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Collection of studies and analyses
Second Regional Conference, Skopje, 2012
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INTRODUCTION

Dear Reader

The Civil Law Forum for South-East Europe is constituted in April 2009 by the outstanding scientists and experts in the field of Civil and Commercial Law and with the support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), by appointment of the Federal Ministry for Economic Cooperation and Development of Germany (BMZ). Since its establishment, The Civil Law Forum has been accompanying the reform processes in the countries of South East Europe towards the EU integration as well as conducting comparative analyses in various fields of Civil Law. The aim of the Civil Law Forum is to develop proposals and opinions for the reform and harmonization of the national legislations in these respective fields in the participating countries, and to monitor the reform measures in those countries from an academic and professional perspective.

The Civil Law Forum consists of the following members proven as an outstanding experts in the fields of Civil and Commercial Law: Dr. Nada Dollani (Tirana), Dr. Gale Galev (Skopje), Dr. Arsen Janevski (Skopje), Dr. Tatjana Josipović (Zagreb), Dr. Branko Morait (Banja Luka), Dr. Ardian Nuni (Tirana), Dr. Miodrag V. Orlić (Belgrade), Dr. Slobodan Perović (Belgrade), Dr. Meliha Povlakić (Sarajevo), Dr. Zoran Rašović (Podgorica) and Dr. Mihailo Velimirović (Podgorica). These eleven members from South-East Europe are supported by Dr. Christa Jessel-Holst (Max-Planck-Institute for Comparative and International Private Law, Hamburg, Germany) and, up to end of 2011, by Dr. Ulrich Drobnig.

Having a closer look on the list of Professors one would mind, why Croatia do have only one representative. Prof. Petar Simonetti was, up to his tragic death on March 11th 2012, member of the Civil Law Forum. Due to his health condition he was unable to participate in the Second Regional Conference in but had prepared a contribution, where we have the honour, to publish it with this book. All members agreed unanimously to dedicate this book to him. He was not only one of the most respected scientists in the region but active as judge at the Supreme Court of the Socialist Republic of Bosnia and Hercegovina. During the last period of his carrier he was very active in the reform of real rights in the region. E.g. he participated in the expert working group for the Law on Property Rights which is waiting for enactment in the Federation of Bosnia and Hercegovina, while it was enforced in the Republika Srpska in 2010. Being involved in legal science and practice during Former Yugoslavia but also in the newly formed States he is reflecting the recent history in the region. We lost a wonderful expert, a hard working professor and a friend.

On 25th of March 2011, the South East European Law School Network (SEELS) is established by eleven public Law Faculties from South East Europe (Tirana, Sarajevo, Zenica, Zagreb, Rijeka, Split, Belgrade, Nis, Kragujevac, Podgorica, Skopje). With the establishment of SEELS an instrument was introduced to bundle and strengthen regional cooperation of Law Faculties to support and facilitate the European integration of the countries in the region. Aiming to create cooperation with mutual advantages and to engage into cooperative research and publishing activities, the Civil Law Forum and SEELS at the Second Regional Conference in Skopje on January 11th 2012 signed the Memorandum of Understanding. Since then, the activities and operation of the Civil Law Forum is under the umbrella of the SEELS Network.
The results of the continuous research carried out within the Civil Law Forum are presented at regional conferences followed by publication of papers. So far, two regional Conferences have been organized, the First Regional Conference in Cavtat, Croatia in October 2010 and the Second Regional Conference in Skopje, in January 2012.

Hereby we would like to present you the results of the work and researches of the outstanding academics being members of the Civil Law Forum presented at the 2nd Civil Law Forum Regional Conference held on 11th January 2012 in Skopje.

The collection of articles within this Book are prepared by the members of the Civil Law Forum and supported by numerous experts, academics and young researchers from the SEELS members. The topics elaborated are divided into six parts of this Book:

1) Recent developments in the field of Civil law in South East Europe;
2) Liability for material defects;
3) Liability for legal defects;
4) Remedies for non-performance in sales contracts - Damage and Interest;
5) E-conclusion of contracts; and
6) Unfair contract terms in general contract law.

The collection presents the results of the working groups in two volumes: Volume I published in English language and Volume II published in local languages. In each of the two Volumes, at the beginning the contributions per each of the six topics are given by the members of the Civil Law Forum, followed in Annexes with the comparative analyses and country reports prepared by the young researchers from the SEELS members.

Last but not least, GIZ Open Regional Fund for South East Europe - Legal Reform express its gratitude to the members of the Civil Law Forum for South-East Europe and to the distinguished legal experts for their contributions in setting up this compilation of legal texts and analysis in various aspects of the Civil Law. In addition, special thank to the young researchers from the academic community of South East Europe for their contributions. We strongly believe this collection will contribute to the further academic researches and developments of the Civil Law in South East Europe and its approximation with the EU Law. We look forward to continuing the successful regional cooperation of the civil law experts within the SEELS Network in the period to come.

Skopje, November 2012

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NATURAL RIGHTS ON CONSTRUCTION LAND

Introduction

This paper discusses the various legal institutes of the right to own a building or other independent permanent construction on publicly owned land and on privately owned land; establishment, duration and termination (ex lege) of the rights that separate the building or other permanent construction from the land, on the duration and cessation of these rights, and in particular their legal nature. Special attention is given to the historical and contemporary comparison of these rights. The purpose of this comparison is to answer the question whether the right of ownership and legal unity of the building constructed on the land could have been achieved by transformation of the permanent right of usage of public owned construction land into a right to build, as well was transformation of the right to usage for purposes of construction into a right to build.

1. General on the nature of the right of usage on public owned construction land

All rights of ownership of construction land in public ownership were characterized by one common characteristic: their fundamental authorization was the right to appropriate the natural characteristics of the construction land in accordance with the legal and spatial purpose of the land and public interest, which was determined and protected with the urbanism legal regime. Since the city rent belonged to the municipality, as provided in the Constitution of SRB&H\(^1\) (Article 91) and LCL of SRB&H from 1986 (Article 8), i.e. with the Constitution of SRC\(^2\), the holders of the right to use of public owned construction land were not authorized to appropriate it on any legal basis. This is the reason why turnover of undeveloped construction land was so excluded or limited only to the closest relatives and martial partners that it was impossible to individually take the city rent in legal traffic. City rent could also be taken in the turnover of developed construction land, by transferring the permanent right of usage of land with the transfer of the right of ownership of the building, but this turnover was an inevitable consequence of the freedom of disposal of the right to ownership on the construction object, i.e. the freedom of disposal, although partially limited, of public owned construction objects, that the public legal entities had at their disposal. In this case the appropriation of city rent could only be prevented with the aid of efficient legal (taxation) instruments, and especially with the tax on turnover of property rights. Analysis of the basis and forms of taxation of city rent is outside the scope of this work.

The particularities of the right of usage for construction and the permanent right of usage will be seen if a comparison is made with the analogous rights in the ownership legal systems. In order to implement this comparison as successfully as possible, it is necessary to first point out the

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\(^1\) Constitution of the Socialist Republic of Bosnia and Herzegovina, Official Gazette SR B&H, no. 4/74, corr. 10/74.

\(^2\) Article of the Constitution of the Socialist Republic of Croatia Official Gazette and Article of the Law on Construction Land of SRC.
mutual differences of these two rights on public owned construction land and their particular characteristics.

2. Differences between the right of usage for construction and permanent right of usage

The right of use of land for construction authorized the holder to build a construction object on public owned construction land predicted in the act on allocation of land, i.e. in the contract for regulating this right and related obligations therewith, with approval for building (construction permit), which determines the modalities and conditions for execution of the right of use for construction. The right of use for construction ceased with the finishing of construction of the predicted construction object, in order for the permanent right of usage to come in to effect, which legally separates the construction object and the land. The right of usage for construction did not appear with the demolishing or removal of the construction object, unless that was explicitly provided or when the law gave priority right to the building owner to build another building on that same land (Article 43 of the LCL from 1986) in accordance with the relevant spatial plan or other urbanism act.

The permanent right of usage that legally separated the building from the public owned land, in principle could not be acquired on the manner of origin, without the right to use for construction and construction permit. In another place it was determined that for acquisition of the right of permanent usage it is necessary to have approval for construction issues by the competent body, but this right could only be given to the carrier of the right of usage for construction on public owned construction land. The construction object built without an approval for construction otherwise had a temporary character, and temporary construction objects are individual objects, individual objects of the right to ownership (disposal) and they were not a component part of the land, although they were not separated from the land with a permanent right of usage. The permanent right of usage, opposite the land divided only the permanent construction object, and for the construction object to have this characteristic it was not enough for it to have been constructed only with the intention to remain in the location where it was built and to be objectively durable in regards to its purpose, but in addition to this it was requested that it is built with a construction permit. This means that the subsequent legalization of illegally built construction objects on public owned construction land established also the right to usage. According to this, legalization of illegal construction contained two acts: subsequent approval (construction permit) and establishing of the right of permanent use. However, the very subsequent approval for construction implicitly contained an act on establishing the right to permanent use according to the law, because the legalized object is permanent, if it was not constructed with the purpose of being removed and if it was intended for a permanent purpose, and the permanent objects according to the law are separated from public owned land only with the permanent right of usage.

The right of usage for construction differed from the permanent right of usage not only according to its content, purpose, manner of establishment, reasons and manner of termination, but also in its legal nature. The right to use for construction was an independent right: it was, in principle, a strictly personal right, because it could not be sold, inherited or burdened; it could be transferred only to certain categories of physical entities: marital partner and close relatives explicitly determined by law, and on other persons according to the LCL in SR B&H, only in the case when a certain

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3 Simonetti, P., Rights on construction land (1945-2007), Faculty of Law of the University in Rijeka, 2008, p.
5 Simonetti, P., Building on land in the ownership of someone else, Svjetlost, Sarajevo, 1982, quote, pp. 56.-63.
6 Article 187, line 3, LSP SRB&H, Official Gazette SRB&H 13/74 and 21/81; Article 238 of the consolidated text and analogous provisions in the socialist republics and socialist autonomous regions.
part of the construction works of the building was performed together with a construction permit. The permanent right of use was connected to the right of ownership of the building and in legal traffic separated the legal destiny of the right of ownership of the building. The sale, burdening or inheriting of the right to ownership of the construction object also sold, burdened or inherited the permanent right of use that separated this object from the land. The permanent right of use existed as long as the permanent building existed and if it ceased according to law with the removal or demolishing of the building (Article 12 paragraph 1 of the LORR (Law on ownership and other real rights), unless otherwise provided by law. The object of the right of use for construction was undeveloped public owned construction land, i.e. the land surface that in the spatial plan or other acts of spatial planning was intended for construction of a certain construction object – that is a construction lot. The object for permanent use was the developed construction land, i.e. that part of the land covered by the construction object, as well as the land surface that serves the regular use of the construction object (Article 12 paragraph 1 of LORR). Thus, although the surface of the construction land as an object of both of the rights coincided in principle, there was a difference because the rights to developed and undeveloped construction land were subjected to various limitations. Although the permanent right of use was related to the right of ownership ((disposal) of the public owned building) on the construction object, these two rights had two completely different objects. The object of the right of ownership (disposal) was a building or other construction object separated from the land, and the object of permanent use was the construction lot on which the permanent building existed or other construction object legally separated from the land. This “paradox”, that two rights with different object create a legal unity, was a consequence of the legal characteristics, i.e. the function of the permanent right of use, which served as a legal catalyst to perfectly separate the land and permanent construction object into two completely independent real-estates. The land remains in public ownership and the building as an object of ownership right, due to the permanent right of use was a part of the assets of the holder of the permanent right of use, certain public legal entity as the object of its right of disposal. This title, provided in the Law on ownership of buildings and separate parts of buildings (1959) remained until the transformation into public ownership. Land was out of circulation, and the construction objects with permanent right of use – in circulation (Article 2 paragraph 3 and Article 5 LTLB (Law on turnover of land and buildings from 1954).  

When it is said that the permanent right of use was related to the right of ownership (disposal) of the construction object, we only point out that it was impossible to imagine a separate right of ownership (disposal) of a permanent construction object on public owned land without the permanent right of use. It is not said that these were two identical rights or that the permanent right of use was authorization of the right of ownership (disposal) of the construction object. It is exactly the fact that these two rights had different objects and that the right of permanent use neutralized the legal attraction force of the land indicates that these were two different rights, but which were placed in such a mutual connection that they represented and inseparable tandem, and in this sense it is said that the permanent right of use is connected to the right of ownership (disposal) of the construction object. However, when the right of ownership (disposal) of the construction object is seen statically, then the right of permanent use is shown as a precondition for this right. But, because in legal traffic the permanent right of use had the same legal destiny as the right of ownership (disposal) of the construction object as its necessary companion, the connection between these two rights is desig-
nated as an inseparable legal unity that lasted from the moment of establishing the right to ownership (disposal) of the construction object, i.e. from its separation to the collapse of this object. There was no right of ownership (disposal) on the permanent construction objects as an independent real-estate without the permanent right of use of public owned construction land. These two rights related to one another as two parallel rights, and not as a main and secondary right: they moved in the legal traffic in an inseparable legal relationship.\(^\text{10}\)

In legal literature the right to use for construction and right to permanent use were frequently equalized.\(^\text{11}\) This was contributed to by the common legal term for both rights – right of use, and much more the fact that there was no adequate delineation of the different content and legal nature of these two rights. In addition to this, in legal science there is the concept of the right to construction from Austrian and German law, which is significantly different from the right of use for construction and permanent right of use of public owned construction land.

In continuation the discussion will focus on these two rights because the legal institute of the construction (Article 286 – 302 LRPR (Law on Real Property Rights) RS\(^\text{12}\), or Article 300 - 316 of the Draft of FB&H\(^\text{13}\), as well as in the Republic of Croatia (Article 280 – 296 LO (Law on Ownership))\(^\text{14}\), has been provisioned according to the institute of Baurecht\(^\text{15}\) – right to build, which is essentially similar to the German institute of Erbbaurecht – succession right to build.\(^\text{16}\)

### 3. Comparison of the right to use for construction and permanent right to use with the right of construction in private ownership systems

#### 3.1. German, Austrian, Croatian and Bosnian right of construction

The German successive right to build and Austrian right to build (which due to their almost identical legal nature are termed in this discussion with the common term as: right to build), besides the fact that they are real rights on some land are also, legally, independent incorporeal things – real estate,\(^\text{17}\) and the construction object belongs to them, i.e. their accessory, Zuwacks according to Austrian law, or an important component part according to German terminology. Since the existence of the main thing does not depend on its accessory, so thus the existence of the right to build (main thing) does not depend on the existence of the construction object (accessory), but just the opposite – the legal independence of the construction object depends on the existence of the right to build. If not otherwise regulated in the act on establishing the right to build, when a construction

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\(^{10}\) In this sense the Adminippative Court of the Republic of Croatia decides that the user of expropriation acquires the right of use of land for ‘construction or performing works for which the expropriation was made, and there is no need to specially award the land on which the expropriated building is located’ (Us 2423/90, from 3 October 1990).


\(^{13}\) Draft of the Law on real property rights of FB&H (abbreviated Draft LRPR FB&H) was published in the Almanac of works IV, International meeting on civil and trade legislation and practice, Neum, June 2006, issued by the Faculty of Law of the University in Mostar and the Faculty of Law of the University in Split, Mostar, 2006.

\(^{14}\) Law on ownership and other real property rights, Official Gazette 91/96, 73/00, 114/01, 79/06, 141/06, 141/08, 38/09, 153/09.


\(^{17}\) In German and Austrian law and legal science this real right is considered as an incorporeal thing or embodied right.
NATURAL RIGHTS ON CONSTRUCTION LAND

object is taken down or demolished, the right to construction does not cease, but its carrier can make another construction object on this construction plot as defined in the act on establishing the right to build. If the right to build ceases, in general due to passage of time or due to fulfillment of the termination condition, also shall cease the right of ownership of the carrier of the right of construction on the construction object that as an accessory comes into the ownership of the land owner (the land legally attracts the construction object). At the moment of cessation of the right to use for construction, the construction object by force of law becomes an accessory to the land: who is at that moment the owner of the land he also becomes the owner of the construction object. If the land remains in public ownership after the cessation of the permanent right of use of the holder thus far, a permanent right of use of the new owner (holder of the disposal right) is concluded over the construction object.

If there was no construction of the term of incorporeal thing (a right that is embodied), it would be impossible to imagine that the construction object is an accessory to the right of construction. Bearing in mind that the right of construction is “second land” in the legal sense, i.e. the “main thing”, the building is an “accessory” or important component part of the “main thing” as expressed in German law.

Croatian and Bosnian (of the Bosnian entities) construction law also has a double legal effect. It is at the same time a limited real right on somebody’s property and independent real-estate «from the viewpoint of law», Any building erected or to be erected on a piece of land that is burdened with the right to build is a component part of such right, «as if it were the land itself».

The right to build is thus the «main thing», and the building is its accessory «accessorium». According to this the right build terminating the attracting legal power of the land, only takes over the role of the land. This means that the right to build does not terminate the principle superficies solo cedit because it comes instead of the land: it legally attracts the building equally as the land that is not burdened by it. The right to build and the building make a unique real-estate, a legal monolith. The legal relationship between the right to build and the building is stronger than the real connection between the land and the building, because while the land and the building are separated or may be separated by the right to build, there is no right that can fully separate the right to build and the building as a whole. There is only one exception, but it does not concern the building as a whole but only the part of the building crossing over to the neighboring land. In case of crossing of the border due to construction a right of real servitude is established that separates this part of the building also from the neighboring land burdened by the right to build in favor of the other person (Articles 155 paragraph 2 and 157 LOORR; Article 162 paragraph 1 and 163 LRPR RS).

3.2. Permanent right of use

The permanent right of use, however, did not exist independently of the construction object but, as was mentioned, it was created with the legal separation of the public owned construction land and the construction object or with the building of a construction object based on the right of use for building and with approval for building. Because destruction of the accessory does not mean destruction of the main thing, and that with the destruction or removal of construction object the permanent right of use ceased, this right could not be considered a main thing as is considered the right of building in Austrian and German law, even if it was treated as an embodied right. The permanent right of use could not be treated as embodied right exactly because it did not take over the...
role of right of ownership on the land, which is taken in German and Austrian law – “juristic land”\(^{19}\), i.e. right to build.

In another place it has been concluded that the permanent right of use could not last longer than the construction object – and this is a rule without exceptions, that does not cease before the demolishing or removing of the construction object – and this was a rule with an exception. The permanent right of use would namely cease when the construction plot would be physically destroyed, e.g. due to floods, landslides, and the destruction of the construction plot causes an imminent physical destruction of the construction object. The construction plot could be destroyed either due to factual changes (sliding or settling of land, landslide etc.) or legal changes (revision of the implementation plan or another act of the urbanism regulation). In the first case, the competent administration body ordered the removal of the construction object that was in a decrepit condition, for safety reasons, and in the other case because with the amendments to the implementation plan or another act of the urbanism regulation, which would bi done for public interest, the existing construction object could not stand on that land any more. In this case a decision was adopted on the removal of the construction object with adequate compensation. The permanent right of use would cease when the decision on removal of the construction object comes into power. After that – until the demolishing – the construction object would be kept at the land as a temporary construction object, and such objects were autonomous objects of the right of ownership (disposal), although they were not separated from the land by a permanent right of usage, because due to loss of the characteristic of permanence they were legally separated from the land according to the law without permanent right of usage.\(^{20}\) Permanent right of usage, as previously concluded, was established only for permanent construction objects built in accordance with the law (Article 12 paragraph 1 of the LORR). However, if the construction object that has lost its permanence was registered in the land registry, and that change could not be seen in the land registry, the principle of protection of the trust in the land registry protects any person that uses it in good faith. Thus, the initiation of the procedure for any reason (expropriation, decision on demolishing due to endangering safety of persons and property…) may be completed by adopting a decision for removal and must be recorded in the land registry. In that case nobody can claim permanence of the construction object.

3.3. Right to build in RS and FB&H de lege ferenda

As previously mentioned, the legal institute of the right to build is regulated in the Law on real property rights of the Republic of Srpska (Article 286 – 302), and the Draft LRPR of FB&H (Article 300 – 316) according to the Austrian institute of the right to build (Baurecht) and the similar German succession right to build (Erbbaurecht). The right to build is a real right on somebody’s land authorizing its holder to have his own building on the surface of the land or under it, and the ordinary owner is obliged to endure this (Article 286 paragraph 1, i.e. 301 paragraph 1). At the same time, the right to build in the legal sense is equalized with a real-estate (Article 286 paragraph 2, i.e. Article 300 paragraph 2). Thus the building that is separated from the land by the right to build belongs to it as it were the land (Article 286 paragraph 3, i.e. Article 300 paragraph 3). The building is legally separated from the land and with the right to build it is an independent real-estate, whether it was built on the right to build or whether after construction it was separated by it from the land. The existing

\(^{19}\) In our legal science the opinion was given that the right of ownership of a construction object is a component part of the right to use for building on public owned construction land, Vedriš M., Basics of property law, quote, pp. 207, because no fundamental difference was seen between the permanent right of use and the Austrian right to build (Baurecht), i.e. the German succession right to build (Erbbaurecht).

\(^{20}\) In the context of the institute of the right to build (usage for building) LCL predicted the cessation of the right to build due to amendments of the implementation plan (Article 53 paragraph 2). However, this did not exclude the possibility of loss of permanent usage right that belonged to the owner of the legally built building, unless there was reason for expropriation.
building is thus separated from the land with the establishment of the right to build. The building cannot be separated from the right to build on any legal basis, and is transferred together with it to another persons, inherited or burdened (Article 291 paragraph 3, i.e. Article 305 paragraph 3). The right to build is in legal traffic, before and after the construction of the building. It is not limited in time by law, but can be limited with a legal act on the establishment of the right to build or its content can be altered – with a deadline or condition (Article 298, i.e. Article 312). The holder of the right to build is the owner of the building, and regarding the land burdened with the right to build he has the rights and obligations of a “usufructor” (Article 287 paragraph 1, i.e. Article 301 paragraph 1). The right to build cannot be separated from the land it burdens, and if any person acquires the right of ownership of the burdened land on any basis shall also acquire land burdened with the right to build, unless otherwise provided by law” (Article 303).

3.4. Right to build in the Brčko District of Bosnia and Herzegovina

The right to build in the Brčko District of Bosnia and Herzegovina is regulated in the Law on ownership and other real rights of the District – hereinafter LOORR BD (Article 74 - 90), also according to the example of the Austrian and German law. According to this, in LOORR BD the right to build is legally equalized with the real-estate (Article 74 paragraph 2). According to this the building is an accessory to the right to build, as if it was the land, and it is legally separated from the land burdened with the right to build. Although the carrier of the right to build has the “rights and obligations of the usufructor”, he is the owner of the building built on the right to build or with it separated existing building from the land (Article 75 paragraph 1). The building on the surface or under it with a right to build shall be an independent real-estate, legally separated from the land (Article 74 paragraph 1). On the other hand, the right to build cannot be separated from the land it burdens. This means that the right to build is at the same time a real right on somebody’s land: somebody else’s or own land (Article 77 and 78 paragraph 2). The building also cannot be separated from the right to build (Article 79 paragraph 3), nor the right to build from the land. The right to build is in legal traffic “unless otherwise regulated” (Article 79 paragraph 1), and is transferred, inherited and burdened together with the building. “Opposing provisions of the contract shall be void” (Article 79 paragraph 3). The right to build can be burdened with service, real burdens and collateral law (Article 79 paragraph 2).

4. Comparison with Superficiary Law

The right to use for building and permanent right to use on public owned construction land were very different from the Italian superficiary law (diritto di superficie). Foremost, superficiary law is in legal traffic and according to an explicit legal provision it can be mortgaged (Article 2810 paragraph 1 point 3 and 2816 Codice civile). Superficiary law neutralizes the attraction power of the land, but in difference to Austrian and German building law it does not take over the role of land, and the construction object is not an accessory to this right or the land, but a fully independent real-estate. On the constructed land superficiary law only serves to divide the legal unity of the land and


22 Law on ownership and other real rights of Brčko District, Official Gazette of Brčko District B&H 11/01, 8/03, 40/04.

23 Povlakić M., Transformation of real property law in Bosnia and Herzegovina, Faculty of Law University in Sarajevo, 2009, pp. 162-165.

24 Institute of Italian superficiary law «Della superficie» is regulated by Codice civile (Article 952 – 956), Book three is in power since 28 October 1941.
building. Thus, in superficiary law two authorizations must be differentiated: right to build (diritto di costruire) and right to hold own building on another person’s land (diritto di mantenere la costruzione sul suolo altrui). This second authorization is fundamental and permanent, whereas the first one does not have to exist when the construction object was already built. If it does exist, it is the right to rebuilding (diritto di ricostruire), in state of suspension (in stato di quiscenza) until the fulfillment of the postponed condition. However, superficiary law on undeveloped construction land always contains two authorizations: the first authorization is real, because it gives the holder the right to build a building on another person’s land, and the other one is virtual – until the building is built, which it legally separates from the land.

Here we have one comparison: the two authorizations of superficiary law at first glance correspond to the two different subjective rights to construction land in public ownership: the right to use for building and permanent right to use. The difference is important because the right to use for building on public owned construction land was a strict individual right and the superficiary right is in legal traffic. Because of the fact that superficiary right is in legal traffic, before and after the construction, there is a single right with two different authorizations. Separation of the right of use for building from the permanent right of use was a necessary consequence of the fact that the first right was outside of traffic, and the other ones, just as the right of ownership (disposal) of the building, in traffic. In addition to this, superficiary law (the right to hold own building on another person’s land), in discrepancy to permanent right of use is a fully independent right. It is not an accessory or component part of the right of ownership of a construction object, nor is the right of ownership of a construction object its component part or accessory. Thus, the superficiary right exists independently of the construction object. It does not cease with the demolishing or removal of the construction object, unless the act of establishment excludes the right to rebuilding, or in another opinion, if the right to rebuilding is not explicitly established (diritto di ricostruire).25 26

Opposed to this, by removing or demolishing of the construction object the permanent right of usage ceased, but the owner of the removed building, according to certain legal preconditions, had priority right of use for building, i.e. right to rebuild, which was not actually different from the priority right to use for building, because the priority right to use for building is only a transformation right.

5. Important differences between the right to use for building, superficiary right and right to build

The Croatian, Austrian and German right to build, as well as the right to build in RS and BD, and the superficiary right (Italian, Spanish, French etc.) are real rights on another person’s land. They limit the right of ownership of the everyday land owner. The land owner agrees to this limitation, most frequently with an appropriate compensation that is generally paid in annual installments, and after a certain time for which this right was established he acquires the right on the construction object, with or without compensation, if it was not agreed that the holder of the right to build should

25 Codile civile is explicit: “il perimento della coppuzione non importa, salvo patto contrario, l’estinzione del diritto di superficie” (art. 954.).
remove it (superficiary right). According to this, the land owner compensates for his right most frequently with a periodic monetary compensation and eventual acquisition of the right to ownership on a certain building after a certain time (with or without compensation). His interest is generally realized by acquiring the expected material benefit, but even when the right to build is constituted (superficiary right) without compensation and without the right of acquisition of the construction object on the basis of an accessory (ex iure accesionis), he also realizes some non-material (moral) interest – to give a present to the person acquiring the right to build (superficiary right). The interest of the individual land owner can be rational or irrational – emotional, moral or, most frequently, proprietary, i.e. economic - market.

The right to use for construction was however constituted on public owned land, and the public interest cannot be irrational from the legal viewpoint. Thus it is believed that in determination of the public interest the legislators used rational reasons. Thus, the right to use for construction could not in principle be constituted without compensation. If the law due to exceptional circumstances exempted the acquirer of the right to use for building from payment of adequate compensation for acquisition of this right, then there was a legal obligation of the giver of the right to build to provide this compensation from his assets (as a rule from the budget of the socio-political community) and pay it into the appropriate fund, because the rational public interest imposes that the value of public ownership should not be diminished.

If we abstract the interest of the individual land owner after a certain time to acquire the construction object on the basis of accessory, with or without compensation, it is irrelevant to him whether the holder of the right to build (superficiary right) will build or not build a building, because his right to compensation (usually periodical) does not depend on the usage of the land (rent). If in the specific case the land owner had an interest in the holder of the right to build constructing a building, the failure to finish construction in a certain time could be constituted in legal act as a reason for loss of the right to build (termination condition).

The right to build (superficiary right) is lost due to non-performance, but not because the non-performance of this right would indirectly attack the interests of the land owner, but due to the reasons why the right of real usage is terminated, when it is not performed in the time period determined by law or legal act. The right to ownership does not suffer the limitations that are not an expression of real legally recognized interests of the holder of a right to another person’s thing. The legal order, that recognizes and protects the right to ownership, as the widest right on a certain thing, and which in principle motivates individual entrepreneurship, cannot tolerate the private legal limitations of the right to ownership in favor of those subjects that do not show an interest in executing their right on another person’s thing, and it is considered that they are showing this when they are not executing it in the time frame provided by law or legal act. For example, according to Italian law, superficiary right is also if it is not executed within 20 years time (Article 954 CC), same as the right of usage. However, this is an explicitly civil solution impassive to socialist elements.

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28 According to LCL SR B&H from 1986, “A person that has been given land for usage, shall pay a compensation for the given land and fee for development fees for that land” (Article 52 paragraph 1). With the exception of the compensation for the taken land – that same compensation shall also be paid by “the previous owner who has realized the primary right of usage of land for construction...” (Article 52 paragraph 2). LCL SRH has prescribed that the contract for giving of construction land for usage for building "must contain a deadline in which the user of the land is obliged to pay the municipality compensation for the land given to him for usage" (Article 51 paragraph 2). See Article 42 regulating the obligation for payment of the land fee.
29 This is expressed generally in the principle for prohibition of sale from public ownership, obligation for replacement for adequate land or selling for purpose of buying other land.
German succession right to build, which contains social elements, in case of constitution of right due to meeting of housing needs of "poorer classes of the population" will be lost due to non-performance only if this is contracted. It does not end by force of law even in such a case, because this would endanger the interests of mortgage creditors and other real right authorized persons with the right to build, but its holder loses it with the realization of the right of repurchase, i.e. with the transfer to the owner of the burdened land (according to German law the owner of a land may have the succession right to build on his land). According to LRPR in RS and LOORR in BD, the owner of a land may ask for termination of the right to build if the building is not constructed within ten years time (Article 299 paragraph 1; Article 88 paragraph 1), and according to Croatian law in twenty years time, Article 294 Paragraph 1 LOORR). The right to use for building on public owned construction land is not, however, in opposition to the right of management and disposal of the municipality, i.e. public interest. It was actually the instrument for realization of the public interest. The socio-political community (municipality) was interested, not only for payment of the compensation for acquisition of the right to use for building, but also for the fees for land utility development, the contribution for use of land and the construction of the predicted construction object, because it met some societal need (if it is a public owned construction object), or some social interest (if it is an object where there is right of ownership, especially a housing object).\(^{30}\) This is the reason why the socialist law of usage for building on state owned construction land was lost due to non-performance in an extremely shorter time than the time in the superficiary right of the Italian law, or the right to build in contemporary Croatian law\(^ {31}\). The loss of right to use for building was the property-legal sanction against the holder, who did not execute his right in accordance with the rational interest of the community, which was expressed in the law regulating the legal regime of public owned construction land. Termination of the right of use for construction was also a precondition to constitute this right on the same land in favor of another subject for which it is presumed that he will execute his right, i.e. that with the construction of the predicted construction object he will also meet some societal need or realized a certain societal interest. Of course, if the new authorized person did not build the building in the allotted time he was also sanctioned with loss of right to use for building.

### 6. Are the right to use for construction and permanent right of use of public owned construction land real rights

#### 6.1. General

Legal science expresses the almost unanimous opinion that the right to use (which understands the right to use for building and permanent right of use) is a real right.\(^ {32}\) This opinion was generally accepted only if these rights belonged to proprietary-legal subjects. The fact that the right of use for building and permanent right of use as property-legal expressions of public ownership are instruments for protection and realization at the same time of individual or societal interest disrupted to a certain extent their individual civil law character. This characteristic limited their individuality, exclusiveness and repulsion, which is a characteristic of classic civil rights that first of all

\(^{30}\) That construction objects on which there is right of ownership are public goods (state interes), is shown in more detail in the monography: Simonetti, P., Building on land belonging to another person, p. 168 and further.

\(^{31}\) Article 294 paragraph 1 of the Law on ownership and other real rights, prescribes the expiry of a 20 year deadlinge as reason for termination of the right to build.

\(^{32}\) Rajačić, Č., quote, p. 378; Spaić, V., Civil law..., quote, p. 672; Vedriš, M., Basics of property law, Zagreb, 1976, pp. 105, 164, 199 and 207; Pop-Georgijev, D., Development of the right to use..., quote, p. 203; Stojanović, D., Real right, quote, p. 232; Božović, S., Expropriation of real uses and leases, p. 35; Šijakova, M., quote, pp. 60 - 67.
serve the egotistical interests of their holders. But these characteristics did not in principle deprive these rights from their real law characteristics.

The object of the right to use for building and permanent right of use was the construction plot – spatially defined thing – *res certa*, and not the obligation of the giver of the right of use for building. Thus, their essential characteristics were: directness and absoluteness. The contract, which was preceded an act on the giving of the right to use for building, was the basis for the rights and obligations between the acquirer and giver of the right to use for building or another authorized social-legal person, but this did not constitute the right of use for construction. In accordance with the principle of registration, which arises from the principles of directness and absoluteness of real rights, this right was acquired with registration in the land registry or other public book, on the basis of a contract or other legal act. Before the registration only the rights and obligation arising from the contract existed. Permanent right of use that belonged to the owner of the building, also in accordance with the principle of registration, was transferred together with the construction object on the basis of a contract only with the registration in the land registry or other public book (Article 12 paragraph 2 and 33 LORR). This right, like the other real rights, was acquired together with the construction object on the basis of a legal ct, with inheritance and according to law, e.g. adverse possession (Article 12 paragraph 1 and 28 LORR). The permanent right of use, together with the construction object, could be mortgaged, although in principle, and as will be seen later, it could not be turned to money through a measure that would enable including the city right, which belong to the municipality according to law (Article 8 LCL from 1986). The circumstance that the right of use for building could not be acquired with adverse possession and that it could not be mortgaged did not bring into question its real right nature, because this limitation came from the prohibition of disposal or transfer to another person, from its characteristic of a strictly individual right of use of public owned construction land for construction of a building. The right of individual service (usufruct of use and housing) cannot be disposed of or inherited, but are typical real rights. The essential content of the right to use for building and permanent right of use, in accordance with the principle of a limited number of real rights, was determined by law.

In the “pre-amendment” period until 1971, during the «indirect self-government» when most of the legal science did not dispute the ownership-legal, i.e. property-legal concept of social ownership, i.e. property-legal concept of public ownership, the right to use and the right to dispose with public assets (pluralist concept), i.e. the right to use (monistic concept), were real rights on assets in public ownership, that belong to the working organization, i.e. another public legal entity. According to this real rights were also permanent right of use, as well as use to build, and other rights of use belonging to public legal entities on things in public ownership.

On the outside all characteristics of real rights had the right of use for building and permanent right of use, even when these rights where in the “assets” (in the language of civil law – quasi property) of a certain public legal entity (“post-amendment” period). But in this case, according to the governing interpretation they were not rights on things, and could not be put in the category of real rights. “Workers and other working people” that associated their work in an organization of
collective work or another public legal entity had in regards to the use of public owned construction land rights, obligations and responsibilities arising from the right to work with public assets and conditions for work in public ownership. This congregation of different rights, obligations and responsibilities arose from the socio-economic relation in which the worker was when he joined his work "due to" funds and conditions of work in public ownership. The collective workers and other working people with their work took over these assets and conditions of work not only to meet their individual and joint needs, but also for general societal needs. Therefore, in collective work rights, obligations and responsibilities from labor rights were created, and not from the right of ownership of things, i.e. the means for work in the narrower sense, like in the case when the characteristics of the things in public ownership (e.g. construction land) are taken by proprietary legal entities, also on the basis of rights, obligations and responsibilities outside of collective work (Article 241 LCW (Law on collective work)). Exclusion from the traffic of the right to use for building is not proof for the claim that it is not a real right belonging to the public legal entity because the same right was in principle outside of traffic also when it belonged to proprietary-legal entities. On the other hand the right of permanent use was in legal traffic together with the building or separate parts of the building (condo, apartment, business office) also when it belonged to public-legal entities. Thus in this place there is confrontation between the non-proprietary legal and proprietary legal concept.

The legal nature of the right to use for construction and permanent right of use from the viewpoint of the concept of public ownership from the time of direct self-government (after the constitutional amendments in 1971) depends on whether these rights belonged to proprietary legal entities or were a part of the assets (property) of the public legal entity. Here we will try to explain the ratio and specifics of these rights as rights of proprietary legal entities and determine in more detail their characteristics when they were a part of the assets of the public legal entity.

6.1.1. Right to dispose in legal science

According to the then predominant opinion, the right to dispose was not a subjective right of the public legal entity over the things. According to one understanding it is in its nature a legal competence or proxy (authorization) that the working collective provides with a general act – self-government agreement, to the public legal entity for inclusion in the legal traffic. The others, in the disposal right of this public legal entity recognize the legal power of this person, a potential right given by law or self-government agreement, to get involved in legal traffic. According to a third opinion, the disposal right of a public legal entity is the legal expression of its business capacity, which is determined by law,


38 Radonić, D., Right to work with public assets, NIO Univerzitetska riječ, Titograd, 1985.

39 Geršković, L., Characteristics of the legal system initiated with the Constitution from 1974, Economy and law, 1974, no. 7 - 8, p. 11; Finžgar, A., Public property in the Draft law on collective work, Self-government law, no. 3, 1976, pp. 7 - 8; Vedriš, M., Rights and obligations of collective work subject regarding the use, management and disposal of public assets, Naša zakonitost, year 31, no. 6 - 7, 1977, p. 78.

self-government agreement or statute. Business capacity is a general precondition for conclusion of business, taking over of obligations and acquisition of rights, but here the issue is the legal business of disposal of a certain thing in public ownership or the acquisition of a right on things that are transferred to public ownership from private ownership. The understanding that the “right of disposal” is outside of the right of ownership, that it is actually an expression of business capacity of a physical or legal entity, predecedes the self-government system and the theories of the nature of public ownership and it was created in the first half of the 20th century inside the bourgeois legal science. According to another opinion the right of disposal is not a competence for disposal in the sense of civil law, but, like the right of use, it is a basic form of management of things in public ownership. In this case, management includes all acts of legal disposition (ius abutendi in the boundaries of the system of public ownership and self-management).

Very few lawyers supported the opinion that the right of disposal is a subjective right over things in public ownership in the civil legal sense, which belongs to civil legal entities. According to one opinion: the right of disposal is a subjective real right, although individual, which belongs to a public legal entity. Another author saw the right of disposal in another way, through a different prism as a specific subjective right. Professor Gams, who developed the theory of divided ownership as a special form of collective ownership on things in public ownership, has argued in even more detailed that the right of disposal of public legal persons is a subjective right. Divided ownership, according to his opinion, is characteristic of all historical form of collective ownership; in the right of disposal he recognized the subjective right of public legal entities that transcends the boundaries of the term suggested by its title. According to his understanding, it is an absolute real right on things in public ownership in property (“assets”) of a certain public legal entity before and after the amendments to the Constitution from 1971.

Although public ownership according to the intentions of the Constitution of SFRY from 1974 and the LCW, the so-called “little constitution”, a negation of the right of private ownership (it establishes the principle of taking of public assets on the basis of collective work, and not on the basis of right of ownership), according to a newer opinion in reality there was “some hybrid of public legal and real legal regime… semi-real legal regime… parallel regime of belonging of things…” and this means that in this legal system there were two parallel real legal regimes. Thus, “organization of collective work and other users of public assets had a quasi ownership position regarding the things

41 Spaić, V., Legal nature of the right to dispose with public assets, Annual bulletin of the Faculty of Law in Sarajevo, 1975, pp. 403 - 404; Radonjić, D., Right to disposal of things in public ownership, Savremena administracija, Belgrade, 1977, 3rd edition, pp. 57 and 58.
42 Živadinović, Stevan, Right to disposal and property, Belgrade, 1938, with quotations from works by renowned European lawyers such as Thon, Planiol, Oetermann etc.
43 Sajovic, B., Temelji družbenolastninskih in premoženskih razmerij, Ljubljana, 1981, p. 113. In another place, discussing the processes of transformation and differentiation of the different forms of ownership in the contemporary world, Sajovic says: “Earlier we talked in many cases of non-ownership, but mostly in relation to known and generally recognized ownership systems. This determination never wanted to indicate an absence of subjects, i.e. ones entitled to ownership rights…” (Sajovic, B., On changes of ownership rights, in the almanac Changes in property law, NIO Official Gazette SR B&H, Sarajevo, NIU Official Gazette SFRY, Belgrade and Union of lawyers’ associations B&H, Sarajevo 1990, pp. 5 -18).
44 Đurović, Ljiljana, Rights and obligations of public legal entities on assets in public ownership (doctor’s thesis), Faculty of Law in Belgrade, 1978, p. 435.
46 Gams, A., Property, Naucna knjiga, Belgrade, 1988; same author: Opinions on property from the viewpoint of economy, law, sociology and philosophy in the above quoted Sarajevo almanac, Changes in property law, Sarajevo, 1990.
“in their usage"... significantly limited by the competences of the public authorities on one hand and with strongly accentuated self-government rights of the workers on the other hand"48.

The supporters of the non-proprietary legal concept meet insurmountable obstacles when they are faced with the question of the nature of legal traffic with public assets and the nature of the legal protection of such assets.

If the right of disposal is an inviolable right of a civil legal person, as is claimed by the supporters of the non-proprietary legal concept, things and not right are in legal traffic. This means that the public legal person transfers things (movable or immovable) into the «assets» of another public legal person, and does not transfer the right to things. In this case, for example, there is no liability for legal defects of the thing, which is an important characteristic of civil legal traffic. On the other hand, this concept cannot explain the legal traffic between civil legal and proprietary legal entity, because when the thing from public ownership is transferred to the property of the proprietary legal entity, this person acquires the right to ownership on it. From this it can be concluded that, from the viewpoint of the public legal entity, a right to a thing was in the traffic, which in a singular succession is transformed into a right of ownership of the proprietary legal entity. In the opposite case it would be acquisition of the right to ownership by origin (appropriation) on things in public ownership, which is not allowed by law. Besides this, if the right of disposal is a characteristic of a public legal entity, and not its subjective right, the question is which right authorizes this entity to file a complaint for court protection. According to this, the term right of disposal is a title for ownership competences that belong to the public legal entity. In this sense the supporters of the proprietary legal concept say that the right of disposal covers other competences of the public legal person, i.e. that it is a subjective right that «goes over the limitations» suggested by its title: it is an absolute real right on things in public ownership. The specifics of right of disposal of public legal entities come from the «hybrid» of the public legal and real legal regime, as is pointed out by one of the supporters of the proprietary legal concept (Gavella).

The constitutional principle of direct appropriation of characteristics of things on the basis of work is a negation of the right of ownership, but not all of the rights in public ownership. The public institute based on the «principle of work» - appropriation on the basis of work, and not on the basis of ownership, was incorporated into the market relations, equally as the proprietary legal institute was incorporated. On the market, exchangers of goods (and these are things exchanged for money or other things, movable or immovable) are recognized as carriers of the right to ownership or other real rights that give them legitimacy to dispose with these things. From the legal viewpoint on the market not only things are exchanged, but primarily rights to things (things are just objects of rights). Thus, the seller is not only liable for material, but also legal defects of the things (Articles 508 - 515 LO (Law on obligations) that came into power on 01.10.1978, and is still applied in B&H).49

By concluding a sales contract the buyer is obliged to pay the seller the purchase price because he recognizes him as the holder of the right to ownership or other real right on the thing that he wants to acquire on the basis of this contract by transfer or constitution of the right to the thing. The holder of the right to dispose with a certain thing concludes a contract of exchange with the holder of the right to dispose with another thing because he wants to acquire the right to that thing, because in

48 Gavella, N., Gliha, I., Introduction to real law, Faculty of Law, Zagreb, Institute for civil legal sciences, Zagreb, 1991, p. 15; N. Gavella: Right of ownership (property) in the system of civil law bearing in mind the segmentation of the real legal system in the aforementioned Almanac, “Changes in property law”, Sarajevo, 1990, pp. 19 - 23. This concept was somewhat similar to the concept of public ownership and the right to use «quasi property» that was formulated in the middle of the fifties Professor Legradić, see: Legradić, R., Two theories on the structure of public property, Archive of legal and social sciences, year XLI, no. 3, 1955, Belgrade, pp. 270 - 276.

the contracting party he recognizes the holder of the right to the thing. According to this the right of disposal is neither a legal authorization nor a characteristic of the public legal entity, which is outside of traffic, but a right to a thing that by selling or exchange is transferred to another public legal entity. The right of disposal over a certain thing is a precondition for acquisition (constitution) of the right of ownership on the basis of a legal business with the proprietary legal person, carrier of the disposal right. Namely, the proprietary legal person could not acquire the right to ownership of the thing on the basis of legal act with the public legal person that is not the holder of the disposal right, in the system of direct self-government of the basic right to the thing in public ownership. The selling of the thing from public ownership to private ownership on the basis of legal act transforms the right of disposal (earlier right of management, i.e. right of use) into a right of ownership, just as the right to ownership of things that are transferred from the private into public ownership is transformed in the right of disposal of things at the moment of establishment of public ownership over that thing.

No owner will give in exchange his thing for a thing in public ownership or pay the market price for it if he does not see in the contractual partner the holder of the right to the thing, which by transfer of the thing into private ownership is transformed in the right of ownership of the acquirer. The right that is in this case transformed into a right of ownership or is a precondition for acquiring the right of ownership is the right of disposal. On the basis of a legal act a right cannot be acquired that the other contracting party does not have, i.e. that cannot be transformed into an appropriate right of the acquirer.

