u Beogradu ovo priznanje su dobili doc. dr Mirjana Radović (za naučnu oblast trgovinskog prava), doc. dr Miloš Živković (stvarno pravo) i doc. dr Vladimir Vuletić (rimsko i obligaciono pravo). Svaki dobitnik je bio u obavezi da, za potrebe ovog susreta, čiji je radni jezik bio engleski, pripremi odgovarajuće izlaganje kojim će prikazati rezultate svog aktuelnog ili istraživanja u doktorskoj disertaciji.

Srbiju su, pored dr Živkovića (izlaganje na temu: „Receivable Secured by Hypothec") i dr Vuletića („Caveat Venditor: Roman Wind in the Sails of Modern Serbian Consumer Law"), predstavljale i kolege dobitnici sa Pravnog fakulteta Univerziteta u Kragujevcu doc. dr Bojan Urdarević („The Impact of Globalization on International Labour Standards") i doc. dr Slavko Đorđević („Adjustment in Private

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International Law“) i sa Pravnog fakulteta Univerziteta u Nišu doc. dr Dejan Janićijević („Multiparty Arbitration“).

Hrvatska je bila predstavljena kolegama dr Hano Ernstom („Functionalism in Personal Property Security“) i dr Romanom Matanovac Vučković („Legal Relationship between a Trademark and an Undertaking in Legal Dispositions with a Trademark“), Bosna i Hercegovina dr Zlatanom Meškićem („Towards a General Part of the European Consumer Law“) i dr Fatimom Mahmutćehajić („Domain Name Law“), Makedonija dr Tinom Prželskom („The Contract Mortgage in the Legal System of Republic of Macedonia“), dr Majom Kambovskom-Božinovskom („Copyright Law in the European Union and in the Republic of Macedonia – challenges in the digital environment“) i dr Igorom Kambovskim („E-Commerce and E-contract: the Consumer Protection“). Crnu Goru su predstavljali dr Vladimir Savković („Legal aspects of using artificial intelligence technology in electronic contracting“) i dr Aneta Spajić („Consolidated Approach in Construing Fundamental Breach“), dok je Albaniju predstavljala dr Nada Dolani („The concept of right to property under European Convention of Human Rights in Albanian Legal Framework“).

Radnim panelima su predsedavali dr Christa Jessel Holst, prof. dr Meliha Povlakić, prof. dr Igor Gliha, prof. dr Goran Koevski, i domaćini ovog susreta prof. dr Zoran Parać, dekan Pravnog fakulteta Sveučilišta u Zagrebu i prof. dr Tatjana Josipović.

Prve večeri boravka za sve učesnike upriličen je svečani prijem u Klubu sveučilišnih nastavnika u Zagrebu, a drugog dana skupa učesnici i gosti su imali jedinstvenu priliku da posete Krapinu i novi muzej (otvoren 2010. godine) istorije planete Zemlje i krapinskog čoveka. Poseta je okončana zajedničkom večerom u živopisnom zagorskom konaku Vuglec Breg.

Postdoktorski kolokvijum je, prema oceni svih učesnika, u potpunosti opravdao očekivanja, a već su počele pripreme za Drugi postdoktorski skup iz oblasti javnog prava. Učesnici ovog skupa imaće priliku i da svoja najnovija istraživanja objave u Zborniku sa ovog kolokvijuma, u formi naučnog članka sa međunarodnom recenzijom.

KOMORSKI KUTAK

NACRT ZAKONA O PRIVREDNIM KOMORAMA*

1. Pojam

Član 1

Privredne komore jesu interesne, poslovno-stručne, neprofitne i jedinstvene organizacije privrednih društava, finansijskih organizacija, preduzetnika i drugih oblika organizovanja koji obavljaju privrednu delatnost i koje povezuje zajednički poslovni interes na određenom području ili teritoriji u Republici Srbiji, a koja kao deo jedinstvenog povezivanja privrednih subjekata učestvuje u ostvarivanju i obezbeđivanju zajedničkih interesa važnih za privredu u Republici (u daljem tekstu: komora).

Komora je samostalna i nezavisna u svom radu.

Komora ima svojstvo pravnog lica.

2. Ciljevi komore

Član 2

Komora se osniva sa ciljem da zastupa, promoviše i štiti zajedničke interese svih svojih članova.

U svom radu komora treba da usaglašava i miri različite strukovne, regionalne i pojedinačne interese svojih članova.

Komora odluke donosi imajući u vidu interese privrede Srbije kao celine.

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* Ovaj Nacrt zakona je dostavljen Harmonius-u na objavljivanje, ljubaznošću gospodina Gorana Jevtića, sekretara Privredne komore Srbije.

3. Zakonitost rada komore

Član 3

Komore obavljaju svoje delatnosti u skladu sa Ustavom, zakonom, statutom i drugima opštim aktima komore, pravilima sporazuma o međukomorskoj saradnji i međunarodnih međukomorskih organizacija čiji su članovi.

Statut i drugi opšti akti komore moraju biti u skladu sa Ustavom i zakonom.

4. Sistem komora

Član 4

U Republici Srbiji osnivaju se komore:

1) Privredna komora Srbije, sa sedištem u Beogradu, za teritoriju Republike Srbije,
2) Privredna komora Vojvodine, sa sedištem u Novom Sadu, za teritoriju Autonomne pokrajine Vojvodine,
3) Privredna komora Kosova i Metohije, sa sedištem u Prištini, za teritoriju Autonomne pokrajine Kosova i Metohije,
4) Privredna komora Beograda, sa sedištem u Beogradu, za teritoriju grada Beograda,

Regionalne komore:

a) Regionalna privredna komora Valjevo, sa sedištem u Valjevu, za područje opština: Bogatić, Valjevo, Vladimirci, Koceljeva, Krupanj, Lajkovac, Loznica, Ljig, Ljubovija, Mali Zvornik, Mionica, Osečina, Ub i Šabac,
b) Regionalna privredna komora Zaječar, sa sedištem u Zaječaru, za područje opština: Boljevac, Bor, Zaječar, Kladovo, Knjaževac, Majdanpek, Negotin i Sokobanja,
v) Regionalna privredna komora Zrenjanin, sa sedištem u Zrenjaninu, za područje opština: Žitište, Zrenjanin, Nova Crnja, Novi Bečej i Sečanj,
g) Regionalna privredna komora Kikinda, sa sedištem u Kikindi, za područje opština: Kikinda, Novi Kneževac i Čoka,
d) Regionalna privredna komora Kragujevac, sa sedištem u Kragujevcu, za područje opština: Aranđelovac, Batočina,

Despotovac, Jagodina, Knić, Kragujevac, Lapovo, Paraćin, Rača, Rekovac, Svilajnac, Topola i Ćuprija,

đ) Regionalna privredna komora Kraljevo, sa sedištem u Kraljevu, za područje opština: Vrnjačka Banja, Gornji Milanovac, Kraljevo, Lučani, Novi Pazar, Raška, Sjenica, Tutin i Čačak,

e) Regionalna privredna komora Kruševac, sa sedištem u Kruševcu, za područje opština: Alaksandrovac, Brus, Varvarin, Kruševac, Trstenik i Ćićevac,

ž) Regionalna privredna komora Leskovac, sa sedištem u Leskovcu, za područje opština: Bojnik, Bosilegrad, Bujanovac, Vlasotince, Vladičin Han, Vranje, Lebane, Leskovac, Medveđa, Preševo, Surdulica, Trgovište i Crna Trava,

z) Regionalna privredna komora Niš, sa sedištem u Nišu, za područje opština: Aleksinac, Babušnica, Bela Palanka, Blace, Gadžin Han, Dimitrovgrad, Doljevac, Žitorađa, Kuršumlija, Merošina, Niš, Pirot, Prokuplje, Ražanj i Svrljig,

i) Regionalna privredna komora Novi Sad, sa sedištem u Novom Sadu, za područje opština: Bač, Bačka Palanka, Bački Petrovac, Beočin, Bečej, Vrbas, Žabalj, Novi Sad, Srbobran, Sremski Karlovci, Temerin i Titel,

j) Regionalna privredna komora Pančevo, sa sedištem u Pančevu, za područje opština: Alibunar, Bela Crkva, Vršac, Kovačica, Kovin, Opovo, Pančevo i Plandište,

k) Regionalna privredna komora Požarevac, sa sedištem u Požarevcu, za područje opština: Velika Plana, Veliko Gradište, Golubac, Žabari, Žagubica, Kučevo, Malo Crniće, Petrovac, Požarevac, Smederevo i Smederevska Palanka,

l) Regionalna privredna komora Sombor, sa sedištem u Somboru, za područje opština: Apatin, Kula, Odžaci i Sombor,

lj) Regionalna privredna komora Sremska Mitrovica, sa sedištem u Sremskoj Mitrovici, za područje opština: Inđija, Irig, Pećinci, Ruma, Sremska Mitrovica, Stara Pazova i Šid,

m) Regionalna privredna komora Subotica, sa sedištem u Subotici, za područje opština: Ada, Bačka Topola, Kanjiža, Mali Iđoš, Senta i Subotica,

n) Regionalna privredna komora Užice, sa sedištem u Užicu, za područje opština: Arilje, Bajina Bašta, Ivanjica, Kosjerić, Nova Varoš, Požega, Priboj, Prijepolje, Užice i Čajetina.

Komore iz stava 1. ovog člana, čine jedinstven komorski sistem.

Komora može na svom području osnovati svoje organizacione jedinice (ispostave, ekspoziture, centre, agencije), u skladu sa statutom.

5. Imovina i odgovornost za obaveze

Član 5

Komora ima svoju imovinu.

Imovinu komore čine pravo svojine na pokretnim i nepokretnim stvarima, udeli i akcije u privrednim društvima, pravo industrijske svojine, potraživanja i druga imovinska prava.

Komora može sticati imovinu od članarina, dobrovoljnih priloga, donacija i poklona, finansijskih subvencija, kamata na uloge, zakupnina, dividendi, nasleđivanjem i na druge zakonom dozvoljene načine.

Član 6

Komora slobodno upravlja, koristi i raspolaže svojom imovinom.

Raspolaganje, upravljanje i korišćenje imovinom komore mora biti u skladu sa ciljevima utvrđenim ovim zakonom.

Član 7

Komora za svoje obaveze odgovara celokupnom svojom imovinom.

Komora ne odgovara za obaveze svojih članova, kao što ni članovi komore ne odgovaraju za njene obaveze.

Izuzetno, članovi komore mogu odgovarati za obaveze komore, ako postupaju sa imovinom komore kao da je u pitanju njihova imovina ili zloupotrebe komoru za nezakonite ili prevarne ciljeve.

6. Naziv komore

Član 8

Naziv je ime pod kojim komora obavlja svoje delatnosti (ALTERNATIVA: posluje).

Naziv komore mora biti na srpskom jeziku i pismu koje je u službenoj upotrebi u Srbiji.

Naziv komore, ako je to predviđeno statutom, može biti i na jeziku i pismu nacionalne manjine.

Naziv komore može biti i na jednom ili više stranih jezika, pod uslovom da je taj prevod utvrđen statutom komore.

Komora može u poslovanju, pored naziva, da koristi i jedno ili više skraćenih i/ili modifikovanih naziva, ako su ona navedena u statutu komore, pod istim uslovima i na način pod kojim se koristi naziv.

Član 9

Naziv i skraćeni i/ili modifikovani naziv komore na srpskom jeziku i pismu koje je u službenoj upotrebi u Srbiji, odnosno jeziku i pismu nacionalne manjine upotrebljavaju se u pravnom saobraćaju u obliku u kome su utvrđeni statutom.

Za poslovanje sa inostranstvom komora može, pored naziva na srpskom jeziku, odnosno jeziku nacionalne manjine da koristi i prevod naziva na stranom jeziku i to u obliku u kome je određen statutom.

Organizacioni delovi komore koji nemaju pravni subjektivitet (predstavništva, ogranci, kancelarije, centri, i sl.) istupaju u pravnom saobraćaju pod nazivom komore i svojim nazivom.

ALTERNATIVA ZA STAV 2:

Za poslovanje sa inostranstvom komora može, pored naziva na srpskom jeziku, odnosno jeziku nacionalne manjine da koristi i naziv na stranom jeziku i to u obliku u kome je određen (utvrđen) statutom komore.

Član 10

Niko osim komore ne može u svom nazivu imati, odnosno u obavljanju svoje delatnosti upotrebljavati ili koristiti reči_„privredna komora“ ili neku izvedenicu od tih reči (trgovinska komora, trgovačka komora, industrijska komora).

Zabrana iz stava 1. ovog člana ne primenjuje se na slobodne profesije i individualne poljoprivrednike, bez obzira da li se oni smatraju preduzetnicima.

Član 11

Komora može imati svoj znak, pečat i druge simbole vizuelnog identiteta, u skladu sa statutom.

Simboli vizuelnog identiteta komore ne mogu biti identični ili zamenljivi sa simbolima drugih pravnih lica, niti izazivati zabunu u pogledu toga o kakvoj se vrsti pravnog lica radi ili o delatnostima komore.

7. Saradnja između komora u Republici Srbiji

Član 12

U izvršavanju poslova i zadataka utvrđenih ovim zakonom, komore međusobno sarađuju, vrše razmenu obaveštavanja i iskustava, koordiniraju svoj rad i dogovaraju se o pitanjima od zajedničkog interesa i interesa svojih članova.

Saradnja iz stava 1. ovog člana između svih komora, uređuje se sporazumom o saradnji komora u Republici Srbiji (u daljem tekstu: Sporazum o saradnji).