On the basis of a legal act the right to ownership of a thing in public ownership cannot be obtained on a thing that is not at the disposal of any public legal person, because then it is a general good, or public good in general use, i.e. it is outside of the traffic and no one can acquire the right of ownership or some other real right.

6.2. Proprietary-legal entities

When the carrier of the right to use for construction or permanent right of use was a proprietary legal subject – these were individual (exclusive) rights to land in public ownership. But, as was already mentioned, not even then did those rights have the explicit characteristics of classical civil rights. They did not limit public ownership, but were actually its proprietary legal expression and an instrument for realization of its purpose. Thus the carriers of the right to use for construction and permanent right to use had at the same time the rights, obligations and responsibilities regarding the use of land, i.e. realization of its purpose in specific social circumstances in accordance with the urbanism regulation for usage of publicly owned construction land. On the other hand, by giving construction land for use for building of family apartment buildings the social community motivated the individual initiative of “working people and citizens” to invest personal funds and with the assistance of social solidarity funds (housing loans with low interest rates – loan price that was favorable due to constant effect of inflation without revalorization) to directly resolve their housing needs by building family housing buildings (individual construction) or apartments (collective construction).

Since the construction land was mostly state owned, the most frequent precondition for individual housing construction was to establish the right of use for construction in favor of individuals or their associations (collective construction etc.). The right of ownership of the citizens “to housing buildings and apartments for satisfying personal and family needs” due to special social importance, as well as a personal right, was guaranteed in the Constitution of SFRY (Article 78 paragraph 2), i.e. Constitution of SRB&H (Article 84 paragraph 2) from 1974 and the Constitution of SRC.56

56 Constitution of the Socialist Republic of Croatia.
For comparison we should state that the housing needs of “working people and citizens” were met in a different way, by establishing a housing right to an apartment in public ownership. Thus, again, with the help of a subjective right on real-estate in public ownership, which, however, did not have the characteristics of a classical real right, but an obligation right with an element of absoluteness – contra omnes. The housing right was most frequently acquired without the direct participation of the housing right holder (the apartments were built from the contributions of all employees) in discrepancy to the right of use for construction, which as a rule was acquired with a compensation paid by the acquirer. The right to an apartment in public ownership was also guaranteed with the Constitution of SFY (Article 164 paragraph 1), i.e. Constitution SRB&H (Article 171 paragraph 1) to all the citizens for meeting personal and family needs.

The housing needs of “working people and citizens” were met by constituting a right that authorized their carriers to take the utilization characteristics of the construction plot for construction of own family building and even an apartment in for example collective construction.

Since these rights were in principle outside of circulation, their carriers could not take the market value of the land nor the apartment in public ownership. The market value could not taken neither with the exchange of public apartments, which was allowed in principle only with the approval of the givers of the apartments for usage (this approval was replaced by a decision of the competent body when it was unjustifiably denied), because exchange is in kind, and the contractual obligation for payment of compensation for the exchange is illegal and thus void. The market value according to the law could not appropriated neither with the transfer of the permanent right to use, together with the sale of the construction object, because in principle the price did not include the value of the construction plot that the legal successor used later by paying a periodical fee (communal fee for use of construction land) just like his predecessor. The price only included the fee that the acquirer of the right to use paid to the giver of this right and compensation of the contribution paid for development of the land. A real possibility for appropriation of the city rent existed (it was limited with the tax on sale of rights on real-estate), but this possibility did not come from the authorizations of the permanent usage right but from factual market circumstance.

The right to use for building is, as was previously said, doubly limited. On one hand it could not be sold, inherited or burdened, and on the other hand it would be lost in a relatively short time if its essential content was not fulfilled – construction of a building. Because, as was already said, the construction of a building also realized the interest of the social community, the loss of the right to use for building due to non-performance was a sanction connected to the obligation that was immanent to this right. From this it came out that these rights cannot be equalized with classic civil rights. The housing right, an obligation right from the contract for use of an apartment in public ownership, although it was close to a real right in some elements, it maintained its basic characteristics of an obligation right, and was lost with cancellation of the contract. The contract could be

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51 See Orić, M., Housing right, in: Encyclopaedia of property law and collective work rights, NIU Official Gazette SFRY, Belgrade, 1978, T. 3, pp. 148 – 151 and the literature quoted there. According to one side the housing right was mostly an obligations right, and according to others a real right. These legal considerations are based on the previous federal Law on housing relations from 1959 (Official Gazette FNRY 16/59 and 17/59), and further laws on housing relations of the federal units from the first half of the seventies, including the Law on housing relations of SRB&H – consolidated text (Official Gazette SRB&H 14/84 and 12/87). See on this in Tumbra, T., Housing right in legislation, practice and theory; Zakonost, year 46, no.3, 1992.

52 Finžgar, A., New views on the legal regime of construction land in public ownership, Archive for legal and social sciences, 1979, no. 4 p. 507, casts doubt on the property legal nature of this right.
canceled due to failure to use the apartment, and as a rule in six months time as was prescribed in the LHR\textsuperscript{53} with exclusion of the prescribed exceptions.\textsuperscript{54}

6.3. Public-legal entities

Construction land in public ownership was a part of the “assets” of the public legal entity as: “asset” for business if it was intended for construction of business objects (Article 227 of LCW), “asset” for common consumption if it was intended to satisfy individual or joint needs of workers and other working people who joined their work in this public legal entity (Article 229 of LCW); for example, for the construction of apartment buildings or buildings for rest and recreation. Regarding the use of this land, as well as the other real-estate that were a part of the assets of a public legal entity, workers and other working people in the public legal entity had rights, obligations and responsibilities prescribed by law and self-government general act (Article 231 of LCW). The workers or other working people in the public legal entity also had rights, obligations and responsibilities regarding the permanent right of use of the building or construction object that was a component part of the “collection of assets” (property) of a public legal entity.

The right to use for building was outside of the traffic even when it was a part of the “collection of assets” of a public legal entity and the construction plot on which this right was constituted could not be transferred from the assets of one to another public legal entity. This transfer was only possible with an act of the social-political community, i.e. the municipality (Article 65 paragraph 2 LCL), so-called administrative transfer.\textsuperscript{55}

The right to use for construction that was a part of the assets of a public legal entity was also lost if it was not performed in a certain time period prescribed by law or contract for establishing of this right that was concluded on the basis of a decision for allocation of an undeveloped construction plot for construction of a building predicted in the detailed urbanism plan or another act for spatial planning. In this regard there was no practical difference whether the holder of this right was a public legal or private legal entity. There was, however, a difference in that the individual, holder of this right, directly satisfied his interest with the realization of the right, satisfying his need, whereas the workers or other working people by realizing the right of use for building at the same time met general and common needs. In the second case a wider social need was realized, and in the first case – the interest of the wider social community: every newly created value – every new building became a part of the treasury of public wealth.

There was a difference between the permanent right of use depending on the belonging to one or the other subject. The right of disposal of the permanent right of use was wider because it was inextricably connected to the right of ownership on the construction object (it was limited mainly by

\textsuperscript{53} Law on housing relations, (consolidated text), Official Gazette SRB&H 14/84, 12/87 (Article 44).

\textsuperscript{54} The housing right was also outside of traffic, and the contract on apartment use could in principle be canceled if the carrier of the housing right and the members of his family stopped using the apartment without interruptions for a period longer than 6 months (Article 44 LHR SRB&H). Similar regulations existed in the other socialist republics and autonomous egions. The one exception from the prohibition of the principle of disposal, and it is the only one, was the exchange of housing rights with the approval of the giver of the apartment for usage, i.e. decision of the competent body if this approval was unjustifiably denied (Article 29 - 31 LHR SRB&H). Similar regulations existed in the other socialist republics and socialist autonomous regions. This exception was in accordance with the freedom of movement and habitation, which was guaranteed with the Constitution from that time (Article 183 paragraph 1 of the Constitution of SFRY) and had the purpose of providing a possibility for holders of the housing right to find themselves appropriate solutions in meeting their housing needs and the housing needs of their families. This, however, did not deviate from the essence of this right, as the right to use of a thing. Thus it was illegal to pay compensation in case of exchange of housing rights.

\textsuperscript{55} There was the legal institute of forced transfer of the right to use on another public legal entity – in the general interest – according to the federal Law on expropriation, Article 65 - 72 and according to the Law on expropriation of SRB&H, Official Gazette SRB&H 35/72, 19/77, 12/87 and 38/89; Official Gazette R&B&H, 3/93 and 15/94 (consolidated text: 88 - 95).
the right of primary purchase in favor of certain subjects),\textsuperscript{56} in comparison to the permanent right of use that came, together with the construction building in the “collection of assets” of public legal entities. Additionally, and what is more important, the owner could use or not use the construction object,\textsuperscript{57} or building; maintain or not maintain it, or could even leave it to decay although this violated the social interest, because the social community did not have effective means (sanctions) to prevent such behavior.\textsuperscript{58} The workers and working people who had apartments in their assets had the right, obligation and responsibility regarding the use, protection and maintenance of the construction object that was a part of the assets of the public legal person. This right, obligation and responsibility were determined with rational social interest. In cases when these subjects did not act in accordance with public interest, the construction object could be forcefully transferred to the assets of another public legal entity. The reason was that the workers and other working people in the public legal entity by using the construction object and the other assets that were a part of the assets of the public legal entity did not only satisfy their individual needs but also joint needs, as well as the needs and not only the interests of the wider social community.\textsuperscript{59} In other words, there was a wider and more direct social interest regarding the use and maintenance of social assets, and it was more effectively protected with the adequate legal sanction.

7. Comparison of the right of use for construction and the permanent right of use and the right of servitude

The authors who agreed that the right of use for construction and the permanent right of use had a real legal nature (according to the prevalent opinion only when they belonged to proprietary legal subjects) had different opinions when they started comparing them to individual real property rights.

According to one opinion “permanent right of use” (a term for both rights) in practice received all important authorizations, including the right of disposal – selling together with the construction building.\textsuperscript{60}

According to another understanding, the right to build (also a term for both rights), which could be established according to this author on land where there was no right of ownership, is similar to personal usage – right to usufruct.\textsuperscript{61}

There was a third opinion according to which the same right was the “right to permanent use” until the construction of the construction object – personal use (this was the right to use for construction according to the terminology adopted in this debate), and after construction, real

\textsuperscript{56} According to LTR (Law on turnover of real-estate) SRB&H (Article 31 and 32). Similar provisions were contained in the law on turnover of real-estate of the other republics and socialist autonomous regions.

\textsuperscript{57} The obligation for giving under lease of uninhabited apartments could exceptionally be predicted with a regulation from the municipal council (Article 60 LHR SRB&H).

\textsuperscript{58} Only when the deterioration of construction buildings is widespread, e.g. due to large war or natural destruction or severe economic disruptions, or huge moving (resettling) of the population, the state through its bodies institutions and public enterprises reacts with the aim of protecting these buildings from deterioration. Such measures were conducted in Yugoslavia after World War II. See, for example, Law on mandatory revitalization of damaged and obsolete of started buildings in the municipalities of Bosnia and Herzegovina from 9 February 1946, Official Gazette NRB&H 7/46. In the monography: Simonetti, P., Building on another person’s land, quote, pp. 168 – 169. We have seen such legal interventions even in Roman law, they were even predicted in GCC (General Civil Code) (§ 387), and they were regulated in the then existing Civil Code of RSFSR (\textit{Russian Soviet Federative Socialist Republic}) from 1 October 1964 (Article 141).

\textsuperscript{59} In more detail, Lukić, R., Public property and self management, pp. 40 and further.

\textsuperscript{60} Janković, M., Content of the rights on construction land, Pravni život, year X, no. 6, 1961, p. 31; Sentić, M., Legal aspects of securing, determining and using construction land in cities, Komuna, no. 4, 1970, p. 16.

\textsuperscript{61} Spaić, V., Real law, Sarajevo, 1962, p. 292.
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use,\textsuperscript{62} (i.e. permanent right of use)\textsuperscript{63}, which exists as long as the construction object exists, i.e. the good used.

Supporters of the first viewpoint compared “permanent right of use” (title for both rights) with the competence of the land owner to, in the boundaries of urbanism regulation, use the land for construction, maintenance and use of construction object, and in this they forgot the other competences of the right of ownership. What was mentioned until now on the legal nature and function of these rights speaks of such a fundamental important difference between them and the right to ownership, which makes it impossible to see between these rights even a possible resemblance. Anyway, such a similarity does not even exist between superficiary right and the right to ownership, because superficiary law is only a real law on another person’s real-estate that neutralizes the attraction power of the land, that comes from the right of ownership and due to this the holder of the superficiary right has the right of ownership of the building (proprietà superficiaria). There is a similarity between the right of ownership and Austrian right to build, i.e. German succession right to build, and today the Croatian and Bosnian right of building\textsuperscript{64}, because these rights are not only rights on another person’s thing, but are at the same time the independent realized rights are the “juristic land” of the non-corporeal thing and are the primary thing in relation to the building. In brief, these rights replace the land, or as German lawyers say that the succession right to build comes instead of the land.\textsuperscript{65} In particular the right to build and permanent right of use of public owned construction land could not be compared with the right of ownership. The right to use for construction was outside of traffic, and the permanent right to use was in legal traffic only together with the right of ownership (and disposal) over the construction object as the precondition for autonomy of the construction object, and not to use it to realize in traffic the value of the construction plot, or to appropriate city rent, which according to law belongs to the socio-political community (municipality).\textsuperscript{66}

Due to the fact that the right of use for construction was established in order to meet some individual or family need – appropriation of usage characteristics of things (construction plot) for construction of a suitable construction object (most frequently a family housing building) and according to this, this right could not be taken sold, inherited or burdened, it could be compared with personal usufruct, especially with the right of use. However, there is an important difference between this right and this personal usufruct. The personal usufruct authorizes the holder to own and use another person’s thing, but he must not infringe upon its substance\textsuperscript{67} – \textit{salva rerum substantia},

\begin{itemize}
\item \textsuperscript{62} Božović, S., Expropriation of real usufruct and lease, Naša zakonitost, 1970, no. 1 p. 40.
\item \textsuperscript{63} Draft of the working group of the Ministry of finance and economy, Code on property and other real rights, Belgrade, June 2006, instead of the institute of right to build introduces a new institute of “usufruct of building” and as “real usufruct of building for needs of the service good” and as the right to the person for his own needs on a “immovable thing” of another person to “have in ownership a building or part thereof, as well as to use and utilize parts of the service good for conducting of ownershup on the building or part thereof” (Article 347 paragraph 1). These usufructs deviate from the classic civil law usufructs and even more from the right of use for construction and permanent right of use of public owned construction land.
\item \textsuperscript{64} Thus, the Draft of the working group of the Law on real property rights of the Federation of B&H/Republic of Srpska from 16. 12. 2005 (Article 300 – 315) which was published in the Almanac of works, Fourth international counselling, Current issues in civil and commercial law and legal practice, Neum, 16, 17 and 18 June 2006, Facult of Law of the University in Mostar, 2006.
\item \textsuperscript{65} See: §11 of the German act on the succession right to build (1919), and §§ 1 and 6 of the Austrian Law on the right to build. Ring, J., quote with paragraph 11 of the Act on the succession right to build.
\item \textsuperscript{66} Thus according to the system of public ownership the contract on giving into lease to a third person of a part of constructed cadaster plot for commercial activities did not have court protection. This would, namely enable the appropriation of city rent: SCB&H, Rev - 373/82 from 31 May 1983, Bulletin of the Supreme Court of B&H, no. 3/83, p. 7, no. 3.
\item \textsuperscript{67} §§ 504. GCC.
\end{itemize}
this is an important characteristic of all personal usufructs in the systems of continental Europe. The right to use for construction authorized the holder to change the existing purpose of the land, which did not belong to another subject (owner), but is a public good that no one has the right of ownership on, nor can acquire it. Construction land is intended for construction, but this intention is physically realized only with construction, and until then it could be used according to the previous purpose, also as agriculture land, if this did not disable the achieving of the urbanism purpose. The opposite, the holder of the personal usufruct could not build on the land on which he had the right of usufruct or right of use, not even when this land was predicted for construction of a construction object, which he or the owner of the land could have in ownership. Regardless, the personal usufructs ceased with the nationalization of land, and it is excluded that they can again be established after the nationalization. Classical civil legal usufructs are rights limiting the right of ownership of another person. The right of use for construction on the construction land in public ownership is a right that belongs to a certain physical or legal entity with the help of which it realizes the purpose of the public owned construction land, in accordance with the legal provisions of spatial planning and by building the appropriate building.

Permanent right of use of public owned construction land could not be compared with real usufruct, “lean the burden of your own building on another building” (§ 475 paragraph 1 point 1 GCC), because this usufruct is limitation of the right of ownership on another person's real-estate, while permanent right of use had the function of realizing public ownership on construction land.

Permanent right of use is somewhat similar to real usufruct, which divided the land in public ownership from accessories (primary good) which was on another land for service. There were, however, two differences. First, the right of usufruct separated from the land the construction object that was accessory to the primary thing, which was on another land, while the permanent right of use separated from the land only that real-estate – independent construction object. Secondly, the right of usufruct did not cease according to law, if the primary thing deteriorated and the accessory remained that it separated from the land, because in the opposite case the construction object (device, facility) which was an accessory to the plant (primary thing) would become the accessory to the “burdened” land. The right of usufruct also did not cease if the accessory deteriorated because in that case the owner of the primary thing would have to right to rebuild the devices that were accessory to this thing, i.e. which belonged to it. Opposed to this, the permanent right of use ceased with the devastation or removal of the construction object as an independent thing.

The permanent right of use was, as said previously, so closely connected to the right of ownership (disposal) of a construction object, that without that right it was impossible to legally separate the permanent construction object from the land as an individual object of the right of ownership, nor would this object without permanent right to use be in the assets (property) of the public legal entity that it belongs to as the investor or on any other legal basis. On the other hand, without a construction object there is no permanent right to use. It occurred with the construction object and lasted as long as the construction object lasted, i.e. until this object kept its characteristic

68 In certain European legal systems, however, there is the institute of specific right of usufruct for construction on another person’s land, both of individual buildings and of devices and installations (pertinence), which is still closer to the right to build than to the classical usufructs, e.g. in Swiss law (Articles 675 and 779 Code civil suisse). Thus, in the draft of the Law on property and other real rights of the Republic of Serbia (Article 347 - 357), printed in the publication Towards the new real property law of the Republic of Serbia / Auf dem Wege zu einen neuen Sachenrecht Serbiens, “publication” of the German organization for technical cooperation (GTZ) GmbH – Open regional fund for Southeastern Europe – Legal reform, Belgrade 2007, and it was developed under the leadership of Prof. V. Vodinelić.

69 Article 50 of the Law on nationalization of lease buildings and construction land that came into power on 06.12.1958; See: Finžgar, A., Usufructs and pledge rights on public assets, Pravni život, no. 3, 1979, pp. 52 - 53, which quotes the provisions on the non-termination of real usufructs also in the case of nationalization on other basis: agriculture reform, arondation (division) and confiscation, in discrepancy to personal usufructs, which terminate with the transfer of real esta (land of buildings) into public ownership.
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of permanence as a precondition for an accessory that neutralizes the real right of usage. Thus, the permanent right of usage and right of ownership (disposal) of the construction object were in a correlation. This thesis is confirmed in case of nationalization of construction land on which there is a permanent building, because according to law then the permanent right of use is established regardless of whether the building is at the same time transferred to public ownership or if it remains in private ownership.

Permanent right of use is also established in the case when the building is transferred to public property with which, according to law, the land is also transferred to public ownership. Because the building in public ownership cannot be placed on land in private ownership. The right of ownership (disposal) of a building and permanent right of use of land, regardless of how tightly they were mutually connected and conditioned, they each had their own object. The object of the permanent right of use was the public owned construction plot, whereas the object of right of ownership (disposal) – was an independent permanent construction object. This legal duality comes from the principle according to which construction land cannot be sold from public property and the independent building (construction object) can.

8. Legal nature of the temporary right to use

Temporary right of use authorized the previous owner of the nationalized undeveloped construction land to use this land from the nationalization to dispossession in principle according to the purpose thus far. This authorization is not a remnant of the right of "yesterdays" owner, but an origin right that has occurred according to the law itself at the moment of forced nationalization of undeveloped construction land. The temporary right of usage is a result of two contradictory legal facts: forces nationalization of construction land and the legal obstacle to forced dispossession of the ex owner until the creation of the possibility to put the land to its urban purpose or until the willing giving over of the land to the municipality. In this period, which would last several years and sometimes several decades, it was socially unjustified to deprive the previous owner of the direct property, i.e. further use of the land, because it was in public interest for the land to be farmed or used for other allowed useful purposes. On the other hand, the dispossession creates an obligation on the municipality for paying the fee for this land, and the municipalities could not fulfill this obligation at once due to lack of funds acquired by leasing of land to be used for construction. The land, however, could not be given in principle to the acquirer of the right to use for construction until it was developed for construction, and due to limited funds or immediate needs it was developed part by part. For the land given, in addition to the compensation for development and contribution for usage, the acquirer of the right to use for construction would pay the municipality a compensation in the amount that the municipality paid to the previous owner.

Since it expressed and ensured the realization of economic interests of an individual, the taking of the usage value of undeveloped construction land until it was put to its purpose, the temporary right of usage was a typical property right. It had certain external characteristics of precarist law (at first glance it seems that it lasts until revoking), but it was significantly different from precarist law (obligations law). Foremost, it was not an asked right but it occurred by law, and its existence (duration and termination) did not depend on the will of another proprietary legal entity, but from the occurrence of legal preconditions for dispossession, which was determined ex oficio by the governing municipality body and not the municipality as a public legal person. Dispossession was not an act at the disposal of the municipality as a public legal entity, but an administrative act of the

70 Article 1 paragraphs 2 and 3 LTLB, i.e. Article 3 paragraphs 2 and 3 of LTR SRB&H.
municipality council. The object of the temporary right to use was not a promise (as in precarios, borrowing or some other obligations law), i.e. obligation of the owner, but a thing – nationalized undeveloped construction land. Thus, it is a real right.

However, the temporary right of use was not a real right on the other person’s thing, such as for example personal servitude (the right to usufruct or right of use - usus), because it did not limit the right of another subject such as the right to usufruct limits the right of ownership – real right on another person’s thing, but temporary right of usage expressed and protected an individual interest that was in line with the public interest: for the land to be farmed or used in another allowed manner.

The municipality, which according to law managed construction land, could not have another interest that was in conflict with the wider public interest, and when such an interest did exist as a rule it would not receive legal protection. The conflict of interest would eventually occur at the moment when legal preconditions occur for putting the land to its urbanism use, but this conflict was resolved by dispossession, i.e. forceful termination of the temporary right to use or by establishing the right to use for construction in favor of a previous owner on the basis of priority right. According to this, until the occurrence of the preconditions for dispossession, i.e. for termination of the temporary right to use, this right was not in collision with the interests of the municipality as long as the interests of the municipality were in accord with the general public interest, and the rights of the municipality to this land were not limited.

An important characteristic of this temporary right of use is that it, like all the other rights to use public owned construction land (right to use for construction and permanent right to use), is a right to use, and not a right to value – a right that gives authorization to appropriate the usage value of things, i.e. natural characteristics of the land, and not the right that gave the authorization to appropriate in legal traffic city rent, due to which it was out of circulation, personal right, that could be transferred only to the marital partner, offspring, adoptees, parents and adopters (Article 24 of the LCL of SR B&H from 1986)\(^{72}\).

9. **Legal nature of the right of real usufruct**

The right of real usufruct on construction land in public ownership, as well as the right of real usufruct on private property, has two characteristics: it is a right on another person’s land (good that is used); it belongs to the everyday owner (as well as the holder of the right to use public owned land) of the service real-estate.

The right of real usufruct differed from the other rights to use of public owned construction land, i.e. the right to use and dispose of undeveloped construction land that, until being put in the urbanism purpose, was a part of the assets of a certain public legal entity. A specific difference between the right of real usufruct and the right to use construction land is that the right of real usufruct is a real right on “public owned land” on which another person has the right to use or it is a part of the “assets” of another public legal entity that had the right to use or just the right to dispose on this land. From this it can be seen that the right of real usufruct was a limited right and that it limited the right of the other authorized person, i.e. the possibility to use, when the burdened land plot was an asset of the public legal entity. Another thing is that the holder of the right of real usufruct is the owner of the service real-estate, i.e. authorized person of the primary right on the public owned real estate.

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\(^{72}\) Article 10 LCL from 1974.
10. Common characteristic of the right to use for construction, permanent right to use, temporary right to use and right to usufruct on public owned construction land

Although the right to use for construction, temporary right to use, and the right of usufruct on public owned construction land cannot be equalized with the classic real right on another person's thing, because they do not limit another person's private right of ownership of land, and these were rights on a real-estate where the right of private ownership was denied, that had the characteristics of independent real rights.

The right of real usufruct – if it belonged to a proprietary legal subject holder of a temporary right to use, right to use for construction or permanent right to use of constructed land, is equal as those rights to use of these persons on that land – was a proprietary real right, regardless of whether it burdened the land on which it exists, which was a part of the assets of the public legal entity, and even the land on which the municipality had the exclusive right of management and disposal. The real legal characteristic of all three rights of use of public owned construction land and right of real usufruct came from the fact that the object of this right – is a thing (land plot), and not promise (obligation), due to which its existence did not depend on the change of subject in the legal relation (the authorized person of the used or service good). Exactly due to this its fundamental characteristic was directness, which was the characteristic of the other real rights. From this characteristic another characteristic emerged, and that it had an effect on everybody. This other characteristic was joined with the principle of publicity, which was realized by registration in the land or other public registry in which rights on real-estate were registered.

A specific characteristic of the right to real usufruct of the holder of the right to use of a public owned construction plot was that it was in an accessory relation not only to the right to use (temporary right to use, right to use for construction, permanent right to use), i.e. to the right of disposal of the public legal entity with undeveloped construction land until putting it into its urbanism purpose, but also the right of disposal of the municipality on the service good. Thus the right of usufruct did not cease with the cessation of right to use for construction, which is a practical value, because in establishing the right use for construction on behalf of another person the right to usufruct did not have to established again.

The right to usufruct is in its general nature the right to use another person's thing and the possibility for appropriation of city rent with this right is excluded. According to this characteristic the right of usufruct is put, in the wider sense, in the right to use public owned construction land.

Summary

In the history of Roman law until modern superificary law and the right to build, i.e. German succession right to build different legal institutes were formed of the right to have own building on another person's land, in opposition to the principle superficies solo cedit. This text is limited, however, only to the most renowned contemporary institutes, including the institutes of use for construction and permanent right of use of state owned construction land. This short overview, created on the basis of wider research, shows the differences and similarities between the rights to state owned construction land, superificary right and right to build, i.e. the German succession right to build. Contemporary superificary right just like the right to build separates the building from the land as an independent real-estate, but does not attract the building as the right to build, which creates with the building an inseparable legal unity because there is no right that could separate the building from the right to build, like the right to build separates the building from the land. The legal unity of the building and the right to build do not have exceptions. On the basis of this insight we
reach the conclusion that the permanent right to use on state owned construction land in Croatian and Bosnian law (law of the entities of B&H) could only be transformed into a right to build that is joined with the right of ownership (co-ownership) of a building or separate parts of a building.

**Key words:** right to use, superficiary right, right to build, right of ownership.
I

RECENT DEVELOPMENTS IN THE FIELD OF CIVIL LAW IN SOUTH EAST EUROPE
Abstract

The present paper is an analysis of the existing legislation in the area of civil law. After the Second World War all legal regulations, meaning also those from the field of civil law, were abolished and have lost their legal force, causing thus the interruption of legal continuity with the law of pre-war Yugoslavia. With such state of affairs, which is characteristic of the countries of South East Europe, in all of these countries the civil law was regulated by particular laws covering individual areas such as family legislation, ownership and other property law rights, inheritance law, the law of obligations and other related branches of civil law.

As far as a general Civil Code in the countries of South East Europe as a universal codification is concerned, the fact is that such general civil code does exist in Albania only (it entered into force in 1994). In all other countries of that Region of Europe there is today no general civil code so that the parts of civil law are regulated by separate codes. However, it is also a fact that at present there is an intensive activity in Serbia in drafting a General Civil Code. This work is carried out on the ground of Decision of the Government of the Republic of Serbia on establishing the Commission on drafting a Civil Code (“Official Herald of the Republic of Serbia”, nr. 104/6). This Commission has published until today several parts of the draft future Code, such relating to the law of obligations, the family law and a part of inheritance law, while the drafting is actually going on concerning the general part of the future Code and the law of objects of property – material things (i.e. property law). The fact is also that the Government of the Republic of Macedonia has enacted, at the end of 2010, the Decision on establishing a Commission charged with drafting a Civil Code of Macedonia.

In other countries of South East Europe (Croatia, Bosnia and Herzegovina, and Montenegro) commissions for drafting a general civil code were not formed, but this does not imply that their theory of law is not open to such initiatives. However, as already mentioned, the area of civil law in these countries is regulated by numerous particular laws.

A brief historical review. – At the time of pre-war Yugoslavia (1918 – 1941) there existed in its territory six regimes of implementation of civil law. These were the following: 1) in the area of Croatia the valid law was the 1811 Austrian Civil Code (in its amended and original edition, depending on individual regions); 2) in the area of Montenegro the current law was the 1888 General Property Code for the Princedom of Montenegro (the work of Valtazar Bogišić); 3) in the area of Serbia the valid law has been the 1844 Serbian Civil Code, 4) in the area of the Province of Vojvodina the applicable law was the Hungarian law that has been strongly influenced by the Austrian Civil Code; 5) in the territory of Bosnia and Herzegovina the law applied was the Austrian Civil Code in the fields of obligation and property law, while in the fields of family and inheritance law this was the Sharia law as well as the customary law rules; 6) in the area of Macedonia (after the Balkan Wars) the valid legislation was the 1844 Serbian Civil Code.
After the Second World War all legal regulations, meaning also those from the civil law field were abolished, losing in such a way their legal force and interrupting the legal continuity with the law of pre-war Yugoslavia. This was done by enacting (on 25 October 1946) the Law on Invalidity of Legal Regulations Enacted prior to 6 April 1941 and During the Time of Enemy Occupation (“Official Gazette of the FPRY, nr. 86, 25 October 1946). In terms of that Law the courts were authorized to decide cases involving civil law relations by applying the general legal rules that were not contrary to the new social and legal order.

Due to such state of affairs, immediately after the Second World War (1946, 1947 and further on), certain parts of civil law have been regulated by particular laws such as the ones in the field of family law (the Basic Law on Marriage, the Guardianship Law, the Law on Adoption, the Law on Relations between Parents and Children), while later on (in 1955) the matters of inheritance law became regulated in more details. The field of obligation law was only partially regulated (for instance, the matter of statute of limitations in the sphere of creditors’ claims). This situation prevailed until 1978 when a federal Law on Obligation Relations (Contract and Torts Law) has been enacted. As far as property relations are concerned, the laws that were enacted were the so-called revolutionary laws and they concerned the matters of nationalization of certain facilities of individual economic branches as well as the nationalization of construction sites and apartment spaces under the conditions prescribed by law. All mentioned fields of civil law were regulated in the context of federal and republic legislations and under the conditions and in the way envisaged by the SFRY constitutions and other acts of legislation.

**The Existing State of Affairs in the Civil Law Field**

The General Civil Code. – As far as a general civil code in the current legislation of the countries of South East Europe is concerned, one should acknowledge the fact that the General Civil Code in these countries exists in Albania only. This Code has entered into force in 1994 (previous codes were enacted in 1929 and 1981). This Code consists of 1168 articles and it is divided into several parts such as: general part, property, obligations and other related institutes.

In all other countries of South East Europe there is at present no general civil code and individual parts of civil law are regulated by particular laws.

However, speaking of actual activities in drafting a general civil code it is necessary to mention that this work is now in progress on the ground of the Decision of the Government of Serbia on establishing a Commission charged of drafting the Civil Code (“Official Herald” of the RS, nos. 104/6 and 110/06. In the text to follow details are going to be exposed relating to the results of the Commission’s work on this Draft.

In addition to elaborating the Draft General Civil Code in the Republic of Serbia, it is also necessary to state the fact that the Government of the Republic of Macedonia has enacted on 28 December 2010 the Decision on establishing the Commission for drafting the civil code of the Republic of Macedonia (nr. 51-7683/1), nominating also the members of that Commission. This Decision was enacted in the “Official Gazette” of the Republic of Macedonia).

In other countries of South East Europe (Croatia, Bosnia and Herzegovina, Montenegro) no commissions have been formed for drafting a general civil code, which does not mean that the legal theory and practice in these countries are not open to such initiatives.

As far as drafting a Civil Code for the Republic of Serbia is concerned, following are the motives speaking in favor of enacting such civil code.
While beginning from the existing state of affairs in the legislation in the field of civil law relations, the established court practice and the developed legal theory, all necessary conditions have been created for the codification of civil law in the form of a civil code of the Republic of Serbia, for which the constitutional ground, too, is undisputed.

By all means, the work on drafting a civil code is not reduced to a simple reception of existing laws and acts in this particular field and their technical formulation in the form of a code. The work, first of all, should include an analysis of the existing legislative solutions, their making up-to-date and completing, and especially their internal harmonization and bringing into accord with contemporary tendencies of civilization of law, legal practice and legal theory – the general one and our own theory. This is why it is necessary to harmonize the corresponding legislative solutions with the solutions of ratified international conventions, and more particularly with the European Union law, where, too, there is the activity of drafting the EU Civil Law, which work is not going to be completed in a near future, but which, by all means, is effected in a parallel optics of the work on drafting a Civil Code of the Republic of Serbia. Individual solutions in this field should be brought into accord with a whole system of directives coming from the European Union which concern entirely specific matters of this law. This is today a fact, not only affecting the European Union member countries but also those countries being on the road to accession to membership of the European Union, which includes the Republic of Serbia and its legal system as well.

Serbia today is one of the rare countries which, at the beginning of the twenty first century, do not have a civil code; this is hard to understand after considering the well-known fact that Serbia has been among the first European countries that have enacted their Civil Code in nineteenth century. A civil code should be enacted not only due to an urgent need thereof, but also due to the general state of affairs in our law, due to its history and culture, as well as because it will mean a significant step towards the rule of law and the legal certainty. In other words, every codification in the area of civil law, by its very existence, increases the wealth of every legal community, contributing in such a way to the stability of legal institutes. This also helps to create indispensable conditions for building a state ruled by law. Moreover, it makes possible to all holders of rights, both citizens and legal entities to have at a single place a concentrated and a complete body of all individual civil rights.

If one begins with the fact that all codifications of private law in the European continent were permeated with achievements of legal science, and that they, right at the time of their appearance and their realization in practice, were characterized by a remarkable progress, there is a firm reason to believe that this would also be the case with the codification of civil law in the Republic of Serbia.

Taking in consideration the results of legal science and the solutions existing in comparative law, this codification should not, by any means, become an obstacle to the development of law, and particularly of the autonomous law of commercial holders of rights, which is a danger expressed in the very notion of codification conceived as a strict legislative framework. This is why a codification act should satisfy the apparently contradictory tendencies: to affirm the already developed relations of a coherent entirety of a body of law, contributing thus to higher respect of the principle of legal certainty, but also, at the same time, not closing the door to further evolution of civil law and to permanent consolidation of legal order and its perfectuation in its totality. On the contrary, it has to motivate that evolution.

The needs of practice, especially of commercial and business practices, are characterized by an accelerated pace of development, influenced by a series of different factors (State intervention, financial market, supranational associations), and more particularly by the dynamic technical development bringing new ways of communication and new contents of civil law relationships. All these elements speak in favor of the view according to which, in opting between individual solutions in-
fluenced by this or that theory, one should take serious consideration of practical life, because the code, too, as any other piece of legislation, is enacted exactly in order to meet the needs of a more qualitative and more humane life and not in order to satisfy the requirements of some theory that does not conform to these needs. Consequently, it is necessary to make joint efforts that the civil law codification, not only in the process of its creation, but particularly in the time of its practical implementation, may contribute to realization of the expected results.

The Commission has until now published four volumes which are dedicated to individual fields of the Civil Code. Thus, the Commission has published in 2007 the volume under the title “Work on Drafting the Civil Code of the Republic of Serbia” – A Report of the Commission on Open Issues” (in 1300 copies and 407 pages of printed text). The book was forwarded to competent bodies and institutions as well as to individuals interested in the matter in order to better inform our general public and also to promote professional discussion in the procedure of finding optimal solutions in the future Civil Code of the Republic of Serbia. This was the reason of making public this text also in the electronic version by the Ministry of Justice.

In addition to general contents of the future Civil Code, the Commission's Report included the exposition of open issues coupled with basic arguments and alternatives as well as with possible normative solutions in certain areas of civil law relations.

The first book of the Commission provoked vivid interest and positive reactions of juridical public, not only in the Republic of Serbia but also in the European Union countries as well as in the former Yugoslav republics – now independent states.

The second book published in 2009 encompassed obligation relations (contracts and torts) and was characterized by numerous alternative solutions for the matters regulated. The book has 450 pages and is printed in 1000 copies, with another reprinted edition in 400 copies. The entire matter of the obligations in this text includes 1436 articles.

The proposed text, with numerous alternatives and notes added to some articles, is a normative illustration of legislative solutions that would be the subject-matter to be decided about by the Commission in accordance with results of the professional public debate that has taken place after the appearance of the book.

Quite understandably, the ground for drafting this part of Civil Code has been the currently applicable Law on Obligation Relations (Contract and Torts Law) which for over thirty years has been and still remained successful in its implementation in practice. One should add that this fact was also positively assessed by both domestic and foreign juridical circles. Its vitality and functionality were confirmed not only in the sphere of practical business, but in its widest possible implementation in the judicial and out-of-court practice as well.

The Commission has endeavored to make this currently valid legislative act refined and completed with new solutions on the basis of its rich application as well as of contemporary tendencies, first of all in the European comparative legislation, but also taking in consideration also the needs and rational requirements of modern legal activities.

The proposed changes, comparing to the current Law on Obligation Relations, are rather considerable in scope. For the sake of illustration, here are the most important changes that were introduced in the Draft:

1) Definitions are formulated of the most important institutes, such as: obligation relations; commercial contracts; damage (loss), dangerous objects of property (things); dangerous activities and substantive violations of contract.
2) The following provisions are made more complete: the act of entering into contract; representation; negotiations; offer; preliminary contract (memorandum of understanding); interpretation of contract and optional contract.

3) Provisions relating to interpretation of contract and to letter of proxy as the widest and quite specific business authorization are elaborated in details.

4) Proposed are different solutions regarding the effect of the institute of hardship (changed circumstance, i.e. the *rebus sic stantibus* clause).

5) Solutions for regulating the matter of tort liability are considerably more extensive (first of all, those relating the liability of commercial entities, of the State and other bodies and institutions competent for performing public functions and services; of medical doctors and other medical personnel). Particularly elaborated are the provisions covering the matter of liability for damage caused by animals, buildings, motor vehicles, terrorist acts, street demonstrations, sports and other events as well as other kinds of public events.

6) Also specified is the right of commercial entities and other juridical entities to monetary compensation of damage caused by undermining their business reputation.

7) Important new solutions are introduced in the area of compensation of non-property (immaterial) damage in the case of infringing the legally protected rights of personality (guaranteed by the Constitution, as well as the rights guaranteed by generally accepted international law rules and recognized by international treaties).

8) The matter of securities is regulated in all necessary details.

9) Proposed are the solutions in the matter of performing of obligations conceived as a most important way of termination of obligations (for instance, the authority of a third person to accept the act of performance, then the order of performance, the refusal of delayed performance, the legal effect of debtor’s delay).

10) Solutions concerning compensation of damage are made more complete.

11) Also formulated are the provisions relating to cumulative and alternative obligations.

12) Following contracts that were not regulated previously by law are now included, i.e.: gift (donation), *commodatum*, partnership, contract of keeping safe the objects of property which are the subject of litigation (contractual sequester, garnishment, deposit), sale coupled with the right to buying up as well as the contract of co-operation in the sphere of agriculture.

13) In order to properly assess the justification of introducing (as non-nominated) of new types of contracts in the area of autonomous commercial law, the following contracts are elaborated in appropriate details: franchising, factoring, forfeiting, as well as the contract of distribution.

The Commission particularly expects to receive opinions of professional circles concerning the need for regulating by the Code of all mentioned contracts.

14) Also introduced are the alternative solutions relating to provisions covering the contract of publishing and the contract of leasing.

15) Important changes are proposed for the following contracts covering the matters of: sale, construction business, business representation (agency), guarantee, the business of insurance and reinsurance.

16) Particularly elaborated is the part regulating contracts in the sphere of banking, including details concerning banking transactions.
Some of these contracts were published in volume I of the Commission (for instance, the insurance contract). However, they are reprinted in volume II since their text was amended in the meantime; they were corrected or extended on the ground of suggestions received in the debate, but also those on the ground of newest European Union directives as well as new experience gained in business practice.

The Commission has published in June 2011 the third volume of the Preliminary Draft Civil Code of the Republic of Serbia (in 144 pages and 600 copies, containing 382 draft articles). That volume includes the following institutes: marriage, relations between parents and children, adoption, relations characteristic of nursing family relations, guardianship, support maintenance (alimony), relations in the area of property, suppression of family violence, as well as particular procedures in the family law litigation. Also included were significant new solutions amending the existing Family Law. These changes were motivated by contemporary tendencies in the European comparative law and also by the adopted international conventions and new theories of law, including the experience gained in the implementation of the Law covering family relations and the judicial and administrative courts’ practices.

For the sake of illustration, the following most important legal institutes in the area of family relations were elaborated and made up-to-date in this part of Preliminary Draft Civil Code:

1) provisions relating to promotion and inducing the child-birth (fighting the “white plague”);
2) provisions relating to extra-marital communion are made better;
3) provisions covering the act of conclusion and termination of marriage are completed, comparing to previous solutions;
4) concluding marriage in the church is a new proposal which, however, requires the change of Constitution;
5) the matter of relations between parents and children are also amended as well as brought to accord with the UN Convention on the Rights of Child (which, for instance, provides the prohibition of bodily punishment of children and the like);
6) suggested were entirely new provisions relating to maternity and paternity in the case of bio-medically assisted conception as well as in the contract of child-birth for another (so-called surrogate maternity’
7) legislative solutions are made more complete in the matters of rights of children under parents’ care;
8) new solutions are also proposed for performance and termination of parental rights; also proposed is the abolishment of the possibility of extending the parental rights; instead of former regulation, the new one was specified in order to improve the protection of child’s interest by entrusting it to the guardian;
9) provisions on adoption are made more elaborate through the particular solution applicable where the adoptant parent is a foreign citizen;
10) the possibility of providing the institute of incomplete adoption;
11) new solutions are specified relating to instituting and termination of guardianship;
12) legal protection of the ward is made better;
13) more precise provisions are also introduced that concern the matters of maintenance support and property law relations between spouses as well as between members of the family communion;
14) the institute of alimony fund is supplemented with a new solution to cope with protection of children whose parent-debtor is avoiding the maintenance payment;

15) current legislative solutions are corrected in the matters of court and administrative procedures involving family law disputes.

Most of the suggested new solutions are formulated as alternative proposals in order to facilitate future public discussions concerning the Preliminary Draft – all with the purpose to obtain the most appropriate final solutions.

In December 2011 the Commission has published volume IV dedicated to matters of inheritance as part of the proposed Code, presenting thus its work on the Preliminary Draft Civil Code of the Republic of Serbia. The book is printed in 600 copies and has 106 pages with 243 articles.

The text of this volume includes numerous amendments and alternative solutions especially as far as the following matters are concerned: inheritance grounds, capacity for inheriting, unworthiness for inheritance, the issue of legal nature of the ‘part in tail’ institute, inheritance law treatment of gift, the notion of bequest as well as many other alternative solutions involving various types of bequest, conditions and time limits, inheritance contract, measures of protection of domestic successors as well as many other matters suggested as future legislative solutions in the Code.

The Commission presently continues to work on drafting the remaining parts of future Civil Code (general part and the law of property, i.e. law of things), so that these six volumes of the Preliminary Draft of the Civil Code of the Republic of Serbia published by the Commission will be the appropriate way to inform the widest juridical and other public about the matters included in the Civil Code. After obtaining opinions and suggestions in due time, the Commission will make public the corresponding amendments of the existing draft texts. The general part of the Civil Code should encompass the basic principles, the holders of civil law rights (of natural persons and legal entities), legal transactions, terms and conditions as well as time limits, agency, exercising and protection of civil rights, statute of limitations relating to claims as well as other related matters derived from the basic matters included in the General Part. As far as areas of ownership and rights of property are concerned, the following matters shall be regulated: the notion, acquisition and protection of ownership, the property and personal servitudes, right of pledge, possession (actual control of property), rights of acquiring property by foreign citizens and other related questions arising out of basic issues of the property law matters. All that will be considered through the optics of making more actual the solutions of the actual Law on Foundations of Property Law Relations (“Official Gazette of SFRY”, nos. 6/80 and 36/90, “Official Gazette of SRY”, nr. 29/96 and “Official Herald of RS”, nr. 115/2005.

Comparative Survey. – As far as a general civil code in the countries of South East Europe is concerned, it was mentioned that only Albania has enacted its General Civil Code (in 1994), while other countries of South East Europe have no a general civil code, so that the civil law matter in these countries is regulated by means of particular legislative acts which are concentrated in the considerable number of laws covering entirely specific questions of the civil law matters. Thus, as far as ownership and other property law matters are concerned, in all countries of South East Europe there exist particular legislative acts regulating a wide area of property law relations and other related rights, while at the same time there are also numerous laws that are complementary to the laws regulating ownership. Same is the case with obligation relations, family relations and inheritance law relations. As far as obligation relations in the majority of South East European countries are concerned, in quite a part of obligation relations the existing solutions were taken over from the 1978 federal Yugoslav Law on Obligation Relations (the Contract and Torts Law). Still quite significant are also the modifications of certain solutions not present in that Law, such as for instance: gift (donation), commodatum, maintenance for life, liability for damage caused by animals, liability related to buildings, liability
of producer of defective goods (as a result of bringing into accord with the relevant EU directives), compensation of damage on the ground of tort law rules and compensation of contractual damage caused by violating the rights of personality, liability relating to preliminary contract, the entering into contract by means of electronic communication, new kinds of contract in the area of autonomous commercial law such as: leasing, franchising, factoring, contract of distribution and other related contracts falling in the category of these specific civil law relations.
ACTUALIZATION OF SYSTEMATIZING OF CIVIL LAW IN SOUTH-EASTERN EUROPE

Abstract

This article deals with the issue of relation between civil-law theory and legislative practice in the field of civil law. The case of study is the systematization of rules and regulations of civil law, and especially of contractual law and theoretic possibilities and legislative orientation in the new civil legislature in South-East Europe.

Key words: system of contractual law, systematization of laws, civil code, civil-law theory.

Prelude

In this study we wish to examine the extent to which the processes of legislative changes and the actual process of adaptation of civil legislatures of south-east European countries to that of the European Union have gone. The question that arises is: Is legal theory, and in which amounts, spurred into new researches by legislative changes, or are the legislative changes the result of theoretic enquiries? If legislative changes are the result of successful theoretic researches, then we can expect to have a balanced and harmonized legal system. If the legislative changes were done hastily and are subordinated by political processes, they cannot be considered as thought-through and adapted to our conditions and needs. At a first glance we can point out the hypothesis that in this aspect of legal life, situation is not ideal. Relationship between idea and practice should be mutual, reciprocal, with undoubted leadership of theory. Such a goal has never been achieved in our socio-political and legal reality and history. The worst variation of that relationship is when the world of idea and theory is ancilla politica. Is the relationship of scientist-theoretician vis-à-vis politics (center of power and authority) a relationship between ‘a servant and a master’? There are shining examples that negate this common practice, such as the results of Kopaonik school of natural law which makes a determined attitude of legal science (scientia iuris civilis) that its word is to be heard, obeyed and respected in ranks of responsible social factors and that a sense is developed that ignoring its activities and stances can only hurt the practice. When we observe the theory of civil law it is evident that the initiators of theoretic researches were, in fact, civil codes or processes of codification of civil laws of European countries and the influences that the most important European codifications made on our own law. In recent past, as in today, professor Konstantinović’s Draft for code on contracts and obligations still has a lasting influence on theoretic researches.

The subject of this article is connected with activities concerning the first Project of creating the Civil Code of Republic of Macedonia1. Content of Macedonian project includes presentations about civil law codifications starting with the old Mediterranean countries, to European codifications from pre-modern period, European codifications from the modern age and acts of codification on the territory of former Yugoslavia to finish it up with partial codifications of civil law in federal Yugoslavia and actual civil law codification in the former Yugoslav republics2. In Project’s Appendix,
among the contributions for creation of the Civil Code of Macedonia, in contributions VI and VII literature and the additional literature can be found. These issues are elaborated on in this article, as well.

Project of Civil Code of Macedonia also problematizes the actual status of civil law codifications of former Yugoslav republics. As a part of the process, an industrious labour will be undertaken during thorough and systematized creation of list and classification of regulations, with all the necessary explanations, reference and comments on complete corpus of regulations of the entire civil law of individual countries of SE Europe. Such a list would be irrelevant as an instrument of preparation for the codification works, if it didn't have the aforementioned explanations. As an example and pattern of possible useful covers of this issue we can see Vuković's 'Rules of Civil Codes'. Said manual, as a foundation, contains rules of both the Austrian and the Serbian Civil Code. As is known, with the creation of federal Yugoslavia, all of the occupier's regulations were made obsolete, as in the matter of both norm and content. With regulations found on 6th of April, 1941, still applied, as was the case with both the Austrian and the Serbian civil code, a revolutionary Law on obsolescence was passed. It ruled that all the regulations that were adverse with the new order were made invalid in term of both norm and content, while the remaining regulations could be applied as 'judicial rules', that is, they were ruled ineffective just in terms of norm.

Contents of classical codifications of civil law do not give a complete picture of contents of rules and regulations of the entire body of civil laws in modern countries. The idea of codification of the entire civil law, all the positive rules that regulate civil-law relations is an unreachable goal, and nothing but a mechanic collection of legal regulations would be created, if such a work was ever started. Codification procedure of this immense amount of material is an undertaking that should be done with the highest level of execution, synthesizing the civil law is a venture that is rarely undertaken in the conditions of modern age.

It is preliminarily pointed out that partial codification of civil law exists in all former republics of Yugoslavia, whereas, the codification processes that lead to integral codification have been started in Republic of Serbia and Republic of Macedonia.

1. Of systems of rules in European codifications of civil law

Discovery of Justinian's code by Western Europeans in the late eleventh century sparked, mostly thanks to schools of glossators and postglossators, new interest which lead to Roman law being studied at European universities with a goal of building a model of law that would be in line with justice and rational theory of natural law. During the 17th and 18th century, codification was begun, that is, conversion of the aforementioned model of law into positive law was conducted, as was suggested by the leading professors of that time. That was a major step forward compared to sources of law of that time, because courts had still used customary law, canon law or mercantile law as the valid ones.

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3 Ibid. 72-81
4 Rules of civil codes/with later added court practice, regulations, remarks and info on literature/Manual for practice, science and legislation of Yugoslav civil law, written by Dr. Mihajlo Vuković, with the cooperation from Dr. Martin Vedriš and Đuro Vuković, Zagreb 1961, IP ‘Školska knjiga’
5 Austrian civil code, following the order of Austro-Hungarian Department in Bosnia and Herzegovina, was applied since 29th of December 1878 on the entire territory of BiH. In Serbia, first official edition of Serbian civil code was published in 1844.
6 Ibid. page 9 of Prelude
8 Ibid.
9 Ibid.
Codification is such a technique of design of legislative acts that systematically and completely governs an entire field of social relations in a single legislative act\textsuperscript{10}. Systematization and the use of a developed system of legal terms, juridical wording and legal classifications is a trademark of codification in European scientific world\textsuperscript{11}. The original idea of codification was the idea of universality. That means that the codification of civil law had universal validity in all countries of Europe of that time, and mandatory use by all courts in those individual countries. In reality of that period, something different happened, something that the authors who were in favour of the codification started to blame the codification itself— they claimed that the codification was the cause of violation of European continental (Roman-Germanic) system of law and the creation of judicial nationalism and positivism\textsuperscript{12}.

Creation of the French Civil Code (further in the text: C.C.) and the Austrian Civil Code (further in the text: A.C.C.) obliged court practice of France and Austria to loyally go by those two codes, and such an approach was backed by the juridical science of that time which followed the premise that by these codes, customary natural-law norms were converted into real positive law. Thus, legal juridical positivism was established, along with the school of term jurisprudence in Germany and the dogmatic views of law as the will of the ruler or the ruling class and that outside of that law, natural, fair and positive law cannot exist\textsuperscript{13}.

Codification swing in Germany took advantage of the contemporary political climate which was in favour of unification and independence of Germany, an action which was supported by Hegel and Fichte\textsuperscript{14}. Basis for the creation of German Civil code (further in the text: G.C.C.) was the wish of professor Thibout who, as an important assumption for the unification of Germany, suggested abolition of different territorial laws (so-called juridical particularism) by the creation of general German Civil code. Savigny rejected Thibout’s ideas of creating a civil code which would resemble the Austrian and the French civil codes, and, starting with the reception of Roman law formatted in the \textit{Corpus iuris civilis}\textsuperscript{15}, developed the so-called Pandectist school\textsuperscript{16}.

Even though the creators of European codifications of civil law had started with different premises, natural-law, general and unchangeable principles of common sense and justice, on one hand, and, Roman law as the source of rules for solving litigations, on the other hand, compositional similarity allowed the essential accordance of European-continental (Roman-Germanic) system of law\textsuperscript{17}. One of the authors of C.C. – Portalis, noticed and pointed out the relationship between creation and implementation of law, which is a significant characteristic of European continental law\textsuperscript{18}. The legislator has to establish the principles for usage, instead of offering solutions for every single (individual) issue. Skillful legislation lies in molding of principles, which judges then, in turn, vivify expanding them to individual cases with wise and rational skill in the use of law\textsuperscript{19}. Therefore, the authors of C.C. dedicated only five clauses to the subject of responsibility, and the creative applica-

\textsuperscript{10} Ibid
\textsuperscript{11} Ibid
\textsuperscript{12} Ibid
\textsuperscript{13} Ibid, 57
\textsuperscript{14} Ibid, 58
\textsuperscript{15} Pandecta- (gre, pán, déchesthai- all-containing) ‘Books that contain everything’ major part of Corpus iuris civilis, collection that contains all works from older Roman jurists (which was created, by the order of Emperor Justinian, 17 Jurists and which was published and implemented on the 16th of December 533); also: name that envelops entire Roman civil laws and studies of it
\textsuperscript{16} Budimir Košutić, mentioned work, page 53
\textsuperscript{17} Ibid, 59
\textsuperscript{18} Ibid, 64
\textsuperscript{19} Ibid, 65
tion did not force legislators to change and amend the code for the next 200 years. Planiol did not criticize the systematics of C.C. which inherited the systematics of Guy’s Institutions and Justinian’s code. Substance of civil law in C.C. is divided into prelude, book one- Persons (status, marital and family law), book two- Objects and other restrictions of possession (real, contractual and hereditary law), book three- different ways of obtaining property (civil judicial procedure –litigation). Planiol defended this systematics with the argument that scientific systematics fits when writing a scientific study or a book, but that it is not indispensible or even useful for a code. The code is not meant to be used for teaching law to students. It is supposed to be used by educated and experienced law practitioners. Therefore, Planiol thought that it was sufficient that matter be presented clearly and adequately, without strictly following the scientific protocol. Real and contractual law from the C.C. is still valid to this day. This code affirmed the principles of freedom of making contracts and liability based on guilt, which makes it an incredible achievement.

German Civil Code is a product of the historic judicial school, which shaped the terminology and the systematics of the code, especially the ‘general part’ which imbues every individual part of the code. Historic school of law inspired the Pandectist school, for which a legal system is a closed array of institutions, ideas and principles developed from the Roman law. Application of law is mechanical and logical, and it gives solutions for every problem with the use of logical method from the given principles and terms. That is the method of conceptual jurisprudence. The makers of the G.C.C. divided the 2.358 paragraphs into five books: General part, Contractual law, Real law, Family law and Hereditary law. With the introductory law, a sixth part is included- Private International law.

Swiss Civil Code (further in the text: S.C.C.) is regarded as one of the most modern ones, and according to its creator Eugene Herbert it is a foundation for the future European code for which the preparations have already begun. S.C.C. does not strive for ‘abstract casuistic’ but intentionally leaves some norms incomplete, which are left to the judge to ‘complete’ them by using the standards of rational thought and justice. Provision of clause number 1 of S.C.C. postulates the role of a judge in the application of law and it dictates that, if there is not a specific decree in the code, judge is free to decide with regards to customary law, and if there are no rules in it, either, he should decide in accordance with the norm he would, himself, create if he was a legislator, all the while respecting the accepted doctrine and tradition. Thus, a method of free research by the judge has been adopted which completely overshadowed the school of Jurisprudence and exegesis.

Contemporary processes of globalization as a component of tradition have created a dilemma: should the ius commune tradition lessen the influence Roman principles and regulations have on contemporary civil law. This dilemma appeared because modern West-European theoreticians started researching the medieval law, so that the so-called medieval ius commune could serve as a paradigm for the modern, unified Europe. It is considered that ius commune is just one link, that had not been studied enough, which connects the antic judicial stance on common foundations of a fair legal order with modern tendencies of maintaining a ‘pillar of justice’ in a whirlpool of contemporary, materialized and commercialized processes of Europeanization and globalization.

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20 Ibid
21 Ibid, 66
22 Ibid, 69
23 Ibid
24 Ibid, 70
25 Ibid, 71
26 Ibid, 73
27 Ibid
28 Ibid, 74
29 Dr. Magdolina Sić: Lasting Values of Roman Law, Collection of works of Law faculty of Split, 1943, 3-4/2006, page 385
Nevertheless, the importance of judicial precedents in modern civil law is noticeable, which is being frequently more and more created by case law on European, and not just national, level. Western countries were developing this system of creation and application of law in the time when socialist countries preserved the system in which a judge still used the *stricti iuris* right. Therefore they are late in that aspect for 50 years, for they had not followed the modernization of law sources in the Western countries. Some authors believe that South-East European law should catch up with the law of Western Europe in terms of place and the role of case law. It is acceptable that the new *ius commune Europeum* be created on foundation of antic and Roman scientific thought, and not on *ius commune* of the early and middle New age. Accomplishment of the basic goal of law- achieving fairness and justice, depends on basic principles of Roman law which serve as a shield from dangers of narrow specialization and juridical positivism, for law is not a mere sum of paragraphs independent from social values and goals.

Sources for Austrian Civil Code (further in the text: A.C.C.) of 1811 are Roman law, studies of natural law and the ideas of enlightenment, but the draft for it was created by Franz von Zeiller, judge and professor of natural law on University of Vienna. A.C.C follows the institutional system. First part governs Persons, legal capacity, marital law, family and guardianship law; second part governs objects (real rights over objects – property, possessions, pawn and easement, and in personal rights it incorporates contracts and right of compensation in case of damage.

Serbian Civil Code, the only complete corpus of civil law in entire judicial history of Serbia, was created in 1844, at the start of a process of national liberation, unification and emancipation of Serb people. It was among the first ones in Europe (French C.C.- 1804, Austrian C.C.- 1811, Dutch C.C.- 1938). Serbian C.C. is an eclectic transplant, propositions mainly taken from the A.C.C., with the influence from C.C., Roman and contractual law.

French C.C. of 1804, which also influenced the Serbian C.C., is divided into four sections: prelude, Book one- on persons, Book two- on property, Book three- on gaining possessions. Sources for C.C.: Roman law of liability, legal inheriting and property law, canon law about marriage, canon law about personal and property-related relations between spouses, royal decrees on registry books of births, marriages, deaths and gifts, revolutionary law for marital and pawn law, as well as teachings of judicial theoreticians Puffendorf, Wolff, Ferriere i Bourjon.

The basis of A.C.C. and C.C. is the institutional system which derives from Roman law (Guy’s Institutions) which divides civil law into: 1) Persons, 2) objects (property), 3) lawsuits. Pandectist system applied in German C.C., on the other hand, divides civil law into: 1) General part, 2) Contractual law, 3) Property law, 4) Family law, 5) Hereditary law.

Serbs divide civil law into these categories: 1) General part, 2) Property law, 3) Contractual law, 4) Hereditary law. Family law has been, in the current system of law, outside the system of subjects of Civil law.

Interesting systematics can also be found in the General Proprietary Code for Duchy of Montenegro written in 1888. Third part includes what is in modern law called rules of labelled contracts (‘of purchases and other major sorts of contracts’). Fourth part is titled: ‘Of contracts in general, as well as other endeavours, deeds and other occurrences from which contracts originate.’ It gives information on sources of obligations, that is, general rules for some sources, starting with contracts (existence and application of contracts, of repercussions of misapplication or violation of contract, of particular propositions and additions that might be included in the contract), continuing onto

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30 Ibid, 394
31 Ibid, 398
32 Ibid, 399
debts that derive from impermissible deeds, but which are not connected to contracts, and debts that originate from various endeavours, deeds and occurrences. Code then goes on to display the rules of debt transfer and debt cessation. Systematics of this code is interesting, because it starts with the introductory rules, which are then followed by real law, contractual law, and then by status part on subjects of proprietary law. This completely opposite to the systematic that is promoted in modern theory of civil law which presents rules from general to singular, whereas, this code went from singular to general rules. As some commentators like to point out: ‘For the first time in history of modern codification, with the General Proprietary Code, were areas such as marriage, guardianship and inheritance excluded from the concept of civil law, and civil code brought down to general part, clauses on persons, real rights and contracts.’

Despite the developed judicial practice from period of application of the so-called old-law-rules civil codes systematization of civil law norms went in a completely different direction. Yugoslavia, during its state-juridical existence, never passed a codification of civil law, but instead, with a set of special laws covered basic branches of civil law, with the exception in the case of general part which was spread out in a whole set of laws. For example, rules of contractual law contained in norms of Law on contractual relations/78, are not based on either Austrian C.C. or Serbian C.C., but on commercial customs (usages) and modern laws, that is, international legal sources (the Hague uniform law for international sale of merchandise). This path of development is still insisted upon in the field of civil law codification- taking into consideration international and European legal sources, such as UN Convention on international sale of merchandise, Principles of European contractual law, Directive on sales of consumer goods and Proposition clauses of European contractual law. However, problematic of sources is beyond the frame of this subject.

Curriculums and programs of Law faculties in Yugoslavia, as in countries created with its dissolution, shared the educational subject named Civil law on: Introduction to civil law34 or General part of civil law35. One subject that especially stood out in frames of educational subject of Civil law was Property law36.

Interaction between theory and practice, along with the dilemma in the sphere of theoretic and judicial systematic of matter of Civil law has never been finalized.

2. Of system of contractual law rules

Law of contractual relations from 1978 divided the matter of contractual relations into two parts. First part is the general part and it contains: principles (Chapter I); general rules for all sources of contractual relations, that is, contractual relations which are created from contracts’ basis, damage infliction, groundless gains, management without warrants and unilateral statements of will (Chapter II); effects of obligations (Chapter III); cessation of obligations (Chapter IV), various sorts of obligations (Chapter V) and changes of subjects in an obligation (Chapter VI). Second part of Law on contractual relations named ‘Contracts’ contains nominated civil-judicial and economical-judicial, commercial contracts. Third part governs the conflict of laws, and the fourth governs transitional and finalizing regulations.

Prof. Dr. Slobodan Perović in his ’Sketch for a Portrait’ pointed out the importance of the creator of scientific codification, prof. Mihailo Konstantinović, who made a vast stock of ‘general juridi-
cal rules’ from Draft for the code of obligations and contracts, which were then used by courts in years to come, to plug any legal holes, even before the passing of Law on contractual relations, but also even after it. In the aforementioned work, prof. Perović highlights that from 1969 to 1978 prof. Konstantinovic’s Draft, as real treasury of life-saving ‘general juridical rules’ assumed a role of source of law in the field of obligations in law practice of those years. However, in conditions of legislative vacuum, courts, as institutions responsible for application and distribution of laws, had to contrive because of insufficiency of judicial regulations for solving contractual disputes. Judicial rules were a much needed helping hand that enabled law to be achieved even without an appropriate legal norm. As was testified by prof. Perović, in court rulings, because of understandable reasons, it was not stated that the case was decided because of a fitting clause of prof. Konstantinovic’s Draft. Instead of that, it was written that the case was decided on the basis of an appropriate ‘legal rule’, which is a matter of technique and form of expression (which is, even today, the case if the court does not have regulations), and not of the essence of the thing. This relation and co-dependence between rules and regulations has played a significant part throughout the history of our civil law.

Konstantinovic’s Draft for code of obligations and contracts as a set of rules has simple systematic and consists of two books; obligations can be found in the first, contracts in the second one. Book One contains following parts: part one, genesis of obligations, holds all obligations from all the approved sources of obligations (contracts, damage infliction, groundless gains, management without permission and unilateral statements of will). Part two contains effect of obligations, the third part contains cessation of obligations, fourth, various sorts of obligations and the fifth contains changes of subjects in an obligation. Book Two contains nominate contracts.

Doctor Lazar Marković, who is a professor at the Law Faculty of Belgrade, is the author of immense number of studies, and in fact of the entire system of Civil law, book of General part and property law, book of Family law, and both of Hereditary and Contractual law, which makes him, according to academic S. Petrović, the creator of the theoretic system of civil law, unique in domestic legal literature. Contractual law, found by accident as a manuscript legacy of Lazar Marković, was published in the edition of ‘Classics of Yugoslav Law’(Klasici jugoslovenskog prava), as a part of his system of classical civil law, and it contains general and the special part. General part covers: considerations of claims, content of performance, execution of performance. Afterwards, sources of obligations that L. Marković calls ‘existence of debt relations’ are exposed: contract and establishment of obligations with unilateral judicial deed. He then goes on to display subjects of obligations and changes of subjects of obligation, and wraps up the general part by presenting facts on cessation of debt relations. Special part covers obligations from individual contracts and obligations without contract basis(debt relations from management without permission, groundless gains, illegal actions, and out of association of objects and rights)

Prof. Ljubiša Milošević bases his system of presenting in the textbook of Contractual law on Notes of prof. Dr. Vladimir Kapor from classes held by Mihailo Konstantinovic on contractual law. Textbook systematic of Lj. Milosevic consisted of making a balance between general and the special part on presentation on the subject of Contractual law. Sources of contractual relations can be found in the general part. After the introductory remarks, the First part is tackled- sources of creation of obligations (contractual agreements, damage infliction as a source of obligations, enrichment without legal basis-legally groundless enrichment as a source of obligations, uncalled-for managing of someone else’s business as a source of obligations, unilateral declarations of will as a source of obligations, law and other legal acts as sources of obligations). Second part holds presentations
on effect of obligations, the third is about cessation of obligations, the fourth about the plurality of a subject in an obligation. Special part of professor Milošević’s textbook, the Contractual law is consisted of the Special part in which he exposes certain nominate contractual agreements. The textbook system of presentation by Lj. Milošević was evaluated by the professor M. Bartoš in the aforementioned Prelude, as a study of positive law, and not as a review of futuristic views of the legal system, where the professors of positive law go beyond, in a large measure, the legislation and present to their students and readers something that they support and want as law, and not what really constitutes the essence of positive-juridical system of laws\textsuperscript{40}.

Interesting systematics was displayed by prof. Dr. Stojan Cigoj in the Special part of Contractual law which included some juridical relations and which he then named: ‘Kontrakti in reparacije’\textsuperscript{41}. In the first part of this textbook, nominated contractual agreements are covered. In the second part, as reparations, he covers certain reparatory obligations(liability of persons in a work relation, liability for damage occurrences, that is, damage inflictions, damage in view of the object and some special cases of enrichment.

Prof. Dr. Oliver Antić\textsuperscript{42} in his textbook divided into seven parts uncovers the general part of Contractual law. The first book contains the theory of obligations and includes all subjects, from the term to the cessation of the obligation. Second book- Contracts, contains the general theory of contractual agreement, Book three- damage causing, fourth- groundless gains/legally groundless enrichment, fifth- clandestine managing, sixth- unilateral declaration of will, and the seventh- law and other juridically relevant facts that directly, via laws, represent the sources of obligations.

Dr. Živomir S Đorđević and Dr. Vladan S Stanković, professors of Belgrade Law Faculty, in their, joint textbook effort\textsuperscript{43}, systematize the presentation of Contractual law on First part- Introduction, which covers basic terms of contractual law, Second part- sources of contractual relations(contract, unilateral declaration of will, damage infliction, legally groundless gains, clandestine managing and law as a source of obligations). Third part consists of the effect of obligations, the fourth- changing of subjects in contractual-legal relation, fifth- securement of obligations and, finally, the sixth- cessation of obligations.

Prof. Slobodan Perović, the academic, in his textbook\textsuperscript{44} presents, along with the general matters of Contractual law, general theory of contract. Substance of the so-called General theory of contracts is exposed, followed by certain nominated contracts. As prof. S. Perović himself implies in ‘Reference to Fourth edition’, entire substance of contractual law should be covered in two books. In the first book, subjects of general theory of obligations are covered(general terms, division and sources of obligations), followed by the entire contractual law, both the general and the special part, respectively. Second book should encompass other sources of obligations(damage infliction, groundless gains, unilateral declarations, along with subjects of effect and cessation of obligations).

Structure of the textbook written by prof. Dr. Gale Galev and prof. Dr. Jadranka Dabović-Anastasovski consists of five parts divided into chapters. First part studies the concept, sources and principles of contractual law, second part- general studies of contractual relations, third part- contractual agreements (general part and the nominate contractual agreements), fourth part- contractual relations created by the infliction of damage and the fifth- other contractual relations (groundless gains/legally groundless enrichment, clandestine management and unilateral declarations of will).

\textsuperscript{40} Ibid
\textsuperscript{41} Published in Ljubljana, 1979
\textsuperscript{42} Obligaciono pravo, 2008, Law Faculty of Belgrade, and ‘Službeni glasnik’
\textsuperscript{43} Obligaciono pravo, Belgrade, ‘Naučna knjiga’, 1986
\textsuperscript{44} Obligaciono pravo, Belgrade, ‘Službeni glasnik SFRJ’ 1981
Diving into finding solutions for the problem of system of presentation about rules of contractual law for the textbook needs, the author of this article systematized the presentation of the entire textbook material of the subject of Contractual law according to the program of Law Faculty of the Banjaluka University, dividing it into two books. First book is divided into general and the special part. General part contains general enquiries on obligations and contracts. Special part of the first book contains solely certain nominate contracts. Second book is consisted of the general and the special part, as well. All extra-contractual sources of obligations in that second book, were given their own general and special part. Material is presented differently than in the Law of contractual relations /78, whose special part only covers nominated contracts. I considered that for the needs of textbook literature and a more thorough look into all the institutes, all sources of obligations can be presented divided into general and special part. Thereby, I would avoid the juridical imbalance of general and special rules that the law does not highlight in such a way, but still leaves room and possibility for us to assess it as we please.

Following the process of reformation of the Yugoslav Law of contractual relations, we noticed that the described solutions in terms of systematic of rules of contractual law were applied during the creation of the new Law on contractual relations of the Republic of Croatia. This systematics the authors name - architecture of juridical text and it divides the legal text into Part one - general part, which contains, as individual chapters: basic principles, participants of contractual relations, genesis of obligations, types of obligations, effects of obligations, changes in the contractual relation and the cessation of obligations. Part two – special part divided into two chapters: contractual obligatory relations and extra-contractual obligatory relations. Chapter that contains contractual obligatory relations consists of: general clauses and contracts. General clauses ,in fact, contain general rules of contract, in general, contracts consist of rules of nominated contracts. Following chapter holds lists for extra-contractual obligatory relations(damage infliction, groundless gains, unwarranted management, public promise of reward and securities). Part three contains transitional and finishing clauses. This systematic, in a way, is nearer to textbook systematic in our shown approach. However, Law on contractual relations RH/05 only rules on obligations, from principles, across subject, sort, effect, change and the cessation of obligations, marked as the general part. For this systematic, what is presented, in a textbook manner, by us, as general rules of contracts or about contract in general, along with certain nominated contracts and rules about all judicially recognized extra-contractual sources of obligation, is to be placed in the special part of the law. Excuses for these changes of structure(architecture) authors of the Croatian Law on contractual relations find in the constitutional order of SFR Yugoslavia which made it so that the federal legislator could regulate only the general part of civil law, while the regulation of the special part was the jurisdiction of federal units of the federal state. Since in that time(1978) it was considered that the damage liability should be regulated uniformly, so it was placed in the general part of the law, even though it is, traditionally, in the special part of contractual-judicial regulation. Author points out that, since constitutional restrictions no longer existed, they moved all extra-contractual obligatory relations in the special part, in accordance with tradition and legal theory. Undoubtedly, in our humble opinion, this systematic makes sense, except for placing rules about contract into the special part, while not putting nominate contracts into the special part. Even here, there is an imbalance of presentation systematic, for, in our opinion, second part could contain both the general and the special clauses on contracts, as was already drafted: Chapter VIII, Contractual obligatory relations: Paragraph 1, General clauses, Paragraph 2. Уговори.

45 Prof. Branko Morait, Obligaciono pravo-knjiga prva, 1997, Banjaluka
46 Prof. Hrvoje Kačer, Novi ZOO, početak ili nastavak, kraj ili...?, Zakon o obveznim odnosima, Inženjerski biro d.d. Zagreb, 2005
47 Ibid, page 24
The structure of the Draft for the code of obligations and contracts still appears like the most representative one. The Draft consists of two books: Book one - Obligations, and Book two - Contracts. Book one has five parts: part one - commencement of obligations, and it covers every recognized source of obligations (contract, damage infliction, groundless enrichment, clandestine management of someone else’s business/unilateral declarations of will); part two - effect of obligations; part three - cessation of obligations; part four - various types of obligations; part five - change of creditor or debtor. Book two - Contracts, holds twenty-nine paragraphs which describe nominative contracts.

The Preliminary draft of the Civil Code of Serbia, book two, Contractual relations, Belgrade 2009, adopts the systematic of the Draft for code of obligations and contracts with certain changes and additions. Second book of Preliminary draft is called: Contractual relations (obligations). This book contains basic principles and seven parts. Part one - commencement of obligations, studies all sources of sources of obligations: contract (general rules), damage infliction, groundless gains, clandestine management, unilateral declaration of will and securities; part two - obligation effect; part three - cessation of obligations; part four - various types of obligations; part five - change of creditor or debtor; part six - contracts, presented in fifty-two chapters; part seven - banking transactions.

A terminological shift in the preliminary draft from the basic terms of the Draft is noticeable. Instead of the term ‘obveza’ which is used in the Draft, Preliminary draft chose to use the term ‘obaveza’ for the obligation. Even though the entire book of Preliminary draft is titled ‘contractual relations (obligations)’, content of the book no longer uses terms contractual relations and obligations, or ‘obaveza’. Instead, term ‘obaveza’ is the only one used. In literature it had been noticed a long time ago that obaveza is not a fitting term to mark the obligation or the contractual relation. Obaveza is the general legal term which is used in all branches of law as an antipode to law, through the symbiosis of right and obligation. Obligation or contractual relation is something completely different. Obligation or contractual relation are terms that define unity of rights and obligations.

We cannot find any justified reasons why such a generally-accepted term like ‘obligation’ cannot be naturalized in modern domestic legislation. It is correct that the Law on contractual relations uses the term ‘contractual relations (obvezni odnosi)’. However, even in this law, term ‘obveza’ was not used in a consistent manner, because terms such as facultative obligations (obveze) and facultative claims are used, too. If obveza is a synonym for obligation, then instead of facultative relation, term facultative debts should have been used. Claim and debt are antipodes. Obligation and debt are synonyms.

On the other hand, obveza is a term for obligation, as it was correctly applied and used by professor Konstantinović.

3. State in Bosnia and Hercegovina and Serb Republic, respectively

In a nutshell, Bosnia and Hercegovina used the Austrian codification, Austrian civil code of 1879 which was used as a norm until the passing of Law on annulment of juridical regulations... in federative Yugoslavia, after which it was still used by courts as a set of judicial rules. For Croatia, Slavonia and Bosnia and Herzegovina unamended Austrian C.C. even after unification into Yugoslavia (Kingdom of Serbs, Croats and Slovenes) in 1918. Federal Yugoslavia enacts a differentiated civil-law system initiating legislative work on creating special (individual) laws instead of codes or codifications, starting with the Law on bill (of exchange) and Law on cheque, which were followed by Law on marriage, Law on relations between parents and children, Law on adoption and Law on guardianship, Law on inheriting, Law on obsolescence of demands, to Law on contractual law in 1978 and the Law on basic proprietary-legal relations of 1980. These basic civil-law regulations were, during the existence of socialist Yugoslavia, divided into federal and republic. Therefore, on territories of SR BiH,
aforementioned laws of 1978 and 1980, respectively, were valid as federal laws, and the Family law of 1979, on the other hand, along with Law on inheriting of 1980 were implemented as republic laws.

Dissolution of federal Yugoslavia leads to creation of two entity judicial regions on the territory of Bosnia and Herzegovina. Civil legislation, according to so-called Dayton Constitution, belonged to the entities. Their legislative jurisdiction, according to constitutionally regulated procedure, entities can delegate to the so-called state, that is, above-entity level.

Serb Republic, by the application of its constitutional authorizations, regulated civil-law relation with special laws. The most important civil laws that are defined as lex generalis that were passed are: Law of real rights (Službeni glasnik RS, 124/2008, 58/09, 14/10), Law on inheritance (Službeni glasnik RS, 3/2009), Family law (Službeni glasnik RS, 54/2002), Law on companies (Službeni glasnik RS, 24/98), Law on commercial companies (Službeni glasnik RS 127/08, 100/11), Law on land registries (Službeni glasnik RS, 67/2003 and 46/2004), Law on cadastre of Serb Republic (Službeni glasnik RS, 60/11), Law on parish registers (Službeni glasnik RS, 111/09), Law on construction sites (Službeni glasnik RS, 112/06), Law on space regulation and construction (Službeni glasnik RS, 55/10), Law on agricultural land (Službeni glasnik RS, 93/06, 86/07, 14/10), Law on expropriation (Službeni glasnik RS, 112/06, 37/07, 110/08), Law on public notaries (Službeni glasnik RS 86/04, 2/05, 74/05, 37/07, 50/10, 78/11).

Law on contractual relations is a Yugoslav federal law with the most important amendments made in 1993, which are, in regards of content, equal to amendments and additions made in Republic of Serbia. Work on creation of new Law on contractual relations was stopped in 2003, with the completion of Draft of Law on contractual relations of Federation of BiH/Serb Republic. As in Bosnia and Herzegovina, situation was the same in other newly-created countries, made from former federal units of Yugoslavia- not a single civil codification has been passed. Lack of a code in BiH made it possible that certain institutes, which are usually found in the general part of the civil code, got a spot in the mentioned Draft for Law on contractual relations of FBiH/RS, e.g. legal and business capacity, representation, condition and deadline, etc.

Assertion that the contemporary civil legislation can mostly be found in civil code, and in a smaller part in a form of special legislation, is disputable, at the least. This claim would be more appropriate for eighteenth and nineteenth-century European countries, but the twentieth century is no longer a century of civil codifications.

Viewed from national perspective, civil law of Bosnia and Herzegovina is neither codified nor unified, whereas, in the other countries of region of South-East Europe it is also not codified (Albania is the exception), but it is unified, for in those countries there are no multiple judicial regions, as is the case with Bosnia and Herzegovina.

**Summary**

Countries created by the dissolution of Yugoslavia have been in the so-called process of transition for a long time. Transition, in the field of Civil law, is marked with reformation and codification intentions. The article examines the relation between theory and practice, the influence theory has on creation of legislative solutions. The basic question which is being tackled today is whether to persist on creating a civil legal code or a codex or keep the existing partial standardization of branches or disciplines of Civil law, respectively. The sub-question includes the system of presentation of Contractual law, in fact how to divide or group the rules of Contractual law, entirely for itself or as a part of Civil Codex.
II
LIABILITY FOR MATERIAL DEFECTS
LIABILITY FOR NON-CONFORMITY OF GOODS IN SALE CONTRACT IN SEE COUNTRIES IN COMPARISON WITH SOLUTIONS OF EUROPEAN LAW

1. Introduction

In the successor countries of the former Socialist Federal Republic of Yugoslavia (hereinafter: successor countries) a liability of the seller for non-conformity of fulfilment is regulated in the same manner since 1978, while the provisions of the former federal Obligations Acts \(^2\) (hereinafter also: OA ex-SFRY) have been incorporated in all countries emerging from the dissolution of the former SFRY. Subsequently, in some of those countries, where new laws have been passed regulating obligations relationships, in principle almost the same solutions regarding seller's liability have been maintained. The Albanian Civil Code (hereinafter also: CC Alb) \(^3\) is already in force for 20 years as well. Taking into account the comprehensive commentary literature on this rather classical topic of the law on obligations, at least in the countries of former SFRY, it could be held that this topic has been already sufficiently discussed.

The relevant Obligations Acts in countries established after the dissolution of former SFRY regulate in principle a contract of sale in general terms, namely irrespective of the type of the contractual parties, with only some exceptions for B2B contracts. In some of these countries as well in Albania separate laws on consumer protection are sedes materiae regarding consumer sales contracts; by enacting such laws on consumer protection, these countries have implemented (more or less successfully) the Directive on certain aspects of the sale of consumer goods and associated guarantees (hereinafter: Consumer Sales Directive or Directive 1999/44/EC) \(^4\). In other countries the implementation of the Directive 1999/44/EC was performed by way of incorporating provisions into their Obligations Acts, so that the general rules on liability of a seller contain some exceptions in relation to B2C contracts. This issue has been comprehensively researched and presented within the First Civil Law Forum held in Cavtat 2010. \(^5\)

Notwithstanding the above mentioned, this topic has still not lost any of its relevance since it received new impulses both on a regional and EU level. First of all, the solutions of the laws on obligations are not identical anymore in all of the mentioned countries (in some countries certain

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1 The basis for this comparative report was given by the national reports made by Aida Gugu (Albania), mag. Almedina Šabić (B&H), Hano Ernst, Ph.D. (Croatia), Neda Zdraveva, Ph.D. (Macedonia), Marko Jovanović, LL.M and mag. Milena Đorđević (Serbia). During the writing of this comparative report a lot of questions arose, which were not covered by the originally provided questionnaire and consequently the national reports could not provide answers in this respect. These questions have been much more elaborated regarding the legal orders of the countries of the former SFRY than regarding Albania, which is only due to the fact that the sources in Albanian language were not available to the author of this paper. The standpoints and conclusions set forth in this paper are personal standpoints of the author and not of the national reporters.

2 Official Gazette of SFRY [Službeni list SFRJ] Nos. 29/78, 39/85, 46/85, 45/89, 57/89.


amendments were introduced by incorporating provisions on consumer sales contracts in the laws on obligations such as e.g. in Croatia and Montenegro). Besides that, legal provisions on consumer protection in any case differ in relation to each other as well as in relation to the law regulating contractual obligations. For that reason, the comparison of the regulations in these countries is still of interest.


None of the countries in the region is currently a member state of the EU and consequently is obliged to implement Directive 2011/83 EU to the extent and in the time frame specified in the respective Stabilisation and Association Agreement (hereinafter: SAA). The Directive 2011/83 EU introduces novelties with regard to information requirements and withdrawal rather than seller’s liability. This Directive did not amend the substantial provisions of the Directive 1999/44/EC on consumer rights in case of non-conformity of goods. The issues of liability of the seller are still regulated by Directive 1999/44/EC – this paper will therefore focus on this Directive.

Article 8a of Directive 1999/44/EC, which was newly inserted by Directive 2011/83/EU, provides for reporting requirements for the Member States. In case a Member State adopts more stringent consumer protection provisions then those provided for in Article 5(1) and 7(1) of Directive 2011/83/EU, the Member State is obliged to inform the Commission thereof. This is a logical consequence of the maximum harmonisation approach of the new Directive 2011/83/EU as laid down in its Article 4. Since the South East European Countries are not EU Member States, the question arises, whether those countries are also obliged to do the same? The answer should be found in the respective SAAs, which are not the subject of this paper. At this point it should be noticed that Articles 5(1) and 7(1) of the Directive 2011/83/EU provide for a very high level of information requirements within consumer contracts and that some of those requirements are surely related to the obligation of the seller to deliver goods without lack of conformity (e.g. 5(1) (a), (i), (l) of the Directive 1999/44/EC7).

Since the Regulations of the EU are not directly in force in the South Eastern European Countries, even if the Regulation on Common European Sales Law will be adopted, contractual parties in these countries will not be able to opt for its application. It seems that there is no practical relevance of comparing the solutions in the region with those of the Proposal. Nevertheless, from an academic perspective there is still a significant interest in comparing regional regulations with such optional legal framework as well as with PECL and DCFR.

The aim of this paper is to compare the solutions of the laws regulating general contractual relationships of the SEE Countries on seller’s liability and also the conformity of these regulations with the legal framework of the European Union. This comparison could provide an answer as to which methodology of the implementation of the consumer acquis regulating the seller’s liability is more appropriate for these countries (method of codification or incorporation). Besides that, the

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6 OJ L 2011, 304/64.
7 These provisions provide for the seller’s obligation to inform a buyer on the main characteristics of the goods, to provide information in case the consumer has to bear the costs of returning the goods as well as information containing a reminder on the existence of a legal guarantee for conformity of goods.
results of this comparative analysis could also provide an answer to the question on how “European” some general contractual rules in these countries really are.

2. Legal Framework

The SEE Countries can be divided in several groups based upon different criteria.

First of all, there are on one hand successor countries of SFRY, with a significant impact of the Obligations Act of the former SFRY and on the other hand there is Albania. Both the OA ex-SFRY and the Albanian Civil Code contain comprehensive and elaborated rules on the seller’s liability for non-conformity of goods.8

In the mentioned first group of countries, the majority has already enacted new laws on obligations – Croatia,9 Macedonia,10 and Montenegro.11 In Bosnia and Herzegovina (hereinafter also: B&H) as well as in Serbia a new regulation on obligations relationships has still not been enacted; here the OA ex-SFRY of former Yugoslavia is still in force. Due to the specific constitutional organisation of B&H there is no uniform law on state level, but the OA ex-SFRY is still, with only some amendments of rather technical nature, applied in both Entities (Federation B&H, Republic of Srpska) and in the Brčko Distrikt B&H.12 However, this application has a different legal basis for each of the three constitutional parts of B&H.

Besides the Obligations Acts and the codification of civil law in Albania, all of these countries have adopted special laws on consumer protection13, regulating consumer issues, which in the majority of these countries (Croatia and Montenegro are exceptions in this case) also encompass the regulation on guarantees of the seller for the conformity of the goods sold. That way these countries have two systems of liability of the seller: one for B2B contracts as well as for all those contracts which cannot be classified as B2C contracts, and one special system for consumer contracts. In these countries a very interesting question regarding the relationship between the general rules of contract law on seller’s liability and special rules for consumer contracts arises.

In Croatia and Montenegro the Directive 1999/44/EC has been implemented into respective Obligations Acts within general rule on the seller’s liability - the extent as well as the quality of this implementation differ in both countries.14 While the Croatian Obligations Act exclusively contains provisions on the seller’s liability and the Law on Consumer Protection does not deal with this issue

10 Official Gazette of the Republic of Macedonia [Služben vesnik na Republika Makedonija] Nos. 18/01, 4/02, 5/03, 84/08, 81/09 and 161/09.
12 This law has been adopted into the legal order of the Federation B&H (Službeni list RBiH/Official Gazette RBiH Nos. 2/92, 13/93, 13/94, Službene novine FBiH/Official Gazette of the Federation B&H No. 29/03 ) and also into the legal order of the Republic of Srpska (Službeni glasnik Republike Srpske /Official Gazette of the Republic of Srpska Nos. 17/93, 57/98, 39/03, 74/04). Since provisions relevant for this analysis have not been changed and consequently do not differ, in order to facilitate understanding of this text, it will be refer only to Obligation Act in Bosnia and Herzegovina or OA BiH. In Serbia this law has not been significantly changed either (Službeni glasnik Republike Srbije/Official Gazette of the Republic of Serbia No. 31/93.
14 More in Meškić, Z., et al., op. cit., 518. et seq.
at all, in Montenegro the respective corpus of rules is divided between these two legal acts. This solution should be considered as the most impractical and inconsistent one.

3. Concept of the lack of conformity respectively liability for material defects in the SEE Countries and European Law

The uniform concept of the breach of contract, as it may be found in certain sources of international law (CISG, UNIDROIT Principles on International Commercial Contracts) as well as in European contract law, was neither adopted in the successor countries nor in Albania. Principles of European Contract Law (PECL), as set of rules for contractual relationships and the Draft Common Frame of Reference (DCFR) as more general set of rules for the entire obligation relationships, as well as frameworks of rules regulating only sales contracts (Common European Sales Law) are based on the uniform concept of non-performance of obligations and liability for fundamental breach of contract. This concept exists in common law systems and in European law systems with Roman tradition. In contrast, Switzerland and Austria have the opposite system, as also Germany used to have until it modernised its law on obligations in 2002.

Generally it is held that in SEE Countries contractual duties could be violated through non-performance, late performance, partial (and late) performance, performance with defects, fault-based impossibility of performance. All types of breach of contractual obligations are considered to have a different basis of liability; also different requirements as well as consequences of liability are stipulated. All countries analysed in this paper use the so called cause approach, taking into account different reasons and consequently different consequences of non-performance. In contrast, other legal orders apply a uniform concept of non-performance of contract and a uniform system of sanctions for fundamental breach of contract.

It is obvious that regulations in the successor countries of the former Yugoslavia are in this regard influenced by Austrian law. However, nowadays the Austrian law represents rather an exception in this matter, especially after Germany has also redefined its regulations on non-performance (Leistungsstörungsrecht) in the course of modernisation of its contract law in 2002. Influenced by the CISG (Art. 25), many national legal orders have adopted this concept. Also in Austria certain legal scholars are of the opinion that a non-uniform system of non-performance is outdated and that it should be reformed by accepting the universal doctrine of the breach of contract. The question arises whether the solutions of the successor countries of the former Yugoslavia and Albania actually significantly differ from the CISG and different European Union legal sources and would it therefore be necessary to reform them in accordance with the latter?

What is the situation with the European legal sources? It is not easy to place the legislation dealing with the rules of general contract law and the one providing only rules on sales contracts on the same level, claiming that the latter are also based on the general concept of non-performance of

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15 Art 8 : 101 PECL.
16 Art. III 1:102 (3).
18 Vukadinović, R., op. cit., p. 206.
20 In this sense Vukadinović, R., op. cit., p. 217.
contract. The PECL and the DCFR belong to the first group and the acceptance of this general concept of non-performance and breach of contract is obvious, even though this has not been accomplished in the same way. While the DCFR provides for basic definitions of an obligation, performance and non-performance of an obligation\(^{22}\), the PECL does not contain such definitions. However, both bodies of rules, although using different wording, define consequences of non-performance of one contractual obligation (PECL) respectively any obligation (DCFR).\(^{23}\) Whenever a party does not perform an obligation (PECL: under the contract) and the non-performance is not justified by the stipulated reasons, the creditor may resort to any of the provided remedies.

This concept has been concretised in the bodies of rules regulating sales contracts. Article 87 of the CESL stipulates that non-performance of an obligation (under a sales contract – Editor’s note) is any failure to perform such (seller’s – Editor’s note) obligation, whether or not the failure is justified, and includes non-delivery or delayed delivery, delivery of non-conforming goods.