Komore mogu zaključivati i posebne sporazume, kojima se ostvaruje saradnja u oblastima od interesa za članove tih komora, u skladu sa Sporazumom o saradnji.

8. Predstavništva komore u inostranstvu

Član 13

Privredna komora Srbije može osnivati svoja predstavništva u inostranstvu, ako oceni da je to u interesu njenih članova.

Odluku o osnivanju predstavništva u inostranstvu donosi Upravni odbor Privredne komore Srbije.

Predstavništvo komore za svoj rad odgovara Upravnom odboru Privredne komore Srbije.

9. Odnos komore i drugih organa i organizacija

Član 14

Privredna komora Srbije može da pokreće inicijativu za donošenje zakona i drugih propisa iz oblasti privrede, da daje mišljenja, predloge i sugestije u vezi sa nacrtima zakona i drugih propisa iz ove oblasti, kao i da učestvuje u pripremi zakona i drugih propisa koji su od interesa za njene članove.

Vlada pre utvrđivanja predloga dostavlja Privrednoj komori Srbije na mišljenje nacrte zakona i drugih propisa iz oblasti privrede ili koji mogu biti od interesa za privredu.

Predstavnik Privredne komore Srbije može da prisustvuje sednicama Vlade i učestvuje u njihovom radu, kada se utvrđuju predlozi zakona ili donose podzakonski akti iz oblasti privrede.

Vlada razmatra mišljenja, predloge i sugestije Privredne komore Srbije i obaveštava je o svojim stavovima.

Odredbe ovog člana se primenjuju i na odnos pokrajinskih komora, regionalnih komora i Privredne komore Beograda sa odgovarajućim državnim organima autonomne pokrajine, grada Beograda i jedinica lokalne samouprave, a u vezi sa donošenjem propisa iz oblasti privrede od interesa za njihove članove.

ALTERNATIVA ZA STAV 2:

Pre utvrđivanja predloga propisa iz oblasti privrede ili propisa koji mogu biti od interesa za privredu ministarstvo u čijem delokrugu je priprema tih propisa dostavlja Privrednoj komori Srbije radi davanja mišljenja nacrte zakona i drugih propisa iz oblasti privrede ili koji mogu biti od interesa za privredu.

(OBRAZLOŽENjE: bolje je vezati ovu obavezu za nadležno ministartsvo nego za Vladu jer će se u praksi lakše realizovati)

Član 15

Privredna komora Srbije sarađuje sa organima i radnim telima Narodne skupštine i Vladom u vezi sa pitanjima od interesa za privredu i određuje svoje predstavnike u radna tela, u skladu sa posebnim propisima.

Na način iz stava 1. pokrajinske komore, regionalne komore i Privredna komora Beograda sarađuju sa odgovarajućim državnim organima autonomne pokrajine, grada Beograda i jedinica lokalne samouprave.

Član 16

U cilju uspostavljanja socijalnog dijaloga, komora sarađuje sa sindikatima zaposlenih i organizacijama poslodavaca po pitanjima radnopravnog položaja zaposlenih i drugim pitanjima od zajedničkog interesa.

Član 17

Radi obezbeđivanja savremene i kontinuirane poslovne edukacije komora u saradnji sa naučnoistraživačkim i obrazovnim institucijama u zemlji i inostranstvu organizuje i realizuje programe obuke za potrebe svojih članova i privrede.

Oblasti u kojima komora organizuje programe obuke utvrđuju se na osnovu potreba tržišta, a naročito uzimajući u obzir preporuke nacionalne organizacije nadležne za zapošljavanje.

10. Članovi komore

Član 18

Članovi komore su privredna društva i drugi oblici organizovanja koji obavljaju privrednu delatnost, banke i druge finansijske organizacije i organizacije za osiguranje imovine i lica.

Preduzetnici, koji u vidu registrovanog zanimanja obavljaju privrednu delatnost i njihove zadruge, su članovi komore preko opštih udruženja preduzetnika.

Zemljoradničke zadruge i drugi oblici organizovanja zemljoradnika su kolektivni članovi komore preko Zadružnog saveza.

Članovi komore mogu biti i poslovna i stručna udruženja i društva, organizacije koje obavljaju delatnost u oblastima zdravstvene, socijalne, boračke, odnosno invalidske zaštite, društvene brige o deci i drugim oblastima, kao što je socijalna sigurnost, obrazovanje, nauka, kultura, fizička kultura, kao i organizacije koje svojom delatnošću unapređuju rad i poslovanje privrednih subjekata ili su u oblastima koje su utvrđene Zakonom, o čemu odluku donosi nadležni organ komore.

Članovi komore imaju jednaka prava i obaveze.

Član 19

Članovi Privredne komore Srbije su svi subjekti iz člana 18. ovog zakona koji imaju sedište, odnosno obavljaju delatnost na teritoriji Republike Srbije.

Članovi Privredne komore Vojvodine su svi subjekti iz člana 18. ovog zakona koji imaju sedište i obavljaju delatnost na teritoriji Autonomne pokrajine Vojvodine.

Članovi Privredne komore Kosova i Metohije su svi subjekti iz člana 18. ovog zakona koji imaju sedište, odnosno obavljaju delatnost na teritoriji Autonomne pokrajine Kosova i Metohije.

Članovi Privredne komore Beograda su svi subjekti iz člana 18. ovog zakona koji imaju sedište, odnosno obavljaju delatnost na teritoriji grada Beograda.

Članovi regionalne komore su svi subjekti iz člana 18. ovog zakona koji imaju sedište, odnosno obavljaju delatnost na području opština za koje su osnovani.

Član 20

Komora vodi registar svojih članova.

Registar članova komore je javna knjiga na osnovu koje se izdaju odgovarajuća uverenja i potvrde kao javne isprave.

Pravilnik za vođenje registra članova komore donosi upravni odbor komore.

ALTERNATIVA ZA ČLAN 20:

Komora vodi registar svojih članova (u daljem tekstu: registar članova komore).

Registar članova komore je javna knjiga na osnovu koje se izdaju odgovarajuća uverenja i potvrde kao javne isprave.

Upravni odbor komore bliže uređuje sadržinu i način vođenja registra članova komore.

Napomena:

Mišljenja smo da bi adekvatniji naziv za evidenciju članova komore bio *imenik članova komore*, a ne registar koji navodi na dupliranje vođenja evidencije istih subjekata po različitim osnovima, ali sa istim podacima. Registracija privrednih subjekata uređena je Zakonom o registraciji privrednih subjekata. Registraciju privrednih subjekata vodi Agencija za privredne registre koja je osnovana posebnim zakonom.

Član 21

Organ, nadležan za registraciju privrednih subjekata, dužan je da u roku od tri dana od donošenja dostavi Privrednoj komori Srbije rešenje o registraciji osnivanja, statusne promene ili brisanja, radi upisa ili brisanja iz registra članova komore.

Privredna komora Srbije će na način i u rokovima propisanim Sporazumom o saradnji sve relevantne podatke iz rešenje navedenih u stavu 1. ovog člana uneti u jedinstven komorski informacioni sistem, koji će pod jednakim uslovima biti dostupan svim komorama.

ALTERNATIVA ZA ČLAN 21:

Upis člana komore, odnosno brisanje upisa člana komore u registar članova komore vrši se na osnovu rešenja o registraciji osnivanja privrednog subjekta u Registar privrednih subjekata, odnosno rešenja o brisanju privrednog subjekta iz tog registra.

Uslove i način dostavljanja rešenja iz stava 1. ovog člana sporazumno uređuju Privredna komora Srbije i organizacija nadležna za vođenje Registra privrednih subjekata. Obrazloženje za Alternativu člana 22.

NAPOMENA: Alternativa za rešenje sadržano u članu 21 stav 1. ovog zakona predložena je iz razloga što je položaj, prava i obaveze, kao i način vođenja Registra privrednih subjekata uređen posebnim zakonom, kojim je i položaj Agencije i njenih organa uređen na načelima samostalnosti, nezavisnosti i efikasnosti rada te organizacije i tih organa. Utvrđivanje obaveza drugim zakonom u pogledu načina rada te organizacije narušilo bi utvrđene principe, odnosno načela, tako da je alternativno rešenje prihvatljivije od osnovnog rešenja.

11. Delatnost

Član 22

Delatnost komore je:

- pružanje i organizovanje stručne pomoći svojim članovima radi poboljšanja i unapređivanja njihovog poslovanja;
- proučavanje pitanja koja se odnose na privredne grane zastupljene u komori, praćenje pojava privrednog života i ocenjivanje njihovog dejstva na privredu Republike Srbije, odnosno svoje teritorije ili područja;
- unapređivanje i uspostavljanje ekonomske saradnje sa inostranstvom, organizovanje privredne i turističko-informativne propagande, sajmova, privrednih izložbi i drugih promotivnih aktivnosti za potrebe svojih članova;

– predstavljanje domaće privrede u zemlji i inostranstvu i uključivanje iste u međunarodnu razmenu roba i usluga na način kojim će se svojim članovima olakšati pristup svetskom tržištu;
– pružanje pravovremenih i kvalitetnih informacija svojim članovima radi pronalaženja potencijalnih partnera i njihovog međusobnog povezivanja;
– razvoj informacionog sistema u komori;
– podsticanje istraživanja u oblasti naučno-tehnološkog razvoja;
– unapređivanje preduzetništva i menadžmenta i praćenje i prenošenje međunarodnih iskustava u tim oblastima, a naročito menadžmenta u oblasti sistema kvaliteta;
– poslovno povezivanje i informisanje članova komore;
– davanje predloga nadležnim državnim organima za razvoj i uvođenje različitih instrumenata zaštite domaće privrede;
– pokretanje inicijative o antidampingu u vezi nekorektnog ponašanja stranih proizvođača na domaćem tržištu;
– pružanje pomoći svojim članovima u vezi sa finansiranjem i kreditiranjem proizvodnje u saradnji sa poslovnim bankama;
– negovanje dobrih poslovnih običaja i poslovnog morala;
– organizovanje predavanja, seminara i specijalizovanih kurseva radi usavršavanja i obuke kadrova u privredi i izdavanje odgovarajućih uverenja komore;
– arbitražno rešavanje međusobnih sporova pred Stalnim izbranim sudom i Spoljnotrgovinskom arbitražom;
– usklađivanje interesa članova komore;
– pružanje pomoći pri osnivanju novih preduzeća i prestrukturiranju postojećih;
– pripremanje i promovisanje tipskih ugovora između preduzeća;
– obavljanje i drugih poslova od interesa za članove komore.

Komora treba da vodi računa da prilikom obavljanja delatnosti nelojalno ne konkuriše svojim članovima.

ALTERNATIVA ZA STAV 2:

U obavljanju delatnosti iz stava 1. ovog člana, komora je dužna da primenjuje propise o zaštiti konkurencije.

Član 23

Privredna komora Srbije, pored delatnosti iz člana 22. ovog zakona, obavlja i delatnost:

- vrši određena javna ovlašćenja koja su joj poverena međunarodnim konvencijama, zakonom i podzakonskim aktima;
- štiti interes svojih članova pred državnim i drugim organima i organizacijama u oblasti privrednog sistema, razvojne i ekonomske politike;
- daje inicijative za donošenje republičkih zakona i drugih propisa iz oblasti privrede i mere tekuće ekonomske politike;
- daje mišljenje na nacrte i predloge zakona i drugih propisa u oblasti privrednog sistema, razvojne i ekonomske politike;
- učestvuje u pripremi zakona i drugih propisa od interesa za svoje članove;
- izdaje odgovarajuće potvrde o bonitetu svojih članova;
- utvrđuje pravila dobrog poslovnog ponašanja svojih članova, odnosno donosi uzanse;
- upravlja jedinstvenom računarskom mrežom komorskog sistema Srbije;
- izdaje digitalne sertifikate i generiše odgovarajuće ključeve za potrebe ostvarivanja elektronskog poslovanja za korisnike jedinstvene računarske mreže komorskog sistema Srbije, spoljnim korisnicima servisa Privredne komore Srbije i drugim zainteresovanim licima van Srbije.

Potvrde, uverenja i druge isprave koje izdaje Privredna komora Srbije imaju karakter javnih isprava.

Privredna komora Srbije može vršenje javnih ovlašćenja iz stava 1. ovog člana preneti na druge komore u Srbiji, osnovane ovim zakonom, ako je to u interesu članova tog područja.

ALTERNATIVA ZA STAV 3:

Privredna komora Srbije može poslove u okviru javnih ovlašćenja obavljati preko komora iz člana 4. ovog zakona, u skladu sa aktom kojim se određuje obavljanje ovih poslova u ime i za račun Privredne komore Srbije.

NAPOMENA: javna ovlašćenja se prema Zakonu o državnoj upravi mogu prenositi samo zakonom. To praktično znači da se donošenjem ovog zakona javna ovlašćenja prenose na Privrednu komoru, što dalje znači da Privredna komora ne može dalje da prenosi ta ovlašćenja svojim aktom na druge komore)

12. Organi i organizacije

Član 24

Komorom upravljaju njeni članovi preko svojih predstavnika u njenim organima, koji se biraju na način utvrđen statutom komore.

Član 25

Organi komore su: skupština, upravni odbor, nadzorni odbor i predsednik.