Such clear definition or explanation of the concept of non-performance could not be expected in the Consumer Sales Directive. First of all, the nature of this Directive and its purpose does not make it possible to include a general notion regarding non-performance. Namely, the purpose of this Directive is the approximation of the regulations of the Member States on certain aspects of the sale of consumer goods and associated guarantees (Article 1 Para. 1); this legal source is only focused on one type of non-performance and this is the delivery of goods with material defects. This relates to the seller’s obligation to deliver goods with features that comply with those which have been contracted for. It follows from the definition, which stipulates when goods are supposed to be in conformity with the contract, that the legislator has not taken into account late delivery or non-delivery (not even partial delivery has been expressly mentioned). Article 3 of the Consumer Sales Directive stipulates that the seller shall be liable for any lack of conformity which exists at the time of delivery of the goods – this formulation expresses the general notion of conformity. Also Article 2 Para. 1 defines the main obligation of the seller in a general manner: the seller is obliged to deliver goods which are in conformity with the contract of sale. However, Article 2 (2) to (5) provide for definitions of non-conformity of the goods, which merely contain different types of material defects.

In the successor countries\(^{24}\) the relevant provisions on non-performance are widely scattered in the different parts of the Obligations Acts.\(^{25}\) The major part of those provisions can be found in the general parts of these laws (which might be confusing since the general parts of these Obligations Acts do not overlap with the general parts of the obligation relationships). Then these rules are partially situated in the parts regulating specific contracts, including in particular sales contracts. This dispersion of the rules on non-performance is to a large extent caused by the non-consequent classification of these Obligations Acts; in those cases the difference between the general part of the law on obligations and the general part of contractual law has not been consequently carried out. In Croatia for example, the classification of the respective general part has been improved\(^{26}\) in the course of the reform of the law on obligations. The reason why it is rather difficult to see the complete picture of the liability for non-performance is the fact that the Obligations Acts in some parts refer to the liability of any debtor and in others refer to the liability of a debtor arising from a contractual obligation.

\(^{22}\) Art. 11:102 (1) - (3) DCFR.
\(^{23}\) Art. 8:101 PECL, Art. III. 3 : 101 DCFR.
\(^{24}\) Due to the fact that Albanian literature and legal texts are not available, the discussion shall be focused on the identical rules contained in the Obligations Acts in each successor country.
\(^{25}\) These laws are almost identically structured.
\(^{26}\) Part I regulates the general part of obligations, Part II is dedicated to the contracts, where the first chapter regulates general questions of contractual law and the second chapter specific contracts.
The justification for the seller’s liability as well as generally for the liability of any creditor for
defective performance has been already laid down in the general principles of the Obligations Acts
applicable in the region. This relates primarily to the principle of equal value of performance 27 and
principle of good faith and fair dealing.28

The general provision on the liability of each debtor i.e. of each contractual party, including
the seller, is located in the general part of the Obligations Acts, however this general rule is often
omitted in the discussions regarding the concept of non-performance in the successor countries.
The parts of the mentioned Acts dealing with the termination of obligations (the effectuation of
performance being the main reason for the termination of obligations), contain a general rule on
performance.29 The performance represents the effectuation of the contain/substance of that partic-
ular obligation, so that neither the debtor can fulfil it by performing something else nor the debtor
can request something different from the creditor. This wording has a general scope: the content of
the obligation covers not only the respective subject of performance, but also the place, time and
manner of performance.

Such a general scope is also emphasised in the context of provisions on liability for perfor-
mane of contractual obligations. The creditor of a contractual obligation is entitled and the debtor
is obliged to perform an obligation as agreed upon i.e. in full conformity with the contract.30 These
provisions express the same idea as the previously cited general rule on performance. The rules
on contractual liability provide for the debtor’s obligation to compensate the damage caused in
case of both, non-performance and late performance of the contractual obligation.31 The entirety
of provisions of the Obligations Acts on contractual liability encompasses the same rules for non-
performance and late performance i.e. one provision speaks explicitly about breach of contract.32

The rules on the creation of contractual obligations, are placed in the general parts of the
Laws on obligations (B&H, Macedonia, Montenegro, Serbia) and in the general part of contractual
law (Croatia) and contain specific rules for liability of the parties for non-performance in reciprocal
contracts. This is the sedes materiae for the liability for non-conformity of the goods, late perfor-
mance and impossibility of performance. First of all, each reciprocal contract can be breached by
non-conformity of the performance with the contract.33 There are no general rules for the liability of
the debtor for such defected performance, but the laws refer to the rules on the seller’s liability for
material defects i.e. for non-conformity of goods. This way, the rules tailored for one specific contract
(sales contract) create effects for the general rules. The rules on reciprocal contracts contain also
rules on remedies for late performance of these contracts.34 The creditor is entitled to demand per-
formance or the termination of the contract and in addition may claim compensation for damages.
The rules on sales contracts provide for the same remedies for the buyer. In case of late performance,
the creditor is generally obliged to give an additional time limit for performance and after that time
limit expires, he can terminate the contract, which is also the case if material defects exist. In all these
cases the creditor is entitled to compensation of damages. This again shows that the consequences
and remedies for different types of non-performance are actually not different but rather similar.

27 Art. 15 OA B&H, Art. 7 OA Cro, Art. 8 OA Mac, Art. 8 OA Mne, Art. 15 OA Ser.
28 Art. 12 OA B&H, Art. 4 OA Cro, Art. 5 OA Mac, Art. 4 OA Mne, Art. 12 OA Ser.
29 Art. 307/1 OA B&H, Art. 166/1 OA Cro, Art. 296/1 OA Mac, Art. 314 OA Mne, Art. 307/1 OA Ser.
30 Art. 262/1 OA B&H, Art. 342/1 OA Cro, Art. 251/1 OA Mac, Art. 269/1 OA Mne, Art. 262/1 OA Ser.
31 Art. 262/2 OA B&H, Art. 342/2 OA Cro, Art. 251/2 OA Mac, Art. 269/2 OA Mne, Art. 262/2 OA Ser.
32 Art. 266/1 OA B&H, Art. 346/1 OA Cro, Art. 255/1 OA Mac, Art. 273/1 OA Mne, Art. 266/1 OA Ser.
It seems that the Obligations Acts in the region are in fact inspired by the idea of the general concept of non-performance of the contract and liability for the not justified lack of conformity, but due to the fact that all these provisions are more than scattered and inconsequentially placed within this Acts, this idea almost got lost or was poorly understood.

The provisions on default i.e. non-performance in the successor countries are based on a system of structured and non-uniform matter of facts. Even though there is no generally proclaimed principle of one uniform system of non-performance and liability for the breach of contract, there are significant indications pointing in this direction. As shortly addressed before, it would be more appropriate to consider the solutions regarding non-conformity with the contract in these countries as a mixture of both systems. Furthermore the considerations on remedies (under 8) will additionally support this thesis.

4. Criteria for determination of conformity of goods (discrepancy in quality, quantity, in nature, packaging, fitness for the purpose of ordinary usage, fitness for particular purpose)

Under the former Yugoslav Obligations Act, the legal definition of material defects focussed on discrepancy in quality and the criteria for conformity were defined negatively; this law provided for the situation in which the material defect exists, meaning the situation when goods are not fit for their regular use or circulation, goods are not fit for the particular purpose the buyer intends to use it for, and when this purpose was known or should have been known to the seller, if goods lack qualities and characteristics which are expressly or impliedly prescribed or contracted, or when the seller has delivered goods not equal to the sample or model, unless the sample or model has been shown only for information. All successor states kept these provisions; in B&H, Serbia, Macedonia there even are no other reasons for non-conformity of goods.  

In Croatia, where the Consumer Sales Directive has been almost correctly transposed into the Obligations Act, and also in Montenegro, where this transposition is in great degree fragmentary and incomplete, the definition of material defect has been supplemented by adding some additional requirements following Article 2.2 (d) and 2.5 of the Consumer Sales Directive. So, besides already enumerated situations, material defects exist if the good does not show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statement on the specific qualities or characteristics of the goods made about them by the seller, the producer or its representative, particularly in advertising or labelling, if the good has been badly installed and when the service of installation has been part of the sale contract, or if bad installation is due to a shortcoming in the installation instructions.

In some of these countries, in which the Consumer Sales Directive has not been transposed in general contract law (Albania, B&H, Macedonia, Serbia), different criteria for material defects occur in two different set of regulation, which will not facilitate the implementation of consumer law in the judicial practice in these countries.

This regulation in successor states focuses on discrepancy in quality and does neither contain provisions regarding discrepancy in quantity, packaging (with exception regarding packaging in Croatia and Montenegro), nor provisions for the case of delivery of aliud. Generally, the delivery of

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36 Art. 401/1 OA Cro, Art. 487 OA Mne.
37 More about omission which have been done in some countries in the region in formulating the rules for responsibility of the trader in consumer sale contracts see by Meškić, Z., et al., op. cit., p. 526.
another asset is a highly discussed issue in these countries, some scholars consider this situation as a lack of conformity and others as non-performance. A clear determination in favour of a common concept of non-performance and breach of contract would facilitate the unnecessary distinction between a bad performance and the delivery of aliud.38

The Obligations Acts do not consider lacks regarding quantity to be a case of non-conformity, but do sanction this kind of deviation from contract. The delivery of a smaller quantity than agreed is considered as a partial performance, and the contract can be dissolved only regarding the lacking part, unless there is a justified interest of the buyer to receive the agreed performance in total, in which case the whole contract can be dissolved.39 If a bigger amount is delivered and it is not a commercial contract, it can be concluded only upon argumentum a contrario, that the buyer is not obliged to accept the surplus and that he is entitled to compensation for damages.40 This is an omission of these Acts; the solutions that see a case of non-conformity in each deviation from the agreed terms regarding quality and quality and foresee a common system of remedies are far more consequent, systematic and easier in their application.

Under Albanian law, lack of conformity primarily exists when the goods are not fit for the specific purpose of use as provided in the contract. When the contract does not determine the purpose for which the goods should be used, non-conformity exists when the goods are not fit for general use of goods of same nature. In addition, goods are deemed to be not in conformity with the contract, if they are not installed and packaged in regular manner in that goods of the same type can be packaged or installed. When this regular manner for packaging or installing cannot be found, the goods have to be packaged and installed in a manner that guarantees their full protection and preservation.41 The Albanian solutions regarding the determination of non-conformity are more modest than the ones in the countries that arose from former Yugoslavia. But on the other hand, they are more comprehensive. In Albania the seller is obliged to deliver the goods in the quality, quantity and type foreseen by the contract, as well as packaged and installed as determined by the contract.

In some aspects the Consumer Sales Directive offers a lower standard of consumer protection than the dispositions of the Obligation Acts in the successor states. Under Directive conformity does not exist if the goods are not fit for any specific purposes required by the consumer, which are made known to the seller at the time of conclusion of the contract. The same provision is contained in all Obligations Acts. But the Consumer Sales Directive contains one further requirement, which does not exist in the SEE countries. Namely, it is necessary that the seller has accepted to deliver goods for these special purposes. After the enactment of the Consumer Right Directive, which is an act of maximum harmonisation, this fact could be subject to information duty under Article 8a.

Regarding the determination of non-conformity of goods, the solutions in South Eastern Europe differ from those existing in European legal sources in the fact that in European law conformity is defined positively and that conformity in packaging, installation and quantity are included, which is missing in some South East European countries.42

38 Schauer, M., op. cit., p. 68.
41 Art. 715 CC Alb.
42 Compare Art. IV.A-2:302 DCFR, Art. 100 CESL.
5. Buyer’s knowledge of the lack of conformity, duty of the buyer

5.1. Buyer’s knowledge of the lack of conformity

In principle seller is liable for the lack of conformity even if he was not aware of it. A similarity with concept of non-performance of contract defined in international and European legal sources can be observed here; in both the awareness of the seller is not relevant. Under DCFR non-performance of an obligation is any failure to perform the obligation, whether excused or not. Also the formulation “whenever a party does not perform an obligation” used in PECL indicates the irrelevance of the seller’s subjective responsibility. There are some reasons, provided in PECL, which exclude seller’s liability and which are of objective nature. The seller is excused if he proves that non-performance is due to an impediment beyond its control, and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences. It is interesting that the Obligations Acts of the successor states accept objective liability for contractual damages with very similar excusing reasons as listed in PECL. These general provisions of contractual liability have to be applied also on sale contracts, but it seems that in countries arisen from former Yugoslavia seller’s liability for non-conformity of goods is not governed by general rules on contractual liability, but by very specific ones. It would be interesting to explore how this affects the consistency of the system of contractual liability under these Obligations Acts.

CESL also envisages the responsibility of the seller for any lack of conformity. Similar rule is not set directly in Consumer Sales Directive, but it arises from the provisions that the seller is obliged to deliver the goods which are in conformity with the contract of sale, as well as from the provisions of Art 2 (2) regulating the event when it is considered that there is no non-conformity with the contract. This provision speaks on absence of non-conformity but not of absence of seller’s liability, according to which it can be concluded that as soon as there is a non-conformity, there is also a seller’s liability, regardless if he was aware of the defect or not.

CC Alb as well as all Obligations Acts in the region provide for same excusing reasons from the seller’s liability. These reasons are connected to the awareness of the buyer on existence of some defects. Its knowledge can under prescribed preconditions lead to exemption of the seller from liability. In Albanian law this rule is prescribed in Law on Consumer Protection. The seller is not liable if the buyer, at the moment of concluding the contract, was aware of the lack of conformity, or was not informed because of it fault, or could not reasonably be unaware of the lack of conformity, or if lack of conformity has its origin in materials supplied by the consumer. And in the former Yugoslavian countries the seller is not responsible if, at the moment of concluding the contract, the material defects were known to the buyer, or it was impossible that these defects remain unknown to the buyer. The Obligations Acts set a presumption that some defects could not have remain unknown to the buyer if a diligent person having average knowledge and experience as a person which exercises

43 Art. 716 CC Alb, Art 478/1 OA v, Art. 400/1 OA Cro, Art. 466/1 OA Mac, Art. 486/1 OA Mne, Art. 478/1 OA Ser.
45 Art. III. 1:102 (3).
46 Art. 8:101 PECL.
47 Art. 8:108 PECL.
48 Art. 262 and 263 OA B&H, Art. 342 and 343 OA Cro, Art. 251 and 252 OA Mac, Art. 269 and 270 OA Mne, Art. 262 and 263 OA Ser.
49 Art. 105/1 CESL.
50 Art. 2/1 Consumer Sales Directive.
51 Art. 29/5 CC Alb.
52 Art. 480/1 OA B&H, Art. 402/1 OA Cro, Art. 467/1 OA Mac, Art. 488/1 OA Mne, Art. 480/1OA Ser.
same profession as the buyer could easily notice this defect by usual examination of the goods.53 In Croatia this provision does not apply on consumer contracts.54

The sense of the mentioned legal provisions is that awareness of the buyer excludes the seller from liability for material defects. This formulation foresees that even in the case that lack of conformity exists, the seller is excused under certain circumstances. In the European legal sources there is no non-conformity or breach of contract in such situation. The excusing reasons as well as effects of the buyer’s knowledge in both European sources and respective Obligations Acts are almost the same as, but philosophy behind them is somewhat different (see under 3).

If the seller is not bona fide, and if he is aware of the lack of conformity, but declares that the goods are free of all defects or that they have specific characteristics, the buyer’s awareness on non-conformity is not relevant.55 It is a reasonable provision, which takes into account necessary balance of rights and responsibilities of the parties, and which is also the consequence of the principle of good faith and fair dealing. A similar provision does not exist in Albanian Civil Code.

It should be kept in mind that all these Obligation Acts as well as Albanian Civil Code have originally not been tailored for consumer protection. But after Directive 1999/44/EC has been transposed into Croatian Obligation Act, this Act does not provide for similar presumption regarding consumer sale contracts; the presumption that some defects could not have remained unknown is directly excluded for consumer contract in Croatian Obligation Act.56 In other jurisdictions analysed in this paper, where rules on consumer protections represent a separate set of rules, such presumption is not contained in relevant laws on consumer protection. It seems the need for elimination of the mentioned presumption is not inevitable for the reason that there is no obligation in these laws for consumer to examine goods. But such omission could be treated also as a legislative gap and this could lead to the application of general contractual rules. More over Article 6 LCP Mne directly prescribes that the provisions of Montegrinian Obligation Act shall be applied regarding contractual relationship, unless something else is provided by the Law on Consumer Protection. This could lead to the conclusion that obligation to examine goods exists also within consumer sale. Such solution would not be in accordance with the Consumer Sales Directive.

5.1. Duty of the buyer

In Albania and in countries arisen from the former SFRY the position of the buyer within general rules of obligation law differs depending on the fact whether the lack of conformity was visible or not, and in the latter also on the fact whether seller is attending the examination of goods. In Obligations Acts of former SFRY successor states the position of buyer as a party in commercial contracts is also differently regulated, but this will not be considered in this paper. This is the point on which Obligations Acts of the successor states and Consumer Sales Directive considerably differ regarding examinations duties of the buyer (which was handled under 5.1.) and deadlines. The same could be said for Albanian provisions.

In Albanian doctrine it is considered that visible defects are those which can be easily identified by the buyer at the moment of delivery of the goods. Invisible defects of goods can be identified after the moment of delivery or during their use. Such a distinction is important for the determination of the liability of the seller for the material defects; the seller is not liable for visible defects of

54 Art. 402/3 OA Cro. Although in Montenegro the Consumer Sales Directive is transposed into Obligations Act there is not such special rule for the consumer at this place.
56 Art. 402/3 OA Cro.
goods.\textsuperscript{57} This makes it possible to indirectly conclude that the buyer is obliged to examine the goods, although this is not expressly regulated. In former Yugoslavian countries this obligation is expressly prescribed.\textsuperscript{58}

After the examination the buyer is obliged to inform the seller on visible lack on conformity within 8 days, respectively within 10 days in Albania, otherwise it will lose its right it is entitled to on the basis of lack of conformity.\textsuperscript{59} In former Yugoslavian countries, after the examination has been performed in the presence of both parties, the buyer is obliged to communicate immediately its objections regarding visible defects to the seller, otherwise he will lose the right he is entitled to in this regard;\textsuperscript{60} similar provision does not exist in Albanian law.

In all legal orders the buyer is obliged to specify the nature of defect when informing the seller.\textsuperscript{62}

If defects are hidden, i.e. if it was not possible to detect them during ordinary examination when taking over the goods, the buyer is obliged to inform the seller about the defects within the prescribed period, after which expiration the buyer is losing its right. The prescribed periods vary significantly here as well depending on the fact whether the Consumer Sales Directive has been transposed into Obligations Acts or not. In BiH, Macedonia, Montenegro and Serbia this deadline is eight days from the day when the buyer detected a defect. There is also an objective deadline – seller is not liable for the lack of conformity which is detected after the expiration of six months from the transfer of goods.\textsuperscript{63} Since the Consumer Sales Directive has been directly transposed in OA Croatia the longer deadline is foreseen there – two months instead of 8 days and two years instead of six month.\textsuperscript{64} The same should have been done in Montenegro, but this point has been left out, and accordingly a proper transposition of Directive has not been performed. It seems that in Albanian law there is no difference in this aspect between visible and invisible lack of conformity – the deadline is 10 days within time period of two years.\textsuperscript{65}

If the seller is not bona fide, if he is aware about the lack of conformity or reasonably the lack could not remain undetected, the buyer is exempt from the duty to examine the delivered goods and to inform the seller within the prescribed period of time.\textsuperscript{66}

Consumer Sales Directive does not provide for difference between visible and invisible defects (Croatia represents exception in this aspect), and also the deadlines are considerably longer than in Obligations Acts of the successor states. The harmonisation of these laws with deadlines given in the Directive is not problematic; it is basically about only one technical intervention. However, the differentiation between visible and invisible lack of conformity is of a conceptual nature, and in this direction and, in order to transpose the Consumer Sales Directive, it should be provide for special exception regarding consumer sales, as Republic Croatia has done it. In Croatian law the consumer is obliged, after the material defect has been detected, to inform the seller about it within following two months, but the latest within two years from delivery of the goods. This regulation is totally in accordance with the Article 5 (2) and (3) of the Consumer Sales Directive, which is not the

\textsuperscript{57} Art. 715 in fine CC Alb.  
\textsuperscript{58} Art. 481/1 OA B&H, Art. OA 403/1 Cro, Art. 469/1 OA Mac, Art. 489/1 OA Mne, Art. 481/1OA Ser.  
\textsuperscript{59} Art. 717 CC Alb, Art. 481/1 OC B&H, OA 403/1 Cro, Art. 469/1 OA Mac, Art. 489/1 OA Mne, Art. 481/1OA Ser.  
\textsuperscript{60} Art. 481/2 OC B&H, Art. 403/2 Cro, Art. 469/2 OA Mac, Art. 489/2 OA Mne, Art. 481/2OA Ser.  
\textsuperscript{61} There are some exceptions for example if the goods should be directly further dispatched.  
\textsuperscript{62} Art. 717 CC Alb, Art. 484/1 OA B&H, Art. 406/1 Cro, Art. 472/1 OA Mac, Art. 491/1 OA Mne, Art. 484/1 OA Ser.  
\textsuperscript{63} Art. 482/2 OA B&H, Art. 470/2 OA Mac, Art. 490/2 OA Mne, Art. 482/2 OA Ser.  
\textsuperscript{64} Art. 404/1 and 2 OA Cro.  
\textsuperscript{65} Art. 717 CC Alb.  
case with the Obligations Act of Montenegro, where the indicated Directive has also been transposed.

6. Relevant time for estimation of the conformity

In all legal orders of the successor states, that have been analysed here, general rules of contract law have same provisions regarding the time at which conformity is assessed. A crucial point in time is the moment of the transfer of risk from the seller to the buyer. The contractual law of the successor states determines moment of the risk transfer as the moment of transfer of possession. Already these dispositions of general contract law are in conformity with Art 3 (1) of Consumer Sales Directive, even if regulations on consumer protection do not contain this rule.

But, this provision of general contract law is not mandatory; the parties can agree otherwise. The question arises whether such possibility, given in general contract law, could be applied when concluding a consumer sale contracts? Whether such contractual clause, which determines another moment of the risk transfer, would be contrary to the mandatory nature of the consumer law provisions and herewith to the Article 7 (1) of the Directive 1999/44/EC? A contracting of such contractual clause is for example forbidden under DCFR. The Member states are not allowed to set rules which directly or indirectly waive or restrict the consumer rights as well as the countries bounded by SAA. In case some countries would have omitted to determinate the moment of passing of risk within the rules on consumer protection, the general rules of contractual law would be applicable. This would mean that contractual parties would be free to determine another moment of passing of risk. For example, it would be disadvantageous for consumer if the moment of passing a risk in consumer sale contract would be set much prior the moment of delivery. In such cases not even the provision as it only exists in LCP Cro would be helpful. According to Article 6/2 LCP Cro the contractual provisions amending the legal provisions to the detriment of the consumer would be considered as invalid. If it is not clear from the provision itself that its goal is consumer protection, or if there is no such legal provision at all, than the cited safeguard clause would not be applied.

This example also shows how carefully interaction of general contract law and consumer contract law should be determined. It is better to solve all issues linked to the Directive 1999/44 either in laws on consumer protection or by completely transposing the Directive in general contract law; referring from the consumer protection law to the rules on general contract law (as is the case in Montenegro), as well as mixture of these rules can lead to the restriction of consumer rights.

It seems that Albanian Civil code does not contain the provision on this issue neither does the Albanian Consumer Protection Law.

7. Contract clauses on exclusion and/or limitation of the liability of the seller

In all countries arisen from the former Yugoslavia the rules on seller’s liability are of non-mandatory nature, therefore this liability can be totally excluded, limited or tightened. Only if seller is mala fide (which means that seller was aware of the defects in the moment of conclusion of the

67 Art. 478/1 OA B&H, Art. 400/1 OA Cro, Art. 466/1 OA Mac, Art. 486/1 OA Mne, Art. 478/1 OA Ser.
68 See also Meškić, Z., et. al., op.cit, p. 527.
69 Art. IV.A.-2:309 DCFR.
70 The question of direct impact of the directive could arise here.
71 Art. 6 LCP Mne.
72 Meškić, Z., et. al., op.cit, p. 527.
sale contracts but failed to notify the buyer thereof) or if such contract clause has been imposed due to seller’s monopolistic position, this exclusion is null and void.\textsuperscript{73} The same rule can be found in PECL.\textsuperscript{74} Also DCFR provides for the prohibition of the exclusion or of the limitation of seller’s liability in consumer sales contracts.\textsuperscript{75}

This possibility to exclude or to limit seller’s liability cannot exist in consumer contract. If in national laws such possibility exists, it means that Consumer Sales Directive has not been correctly transposed. Such a possibility would be contrary to the Article 7 (1) of this Directive. It is necessary to have provision foreseen either in general contract law or in special laws on consumer protection which directly prohibits such contract clauses.

The Croatian Obligations Act prescribed that this exclusion in consumer contract is null and void.\textsuperscript{76} Same prohibition for consumer contract exists also in LCP B&H\textsuperscript{77}. But same provision does exist neither in Montenegrin Obligations Act nor in LCP. In LCP Mac such clause is incorporated in the set of unfair contract terms\textsuperscript{78}, but only if the liability is excluded for invisible defects. It is evident that in this respect the provisions of the South East European Countries are not completely harmonized with European law.

8. Buyer’s remedies

Under former Yugoslavian Obligations Act and new Obligations Acts of the successor states, as well as under Albanian Civil Code the buyer has a choice between different remedies: a) he can claim for fulfilment of the contract, whereby this right has two modalities – buyer’s claim can be directed towards the elimination of the defects or towards the delivery of the goods without defect, b) he can claim for a reduction of the price, and c) he can terminate the contract. Irrespective of the chosen remedy the buyer has the right for compensation for damage.\textsuperscript{79} A precondition for the exercise of this range of remedies in Albanian law is the substantial breach of contractual obligation, which means cases under which the defects of goods are of such nature, which totally hampers the fulfilment of the aim of the contract by heavily impairing the rights of the buyer.\textsuperscript{80} It can be stated however that the solution is different from the one in other South Eastern European countries, in which remedies are allowed even if there is non-conformity of lesser extent; it is only important that the lack is not inconsiderable.\textsuperscript{81}

The same remedies are listed in European legal sources as well as in CISG.\textsuperscript{82} In the CISG a uniform concept of breach of contract and a uniform system of remedies is used. It has been already explained that South Eastern European countries do not accept the uniform system of non-conformity i.e. breach of contract. But, the foreseen system of the buyer’s remedies is obviously not essentially linked to the uniform system of breach of the contract, so that the regulation of remedies in the South Eastern Europe is under high and direct impact of CISG.

\textsuperscript{73} Art. 486/2 OA B&H, Art. 408/2 OA Cro, Art. 474/2 OA Mac, Art. 494/2 OA Mne, Art. 486/2 OA Ser.
\textsuperscript{74} Art. 8:109 PECL.
\textsuperscript{75} Art. IVA. – 2:309 DCFR.
\textsuperscript{76} Art. 408/2 OA Cro.
\textsuperscript{77} Art. 2 LCP B&H.
\textsuperscript{78} Art. 65 LCP Mac.
\textsuperscript{80} Art. 723 CC Alb.
\textsuperscript{81} Art. 478/3 OA B&H, Art. 400/4 OA Cro, Art. 466/3 OA Mac, Art. 486 OA Mne, Art. 488 OA Ser.
\textsuperscript{82} Art. 45 to 52 CISG.
Under CISG, buyer’s remedies are characterised by the alternative or competitive character,\(^{83}\) which is the case in the successor states as well. The buyer’s choice is not unlimited; for some of these remedies the buyer is free to make a choice, while some of these remedies can be chosen depending on the kind of breach and fulfillment of additional conditions. The restrictions are generally not prescribed for those remedies which aim to fulfillment of the contract, but the termination of the contract cannot be generally exercised as first option; it is necessary that a buyer gives notice to the seller and allows an additional period of time for performance which is in conformity with the contract.\(^{84}\) The buyer is not obliged to give additional time for performance if the seller, after notice on deficiencies, inform the buyer that he will not fulfill the contract, or if out of the circumstances of the case it can be inferred that the seller will not be able to fulfill the contract not even within a subsequent period of time.\(^{85}\) The same solution can be found in Albanian law. The buyer should give the seller the reasonable time to fulfill its obligation. During reasonable time the buyer is not allowed to use any other form of remedies unless he has been informed by the seller that the latter will not fulfils its obligation.\(^{86}\)

The European and South Eastern European solutions differ regarding the remedies and especially regarding their interrelation. European legal sources do not accept general hierarchy of remedies, according to which some of them should be used with a priority.\(^{87}\) DCFR provided for same remedies but did not enumerate them expressly. Furthermore, DCFR’s starting point is not buyer’s right to choose; this choice is limited by the seller’s readiness to perform in conformity with contract and to cure contract.\(^{88}\) Under Article 9:301 PECL the buyer has the right to terminate the contract if the seller’s non-performance is fundamental, and it seems that this right does not depend from possibility to use other remedies. But Article 8:104 PECL deals with debtor’s right to cure. “This right to cure, however, forecloses a priority for the claim of specific performance and merely gives the debtor the possibility to exclude certain remedies by its own activities.”\(^{89}\) In Article 106 of the ECSL the buyer’s remedies are only listed, and there are no provisions which would establish some kind of ranking of these remedies. The only disposition in this direction is that only compatible remedies can be cumulated.\(^{90}\)

The obligation to of allowing additional period of time for performance has been accepted in the European contract law as well,\(^{91}\) which refers to the ranking of the remedies. However, under some circumstances the European sources of contractual law also rescind from the obligation to allow additional time for performance, but both the formulation and the aim of this rule as well differ from the solution in South Eastern European. Under DCFR this is not necessary if the failure to deliver goods in the conformity with the contract is related to the fact which debtor knew or could reasonably be expected to have known about, and which the debtor did not disclose to the creditor.\(^{92}\) So under ECSL this additional time period is not given if the buyer has reason to believe that the seller’s future performance cannot be relied on.\(^{93}\) PECL provides for an anticipatory non-perfor-

\(^{83}\) Vukadinović, R., op. cit., p. 216.
\(^{86}\) Art. 722 CC Alb.
\(^{88}\) Art. III. – 3:202 DCFR.
\(^{89}\) Schmidt-Kessel, M., op. cit., p. 194.
\(^{90}\) Art. 106.6 ECSL.
\(^{91}\) Art. III. – 3:103 DCFR.
\(^{92}\) Art. III. – 3:107 (3) DCFR.
\(^{93}\) Art. 109.4 (c) ECSL.
mance; where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it, the other party may terminate the contract. 94 In this segment, the diversity of solutions on the European level is astonishing, whereby it seems that provisions in Obligation Acts are more precisely formulated; ECSL solution is coloured by subjective understanding of the particular contractual party, and PECL formulation is too broad, which comes as a consequence of the fact that this formulation was not designed strictly for sale contract but rather for all reciprocal contracts.

South East European legal orders, which has been analysed in paper do not define which kind of damage the party is entitled to, and to which extent it should be compensated. This question is solved in PECL by stipulating that the aggrieved party is entitled to damage for loss caused by the other party’s non-performance which is not excused, thereby referring to the general provisions on exemption of liability contained in Article 8:108. 95 This solution is also acceptable for here analysed legal orders.

With regards to the available remedies it is clear that the provisions in the region are closer to the CISG solutions than to those of different legal sources of European contract law, which, again, differ significantly from each other.

9. Conclusion

The comparative analysis based on national reports which were made along a provided questionnaire enables a number of conclusions.

First of all, there is still a great resemblance and in the case of B&H, Serbia and Macedonia even complete uniformity, regarding the provisions of general contract law in the field of liability for material defects. The differences in the laws of Croatia and Montenegro are consequence of the transposition of the Directive 1999/44/EC into the Obligations Acts of these countries. The Albanian solutions are parallel to a certain extent, although they are less detailed and elaborated in certain aspects. This already shows that cross-border transactions not related to consumers would not be hindered by the existence of different legal orders. Potential future legislative activities in these countries should not endanger this level of harmonisation of the provisions. It is even possible that different and sometimes also inadequate transposition of the consumer acquis in some countries causes more obstacles for cross-border consumer contracts, than this is the case with other cross-border sales contracts.

Further, the solutions of general contract law on the sellers’ liability for material defects have shown a great level of convergence with PECL and DCFR. It is very interesting, that the solutions regarding sale contract have shown a great degree of similarity with the Directive 1999/44/EC even without its transposition.

As has already been stated, the implementation level of the Directive 1999/44/EC into the national legal orders of SEE countries has been explored to a large extent within the Civil Law Forum I and the results have been made public. 96 The question whether the method of implementation, especially in the successor countries of former SFRY, could have been different, deserved the attention of this paper. This paper is on the standpoint that, since the provisions of the Obligations Act of former SFRY, as well as the Obligations Acts of the countries arisen from former Yugoslavia, show convergence with the Directive 1999/44/EC to a high extent, it was better to perform the transpo-
sition into the general rules on sales\textsuperscript{97} and accomplish a consistent system of those rules with the necessary individual exceptions regarding consumers.

As far as the method of implementation of consumer acquis is concerned, the principal decision in all analysed countries was in favour of the codification method that is the enactment of special consumer protection acts that include consumer contract law. The integration method was used only partially and only regarding some directives, although in all countries resulting from the dissolution of former SFRY the Obligations Acts provided this possibility, as well as the Albanian Civil Code. The Consumer Sales Directive represents a rare exception where in some countries (Croatia, Montenegro) a mixed method was used (along the enactment of a special law on consumer protection the provisions of the Acts of Obligations were also changed under the influence of the consumer acquis).

The general integration of consumer contract law into the Obligations Acts was feasible for many reasons. The general part of obligations was the place where the legal concept of withdrawal from contract could have been regulated in a uniform and general manner for all contracts and some exceptions of course could have been stipulated in favour of the consumers. Furthermore the Obligations Act contains provisions on unfair contractual terms, regulates the special liability for defective products, so that adding of a new, special ground for liability as such for misleading advertising would not undermine the system of tort law etc. With regard to the sellers’ liability for the conformity of the contract performance and accordingly for liability for material defects, the Obligations Acts have an elaborated liability system for material defects and a system of remedies in that case. Also liability for services has been regulated etc. As has already been stated, provisions on sale contract of the Obligations Acts of the successor states show a high degree of convergence with the Consumer Sales Directive, which implicates that the decision against the transposition of this Directive into the general contract law means a missed chance.

Along the trend to enact maximum harmonisation directives, as the Consumer Rights Directive, the question of implementation methods might lose its significance. Those directives that do not allow deviations regarding the level of consumer protection are less convenient for the implementation into acts regulating law of obligations or civil codes. Thus a bigger difference between a consumer contract and an “ordinary” contract is created which can cause more problems in application of consumer law.\textsuperscript{98}

\textsuperscript{97} Tako i Meškić, Z., op. cit. p. 547.
LIABILITY FOR LACK OF CONFORMITY OF FOODS IN TERMS OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND LIABILITY FOR SUBSTANTIVE DEFAULTS ACCORDING TO NATIONAL LAWS OF THE COUNTRIES OF THE REGION

Introduction

The UN Convention relating to contracts of international sale of goods,¹ adopted in 1980 (Vienna Convention) is one of the most significant conventions along the lines of unification of the law of contract.² This Convention is a result of the long time work of representatives of states with different legal systems performed under the auspices of UNCITRAL which work resulted in creating a universal codification act in the area of international sale of goods. The Vienna Convention which entered into force in former Yugoslavia and ten other countries in 1988³ was applied with an increasing success and continues to be applied until the present times. By February 2012, seventy eight states from all over the world have ratified the Convention. As far as the European Union is concerned, almost all Member States have ratified this international document, so that Vienna Convention, among other things, has become known also as the general law of international sales in Europe.

For the purposes of the Conference of the South East Europe Civil Law Forum, a comparative analysis has been prepared of the concept of lack of conformity of goods, as adopted in the Vienna Convention, including the rules of substantive defaults adopted in national legislations of Serbia, Croatia, Bosnia and Herzegovina, Montenegro and Macedonia; included in the analysis are also the corresponding solutions adopted in the Civil Code of Albania.

Included in the elaboration in the mentioned analysis is a Questionnaire relating to rules covering the matters of lack of conformity of goods and substantive defaults of things (goods), as systematized according to the following general questions: 1) the concept of lack of conformity of goods in terms of the Vienna Convention, and the liability for substantive defaults adopted in national laws of countries of the Region (general comparison); 2) criteria for taking place of the lack of conformity in terms of the Vienna Convention and criteria applied in national legislations of the

³ Former Yugoslavia has ratified this Convention on 27 March 1985. After the changes that have taken place in the organization of state and legal order, the Convention remained in force in Serbia.
countries of the Region in the matter of existence of substantive defaults; 3) liability of seller for lack of conformity and/or substantive defaults; 4) clauses of exemption and limitation of seller’s liability for lack of conformity and/or substantive defaults; 5) obligation of inspection of goods and of notifying the seller on the lack of conformity and/or substantive defaults; 6) legal remedies of the buyer in the case of lack of conformity and/or in the case of substantive defaults.

The questions set in the Questionnaire were answered by the following young experts from the countries of the Region:

- Milena Đorđević, LLM and Marko Jovanović, LLM, University of Belgrade School of Law (Serbia);
- Hano Ernst, LLD, Zagreb, University of Zagreb School of Law (Croatia);
- Draginja Vuksanović, LLD and Velibor Korać, LLM, University of Podgorica School of Law (Montenegro);
- Aida Bushati, LLM, University of Tirana School of Law (Albania);
- Almedina Sabić, University of Sarajevo School of Law (Bosnia and Herzegovina);
- Nenad Gavrilović, LLD, Borka Tuševska, LLD and Neda Zdraveva, LLM, University of Skopje School of Law (Macedonia).

Drafted on the ground of answers received from the above mentioned young experts, the present Report is a summary presentation of basic solutions applied in the Vienna Convention relating to matters of lack of conformity and/or substantive defaults.

The Concept of Lack of Conformity of Goods in Terms of the Vienna Convention and Liability for Substantive Defaults in National Laws of Countries of the Region

The Vienna Convention adopts a unique concept of lack of conformity of goods (défaut de conformité) according to which a seller is obliged to deliver the goods in the quantity, the quality and the kind provided for by contract, as well as packed or protected as specified by the contract (art. 35). According to this concept, the notion of conformity of goods, in addition to differences in quality, the differences in quality of goods are also included as well as the case of delivering other kinds of goods – aliud, including the differences relating to packaging of goods. The concept of lack of conformity, as adopted in the Vienna Convention, should be interpreted autonomously and in concordance with article 7.1 of the Convention, and not by applying the corresponding criteria accepted in national legal systems.

On the other hand, the individual laws of contract and torts (obligation laws) of Serbia, Croatia, Bosnia and Herzegovina, Montenegro and Macedonia (hereinafter: national laws of countries of the Region) make a distinction between defaults in quality of thing (goods) encompassed by particular rules of liability for substantive defaults, at one hand, and the remaining cases of default performance of the delivery duty, which cases are specified in other rules of the Law, separately from the rules of liability for substantive defaults. Still, the concept of lack of conformity is not entirely unknown in the legal system of the countries of the Region. The Sketch (rough draft) of the Law on Obligations and Contracts, whose author is Professor Mihailo Konstantinović, considerable number of solutions of which were accepted in the actual Law of Contract and Torts, which Law was implemented in former Yugoslavia, in addition to “classical” rules of substantive defaults, provided also

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4 See the answers in the Questionnaire for Serbia (M. Đorđević, M. Jovanović), Croatia (H. Ernst), Bosnia and Herzegovina (A. Sabić), Montenegro (D. Vuksanović, V. Korać), and Macedonia (N. Gavrilović, B. Tuševska, N. Zdraveva).

5 Solutions of that Law, with minor amendments relating to changes and additions, were in essence kept in the laws on obligation relations adopted in former Yugoslav republics as their national legislation after the former Yugoslavia ceased to exist.
for particular rules covering the contract of sale in the sphere of economy. According to these rules, a seller shall be held liable for substantive defaults also in the case of delivery of only a part of the goods specified in contract, as well as in the case of handing over to buyer another thing (goods) not specified in the contract. The same solution applies to the case of delivering goods of another kind, and the case of lack of conformity of goods with the sample or model (art. 407, paragraph 3). In addition, the editors of the Serbian Civil Code, whose drafting is now in progress, being inspired with corresponding solutions of the mentioned pre-war Sketch for the Law of Oligations and the Vienna Convention, have proposed that corresponding changes of the rules of substantive defaults be included in the Serbian Law of Obligations. According to that proposal, rules relating to substantive defaults shall be applied also in the case of delivering only a part of the thing (goods), or delivering the goods in lesser or bigger quantity than stipulated by contract, as well as in the case of delivering another thing and not the one stipulated, or, as the case may be – delivering a thing of another kind (aliud). The same solution applies also in the case the thing was not packed or protected in usual way characteristic of the kind of the thing ordered or, should there be no such way – in the way appropriate to preserve or protect the thing.6

In contrast to other national laws of the countries of the Region, the Civil Code of Albania has adopted the concept of lack of conformity of goods in terms of which a seller was obliged to deliver the goods conformable to the quality, quantity and kind stipulated by contract as well as packed and installed in conformity with contract.7

**Criteria for Existing of Lack of Conformity According to Vienna Convention and Criteria of National Laws of Countries of the Region for Existing of Substantive Defaults**

According to the Vienna Convention the seller is bound to deliver goods that have to be in the quality, quantity and kind as provided for in the contract, and packed or protected in the way stipulated by contract. Unless otherwise agreed by the parties, it is considered that goods are not conformable to contract in the following cases: goods are not appropriate for a specific purpose that was expressly or impliedly declared to the seller at the time of entering into contract, unless circumstances indicated that the buyer relied on seller's professional ability and assessment of the matter, or that it was reasonable for him to act like that; goods lack the quality that was presented to the buyer in the form of sample or model; goods are not packed or protected in the way practised for their line or, should there be no such way, in the way that is apt to preserve and protect the goods (art. 35.1).

Such formulation of lack of conformity criteria are significantly similar but at the same time also dissimilar in comparison to the solutions found in national legislations of the countries of the Region covering the matter of substantive defaults.

Criteria applied in the Convention relating to the lack of conformity to usual (regular) purpose (use) of goods, to special purpose (use), as well as to non-conformity to sample or model, correspond to quite a degree to the solutions of national laws regulating the matter of substantive defaults of the thing (goods). According to national laws, there shall be a substantive default of thing if it lacks the properties necessary for its regular use or for its trading; if it lacks properties necessary for a special purpose that has induced the buyer to purchase it, which purpose had to be known or was supposed to be known to the seller; if a thing lacks properties and characteristics that were expressly or impliedly stipulated in contract and/or prescribed by law, and if the seller has delivered a thing not conformable to sample or moder, unless the sample or the model were shown for informa-

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7 Articles 710 and 715 of the Civil Code of Albania, quoted on the ground of answers to the Questionnaire filed by A. Bushati Gugu.
tion only. Within these frameworks, some national legislations have introduced new and additional criteria in order to bring them into accord with the Directive 1999/44/EC relating to specific aspects of sale of consumer goods and on European Union guarantees. Thus, for instance, the Croatian Law on Obligation Relations extends the mentioned rules onto substantive defaults by providing that there shall be a default in the following cases as well: where a thing lacks the properties otherwise existing at other things of the same kind, and which had to be reasonably expected by the buyer by the very nature of the matter, particularly taking in consideration seller’s public statements and producer’s declarations and those of his representatives concerning the properties of the thing at issue (advertisements, marking the thing, and the like); where a thing is inappropriately installed in cases the installation was included as an obligation according to the terms of contract of sale, and if the inappropriate installation was a result of defaults of the installation instructions.8 Similar rules are included in the Law on Obligation Relations of Montenegro.9

One of the differences between the Convention and the national laws of countries of the Region concerns the formulation of the rule on compliance of the special purpose goods. According to Convention, a seller is not liable for the lack of conformity if „the circumstances indicate that the buyer failed to rely, or that is was not reasonable for him to rely, on seller’s professional ability and assessment of the matter”, On the other hand, according to solutions of national legislations, there shall be a default „where a thing lacks properties necessary for special use that induced the buyer to purchase it, which purpose was known to seller, or had to be known by him”. The second difference consists in the fact that the Convention expressly includes in the notion of lack of conformity the claim relating the packaging and/or protection of goods. Specifying this claim is characteristic of American Law, while European continental legal systems, as a rule, do not expressly provide for such solution, although it seems that the needs of international commerce require its clear legislative regulation. Generally speaking, unless otherwise stipulated in the contract, the goods have to be packed in the way usually applied to a given kind of goods, which fact has to be assessed according to the established way of packaging in a given line of trade or, should there be no such way, the packaging must be appropriate for preserving and protecting the goods.

There exists a difference between the Convention and the national laws also relating to the very formulation of the rule governing the matter of lack of conformity and/or substantive defaults. The Convention expressly provides that quantity, quality, kind, and package of goods must be in concordance with the agreed terms and conditions of contract; the cases of lack of conformity are specified by the Convention only as a subsidiary solution, applicable only if contracting parties failed to agree otherwise. On the other hand, national laws provide that materialization of cases of substantive defaults depends on whether the parties have stipulated the properties of the thing in their contract, or whether there is no such stipulation in the contract at all. If properties of the thing are specified in the contract, the laws provide a rule according to which there shall be a substantive default should the thing fail to have the property and characteristics that were expressly or impliedly specified in the contract. In this way national laws, by applying the optional standard norm rule, adopt a wide definition of the notion of substantive default, leaving to contracting parties the freedom to regulate this matter by mutual consent.

Finally, the Civil Code of Albania, which adopts the concept according to which materialization of the lack of conformity of goods may take place, unless otherwise stipulated by the parties, where the goods are not fit for the purpose provided for by contract. Should this be impossible to determine, it shall be considered that goods are not conformable to contract where they are not fit for general use otherwise characteristic of the use of the same kind of goods. In addition, it is consid-

8 Quoted according to H. Ernst, answer to the Questionnaire for Croatia.
9 Quoted according to D. Vuksanović and V. Korač, answer to the Questionnaire for Montenegro.
II • LIABILITY FOR MATERIAL DEFECTS

erred that goods are not in conformity with the contract if not installed and packed in the way usual for packaging and installing of such goods, while should there be no such way – in the way apt to protect and preserve the goods.  

**Seller’s Liability for Lack of Conformity and/or Substantive Defaults**

According to the Vienna Convention, a seller shall be held liable for every default in conformity that did exist at the moment of passing the risk to the buyer, even where such default became obvious only subsequently. The seller is also held liable for every case of lack of conformity that has appeared after the moment of passing the risk, which lack may be ascribed to the violation of any of his obligations, including the violation of guaranty that the goods will remain fit for some time for their regular or particular use, or that they will keep their specific properties or characteristics (art. 36).

Similar solutions are provided in the national laws as well. According to these solutions, the seller shall be held liable for substantive defaults that the thing had at the moment of passing the risk, regardless of whether that fact was known to him. The seller is liable also for those substantive defaults appearing after the risk has passed to the buyer if they are the consequence of a cause existing before that time. Differing from the Convention, the national legislations provide that a minor substantive default shall not be taken in consideration.

According to the Convention, the seller is not liable for lack of conformity where the buyer was aware of that default at the time of entering into contract, or where that was impossible that it could have been unknown to him (art. 35.3). National laws provide for similar rules that cover this matter. According to these laws, the seller shall not be held liable for defaults relating to fitness for regular use or for trading, to particular use and the stipulated properties or characteristics of goods where they have been known to the buyer at the moment of entering into contract or where it was impossible that they could have been unknown to him. There is a precise formulation in the laws in terms of which it is assumed that the buyer could not have been unaware of those defaults which were easily discernible by an attentive person – in his/her capacity of buyer – with average knowledge and experience in the given profession or line of business, through a usual inspection of

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10 Quoted according to A. Bushati Gugu, author of the following answer to the Questionnaire for Albania: “A presumption of conformity is expressed in a negative way (lack of conformity): goods are presumed not to be in conformity with the contract if they are not fit for the specific purpose of use as provided in the contract, unless it is otherwise provided by an agreement. In cases when this cannot be determined goods will be deemed not to be in conformity with the contract if they are not fit for general use that the same type of goods can be. In addition goods are deemed to be not in the conformity with the contract if they are not installed and packaged in general manner that the goods of the same type can be packaged or installed. When this general manner for packing or installing cannot be found the goods have to be packaged and installed in a manner that guarantee their full protection and preservation (art. 715 of the CC).”

11 According to Albanian Civil Code, the seller is liable for any lack of conformity that exists at the moment of passing the risk to the buyer and at the time after that moment. Quoted according to the following answer of A. Bushati Gugu in the Questionnaire for Albania: “Article 716 of the CC stipulates that the seller is liable for any defect or non-conformity that exists at the time the risk passes from seller to buyer and the time after it. The seller is liable for defects or nonconformity that are determined after the time it delivers the goods and which fall under any kind of its obligation, including also the guarantee time during which the goods should be fit for purpose of usual use, or be fit for particular purpose, or during which the goods are supposed to preserve their quality and characteristics (Art. 716, 2nd).”

12 This question of the Civil Code of Albania is answered in A. Bushati Gugu’s answer in the Questionnaire for Albania reading as follows: “Article 715 of the CC stipulates that the seller cannot be held liable for the defects of goods that are known to buyer at the moment of conclusion of contract except when the defects have to do with the quality that the goods must have had according to the contract or according the seller notice.”
Still, a seller is held liable for defaults that were easy to discern where he/she declared that the thing had no defects at all or that it had specific properties or characteristics. In contrast to the Convention, the national laws do not provide for a legally prescribed exemption from liability in the case of lack of conformity of goods to a sample or a model, as well as in the case of inadequate packaging or protection. Finally, the rules of national laws concerning the guarantee for correct functioning of goods do apply only as far as technical goods are concerned ordinarily supplied by a warranty certificate handed over to the buyer.

Clauses of Exclusion and Limitation of Seller’s Liability for Lack of Conformity and/or Substantive Defaults

The rules of Vienna Convention relating to assessment of damage are based on two basic principles – the principle of complete compensation and the principle of limitation of liability by applying the foreseeability rule. According to article 74 of the Convention prescribing that: „Damages for violation of contract caused by one party shall be equal to loss and prevented gain suffered by the other party. These damages shall not exceed the loss foreseen or the one that should have been foreseen by the party violating the contract at the moment of entering into contract as a possible consequence of violation of contract, due to the circumstances that were known or should have been known to such party.”

As far as liability on the ground of contract is concerned, the national laws of countries of the Region set the rule according to which the creditor is entitled to compensation of actual loss and prevented gain that had to be foreseen by the debtor at the time of conclusion of contract as the possible consequences of violation of contract, and considering the facts that were known or had to be known to him. This solution, being based on the principle of total compensation and the principle of limitation of liability by applying the foreseeability rule, corresponds to the relevant solution in the Vienna Convention. However, in contrast to the Convention, national laws expressly specify that the limitation to the foreseeable loss shall not apply to cases of loss which is the result of fraud, wilfull lack of performance or gross negligence.

The issue of liability for violation of contract is most frequently regulated by consenting of minds of contracting parties by applying corresponding clauses. Contracting parties are free within these frameworks, and within the limits of public policy, the coercive laws (jus cogens) and good faith usage, to envisage various modalities of contractual liability. These modalities begin from complete exclusion of liability on the ground of contract, through its limitation, and all the way down to extending this liability to cases otherwise not involving liability under the rules of current law. Accordingly, the rules of current law relating to exclusion of contractual liability apply where this matter is not settled by applying a contractual clause and/or where the contractual clause is prone to the sanction of nullity.

13 In the Croatian Obligation Relations Law regulating the consumer contracts as well, the mentioned presumption is not applicable to consumer contracts because these contracts do not provide for the duty of inspection of goods, the only duty being to notify the seller on defaults that were discovered. Quoted according to H. Ernst in the answer included in the Questionnaire for Croatia.

14 This rule was taken over from article 82 of the 1964 Hague Uniform Law on International Sale of Goods (ULIS), with the proviso that article 74 of the Convention applies also in case of rescission of contract, which is a solution different from the Hague Law rule concerning only the cases where the contract is not rescinded.

15 Article 266.
There exists considerable unevenness in the sphere of rules covering this kind of clauses.\textsuperscript{16} Within the source of the uniform contract law, the UNIDROIT principles envisage that a contracting party may not invoke a clause limiting or excluding the liability for failure in performance, or permitting performance that is essentially different from what the other party has reasonably expected, should this be obviously a move inequitable in terms of the purpose of contract (art. 7.1.6). On the other hand, the principles of the European contract law include a rule according to which legal remedies applicable in the case of failure in performance may be excluded or limited only where invoking the exclusion or the limitation would be contrary to the principle of good faith and honesty (art. 8.109). A similar solution of this matter is provided for also in the Draft Common Frame (art. III – 3:105). Finally, the Vienna Convention on International Sale does not cover the issue of validity of contract and of any of its terms and conditions (art. 4a), meaning that the issue of exclusion and limitation clauses remain outside the scope of the Convention.

National laws of countries of the Region provide for detailed rules on limitation and exclusion of liability.\textsuperscript{17} In terms of these rules liability of a debtor for wilful misconduct (\textit{dolus}) or gross negligence (\textit{culpa lata}) may not be excluded in advance by the contract. Responding to the claim of an interested party, the court may also annul a contractual clause on exclusion of liability for simple negligence, where such clause is a result of debtor’s monopoly position or, generally, of inequitable relationship between the contracting parties. A clause specifying the highest amount of damages shall be full and valid where the amount specified in this way is not in obvious disproportion to the loss caused, and where it was otherwise provided for by the law. Finally, in the case of limiting the amount of damages, the creditor may be entitled to full compensation of loss where the impossibility of performance was the result of debtor’s wilful misconduct or gross negligence. A particular question may arise in the case of a clause excluding or limiting the liability was included in the general terms and conditions specified in the contract by the standard clause contracts (adhesive contracts). According to national laws of countries of the Region, the provisions included in the general terms and conditions contrary to the very purpose of the contract that has been concluded are null and void. In addition, the court may deny the application of certain provisions of general terms and conditions that deprive the other party of the right to raise objections, or of those provisions that may be the grounds for that party’s forfeiting the rights specified in contract or losing the time limits, or, as the case may be, those provisions which are obviously inequitable or excessively severe for that party. Finally, one should also take in consideration in this respect the \textit{contra preferentem} rule according to which the court is obliged to interpret the unclear provisions of a standard clause contract to the benefit of the party who acceded to such contract.

\textsuperscript{16} There are two directives in the European Union legislation that oblige the member states to bring into accord their rules concerning the clauses of exclusion and limitation of liability. First of all, this is the Directive of 5 April 1993 covering the inequitable clauses in consumer contracts. In terms of its norms, a contractual clause that was not the matter of particular negotiations shall be deemed an inequitable clause where, contrary to the principle of good faith and honesty, it has given rise to considerable lack of balance in the rights and obligations of contracting parties, and has inflicted harm to consumers. Member states have to provide that inequitable clauses inserted by seller or supplier in the contract entered into with a consumer shall not oblige the consumer (\textit{Council Directive 93/13/EEC, of 5 April 1993 on unfair terms in consumer contracts}. Official Journal, L 95/93, p. 29). Along the same lines, the Directive of 25 May 1999 specifies that, under the conditions set down by national law, a consumer shall not be obliged by contractual clauses or agreements concluded with the seller before the instance of lack of conformity has been made known to seller, which lack of conformity directly or indirectly excludes or limits the rights stemming out from the Directive (\textit{Directive 1999/44/EC of the European Parliament and of the Council, of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees}, Official Journal L 17/99, p. 12.).

\textsuperscript{17} The Civil Code of Albania does not include explicit provisions to cover the matter of exclusion or limitation of liability. See the following A. Bushati Gugu’s answer in the Questionnaire for Albania: “Article 715 of the CC stipulates that the seller cannot be held liable for the defects of goods that are known to buyer at the moment of conclusion of contract except when the defects have to do with the quality that the goods must have had according to the contract or according the seller notice. There is no other specific rule for the limitation or total exclusion of the liability of sellers.”
As far as contract of sale is concerned, the national laws lay down that contracting parties may limit or entirely exclude seller’s liability for substantive defaults of thing (goods). Still, a clause in the contract of sale specified by seller with the aim of limiting or excluding his liability for substantive defaults shall be null and void if the default was known to the seller and if he failed to notify the buyer accordingly, as well as if the seller imposed such clause using his particular monopoly position. A buyer who renounced his right to rescind the contract due to defect of the thing still keeps all his other rights deriving on the ground of these defects.

Duty of Inspection of Goods and of Notifying the Seller on the Lack of Conformity and/or on Subsantive Defaults

According to the Convention, two requirements are necessary for invoking the fact of lack of conformity, i.e.: firstly, that the buyer was not aware of this non-conformity at the time of entering into contract and, secondly, that the defect was present at the moment of passing the risk to the buyer. This implies buyer’s obligation to inspect the goods within a shortest possible time depending on circumstances and that, should he find the lack of conformity, to notify the seller within a reasonable time limit running from the moment of discovering it or of having been in the position to discover it and, in any case, within two years from the day of actual delivery, at the latest. However, even after elapsing of all these deadlines, the buyer does not forfeit his right to invoke the lack of conformity should such lack involve the facts which were known to the seller or which it was impossible not to be known by him, while he has failed to disclose them to the buyer.

National laws within the framework of rules of liability relating to substantive defaults provide for solutions close to the ones specified by the Convention. Thus the buyer is entitled to invoke the existence of substantive default that was unknown to him at the time of entering into contract, and which default existed at the time of passing the risk to buyer. In the matter of inspection of goods and notifying the seller on substantive defaults, national laws make a distinction between visible defaults, at the one hand, and the concealed defaults, at the other. Although visible and concealed defaults are regulated by these laws as two separate matters, this solution in essence does not differ from that provided for by the Convention, which expressly specifies that there shall be no seller’s liability for lack of conformity “even after such lack has become visible subsequently”.

According to national laws, the buyer is bound to inspect the goods he received in a usual way, or to put it on inspection as soon as, according to regular course of events, this becomes possible; he is also obliged to notify the seller on visible defaults within an eight day time limit, while in the case of commercial contracts he must do that without delay, since otherwise he shall forfeit his right on that ground. Where inspection is performed in the presence of both parties, the buyer is bound to immediately inform the seller about his remarks concerning the visible defaults; otherwise he shall forfeit his right on that ground. On the other hand, where the buyer has forwarded the goods further, without reloading them, while the seller was aware or had to be aware of such possibility of further shipment, the inspection of goods may be postponed until their arrival to new destination; in that case the buyer is bound to notify the seller on defaults as soon as, within regular

18 The Croatian Obligation Relations Law, which regulates also the matter of consumer contracts, provides that there is no possibility at all in consumer contracts to limit or exclude seller's liability. Quoted from H. Ernst's answer included in the Questionnaire for Croatia.

19 Article 35.3.

20 Article 36.

21 Article 38.

22 Article 39.

23 Article 40.
course of matters, he became aware of them from his clients. According to the contract and tort laws (obligation relations law) of Croatia and Montenegro, which laws regulate the consumer contracts as well, there is no obligation of inspection where consumer contract are involved.\textsuperscript{24} A concealed default is defined by the mentioned laws as a defect that was not possible to discern through usual inspection in course of the actitivity of accepting the goods. Should it turn out that, after the buyer has received the goods, the thing has a concealed default, the buyer shall become obliged to communicate to seller that fact within eight days (in the relevant Croatian law – within two months) from the day of discovering the defect, since otherwise he shall forfeit that right,\textsuperscript{25} while in the case of commercial contracts – he must do that without any delay. Unless otherwise stipulated by contract, the seller shall not be held liable after six months have elapsed from the day of handing over the goods, unless such default had been known to him, or unless it was impossible that it could have remained unknown to him.

Solutions existing in the Convention and in the national laws relating to the matter of notification about the lack of conformity are rather similar. According to these solutions, the notification has to be specific (the buyer is bound to describe the defect in details and/or indicate its nature)\textsuperscript{26} and communicated promptly. In contrast to Convention, the national laws regulating the matter of notifying about defaults envisage that the buyer is bound to call the seller to inspect the goods, although the form of such notification is not provided for. However, national legislations include a rule in terms of which the buyer is deemed to have performed his obligation of notifying the seller if a timely notification covering the defect, sent to seller by a registered letter, telegram or any other reliable way, was late or never reached the seller.

Again, according to national laws, the buyer shall not forfeit the right to invoke the substantive defaults also in the case of his failing to perform his obligation of inspection or the obligation of timely notification, as well as in the case the default appeared visible six month after handing over the goods – if such default was known to the seller or if it was impossible that it could have remained unknown to him. This solution is close in its substance to the corresponding rule of the Vienna Convention.\textsuperscript{27}

**Buyer’s Legal Remedies in the Case of Lack of Conformity and/or Substantive Defaults**

According to the Vienna Convention, in the case of lack of conformity of goods a buyer may take the following steps: he may demand the performance of contract – i.e. delivery of other goods as a replacement of the defective ones; a other options include the demand for elimination of defaults (art. 46), reduction of the price (art. 50), declaring his intention to rescind the contract on

\textsuperscript{24} Quoted from H. Ernst’s answer in the Questionnaire for Croatia and D. Vuksanović’s and V. Korač’s answer in the Questionnaire for Montenegro.

\textsuperscript{25} In Croatian law, as far as consumer contracts are concerned, the prescribed time limit amounts always to two months because there is no obligation of inspection. Quoted according to H. Ernst – answer in the Questionnaire for Croatia.

\textsuperscript{26} According to Croatian Contract and Torts Law, the buyer is not obliged to indicate in the default notification the relevant details; he is also not bound to call the seller to inspect the goods, unless commercial contracts are involved. Quoted according to H. Ernst’s answer in the Questionnaire for Croatia.

\textsuperscript{27} See the following answer in the Questionnaire for Albania submitted by A. Bushati Gugu: “According to CC (717) the buyer when it is not otherwise foreseen in other laws or by the parties, has 10 days to notify the seller for the defects of goods from the moment he/she discovers such defects. The buyer is obliged to specify the nature of the defects. The buyer loses his right to claim the defects of goods if he does not exercise it within two years from the moment of the delivery of goods if such a time limit does not contradict with time of the guarantee foreseen in a contract. However, the Civil Code contains an exception to these general rules of the time limit for the right of claim of the buyer. Article 718 of the CC reads that the seller will not profit from the rules of article 717 (meaning that the time limit is not applicable if the defects of goods have to do with facts that he was aware of or could have been aware of and he/she did not make known to the buyer.”
the ground of conditions provided for in article 49 of the Convention; he may also claim damages, either independently (art. 45.1.b) or together with some other legal remedy (art. 45.2). The claim for replacement (of goods) and rescission of contract depends on materialization of the requirement of substantial violation of contract in terms of article 25 of the Convention. The Convention does not apply the institute of automatic rescission (ipso iure, de plain droit) so that the statement of rescission becomes effective only after the other party has been duly notified. The buyer shall forfeit his right to replacement or to statement of rescission of contract after being unable to return the goods in the condition they were received by him (art. 82).

According to national laws, a buyer who has notified the seller, duly and on time, about a substantive default may choose one of the following options:

1) He/she may claim the elimination of the default or demand delivery of another thing free of default (performing the contract).28 A buyer who does not obtain the claimed performance of contract29 shall keep his right to rescind the contract or to claim the reduction of price.

2) Another option is to claim the reduction of price. The reduction of price shall be effected by applying the criterion of relationship between a thing without default and the value the defective thing had at the time of entering into contract. A buyer successful with his claim for price reduction on the ground of substantive default may rescind the contract or claim new reduction of price after subsequently discovering some other default.

3) He may state his intention to rescind the contract. National laws do not adopt the conception of substantial violation of contract as specified in the Vienna Convention. However, that conception is not entirely unknown in the legal systems of the countries of the Region. Thus, the institute of substantial violation of contract was envisaged in Professor Konstantinović’s Sketch (preliminary draft) of the Law on Obligations and Contracts,30 while in the First Draft Civil Code of Serbia there was a proposal of including this institute in the Serbian law of obligations. According to that proposal – “There shall be a substantial violation of contract should the failure of performing the contractual obligation on the part of debtor cause such loss to the creditor which in essence would deprive him of the benefit reasonably expected from the contract, or which would cause the purpose of contract to become impossible of realization as far as creditor is concerned.”31 In conformity with the mentioned general rule, the First Draft Civil Code provides also for changes of corresponding rules covering the matter of rescission of contract of sale due to substantive defaults.32 According to national laws, the buyer may rescind the contract only after leaving to seller an additional and reasonable time limit for the performance of obligations. Should the seller fail to perform the contract within the additional time limit, the contract shall be rescinded by the very operation of law (ipso iure, de plain droit), but the buyer may keep it valid after notifying the seller without delay on his intention to keep the contract full and valid. On the other hand, the buyer may rescind the contract even without leaving to seller the additional time limit, in the case the

28 The laws of Croatia and Montenegro expressly specify that the costs of elimination of default and replacement have to be reimbursed by the seller. Quoted according to H. Ernst’s answer in the Questionnaire for Croatia, and answer of D. Vuksanović and V. Korać in the Questionnaire for Montenegro.

29 According to the Croatian Law, should the way of elimination of default and/or delivery of another thing free of default cause considerable inconvenience of the buyer, he becomes entitled to rescind the contract immediately or claim proportionate reduction of the price. Quoted according to H. Ernst’s answer in the Questionnaire for Croatia.

30 Article 95.

31 Crucial departure from the Convention is expressed in omitting the requirement of anticipation of loss provided in article 25 of the Convention. See the entire text of article 138 of the First Draft Civil Code of Serbia, volume II, Obligation Relations, p. 52. Compare with article 25 of the Vienna Convention.

seller notifies him, after being informed about the defaults, that he is not going to perform the contract, or where, on the ground of circumstances of the concrete case, it follows that the seller shall not perform the contract even within the additional time limit. Should the seller fail to perform the contract within the additional time limit, the contract shall be rescinded by the very operation of law, but the buyer may keep it valid, after stating without delay, his intention to keep the contract valid. National laws provide for special rules relating to rescission of contract due to partial defects, which rules are close in their formulation to the corresponding rules of Convention, which applies also to the rules covering the rescission where a single price has been specified for several kinds of goods. The buyer shall lose his right to rescind the contract due to default of goods after being unable to return the goods, or to return them in the condition they were at the time he accepted them. However, the buyer may rescind the contract due to default if the goods have entirely or partially perished or damaged due to a default amounting to a justified ground for rescission, or due to an event not ascribable to him or persons he is responsible for. The same solution applies where goods have entirely or partially perished due to buyer’s duty of inspection of goods, or where the buyer, before the default was discovered, has spent or altered one part of the goods in course of their regular use as well as where damage or alteration were insignificant. However, a buyer who has lost his right to rescission of contract out of the above mentioned grounds, shall still keep other rights provided for to him/her by law on the ground of substantive defaults.

In every one of the mentioned cases the buyer shall be entitled also to compensation of damage. In addition, and quite independently, the seller shall be held liable according to general tort law rules, for damage caused due to the defect to other property of the buyer.

According to national laws, the rights of a buyer who has notified the seller on time about the existence of substantive default shall expire after one year (two years according to the Croatian Law) from the day of communicating the information to the seller, except where the buyer was prevented through seller’s fraud to exercise these rights. However, the buyer who has informed the seller on time about the default, and who still did not pay the price, may claim the reduction of price or demand compensation of damage as an objection move against seller’s claim to have the price paid to him.

33 See regarding the solution of this matter in the Civil Code of Albania the following answer submitted by A. Bushati Gugu in the Questionnaire for Albania: “The Albanian Civil Code distinguishes two separate situations for determining buyer’s remedies according to the degree of non conformity. The civil doctrine distinguishes between substantial breach of contractual obligation and unsubstantial breach of contractual obligation. The substantial breach of contractual obligation will comprise cases under which the defects of goods are of nature that totally hamper the object of the contract by heavily impairing the rights of the buyer. The substantial breach of the contract does not necessarily mean the total breach of the contract, it can also be partial breach of the contract but in any case it will be qualified as substantial breach where it causes the non fulfillment of buyer’s rights. Having said that, article 722 CC stipulates that in cases where delivery of defective goods constitutes a substantial breach of contractual obligation, the buyer may ask not only the repair or replacement of goods but also for a reduction of price or the dissolution of contract. The request for the repair or the replacement can be done by the buyer at the time of the detection of the defect (art. 717 of CC) or within a reasonable time. The buyer should give the seller the reasonable time to fulfill its obligation. During reasonable time the buyer is not allowed to use any other form of remedies unless he has been informed by the seller that the latter will not fulfill its obligation. In any case the buyer has the right to seek for compensation of damage (art. 722 of CC). Unsubstantial breach of obligation defined by article 723 of the CC implies the situation in which the delivery of defective goods constitutes unsubstantial breach of contract which not necessary impair the buyer’s rights and the general will of the contractual parties. In such cases the buyer may require the replacement or the repair of defects, secondly price reduction. Again like in the cases of substantial breaches the buyer is supposed to provide the seller with reasonable time to comply with such obligations and when the seller does not comply point 1 (the repair or replacement of goods with defects) within the time limit provided by the buyer, the latter has the right to ask for the price reduction. In any case the buyer can claim damage compensation (art. 723 CC).”
Concluding Considerations

Comparative analysis of rules of the Vienna Convention and national laws relating to the matters of lack of conformity and/or substantive defaults, leads to the conclusion that basic differences stem from the systematics and the area of application of these legal sources: the national laws regulate the field of obligation relations in general, while the Vienna Convention is applicable exclusively to the contract of international sale of goods. The area of implementation of the Vienna Convention does not encompass the sale of goods purchased for personal or family use or for meeting the needs of households.\textsuperscript{34} On the other hand, some national laws include in the area of their regulation also the rules relating to consumer sale, while in other legal systems consumer contracts are regulated by particular legislative acts.

Outside the framework of mentioned differences of formal legal nature, the basic distinction between the Vienna Convention and the national laws is expressed in the notion of lack of conformity of goods accepted in the Convention. The notion of lack of conformity, compared to the notion of substantive defaults, is more extensive and includes also the case of partial delivery, delivery of a lesser or bigger quantity than the one stipulated in the contract, delivery of other goods – the case of \textit{aliud}, as well as the packaging of goods.

On the other hand, determining of particular cases of lack of conformity in the Convention, relating to unfitness of goods for their usual use, for special use as well as to lack of conformity of goods to samples or models, matches to quite a degree the solutions provided for in national laws for regulating substantive defaults of goods.

In addition, Convention rules relating to liability of seller for lack of conformity of goods are almost identical with the provisions of national laws covering seller’s liability for substantive defaults. According to both systems, the seller is held liable for every lack of conformity (substantive default) that existed at the time of passing the risk to the buyer, even where such default has become visible only subsequently; the seller shall not be held liable for such default if the buyer was aware of it at the time of entering into contract, or if it was impossible that it could have remained unknown to him.

The solution provided in the Convention relating to buyer’s right to invoke the lack of conformity is also close in its formulation to the rules of national laws. The basic difference in this respect consists in the fact that national laws, as far as inspection of goods and informing the seller on substantive defaults are concerned, distinguish between visible defects, at the one hand, and concealed defects, at the other.

In assessing buyer’s rights to rescind the contract on the ground of lack of conformity and/or substantive defaults, the basic criterion to be applied is the seriousness and/or character of defect at issue. In principle, the seller shall be held liable for all defaults of thing, i.e. goods, that reduce their value or usefulness in terms of purpose specified by contract or implied by the circumstances of the case or parties’ intentions. However, the right to rescission is not guaranteed by every default, but only by the one of such character due to which the buyer is prevented to realize the expected benefit, but only in the way which does not substantially frustrate the purpose of contract. This principle is included in the Convention in the requirements for materialization of substantial violation of contract, while the national laws express it through the provision in terms of which an insignificant default shall not be taken in consideration. The same principle is also included in the rules of rescission of contract due to partial defaults, as well as in the general rule according to which a contract may not be rescinded because of failure to perform an insignificant part of obligation.

\textsuperscript{34} See the entire article 2a of the Convention.
Summary

For the needs of the Conference of the South East Europe Civil Law Forum, held in Skopje in January 2012, and organized by the GIZ, a comparative analysis has been made of the concept of lack of conformity of goods adopted in the Vienna Convention on International Sale of Goods as well as the rules concerning substantive defects accepted in national laws of Serbia, Croatia, Bosnia and Herzegovina, Montenegro and Macedonia; also included in the analysis were the corresponding solutions accepted in the Civil Code of Albania. The mentioned analysis included a questionnaire relating to rules relevant for the concept of lack of conformity of goods and solutions in national laws applicable to substantive defects of thing (goods). The text of the questionnaire was systematized according to the following general questions: 1) the concept of lack of conformity of goods in terms of the Vienna Convention and the notion of liability for substantive defects in national legislation of the countries of the Region (general comparison); 2) criteria for the existence (materialization) of the lack of conformity according to Vienna Convention, and criteria of national laws of countries of the Region for taking place (materialization) of substantive defects; 3) liability of seller for the lack of conformity and/or substantive defects; 4) clauses of exclusion and restriction of liability of seller for lack of conformity and/or substantive defects; 5) the obligation of inspecting the goods and of notifying the seller on lack of conformity and/or substantive defects; 6) legal remedies at the disposal of the buyer in the case of lack of conformity and/or substantive defects. The questionnaire was processed by young experts from the countries of the Region who provided the required answers. The answers given in the questionnaire made the grounds for summarizing in the present paper the basic solutions found in the Vienna Convention and in national laws of countries of the Region relating to matters of lack of conformity and/or substantive defects.
III

LIABILITY FOR LEGAL DEFECTS
The matter of legal defects and the liability for legal defects is of essential importance for fulfilment of the aim of contractual relations. The aim of the contract cannot be fulfilled or cannot be fulfilled in complete if there aren't legal mechanisms that enable the acquisition of subjective rights, particularly the property right or the right of use, that will be uninterrupted by the rights and claims of third parties. Existence of such rights and claims supposes existence of legal defects and legal liability. The liability for legal defects entails substantive and procedural issues, and the goal of this comparative study is to determine the level of coherence of the legislation in this field in the countries of South Eastern Europe.

The situation of the national legislation concerning the liability for legal defects is in the center of interest particularly because of the Proposal for Regulation on a Common European Sales Law.1 Until now, the European legislation concerning the contracts (primarily consumer law) hasn't regulated the matter of legal defects nor the rights of the third parties and the liability of the seller if those rights emerge. Article 102 of the Annex of the Regulation states that the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party, including intellectual property rights: (a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract; and (b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract (paragraph 2). In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract. In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract (paragraph 4). In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

The general conclusion of this research concerning the regulation of the legal institute liability for legal defects (also known as protection from eviction or responsibility for eviction) is that it

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1 *This work is translated from Serbian to English by Milka Rakočević, Msc, Teaching Assistant at Faculty of Law „Iustinianus Primus“ in Skopje. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011)635 final.*
is regulated in all the countries of South Eastern Europe and that the provisions that regulate it are relatively uniform.

The Legislators in the countries of South Eastern Europe regulates the matter of liability for legal defects in the general part of contract law, with a provision which refers to the effect of freight contracts and the contract of sale, with a remark in the part for particular contracts (gift, loan, lease, etc.) of application of provisions regulating the contract of sale. Comparatively, the Austrian Civil Code regulates this issue in the general part of contracts. The German Civil Code, the Swiss Code of Obligation, the Italian Civil Code and the French Civil Code regulates this issue under the provisions for contract of sale, having in consideration that the Italian Civil Code contains also a general provision for other types of contracts.

The study implies that the rules are more detailed in the laws of the countries of former Yugoslavia, and that it should be an example to be followed by Albania, particularly when it comes to the liability for legal defects of rights. At the same time, it can be concluded that the laws of Montenegro, Serbia, Croatia, Macedonia, Bosnia and Herzegovina and Republic of Srpska have no referral provisions for adequate application of the provisions concerning material defects, which is an omission. There should be applied, for example, the provisions concerning: compensation for damage, cost for eliminations of defects and delivery of object free of defects, breaking of contract without leaving a subsequent period, partial defects in cases where one price is determined for certain number of things, the loss of the right to break a contract, the consequences of breaking due to defects, the price reduction, the legal position of the acquirer of the right in case of a gradual discovery of defects. The same legal solution as in the above mentioned laws also exists in the Swiss Civil Code, the French Civil Code and the Italian Civil Code, while the German Civil Code and the Austrian Civil Code contain common provisions on material and legal defects and also specific provisions on legal defects.

1. Liability for legal defects

The legal institute liability for legal defects is regulated in the Civil Code of Albania and the Law of Obligations in Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia. The Laws/Codes do not contain an explicit definition for liability for legal defects. In all mentioned countries this liability is related with the liability for legal defects of fulfilment, more exactly with the obligation of the seller to deliver the buyer an object that is exempt from rights or claims of a third party. It is noticed that the court has an important role in completing the meaning of this notion, but unfortunately the case law is not easily available everywhere, so its implication cannot be equally analyzed in all the countries.

The Civil Code of Albania\(^2\) (hereinafter CCA) does not provide a definition of liability for legal defects, nor its definition results from any case law of the highest court. The liability for legal defects supposes an obligation of the seller to deliver the goods exempt from rights and claims of any third party. The Albanian law recognizes this liability as protection from eviction\(^3\), as loss or disturbance of property right of the buyer during the exercise of his/her right as an owner.\(^4\) The Albanian Civil Code regulates this matter in article 719, which can be interpreted in a way that it covers not only the protection from eviction due to existence of rights of third parties, but also due to the claims of


\(^4\) Mariana Semini, v. supra, ibid.
third parties that could disturb the quiet possession of the buyer as an owner.³ Thereby, it should be
taken in consideration that the article 719 limits the liability to cases where it is not otherwise agreed
between the contractual parties.

In the countries of former Yugoslavia the liability for legal defects is regulated in the same
manner. Firstly, the Laws of Obligations regulate the general liability concerning mutually binding
freight contracts where each contractual party is liable for the legal defects concerning fulfillment
and is obligated to protect the other contractual party from the rights and claims of a third party
that could exclude or limit his/her right. This definition is provided in the legislation of Bosnia and
Herzegovina (article 121, par. 2 of the Law of Obligation, hereinafter LOBH)⁶, Croatia (article 357, par.
2 of the Law of Obligation, hereinafter LOC)⁷, Republic of Macedonia (article 110, par. 2 of the Law
of Obligation, hereinafter LORM)⁸, Montenegro (article 116, par. 2 of the Law of Obligation, hereinafter
LOM)⁹, and Serbia (article 121, par.2 of the Law of Obligation, hereinafter LOS).¹⁰ This general liability
is related with the liability of the seller for legal defects, unless provisions concerning particular con-
tract provide otherwise. The liability of the seller for legal defects is regulated by art. 508 of LOBH, art.
430 of LOC, art. 496 of LORM, art. 516 of LOM and art. 508 of LOS. The mentioned Acts stipulate the
liability in cases of complete and partial eviction for transfer of goods. Regarding transfer of rights
it is guaranteed an existence and uninterrupted realization of the right, more exactly the liability for
legal defects will appear when the transferred right does not exist or it cannot be exercised uninter-
ruptedly.

The case law completes the definition of the institute. The Croatian case law gives a de-
finition of the liability for legal defects providing that it is a matter of protection from eviction de-
defined as “legal disturbance that is made upon a right of a third party that existed before the buyer’s
acquisition”¹¹ or the liability for eviction “…the liability for legal defects (eviction) is nothing more
than legal disturbance by a third party that excludes, reduces or limits the right of the buyer…”¹²

In determining the existence of the liability for legal defects it is also important to point out
that it exists if the buyer or other acquirer was not informed about the defect nor has agreed that

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³ A. Sallabanda, ibid. For example, when the buyer has lost his property rights over an object, as a consequence of a court decision
which recognizes the right of property of a third party, the buyer is considered evicted.
⁴ The Law of Obligation, Official Gazette of SFRY, No. 29/78, 39/85, 45/89, 57/89 is accepted in both entities. In Federation of Bosnia and
Herzegovina (hereinafter FBH), as Law of Obligation FBH (Official Gazette of RBH, No. 2/92, 14/93, 13/94 and Official Gazette FBH No.
29/03), and in Republic of Srpska (hereinafter RS), as Law of Obligation of Republic of Srpska (Official Gazette of RS No. 17/93, 57/98,
39/03, 17/04). The provisions of these Laws concerning the liability for legal defects are identical, so for easier understanding of the
text, the Law will only be used as LO, without any designation of FBH or RS, referring to the legislation of both entities.
⁵ Official Gazette of Croatia, No. 35/05, 41/08.
⁶ Official Gazette of Republic of Macedonia, No. 18/01, 4/02, 5/03, 84/08, 81/09, 161/09.
⁷ Official Gazette of Montenegro, No. 47/08.
⁸ Official Gazette of Serbia, No. 29/78, 39/85, 45/89, 57/89 and 31/93.
¹¹ District court in Zagreb, decision Gz-4788/02, of 23.4.2004.
¹² District court in Rijeka, decision Gz-1326/03, of 24.11.2004
the object of fulfilment has a legal defect. Additionally, for the liability of the seller for legal defect it is necessary that such defect existed in the time of the delivery to the buyer, where it is irrelevant whether the seller knew about such defect. The awareness of the seller will be a condition for his/her liability in situations when it comes to specific limitations that are of public nature and where in order to have liability it is required that the seller knew of existence of such defects or knew that such defects could be expected, and did not inform the other party about such. Public law limitations exist also in German and Austrian law.

Furthermore, comparatively speaking, a similar regulation to the Albanian code could be found in the article 42 of Vienna Convention, which states that the goods that are delivered by the seller shall be exempt from any right or claim of a third party. The Swiss Code of Obligation provides that the seller guarantees that the third party cannot fully or partially deprive the object of sale from the buyer on legal ground that existed at the time of signing of contract. The German civil code has a negative definition stating that the object does not have legal defects when a third party cannot exercise any rights or only right from the sale contract towards the buyer. The UN Convention on International Sale of Goods provides a general obligation for the seller to deliver goods free of any rights and claims of a third party.

2. Definition of legal defects of goods and rights

The legislation of all countries has provisions that specify that the legal defects can appear concerning goods. The legal defects of rights in general terms are not defined in Albania, while in other countries there is a legal definition regulating it.

Concerning goods, according to the legislation, the legal defects appear when the (sold) goods are burden by a right of a third party that excludes, reduces or limits the right of the buyer. The right of the third party could be any right that affects the right that the acquiring party should have acquired according to the contract. Related to this, it should be noted that only the right of third parties that are of absolute nature (for example rights in rem) will affect the acquiring party, in other words, only those rights will appear as essence of the legal defect. The relative rights of a

13 From the case law:
- In the case law of Croatia this is confirmed in a decision of the Supreme Court, Rev. 848/88 of 27.9.1989. It states: “However, a condition for the sellers liability in such case is that the buyer was not informed about the existence of the rights of third parties on the object that is bought, at the time of buying, more exactly, the buyer has not agreed to buy the object that is burden with such right. In this case, it was determined that the plaintiff and the defendant knew that the television set wasn’t cleared through customs and the plaintiff agreed on buying such television set. Due to that circumstance, the defendant is not liable as a seller for the defect that the object had at the time of sale, so the plaintiff, as it is justifiably emphasized in the review, unfoundedly claims a compensation for damage from the defendant”.
- “The buyer who did not know, or didn’t have to know that he was sold somebody else’s object, is authorized to break the contract and claim for damage if the aim of the contract couldn’t be realized. Those rights belong also to the buyer who was sold a vehicle with forgery serial number of the chassis and the engine, because those are legal defects that disable the vehicle’s use”. Legal opinion of the Cantonal court in Sarajevo, Bilten sudske prakse Kantonalnog suda u Sarajevu, broj 3/2001, str. 25.

14 From the case law:
- It isn’t a matter of legal defect of object that the seller should be liable under conditions stated in article 508-514 if “the buyer only thinks or is concerned that someday a third party is going to take away the object on the basis of stronger right of possession”. Supreme Court of Republic of Srpska, decision Rev. 4/01 of 27.1.2001, Bilten sudske prakse VS RS, broj 1/2004, odluka broj 70, str. 120-121.
- “The seller is liable for the legal defects of the object whether he knew about such or not”, Decision of Supreme Court of Montenegro, Rev. No. 116/09 of 18.11.2009.

15 Art. 508, par. 1 of LOBH, art. 430, par. 1 of LOC, art. 496, par. 1 of LORM, art. 516, par. 1 of LOM, art. 508, par. 1 of LOS. It should be emphasized that in Albania this kind of legal definition cannot be found in the legislation, yet it is drew out from the interpretation of art. 719 CCA, concerning the rights in rem and the rights in personae which disables or interrupt the quiet possession. See Ardian Nuni, Hyrje në të Drejtën Civile, Botime “Morava”, Tiranë 2006, p. 96.
third party shall appear as legal defect only if those have effect on the acquiring party in certain circumstances. In the legal theory it is emphasized that the disturbance that is not a result of exercising a right, but a purely factual disturbance does not fall within the concept of eviction.\textsuperscript{16}

For transfer of rights, according to the Law of Obligations in the countries of former Yugoslavia, it is considered that there is a legal defect when the right that is sold does not exist, or has legal obstacles for its realization.\textsuperscript{17} The Albanian legislation provides that the subject of a sale contract could be transfer of right, but CCA has no general definition governing legal defects for those rights.

As a special form of legal defects the limitations of public nature could be mentioned.\textsuperscript{18} It is considered that this limitation exists when a general or particular act of public law exclude, limit or reduce only the right of the acquirer or the authorizations which he/she would have according to the contract.

3. The obligations of the buyer in case of legal defects

In all the analyzed legal systems it is regulated that the buyer has an obligation due to appearance of the legal defect to inform the seller. According to article 720 of CCA, the buyer must inform the seller of the rights and claims of a third party and to specify the nature of those rights and claims. Similar obligation for informing the buyer is provided in art. 509 of LOBH, art. 431 of LOC, art. 497 of LORM, art. 517 LOM and art. 509 of LOS. This obligation of the buyer exists, except in cases when the seller is familiar with the fact that the goods are with a legal defect\textsuperscript{19} that is when the right
of the third party is obviously grounded.\textsuperscript{20} The time limit for informing is not specified in the Laws. In the Albanian law it is considered that that should be in a reasonable time, while in the laws of the former republics of Yugoslavia, it is considered that the notice should be in a shortest term. This comes from the general provision for liability for omitting to inform, according to which the buyer/acquirer is liable to the seller for the damage that would appear due to the omit to inform.\textsuperscript{21} The manner in which the other contractual party should be informed is also unregulated. In addition to the obligation to inform, in the legal systems that are based on the LO of SFRY, in a case when it appears that a third party has a right on the goods, the buyer is obligated to cite the seller to free the goods from the rights or pretensions of the third party in a reasonable time, or to deliver him/her another goods without legal defects, when the subject of the contract are goods determined by type.\textsuperscript{22}

There are similar solutions for the obligation of the buyer to those provided in the legislation in Montenegro, Serbia, Croatia, Macedonia, the Federation of Bosnia and Herzegovina and in Republic of Srpska, in the Austrian Civil Code, Italian Civil Code and the French Civil Code. Similar to the law of Albania is the provision in article 42 and 43 of the Wien Convention.

4. Sanctions for legal defects (The scope of liability for legal defects)

Main sanctions that arise from the existence of legal defects are breaking of a contract, price reduction and liability for suffered damage. This liability arises when the seller is not responding to the notice of the buyer to free the goods from the right or pretension of a third party in a reasonable time, or when the subject of the contract is determined by type, to deliver other goods without legal defect.

A break of contract by the law exists in a case when the seller does not act on the demand of the buyer and the goods are deprived from the buyer (art. 510, par. 1 of LOBH, art. 432, par. 1 of LOC\textsuperscript{23}, art. 498, par. 1 of LORM, art. 518, par. 1 of LOM, art. 510, par. 1 of LOS). A break of contract by

\begin{footnotesize}
\begin{enumerate}
\item[20] Art. 512, par. 1 of LOBH, art. 434 par. 1 of LOC, art. 500, par. 1 of LORM, art. 529, par. Of LOM, art. 512, par. 1 of LOS. According to the case law of Croatia: “The fact that the third party has submitted a demand for returning the deprived property is not an obviously grounded right according to art. 434, par. 1 of LO, that would exclude, reduce or limit the right of the plaintiff as a buyer. The existence of the right of a third party should be doubtless, and the outcome of the administrative proceedings that has been brought by the third party is not certain. The right of the third party must be obvious; In this case there is only possibility that the third party acquire certain rights in the initiated proceedings in front of the administrative authority. The rights that the third party will eventually acquire don’t have to exclude, reduce or limit the rights of the plaintiff”. (Decision of the Supreme Court of Croatia, Rev. No. 668/05 of 14.6.2006).
\item[21] See art. 268 of LOBH, art. 348 of LOC, art. 275 of LORM, art. 275 of LOM and art. 268 of LOS, which provides that the contractual party that is obligated to inform the other party about facts that effect their internal relation is liable for the damage that appears for the other party because he/she was not informed on time.
\item[22] Art. 509 of LOBH, art. 431 of LOC, art. 497 of LORM, art. 517 of LOM and art. 509 of LOS. According to the case law of the Supreme Courte of Bosnia and Herzegovina “the buyer cannot demand from the seller a transfer of the right of property on another parcel, in a situation when it is impossible to transfer the right of the property on the sold parcel because the parcel is in property of other joint owner due to the revocation of the joint property community, because the parcels are not goods determined by type, but goods that are always individually determined (Art. 508 and 509 of LO)”, Decision of the Supreme Court of Bosnia and Herzegovina, Rev. No. 246/86 of 30.7.1986.
\end{enumerate}
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the choice of the buyer exists in a case when the seller does not act on the demand of the buyer, and that results in reduction or limitation of the buyer's rights (art. 727 in connection with art. 710-3 and 690, 698, 699 of CCA, art. 510, par. 1 of LOBH, art. 432, par. 1 of LOC, art. 498, par. 1 of LORM, art. 518, par. 1 of LOM, art. 510, par. 1 of LOS). Similar to this, if the seller does not satisfy the buyer's demand to free the goods or the right from the claims of a third party in a reasonable time, the buyer can break the contract if its aim cannot be realized (art. 510, par. 2 of LOBH, art. 432, par. 2 of LOC, art. 498, par. 2 of LORM, art. 518, par. 2 of LOM, art. 510, par. 2 of LOS). In a case of break of contract, there are consequences that follow the break of a contract, but those weren't of direct interest of this research.

The buyer could ask for proportional reduction of price if the seller does not act on his demand in case of reduction or limitation of the buyer's right (art. 510, par. 1 of LOBH, art. 432, par. 1 of LOC, art. 498, par. 1 of LORM, art. 518, par. 1 of LOM, art. 510, par. 1 of LOS). The buyer has the right of compensation of damage in case of full eviction (according to art. 727 CCA), in other words in every case according to the general rules for liability for damage (art. 510, par. 3 of LOBH, art. 432, par. 3 of LOC, art. 498, par. 3 of LORM, art. 518, par. 3 of LOM, art. 510, par. 3 of LOS). In the laws of the countries, successors of the LO of SFRY, the condition for the buyer to claim a compensation of damage is that in time of signing the contract he/she didn't know of the possibility of depriving...
the goods or the possibility of reduction or limitation of his/her right, and that possibility is realized. Anyway, even in cases when the buyer knew about the possibility of partial or full eviction, and that possibility occurred, no matter of the fact that he/she has no right of compensation of damage, he/she has right to demand return or reduction of the price (art. 510, par. 4 of LOBH, art. 432, par. 4 of LOC, art. 498, par. 4 of LORM, art. 518, par. 4 of LOM, art. 510, par. 4 of LOS).