Član 26

Skupština donosi statut, finansijski plan, godišnji obračun i program rada komore; bira i razrešava članove upravnog odbora i nadzornog odbora, predsednika i potpredsednike komore; imenuje generalnog sekretara komore; utvrđuje stavove i daje smernice za rad organa i tela komore u oblasti ekonomskog razvoja i privrednog sistema; odlučuje o raspolaganju nepokretnostima komore, drugim značajnim privrednim pitanjima i obavlja i druge poslove u skladu sa zakonom i statutom.

Skupštinu sačinjavaju predstavnici članova komore koji se biraju na način utvrđen statutom.

Članovi komore biraju se po regionalnom, teritorijalnom, granskom i sektorskom principu.

Članovi skupštine biraju se na četiri godine i mogu biti ponovo birani.

Skupština iz svojih redova bira predsednika i zamenika predsednika skupštine na četiri godine.

Skupština se obavezno saziva dva puta godišnje, a po potrebi i češće.

Na sednici skupštine mora da prisustvuje više od polovine članova. Skupština odluke donosi većinom glasova prisutnih članova.

Član 27

Upravni odbor je organ upravljanja komorom.

Upravni odbor: priprema predloge odluka za skupštinu i izvršava njene odluke, donosi opšta i druga akta utvrđena statutom, obavlja i druge poslove iz delokruga komore utvrđene ovim zakonom i statutom.

Predsednik komore je predsednik upravnog odbora komore.

Članovi upravnog odbora komore biraju se na četiri godine i mogu biti ponovo birani.

Član 28

Nadzorni odbor vrši kontrolu nad radom, pregleda periodične i godišnje obračune i utvrđuje da li su oni sačinjeni u skladu sa propisima, ostvaruje uvid u izvršavanje obaveza članica i kontroliše način korišćenja sredstava komore.

Članovi nadzornog odbora komore biraju se na četiri godine i mogu biti ponovo birani.

Nadzorni odbor podnosi skupštini komore izveštaj o pitanjima iz svog delokruga najmanje jedanput godišnje.

Član 29

Predsednik predstavlja komoru, odgovoran je za zakonitost rada i rukovodi i usklađuje njen rad i obavlja druge poslove utvrđene ovim zakonom i statutom.

Predsednik komore za svoj rad odgovara skupštini komore.

Predsednik komore bira se na četiri godine. Isto lice može biti izabrano za predsednika komore najviše dva puta uzastopno.

Član 30

Komora može imati jednog ili više potpredsednika, koje bira skupština komore, na predlog predsednika komore.

Potpredsednik komore za svoj rad odgovara skupštini i predsedniku komore.

Potpredsednik komore bira se na četiri godine i može biti ponovo biran.

Potpredsednik komore je član upravnog odbora komore.

Član 31

Komora ima generalnog sekretara, koga imenuje skupština komore na predlog predsednika komore.

Generalni sekretar: stara se o pripremama sednica organa komore i o izvršenju odluka i drugih akata tih organa; rukovodi

Sekretarijatom generalnog sekretara; pomaže predsedniku u obavljanju njegovih poslova i obavlja druge poslove utvrđene statutom.

Generalni sekretar se imenuje na četiri godine i može ponovo biti imenovan.

Generalni sekretar za svoj rad odgovara skupštini i predsedniku komore.

Član 32

Radi izvršavanja određenih zadataka i poslova od interesa za članove, u komori se mogu obrazovati i radna tela i organizovati drugi oblici rada.

Član 33

Za pružanje stručne pomoći i određenih poslovnih usluga članovima u komori mogu se, u skladu sa statutom, obrazovati specijalizovane organizacije (biroi, agencije, centri i dr.).

13. Akti komore

Član 34

Komora ima statut.

Statutom komore uređuju se: zadaci; oblici rada i organizovanja; delokrug i ovlašćenja skupštine i drugih organa komore; sastav, izbor, broj članova i trajanje mandata članova organa komore; prava, obaveze i odgovornost članova; način upravljanja i odlučivanja; način izbora i imenovanja funkcionera i rukovodećih radnika komore; sadržaj i oblici ostvarivanja saradnje sa državnim organima i drugim organizacijama; način međusobne saradnje i saradnje sa privrednim komorama i sličnim asocijacijama u inostranstvu; javnost rada i obaveštavanje članova komore o radu njenih organa; način obezbeđenja sredstava za rad; položaj i zadaci stručne službe; postupak donošenja statuta i drugih opštih akata, kao i druga pitanja značajna za rad komore.

Statut komore objavljuje se u glasilu komore, a Statut Privredne komore Srbije i u „Službenom glasniku Republike Srbije".

Svi opšti akti komore moraju biti u skladu sa statutom.

14. Finansiranje

Član 35

Sredstva za rad komore obrazuju se od članarine, naknada za usluge i iz drugih izvora.

Visinu članarine i osnovicu na osnovu koje se obračunava članarina, kao i način i rokove plaćanja članarine utvrđuje skupština komore.

Sporazumom o saradnji utvrdiće se kriterijumi na osnovu kojih će se određivati visina članarine i osnovica za obračun.

Kontrola naplate članarine vršiće se na način utvrđen Statutom Privredne komore Srbije.

Komora višak prihoda nad rashodima na godišnjem nivou, koristi isključivo za ostvarivanje ciljeva i zadataka zbog kojih je osnovana.

15. Finansijski izveštaji, poslovne knjige i revizija

Član 36

Komora vodi poslovne knjige, sačinjava finansijske izveštaje, podleže reviziji finansijskih izveštaja i internoj reviziji, u skladu sa propisima o računovodstvu i reviziji.

Godišnji obračuni i izveštaji o radu komore i njenih organa podnose se skupštini komore na način utvrđen statutom.

16. Opšta udruženja

Član 37

Radi zajedničkog unapređivanja rada i poslovanja, usklađivanja posebnih i zajedničkih interesa, predlaganja mera za poboljšanje uslova poslovanja i ekonomskog položaja i socijalne sigurnosti, kao i radi razmatranja i rešavanja i drugih pitanja od zajedničkog interesa, osnivaju se opšta udruženja preduzetnika (u daljem tekstu: opšta udruženja).

Članovi opštih udruženja su preduzetnici iz člana 18. stav 2. ovog zakona.

Član 38

Opšta udruženja osnivaju se za područje Privredne komore Beograda i regionalne privredne komore ili za područje jedne ili više opština, i to za jednu ili više privrednih delatnosti.

Skupština Privredne komore Beograda, odnosno regionalne privredne komore, određuje za koje se delatnosti i područja osnivaju opšta udruženja.

Član 39

Odluku o osnivanju opšteg udruženja donosi Skupština Privredne komore Beograda, odnosno regionalne privredne komore.

Akt o osnivanju opšteg udruženja sadrži naročito:

1. naziv i sedište opšteg udruženja;
2. delatnost za koje se osniva opšte udruženje;
3. sredstva za početak rada udruženja i način obezbeđivanja tih sredstava;
4. podatke o licu koje vrši dužnost sekretara opšteg udruženja i njegova ovlašćenja.

Član 40

Organi opšteg udruženja su: skupština, izvršni odbor, nadzorni odbor i sekretar.

Član 41

Konstituisanje opšteg udruženja vrši se donošenjem statuta udruženja i izborom njegovih organa.

Član 42

Statutom opšteg udruženja uređuju se zadaci udruženja, organi i tela udruženja i njihov delokrug i sastav, način izbora i vreme trajanja mandata članstva organa i tela udruženja, prava i dužnosti članova udruženja, način finansiranja udruženja, kao i duga pitanja od značaja za rad udruženja.

Statut opšteg udruženja donosi skupština udruženja koju čine članovi tog udruženja.

Član 43

Opšte udruženje ima svojstvo pravnog lica.

Opšte udruženje upisuje se u registar opštih udruženja koji vodi Privredna komora Beograda, odnosno regionalna privredna komora.

Privredna komora Srbije utvrđuje način vođenja registra opštih udruženja.

Član 44

Radi usaglašavanja zajedničkih interesa i predlaganja mera za poboljšanje uslova poslovanja i ekonomskog položaja preduzetnika u Privrednoj komori Srbije, Privrednoj komori Vojvodine i Privrednoj komori Kosova i Metohije obrazuje se Zajednica preduzetnika.

Skupština komore iz stava 1. ovog člana određuje broj i sastav, kao i način izbora članova Zajednice preduzetnika.

Organi Zajednice preduzetnika su: skupština, izvršni odbor i predsednik zajednice, koji je istovremeno i predsednik skupštine.

16. Sud časti

Član 45

Pri komori postoji Sud časti.

Sud časti odlučuje o povredama dobrih poslovnih običaja.

Sud časti je nezavisan i samostalan u svom radu.

Organizacija, sastav, postupak, način rada Suda časti i mere koje on može izricati uređuju se opštim aktom koji donosi skupština komore.

17. Stalni izbrani sud

Član 46

Pri Privrednoj komori Srbije postoji Stalni izbrani sud.

Stalni izbrani sud odlučuje i posreduje kada je njegova nadležnost ugovorena u privrednim sporovima bez međunarodnog elementa.

Stalni izbrani sud je nezavisan i samostalan u svom radu.

Odluka Stalnog izbranog suda je konačna i ima snagu pravosnažne sudske presude.

Organizacija, sastav, postupak, način rada Stalnog izbranog suda uređuju se opštim aktom koji donosi Skupština Privredne komore Srbije.

18. Spoljnotrgovinska arbitraža

Član 47

Pri Privrednoj komori Srbije postoji Spoljnotrgovinska arbitraža.

Spoljnotrgovinska arbitraža odlučuje i posreduje kada je njena nadležnost ugovorena u privrednim sporovima sa međunarodnim elementom.

Spoljnotrgovinska arbitraža je nezavisna i samostalna u svom radu.

Odluka Spoljnotrgovinske arbitraže je konačna i ima snagu pravosnažne sudske presude.

Organizacija, sastav, postupak i način rada Spoljnotrgovinske arbitraže uređuju se opštim aktom koji donosi Skupština Privredne komore Srbije.

19. Javnost rada komore

Član 48

Rad komore je javan.

Javnost komore ostvaruje se ovim zakonom, statutom i drugim opštim aktima komore.

Javnost rada komore se oodržavanjem javnih sednica organa i tela komore;

- redovnim informisanjem članova o radu komore;
- objavljivanjem odluka organa komore u glasilu komore;
- objavljivanjem na internet strani komore;
- saradnjom sa sredstvima javnog informisanja;
- međusobnim razmenjivanjem informacija između komora, a posebno o poslovima od zajedničkog interesa;
- izdavanjem brošura, časopisa i drugih publikacija na način predviđen statutom komore; i
- drugim načinima bliže definisanim opštim aktima komore.

Član 49

Sednice organa i tela komore su javne.

Organi i tela komore mogu isključiti ili ograničiti javnost sednica, kada to nalaže opšti interes ili kada se razmatraju dokumenti ili podaci poverljive prirode.

Član 50

Komora je obavezna da redovno upoznaje svoje članove sa odlukama, stavovima i predlozima usvojenim na sednicama organa i tela komore.

Obavezu iz stava 1. ovog člana komora može izvršiti putem javnih glasila, objavljivanjem na internet strani komore, izdavanjem posebnih biltena, objavljivanjem u glasilu komore, ličnim obaveštavanjem, i sl.

Statut i drugi opšti akti komore će urediti načine informisanja članova komore, imajući pri tom u vidu interes članova i ekonomičnost postupka objavljivanja.

Član 51

Komora osniva svoje glasilo posebnim aktom kojim se određuju programska načela, sadržaj i naziv glasila.

Upravni odbor donosi akt o osnivanju glasila.

Član 52

Svaka komora ima svoju internet stranu.

Komora je obavezna da objavi odluke organa komore na internet strani komore u roku od tri dana od dana usvajanja odluke, na način propisan statutom.

Član 53

Komore su dužne da sarađuju sa sredstvima javnog informisanja.

Saradnja iz stava 1. ovog člana obuhvata davanje odgovora na pitanja vezana za aktivnosti komore, davanje izjava, saopštenja, komentara, intervjua i gostovanja u medijima nadležnih lica iz komore.

Komore su dužne da svim novinarima i javnim glasilima bez diskriminacije omoguće jednak pristup informacijama.

Član 54

Opštim aktom komore određuju se informacije koje se smatraju poslovnom tajnom, čije bi iznošenje neovlašćenoj osobi, zbog njihove prirode i značaja, bilo protivno interesima komore i njenih članova.

Komora i članovi njenih organa, zaposleni u komori, kao i druga lica koja zbog prirode posla koji obavljaju imaju pristup informacijama iz stava 1. ovog člana, ne mogu te informacije saopštavati trećim licima, niti trećim licima omogućiti pristup tim podacima. U slučaju da pomenuta lica prekrše obavezu čuvanja poslovne tajne, odgovaraju za štetu prouzrokovanu komori.

Informacija čije je objavljivanje obavezno u skladu sa zakonom ili koje su u vezi sa povredom zakona, dobre poslovne prakse ili principa poslovnog morala, uključujući i informaciju za koju postoji osnovana sumnja na postojanje korupcije, ne može se smatrati poslovnom tajnom komore i objavljivanje ove informacije je zakonito, ako ima za cilj da zaštiti javni interes.

Član 55

Svaka komora je obavezna da na zahtev druge komore bez odlaganja pruži sve tražene informacije.

Za poslove od zajedničkog interesa sve komore u Srbiji će obrazovati jedinstven informacioni sistem, na način i u rokovima propisanim Sporazumom o saradnji.

Komore o ostvarivanju značajnije međunarodne saradnje informišu Privrednu komoru Srbije.

Član 56

Predstavnik komore koji u ime komore daje informacije u vezi sa njenim radom odgovara za njihovu tačnost.

Stavove komore, njenih organa i tela mogu da iznose izabrani i imenovani funkcioneri komore i predsednici organa i tela komore.

Organi i tela komore mogu da ovlaste i stručne radnike komore da o određenim pitanjima iznose stavove komore.

20. Prelazne i završne odredbe

Član 57

Privredna komora Srbije, Privredna komora Vojvodine, Privredna komora Kosova i Metohije, Privredna komora Beograda i regionalne privredne komore uskladiće svoju organizaciju, akta i rad sa odredbama ovog zakona, u roku od godinu dana od dana njegovog stupanja na snagu.

Do usklađivanja organizacije, akata i rada, komore iz stava 1. ovog člana, nastavljaju da rade na način i pod uslovima pod kojima su osnovane.

Član 58.

Danom stupanja na snagu ovog zakona Sud časti, Stalni izbrani sud i Spoljnotrgovinska arbitraža nastavljaju sa radom u skladu sa odredbama ovog zakona.

Član 59

Danom stupanja na snagu ovog zakona, prestaje da važi Zakon o privrednim komorama („Službeni glasnik RS“, br. 65/01 i 36/09).

Član 60

Ovaj zakon stupa na snagu osmog dana od dana objavljivanja u „Službenom glasniku Republike Srbije“.

OBRAZLOŽENJE

I. Ustavni osnov

Ustavni osnov za donošenje ovog zakona sadržan je u odredbi člana 97. tačka 6. Ustava Republike Srbije, prema kojoj, pored ostalog, Republika Srbija uređuje i obezbeđuje jedinstveno tržište i pravni položaj privrednih subjekata.

II. Razlozi za donošenje zakona

Zakon o privrednim komorama („Službeni glasnik RS", br. 65/01 i 36/09), donet je sa ciljem da se na temelju demokratskih promena koje su nastale u našem društvu, izgradi otvorena i tržišno orijentisana privreda. Takav pristup nametnuo je potrebu da se privredne komore u Republici Srbiji transformišu u skladu sa opštom izgradnjom tržišnih institucija u našoj zemlji. Polazni osnov za donošenje važećeg zakona u ovoj oblasti bila je okolnost da država ima glavnu i osnovnu ulogu u stvaranju tržišnog ambijenta i da se ta uloga ogleda u tome da se zakonom i drugim propisima uređuje ekonomski prostor. U skladu sa tim, a po ugledu na privredne komore u zemljama EU, komorski sistem u Republici Srbiji ustanovljen je po modelu evrokontinentalnog tipa privrednih komora (Francuska, Nemačka, Austrija, Italija i dr).

Komore evrokontinentalnog tipa osnivaju se zakonom, što znači da ove komore stiču pravni subjektivitet stupanjem na snagu odgovarajućeg zakona o privrednim komorama. Zakonom se određuju zadaci komora, obavezno članstvo, organi i organizacija komora, način finansiranja i nadzor nad radom komora. Zakonski sistem osnivanja komora je karakterističan za ekonomski najrazvijenije kontinentalne zemlje EU, ali i za zemlje koje imaju dugogodišnju tradiciju komorskog organizovanja. Država se najčešće opredeljuje za zakonski sistem osnivanja ako prihvata: javnopravni karakter komora i obavezno članstvo u komorama.

Opredeljujući se za javnopravni karakter komora, Republika Srbija je jasno izrazila svoj interes za postojanjem posebnih, razvijenih

i stabilnih institucija sa jasno definisanim zadacima i ciljevima i na taj način je sebi obezbedila legitimnog partnera, putem koga će i sama uspešnije ostvarivati svoje funkcije, a posebno u domenu razvoja privrede i preduzetništva. Opredeljenje da se komori poveri vršenje javnopravnih ovlašćenja, nedvosmisleno ukazuje na potrebu prihvatanja zakonskog modela osnivanja komora.

Čist zakonski model osnivanja privrednih komora podrazumeva i prihvatanje sistema obaveznog članstva u privrednim komorama. Ideja osnivanja ovih komora je u tome da one zastupaju zajedničke interese svih privrednih subjekata pred državnim organima, a to je moguće samo ako su svi privredni subjekti članovi komore.

U skladu sa iznetim, rad, osnivanje i organizovanje privrednih komora prema Zakonu o privrednim komorama zasniva se na sledećim principima: zakonitosti, javnosti, ravnopravnosti članova, zakonskog osnivanja komora, teritorijalnosti komorskog organizovanja, strukovnog organizovanja, jedinstvenog komorskog organizovanja, obaveznog članstva i međukomorske saradnje. Javnopravni karakter komorskog sistema ogleda se u ovlašćenjima Privredne komore Srbije da vrši određena javna ovlašćenja koja su joj poverena zakonom, kao što je izdavanje potvrda, uverenja i drugih isprava: o članstvu u komori; bonitetu; poslovno-tehničkoj osposobljenosti pravnog lica; upis u registar prevoznika; da se roba ne proizvodi u zemlji; ispunjenosti uslova za vršenje međunarodnog javnog prevoza; referentne liste; o poreklu robe; TIR karnetima; uverenja koja prate robu pri uvozu i izvozu; potvrda o upisu na Listu zainteresovanih izvođača građevinskih radova, radi učešća u postupku javnih nabavki; potvrda da je privredno društvo ili drugo pravno lice jedini ponuđač predmeta javne nabavke u zemlji; radi dodele ugovora o javnoj nabavci u postupku sa pogađanjem bez prethodnog objavljivanja; mišljenje o ispunjenosti uslova za unošenje naziva „Srbija“ u poslovno ime privrednih društava, i dr.

Postojeći komorski sistem, sa Privrednom komorom Srbije kao nacionalnom komorom, u osnovi je uspostavljen u skladu sa potrebama privrede u Republici Srbiji, a kada je reč o komorama na regionalnom i pokrajinskom nivou, postoji velika sličnost u organizaciji i načinu rada tih komora sa komorama istog nivoa organizovanja u velikom broju evropskih zemalja.

Napominjemo da danas u zemljama EU postoje dva osnovna sistema osnivanja komora: sistem zakonskog i sistem dobrovoljnog

osnivanja. Osnovna razlika između ova dva sistema se sastoji u načinu sticanja svojstva pravnog lica, odnosno na osnovu kog pravnog akta komore stiču pravni subjektivitet. Pored ova dva čista sistema osnivanja privrednih komora, vremenom se razvio i treći, tzv. mešoviti sistem osnivanja komora.

Osnovne karakteristike čistog zakonskog modela osnivanja privrednih komora su: (1) komore se mogu osnovati samo zakonom; (2) komore su specifičan oblik organizovanja privrednih subjekata, na koje se primenjuje isključivo zakon o komorama. Drugim rečima, na komore se supsidijarno ne primenjuju ni odredbe zakona o privrednim društvima, ni zakona o udruženjima; (3) zakonom se uređuju sva značajnija pitanja za rad komora, pri čemu se komore ovlašćuju da svojim internim aktima (pre svega statutom) detaljnije urede svoju organizaciju i načine delovanja, ali u skladu sa odredbama zakona.

Sistem dobrovoljnog osnivanja komora se zasniva na volji privrednika da sami osnuju komoru. On je poznat kao privatnopravni ili anglosaksonski model osnivanja komora. Zakoni koji prihvataju ovaj sistem, uređuju komorsko organizovanje na sumaran način. Zakonom se, pre svega, proklamuju osnovni principi osnivanja i rada komora, osnovne delatnosti, najelementarnije odredbe o unutrašnjoj organizaciji komore i finansiranju rada. Uređivanje većine pitanja je prepušteno samim osnivačima, koji će statutom komore dalje precizirati sve ostale aspekte od značaja za rad komore.

Treba istaći da Srbija ima višedecenijsko iskustvo i tradiciju u organizovanju privrednih komora. Prve komore na ovom prostoru organizovane su u XIX veku po ugledu na komore u Evropi. Ova tradicija duga je 150 godina i upućuje nas da i sopstvena iskustva treba koristiti u prilagođavanju naših komora evropskim komorama.

Imajući u vidu izneto, kao i činjenicu da važeći zakon kojim se uređuje komorski sistem u Republici Srbiji korespondira sa zakonima zemalja EU i to zakonima Nemačke, Austrije, Francuske, Italije, Holandije, Španije, Grčke, Luksemburga itd. i to da tranzicija u Republici Srbiji nije završena, nisu se stekli uslovi za uspostavljanje komorskog sistema na drugačijim osnovama, s obzirom na to da bi nova organizacija komorskog sistema bila izraz ne ekonomske potrebe, već pre svega izraz monopolskih i drugih potreba, što bi još više ojačalo pozicije dominantnih subjekata i urušilo uspostavljen sistem zaštite konkurencije. Uz to, svojinski sistem u Republici Srbiji, nakon

usvajanja novog Ustava, još uvek nije uređen novim zakonom, što bi uzrokovalo velike svojinske probleme oko titulara postojeće imovine komora, a to bi privredu i dalje vodilo bavljenju samom sobom umesto konkurencijom i razvojem.

Međutim, već uspostavljeni komorski sistem pojačava sa svoje strane potrebu njegovog unapređenja, kako bi se pojačala uloga komora u više pravaca u kojima komora treba da bude: inicijator i predlagač privrednih zakona; kritičar Vlade u ekonomskoj i socijalnoj politici; servis privrede i poslodavaca; vršilac proširenih javnih ovlašćenja; privredni samoregulator (uzanse, kodeksi, vodiči, modeli zakona, standardi) i kreator „mekog prava"; nosilac alternativnih načina rešavanja privrednih sporova; organizovani edukator; reprezentant privrede pred državom; reprezentant privrede u inostranstvu; nosilac raznovrsnih usluga za potrebe malih i srednjih preduzeća; inicijator svih formi interesnog povezivanja preduzeća; informacioni centar za privredne subjekte; tržišno orijentisana u svom radu u cilju obezbeđivanja finansijskih sredstava na tim principima čime se obezbeđuje smanjivanje obima finansiranja iz članarina.

Unapređenje rada komora treba obezbediti i kroz diversifikaciju funkcija regionalnih i „viših" komora i eliminisanje preklapanja funkcija i kroz unapređenje sistema unutrašnje organizacije, racionalizacije i rukovođenja itd.

U svakom slučaju, reprezentativnost pozicije Komore (u smislu uticaja, članstva, moći, rezultata, snage, kvaliteta i slično) prema inostranstvu, prema državi i prema članstvu, u postojećim okolnostima, daleko je izraženija u okruženju obaveznog članstva i zakonskog osnivanja nego u okruženju dobrovoljnog članstva i ugovornog osnivanja. Zamena sistema obaveznog članstva dobrovoljnim članstvom, kako to iskustvo zemalja koje su to učinile pokazuje, u svakom slučaju i to na duži rok vodi gubitku snage komorskog sistema zasnovane na reprezentativnosti članstva. Isto tako, zamena zakona kao osnivačkog akta ugovorom ili nekim sporazumom, vodi gubitku institucionalnog legitimiteta i institucionalnog kontinuiteta koji postojeći komorski sistem baštini iz snage istorijskog utemeljenja i snage tradicije. S druge strane, monopolizam postojeće pozicioniranosti komorskog sistema može se prevazići snaženjem pozicije članova, unapređenjem sistema odgovornosti, unapređenjem sistema javnosti rada i polaganja računa, kao i snaženjem tržišne i nezavisne pozicije komora i konstituisanjem adekvatnog sistema nadzora.

Prema tome, postojeći komorski sistem u Republici Srbiji do daljeg treba bezuslovno zadržati, iz sledećih razloga: (1) sigurnost osnivačkog akta,(2) jača pravna snaga osnivačkog akta, (3) evropska tradicija, (4) evropska dominacija ovog sistema, (5) loše iskustvo komora koje su ovaj sistem zamenile ugovornim osnivanjem i dobrovoljnim članstvom, (6) snaga domaće tradicije, (7) slabost snage tranzicione privrede za samoorganizovanjem u ovom smislu u sistemu dobrovoljnosti, (8) nehomogenost interesa privrednih subjekata i nemogućnost snažne reprezentativnosti u sistemu dobrovoljnosti, (9) sistem ugovornog osnivanja i dobrovoljnog članstva omogućio bi nametanje interesa jakih i malobrojnih nad slabima i mnogobrojnima, (10) potreba snaženja javnih ovlašćenja koje vrši Komora, (11) jači partner Vladi u zaštiti interesa privrede, (12) jačanje međunarodne reputacije domaće privrede,(13) gubitak vremena za uhodavanje novog sistema, (14) maksimalna reprezentativnost, (15) ravnopravnost interesa privrednih subjekata, (16) nepostojanje takve obaveze za promenom sistema članstva i osnivanja u propisima nivoa EU, (17) svojinski i imovinski aspekti. Funkcionisanje postojećeg komorskog sistema u praksi pokazao je pozitivne rezultate, kako u pogledu zaštite i ostvarivanja zajedničkih interesa članova komore, tako i u zastupanju njihovih interesa i povezivanju sa privrednim subjektima u drugim zemljama.

Iz iznetih razloga ocenjeno je da je u ovoj oblasti celishodno doneti novi zakon i da se određena pitanja iz domena rada komora koja su važećim zakonom nedovoljno uređena ili nisu uopšte uređena (pravni subjektivitet komore, imovina komora, javnost u radu, arbitražno rešavanje sporova) moraju urediti novim zakonom pa je u tom smislu pripremljen ovaj zakon.