In Albanian law, the buyer can postpone the payment of the contractual price when there is reasonable ground to doubt that the goods or a part of them could be returned to a third party, unless the seller gives appropriate guarantees. The payment cannot be postponed if the buyer was familiar with the risk in the time of signing the contract. Similar to the Albanian provision is article 1481 of the Italian Civil Code.

5. Limitation/exclusion the liability of the seller for legal defects

The rules referring to legal defects are of dispositional nature. The LO of Serbia, Macedonia, Croatia, Montenegro and Bosnia and Herzegovina contain specific provision that provides the possibility of limiting or excluding the liability of the seller for legal defects with a contract.29 This provision is a result of the dispositional principle according to which the contractual parties freely arrange their obligation relations. However, the limitation or the exclusion of the liability is conditional. So, if in time of signing the contract, the seller was aware or could not have been unaware with some defect concerning his right, the provision of the contract referring to the limitation or exclusion of the liability for legal defects is void.30 That means that the seller will be liable to the buyer as such provision did not exist at all.

However, even in case the liability of the seller was excluded with the contract, the seller is not free of every kind of liability. If a full eviction occurred, he/she would have to return the received amount on behalf of the purchased price, as it would be, otherwise unjustified enrichment.31

When we speak about the Albanian law, according to article 720, par. 1 of the CCA, the buyer should inform the seller on third party’s rights or claims, specifying their nature, within a reasonable time from the moment the buyer was aware, or ought to have become aware. An interpretation a contrario of this provision means that, if the buyer does not give notice to the seller on the rights or claims of a third party, the seller is released from his obligation for warranty against eviction so, shall be excluded from his liability for legal defects. As in other countries of the region, the Albanian law also states that the seller, cannot rely on the lack of notification from the buyer, and as such, escape the obligation of warranty, if he was aware of the rights and claims of third party, or of their nature.32

6. Temporal limitation of the buyer’s right concerning legal defects

Realization of the buyer’s right concerning the legal defects is limited in time. The law of Serbia, Macedonia, Croatia, Montenegro and Bosnia and Herzegovina provides almost identical pro-

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29 See art. 513, par. 1 of LOS, art. 501, par. 1 of LORM, art. 435, par. 1 of LOC, art. 522, par. 1 of LOM, art. 513, par. 1 of LOBH.
30 See art. 513, par. 2 of LOS, art. 501, par. 2 of LORM, art. 435, par. 2 of LOC, art. 522, par. 2 of LOM, art. 513, par. 2 of LOBH.
31 From the case law:
   - “As result of full eviction the contract is breaking by the law, and the seller cannot keep the price, because there is no legal ground for that”, Decision of the Supreme Court of Montenegro, Rev. No. 47/200 of 5.2.2008.
   - “As a result of full eviction the contract is breaking by the law, and the seller cannot keep the price, because there is no legal ground for that. The provision of the contract that limits or excludes the liability of the seller for legal defects is void if the seller was dishonest in the time of signing the contract”. Decision of the Supreme Court of Montenegro, Rev. No. 518/94 of 14.6.1995.
32 See art. 720, par. 2 of CCA.
vision that regulates the loss of the buyer's rights on the basis of legal defects. Realization of the buyer's right concerning the legal defects in the laws of these countries is limited in time by a time-limit which varies depending on whether it is a non-judicial or judicial eviction.

In the Law of Obligation of the mentioned countries of the region, the matter of losing the right of the buyer based on legal defects is regulated as follows:

a) When it comes to non-judicial eviction, the rule provides that the buyer's right on the grounds of legal defects expires one year after the awareness of the existence of a right of a third party.\(^{33}\) \(^{34}\) By its nature, it is a subjective and preclusive time limit. The time limit is subjective because it begins from the awareness of the existence of a right of a third party. In this case it is irrelevant how the buyer become aware of the right of the third party.

b) When it comes to judicial eviction, when the third party filed for a claim before the expiration of the time limit of one year and the buyer noticed the seller to intervene in the lawsuit, the right of the buyer expires after six months of the final completion of the lawsuit.\(^{35}\) \(^{36}\) In this case the time limit is preclusive and objective. After expiration of the mentioned time limit, the buyer loses the rights on the grounds of liability for legal defects.

In Albanian law, concerning the temporal limitation of the buyer's right on the basis of legal defects, the time limits in which the buyer can refer to legal defects are not explicitly regulated. The article 720, par. 1 of CCA, provides the obligation of the buyer to give notice to the seller on the rights or claims of a third party. The time limit constrain established in this article is that, the notice should be done "within a reasonable time from the moment the buyer was aware or ought to have become aware of the third party's rights and claims". What would be assessed as a reasonable time it is a matter of the circumstances and the complexity of the individual case. This period of notification is different from the time-limit for defects related to the non-conformity of goods. Article 717 of the

\(^{33}\) See art. 515, par. 1 of LOS, art. 503, par. 1 of LORM, art. 437, par. 1 of LOC, art. 524, par. 1 of LOM, art. 515, par. 1 of LOBH.

\(^{34}\) Concerning this matter two decision of the Supreme Court of Croatia are cited as follows:

- In decision of the Supreme Court of Croatia, Rev. No. 1435/97 of 3.12.1997 it is stated that "the mentioned right of break of a contract is a right of one-sided, non-judicial break of contract, which means that the statement of break of a contract itself has an effect of break of contract, and when a judicial break of contract is claimed and a decision is made, that decision has no constitutive, but declarative effect. […] As in this case the statement is made within a period of one year, and the claim for breach of contract has only a declarative meaning, and it could refer only to determination of already broken contract, it is concluded that the loss of such right did not happened".

- In decision of the Supreme Court of Croatia, Rev. No. 3122/99 of 8.7.200 it is stated that "The conclusion of the lower courts concerning the nonexistence of the circumstances on the side of the plaintiff, as a buyer, that would lead to expiration of his rights based on legal defects is correct. In fact, contrary to the judicial review, the plaintiff by noticing the defendant about deprivation of the vehicle at the same day when the vehicle was deprived, on the 21\(^{st}\) of March 1995, he/she maintained the time limit provided in art. 515, par. 1 of LO (now art. 437, par. 1 of LO). […] Also, contrary to the judicial review, the notice about deprivation, together with the claim for refund of the full purchased price for the vehicle, would describe a will for break of contract, which break would, in the given circumstances, and taking in consideration the nature of the legal defect, appear by the law according to art. 510, par. 1 of LO (now art. 432, par. 1)".

\(^{35}\) See art. 515, par. 2 of LOS, art. 503, par. 2 of LORM, art. 437, par. 2 of LOC, art. 524, par. 2 of LOM, art. 515, par. 2 of LOBH.

\(^{36}\) Concerning this matter two decision of the Supreme Court of Croatia are cited as follows:

- In decision of the Supreme Court of Croatia, Rev. No. 3226/94 of 28.10.1997 it is stated that "The buyer whose vehicle was deprived from a competent authority because it was stolen, has a right to claim from the seller a refund of the purchased price, because the seller is liable as a seller of goods with a legal defect, and all that is in accordance with art. 508, par. 1 of LO, because he/she sold to the buyer goods that a third party has right of, that excludes the buyers right. Sanctions for selling goods with legal defect that was deprived from the buyer are provided in art. 510, par. 1 of LO, and the plaintiff could have terminate the contract according to this provision, and as a consequence of the termination could have claim for refund of the purchased price (art. 132, par. 2 of LO)".

- In decision of the Supreme Court of Croatian, Rev. No. 1703/91 of 14.11.1991 it is stated that "With the break of contract the parties are free of their obligations (except of compensation of damage), and as the plaintiff has partially carried out the contract, he/she has right to claim from the defendant to give back what was given (art. 132, par. 1,2 of LO). According to art. 361, par. 1 of LO, the plaintiff's claim began to expire the first day after the break of contract, and from then till filing of the claim the five year expiration time limit has passed, as seen from the relevant facts that were established by the courts".
CCA provides that the buyer loses the right to rely on a lack of conformity of the goods, if he does not give notice to the seller, specifying the nature of the lack of conformity, within ten days after he has discovered it, unless the law or the parties agree for another time-limit. In any case the buyer loses the right to rely on this legal defect if he does not give the seller notification thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless the time-limit is inconsistent with the contractual period of guarantee.

7. The position of the parties (the seller, the buyer and the third party who is holder of a right or claims for a right) in the disputes for liability for legal defects. Specific legal remedies against the decisions of the first instance court in the dispute for liability for legal defects. Specifics concerning enforcement of these decisions

By definition, the eviction is a legal act of a third party (objection, action in material sense), that he/she on the grounds of a stronger right that existed at the time of signing the contract of sale, excludes or limits the buyer’s property right, who assumed that the property right was acquired in full and without limitations on the basis of the contract of sale.

When a third party claims particular right on the goods, which is a subject of the contract of sale, the third party may file a claim to the competent court, in other words, to bring a lawsuit against the buyer of the goods (property claim), claiming for return of the goods.

When it comes to disputes for liability for legal defects, the third party that pretends on particular goods, as a plaintiff, files a claim against the buyer, as the defendant. In this case, the seller of the goods may participate in the lawsuit as a third party. His position in the litigation may be as an intervenient, i.e. a third party, informed about the lawsuit.

Substantive law (LO) of Serbia, Macedonia, Croatia, Montenegro and Bosnia and Herzegovina does not contain specific provisions referring to the position of the parties (the seller, the buyer and the third party who is a holder of a right or claims for a right) in lawsuits for liability for legal defects. When it comes to their position in the disputes for liability for legal defects, in the legal systems of the mentioned countries of the region we find the answer in the procedural provisions. The following situations are possible:

From the provisions of Law of Obligation of the above mentioned countries governing the matter of liability for legal defects we can draw certain conclusions relating to the position of interested parties in the civil litigation for liability for legal defects. The LO, in its provisions concerning the loss of the buyer’s right due to legal defects, provides a rule which states that the buyer may cite the seller to intervene in a lawsuit that was brought against him by a third party. The legal institute of participation of the intervenient in the civil litigation is governed by the rules of procedural law, which will be applied in the certain case.

However, the following situation is possible: in a lawsuit that was brought by a third party against the buyer, under the provisions stated in CPA, the buyer may notice the seller for the law-

37 See art. 515, par. 2 of LOS, art. 503, par. 2 of LORM, art. 437, par. 2 of LOC, art. 524, par. 2 of LDM, art. 515, par. 2 of LOBH.
suit. In this context, the LO provides a provision which states that the buyer has the right to refer on the seller’s liability for legal defect in cases when he/she recognized the apparent right of the third party without any notice or dispute.

In a situation where the buyer, without noticing the seller, is engaged in a lawsuit with the third party and loses the case, he/she can still cite to the liability of the seller for legal defects, unless the seller proves that he possessed means that could reject the claim of the third party. In this case, in a possible lawsuit between the buyer (as plaintiff) and the seller (as the defendant), the seller can file an objection for misconduct of litigation.

The buyer could also be an active party in the lawsuit (a plaintiff). For example, with a property claim for delivering of goods (reivindicatio) the buyer demands from the third party delivery of goods and the third party objects that he is the owner of the goods.

Likewise, the buyer could file a claim for determination, asking the court to determine the existence or nonexistence of the right of the third party if the buyer fears of possible eviction. In this case, the buyer would also have the position of a plaintiff in the lawsuit.

Another possible situation is existence of a lawsuit between the buyer and the seller concerning the contract of sale, and the third party files a claim for main intervention against the buyer and the seller, who would have the position of co-litigants in that litigation.

In Montenegro, the case law shows that the third party that files eviction claim, usually appears as a plaintiff, and taking in consideration that the most disputed is the property right, the third party tries by a property claim to restore the possession of the goods that he/she has right of. As defendants occur both the buyer and the seller.

Albanian law, in article 728 of CCA explicitly states that the buyer, suited by a third party who claims right upon the goods, must cite the seller in the dispute. When the buyer does not do this, and against him a final court decision is given, he loses the right of warranty against eviction, if the seller proves that there were enough reasons of withdrawal of the application of the third party. The buyer that has willingly recognized a third party’s right, loses his right of warranty against eviction, if he does not prove that there were not enough reasons to hinder the gaining of the goods. The position of the seller in the lawsuit between the third party, as plaintiff and the buyer as the defendant could be as intervenient or a third party noticed about the lawsuit.

As for the question of specific legal remedies against decision of first instance courts in the disputes for liability for legal defects, all the analyzed legal systems of the countries of the region do not recognize specific provisions concerning particular (specific) legal remedies against decisions of the first instance courts.

Regarding the possibility of existence of certain specifics related to the enforcement of decisions in cases of liability for legal defects, as in the previous question, the laws of the analyzed countries do not recognize such specifics.

39 If the defendant or the plaintiff should notify a third party of the lawsuit to found a certain legal effect, they could do that at the latest till the final completion of the lawsuit, with a request through the court, stating the reasons of the notification and the state of the lawsuit.

40 See art. 511 of LOS, art. 499 of LORM, art. 433 of LOC, art. 519 of LOM, art. 511 of LOBH.

41 This kind of position of the interested parties in the lawsuit is stated in the answers to the questionnaire from Bosnia and Herzegovina.

42 In decision of the Supreme Court of Montenegro, Rev. No. 17/2008 of 5.2.2008 it is stated that “The unauthorized disposition with their apartment, does not stop the plaintiffs as owners, with a property claim to demand handing over the apartment that is in possession of the buyer, as a second defendant, in their possession”.

43 See art. 191 of CCA.

44 See art. 192 of CCA.
Summary

In this article the authors analyze the level of coherence in the regulation of the notion of the legal defects and the liability for legal defects in the countries of South East Europe. The liability for legal defects entails substantive and procedural issues that are separately analyzed in the article.

In the first part of the article the notion of legal defects is explored. When legal defects may occur is a question that is reviewed in the second part of the article. The legislation of all countries concerned has provisions which provide that the legal defects may occur in relation to things. In regard to the legal defects of rights (to be transferred) the legislation of Albania is the only one that does not have general legal definition. Further in the article the issue of the obligations of the buyer (injured party) is analyzed. The authors conclude that the in all of the analyzed legal systems the buyer has the obligation to notify the seller when the legal defect occurs. From the analysis in the fourth part it is concluded that the main sanctions in cases of liability for legal defects are termination of the contract, decrease of price and damages. In the fifth part the rules on limitation or exclusion of liability are analyzed. The discussion in the sixth part lead to conclusion that the rights of the buyer regarding the liability for legal defects are limited in time. In the seventh part of the article the authors analyze the procedural issues related to the liability for legal defects. Regarding the position of the parties (seller, buyer or third party who is holder of a right or pretenders to a right) in the cases for liability for legal defects it is concluded that the material laws of Serbia, Macedonia, Croatia, Montenegro and Bosnia and Herzegovina does not contain specific provisions concerning the status of the parties in the lawsuit for legal liability for legal defects. Regarding the legal remedies against the decision in first instance, as well as to the enforcement of the judgments, the legislation of the concerned countries does not have any specifications that differentiate these cases from any others.
IV
REMEDIES FOR NON-PERFORMANCE IN SALES CONTRACTS- DAMAGE AND INTEREST
REMEDIES FOR BREACH OF SALES CONTRACT – LOSS AND INTEREST
Collective representation of the solutions in the legal systems of Albania, Bosnia and Herzegovina (Republika Srpska, Federation of B&H and District Brčko), Montenegro, Croatia, Macedonia and Serbia

1. Introduction

The subject of this text is the collective representation of the solutions in the legal systems of Albania, Bosnia and Herzegovina, Montenegro, Republic of Croatia, Republic of Macedonia and Republic of Serbia, on the basis of the presentations by the national researchers in all of these countries. The national reports were made according to a previous questionnaire, the primary goal of which was to list the basic solutions of these legal systems regarding the legal remedies for breach of sales contract – damage and interest. In this, the national reports focus on several questions related to presentation of national legal rules for compensation of damage and payment of default interest due to default of sales contract obligations by contracting parties. Here is an overview of the national reports, and at the end of the text there is a summary on the level of harmonization of these legal systems on this issue.

2. Answers to individual questions

1. In which case of breach of sales contract are the parties entitled to claim compensation for loss? Is the right of compensation for loss the sole right, or is it one of the rights that follow the breach of contract?

   In the Albanian legal system this question is regulated by the Albanian Civil Code (law no. 7850, dated 29.07.1994, as amended). The Albanian Civil Code (ACC) regulates the sales contract in its articles 705-756. According to the ACC, a contract has the force of law between the parties. It can be dissolved or changed by mutual consent or for a cause permitted by law (Article 690 ACC). A contract obliges the parties not only for what it provided itself, but also for the effects arising from the application of the law (Article 693 ACC). As it can be seen, in concluding a contract, the parties put themselves under an obligation that derives and is defined by the contract itself. They have the obligation to fulfill the contract conditions in good faith (bonafide). According to article 422 of ACC the creditor and debtor must behave correctly toward each other, with impartiality and according to the requests of reason. If the debtor doesn’t execute his obligation, or he doesn’t execute it properly, this means that we have a breach of the obligation that derives from the contract or from the law. The breach of contract causes the application of sanctions for the respective party. Every non-fulfillment on the execution of the obligations obliges the debtor to compensate the damage caused to the creditor, except when he proves that non-fulfillment has not occurred due to his fault. to ask the execution on nature of the obligation, especially the delivery of the thing or conduction of works, as well as the compensation of the damage caused from the delay of the execution; b) request compensation of the damage caused by non-execution of the obligation. It should be reminded that
the parties in a contract can't put special clauses that exclude or limit their responsibility for non-fulfilment of the obligation. Any agreement that excludes or limits the parties from the liability of the non-execution of the obligations is considered invalid (Article 479 ACC).

When the execution is made impossible due to the fault of the debtor, the creditor has the right to ask from him the compensation of the damage caused. The debtor is guilty, when with intention or by negligence has created such circumstances that have made it impossible the execution or when he has taken measures to prevent it (Article 480 ACC). Now, in relation to the question that we are analyzing here, article 486 of the Albanian Civil Code provides that the damage to be compensated from the debtor for the non-execution of the obligation is composed of all the losses causes by the reduction of the property, as well as the profit that might have been extracted in normal conditions of the market (the missing profit). There belong on the compensation and repair of the damage also the reasonable expenses to prevent or limit the damage, that are related to the circumstances, which is based on the liability of the party, reasonable and necessary expenses to determine the damage and liability, as well as those that were needed to find an extra judicial settlement of the obligation's fulfilment.

On the other hand, when in a contract with two-sided obligations, the execution of the obligations of one of the parties is impossible not due to the fault of one of the parties, none of them has the right to ask from the other the execution of the obligation or the compensation of the damage, except when on law or contract is provided differently. Each of the parties has the right to ask the other party to return that which is given for the execution of the obligation (Article 488 ACC). According to article 492 of ACC when the creditor is in delay, the debtor has the right to ask for the compensation of the damage caused from it and is relived from the responsibility in case that later on the execution of the obligation becomes impossible, except when the impossibility of the execution of the obligation happens due to his fault. When the creditor is in delay, the debtor does not pay interest. Article 450 of the Albanian Civil Code provides that the recompense for the damage caused by the delay of the payment of a certain amount of money consists of matured interests, from the day the debtor's delay begun, in the official currency of the country where the payment is done. The percentage of interest is defined by law. At the end of each year, the matured interests are added to the sum of the obligation upon which their calculation is done.

The legal interest is paid without the creditor being obliged to prove any damage. When the creditor proves that he has incurred damages greater than the legal interest, debtor is obliged to pay him the other part of the damage. Also, according to article 454 of ACC, article 450 of this Code doesn't take away the right of the creditor to require the recompense for the damage caused by the fact the exchange rate of the defined currency might have changed from the day in which started the delay. In relation to the question in which case of breach of sales contract are the parties entitled to claim compensation for loss, we can say that the parties have the right to claim compensation for losses in every case in which the other party is responsible for the breach of contract that resulted in loss. As we will see below, the right of compensation for loss is not the only right. In article 722 of ACC it is provided that: In cases where delivery of defective property constitutes a substantial breach of contractual obligations, the buyer has the right to ask: 1) at the moment of the challenge, provided in article 717 of this code or within a reasonable time from this challenge, the delivery of a thing as an addition or substitution; 2) for repair of the things when this is reasonable, taking into account all concrete surrounding circumstances. The demand for repairs must be done at the moment of challenge provided in article 717 above or within a reasonable time from this challenge; 3) for a reduction in price; 4) to dissolve the contract.

The buyer can give to the seller a reasonable time to fulfil these obligations. During this time, the buyer cannot use any legal means to address the breach except when he is notified by the
seller that the seller will not fulfil the obligation within the term provided. In any case, the buyer does not lose the right to indemnity. Article 723 of ACC provides that when the delivery of the things with defects is not a substantial breach of the contract, the buyer can ask: 1) for the repair of the things that are damaged; or 2) for a reduction in price. The buyer can give the seller a reasonable term for the fulfilment of these obligations. During this term, the buyer cannot use any legal means to address the breach except when he is notified by the seller that the seller will not fulfil the obligation within the term provided. When the seller does not fulfil the demand provided for in point one of this article within the term established by the buyer, the latter can ask for a price reduction of the above thing. In any case, the buyer does not lose the right to indemnity.

Article 736 of ACC provides that the seller can give to the buyer extra time for the fulfilment of his obligations. With the exception of cases where the seller has not received notice from the buyer that he will comply with his obligation within this period, the seller cannot use any legal means for the indemnity of the loss caused by the delay in the fulfilment. However, the seller does not lose the right to compensation for damages caused by the delay. In addition, article 737 of ACC provides that: The seller can consider the contract dissolved: if the breach of buyer’s contractual or legal obligation is in fact a particularly substantial or essential breach; if the buyer does not fulfil his obligation to pay the price or to take delivery of the things within the additional term established by the seller or declares that he is not going to make it within this term; If the buyer has paid the price, the seller loses the right to declare the contract dissolved if he does not ask for it; in case of delayed fulfilment of a buyer’s obligation, before he became aware of the execution of the obligation; in case of another breach different from delayed non-fulfilment within a reasonable time; after the moment when he knew or should have known of such breach; after the termination of the additional term established by himself, or after the buyer has declared that he will not fulfil his obligations within this additional term.

Article 743 of ACC provides that if one of the parties is late in paying the price or any other amount, the other party has the right to ask the interest on these amounts without influencing indemnity. Article 745 of ACC provides that if the contract is dissolved and if within a reasonable manner and time after the dissolution the buyer has made a substitute purchase or the seller has resold the things, the party that asks for indemnity can take the difference between the price provided for in the contract and the price of the substituting purchase or sale, and as well every other recompense that is provided in to the preceding Article. In case of sales with reserved ownership, article 749 of ACC provides that if the contract is dissolved due to the buyer’s non-performance, the seller must return the installments he has received, subject to his right to fair compensation for use of the thing and for damages. If it was stipulated that the installments paid should be retained by the seller as indemnity, the court, according to the circumstances, can grant a reduction of the agreed indemnity.

In Bosnia and Herzegovina (Republika Srpska), the most important general presumption of liability for breach of contract is that there was actual breach of the contract. A breach of the contract occurs when contracting parties do not act in accordance with the content of the contract, i.e. the breach of contract can occur either on the side of the creditor or the side of the debtor. Thus, for example, breach of sales contract occurs when the debtor does not fulfil his obligation at all or does not fulfil it in the predicted time or the agreed location etc. The creditor may cause breach of contract if he, for example, refuses to accept proper payment of the debt or requests the payment of the debt at a different time or in a different place, etc.

LO regulates the breach of contract in the part entitled “Effects of Obligations” (Articles 262-294). When a breach of contract occurs the contract does not automatically cease to exist because of that. It is so according to the LO, which contains special rules for cessation of obligations (Chapter
IV: “Cessation of Obligations”, Articles 295-393) in the frames of which it does not predict breach of contract or obligations in general as a manner for the cessation. Thus, in case of breach of contract the “creditor’s rights and debtor’s obligations” continue to exist as basic (primary), just that now arises a new (additional, secondary, accessory) obligation consisted of compensation for caused damage. The identity of obligation has not been changed, only the content of the obligation has been changed. This understanding is known as theory of subrogation, because the amount owed by the debtor for breach of contract is a surrogate of the primary effect, although this opinion is not fully acceptable.

The most frequent case of violation of the basic obligation is when the debtor does not fulfill his obligation or is overdue on its fulfillment. The creditor in that case is entitled to, in addition to the right to request fulfillment of the obligation by the debtor, ask for compensation of the damage he has suffered due to that. This right of the creditor for compensation of damage as a general rule is regulated in Article 262/2 of the LO, while there is a whole set of individual provisions of the LO that contain the right of the creditor for compensation of damage, which is considered superfluous, because regardless of these individual provisions the general rule would apply. Namely, the provision from Article 262/2 of the LO shall apply to all cases when the debtor fails to fulfill his obligation or is overdue in its fulfillment regardless of the source the obligation was created from (contract, causing of damage, unfounded acquisition, business activity without mandate), which is why it is believed that it is more correct to entitle this liability as liability for damage caused for breach of existing obligation instead of “contractual liability for damage”.

In order for liability due to breach of contract to occur because the debtor did not fulfill his obligation fully or the fulfillment is partial or he was overdue with its fulfillment, it is necessary for this obligation of the debtor to be previously determined, i.e. for there to exist an obligation relationship between the creditor and debtor. If the party suffering the damage and the party liable were in no obligation relationship before the damage occurred or the damage caused is not related in any way to the obligation relations of these parties, contractual liability for damage does not occur between them. This obligation relation must be in effect, i.e. to produce legal effect, and it should not be a void or null contract that was later terminated in the legal timeframe.

Liability for breach of contract can also arise when its explicit provisions were not violated, but the legal provisions applied as additional in the case when individual legal provisions are not regulated by contract. This comes from the dispositive character of the provisions from Article 20 of the LO. Every breach of contract, i.e. its non-fulfillment fully or partially or lateness in fulfillment, does not have as consequence the liability of one of the contracting parties for such a breach of contract. In order to reach liability for breach, it is necessary for the damage to have really occurred. Whether this damage will be compensated, bottom line, depends on the creditor as well, firstly whether he will use his right to compensation of damage (Article 262/2 LO), and then whether he will succeed in proving its existence and amount. Additionally, the creditor must prove the causal link between the damage and the breach and the cause must be such that there would have been no damaging consequences without it.

In order for the debtor to be exempt from the liability for damage that he has caused to the creditor by breach of contract, for which liability there is a disputable assumption, he must prove the existence of certain circumstances that eliminate the illegality of his behaviour. In this sense the LO has accepted the so-called subjective – objective concept of debtor liability and his exemption from this liability. In Article 263 of the LO two preconditions are regulated that cumulatively exempt the debtor from liability: 1. that the inability to fulfil the obligation or the lateness in fulfilling the obligation to be related to circumstances occurring after conclusion of the contract, and 2. that these circumstances the debtor could not prevent, remove or avoid.
Circumstances leading to inability to fulfill the obligation or the lateness in fulfilling the obligation are a situation in which the debtor came about, and it can comprise natural or legal reasons, temporary or permanent, full or partial, objective (when no one can fulfill a certain obligation) or subjective (when the debtor cannot fulfill the obligation). The circumstance should have occurred after the conclusion of the contract, irrespective of the will of the debtor, that the debtor could not prevent, remove or avoid it. The expressions “prevent, remove or avoid” should be interpreted as related both to the occurring of the circumstance and the consequences that this circumstance creates, i.e. the damage causes This means that the debtor first proves that the occurrence of a certain circumstance was insurmountable for him, and then that the he could not prevent, remove or avoid the resulting damage (consequence). In this the attention of the debtor is evaluated objectively, i.e. did he behave like a good businessman in the given situation, i.e. as a good host (see Article 18/1 LO).

The liability of the debtor for damage caused to the creditor by breach of contract can be influenced by the contract itself. It is contractual expansion of debtor liability from Article 264/1 of the LO and cases for which regularly ("otherwise") one would not be liable, but not in the direction of (disproportionally) greater compensation for damage than the one caused, which is in accordance with the principles of conscientiousness and fairness (see Article 264/2 LO). Also the possibility has been regulated for contractual limitation and exemption of liability (Article 265 LO), but the debtor liability can only be excluded for ordinary negligence (culpa levis), and not for deliberate (dolus) or gross negligence (culpa lata). The exemption from liability is not unlimited even for ordinary negligence, and the exemption of liability clause is only allowed if it is the result of freely expressed will by the contracting parties and is not in opposition to the basic principles of the LO, which are the principles for prohibition of the creation and utilization of a monopoly position (Article 14), equality of parties (Article 11) and principle of conscientiousness and fairness (Article 12).

In Bosnia and Herzegovina (Federation of B&H, District Brčko), The most important general presumption of liability for breach of contract is that there was actual breach of the contract. A breach of the contract occurs when contracting parties do not act in accordance with the content of the contract, i.e. the breach of contract can occur either on the side of the creditor or the side of the debtor. Thus, for example, breach of sales contract occurs when the debtor does not fulfill his obligation at all or does not fulfill it in the predicted time or the agreed location etc. The creditor may cause breach of contract if he, for example, refuses to accept proper payment of the debt or requests the payment of the debt at a different time or in a different place, etc.

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es a new (additional, secondary, accessory) obligation consisted of compensation for caused damage. The identity of obligation has not been changed, only the content of the obligation has been changed. This understanding is known as theory of subrogation, because the amount owed by the debtor for breach of contract is a surrogate of the primary effect, although this opinion is not fully acceptable.

The most frequent case of violation of the basic obligation is when the debtor does not fulfil his obligation or is overdue on its fulfilment. The creditor in that case is entitled to, in addition to the right to request fulfilment of the obligation by the debtor, ask for compensation of the damage he has suffered due to that. This right of the creditor for compensation of damage as a general rule is regulated in Article 262/2 of the LO, while there is a whole set of individual provisions of the LO that contain the right of the creditor for compensation of damage, which is considered superfluous, because regardless of these individual provisions the general rule would apply. Namely, the provision from Article 262/2 of the LO shall apply to all cases when the debtor fails to fulfil his obligation or is overdue in its fulfilment regardless of the source the obligation was created from (contract, causing of damage, unfounded acquisition, business activity without mandate), which is why it is believed that it is more correct to entitle this liability as liability for damage caused for breach of existing obligation instead of “contractual liability for damage”.

In order for liability to exist due to breach of contract to occur because the debtor did not fulfil his obligation fully or the fulfilment is partial or he was overdue with its fulfilment, it is necessary for this obligation of the debtor to be previously determined, i.e. for there to exist an obligation relationship between the creditor and debtor. If the party suffering the damage and the party liable were in no obligation relationship before the damage occurred or the damage caused is not related in any way to the obligation relations of these parties, contractual liability for damage does not occur between them. This obligation relation must be in effect, i.e. to produce legal effect, and it should not be a void or null contract that was later terminated in the legal timeframe.

Liability for breach of contract can also arise when its explicit provisions were not violated, but the legal provisions applied as additional in the case when individual legal provisions are not regulated by contract. This comes from the dispositive character of the provisions from Article 20 of the LO.

Every breach of contract, i.e. its non-fulfilment fully or partially or lateness in fulfilment, does not have as consequence the liability of one of the contracting parties for such a breach of contract. In order to reach liability for breach, or as Professor Loza states, “in order for the content of the obligation to change due to its violation”, it is necessary for the damage to have really occurred. Whether this damage will be compensated, bottom line, depends on the creditor as well, firstly whether he will use his right to compensation of damage (Article 262/2 LO), and then whether he will succeed in proving its existence and amount. Additionally, the creditor must prove the causal link between the damage and the breach and the cause must be such that there would have been no damaging consequences without it.

In order for the debtor to be exempt from the liability for damage that he has caused to the creditor by breach of contract, for which liability there is a disputable assumption, he must prove the existence of certain circumstances that eliminate the illegality of his behaviour. In this sense the LO has accepted the so-called subjective – objective concept of debtor liability and his exemption from this liability. In Article 263 of the LO two preconditions are regulated that cumulatively exempt the debtor from liability: 1. that the inability to fulfil the obligation or the lateness in fulfilling the obligation to be related to circumstances occurring after conclusion of the contract, and 2. that these circumstances the debtor could not prevent, remove or avoid.
Circumstances leading to inability to fulfil the obligation or the lateness in fulfilling the obligation are a situation in which the debtor came about, and it can comprise natural or legal reasons, temporary or permanent, full or partial, objective (when no one can fulfil a certain obligation) or subjective (when the debtor cannot fulfil the obligation). The circumstance should have occurred after the conclusion of the contract, irrespective of the will of the debtor, that the debtor could not prevent, remove or avoid it. The expressions “prevent, remove or avoid” should be interpreted as related both to the occurring of the circumstance and the consequences that this circumstance creates, i.e. the damage causes. This means that the debtor first proves that the occurrence of a certain circumstance was insurmountable for him, and then that the he could not prevent, remove or avoid the resulting damage (consequence). In this the attention of the debtor is evaluated objectively, i.e. did he behave like a good businessman in the given situation, i.e. as a good host (see Article 18/1 LO).

The liability of the debtor for damage caused to the creditor by breach of contract can be influenced by the contract itself. It is contractual expansion of debtor liability from Article 264/1 of the LO and cases for which regularly ("otherwise") one would not be liable, but not in the direction of (disproportionally) greater compensation for damage than the one caused, which is in accordance with the principles of conscientiousness and fairness (see Article 264/2 LO).

Also the possibility has been regulated for contractual limitation and exemption of liability (Article 265 LO), but the debtor liability can only be excluded for ordinary negligence (culpa levis), and not for deliberate (dolus) or gross negligence (culpa lata). The exemption from liability is not unlimited even for ordinary negligence, and the exemption of liability clause is only allowed if it is the result of freely expressed will by the contracting parties and is not in opposition to the basic principles of the LO, which are the principles for prohibition of the creation and utilization of a monopoly position (Article 14), equality of parties (Article 11) and principle of conscientiousness and fairness (Article 12).

The contractual limitation of liability means that the debtor is liable for damage caused due to non-fulfilment or overdue fulfilment of contractual obligations, but not in the volume in which he would be liable if the clause for limitation of liability was not agreed (see Article 265/3 LO). Similarly to exemption, the limitation of liability is also not “unlimited” if the inability to fulfil the obligation was caused deliberately or due to gross negligence of the debtor (Article 265/4 LO). In addition to this general exemption in limiting liability, two individual cases are regulated when the determined amount is in “apparent disproportion” to the damage and “unless otherwise prescribed by law for the concrete case” (Article 265/3 LO), and the law prescribes, for example, payment of default interest for lateness in fulfilling monetary obligations (Article 277 LO), then liability of caterers (Article 724 LO) etc.

Regarding the scope of compensation for damage caused by breach of contract it is necessary to make a difference between damage caused by ordinary negligence of the debtor and damage caused by fraud, deliberate non-fulfilment of obligations or non-fulfilment due to gross negligence of the debtor.

Ordinary negligence (culpa levis) is negligence due to action or inaction, which deviates from the behaviour of a particularly careful (conscientious) person, a negligence that would not be committed by a particularly careful person. A debtor acting with ordinary negligence is obliged to pay the creditor only for predictable damage, i.e. the damage that debtor knew or had to know will occur if he does not fulfil the contractual obligation to the letter. This is regulated with the provision from Article 266/1 of the LO and is only valid for contractual liability, whereas in tort liability, the person liable is obliged to compensate the full damage that can be attributed to the damaging activity. The rule of predictable damage is valid only if there is no agreed clause for limitation of debtor liability from Article 265 of the LO, since in this case the agreed amount is the predictable damage.
Also, via contract the debtor liability can also be expanded (Article 264 LO) when the debtor is held liable for all damage and not only the predictable one.

LO differentiates two situations when the damage is predictable, and outside of these situations it is considered that the damage is unpredictable and the debtor is not held liable for it. One situation is related to damage that the debtor must have presumed would happen if he breaches the contract, because it is damage occurring in the normal course of matters if the contract is breached. Another situation is deviating from the normal course of things due to special (extraordinary) circumstance that the debtor did not have to know, but still knew.

In both situations the criterion for evaluation of the predictability of damage by the debtor for breach of contract is disputable. However, between the concrete (subjective) and abstract (objective) criteria, most authors selects the second, abstract criterion according to which the circumstances are assessed, bearing in mind the attention required in legal operations from an average debtor, and not the personal characteristics and capacities of the debtor (concrete criteria). Thus, we start from the standard of a good host, i.e. good businessman, and in certain cases a good expert (see Article 18 LO).

Predictable damage occurring in the regular course of things is proved by the debtor according to the general rule for burden of proof, when a person claiming something is obliged to prove it as well, since the predictable damage limits the contractual liability and is in favour of the debtor. If the debtor does not act in this way, the creditor will request the damage that he really suffered. Predictable damage that deviates from the normal course of things due to special circumstances that the debtor was aware of, and which resulted in greater than normal damage for the creditor, the debtor is obliged to compensate. This damage, i.e. that the debtor was aware of these special circumstances, is proven by the creditor. In both cases the valid time for evaluating whether the debtor was aware of the circumstances is the moment of conclusion of the contract. In this the debtor does not need to know the amount, but just the possibility for damage occurring due to breach of contract. Also, the debtor is requested to take into account the real danger of damage, i.e. predictable is the damage that usually occurs during breach of contract. The debtor is liable only for the damage that is a direct consequence of the breach of contract, and not for damage due to a different cause (indirect damage).

It is an interesting question of application of provisions on the limitation of the debtor liability for predictable damage in case of non-fulfilment or inadequate fulfilment of monetary obligations. In answer to this question the relevant provision is the provision of Article 278/1 of the LO according to which “The creditor shall be entitled to default interest regardless of whether he has suffered any damage because the debtor is overdue”. Bearing in mind that default interest is the minimal compensation for damage that the creditor is entitled to in case the debtor is overdue in fulfilling the monetary obligation, then the debtor could not request the limitation of liability to an amount lesser than the amount of the default interest. If the creditor has suffered greater damage than the amount he would receive from the default interest, he has a right to request the difference until the full compensation (Article 278/2 LO). In this case, the provisions for limitation of debtor liability for predictable damages could be applied.

The rule of debtor liability for predictable damage cannot be applied if the debtor has caused the damage by fraud (fraus), deliberate non-fulfilment of obligations (dolus) or non-fulfilment due to gross negligence (culpa lata). In case of breach of contract due to fraud, deliberate non-fulfilment of obligations or non-fulfilment due to gross negligence the creditor is entitled to compensation of the entire damage, irrespective of whether the debtor was unaware of the special circumstances due to which it occurred (Article 266/2 LO). Here the guilt of the debtor is not presumed, so the burden of
proof is on the creditor, and if he does not succeed in proving that the debtor acted *fraus, dolus* or *culpa lata* he will only be entitled to predictable damage.

Compensation for the damage that the debtor owes the creditor due to breach of contract can be reduced in two cases. The first case is when, due to breach of contract by the debtor, there is some profit for the creditor, in which case the profit is deduced from the damage (so-called profit compensation from Article 266/3 of the LO). The other case is when the contracting party which is making the charge for breach is undertaking all possible reasonable measure to reduce the damage, because otherwise the other contracting party will have a right to reduction of compensation (Article 266/4 LO). In addition to the two listed cases, the compensation of the debtor can also be reduced in case of guilt of the creditor (Article 267 LO).

According to the *legal system of Montenegro*, Damage as consequence for breach of duty for fulfilment of an obligation by the debtor can occur either because the debtor did not fulfil his obligation (non-performance of obligation) or because he did not fulfil it in the deadline (overdue fulfilment) (Article 269 paragraph 2 of the Montenegrin LO). The right to compensation of damage is one of the rights, bearing in mind that in two sided contract, when one of the parties does not fulfil its obligation, the other party may request fulfilment of obligations or terminate the contract, and in any case has the right to compensation of damage (Article 119 of the Montenegrin LO).

In the Republic of Croatia the sales contract has generally been regulated in the Law on Obligations (Articles 376-473 of the Croatian LO). When the sales contract is terminated due to breach of contract by one of the contracting parties, the other party shall be entitled to compensation for damage he has suffered due to that, according to the general rules on compensation for damage incurred by breach of contract (Article 445 of the Croatian LO). It is a special provision (*lex specialis*), which is valid for purchase and sales agreement, and which actually refers to the application of the general provision (*lex generalis*) on the obligation for fulfilment of contractual obligations and the consequences for default thereof from Article 342 of the Croatian LO. According to the general provision, the fundamental goal and effect of contractual relations is the right of the creditor to request the debtor for fulfilment of the obligation “conscientiously and to the letter”, and the obligation of the debtor is to fulfil the obligation “conscientiously and to the letter”. If the debtor does not fulfil conscientiously or fully his obligation, the creditor has a right to request compensation for damage he has suffered due to that. With this formulation the Croatian legislator has clearly set the rule according to which for lateness or non-fulfilment of obligations the debtor is not released from the obligation for fulfilment, and that it remains and he still obliged to fulfil it and does not have the right to non-fulfilment or giving up on the agreement by compensating the damage to the creditor. The obligation for fulfilment as primary obligation remains (since the obligation ceases only when it is fulfilled, Article of the Croatian LO), but a new, secondary obligation appears alongside it – the obligation for compensation of damage caused in consequence to the non-fulfilment or lateness with the primary obligation. In addition to these general situations of termination of purchase and sales contracts, the Law on Obligations regulates two more specific situations for termination of purchase and sales contracts and compensation of damage.

When the sale has been terminated due to breach of contract by one of the contracting parties, and the good has a current price, the other party may request for the difference between the price set in the contract and the current price on the date of termination of the contract in the market of the place where the business was conducted (Article 446 paragraph 1). Current price is the price determined with the official records of the market in the location of the seller at the time where fulfilment should have occurred (Article 286 paragraph 1 of the Croatian LO). If on the market of the place in which the business is concluded there is no current price, for calculation of the compensation amount we take into account the market price that could replace this market in the given case,
and the difference in transportation costs should be added to the price (Article 446 paragraph 2 of the Croatian LO). In legal literature this type of damage is entitled abstract damage. For creation of liability relations for this type of damage it is necessary: 1. for the contract to be terminated due to breach of contract by one of the contracting parties, 2. for the object of sales to have a current price. The term abstract damage comes from the presumption that the contracting party has suffered damage due to differences in current price. Simply put, when the buyer is obliged to pay a price that is lower than the current and the seller is responsible for termination of the agreement, the buyer has a right to request the difference between the price that he would be obliged to pay if the contract was not terminated and the higher current price. On the other hand, when the buyer is obliged to pay the price higher than the current price and is responsible for termination of the contract, the seller has a right to request the difference between the higher price that the buyer would be obliged to pay had the contract not been terminated and the lower current price. Thus, the difference between the individual amounts of prices (difference between the contracted price and current price) is the amount of abstract damage.

Where the object of sale is a certain quantity of things determinate as to their kind, and one party fails to perform its obligation in due time, the other party may effect sale for the purpose of settlement, or purchase for the purpose of settlement and demand payment of the difference stipulate in the agreement and price of sale or purchase effected for the purpose of settlement. It is important that the sale or purchase for the purpose of settlement must be effected within a reasonable period and in a reasonable manner. It is also important that the creditor notifies the debtor on the intended sale or otherwise be liable for damage arising thereof (Article 447 of the Croatian LO). From the Article itself we can see that for damage to occur it is necessary: 1. for the object to be a substantial sum of goods determinate as to their kind, 2. for one party to be overdue, 3. for the other party to have made a sale or purchase due to settlement, 4. that the purchase, or sale for settlement to have been done in reasonable time and in a reasonable manner. In legal literature this type of damage is entitled concrete damage. This is because the contracting party performing the sale, or purchase for settlement can ask under the given preconditions the other party for the difference in the contract price and sales price, i.e. purchase that he has really made for purposes of settlement. Thus, the difference between individual amounts of prices (the difference between the contracted price and the price achieved purchasing or selling) is the amount of the abstract damage. It is important that the notification on the intended purchase or sale is not a precondition for occurrence of damage liability, but the party that did not inform the other party of the intended sale or purchase for settlement can be held liable to the other party for the damage thus incurred. However, in addition to compensation for damage in accordance with the stipulated rules, a party not in breach of the contract shall be entitled to compensation for excess damage, if suffered (Article 448 of the Croatian LO).

In the Macedonian legal system, The right to compensation for damage due to breach of contract exists in both situations of non-fulfilment of sales contracts, or in situations of lateness, and in situations of improper contract fulfilment. When the contract was terminated due to non-fulfilment, according to the general rules on liability for non-fulfilment of contract, both parties are exempted from the obligations with the exception of the obligation of compensation for potential damage (Article 121(1) of the Macedonian LO). This is also according to general rules on lateness, i.e. the general rules on non-fulfilment, Namely, when the debtor fails to fulfil an obligation or is overdue in its fulfilment, the creditor has the right to request compensation for the damage incurred as a consequence thereof (Article 251(2) of the Macedonian LO). For damages due to lateness in fulfilling the contract and a debtor that the creditor has provided with an adequate additional time for fulfilment (Article 251 (3) of the Macedonian LO). Bearing in mind these provisions, the right to
compensation for damage exists in the case of contract termination, also when the contract has been fulfilled but belatedly. Regarding the improper fulfilment of a sales contract, the right to compensation of damage is the right of the buyer, and can request proper fulfilment, also in cases when requests for termination of contract or lowering of price were selected (Article 476(2) of the Macedonian LO). These rules relate to material defects in fulfilment. Regarding the legal defects of fulfilment, there is also the right of the buyer for compensation of damage, regardless of whether there was full or partial eviction (Article 498(3) of the Macedonian LO). Finally, regarding sales there are special rules on compensation for damage in the case of termination of contract due to contract breach. The range of application of these provisions is disputable, bearing in mind that the breach is not limited to cases of defects in fulfilment, but to non-fulfilment as well. At least on a theoretical level, a breach would exist in cases of non-fulfilment and in cases of defect in non-fulfilment. In any case, when the sale has been terminated due to contract breach by one of the contracting parties, the other party shall be entitled to compensation for damage suffered due to that, according to the general rules for compensation of damage incurred due to contract breach (Article 511 Macedonian LO). Also, there is a special rule on compensation of so-called abstract damage. Namely, when the sales has been terminated due to contract breach of one contracting party and the good has a current price, the other party can request the difference between the price agreed in the contract and the current price on the date of termination of contract in the market where the business was concluded (Article 512(1) of the Macedonian LO). Finally, there is a special rule for compensation of so-called concrete damage due to settlement, which means that when the object of sales is a certain amount of goods determined by type, and one party does not fulfil its obligation on time, the other party may conduct sales for settlement, or buying for settlement, and request the difference between the price agreed in the contract and the price of sales, or buying, for settlement (Article 513(1) of the Macedonian LO).