III. Objašnjenje osnovnih pravnih instituta i pojedinačnih rešenja

Član 1. – ovim članom izvršeno je terminološko usklađivanje naziva subjekata članova komore sa zakonima koji su u međuvremenu doneti kao što je npr. Zakon o privrednim društvima, kao i uređivanje pitanja koja se odnose na položaj i svojstvo Komore.

Ovim članom jasno je opredeljen položaj komora u odnosu na druge institucije sistema. Samostalnost i nezavisnost su preduslovi za

uspešan rad komore s tim da se pod samostalnošću podrazumeva da svaka komora ima svoje organe, imovinu, naziv, sedište, zastupnike, pečat, unutrašnje akte, i sl., dok se nezavisnost komore vezuje za autonomnu volju komore koja ne zavisi od volje bilo kog drugog lica.

Član 2. – ovim članom utvrđeni su ciljevi sa kojim sa osniva Komora (da zastupa, promoviše i štiti zajedničke interese svih svojih članova), način ostvarivanja tih ciljeva (treba da usaglašava i miri različite strukovne, regionalne i pojedinačne interese svojih članova), kao i donošenje odluka Komore imajući u vidu interese privrede Srbije kao celine.

Član 3. – ovim članom utvrđen je način postupanja Komore imajući u vidu zakonitost njenog rada pa je utvrđeno da Komore obavljaju svoje delatnosti u skladu sa Ustavom, zakonom, statutom i drugim opštim aktima komore, pravilima sporazuma o međukomorskoj saradnji i međunarodnih međukomorskih organizacija čiji su članovi i da Statut i drugi opšti akti komore moraju biti u skladu sa Ustavom i zakonom.

Član 4. – ovim članom osnivaju se Regionalne komore i utvrđuju nazivi regionalnih privrednih komora koji odgovaraju sedištima tih komora. Istovremeno propisano je da Privredna komora Srbije, Privredna komora Vojvodine, Privredna komora Kosova i Metohije, Privredna komora Beograda i regionalne komore čine jedinstven komorski sistem Republike Srbije. Jedinstvenim komorskim sistemom Republike Srbije se obezbeđuje da se zajednički interesi članova komore ostvaruju na teritoriji cele Republike Srbije. Jedinstvo komorskog sistema se obezbeđuje sporazumom o saradnji privrednih komora, odredbama statuta i aktima i odlukama donetima u skladu sa zakonom, Sporazumom i statutom.

Čl. 5–8. – ovim članovima uređena su pitanja koja se odnose na imovinu Komore i odgovornosti za obaveze. U imovinu komore ulaze pravo svojine, udeli i akcije u privrednim društvima, pravo industrijske svojine, potraživanja i druga prava imovinskog karaktera. Imovina komore je jedinstvena odnosno jedna komora može imati samo jednu imovinu koju čini ukupnost prava koja joj pripadaju kao pravnom licu. Zakonom o obligacionim odnosima i Zakonom o osnovama svojinsko-pravnih odnosa, nedvosmisleno je propisano da svi subjekti prava, odnosno fizička i pravna lica, između ostalog mogu sticati pokretnu i ne-

pokretnu imovinu, kao i sva druga stvarna prava propisana zakonom. Sve privredne komore u Republici Srbiji koje su osnovane Zakonom o privrednim komorama, imaju svojstvo pravnog lica *ex lege* što znači da su subjekt prava i da imaju poslovnu sposobnost da u pravnom prometu zaključuju sve vrste pravnih poslova, odnosno da stiču razne oblike prava kao i da preuzimaju različite obaveze. Privredne komore kao subjekti prava, odnosno pravna lica, imaju kapacitet da stiču pokretnu i nepokretnu imovinu, što se u praksi često i događa. Imovina privrednih komora koristi se za obavljanje njihove delatnosti propisane Zakonom i statutima komora. Komora za svoje obaveze odgovara celokupnom svojom imovinom. Na svakom imovinskom pravu koje pripada komori može se sprovesti postupak prinudnog izvršenja.

Čl. 8–12. – ovim članovima uređuju se pitanja vezana za naziv komore kao njenog bitnog obeležja. Svaka komora vrši svoje delatnosti pod određenim nazivom. Uz pun naziv komore, u poslovanju se može koristiti i skraćeni naziv.

Svaka komora u svom nazivu mora imati reč „komora" i niko osim komore ne može u svom imenu imati, odnosno u obavljanju svoje delatnosti upotrebljavati ili koristiti reč „komora" ili neku izvedenicu od te reči. Slična analogija se može napraviti sa zabranama koje postoje za finansijske institucije (npr. banke). Izuzetak od navedene zabrane uspostavlja se za profesionalne organizacije slobodnih profesija za koje se uobičajeno koristi reč komora (npr. komore imaju advokati, biohemičari, zdravstveni radnici, lekari, i dr.). Pored naziva komore na jeziku koji je u službenoj upotrebi u državi, za poslovanje sa inostranstvom se koriste i nazivi na nekom stranom jeziku.

Član 12. – ovim članom uređuje se način na koji se vrši: saradnja između komora u izvršavanju poslova i zadataka utvrđenih Zakonom; razmena obaveštenja i iskustava, kao i koordinacija njihovog rada i dogovaranja o pitanjima od zajedničkog interesa i interesa članova. Takođe, predloženo je i rešenje prema kome komore mogu zaključivati i posebne sporazume, kojima se ostvaruje međusobna saradnja u oblastima od interesa za članove tih komora, u skladu sa Sporazumom o saradnji.

Predložena rešenja zasnivaju se na činjenici da je najefikasniji oblik uspostavljanja međukomorske saradnje u uslovima jedinstvenog komorskog sistema Sporazum o saradnji između svih privrednih

komora u državi. On može predstavljati efikasan modus za razmenu informacija i iskustava između komora, ali i način ujednačavanja prakse (npr. u vezi sa načinima određivanja članarine u okvirima koji su dozvoljeni zakonom). Pošto se sva pitanja međusobnih odnosa između privrednih komora u Republici Srbiji ne mogu u potpunosti urediti zakonom, predloženo je da komore međusobno sarađuju i koordiniraju svoj rad u skladu sa posebnim aktom kojim bi se detaljnije uredio njihov međusobni odnos. Svrha ovog sporazuma je da uspostavi pravila koja će se primenjivati uporedo sa Zakonom kako bi se obezbedio integritet jedinstvenog komorskog sistema u Republici Srbiji i ojačao proces izrade, usklađivanja i usvajanja statuta privrednih komora u Republici Srbiji, imajući u vidu da sve privredne komore imaju svojstvo pravnog lica, bez obzira na kom nivou su osnovane (republičkom, pokrajinskom, gradskom ili regionalnom), kao i obavezu da donesu svoje statute.

Takođe je predložena mogućnost da komore mogu zaključivati i posebne sporazume, kojima se ostvaruje saradnja u oblastima od interesa za članove tih komora, u skladu sa Sporazumom o saradnji, kroz zaključivanje bilateralnih sporazuma između samo nekih komora s tim da ti sporazumi ne smeju da utiču na jedinstvo komorskog sistema i ne smeju biti u suprotnosti sa zajedničkim sporazumom, jer zajednički sporazum ima jaču pravnu snagu.

Član 13. – ovim članom predložena je mogućnost osnivanja privrednih predstavništava u inostranstvu od strane Privredne komore Srbije, ako je to u interesu njenih članova, da odluku o osnivanju predstavništva u inostranstvu donosi Upravni odbor Privredne komore Srbije i da predstavništvo Privredne komore Srbije za svoj rad odgovara Upravnom odboru Privredne komore Srbije. Osnovni cilj rada predstavništva Privredne komore Srbije u inostranstvu je ispunjavanje potreba i zahteva članica privrednih komora i drugih subjekata, poslovno povezivanje domaće privrede u inostranstvu, učešće u promociji srpske privrede na međunarodnim sajmovima i izložbama, identifikovanje poslovnih partnera, saradnja sa ekonomskim odeljenjem inostranih ambasada u zemlji, poslovno susretanje, savetovanja, multilateralno i bilateralno poslovno povezivanje, i dr.

Član 14. – ovim članom opredeljen je položaj Privredne komore Srbije kao inicijatora i predlagača zakona iz oblasti privrede, položaj Privredne komore Srbije u vezi sa donošenjem propisa iz oblasti pri-

vrede od interesa za njene članove. Privredna komora Srbije zastupa interese privrede – članova Komore i komorskog sistema u Republici Srbiji pred organima vlasti i iz tog razloga je predloženo da Privredna komora Srbije može da pokreće inicijative za donošenje zakona i drugih propisa u oblasti privrednog sistema i ekonomske politike, učestvuje u pripremi ovih propisa i daje primedbe na nacrte i predloge zakona i drugih propisa iz oblasti privrede kako bi sugestije i predlozi privrede bili uzeti u obzir, pokreće inicijative za donošenje zakona ili izmena i dopuna istih, i sl.

Član 15. – ovim članom predloženo je da Privredna komora Srbije sarađuje sa organima i radnim telima Narodne skupštine Republike Srbije i Vladom u vezi sa pitanjima od interesa za privredu i određuje svoje predstavnike u radna tela, u skladu sa posebnim propisima. Regionalne privredne komore takođe zastupaju interese svojih članova pred organima vlasti, ali na nižim nivoima (npr. sa organima teritorijalne autonomije i jedinica lokalne samouprave).

Čl. 16–17. – ovim članovima predloženo je da u cilju uspostavljanja socijalnog dijaloga, komora sarađuje sa sindikatima zaposlenih i organizacijama poslodavaca po pitanjima radnopravnog položaja zaposlenih i drugim pitanjima od zajedničkog interesa. Takođe je predloženo da komora u saradnji sa naučnoistraživačkim i obrazovnim institucijama u zemlji i u inostranstvu organizuje i realizuje programe obuke za potrebe svojih članova i privrede koji se utvrđuju na osnovu potreba tržišta, a naročito uzimajući u obzir preporuke nacionalne organizacije nadležne za zapošljavanje.

Navedene odredbe Zakona su predložene iz razloga što privredne komore u narednim godinama treba veću pažnju da posvete razvoju brojnih aktivnosti na polju edukacije u okviru kojih bi se organizovali i realizovali programi obuke polaznika za potrebe privrede sa ciljem obezbeđenja savremene i kontinuirane poslovne edukacije. U tom smislu, potrebno je omogućiti razvoj i unapređenje saradnje sa domaćim i međunarodnim razvojnim, naučnoistraživačkim i obrazovnim institucijama, saradnju sa poslovnim školama i fakultetima u zemlji i u inostranstvu i sa Nacionalnom službom za zapošljavanje, u cilju sprovođenja dopunskog obrazovanja u privredi Republike Srbije.

Čl. 18–22. – ovim članovima Zakona uređuju se pitanja koja se odnose na članove komore, način vođenja registra članova komo-

re i dužnosti organa nadležnog za registraciju privrednih subjekata da dostavlja Privrednoj komori Srbije rešenja o registraciji privrednog subjekta, odnosno rešenja o brisanju privrednog subjekta iz Registra privrednih subjekata radi upisa ili brisanja tog subjekta iz registra članova komore. Imajući u vidu da se članstvo u komori stiče upisom privrednog društva u odgovarajući registar potrebno je da Agencija za privredne registre komori dostavlja rešenja o registraciji osnivanja, statusne promene ili brisanja, radi upisa ili brisanja iz registra članova komore.

Čl. 22–23. – ovim članovima uređuju se pitanja koja se odnose u delatnosti koje Komora obavlja. U odnosu na važeći Zakon promenjen je obim delatnosti koje komora može da obavlja s obzirom da se, u međuvremenu (od dana donošenja važećeg Zakona o privrednim komorama do danas), u praksi pojavila potreba da komora obavlja pojedine delatnosti kao što su npr. da upravlja jedinstvenom računskom mrežom komorskog sistema Republike Srbije i izdaje digitalne sertifikate i da generiše odgovarajuće ključeve za potrebe ostvarivanja elektronskog poslovanja za korisnike jedinstvene računske mreže komorskog sistema Republike Srbije, spoljnim korisnicima servisa Privredne komore Srbije i drugim zainteresovanim licima. Imajući u vidu da Privredna komora Srbije vrši javna ovlašćenja koja su joj poverena Zakonom predloženo je da Privredna komora Srbije može poslove u okviru javnih ovlašćenja obavljati preko komora iz člana 2. Zakona, u skladu sa aktom kojim se određuje obavljanje tih poslova u ime i za račun Privredne komore Srbije.

Takođe, ovim odredbama usklađuje se poslovanje Komore sa odredbama Zakona o zaštiti konkurencije s obzirom na to da komora načelno može da obavlja i privredne delatnosti, tako da se mora voditi računa da komora na taj način ne konkuriše svojim članovima. Zbog toga je veoma važno naglasiti u zakonu da je obavljanje delatnosti od strane komora moguće samo uz poštovanje pravila koja se odnose na zaštitu konkurencije.

Čl. 24–34. – ovim članovima uređuju se pitanja koja se odnose na organe Komore i njihove nadležnosti i način rada. Između ostalog utvrđuju se nadležnosti Skupštine komore, način izbora članova Skupštine, izbora predsednika Skupštine i druga pitanja od značaja za rad Skupštine. Opredeljenjem da se članovi skupštine privredne ko-

more biraju po regionalnom, teritorijalnom, granskom i sektorskom principu usaglašava se više različitih interesa u privredi, od interesa pokrajina i gradova, pa sve do interesa različitih grana privrede, uključujući preduzetnike i zadruge, kao specifične oblike privrednog organizovanja. Predloženo je i rešenje prema kome je predsednik komore istovremeno i predsednik upravnog odbora komore. Upravni odbor je organ upravljanja privrednom komorom, njegove članove bira skupština iz reda istaknutih privrednika i eksperata za pojedine naučne oblasti, a ocenjeno je da pored izabranih članova, određen broj lica treba da bude član upravnog odbora po svojoj funkciji (npr. predsednik komore). Odredbama navedenih članova uređuju se statusna pitanja članova nadzornog odbora i obaveza nadzornog odbora da podnosi skupštini komore izveštaj o pitanjima iz svog delokruga najmanje jedanput godišnje. Nadzorni odbor je interni organ nadzora privredne komore, čije članove bira skupština i vrši kontrolu zakonitosti rada komore, sa posebnim naglaskom na kontrolu finansijskog poslovanja komore. Potrebno je da nadzorni odbor podnosi skupštini komore izveštaj o pitanjima iz svog delokruga najmanje jedanput godišnje, i to prilikom usvajanja godišnjih izveštaja. Pored navedenog uređuju se i pitanja koja se odnose na odgovornost i način izbora predsednika privredne komore, položaj, prava i odgovornosti potpredsednika komore i generalnog sekretara. Zakonom je potrebno urediti osnovna pitanja o potpredsedniku komore i generalnom sekretaru komore kojima se uređuju ovlašćenja koja ne mogu biti ustanovljena Statutom, već to mora biti učinjeno zakonom. Komora može imati jednog ili više potpredsednika koje bira skupština komore na predlog predsednika komore, na period od četiri godine. Potpredsednik komore za svoj rad odgovara skupštini i predsedniku komore i član je upravnog odbora komore. Generalni sekretar pomaže predsedniku komore u obavljanju njegovih poslova, organizuje proces rada, rukovodi radom i poslovanjem stručnih službi, a u određenim pravnim poslovima i zastupa komoru. De lege lata, u Republici Srbiji generalnog sekretara imenuje skupština komore. Komora pored Statuta ima i druge opšte akte (pravilnike, odluke i dr.) koji moraju biti u skladu sa Statutom.

Čl. 35–36. – ovim članom predložen je način finansiranja komore i način određivanja kriterijuma na osnovu kojih će se određivati visina članarine i osnovica za obračun, kao i namena za koje se može koristiti višak prihoda nad rashodima komore na godišnjem ni-

vou. Visinu članarine, osnovicu za obračun, način utvrđivanja i rokove plaćanja utvrđuje Skupština Komore svojom odlukom. Kako se članovi Skupštine biraju po regionalnom, teritorijalnom, granskom i sektorskom principu, odluke koje Skupština donosi predstavljaju volju čitave privrede. Shodno tome visinu obavezne članarine u privrednoj komori određuju svi privredni subjekti koji posluju na teritoriji Republike Srbije preko svojih predstavnika u Skupštini Komore. Prilikom utvrđivanja visine članarine vodi se računa o ekonomskoj snazi članova, a kako privredne komore nisu profitne organizacije poslovanje Komore mora biti u skladu sa principima štedljivosti, ekonomičnosti i svrsishodnosti, a finansijsko opterećenje članova može biti samo do iznosa koji je neophodan za pokriće troškova, tako da godišnji prihod Komore treba da pokrije rashode nastale u vršenju Zakonom utvrđenih delatnosti Privredne komore, a na osnovu Programa i plana rada. Takođe, članom 36. Zakona usklađeno je poslovanje komore sa Zakonom o računovodstvu i reviziji.

Čl. 37–45. – ovim članovima uređuju se pitanja koja se odnose na Opšta udruženja tako što se uređuje da se radi zajedničkog unapređivanja rada i poslovanja, usklađivanja posebnih i zajedničkih interesa, predlaganja mera za poboljšanje uslova poslovanja i ekonomskog položaja i socijalne sigurnosti, kao i radi razmatranja i rešavanja i drugih pitanja od zajedničkog interesa, osnivaju se opšta udruženja preduzetnika čiji u članovi preduzetnici koji u vidu registrovanog zanimanja obavljaju privrednu delatnost i njihove zadruge.

Uređuje se i pitanje načina osnivanja opštih udruženja i nadležnosti za donošenje akta o njihovom osnivanju, sadržina akta o osnivanju opšteg udruženja, organi opšteg udruženja, način konstituisanja opšteg udruženja, način upisa u registar opštih udruženja i nadležnost za vođenje tog registra.

Pored navedenih pitanja odredbama člana 44. Zakona uređuje se osnivanje Zajednica preduzetnika, broj i sastav, kao i način izbora članova Zajednice preduzetnika, kao i organi Zajednice preduzetnika.

Čl. 45–47. – ovim članovima uređuju se pitanja koja se odnose na položaj i rad Suda časti, Stalnog izabranog suda i Spoljnotrgovinske arbitraže, a naročito imajući u vidu da položaj i rad Spoljnotrgovinske arbitraže pri Privrednoj komori Srbije nije bio uređen odredbama važećeg zakona. Pri Privrednoj komori Srbije deluju dve stalne, institu-

cionalne arbitraže – Stalni izabrani sud i Spoljnotrgovinska arbitraža, a zakonski okvir u kome deluju obe arbitraže određen je Zakonom o arbitraži iz 2006. godine.

Čl. 48–57. – ovim članovima uređuju se pitanja u pogledu javnosti rada privrednih komora, jer se doslednim sprovođenjem javnosti u radu, komore približavaju svojim članovima, što im omogućava veći uticaj i lakše ostvarivanje utvrđenih ciljeva. Javnost rada Komore se obezbeđuje kroz javnost rada sednica organa i tela komore; redovno informisanje članova o radu komore – informisanje članova komore se pre svega odnosi na informisanje o odlukama, stavovima i predlozima usvojenim od strane organa komore, a koji mogu biti od značaja za članove komore. objavljivanje odluka organa komore u glasilu komore; objavljivanje na internet strani komore – ovaj oblik objavljivanja može i treba da obuhvati znatno veći broj informacija od onih koje se objavljuju u Službenom listu komore; saradnju sa medijima – komore treba tesno da sarađuju sa medijima, što obuhvata davanje odgovora na konkretna pitanja vezana za rad i aktivnosti komore, davanje izjava, komentara, intervjua i gostovanja u medijima nadležnih lica iz komore; međusobno informisanje između komora, a posebno o poslovima od zajedničkog interesa; izdavanje brošura, časopisa i drugih publikacija. Komora svojim opštim aktom treba da definiše koje informacije i isprave predstavljaju poslovnu tajnu, rukovodeći se prevashodno sopstvenim interesima, a lica na rukovodećim položajima u komori moraju biti odgovorna za štetu prouzrokovanu komori odavanjem poslovne tajne protivno odredbama opšteg akta.

Čl. 57–59.– ovim članovima uređuje se da će Privredna komora Srbije, Privredna komora Vojvodine, Privredna komora Kosova i Metohije, Privredna komora Beograda i regionalne privredne komore uskladiti svoju organizaciju, akta i rad sa odredbama Zakona, u roku od godinu dana od dana njegovog stupanja na snagu, da će do usklađivanja organizacije, akata i rada, komore nastaviti da rade na način i pod uslovima pod kojima su osnovane.

Takoće, predloženo je da danom stupanja na snagu Zakona Sud časti, Stalni izbrani sud i Spoljnotrgovinska arbitraža nastavljaju sa radom u skladu sa odredbama ovog zakona, kao i to da prestaje da važe Zakon o privrednim komorama („Službeni glasnik RS“, br. 65/01 i 36/09).

Član 60 – ovim članom predviđeno je stupanje na snagu ovog zakona.

IV. Procena finansijskih sredstava koja su neophodna za sprovođenje zakona

Za sprovođenje ovog zakona nije potrebno obezbediti sredstva u budžetu Republike Srbije

MEĐUNARODNA SARADNJA

Dr. Stefan Pürner[*]

THE IRZ AND ITS CONTRIBUTION TO LEGAL HARMONISATION IN PRESENT AND FUTURE EU MEMBER STATES – PART 1 – GENERAL[**]

1. INTRODUCTION

The German Foundation for International Legal Cooperation, IRZ, is an organisation which has cooperated with a large number of the present Member States of the European Union in harmonising their laws and which has been supporting the present and potential accession candidates in this task until today.[1] As the IRZ is celebrating its 20th anniversary, the following is a condensed outline of its foundation, development and tasks.[2] Presenting the IRZ in a journal which deals with European law and the harmonisation of national laws, however, also aims to look upon the practice of the Europeanisation of national laws. Furthermore, there will also be attorneys at law and other law experts among the readers of this journal who are interested in working as short or long-term experts within the field of international legal advice. They will be interested in learning about the different kinds of the

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** The IRZ and its contribution to the legal harmonisation of present and future EU Member States: Part 2 – The next issue of this journal will cover the IRZ's activity in South Eastern Europe.

1 Extensive information on the IRZ, in particular the annual reports, are available on *www.irz-stiftung.de* which provide further details in German and English on the IRZ's activities in specific countries. In addition to English and German, IRZ's website is also available in Arab and Russian.

2 To mark the occasion of this anniversary, a commemorative publication has been issued by Stefan Hülshörster, Dirk Mirow: „Deutsche Beratung bei Rechts– und Justizreformen im Ausland – 20 Jahre Deutsche Stiftung für internationale rechtliche Zusammenarbeit, Berlin 2012" [German Consultation Services assisting International Legal and Judicial Reforms – 20 years of German Foundation for International Legal Cooperation, Berlin 2012] in the following referred to as „IRZ-FS" which contains a large number of further articles about the IRZ's work in German.

respective support programmes in the overview in the presentation of the IRZ. In this context, however, it is impossible to give a detailed outline. The texts and materials included in the footnotes, however, many of which are available on the Internet, allow those who want to familiarise themselves in more detail with international legal cooperation to read more about the forms of international cooperation in general.

2. FOUNDATION, MISSION, ORGANISATIONAL STRUCTURE AND FUNDING OF THE IRZ

2.1. Foundation and Organisational Structure of the IRZ

2.1.1. Foundation

The initiative for founding the IRZ as an independent advisory institution specialising in law[3] was launched at a conference in Bonn on 18 and 19 November 1991, where ministers of justice of various states of East and Central Europe discussed ways for a change away from socialist and towards free democratic states based on the rule of law upon invitation of the former Federal Minister of Justice, Dr. Klaus Kinkel[4]. An organisation was established which was not supposed to „export" German law[5], but which was to provide support to the former socialist states of East and Central Europe in the spirit of partnership in the transformation of their legal systems by giving legislative advice as well as support in the basic and further training of attorneys at law.

2.1.2. Form of Organisation

Despite the designation „Foundation" in the IRZ's name, the legal form of an association according to the German law was chosen as legal form of organisation.[6] The legal form of an association is ben-

3 This specialisation is the IRZ's characteristic feature. However, it has to be pointed out that legal cooperation in Germany rests „on many shoulders", and insofar, a „decentralised approach" is taken (as the present Federal Minister of Justice, Ms. Sabine Leutheusser-Schnarrenberger put it in her message in IRZ-FS, 15 *et seq;* she also stated that the IRZ „has become a key player in international legal cooperation since its foundation")

4 Cf. Klaus Kinkel, foreword to IRZ-FS, 19.

5 Cf. Kinkel, *op. cit.* fn. 4, 20.

6 A complete list of the IRZ's members is available on http://www.irz-stiftung.de/stiftung-wir-ueber-uns/mitglieder/mitglieder.html; also compare the entry

eficial due to the structure of the IRZ's members: the members of the IRZ are namely the professional associations and interest groups of the different classical legal professions (to mention only as examples: The German Association of Judges DRB, the Federal Bar, the German Bar Association, the Federal Chamber of Notaries and the *Bund Deutscher Rechtspfleger* – association of judicial officers), a small number of companies and associations of enterprises (for instance the Association of German Chambers of Commerce and Industryas well as the German Insurance Association GDV) as well as some (few) individuals who are particularly linked to the objectives and work of the IRZ (in particular attorneys at law in prominent positions and Members of the German Bundestag). This structure enables the IRZ to draw on the expertise of these organisations and individuals in its daily work without any detours and to find also experts with rare profiles without long lead times.[7]

2.1.3. Competences and Tasks of the Employees

The task of the IRZ and its members is to match the actual needs of its partners with the advice provided by the assigned experts for which they are especially qualified due to their professional training. Most employees of the IRZ are attorneys at law; many of them speak the languages of the partner states to which they are assigned, quite a few have held legal and Slavonic chairs, and some of them also pursue academic work on the laws of the respective partner states or have even done a PhD in them.[8] Furthermore, many heads of section and project

on the IRZ in the German version of the online Wikipedia encyclopaedia.

7 Cf. Rainer Deville, Inga Todria, „Mission impossible: Die perfekte Personalauswahl bei Richtern" [Mission Impossible: The Perfect Staff Selection of Judges], IRZ-FS, 187 et. seq., who sum up their experience gathered in the search for experts having a particular profile required in a specific project in the sentence „The IRZ knows them all".