In the law of the Republic of Serbia, when one of the parties in a contract fails to fulfil its due obligations, the other party has a right to ask for fulfilment of the contract or terminate the contract due to non-fulfilment. In both cases the party towards which the obligation was not fulfilled has a right to claim compensation for damages generated. In the first case it is damage caused by delays in fulfilment of obligations, while the second case is damage caused by non-fulfilment of obligations. The right to choice is provided in Article 124 of the Law on Obligations. Namely, the creditor has a right for fulfilment of obligations and may realize it without any limitations and additional conditions, since it is an obligations created on the debtor by concluding a contract. On the other hand, in order for the creditor with a simple expression of will, expressed to the other party, to be able to terminate the contract, the Law prescribes the fulfilment of additional conditions, provided in Articles 125 – 131. Maybe it should be pointed out that in Serbian law, the legal regime of termination of contract due to material defects is fully equalized with the legal regime of termination of contract due to non-fulfilment (Article 497 LO), and that this is related both to the procedure for termination and the effect of termination. Namely, in the first case it is liability for qualitative material defects, and in the second liability for partial non-fulfilment - delivery of a lesser quantity than the contracted one and delivery of a different type than the contracted one and complete non-fulfilment of the contract. Lawyers in the Anglo-Saxon system would place all of the aforementioned under “substantial breach of contract”, which is the formulation contained in the Civil code.

Article 132 of the LO regulates the effects of termination. In cases of termination of contract due to non-fulfilment of obligations certain legal consequences arise. When terminating a contract due to non-fulfilment the legal obligations base ceases to exist. Parties are free of all obligations created by concluding the contract (Article 132, paragraph 1 of the Serbian LO). None of them can further request fulfilment of contractual obligations by the other party, since the contract as a legal basis for obligations has ceased to exist. However, if the both parties have partially fulfilled their contractual obligations or one party has fully completed its obligation and the other one has not (or
only partially), there is the issue of restitution—return of what was given, because termination has a retroactive effect. Each party has the right to request return of what was given (Article 132, paragraph 2 and paragraph 3 of the Serbian LO), and the return is made according to the rule in natura, and only if this is impossible in money. In addition to compensation for damage and restitution, each party owes the other one compensation for gain that it had in the meantime from what they were obliged to return, i.e. compensate (Article 132, paragraph 4 of the Serbian LO).

The question is posed whether termination due to non-fulfilment has effects on third conscientious parties? Based on the sales contract, the seller has given the good to the buyer. A third party has acquired the good from the buyer from the previous contract, who is obliged, according to the terminated contract, to return that same good the seller from the terminated contact. However, the third conscientious party could have acquired the property right by way of origin over the disputed good. Firstly, in the sense of the Law on the basis of property legal relations, if it is movable property, on which holding has been acquired in a valid, applicable contract, directed at transfer of ownership (ownership could not, however, be acquired derivatively, because a contract was made with a non-owner), the conscientious acquirer acquires the right to ownership based on the rules of acquisition from a non-owner. Another way of acquisition by origin is maintenance (regulated in the Law on the basis of property legal relations). Conscientious acquirer by way of maintenance acquires the right to ownership based on time elapsed during which he had qualified holding (what is understood under this depends on whether he had regular or extraordinary maintenance). As the third party acquired the right of ownership, the right of ownership of the seller from the terminated contract ceased to exist due to the fact that one good cannot be subject to two ownership rights. Thus, the seller cannot request return of the good with a property complaint, nor raise an obligation complaint against the third party, because he does not have an obligations relation with him, and can only request from the buyer from the terminated contract a monetary compensation for the value of the good.

2. What is the definition of the concept compensation for damage and loss/damage in your legislation – the tangible and intangible one? In accordance with your laws, are the contractual parties entitled to compensation for tangible and/or intangible damages in case of breach of contract? Are there any particular requirements regarding the liability for damages where a breach of sales contract is made? According to which rules are the liability extent and the compensation amount for damages (tangible and/or intangible) specified, in case of breach of contract?

In the legal system of the Republic of Albania, the tangible loss is regulated by articles 450 and 486 of the Albanian Civil Code that we have mentioned above. These articles provide the basis for the proper understanding of the tangible loss that can be compensated to the party that suffers from the breach of contract. On the other hand the Albanian legislation doesn't provide any definition of the concept of intangible loss. It's worth mentioning that the Albanian jurisprudence has dealt with the concept of extra-contractual damages and in this respect the Supreme Court of Albania, in the unifying decision no. 12, dated 14.09.2007, has given some general orientations that the lower courts should follow in cases of damages form traffic accidents. In this decision the Albanian Supreme Court has treated the concepts of tangible and intangible loss. The interpretations of the unifying decision can be used, in analogy, if they are deemed proper, even in cases involving intangible loss form breach of sales contracts. Anyhow it should be stated again that the Albanian legislation doesn't provide any definition of intangible loss, so it's up to jurisprudence to define it case by case. The Albanian civil law provides that the parties are always entitled to compensation for
tangible losses due to a breach of contract. Regarding the intangible one, the law doesn't expressly exclude or include it. According to the question if there are any requirements regarding the liability for losses where a breach of sales contract is made, we can refer to articles 722, 723, and 737 of the Albanian Civil Code.

In Bosnia and Herzegovina (Republika Srpska), regarding the scope of compensation for damage caused by breach of contract it is necessary to make a difference between damage caused by ordinary negligence of the debtor and damage caused by fraud, deliberate non-fulfilment of obligations or non-fulfilment due to gross negligence of the debtor. Ordinary negligence (culpa levis) is negligence due to action or inaction, which deviates from the behaviour of a particularly careful (conscientious) person, a negligence that would not be committed by a particularly careful person. A debtor acting with ordinary negligence is obliged to pay the creditor only for predictable damage, i.e. the damage that debtor knew or had to know will occur if he does not fulfil the contractual obligation to the letter. This is regulated with the provision from Article 266/1 of the LO and is only valid for contractual liability, whereas in tort liability, the person liable is obliged to compensate the full damage that can be attributed to the damaging activity. The rule of predictable damage is valid only if there is no agreed clause for limitation of debtor liability from Article 265 of the LO, since in this case the agreed amount is the predictable damage. Also, via contract the debtor liability can also be expanded (Article 264 LO) when the debtor is held liable for all damage and not only the predictable one.

LO differentiates two situations when the damage is predictable, and outside of these situations it is considered that the damage is unpredictable and the debtor is not held liable for it. One situation is related to damage that the debtor must have presumed would happen if he breaches the contract, because it is damage occurring in the normal course of matters if the contract is breached. Another situation is deviating from the normal course of things due to special (extraordinary) circumstance that the debtor did not have to now, but still knew. In both situations the criterion for evaluation of the predictability of damage by the debtor for breach of contract is disputable. However, between the concrete (subjective) and abstract (objective) criteria, most authors selects the second, abstract criterion according to which the circumstances are assessed, bearing in mind the attention required in legal operations from an average debtor, and not the personal characteristics and capacities of the debtor (concrete criteria). Thus, we start from the standard of a good host, i.e. good businessman, and in certain cases a good expert (see Article 18 LO).

Predictable damage occurring in the regular course of things is proved by the debtor according to the general rule for burden of proof, when a person claiming something is obliged to prove it as well, since the predictable damage limits the contractual liability and is in favour of the debtor. If the debtor does not act in this way, the creditor will request the damage that he really suffered. Predictable damage that deviates from the normal course of things due to special circumstances that the debtor was aware of, and which resulted in greater than normal damage for the creditor, the debtor is obliged to compensate. This damage, i.e. that the debtor was aware of these special circumstances, is proven by the creditor. In both cases the valid time for evaluating whether the debtor was aware of the circumstances is the moment of conclusion of the contract. In this the debtor does not need to know the amount, but just the possibility for damage occurring due to breach of contract. Also, the debtor is requested to take into account the real danger of damage, i.e. predictable is the damage that usually occurs during breach of contract. The debtor is liable only for the damage that is a direct consequence of the breach of contract, and not for damage due to a different cause (indirect damage).

It is an interesting question of application of provisions on the limitation of the debtor liability for predictable damage in case of non-fulfilment or inadequate fulfilment of monetary obli-
gations. In answer to this question the relevant provision is the provision of Article 278/1 of the LO according to which “The creditor shall be entitled to default interest regardless of whether he has suffered any damage because the debtor is overdue”. Bearing in mind that default interest is the minimal compensation for damage that the creditor is entitled to in case the debtor is overdue in fulfilling the monetary obligation, then the debtor could not request the limitation of liability to an amount lesser than the amount of the default interest. If the creditor has suffered greater damage than the amount he would receive from the default interest, he has a right to request the difference until the full compensation (Article 278/2 LO). In this case, the provisions for limitation of debtor liability for predictable damages could be applied.

The rule of debtor liability for predictable damage cannot be applied if the debtor has caused the damage by fraud (fraus), deliberate non-fulfilment of obligations (dolus) or non-fulfilment due to gross negligence (culpa lata). In case of breach of contract due to fraud, deliberate non-fulfilment of obligations or non-fulfilment due to gross negligence the creditor is entitled to compensation of the entire damage, irrespective of whether the debtor was unaware of the special circumstances due to which it occurred (Article 266/2 LO). Here the guilt of the debtor is not presumed, so the burden of proof is on the creditor, and if he does not succeed in proving that the debtor acted fraus, dolus or culpa lata he will only be entitled to predictable damage.

Compensation for the damage that the debtor owes the creditor due to breach of contract can be reduced in two cases. The first case is when, due to breach of contract by the debtor, there is some profit for the creditor, in which case the profit is deducted from the damage (so-called profit compensation from Article 266/3 of the LO). The other case is when the contracting party which is making the charge for breach is undertaking all possible reasonable measure to reduce the damage, because otherwise the other contracting party will have a right to reduction of compensation (Article 266/4 LO). In addition to the two listed cases, the compensation of the debtor can also be reduced in case of guilt of the creditor (Article 267 LO).

In our legal theory, practice and legislation one of the divisions of damage is to material and immaterial damage. As material damage ordinary damage is known (real or positive damage, damnum emergens) and gain damage (indirect damage, lucrum cessans). The rules for compensation in both types of material damage can apply both to predictable and total damage, which were mentioned previously. The compensation for damage is as a rule awarded in monetary form, and according to the manner of calculation it can be concrete and abstract.

In addition to compensation for material damage for violation of contract obligations, immaterial damage can also be awarded if the contracting party has suffered such damage. This possibility for compensation of immaterial damage in case of violation of contract obligation arises from the indirect provision of the LO. Namely the LO does not contain provisions directly regulating the immaterial damage in contractual relations. However, on the basis of the referring provision from Article 269 of the LO, its provisions are respectively applied to the compensation of immaterial damage according to the rules on tort liability (Part 2 of the LO entitled “Causing Damage”). This is a modernist interpretation of immaterial damage with contractual liability, since traditionally it was believed that contractual liability is reserved only for material damage. Previously it was considered that provision from Article 262/2 of the LO is related only to material damage and that Article 266/1 and 2 of the LO serves for implementation of this article, i.e. that the provision from Article 262/2 could relate both to material and immaterial damage, but that Article 266/1 and 2 are related exclusively to determining the volume of compensation of the scope of material damage.

Our legal theory has positioned itself differently on this issue, and some authors, under the influence of the property-legal character of the LO and civil law as a whole do not point out im-
material damage at all in contractual liability, while other authors leave the possibility for awarding monetary compensation for breach of contract obligations. Regarding the opinion of the case law on this issue it is almost non-existent. However, the given modernistic interpretation should present a modern concept of immaterial damage with contracting liability. This concept, de lege lata and/or de lege ferenda is accepted in many European legislations as well as in the principles of European contractual law (so-called Land principles). A positive example in this direction is the Republic of Croatia, bearing in mind that it belonged to the same legal circle with uniform legislation in this area, which has with the Law on Obligations from 2005 in Article 346/1 explicitly regulated, in addition to compensation for ordinary damage and gain damage, the right of the creditor to “just compensation of non-property damage”. This solution was of course influenced by the acceptance of a different concept (so-called objective instead of the previous subjective concept) of the immaterial damage when violating the rights of persons in general, which is also the tendency in modern law.

The given recognition of contractual liability for immaterial damage is a consequence of application of the social and legal function of the obligation-legal contracts. Namely, more and more by concluding individual contracts (for example, contracts on organizing trips, contracts on hotel services etc.), instead of material goods the desire is to acquire some type of pleasure, certain spiritual enrichment (so-called leisure industry), where the person is not only a so-called homo consumens (consumer of mass goods), but also a so-called homo sensibilis (enjoying immaterial goods). In any event, accepting the opinion of immaterial damage in contractual law is the first step in this direction that raises many other questions: predictability of immaterial damage, just monetary compensation for breach of contract (problem of commercialization), limitation and expansion of liability to immaterial damage etc.

In Bosnia and Herzegovina (Federaciji BiH, Distriktu Brčko), As material damage ordinary damage is known (real or positive damage, damnum emergens) and gain damage (indirect damage, lucrum cessans). The rules for compensation in both types of material damage can apply both to predictable and total damage, which were mentioned previously. The compensation for damage is as a rule awarded in monetary form, and according to the manner of calculation it can be concrete and abstract.

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In any event, accepting the opinion of immaterial damage under contractual law is the first step in this direction that raises many other questions: predictability of immaterial damage, just monetary compensation for breach of contract (problem of commercialization), limitation and expansion of liability to immaterial damage etc.

In the **legal system of Montenegro**, Damage is loss of a person’s assets (ordinary loss), halting of assets increase (loss of profit), inflicting physical or psychological pain and fear on another person and violation of personality rights and reputation of a legal entity (Article 149 of the Montenegrin LO). According to our law the contracting parties have a right to compensation of material damage in case of breach of contract and these are ordinary loss (dammnum emergens) and loss of profit (lucrum cessans). The general rule is that when sales have been terminated due to breach of contract of one contracting party, the other party shall be entitled to compensation for damage suffered, according to the general rules for compensation of damage from breach of contract (Article 532 of the Montenegrin LO). When the sale has been terminated due to breach of contract by one of the contracting parties, and the good has a current price, the other party may request for the difference between the price set in the contract and the current price on the date of termination of the contract in the market of the place where the business was conducted, as well as compensation for all reasonable expenses incurred due to non-performance. If on the market of the place in which the business is concluded there is no current price, for calculation of the compensation amount we take into account the market price that could replace this market in the given case, and the difference in transportation costs should be added to the price (Article 533 of the Montenegrin LO).

Where the object of sale is a certain quantity of things determinate as to their kind, and one party fails to perform its obligation in due time, the other party may effect sale for the purpose of settlement, or purchase for the purpose of settlement and demand payment of the difference stipulate in the agreement and price of sale or purchase effected for the purpose of settlement, as well as compensation for all reasonable expenses incurred due to non-performance. The sale or purchase for the purpose of settlement must be effected within a reasonable period and in a reasonable manner. The creditor shall notify the debtor on the made purchase or sale (Article 534 of the Montenegrin LO). In addition to the right for compensation of damage according to the aforementioned rules, the party that did not breach the contract is entitled to compensation of higher damages, if it has suffered it (Article 535 of the Montenegrin LO). The buyer has a right to compensation of damage on the basis of seller liability for material defects of goods. The buyer who has timely and adequately in-
formed the seller of the defect can: 1) request the seller to remove the defect or to give him another good without defect (fulfilment of contract); 2) request reduction of price; 3) state that he terminates the contract. In these cases the buyer is also entitled to compensation for damages. The seller shall be held liable for the damage due to defect in the good suffered by the buyer on his other goods, and according to the general rules on liability for damage (Article 496 of the Montenegrin LO). The buyer has a right to compensation of damage also on the basis of seller liability for the correct functioning of the sold good. If the seller does not repair or exchange the good in reasonable time, the buyer may terminate the contract, or reduce the price and request compensation of damage (Article 512 of the Montenegrin LO). The buyer has a right to compensation of suffered damage also on the basis of seller liability for legal defects (protection from eviction) (Article 518 of the Montenegrin LO). The regulations for defining the extent of liability and amount for damages in case of breach of contract are provided in the Law on Obligations (269-276 of the Montenegrin LO), as special provisions and general provisions on the amount for compensation of material damage (196-199 of the Montenegrin LO).

In the Republic of Croatia, the general rules on damage liability, including definitions of terms such as: definition of degree of liability and determination of the amount of damage compensation are regulated in the Law on Obligations as general regulations of obligations law (Articles 1045-1110 of the Croatian LO). In addition to this some specific relations for damage liability are regulated in certain special law, such as the Law on Protection of the Environment that regulates the damage liability for polluting the environment; the Customs Law provides that if by searching the items or personal search the traveller is caused damage, the traveller is entitled to compensation of thus incurred damage by the Republic of Croatia; Law on the System of State Administration provides for liability of the Republic of Croatia where citizens have a right to compensation of expenses incurred due to failure to perform an official action, and the decision on the request for compensation of such expenses is made by the manager of the procedure who invited the party to a certain action in the legal procedure etc. However, even on the damage liability in these special regulations, the general provisions shall apply and general concept of the damage liability relations, which are regulated with the Law on Obligations.

According to the general rules of the Law on Obligations for the damage liability relation to occur it is necessary to fulfill the following preconditions: 1) to exist clearly determined subjects of the damage liability relation – a party doing the damage and a damaged party; 2) for a certain damage to have occurred with the damaged party. In this the law defines damage as reduction of somebody’s property (ordinary damage), prevention of its increase (gain loss) and violation of personal rights (non-property loss); 3) to exist a damaging activity of the party causing the damage. The damaging activity can be breach of some contractual obligation (contractual liability for damage), civil tort (extra contractual liability for damage) and from violation of negotiations prior to concluding a contract (pre-contract liability for damage); 4) for there to be a causal link (causal nexus) between the damaging activity as cause and the damage as consequence; 5) for the condition of illegality of the damaging activity to be satisfied. Here we speak of: a) illegality in the objective sense: the damaging activity is opposite to some legal rule; b) illegality in the subjective sense: the damaging activity was committed by guilt of the defendant. LO stipulates that damage shall exist where a defendant has caused damage intentionally or by acting carelessly (Article 1049 of the Croatian LO), where the Croatian LO differentiates between ordinary and gross negligence.

Regarding the types of liability for damage the fundamental rule of the Croatian legal system related to liability for damage is the subjective liability where the guilt is presumed, unless otherwise provided. In other words, a person who has caused damage to another person shall com-
pensate for this damage, unless he has proven that the damage has not occurred as a result of his own fault (Article 1045 paragraph 1 of the Croatian LO). In this only ordinary negligence is presumed (Article 1045 paragraph 2) whereas gross negligence and intent must be proven. Since fault is looked for as a presumption, it is subjective liability for damage. However, our law recognizes also objective liability for damage where fault is not looked for (illegality in the subjective sense) as a general presumption, but only illegality in the objective sense. Thus, for things or activities representing a major source of danger for the environment liability shall be imposed regardless of the fault (Article 1045 paragraph 3 of the Croatian LO). But, liability shall also be imposed regardless of the fault in other cases prescribed by the law (Article 1045 paragraph 4 of the Croatian LO) such as liability for dangerous things or dangerous activities (Article 1063-1067 of the Croatian LO), liability caused by a motor vehicle in operation (Article 1068-1072 of the Croatian LO), liability for defective product (Article 1073-1080 of the Croatian LO), liability of parents for children until seven years of age (Article 1065 paragraph 1 of the Croatian LO) etc. In addition to subjective and objective liability for damage, the LO additionally recognizes: 1. pre-contractual, contractual and extra-contractual liability for damage, 2. own liability and liability of others, 3. liability of several persons for damage: separate and solidarity, 4. as well as some other special cases as liability for not providing necessary help, liability regarding the obligation for concluding a contract, liability related to conducting activities of public interest.

In the Croatian legal system damage has been defined as loss of a person's assets (pure economic loss), halting of assets increase (loss of profit) and violation of privacy rights (non-material damage) (Article 1046 of the Croatian LO). Additionally, the Croatian LO regulates personality rights stipulating that every physical or legal entity has a right to protection of their personality rights under the provisions provided by law. Under personality rights are understood to be the right to life, to physical and mental health, reputation, honour, dignity, name, privacy of personal and family life, etc. A legal entity has all the stated personality rights, other than the rights related to the biological character of a natural person, in particular the right to reputation and a good name, honour, name or firm name, business secrecy, freedom to conduct business, and other (Article 19 of the Croatian LO). It is important to mention that the listed personality rights are not a closed list, and that other personality rights not explicitly put in a legal provision can be violated as well. This legal solution of the LO from 2005 is different from the solution of the LO from 1978, which limited personality rights and definition of non-material damage exclusively to the right that were then explicitly listed in the law.

Compensation for damage in case of non-fulfilment or overdue fulfilment of a contract is generally regulated in the provisions of Articles 342-349 of the Croatian LO. Where a debtor does not perform an obligation or is late with the performance, the creditor is also entitled to request compensation for the damage suffered thereby (contractual liability for damage, Article 342 paragraph 2 of the Croatian LO). This is a general rule (lex generalis). In this the creditor has a right to ask for tangible and non-tangible damage. This novelty was introduced in the Law on Obligations from 2005 (according to LO/78 only compensation for tangible damage could be requested) and thus there is no newer case law particularly related to the compensation of non-tangible damage due to violation of sales contracts.

Where a sale has been terminated due to the breach of contract by one contracting party, the other party shall be entitled to compensation for damages suffered as a result in accordance with general rules on compensation for damage arising from breach of contract (Article 445 of the Croatian LO). The same applies when the thing has a current price or a sale has been made for settlement or a purchase has been made for settlement or purchase or purchase for settlement under special preconditions (Articles 446-447). These provisions prescribe special rules (lex specialis) in
case of termination of sales contract, which compounds the general provisions on compensation for damage due to non-fulfilment or overdue fulfilment of the debtor’s obligation from Article 342 of the Croatian LO (lex generails).

The difference between general and special provisions is not great, but we can still point out two differences. First, without a special rule on the termination of sales contract (Article 445 of the Croatian LO) the right to compensation for damages suffered would be evaluated in accordance with general rules on compensation for damage arising from lateness or non-fulfilment (Article 342 of the Croatian LO). According to this only the creditor would have right to compensation for damage. Introducing a special rule for compensation of damage in sales contracts the right to compensation has also been expanded to cases when the contract was terminated due to breach of contract of one contracting party, which means that the obligation can be violated by the creditor as well, and that is why according to the special sales rule, the right to termination and compensation of damages is also entitled to the debtor. Second, in order for the obligation for compensation of damage to occur from a sales contract it is not sufficient only for lateness, non-fulfilment or non-informing to happen, but according to the special rules the sales contract must truly be terminated.

The degree of liability and the amount of compensation for damages is regulated in the Law on Obligations. In this the Croatian LO as the fundamental principal presumes only the lowest degree of fault – ordinary negligence, whereas gross negligence and intent have to be proven (unless it is objective liability for damages). Regarding the scope of compensation for damages due non-fulfilment of obligations the creditor has a right to compensation of ordinary damage and loss of profit (property damage) and just compensation for non-property damage, which the debtor must have predicted at the time of concluding of the contract as a possible consequence of breach of contract having in mind the facts that were then known or had to be known to him (Article 346 paragraph 1 of the Croatian LO). Here we have an obligation for compensation only of so-called predictable damage. So the liability for breach of contractual obligations is quantitatively limited since it is not equal to the full volume of damage, but only to the extent that could be predicted at the moment of conclusion of the contract. The criteria for assessing predictability or unpredictability we take the objective criteria for evaluation of the debtor as a responsible and conscientious businessman, i.e. good householder from Article 10 of the LO. However, in case of fraud or deliberate non-performance or non-performance due to gross negligence, the creditor shall have the right to request from the debtor compensation for the entire damage that was caused due to breach of the contract, regardless of the fact that the debtor did not know of the particular circumstances resulting in the damage caused (Article 346 paragraph 2 of the Croatian LO). This is an obligation of compensation of the so-called total damage. Fraud, intent and gross negligence must be proven. Where a breach of obligation, apart from the damage, gives rise to a certain benefit for the creditor, it shall be taken into account to a reasonable extent in determining the volume of compensation. This is the special institute of compensation of damage with benefit realized (compensatio lucri cum damno).

Finally, when evaluating the amount of compensation for damage caused by breach of contractual obligation the court must take care of the behaviour of this person invoking the right to compensation of damage. Thus the party invoking the breach of contract is obliged to take all reasonable steps to reduce the damage caused by such breach, otherwise the other party may request a decrease of the compensation (Article 346 paragraphs 3-4 of the Croatian LO). However, where a creditor or a person for whom the creditor is responsible is at fault for contributing to the caused damage or its scope or for making the position of the debtor more onerous, the compensation is proportionally reduced (Article 347 of the Croatian LO). How are damages corrected? Property damage is corrected by restitution to the previous condition, and if it does not eliminate the damage
completely, or the establishment of the previous condition is not possible, then the damage is corrected with compensation in cash (Article 1085 of the Croatian LO). The exact amount of real damage shall be determined with respect to the prices at the time of delivery of court judgment, unless otherwise provided for by the law. In assessing the amount of profit lost, a profit which could have reasonably been expected under the normal or special circumstances shall be taken into account, the realization of which has been prevented by acting or failing to act on the part of the defendant (Article 1089 of the Croatian LO). Liability to compensate for damage shall be considered due as of the time of damage occurrence (Article 1086 of the Croatian LO).

Non-property damage (damage of personality rights) is corrected with a disclosure of the judgment or its modification if it can attain the purpose of achieving a just pecuniary compensation (Article 1099 of the Croatian LO). However, if this purpose cannot be achieved by disclosure of the judgment then the non-property damage will be corrected with just pecuniary compensation that the court will award if the severity of the violation and the circumstances of the case justify this. In deciding on the amount of just pecuniary compensation, the court shall take into account a degree and duration of the physical and mental pain and fear caused by the violation, the objective of this compensation, and the fact that it should not favour the aspirations that are not compatible with its nature and social purpose. In the event of violation of reputation and other personality rights, the court shall, where if finds that this is justified by the seriousness of the violation and circumstances, award a just pecuniary compensation, irrespective of the compensation for material damage and in the absence of the latter (Article 1100 of the Croatian LO). It is interesting that the court shall, at the request of an injured party, also award a just pecuniary compensation for future non-material damage, if it is certain that it will continue into the future (Article 1104 of the Croatian LO). The liability of a just pecuniary compensation shall mature as of the date of submitting a written request or claim, unless the damage has been caused subsequently (Article 1103 of the Croatian LO).

In the Macedonian legal system, Regarding the range and amount of damage compensation, in addition to the aforementioned rules for compensation of abstract damage and concrete damage due to settlement, the general rules shall apply for damage liability due to non-fulfilment or lateness. According to Article 255(1) of the Macedonian LO, the creditor has a right to compensation for normal damage and gain damage, as well as right to pecuniary compensation of intangible damage, which the debtor had to have predicted at the moment of concluding of the contract as the possible consequences of the breach of contract, bearing in mind the fact that he then knew or must have known. In brief, the creditor has a right to compensation of tangible damage (normal damage and gain damage), and intangible damage. The explicit mentioning of the right for compensation of intangible damage, in case of breach of contracts, was put in the novelties to the LO in 2008, bearing also in mind the general principle of protecting personal rights from Article 9-a of the Macedonian LO. In any case, this damage is compensated exclusively as predictable. An exception to this rule is the provision from Article 255(2) of the Macedonian LO, which prescribes that in case of fraud or deliberate non-fulfilment, as well as non-fulfilment due to gross negligence, the creditor has a right to request from the debtor compensation of the total damage occurring due to breach of contract, regardless that the debtor was not aware of the special circumstances that lead to them. When determining the amount of the damage, the contribution of the creditor to the created damage is also taken into account. This contribution, after the novelty to the LO from 2008, is no longer evaluated according to the guilt of the creditor. So, in accordance with Article 256 of the Macedonian LO, when the creditor, or a person for whom he is liable, has contributed to the occurring of the damage or to its amount or for aggravating the debtor’s condition, then the damage is proportionally reduced. Finally, the debtor can be exempted from damage liability only if he proves that he could not fulfil his obligation, or he was overdue with fulfilling the obligation, due to an extraordinary event occurring
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In the law of the Republic of Serbia, The Law on obligations does not provide a definition of damage. In Article 155 entitled – damage, all types of damage are listed, divided into tangible and intangible. Tangible damages are considered to be reductions of a person's property – normal (real) damage and prevention of its increase – lost gain. Intangible damage is, according to the Law, inflicting on another person physical or psychological pain or fear. Tangible or property damage is damage incurred on property goods, whereas property goods we understand things whose value can be measured in money, i.e. as frequently defined in theory – "ones that can be sold and procured for money". If the property of the damaged party has been impacted directly, there was reduction of property, it is an issue of real damage. In the opposite, if the property of the damaged party has been impacted indirectly, i.e. in the regular course of things there it would have increased, but this did not occur due to the damaging event, we have lost gain as a type of tangible damage.

When the debtor (buyer or seller) does not fulfill or incorrectly fulfills his obligation from the sales contract, he becomes debtor for compensation of damage to the creditor (buyer or seller), unless the damage was caused by reasons for which the debtor is not liable. The purpose of the compensation of damage is to put the creditor in the property position he would be in if the contract was properly fulfilled – positive legal interest. In case of termination of contract the debtor owes the creditor for abstract and concrete damage (Articles 523 - 526). Abstract damage is determined abstractly (as indicated by its title), i.e. regardless whether the creditor has suffered any damage at all – this is presumed damage. Determining the amount of damage suffered in this way is based on the idea of resale. Thus, had the seller fulfilled his contractual obligation and delivered the goods to the buyer, the buyer could have resold the same according to a certain price (and since he did not do that, because the seller did not deliver the goods, he suffers damage). On the other hand, the seller could also have sold the same goods to another buyer at a certain price. Another idea we can base abstract damage on is buying or selling for settlement. If the current price of the goods at the moment of termination of contract is higher than the contracted one, the buyer suffers damages and opposite, if the current price is lower than the contracted one, the seller suffers damage. In both cases, the creditor for compensation of damage must prove the given difference in price. In addition to abstract damage, the buyer or seller, in case of non-fulfilment of obligations by the other party, may be creditors for compensation of real damage – realization of buying or selling for settlement. The damage is calculated according to the difference between the contracted price and the price realized through sales or purchase (it is taken as given that the expenses incurred are also taken into account). In addition to abstract and concrete damage, in case of termination of a sales contract the creditor (buyer or seller) can realize the right to compensation of other proven damage.

When the contract has not been terminated the creditor only realizes the right to compensation of so-called other damage (type of concrete damage), which covers real damage and gain damage. Chapter VII of the LO is dedicated to sales contracts. Article 488 paragraph 1 of the Serbian LO stipulates that it is the buyer’s right (who has timely and duly informed the seller of the good's defect) to be able to: request from the seller to remove the defect or to give him another good without defects (fulfillment of the contract); request lowering of price; state that he terminates the contract. Paragraph 2 of the same Article stipulates that the buyer in all of these cases has the right to compensation of damage. In order to precisely answer the question, in cases when the buyer has a right to compensation of damage, it is necessary to first indicate the cases in which there are material defects, i.e. the liability of the seller for it, in the sense of the Serbian LO. In order for it to be a material defect, it is necessary that it exists in the concrete case in the sense of Article 479 of the Serbian LO; that the defect was hidden; that it existed at the moment of transfer of risk to the buyer.
(which in Serbian law is the moment of acquiring the holding of the good by the buyer) and that there is timely notification of the seller by the buyer.

In the frames of the provisions that LO dedicates to sales contracts, there are articles regulating the issue of proper functioning of the sold good, i.e. Article 504 regulates the right of the buyer to terminate an agreement or request a price reduction, with compensation for damage in both cases, if the seller does not fix or replace the good in reasonable time. In the same chapter of the LO in another place there are also regulations for the buyer’s right to compensation of damage by the seller, in the case of so-called eviction, i.e. the seller liability for legal defects of the good - Article 510 paragraph 3 of the Serbian LO. Regardless whether due to the eviction the contract is terminated by law (total eviction) or the buyer realizes his right to terminate the contract or proportionally reduce the price, the buyer always has a right to compensation for damage suffered. Regarding the position of the seller, it is indubitable that the seller, when certain conditions are met, has a right to request compensation for damage from the buyer. First, the seller can terminate the sales contract in case that the buyer does not pay the price, which is the basic obligation of the buyer in a sales contract. The seller also has a right to request fulfilment (forced enforcement). In both cases the seller may request from the buyer compensation for damage.

We have the question of whether the seller has any rights and if he has them, what are those rights, in cases when the buyer fails to fulfil some other obligation from the contract (in Anglo-Saxon law this would come under minor breach of contract). What is beyond doubt is that the seller has also in this case the right for compensation for damage (and, of course, the right to ask for fulfilment). Thus, the compensation for damage occurs as a general sanction. Article 523 of the Serbian LO provides that in case of termination of a sales contract because of contract breaches by one of the contracting parties, the other party has the right to compensation for damage suffered, according to the general rules on compensation for damage incurred by breach of contract. Thus, this article refers to general provisions for compensation of damage incurred by breach of contract. What are those provisions? Article 262, paragraph 2 stipulates that the creditor has a right to request compensation for damage he has suffered due to non-fulfilment or delays in fulfilment by the debtor. Further, Article 264 stipulates that the contract can expand the liability of the debtor to cases for which he would not usually be held liable, but that the fulfilment of such contractual provisions cannot be requested if it is in opposition to the principle of conscience and honesty. Opposite to this is the provision from Article 265 which prescribes the possibility for limitation and exemption of liability. Liability cannot be excluded for intent and gross negligence (paragraph 1), nor for normal negligence (paragraph 2), if it is a consequence of the contract arising from the monopoly position of the debtor or generally unequal relationship between the contracting parties. The provision of the contract determining the highest compensation amount is also valid, if the amount determined thus is not in apparent disproportion to the damage and unless otherwise provided by law for the concrete case (paragraph 3). In case of limitation of the amount of compensation, the creditor has a right to full compensation if the inability to fulfil the obligation has been caused deliberately or with gross negligence by the debtor (paragraph 4). Regarding the compensation amount, Article 266 gives the creditor the right for compensation of normal damage and gain damage, but only the ones that the debtor had to predict at the time of concluding the contract (paragraph 1). In case of fraud, intent or gross negligence compensation for the damage that could not be predicted is owed as well (paragraph 2). Always when the Law does not prescribe differently, on compensation of contractual damage the appropriate provisions of the Law on compensation of non-contractual damage shall apply.
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3. **In which cases does the breach of contract imply the right of interest? How is the amount of the interest rate specified in case of breach (overdue fulfilment) of sales contract?**

Answer the following questions: Is your legislation in compliance with the Directive on combating late payment (Directive 2000/35/EC of the European Parliament and of Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35-38) and in what manner is it done? Please precisely list the legal solutions of this question.

In the **legal system of the Republic of Albania**, if there is a breach of contract, an obligation to compensate the damaged party arises. From the moment the obligation arises, the creditor has the right to request interests for the sum of money that corresponds to the indemnity, if the debtor doesn’t itself fulfil the obligation. Article 450 of ACC should be kept in mind in this case. This article provides also that the percentage of interest is defined by law. In fact the Albanian Parliament hasn’t, till now, enacted any law fixing the percentage of interest. On the other hand, Albanian Supreme Court have delivered the unifying decision no. 932, dated 22.06.2000 in which it gives some criteria’s to evaluate the amount of the interest rate. In fact, this decision was delivered in a different set of circumstances (after the fall of pyramid schemes in 1997), but it can still serve nowadays as a guideline to courts, when deciding about compensation for damages and the application of interest rate for the amount of money to be paid to the creditor by the debtor. In this decision the Albanian Supreme Court have stated that, the high interest rate applied in loans, is illegal, except for the amount that corresponds to the highest interest rate published by the Central Bank of Albania at the time of the conclusion of the contract. Off course, this decision regulates the interest rate used in loans, but the courts can use its criteria’s also when determining the loss (the amount of money to be paid) for breach of sales contracts. In this respect we can say that the amount of interest rate, in cases of breach of sales contract, is specified case by case, accordingly to the interest rate published by the Central Bank of Albania. Courts rely on licensed accountants to calculate the specific interest amount in individual cases.

In relation to the Directive 2000/35/EC of the European Parliament and of Council, of 29 June 2000, “On combating late payment in commercial transactions”, we should stress that the Albanian civil legislation have not implemented the abovementioned Directive. This doesn’t mean that the legislation is not fully in compliance with the Directive, but only that there was not enacted a special law to incorporate the directive orientations in the civil legislation. Regarding article 3 of the Directive, article 450 of ACC provides that the recompense for the damage caused by the delay of the payment of a certain amount of money consists of matured interests, from the day the debtor’s delay begun, in the official currency of the country where the payment is done. The percentage of interest is defined by law. At the end of each year, the matured interests are added to the sum of the obligation upon which their calculation is done. The legal interest is paid without the creditor being obliged to prove any damage. When the creditor proves that he has incurred damages greater than the legal interest, debtor is obliged to pay him the other part of the damage.

Article 686 of the ACC provides that Standard conditions prepared by one of the parties are effective as to the other, if at the time of formation of the contract the latter knew of them or should have known of them by using ordinary diligence. The general provisions that bring about a loss or disproportional infringement of the interests of the contracting parties are effective especially when they differ essentially from the principles of equality and impartiality provided for in this Code and that regulate the contractual relationships. In any case, conditions are ineffective, unless specially approved in writing, which establish in favour of him who has prepared them in advance, limitations of liability, the power to withdraw from the contract or to suspend its performance, or which imposes time limits involving forfeitures on the other party, limitations on the power to raise coun-
ter claims, restrictions on contractual freedom in relations with the third parties, arbitration clauses, or derogations from the competence of the courts.

Article 479 of the ACC also provides that any agreement that excludes or limits the parties from the liability of the non-execution of the obligations is invalid. In relation to paragraph 5 of article 2 of the Directive, the civil legislation doesn’t incorporate provisions that explicitly allow organizations officially recognized as, or having a legitimate interest in, representing small and medium-sized enterprises, to take action according to the national law concerned before the courts or before competent administrative bodies, on the grounds that contractual terms drawn up for general use are grossly unfair within the meaning of paragraph 3 of the Directive. If other issues arise related to do with unfair competition, then the law no. 9121, dated 28.07.2003 on the protection of competition, as amended will apply. If someone is classified as consumer, the law no.9902, dated 17.04.2008 on the protection of consumers will apply (as ammended). According to article 4 of the Directive, the Albanian Civil Code in article 746 provides that when something is sold on an installment basis the buyer acquires ownership of the thing upon payment of the last installment, assuming the risk from the time of delivery. The delayed transfer of ownership with the above conditions must be reflected in the contract. Article 747 provides that The transfer of ownership according to the above provision can only be utilized vis a vis creditors of the buyer only if it is documented in writing with a date prior to the issuance of the credit. If the sale involves immovable or movable registered things, the registration provisions apply. Article 748 of the ACC further provides that Notwithstanding any agreement to the contrary, default in payment of only one installment which does not exceed one-eighth of the total price does not result in dissolution of the contract, and the buyer retains the benefit of the time limit for subsequent installments. On the other hand, article 749 of ACC, stipulates that If the contract is dissolved due to the buyer’s non-performance, the seller must return the installments he has received, subject to his right to fair compensation for use of the thing and for damages. If it was stipulated that the installments paid should be retained by the seller as indemnity, the court, according to the circumstances, can grant a reduction of the agreed indemnity. At the end, we can say that so far the Albanian legislation has not incorporated any regulation regarding article 5 of the Directive.

In Bosnia and Herzegovina (Republic of Srpska), Interest (interest, usury, profit, gain) is the price, i.e. fee paid for using other persons’ money or other persons’ exchangeable movable goods, regardless whether the said goods are used based on legal operations, that is on some legal basis or not, which is given to things of that kind. Bearing in mind the basis for occurrence (contract or law) we differentiate between contractual and legal interests. Default (moratorium) interest is the legal interest owed by the debtor, in addition to the principal, in case of being overdue in fulfilling the monetary obligation (Article 277/1 LO). It is aimed at compensation of damage, i.e. it represents a sanction for untimely fulfilment of monetary obligations, bearing in mind the nature of money as an owed thing.

The given provisions need to be related to provision from Article 266/1 of the LO regulating the right of the individual to compensation of ordinary damage and gain damage, which is the one that the debtor had to predict. Ordinary damage, in principle, is easy to prove. Namely, the liability of the monetary obligation debtor is presumed due to the fact that he is overdue so ipso facto the creditor acquires the right to default interest. The creditor can also prove the compensation for damage higher than the amount of the default interest. However, gain damage is not presumed and it is not easy to determine, because according to the provision from Article 189/3 of the LO it must be determined what damage has occurred for the creditor due to the lateness of the debtor in order to achieve the full compensation for damage from Article 278/2 of the LO, and in relation to Article 266 of the LO, which has a corrective role. The purpose of total or integral compensation for damage
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(see Article 190 of the LO) is to bring the creditor of the monetary receivable in the state he would be if the debtor had according to the normal course of things had performed his obligation when it became due.

In addition to compensation for full damage, the creditor can also request valorization of devalued monetary claim due to inflation (so-called inflation damage) in order to establish the principle of equal value of the given thing from Article 15 of the LO, i.e. to compensate for the difference between the real paid value of the contractual obligation and the market value. Default interest can be awarded also with immaterial damage for breach of contractual obligation, because this form of damage also has its place with liability for breach of contract, as mentioned before. Monetary compensation for immaterial damage is a main claim, and the compensation for overdue payment of the main receivable is the default interest, the occurrence and amount of which are directly dependent on the existence of the main receivable.

Default interest is paid according to the rate provided in the Law on the default interest rate of the Republic of Srpska. According to the provisions of this law, in case of lateness of debtor in fulfilling monetary obligations in domestic or foreign currency, he owes in addition to the principal also default interest on the debt until the day of payment according to the interest rate comprised of the rate of growth of retail prices for the period for which the default interest is calculated and a fixed rate of 0.05% per day (Article 3). The calculation of the default interest is made by multiplying the fixed daily rate of 0.05% with the number of days overdue and that rate is then multiplied with the amount of the principal debt increased by the interest according to the rate of growth of retail prices from the previous article. If the rate of growth of retail prices is zero or negative, only the fixed rate of 0.05% per day shall apply (Article 4). The Law on Amending the Law on Default Interest Rate regulates the calculation of interest on the monetary obligation expressed in dinars, whereas the Law on Amending the Law on Default Interest Rate from 2008, replaces the words “retail prices” in Articles 3 and 4 of the basic law from 2001, with the words “consumer prices”.

This manner of regulation of the establishment of the default interest rate, as well as its regulation in LO is not in accordance with the Directive on combating late payment in commercial transactions. Of course, this is another task for the legislators in the procedure for harmonization of the national regulations with the EU law (acquis communautaire).

In Bosnia and Herzegovina (Federation of B&H, District Brčko), Default (moratorium) interest is the legal interest owed by the debtor, in addition to the principal, in case of being overdue in fulfilling the monetary obligation (Article 277/1 LO). The given provisions need to be related to provision from Article 266/1 of the LO regulating the right of the individual to compensation of ordinary damage and gain damage, which is the one that the debtor had to predict. Ordinary damage, in principle, is easy to prove. Namely, the liability of the monetary obligation debtor is presumed due to the fact that he is overdue so ipso facto the creditor acquires the right to default interest. The creditor can also prove the compensation for damage higher than the amount of the default interest. However, gain damage is not presumed and it is not easy to determine, because according to the provision from Article 189/3 of the LO it must be determined what damage has occurred for the creditor due to the lateness of the debtor in order to achieve the full compensation for damage from Article 278/2 of the LO, and in relation to Article 266 of the LO, which has a corrective role. The purpose of total or integral compensation for damage (see Article 190 of the LO) is to bring the creditor of the monetary receivable in the state he would be if the debtor had according to the normal course of things had performed his obligation when it became due.

In addition to compensation for full damage, the creditor can also request valorization of devalued monetary claim due to inflation (so-called inflation damage) in order to establish the prin-
ciple of equal value of the given thing from Article 15 of the LO, i.e. to compensate for the difference between the real paid value of the contractual obligation and the market value.

Default interest can be awarded also with immaterial damage for breach of contractual obligation, because this form of damage also has its place with liability for breach of contract, as mentioned before. Monetary compensation for immaterial damage is a main claim, and the compensation for overdue payment of the main receivable is the default interest, the occurrence and amount of which are directly dependent on the existence of the main receivable.

Default interest is paid according to the rate provided in a special law. In the Republic of Srpska this is the Law on the default interest rate of the Republic of Srpska (“Official Gazette of the Republic of Srpska”, No. 19/01, 52/06, 103/08) and in the Federation of B&H this is the Law on the amount of the default interest rate for overdue debts (“Official Gazette of the Federation of B&H”, No. 56/04, 68/04, 29/05, 48/11. Before this law and its amendments in power was the Law on the amount of the default interest rate, “Official Gazette of the Federation of B&H”, No. 27/98, 51/01.), and in the Brčko District of B&H Law on the amount of the default interest rate, “Official Gazette of Brčko District B&H”, No. 2/02, 25/08).

The calculation of default interest on overdue debts from debtor-creditor relations is made, according to the Law on the amount of the default interest rate for overdue debts of the Federation of B&H, at a rate of 12% annually (Article 2/1). The calculation of this default interest is made applying the method of a simple interest calculation for yearly periods and conform interest calculation for periods less than one year (Article 3/1).