8 *Stefan Hülshörster* (the IRZ's present Deputy Director and Head of Section for Belarus, Moldova andUkraine) did his PhD on *Recht im Umbruch: Die Transformation des Rechtssystems in der Ukraine unter ausländischer Beratung* [The Law undergoing a Radical Change: The Transformation of the Legal System in Ukraine assisted by Foreign Advice], Studies of the Institute for Eastern Law, Munich, Frankfurt am Main, Berlin, Bern, Brussels, New York, Oxford, Vienna 2008. Doctoral thesis of *Julie Trappe* (General Twinning Coordinator and Head of Section for Romania and Turkey), *Romania's Dealing*

managers have gathered practical professional experience with regard to the partner states which they deal with today and/or are trained in the classical legal professions (judge, public prosecutor and attorney at law) as well as in public authorities and ministries before working for the IRZ. The employees of the IRZ responsible for the project work do not only „manage" the advice to be given to the respective foreign project partner on the basis of this qualification, but they also contribute their legal and country-specific expertise and experience. Due to these intercultural competences, they are furthermore suitable „relay stations" for the communication between the advised institutions in the foreign partner states and the mainly German experts.

2.2. The IRZ's Funding and its Fields of Activity defined by the Funding Type

2.2.1. Overview of the IRZ's Funding Sources

The work of the IRZ is funded by the Federal Ministry of Justice, the Federal Foreign Office (for South East Europe in particular from the financial contribution of the Federal Republic of Germany to the Stability Pact for South East Europe) by which the so-called bilateral work of the IRZ is funded, as well as by so-called third-party funds.[9] Third-party funds are on the one hand raised by successful tenders in legal projects awarded by the EU and the World

with its Communist Past.An Examination from a Criminal Law Perspective, Göttingen 2009. The author of this article, *Stefan Pürner* (presently Head of Section for Bosnia and Herzegovina, Macedonia, Montenegro and Serbia) did his PhD on *Die GmbH als neugeschaffene Form ausländischer Investition in Jugoslawien: Vorbedingungen, gesetzliche Regelungen, rechtliche Probleme; ein Beitrag zur wirtschaftlichen Ost-West-Zusammenarbeit in der Umbruchphase* [The German GmbH as a newly created Form of Foreign Investment in Yugoslavia: Prerequisites, Regulations, Legal Problems; a Contribution to Economic Cooperation between the East and the West in the Period of Transition], Regensburg 1992.

9 Further information on the types of EU projects implemented by the IRZ are available on the IRZ's website in German on *http://irz-stiftung.de/index.php?menuid=60&getlang=de*, in English on *http://irz-stiftung.de/en/stiftung-projects/information-eu-projects/=,* in Russian on *http://irz-stiftung.de/index.php?menuid=60&getlang=ru*, and in Arabic on *http://irz-stiftung.de/index.php?menuid=60&getlang=ar*.

Bank and their implementation, and on the other hand by so-called twinning projects.[10] These fields of activity can be described in simplified terms as follows:

2.2.2. Bilateral Work Funded by the Federal Government budget

Within the field of bilateral work, the IRZ files applications with the German Federal Government outlining the projects defined in cooperation with the foreign partners. These projects are defined and planned directly on a bilateral level between the IRZ and the respective partner institution (for instance advice on specific laws, implementation of a series of basic and further training events or the publication of expert literature). In this area, it is possible to plan tasks and their solution with the partners in a creative way, thus being relatively flexible.It is particularly possible, within the fields of work predefined in the project proposals and the financial limits defined by the approved funds, to respond quickly and flexibly to new needs and the project partners' individual initiatives (the publication of this journal, for instance, is funded from these bilateral funds). The bilateral work is also particularly sustainable since in some areas, long-term cooperation and projects are implemented within its framework. Examples are the cooperation within the field of the basic and further training with a large number of academies, including academies in South East Europe and judicial training centres.Within the bilateral work, the IRZ cooperates with resident local employees in South East Europe, whereas foreign experts only travel to the respective country for specific activities (expert talks within legislative projects, seminars and the like).

10 For general information on twinning projects in English: *http://ec.europa.eu/europeaid/where/neighbourhood/overview/twinning_en.htm*, as well as the Twinning Manual, which gives an insight into the procedure of twinning projects in English: *http://ec.europa.eu/enlargement/pdf/financial_assistance/institution_building/2012/manual_may_2012.pdfoder* and in German: *http://www.berlin.de/rbmskzl/europa/europapolitik/twining.html* as well as on twinning projects within the IRZ's sphere of activities: Julie Trappe, „EU Twinning-Projekte als Chance der internationalen Zusammenarbeit" [EU Twinning Projects as an Opportunity for International Cooperation], *IRZ-FS*, 341 *et seq*.

2.2.3 General Information About Third-Party Funded Projects

Invitations to tender are issued for third-party funded projects after being defined by the tendering institution (EU or World Bank) in cooperation with the beneficiary of such project first (e.g. a foreign ministry of justice) and after having set up a detailed work schedule. Then organisations or consortia can tender for this project pursuant to fixed tendering rules. These projects mainly run between 18 and 36 months. In most cases, a project office is established for these projects in the partner country. These projects have at least one long-term foreign expert (team leader or resident twinning advisor) who lives in the respective partner country during the whole project period. In most cases, he or she is supported by further foreign long-term or short-term experts. His or her task is to execute the tasks defined in the invitation to tender and to achieve the stipulated objectives. The work in these projects is accompanied and supervised by a supervisory body consisting of representatives of the beneficiary organisations, the partner country and the tendering organisation.

2.2.4. The IPA Programme of the EU as Main Third-Party Funded Programme

Third-party funded projects of the EU are tendered within the programme „Instrument for Pre-Accession Assistance (IPA)“[11], the legal basis of which is Council Regulation (EC) No. 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA).It provides support to countries with pending EU accession within the period of 2007 to 2013. The IPA is aimed at increasing efficiency and coherence of the assistance by providing a uniform framework for enhancing institutional capacities, cross-border cooperation as well as economic and social development and rural development. The Pre-Accession Assistance supports the stabilisation and association process of the accession candidates and potential new members, thus taking account of the particularities and procedures which they respectively undergo. This definition implies that the projects do not

11 A detailed description with many further links is available in German: *http://ec.europa.eu/regional_policy/thefunds/ipa/index_de.cfm and in English on http://ec.europa.eu/regional_policy/thefunds/ipa/index_en.cfm*.

only relate to the legal area.[12] Another distinction has to be made between technical assistance and twinning projects.[13]

2.2.5. Technical Assistance

The group of organisations eligible for third-party funded projects varies depending on the kind of project. Within the IPA Programme, there are on the one hand technical assistance projects for which also private companies (consultants) can tender. This means that the IRZ competes with profit-oriented organisations (quite successfully) in this field.

2.2.6. *Twinning*

The IRZ, however, is particularly active within the twinning area. Twinning projects[14] are also called „*Behördenpartnerschaft*" (partnership between public authorities) in German. The EU issues invitations to tender for projects to support the partner states by governmental organisations and so-called mandate bodies (to which the IRZ belongs). In this context it is not possible to give a detailed description of twinning projects.[15] However, it should be pointed out that in these programmes, public officials (civil servants, employees and also old-age pensioners) from public administrations are assigned to other

12 Information on the IPA projects in Macedonia is available in German: *http://ec.europa.eu/regional_policy/thefunds/ipa/fyrom_development_de.cfmand in English on http://ec.europa.eu/regional_policy/thefunds/ipa/fyrom_development_en.cfm.*

13 It would lead too far to outline in this article in further detail for what kind of projects technical assistance, and for what kind of projects twinning projects are (should be) chosen.The EU recently had this issue investigated by a consultancy; the respective report „Evaluation Twinning versus Technical Assistance – Final report", Rotterdam, 26 January 2011 is available on *http://ec.europa.eu/enlargement/pdf/financial_assistance/institution_building/2012/20120525_twinning_vs_ta_final_report.pdf.*

14 For general information on twinning projects in English: *http://ec.europa.eu/europeaid/where/neighbourhood/overview/twinning_en.htm* and the Twinning Manual, which gives an insight into the procedure of twinning projects in English: *http://ec.europa.eu/enlargement/pdf/financial_assistance/institution_building/2012/manual_may_2012.pdfoder* and in German: *http://www.berlin.de/rbmskzl/europa/europapolitik/twining.html* as well as on twinning projects within the IRZ's sphere of activity: Julie Trappe, *op. cit.* fn. 10, 341 *et seq*.

15 Available in German: *http://www.europa.bremen.de/twinning.*

European states outside the territory of the EU Member States or to new EU Member States for a limited period of time in order to assist their colleagues as advisors in their daily work. The assignment periods vary between one and three years for resident twinning advisors and several weeks for short-term experts. Twinning projects are aimed at supporting the set-up of administrations and, as a rule, at conveying experience with regard to EU legislation. The integral person in twinning projects is the resident twinning advisor (RTA), who is in charge of managing the assignment of short-term experts and of coordinating the project in the respective country.

3. OVERVIEW OF THE IRZ'S DEVELOPMENT [16]

3.1. Original Group of Partner Countries and EU Accession of Former Partner States

The IRZ's field of tasks changed and expanded in the first 20 years of its existence due to the recent historical developments. At the early stage, the focus was above all on the former socialist states in Central and Eastern Europe, the Russian Federation and the new independent states of the former Soviet Union (also within the „Eastern neighbourhood" as part of the European Neighbourhood Policy ENP). Consisting of eleven states[17], the group of these countries was comparably manageable compared to today.[18]

During the years up to the fifth enlargement of the EU(first part of the Eastern enlargement of the EU) in 2004, the IRZ provided support to the Baltic states Estonia, Latvia and Lithuania as well as to the Czech Republic, Hungary, Poland, Slovakia and Slovenia in many different ways with regard to the harmonisation of the legal system and legal practice to the requirements of the aquis communautaire. With

16 Further to the development of the IRZ also cf. interview with its present director, Dirk Mirow, in NJW-aktuell 26/2011 (p. 12 et. seq.), available in German: *http://irz-stiftung.de/stiftung-download/medienberichte/medienberichte.html.*

17 Kinkel, *op. cit*. fn. 4, 20.

18 With regard to the IRZ's first years also cf. Lujo Fade, „Aller Anfang ist schwer: Gründung und Anfangsjahre (Mai 1992 bis Mai 1998) der Deutschen Stiftung für internationale rechtliche Zusammenarbeit (IRZ-Stiftung)" [All Beginnings are Difficult: Foundation and Early Years (May 1992 to May 1998) of the German Foundation for International Legal Cooperation (IRZ Foundation)], *IRZ-FS*, 317 *et seq*.

the accession of these countries, the IRZ finished its activities there, apart from some few remaining activities. There are, however, still relations to these countries insofar as today future EU Member States are advised by local attorneys at law commissioned by the IRZ. Due to the specific circumstances in these countries, the IRZ, however, is still active in the EU Member States Bulgaria and Romania which acceded the EU in 2007.

3.2. Enlargement by the Stability Pact, the MEDA Region, Asia, the Arab Revolution

While on the one hand the IRZ's field of activity became smaller due to the accession of former partner states to the EU, it expanded on the other hand due to further recent historical developments. Especially the end of the bloody conflicts on the territory of former Yugoslavia should be mentioned in this context as a consequence of which the IRZ was commissioned by the German Federal Government to support Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia in their legal transformation (which turned into legal harmonisation with an increasing approximation to the EU). In the following period, states from the European-Mediterranean cooperation (MEDA Region), but also states from Central and South East Asia such as Armenia, Azerbaijan, Georgia, Kazakhstan and Uzbekistan as well as Vietnam were included in the activities. The so-called „Arab spring" finally resulted in the IRZ's reassuming its work in Egypt and Tunisia, again by order of the Federal German Government.[19]

19 Cf. Patrick Schneider, „Zusammenarbeit mit Zukunftsperspektive– Die Arbeit der IRZ in Ägypten und Tunesien" [Cooperation with Future Prospects – The IRZ's Work in Egypt and Tunisia], *Deutsche Richterzeitung* [Judges' Journal] 2012, 258 *et seq., http://irz-stiftung.de/dokumente/upload/5dbd5_schneider_driz_sept12.pdf*; Wolfgang Janisch, „Deutsche Experten für Ägypten und Tunesien: Juristische Entwicklungshelfer" [German Experts for Egypt and Tunisia: Legal Development Workers], *Süddeutsche Zeitung* of 11 May 2011, *http://www.sueddeutsche.de/politik/deutsche-experten-fuer-aegypten-und-tunesien-juristische-entwicklungshelfer–1.1095678*; *Focus online* of 25 May 2011 „Exporteur des deutschen Rechts: Fettnäpfchen tunlichst vermeiden" [Exporter of the German Law: You'd Better not Put your Foot in it], *http://www.focus.de/politik/ausland/krise-in-der-arabischen-welt/tid–22444/exporteur-des-deutschen-rechts-fettnaepfchen-tunlichst-vermeiden_aid_630664.html.* See also *http://mediacenter.dw.de/german/video/item/272553/Unterwegs_mit_deutschen_Juristen_in_Tunesien.*

It is quite remarkable, especially in times in which an efficient use of governmental funds is the order of the day, that the IRZ tackles all these tasks with surprisingly few staff. Presently, as little as45 employees work for the IRZ in Germany at the two sites in Bonn (headquarters) and Berlin who are assisted by 15 colleagues abroad.[20]

For the sake of completeness, it should be mentioned that the IRZ was recorded only as a temporary organisation in the budget of the Federal Republic of Germany until recently. This was expressed by the fact that until 2010, the funds of the IRZ were marked with the so-called „KW note" („kann wegfallen"/can be cancelled).The removal of this restriction can also be understood as an acknowledgement of the circumstance that a small and efficient organisation has meanwhile developed in the form of the IRZ whose know-how and expertise within the field of legal transformation (and harmonisation) is valuable also in the new historical contexts.

4. SELECTED ASPECTS IN CONNECTION WITH THE IRZ'S WORK

4.1. General

For lack of space, it is impossible to cover the IRZ's work exhaustively in this context.[21] For this reason, only some major aspects will be outlined here which are of particular interest to the readers of this journal.

4.2. Focus on the Rule of Law and Legal Harmonisation

The IRZ's work was originally aimed at supporting (only) ts partner states on their way to a rule-of-law state.[22] This was already a challenge in itself! When the „former socialist states" more and more turned into EU accession candidates and potential candidates, it became necessary for the IRZ to redefine its task, i.e. the mission of providing advice to the partner states. After all, this mission was not only to support these

20 Cf. Focus Online, *op. cit.* fn. 19..

21 In this context, reference is made to IRZ's commemorative publication which covers a multitude of aspects from the IRZ's work in more than 40 articles on almost 500 pages.

22 Cf. Stefan Pürner, „Vorbedingungen der internationalen Rechtsberatung durch die IRZ" [Prerequisites for International Legal Advice by the IRZ] in IRZ's commemorative publication, 349 *et seq*.

states in setting up the rule of law (also states which have not adopted the acquis may nevertheless be states governed by the rule of law), but specifically to provide support in the harmonisation of national law with the acquis. As can be seen from today's EU Member States which have harmonised their legal system, amongst other things, in cooperation with the IRZ, the IRZ Foundation is well prepared for this task.

4.3. Importance of the German Law

The harmonisation of national laws raises many questions since there is no uniform way towards harmonisation, because in particular the EU Directives give considerable leeway in the harmonisation of a national law with regard to its implementation. For this reason, it is quite natural that the way towards a harmonised law and its contents is not automatically defined. As we are considering a German organisation which provides support in legal harmonisation, we will only deal with the question of the importance of German law in the IRZ's work,[23] especially as there has been a „competition of legal systems", in particular between Anglo-American and Continental-European „providers", in the transformation states for many years now.[24]

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23 The question whether and how offensively Germany and German organisations should represent the German law abroad was and still is intensively discussed in Germany for some time. Unfortunately, this discussion cannot be covered in further detail here. However, reference is made to the initiative „Law made in Germany" which has meanwhile been launched in this context by various German legal organisations, which sets out the advantages of the German law as a response to respective efforts on the Anglo-American part to present the advantages of Anglo-American law. (cf. the website on this initiative on *http://www.lawmadeingermany.de/archiv.htm*; a critical comment on this initiative by Alexander F. Peter, „Warum die Initiative „Law – Made in Germany" bislang zum Scheitern verurteilt ist" [Why the Initiative „Law–Made in Germany" has so far been doomed to Failure], *Juristenzeitung* 2011, 939 *et. seq*, whose reasoning, however, is not entirely comprehensible. In particular his or her doubts, whether the German law is actually welcome by the target group, is not entirely comprehensible in view of the situation and legal tradition in South East Europe.

24 Further to this topic from the view of the local project work cf. Stefan Hülshörster „Konkurrenz der Rechtsordnungen" [Competition of Legal Systems], *Zeitschrift für Wirtschaft und Recht in Osteuropa* [Journal for Commerce and Law in Eastern Europe] 2011, 191 *et. seq.*, *http://www.irz-stiftung.de/dokumente/upload/74896_wiro_06_2011_irz.pdf*. Interesting in this context is also Menno Aden „Law Made in Germany", *Recht der internationalen Wirtschaft* [International Commercial Law] 2012, issue 1–2, 1, who also covers practical

It should be pointed out in this context that as a matter of fact the German law plays an important role in the advice given by the IRZ as a German organisation in other states. However, it is not about engaging in a „legal export" or „legal imperialism" or adopting the German law „wholesale" in another country. The objective is rather to find solutions together with the partners which are also feasible for the actual situation in the respective country.[25] In this respect, the IRZ and its experts are quite aware of the fact that Germany is a big country with comparably good financial resources, an established legal culture (which also includes the professional self-conception of all legal professions!), a large number of courts and published court rulings and comprehensive legal literature. These are only some of the outline conditions which distinguish Germany from many transformation states which already rule out an indiscriminate adoption ofthe German law.

4.4. Reasons in Favour of the German Law as a Basis

Nevertheless, the German law plays an integral role in the advice provided by the IRZ which is expressly desired by the partner states. As the German law enjoys a very good reputation there, it is „actively demanded" by the partner states. There are a large number of factual reasons in favour of this:[26] On the one hand, the German law is already harmonised law. This may be a matter of fact, when we speak about advice given by European organisations. However, it should not be forgotten that also Anglo-American approaches are taken in the daily routine of legal reform in the transformation states and are also adopted by some states.[27] Another advantage of the German law is the fact that it is predictable, since it is codified. This is a circumstance which is definitely an advantage in the „stormy" transformation.

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advantages of the German law vis-à-vis American law (lower costs for legal advice already when drawing up contracts).

25 On this topic: Hülshörster, *op. cit*. fn. 24, 192. If the national legal tradition, the respective legal culture and the legal history are not taken into account, a legal reform will lead to nothing or will at least run the risk of having no long-term effect.

26 Cf. Stefan Pürner about the IRZ's activity in Bosnia and Herzegovina, WiRO 2011, 381 *et. seq*.

27 Cf. Hülshörster *op. cit*. fn. 25, 192.

The main reason for considering solutions on the basis of the German law in the legal transformation in the states of South East Europe, however is that it is a law which was used as a guideline not only before the socialist era, but also during this time to the extent it was possible in Socialism. Or to put it in other words: the German law (and Austrian law) as a „law of reference" includes the advantage that we remain in the former tradition, thus avoiding arbitrary breakups or „changes of the operating system".

4.5. The Importance of Cooperating with Civil Society and Non-Governmental Organisations within the IRZ's Activity

A state governed by the rule of law must be established by the state, i.e. by governmental institutions. However, this cannot be done in a patronising way but must be supported by society („those who are subjected to the law").Furthermore, it is not the case that the respective governments in the transformation states would always follow the way towards the rule of law straightforwardly and without stepping backwards. There are also examples for this among the new EU Member States. But also the „old" Member States need guardians. From this, it follows that several approaches must be taken in the advice given with regard to legal transformation rather than addressing only public bodies. For this reason, the IRZ does not only cooperate with governments and public bodies but also with NGO's. NGO's can support the „restructuring towards a rule-of-law state" at citizen level; in situations, however, in which the public bodies' will to transform their law is about to fade to a lip service, they can also become a guarantor to ensure that the rule of law is not entirely lost out of sight as a target. NGO's furthermore have a better overview of the legal reality in their respective area than contacts with official bodies, the lecture of court judgements (if procedures come to a judgement at all and the judgements can then be published) and talks with the responsible people in the public bodies can provide.

The transformation process towards the rule of law (and thus also towards the harmonisation of the national law to become a direct or indirect housemate in the joint house of the European Union) was triggered in the past, to be more specific in the late nineteen-eighties

and early nineteen-nineties. The way to this goal, however, leads far into the future,since the rule of law is no static condition, but rather a target which will never be achieved, unless the achievements made so far are put into question every day anew in the light of the developments and findings which have been made in the meantime. Furthermore, we must respond to new tasks and challenges by looking critically at the status quo. What is more, we always have to face the risk of setbacks. (There are plenty of historical examples from different historical eras in various states.)

All these problems can be tackled most efficiently by cooperating with those who have least respect for the achievements made so far, who are little impressed by historical events which had partly taken place long before they were born, and who ask the old questions anew, yet with young perseverance and with little respect for the achievements made so far. The importance of young attorneys at law for transformation results from the fact that transformation is a project which reaches *far* into the future. Actually, nothing more needs to be said about the importance of young attorneys at law in science and practice as well as of NGO's.

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Primer: N. Gavella *et al.*

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Primer: M. Povlakić, *op. cit.* fn. 4, 23.

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Primer: T. Josipović (2001a), *op. cit.* fn. 45, 53.

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Primer: M. Povlakić, *op. cit.* fn. 4, 23–34.

Primer: T. Josipović (2001a), *op. cit.* fn. 45, 53 *i dalje.*

6. Ukoliko se citira podatak s iste strane iz istog dela kao u prethodnoj fusnoti, koristi se latinična skraćenica za ibidem u kurzivu, s tačkom na kraju (bez navođenja prezimena i imena autora).

Primer: *Ibid.*

Ukoliko se citira podatak iz istog dela kao u prethodnoj fus– noti, ali s različite strane, koristi se latinična skraćenica ibid, navodi se odgovarajuća strana i stavlja tačka na kraju.

Primer: *Ibid., 23.*

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Primer: A. Buchanan, „Liberalism and Group Rights", *Essays in Honour of Joel Feinberg* (eds. J. L. Coleman, A. Buchanan), Cambridge University Press, Cambridge 1994, 1–15.

8. **Propisi** se navode punim nazivom u kurentu – obično, potom se kurzivom navodi glasilo u kome je propis objavljen, a posle zareza broj i godina objavljivanja, ponovo u kurentu – obično. Ukoliko će se pomenuti zakon citirati i kasnije, prilikom prvog pominjanja posle crte navodi se skraćenica pod kojom će se propis dalje pojavljivati.

Primer: Zakon o obligacionim odnosima – ZOO, Službeni list SFRJ, br. 29/78 ili Zakon o izvršnom postupku – ZIP, Službeni glasnik RS, br. 125/04.

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Primer: Zakon o osnovama sistema vaspitanja i obrazovanja, Službeni glasnik RS, br. 62/03, 64/03, 58/04 i 62/04.

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12. Citiranje tekstova s **interneta** treba da sadrži naziv citiranog teksta, adresu internet stranice ispisanu kurzivom i datum pristupa stranici.

Primer: J. Basedow *et. al.*, Ein europäisches Vertragsrecht kommt – aber zu welchem Preis?, *http://faz.net/–019m8q*, 24. maj 2007.

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Example: M. Povlakić, "Fiducijarno vlasništvo u usporednom pravu i sudskoj praksi", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1/2003, 196.

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Example: M. Petrović, M. Popović, V. Ilić,

If there are more than three authors, only the first name should be cited, followed by the abbreviation *et alia* (*et al.*) in verso.

Example: N. Gavella *et al.*

If there is more than one place of publication, a dash is used to separate the places.

H. Koziol, P. Bydlinski, R. Bollenberger (Hrsg.), *Kurzkommentar zum ABGB, Allgemeines bürgerliches Gesetzbuch, Ehegesetz, Konsumentenschutzgesetz, IPR-Gesetz, Rom I– und Rom II-VO*, Wien – New York 2010[3].

4. **Repeated citations to the same author** should include only the first letter of his or her name, the last name, *op. cit.*fn. ... (number of the footnote of the first citation), and the number of the page.

Example: M. Povlakić, *op. cit.* fn. 4, 23.

If two or more references to the same author are cited, the year of publication should be provided in brackets. If two or more references to the same author published in the same year are cited, these should be distinguished by adding a,b,c, etc. after the year:

Example: T. Josipović (2001a), *op. cit.* fn. 45, 53.

5. If **more than one page is cited from a text** and the pages are specified, they should be separated by a dash, followed by a period. If more than one page is cited from a text but without specification, „*et seq.*" should follow the number which notes the first page.

Example: M. Povlakić, *op. cit.* fn. 4, 23–34.

Example: T. Josipović (2001a), *op. cit.* fn. 45, 53 *et seq*.

6. If the **same page of the same source was cited in the preceding footnote**, the Latin abbreviation for Ibidem should be used, in verso, followed by a period.

Example: *Ibid.*

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Example: *Ibid., 23.*

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Example: A. Buchanan, „Liberalism and Group Rights", *Essays in Honour of Joel Feinberg* (eds. J. L. Coleman, A. Buchanan), Cambridge University Press, Cambridge 1994, 1–15.

8. **Statutes and other regulations** should be provided with a complete title in recto, followed by the name of the official publication (e.g. official gazette) in verso, and then the number (volume) and year of publication in recto. In case of repeated citations, an acronym should be provided on the first mention of a given statute or other regulation.

Example: Personal Data Protection Act, *Official Gazette of the Republic of Serbia*, No. 97/08.

If the statute has been changed and supplemented, numbers and years should be given in a successive order of publishing changes and additions.

Example: Criminal Procedure Act, *Official Gazette of the Republic of Serbia*, No. 58/04, 85/05 and 115/05.

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Example: Art. 5 (1) (3); Arts. 4–12.

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11. **Latin and other foreign words and phrases** as well as **internet addresses** should be written in verso.

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Example: J. Basedow *et. al.*, Ein europäisches Vertragsrecht kommt – aber zu welchem Preis?, *http://faz.net/–019m8q*, last visited 24 May 2007.

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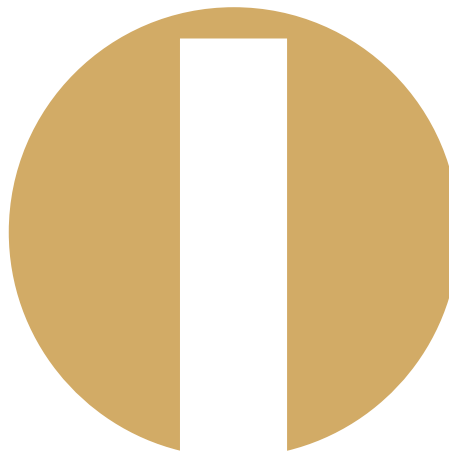

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