The default interest rate in the Brčko District of B&H in cases when the debtor is overdue with the fulfillment of a monetary obligation is comprised of: 1. the coefficient of growth of consumer prices in the district in the period for which the interest is calculated and 2. a fixed daily rate of 0.03% (Article 3/2). The calculation of default interest is made by multiplying the fixed daily rate of 0.03% with the days overdue and the rate calculated like that is multiplied with the amount of the principal debt increased by the interest according to the coefficient of growth of consumer prices (Article 4/1), and if the coefficient of growth of consumer prices is zero or negative, only a fixed daily of 0.03% is applied (Article 4/2).

This manner of regulation of the establishment of the default interest rate, as well as its regulation in LO is not in accordance with the Directive on combating late payment in commercial transactions, according to which the amount of interest for default on payments that the debtor owes is the amount of the interest rate applied by the European Central Bank on its last termed transactions before the first calendar day of the respective semester (reference rate), plus at least seven percent (margin), unless otherwise provided in the contract (Article 3/1/(d)). Of course, this is another task for the legislators in the procedure for harmonization of the national regulations with the EU law (acquis communautaire).

According to the legal system of Montenegro, The right to interest is prescribed in case of overdue fulfillment of monetary obligations. The debtor in default with the performance of a monetary obligation shall in addition to the principal owe default interest at a rate prescribed by law. The creditor and debtor may agree to have the default interest rate lower or higher than the default interest rate provided by law. If the contractual interest rate is higher than the default interest rate, it shall also accrue after the debtor becomes overdue (Article 284 of the Montenegrin LO). The creditor shall have the right to default interest regardless whether he suffered any damage as a result of the debtor’s lateness. If the damage suffered by the creditor as a result of the default by the debtor exceeds the amount to be received from default interest, he shall be entitled to full compensation of the difference (Article 285 of the Montenegrin LO). On due and unpaid contractual or default
interest, as well as other due periodical monetary payments, default interest shall not accrue, unless otherwise provided by law. On the amount of unpaid interest default interest can be requested only from the day when a request for its payment was submitted to court, and on due periodical monetary obligations, default interest shall accrue only from the day when a request for their payment was submitted to court (Article 286 of the Montenegrin LO).

The interest rate in case of overdue payment of monetary obligations is regulated in accordance with the Law on the Amount of Default Interest (“Official Gazette of Montenegro”, no. 83/09). This law regulates the amount of the default interest rate paid by the debtor when he is late fulfilling the monetary obligation in cases when the amount of the default interest rate is not regulated in the contract. The debtor who is overdue in payment of a monetary obligation shall owe, in addition to the principal, default interest rate on the amount of the debt until the date of payment, at a rate provided by this law (Article 2). The default interest rate is determined in the amount of the basic default interest rate increased by seven percentage points. The basic default interest rate shall be the interest rate determined by the European Central Bank for main refinancing operation and which is in effect on the first day of the calendar semester it relates to (Article 3). The default interest rate shall be determined every half year and calculated every one year. The default interest rate shall be determined for the semesters from 1 January to 30 June and from 1 July to 31 December (Article 4).

The Montenegrin legislation in compliance with Directive 2000/35 EC (Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions). This is confirmed by the aforementioned provisions of the Law on Obligations and the Law on the Amount of Default Interest, regarding the right to interest and determining the default interest rate. The Law on Obligations regulates the time for fulfilment of monetary obligations from commercial contracts in order to harmonize the LO with the provisions of the Directive (Article 322 of the Montenegrin LO).

In the Republic of Croatia, the debtor in default with the performance of a monetary obligation shall in addition to the principal owe default interest (Article 29 paragraph 1 of the Croatian LO). This is a general provision related to sales contracts as well (especially to a sales contract with payment of the price in installments or a contract for sales on credit), unless the parties agree otherwise. The interests are the consequence of the debtor default in performing the obligation and they accrue from the moment of maturity of the payment. From this we reach the fundamental question: when is the debtor overdue? That is to say, how do we determine the moment of maturity? The answer depends on the type of relation we have.

In contractual obligations in which at least one contracting party is not a trader, the debtor is overdue when he fails to fulfil the obligations in the time set for its fulfilment. If a time limit for performance is not stipulated in the contract, the debtor shall perform the obligation within the time limit stipulated by law. However, if the time limit is not stipulated by contract or law, and the objective of the transaction, the nature of the obligation or other circumstances do not require a specific time limit, the creditor may request immediate performance of the obligation, and the debtor on his part may request from the creditor to receive immediate performance (Article 173 of the Croatian LO). The request by the creditor for fulfilment of obligation when the time limit is not set, can be written or oral, by an extrajudicial demand or initiation of a proceeding aimed at achieving performance of the obligation (Article 183 of the Croatian LO). In the latter case the debtor is obliged to immediately fulfil his obligation, although there is an established practice of eight days from such a request.

In the time for fulfilment of monetary obligations in trade contracts and contracts between traders and public authorities until 31.12.2011 Article 174 of the Croatian LO shall be in power, which is fully harmonized with Directive 2000/35/EC. However, from 01.01.2012 the provisions of this Article shall be made void with the coming into power of the new Law on the Deadline for Fulfilment
of Monetary Obligations. The Croatian Parliament at the meeting on 21.10.2011 adopted the new Law on the Deadline for Fulfilment of Monetary Obligations (OG 125/11, hereinafter: LODFMO), which would come into power on 01.01.2012. The new Law prescribes the deadlines for fulfilment of monetary obligations and the legal consequences of lateness in fulfilment of monetary obligations between undertakings and between undertakings and public authorities. This law comes as consequence of harmonization of the Croatian legal system with Directive 2011/7/EU on combating late payment in commercial transactions (OJ L 48/01). Directive 2011/7/EU was adopted for more efficient combat against fulfilment of monetary obligations in commercial transactions. The deadline for its implementation in the national law of EU member states is 16.03.2013 after which it will completely replace Directive 2000/35/EC. The Republic of Croatia has already fulfilled its obligation by adopting the new Law on the Deadline for Fulfilment of Monetary Obligations. This law makes void the provision thus far from Article 174 of the Law on Obligations (monetary obligation in commercial contracts), which was used to implement the solutions of Directive 2000/35/EC.

Regarding the deadlines for fulfilment of monetary obligations between undertakings, with the said contract a deadline may be agreed upon for fulfilment of the monetary obligation in up to 60 days, and in very exceptional cases a longer deadline can be contracted for fulfilment of monetary obligations. If there is no deadline contracted for fulfilment of monetary obligations in the contract between undertakings, the debtor is obliged, without being requested by the creditor, to fulfil the monetary obligation within 30 days from: 1) the date when the debtor received the bill or other appropriate request for payment, or 2) from the day when the creditor fulfilled his obligation, if it cannot be determined with certainty the day of receiving of the bill or other appropriate request for payment or if the debtor has received the bill or other appropriate request for payment before the creditor fulfilled his obligation, or 3) from the day of expiry of the deadline for verification of the subject of the obligation, if the contract or law provides a certain deadline for such verification, and the debtor has received the bill or other appropriate request for payment before the expiry of that deadline. In this the timeframe for verification of the subject of the obligations may not be longer than 30 days from acceptance of the subject of the obligation, unless a longer deadline has been exclusively agreed for verification of the subject of the obligation (Article 2 LODFMO). Regarding the deadlines for fulfilment of monetary obligations between undertakings and public authorities, in a contract between undertakings and public authorities in which the public authority is the debtor of the monetary obligation a deadline can be contracted for fulfilment of the monetary obligation of up to 30 days. Exceptionally a longer deadline can be contracted but no longer than a maximum of 60 days. Monetary obligations in contracts between undertakings and public authorities, and in which the debtors of monetary obligations are undertakings or the institute for implementing mandatory healthcare or a medical institution founded by the Republic of Croatia, or a unit of regional self-government or city, are fulfilled in accordance with the provisions for fulfilling obligations among undertakings (i.e. according to Article 2). If the contract between an undertaking and a public authority does not stipulate the deadline for fulfilment of the monetary obligation, the debtor is obliged, without the request of the creditor, to fulfil the monetary obligations within 30 days’ time, which are determined in the same way as in contracts between undertakings. The same provision applies to the deadline for verification of the subject of the obligation (Article 3 LODFMO).

The law is very restrictive. Void are the contractual obligations that exclude, restrict or condition the right of creditors to default interest in case of the debtor being overdue in fulfilment of the monetary obligation. Equally void are provisions which: 1. contract the date of receiving of the bill or other appropriate request for payment; 2. contract the deadline for fulfilment of monetary obligations longer than 60 days (in contracts between undertakings in Article 2.2 LODFMO); 3. contract the deadline for verification of the object of the obligation longer than 30 days (in contracts between
undertakings in Article 2.5 LODFMO); 4. contract the deadline for fulfilment of monetary obligations longer than 30 days (and the public authority is not the debtor in contracts between undertakings and public authorities from Article 3.2. LODFMO); 5. contract the deadline for fulfilment of monetary obligations longer than 60 days (in contracts between undertakings and public authorities from Article 3.3 LODFMO); 6. contract the deadline for verification of the object of the obligation longer than 30 days (in contracts between undertakings and public authorities from Article 3.6 LODFMO).

All of the above shall apply if on the basis of the circumstances in the case, and in particular commercial customs and nature of the subject of obligation, it can be seen that with such a contractual obligation, in opposition to the principles of conscientiousness and honesty, a legal inequality has been cause in the rights and obligations of the contracting parties for the damage of the creditor.

When evaluating whether a provision is void it will be taken into consideration if there are any justified reasons for deviation from the deadlines for fulfilment of monetary obligations prescribed by this law (Article 4 LODFMO).

Default interest come as consequence of the debtor’s lateness in fulfilment of monetary obligations, and in addition to the principal the debtor in case of lateness also owes interest (Article 26 paragraph 1 of the Croatian LO). They accrue from the first day after the day of maturity of the claim. Default interests are not contracted and they belong to the creditor – contracting party, by the law itself (ex lege). Thus, in practice they are also called statutory default interest and their rate is regulated by law. The obligation for payment of interest appears as a primary obligation of the contracting party in, for example, credit contracts, loan contracts, contracts on monetary deposits in banks, sales contracts with payment in installments or sales on credit. The default interest rate on relations arising from commercial contracts and contracts between a trader and a public law person shall be determined on semi-annual basis by increasing the discount rate of the Croatian National Bank applicable on the last day of a six-month period prior to the current six-month period by eight percentage points (discount rate + 8%), or five percentage points in other relations (discount rate + 5%). The parties to commercial contracts and contracts between a trader and a public law person may contract a different default interest rate, but not over the maximum determined amount (Article 29 paragraph 2-3 of the Croatian LO). The differentiation between the amounts of interest rates depends on the legal business from which the consequence arises is implementation of Directive 2000/35/EC in the Croatian legal system. The provisions on the amount of interest rate are of forced or cogent nature.

The provision of the contract on a different interest rate than the one prescribed by law shall be void, if it arises from the circumstances of the case, in particular from commercial custom and the nature of the subject of obligation, that the contracted default interest rate has contrary to the principle of fair conduct caused obvious inequality of rights and obligations of parties to the contract. In deciding whether the provision regarding the rate of default interest is void it shall be taken into account whether there were reasons for departing from the default interest rate prescribed by law (Article 29 paragraphs 4-5 of the Croatian LO). The default interest rate shall refer to the period of one year. It is determined by the Croatian National Bank, is obliged on 1 January and 1 July of every year to publish its discount rate in the Official Gazette of the Republic of Croatia (Article 29 paragraphs 7-8). In legal literature it is considered that the discount rate of the Croatian National Bank is a reference image of the real situation of the money market.

However, in addition to default, the Croatian legal system allows the parties to themselves contract interests, and they are thus called contractual interests. The difference to default interests is that they can be contracted to use exchangeable (generic) things. The contractual rate of interest among persons of whom at least one is not a trader may not exceed the statutory default interest rate applicable on the day of entering into the contract or the day the contractual rate of interest
changed, where the contracted rate of interest is variable. The contractual rate of interest among traders or a trader and a public law person may not exceed the statutory default interest rate for such persons, increased by one half of that rate (Article 26 paragraphs 1-2 of the Croatian LO). If interest is contracted without determining its rate the interest rate applicable among persons of whom at least one is not a trader shall be equal to one quarter of the statutory default interest rate and among traders to one half of the statutory default interest rate (Article 26 paragraph 3 of the Croatian LO). If the contractual interest exceeds the statutory interest, the highest statutory rate of interest shall apply. Same as the default interest, the contractual rate of interest shall refer to a period of one year (Article 26 paragraph 4 of the Croatian LO). Regarding the relation between contractual and default interests, if in commercial contracts and contracts between traders and persons of public law the contractual rate of interest exceeds the default interest rate, they shall continue to accrue also when the debtor is in default (Article 29 paragraph 6 of the Croatian LO). If in the given contracts there is a contracted contractual interest, which is up to one half higher than the statutory rate of default interest, then it shall be applied. Thus, if the debtor is overdue, there will not be an obligation on him to pay default interest, but his obligation will remain to pay contractual interests at the rate higher than the rate of default interests.

In the Macedonian legal system, generally, only the breach of a monetary obligation gives the creditor the right to payment of so-called default interest, and these general rules also apply to the obligation of the buyer for payment of the sales price. This interest is paid by force of law, when the debtor is overdue with fulfilment of a monetary obligation (Article 266(1) of the Macedonian LO). As a rule, the time of when the debtor becomes overdue is determined by applying the regulation of the Macedonian LO on maturity of receivables (Article 266(2) of the Macedonian LO). If maturity cannot be determined by using these rules, than the rules taken from Directive 2000/35/EC shall apply, which are implemented in Article 266(3) of the Macedonian LO. A characteristic of domestic law is that the LO determines the amount of the default interest rate. In this, in relation to Directive 2000/35/EC, LO makes a difference between the so-called legal default interest and the so-called contractual default interest. The basis for determining each of these rates is the so-called reference rate, which is the interest rate of the basic operations instrument on the open market, published by the National Bank of the Republic of Macedonia every January second and every July first. The National Bank published the reference rate for the current semester, i.e. until the end of the current semester, on its website (Article 266-a(6) of the Macedonian LO). When talking of the rate of the legal default interest, it is determined for every current semester that the debtor is overdue, by enlarging the reference interest rate valid for the last day of the previous semester for a certain number of percentage points. In commercial contracts and in contracts between traders and persons of public law, this reference rate is increased by ten percentage points, and in contracts in which at least one person is not a trader the reference rate is increased for eight percentage points (Article 266-a(1) of the Macedonian LO). The rate of legal default interest determined thus, is valid for every semester that the debtor is overdue. It must be mentioned that these rules are valid only when the monetary obligation is expressed in domestic currency. The rule is similar when the monetary obligation is expressed or determined in foreign currency, but in such situations the reference rate is the monthly rate of EURIBOR, for Euros, that was valid on the last day of the previous semester (Article 266-a(2) of the Macedonian LO). These rules apply to the so-called legal default interest. It is allowed to agree on so-called contractual default interest, but only in commercial contracts and in contracts between traders and persons of public law. Persons of public law are considered to be all persons obliged to act according to the rules for public procurement with the exception of traders (Article 266-a(7) of the Macedonian LO). The rate of the contractual default interest, however, may not be higher than the legal default interest increased by fifty percent, which was valid on the date of conclusion of the contract (Article 266-a(3) of the Macedonian LO), depending on the currency of the obligation.
The court is authorized, at the request of the other party, to fully or partially declare null and void the contractual obligation on the rate of contractual default interest under the conditions of Article 266-a(4) and (5) of the Macedonian LO. All of these rules relate to the overdue payment of monetary obligations arising from the contract. Regarding other types of obligations, the rate shall apply for legal default interest that is applied to contracts in which at least one person is not a trader, for the respective currency (Article 266-b of the Macedonian LO).

In the law of the Republic of Serbia, in case of breach of contractual obligations from a sales contract (regulated by the Law on Obligations of the Republic of Serbia) the issue of default interest occurs in two cases. In the first case the right to default interest is on due receivables to the buyer due to non-payment (or incomplete payment of the price), as well as on other monetary receivables of the seller to the buyer. Another case is the right of the buyer to default interest in case of return of price due to termination of the sales contract. The basic obligation of the buyer from the sales contract is payment of the price on time and in the place determined in the contract, assuming that the parties have reached a common agreement (Article 516 of the Serbian LO). As the price must be expressed in money (at least predominantly if not fully), the obligation of the buyer is a monetary obligation. The sales contract is a typical two sided contract, which means that it puts both the seller and the buyer in the position of creditor and debtor. If the buyer does not pay the due price, he is overdue, as a debtor, and since these are monetary obligations we have the case of default interest, the existence of which is conditioned by the existence of money as a good. In Serbian love, being overdue as a debtor is regulated in Article 324 of the Serbian LO, prescribing that the debtor is overdue when he does not fulfil the obligation in the time due for its fulfilment, that is, if the time has not been set the debtor is overdue when the creditor calls on him to fulfil his obligation, orally or in writing, with a non-judicial warning or by starting a procedure the purpose of which is to achieve the fulfilment of a certain obligation. We will look at the quoted article in connection to Article 277 of that same law, which prescribes that the debtor (in this case the buyer) who is late fulfilling the monetary obligation owes in addition to the principal also default interest. Thus, when the buyer from a sales contract fails to meet his due obligation, the creditor always has the right to default interest, regardless whether the buyer is responsible for the lateness. The creditor is not obliged to prove that he has suffered damage in the amount of the default interest. On the other hand, the debtor cannot prove that because he is overdue there was no damage incurred on the creditor, just as he cannot prove that the damage has occurred, but to an extent lesser than the amount of the default interest. The logic behind these rules is simple. Had the buyer paid the price on time, the seller could have deposited the received money. Thus, regardless of why the buyer was overdue and his possible responsibility or irresponsibility for that, the seller suffers damage in the amount of the default interest, and it is all due to the characteristic of money as a good that can be “given under interest”. We will talk about the relationship between default interest and compensation for damage when we answer other questions.

In case of termination of sales contract, we have the question of the buyer’s right to return of the price, if the buyer has fulfilled his contractual obligation. If he has not, termination by both parties relieves them of all contractual obligations. Termination of contract is one of the ways for closing of the contract. Because termination eliminates the legal bases on which the seller has received a certain amount of money in the name of price, the question arises of restitution as the consequence of the contract’s termination. The buyer has a right to ask for return of the price, but also an amount of interest, from the date when the price was paid to the seller. The reason for this is the retroactive effect of the termination, and this is provided in Article 132 paragraph 5 of the Serbian LO, which stipulates that the party (in this case the seller) returning the money is obliged to pay default interest from the day they have received the payment. The explanation for this rule is the same in all cases
of monetary obligations, that is in the field of the specific characteristics of money, its internal value that can be changed, and in the concrete case the inability of the buyer to use the money during the time it was in possession of the seller. In case of termination of the contract, the buyer would have a right to return of the advance he possibly gave the buyer. This, of course, includes the right to interest on the amount of the advance, until the moment of payment thereof (Verdict of the Higher Commercial Court of Serbia, Pz. 3034/91 from 15.05.1991). In the last case, the interest is paid as compensation for using of the money by the seller.

In Serbian law the provisions on default interest are located in the Law on Obligations and the Law on the Rate of Default interest. LO, as stated in the answer to the previous question, prescribes the right of the creditor to default interest in cases when the debtor is overdue with the payment of the monetary amount, and the other determines the amount of the interest rate of the default interest and the manner of its calculation. Namely, according to Article 277 paragraph 1 of the Serbian LO, the debtor who is overdue paying a monetary obligation owes in addition to the principal also default interest provided by law. If the rate of the agreed interest is higher than the rate of default interest, it also accrues after the debtor is overdue. Opposite to this, if the rate of agreed interest is lower than the rate of interest of arrears, than after the debtor is overdue only the default interest accrues and never both together (Article 277, paragraph 2 of the Serbian LO). The debtor obligation when he is overdue in fulfilling the monetary to pay the legal interest, on the amount of the debt until the date of payment, is provided also in Article 1 of the Law on the Rate of the Default interest. Article 2 of the same Law predicts that the rate of default interest is comprised of the monthly rate of growth of consumer prices and a fixed rate of 0.5% per month. Calculation of default interest is performed by multiplying the monthly flat rate of 0.5% with the amount of the principal debt increased by the interest for the monthly rate of growth of consumer prices using the conformity method, which means addition of the monthly calculated interest to the principal debt and calculation of the new interest on the amount of the principal thus set (Article 3 paragraph 1 of the Law). Article 3 paragraph 2 of the same Law provides that if for a certain month the rate of growth of consumer prices is not known, the last published monthly rate of growth of consumer prices, and paragraph 3 prescribes that for a month when the rate of growth of consumer prices is zero or negative, the monthly rate of default interest is equal to the flat rate of 0.5%. The data on monthly rates of growth of consumer prices in the Republic of Serbia is published on the website of the Republic Statistical Institute. Default interest is calculated starting from the first day after expiration of the contracted or legally prescribed time for payment, and stops accruing with expiration of the day when the payment was made. If it was not agreed on how the debtor’s liability becomes due, the default interest starts accruing from the moment of the creditor’s call to the debtor to pay the debt, i.e. the date from submission of a complaint in court since from that moment the debtor is overdue.

The Law on the Rate of the Default interest was adopted in 2001, and the amendments came in 2011. On the day of coming into power of this Law the Law on the Rate of the Default interest from 1993 was annulled. The new Law, unlike the old one, does not prescribe special provisions on the rate of default interest on receivables in foreign currency between domestic and foreign entities, or we could say that there is a legal gap, which case law has not managed to fully fill out. There are opinions that the relevant interest rate on foreign currency receivables could be reached by adding the reference interest rate in the country of the foreign currency, where the debt is expressed by a fixed annual rate of 6% (annual interest rate according to the previous Law), and reach in this way the adequate percentage of the yearly interest rate.

The legislation of the Republic of Serbia is not harmonized with Directive 2000/35 of the European Communities.
4. Is the damaged party entitled to claim compensation for loss apart from the right of interest, or are both rights excluded? In case of cumulative rights, does the interest payment affect the determination of the compensation amount for loss and in what manner?

In the legal system of the Republic of Albania, article 450 of ACC, it is provided that when the creditor proves that he has incurred damages greater than the legal interest, debtor is obliged to pay him the other part of the damage. In this respect, we can say that the both rights are included, not excluded. Additionally, According to the second question above, we can say that the interest payment affects the determination of the compensation amount for losses. In paragraph 2 of article 450 of ACC it is provided that at the end of each year, the matured interests are added to the sum of the obligation upon which their calculation is done. This means that the sum of the obligation increases each year, because of the application of the legal interest. This one is applied to the sum that results from the adding to the original amount of obligation, of the amount of money that corresponds to interests at the end of the year. So, in the coming year the sum that corresponds to the obligation for which the legal interests will be applied, will be larger than the one that was calculated the previous year.

In Bosnia and Herzegovina (Republic of Srpska), the creditor is entitled to default interest regardless whether he has suffered any damage due to the debtor being overdue (Article 278/1). Thus, this is presumed damage that the creditor does not prove and it is enough only to prove that the debtor is overdue in the monetary obligation. If the creditor due to the lateness of the debtor has suffered damage greater than what he would receive in the name of default interest, he has the right to request the difference until the dull compensation for the damage (Article 278/2 LO). In this case the creditor must prove that he has suffered this greater damage.

In Bosnia and Herzegovina (Federation of B&H, District Brčko), the creditor is entitled to default interest regardless whether he has suffered any damage due to the debtor being overdue (Article 278/1). Thus, this is presumed damage that the creditor does not prove and it is enough only to prove that the debtor is overdue in the monetary obligation. If the creditor due to the lateness of the debtor has suffered damage greater than what he would receive in the name of default interest, he has the right to request the difference until the dull compensation for the damage (Article 278/2 LO). In this case the creditor must prove that he has suffered this greater damage.

According to the legal system of Montenegro, The right to default interest is an independent right of the creditor. The creditor shall have the right to default interest regardless whether he suffered any damage as a result of the debtor’s lateness (Article 285 paragraph 1 of the Montenegrin LO). If the damage suffered by the creditor as a result of the default by the debtor exceeds the amount to be received from default interest, he shall be entitled to full compensation of the difference (Article 285 paragraph 2). When the damage is higher than the amount of default interest, the creditor must according to the general rules prove this in order to have a right to request full compensation of the difference.

In the Republic of Croatia the damaged party is entitled to request both interest and compensation for damage as two cumulative rights. The creditor shall have the right to default interest regardless whether he suffered any damage as a result of the debtor’s default. If the damage suffered by the creditor as a result of the default by the debtor exceeds the amount to be received from default interest, he shall be entitled to full compensation of the difference (Article 30 of the Croatian LO). The reason for this legal regulation arises from the very nature of these rights. Interest is compensation that somebody pays for using the money of another person in a certain period of time, and compensation for damage, as its name implies, is aimed at compensating material or non-material damage occurring due to breach of contract. The opinion that default interests are not com-
pensation for damage has been clearly stated by the Supreme Court of the Republic of Croatia. In this sense these two rights do not influence one another, especially when determining the amount of compensation for damage. Damage that has really occurred is compensated, in accordance with the rules and criteria for compensation of damage described in the previous answers. In discrepancy to this, interests are paid even if no damage occurred. It is not even allowed to present counter evidence that the creditor has suffered a smaller loss than the one prescribed in the cogent provisions on the amount of default interest rates.

In the Macedonian legal system, in principal, the default interest does not only have an indemnification, but also a preventive and penalty function. In other words, the creditor has a right to default interest even if his real damage is less than the amount of the default interest or if he has not suffered any damage at all (Article 267(1) of the Macedonian LO). However, if the creditor proves that his real damage is higher than the amount that belongs to him on the basis of default interest, then he has a right to full compensation of damage. Namely, as provided in Article 267(2) of the Macedonian LO, if the damage that the creditor suffered because the debtor was overdue is higher than the amount he has received in the name of default interest, he has a right to request the difference up unto the full compensation for the damage.

In the law of the Republic of Serbia, Article 278 paragraph 1 of the Serbian LO stipulates that the creditor has a right to default interest regardless of whether he has suffered any damage because the debtor was overdue. Paragraph 2 of the same article stipulates that if the damage suffered by the creditor due to the lateness of the debtor is higher than the amount he would receive from the default interest, he has a right to request the difference to the full compensation of damage. This is the answer to the question whether the right to compensation for damage and the right to interest are rights that can be realized independent of each other or if the realization of one right excludes the realization of the other. The Serbian legislation has decided on the first option, i.e. the creditor can in the specific case realize the right both to default interest and compensation for damage (the second one only in the amount of the difference up to the full compensation for damage). Thus, the creditor has a right to default interest, from the moment the debtor becomes overdue until the expiration of the day when the payment was made and, as we already pointed out, regardless of whether he is responsible for the lateness in payment. Separately from this we look at the question of possible damage caused to the creditor by the debtor’s lateness. First, we have the question whether the creditor has suffered damage cause by the debtor being overdue? If he has, the debtor will be obliged to compensate the creditor for the damage, but only if he is responsible for being late in paying the debt. Of course, an aggravating circumstance for the debtor is that his liability is presumed and not proven! Only the opposite can be proven, i.e. that the debtor is not responsible for the lateness and then the burden of proof is on the debtor. How is the debtor exempted from liability for damage? First, from Article 278 paragraph 2 comes the obligation of the debtor for compensation of damage caused to the creditor due to lateness. We can relate this article with Article 262 paragraph 2 that also prescribes the obligation of the debtor for compensation of damage to the creditor incurred due to non-fulfilment or lateness in fulfilment of obligations. The next article – Article 263 answers the question, that is the debtor is exempted from liability for damage if he can prove that he could not fulfil his obligation or that he was late fulfilling the obligation due to circumstances occurring after the conclusion of the contract that he could not prevent, remove or avoid (namely, the debtor is exempted from liability due to circumstances exempting liability irrespective of guilt). Thus, the following conclusion can be made: if the debtor is not responsible for being overdue in the fulfilling of his obligation, the creditor has a right only to interest in arrears, and in the opposite case has a right both to interest in arrears and the difference to the full amount of the damage if, of course, the amount of damage suffered is higher than the amount of the default interest, which
must be proven and the burden of proof of the existence of the damage and its amount falls on the creditor. Thus, the creditor requests default interest and proves that he has suffered damage that the default interest does not cover fully, and if he proves that the court shall award him both with default interest and the difference between the default interest and the proven damage.

There is presumption of liability of the debtor for lateness, but even if the debtor does not prove the existence of circumstance excluding his liability, the position of the creditor is not easy at all. It is exactly the creditor who must prove that there is damage and that it has occurred in consequence to the debtor being overdue with the payment. Regarding the amount of damage suffered, the burden of proof is also on the creditor. The damage occurring as consequence of failing to pay in time may sometimes be gain damage for the creditor, i.e. the profit that the creditor would certainly make had the debtor paid on time (which the creditor must prove). In other cases the damage suffered is real damage. When the creditor proves that he has suffered damage and when its amount is determined, the default interest must be deducted from the amount of damage suffered! Thus, the creditor has a right to request only the difference between the default interest and damage suffered; i.e. only the difference will be paid until the full compensation for the damage. Another possibility is for the creditor to only request the full amount for compensation of the proven damage, without calculation and payment of the default interest!

It can be said that Article 278 paragraph 2 of the Serbian LO is a rule in Serbian law – default interest is deducted from the amount of damage suffered. In spite of this, the aforementioned rule should not be applied always and literally, without taking into account the specifics of every concrete case. A situation that brings in the question the adequate application of this article is selling for purposes of settlement. Namely, the buyer did not pay the price on time, he became overdue and default interest started accruing. On the other hand, the seller did not hand over to him the good, waited for the payment of the price, and in the end terminated the contract, sold the good to another person, but at a price lower than the one agreed with the first buyer – thus he suffered damage! Who owes the compensation? The first buyer! As he collected the price from the second buyer, default interest due to overdue payments stopped accruing, which was a burden on the first buyer, but an obligation for compensation for damage was created and now there is default interest accruing on the amount that is the difference in prices (i.e. damage). This example indicates the complexity of individual cases and the inability to solve them by simple application of the rule contained in Article 278 – deduce the default interest from damage suffered!

**Summary**

Regarding the first group of questions, in the legal system of the Republic of Albania there is liability of parties for breach of sales contract. In this, the compensation for damage is not the only legal remedy that can be requested, bearing in mind that also a request can be given for fulfillment, proper fulfillment, reduction of price and termination of contract, as well as the payment of interest when talking about monetary obligations. Regarding the legal systems of Bosnia and Herzegovina (Republic of Srpska, Federation of B&H and District Brčko), the State of Montenegro, Republic of Croatia, Republic of Macedonia and Republic of Serbia, it has been generally accepted that breach of contract occurs in case of non-fulfillment (full or partial), in case of inadequate fulfillment (fulfillment with material or legal defects), and in cases of lateness. Compensation for damage is one of the available legal remedies, and also requests can be given for fulfillment, proper fulfillment, reduction of price and termination of contract. Also, compensation for so-called abstract damage can be requested, as well as compensation of damage for sale or purchase for settlement.
Regarding the second group of questions, in the legal system of the Republic of Albania it is accepted that the creditor has a right to compensation of material damage, generally in the form of ordinary damage and loss of profit. There is no explicit solution on the compensation of non-material damage for violation of contractual obligations. Regarding the legal systems of Bosnia and Herzegovina (Republic of Srpska, Federation of B&H and District Brčko), the State of Montenegro, Republic of Croatia, Republic of Macedonia and Republic of Serbia, it has been generally accepted that in breaches of sales contracts both ordinary damage and loss of profit are compensated, as forms of material damage. In this, only predictable damage is compensated as a rule, with the exception of some special cases. In the legal systems of Bosnia and Herzegovina (Republic of Srpska, Federation of B&H and District Brčko), the State of Montenegro, and Republic of Serbia there are no explicit legal solutions on the compensation for non-material damage, while the legal systems of the Republic of Croatia and the Republic of Macedonia recognize the right to compensation of this damage as well.

Regarding the third group of questions, in the legal system of the Republic of Albania there are provisions on the obligation for payment of default interest in case of overdue payment of monetary obligations. The Civil Act is harmonized with the provisions of Directive 2000/35/EC only in principal, but not as full implementation of the Directive, but as a principal rule on the payment of default interests. Regarding the legal systems of Bosnia and Herzegovina (Republic of Srpska, Federation of B&H and District Brčko), the State of Montenegro, Republic of Croatia, Republic of Macedonia and Republic of Serbia, it has been generally accepted that overdue payment of monetary obligations gives the creditor the right to payment of interest, at a rate prescribed by law. Regarding the determination of the default interest rate, the legal systems of the State of Montenegro, Republic of Croatia, and Republic of Macedonia accept the system of Directive 2000/35/EC, and in the Republic of Croatia the reference rate is the discount rate. Directive 2000/35/EC is not implemented in the law of Bosnia and Herzegovina (Republic of Srpska, Federation of B&H and District Brčko) and the law of the Republic of Serbia.

It is important to mention that in the Republic of Croatia in 2011 a new Law on the Deadlines for Fulfillment of Monetary Obligations was adopted that comes into power on 01.01.2012. This law comes as consequence of harmonization of the Croatian legal system with Directive 2011/7/EU on combating late payment in commercial transactions. Directive 2011/7/EU was adopted for more efficient combat against fulfillment of monetary obligations in commercial transactions. The deadline for its implementation in the national legislations of EU member states is 16.03.2013, after which it will fully replace Directive 2000/35/EC.

Regarding the fourth group of questions, in the legal system of the Republic of Albania it is accepted that the damage is covered by payment of interest, but greater indemnity can be requested. Regarding the legal systems of Bosnia and Herzegovina (Republic of Srpska, Federation of B&H and District Brčko), the State of Montenegro, Republic of Croatia, Republic of Macedonia and Republic of Serbia, it is the general rule that the right to interest is an independent right of the creditor. If the damage exceeds the interest, the creditor is entitled to so-called full compensation.
V

E-CONCLUSION OF CONTRACTS
FINAL COMPARATIVE ANALYSES ON ELECTRONIC CONCLUSION OF CONTRACTS


General remarks

In the referent countries there are various laws that transpose the above mentioned EU Directives.

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1 This law shall apply from 1.1.2012
2 This law shall apply from 1.1.2012
3 This Law is not related to the mentioned EU directives, but however is part of the legal framework covering e-contracts.
2. Is any reference made to the 1996 UNCITRAL Model Law on Electronic Commerce?

**General remarks**

In the legislation of the referent countries, in the area of e-commerce, there are no direct references to the 1996 UNICITRAL Model Law on Electronic Commerce, but the provisions of the Laws on E-Commerce in the respective countries are made in the spirit of this model, indirectly, by following and transposing the relevant EU Directives.

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3. Are there separate national laws and pieces of implementing (enabling) legislation that are related to e-contracts that are enacted in SEE countries?

**General remarks**

The legal framework for e-commerce and e-contracting in the countries referred to is encompassed in the laws (mentioned above in the answer to Question 1), regulations and other measures used to implement legislation covering specific areas. Montenegro is an exception to this. Usually implementing legislation covers specific issues that are related to: issuing qualified electronic certificates, proceedings for forming qualified certification-service-providers, registering certification-service-providers who authorized to issue electronic certificates, etc. The implementation of this legislation is in the legal form of decisions, guidelines, and rulebooks.

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There is no such legislation in Montenegro

4. The definition of an e-contract in national law

**General remarks**

The laws of Albania, Croatia, Macedonia, Montenegro and Serbia all contain definitions of an e-contract, but the law in Bosnia and Herzegovina does not define an e-contract. According to national laws, a *contract in electronic form* is a contract that legal and natural persons, entirely or in part, conclude, transmit, receive, terminate, cancel, have access to and can display electronically by use of electronic, optical or other similar means, including but not limited to transmission via the Internet.
5. How many steps are needed for an enforceable e-contract to be concluded?

**General remarks**

In order to conclude an e-contract three to four steps are usually needed. Namely, the first one is informative; the parties to the contract (business partners) inform themselves about prices of goods and services, the subject of the potential future offer to be made on the on-line market. The second step is when, on the basis of the information gained, an offer is made regarding the goods or services, prices, payment conditions, delivery issues and other contractual terms and conditions. The third step consists of drawing up a contract. At this stage, in particular, there is usually some negotiation regarding the details of the future contract. Finally, the fourth step is the moment that the contract is concluded (the purchase order) and an obligation for the purpose of realization is finalized.

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<td>- Under article 11 of the “On Electronic Commerce”, the contracts concluded through electronic means are considered to be electronic contracts. - electronic means including any electronic equipment for processing (including digital compression) and for the storage of data, by which the service is delivered from the point of origin to the final destination, through electronic equipment. - Note: when defining a contract (electronic or not) it is necessary to refer to the definition provided by the Civil Code.</td>
<td>- The Law on Electronic Law and Business Traffic defines electronic message and electronic data but there is no definition for an e-contract - In Serbia, the definition is the same as in the paragraph above.</td>
<td>The definition is the same as in the paragraph above in the section on general remarks</td>
<td>- The same as the definition given in the paragraph above. - Law on Consumer Protection defines the notion of a contract concluded on distance/long distance contract - Law on Obligations defines the term contract made among absent persons, and the Law on Trade defines the term contracts on distance made among persons on different places/long distance contracts made between persons in different places. The Law on Distance Financial Services uses the term distance contract.</td>
<td>The same as the definition given in the paragraph above in the general remarks</td>
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<td>- Law on Electronic Commerce.</td>
<td>- In B&amp;H, the conclusion of an e-contract requires four steps.</td>
<td>- There is no single answer to this question, nor is there a law which determines the number of steps that are required to conclude an e-contract.</td>
<td>- In Macedonia there is a difference between B2B and B2C contracts. For B2B contracts, four steps are needed and for B2C three steps are needed.</td>
<td>- B2C contracts in Montenegro usually require three steps.</td>
<td>A traditional way of conclusion (offer, acceptance) applies.</td>
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6. The moment at which an e-contract is considered to be concluded

**General remarks**

The moment when an e-contract is considered to have been concluded is the moment when the offeree accepts an e-message which contains a statement made by the offeree regarding her/his/its acceptance of the content of the contract. The offer and the acceptance of it are considered as received at the moment when the content of the message is available to the parties to whom it was addressed. The law does not clarify what is meant by *able to access the acceptance of statement/available to the parties*.

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<td>There are no significant differences from in the general remarks above.</td>
<td>According to the Law on Electronic Law and Business Traffic, an e-contract is concluded when a statement of will for concluding an e-contract is received by the recipient under regular circumstances.</td>
<td>There are no significant differences from in the general remarks above.</td>
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7. The legal form (formality) required for e-contract to be deemed valid

**General remarks**

E-contracts are equally valid as traditional written contracts. The validity of an e-contract shall not be denied purely on the basis that it was concluded in electronic form. However, there might be some additional specific formal requirements for B2C e-contracts.

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8. Are the contracts concluded by electronic means (‘on-line’) given the equivalent legal status as ‘paper’ (‘off-line’) contracts?

**General remarks**

Yes, e-contracts are equivalent to paper based (‘off-line’) contracts. The national laws of the referent countries have all given electronic documents signed by contractual parties the equivalent status to a hard copy document.
9. Are there any *differentia specifica* aspects with e-contracts regarding general national law on contracts related to contract formation (offer, acceptance, acknowledgement, does e-marketing (e-advertisement) represent offering of goods or invitation to treat, e-contracts and general terms and conditions etc)?

**General remarks**

The national laws of the referent countries require electronic contracts to meet the same essential terms and conditions regarding validity and contract form as offline contracts. Therefore, the same rules of the Law of Obligations (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia) or the Civil Code (Albania), on general terms and conditions, proposal, offer and acknowledgement, should govern e-contracts as well. It is obvious that there is no significant *differentia specifica* with regard to e-contracts as long as they are considered to have equivalent status with traditional offline contracts, although some specific aspects can be found due to the nature of e-communications. There is no dilemma that such legal categories should be interpreted by taking into account certain specifics of e-transactions. The main difference is that e-marketing is considered to be one of the phases for concluding a contract; as a result of advertising, a buyer will realize an initial contact with a product and a trader in a way that is not usual for a traditional contract. Also, consumer protection legislation is applied to e-commerce commercial communications.

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10. Contracts and transactions excluded from the application of e-contract legislation

**General remarks**

Specific contracts and transactions, in all referent countries, by reason of their specific legal nature are excluded from the application of e-contract legislation. The reason is mainly related to the fact that these areas are thoroughly governed by other laws. In summary the exemptions refer to:

- Activities of notaries or other similar actions directly related to the exercise of public authority;
- The representation of persons and the protection of their interests before the courts, and any other bodies, where the representation of a person can be made by a third party through an act of representation.
- Paid activities for the participation of players in betting, lotteries, gambling, electronic games, racetracks and casinos.
- The field of taxation;
- Personal data protection;
- Issues related to practices and agreements governed by the Law on Competition.
- Contracts that create or transfer rights in real estate, except for rental rights;
- Contracts which, under the law, require the involvement of courts, public authorities and professions, that exercise or give a public service;
• Contracts of suretyship that have been granted, and where collateral securities have been furnished by persons acting for purposes outside their trade, business or profession;
• Contracts governed by Family Law or by the Law of Succession
• Financial services or security services, to which distance marketing is applied.

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11. Equivalence for electronic documentation in all contractual matters (for example, the notion of a durable medium, an electronic record, etc.)

**General remarks**

If electronic documentation meets certain conditions regarding the protection of authenticity, the security of communication and its transmission, an electronic document is equal to a paper document in its legal validity.

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<td>The legislative framework does not give any specific regulations concerning the equivalence of electronic documentation with regard to the notion of durable mediums, electronic records etc. This issue should be solved by practice. But the most relevant issue governed by the law is the security of electronic documentation and its perception in the real world. Regarding this issue, the Law On Electronic Commerce does not have any regulations, but Law No. 10273, dated 29.4.2010 “On Electronic Document,” foresees some general provisions regarding the preservation of electronic documents. The law sets forth rules for the creation of an archive to preserve electronic documents.</td>
<td>Electronic data can be used as evidence in legal proceedings</td>
<td>The definition for durable medium can be found in the Consumer Protection Act. Some definitions can be found in the Law on Electronic Communications</td>
<td>Bearing in mind that particular information provided by electronic technology appears only during a transitional period, while establishing durable mediums, the Law on Providing Financial Services in Distance, enacted in 2010, precisely defined, for the first time, the notion of durable medium as meaning: any instrument used to facilitate the storage of a consumer’s personal data whilst enabling the use of the same during any given period. This term refers to any instrument used to enable a consumer to store information addressed to him in such a way that enables him to use that information during a period of time appropriate to the aim of information; it also means that the instrument should allow the unchanged reproduction of the information stored.</td>
<td>The equivalence of electronic documentation with paper documentation is stipulated in the Law on Electronic Document (Official Gazette no. 5/08)</td>
<td>The Serbian Law on Electronic Documents specifies that the legal validity of an e-document cannot be questioned purely because of its electronic form. Therefore, an e-document is equivalent to a ‘paper’ document, if it meets all of the necessary requirements as prescribed by the Law on E-Document.</td>
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**General remarks**

Under the legal framework of the referent countries, e-contracts can be concluded between businesses, businesses and consumers, and businesses and government. Depending on the parties involved in the transactions, electronic contracting can be classified as e-contracts and can be concluded between: business entities (B2B), trader and consumer (B2C) trader and government (B2G) and consumer to consumer (C2C). Therefore, depending on the type of the contract different rules apply in the national legislation. The most common e-contracts in referent countries are B2B and B2C.

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<td>There are no statistics or official data on contracts entered into between these parties, because currently there are no official registers.</td>
<td>In Bosnia and Herzegovina there is no PKI infrastructure for legal and natural persons on a state level. However, there are independent IPK infrastructures in the area of e-banking and e-government within a closed system which engages 10,000 companies and 10,000 public servants. The possible negative consequences of this can be seen in B2B and G2B transactions.</td>
<td>In the area of B2G contracting in Croatia there has been activity in the areas of e-health, e-pensions, e-customs, e-tax etc., e-public procurement.</td>
<td>According to the regulatory reform for business operations, the Republic of Macedonia has worked continuously since 2010 on improving the Macedonian business environment with the aim of harmonizing EU directives and recommendations regarding electronic registration. These have been handled as projects as follows: the implementation of a one stop shop system for licensing export and import activities as well as facilitating the transit of goods and services; tariff quotas; services for electronic registration in the trade register and in the registers of other legal persons thus enabling the submission of requests for company registration; making changes and deleting legal entities though the internet whilst ensuring that all electronic documentation and electronic certificates are complete and present; the registration of direct investments of non-residents in the Republic of Macedonia and of those resident abroad; the electronic management of insolvency etc.</td>
<td>In Montenegro, most contracts are B2C. B2B contracts are present only in the financial and capital markets. B2G contracts are not present in Montenegro.</td>
<td>The Serbian Law on Electronic Documents specifies that the legal validity of an e-document cannot be questioned purely because of its electronic form. Therefore, an e-document is equivalent to a ‘paper’ document, if it meets all of the necessary requirements as prescribed by the Law on E-Document.</td>
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13. Tax aspects and possible tax obstacles related to cross-border e-transactions

**General remarks**

Information-communication technology has changed the world on a huge scale. These revolutionary steps forwards new technology enable new ways of buying and selling goods and of providing services. Today, a physical presence is not as important as it used to be for concluding contracts; therefore the key question is whether income made through such transactions has to be taxed. Many governments are alarmed by the huge expansion of the Internet and the problem of taxing transactions executed in an intangible form is a global problem. Usually laws on electronic
commerce do not provide any specific rules on fiscal obligations nor do they provide any instruments for the fiscal aspects of e-commerce. Therefore, a very important question is how to harmonize national fiscal borders with the limitless world of the Internet.

In general, cross border e-transactions are just an extension of existing cross border transactions that exploit information technology; therefore, no different tax regime should be applied to any such transactions. Thus, e-transactions are subject to income tax, import duties and VAT. Sectors, goods and services that are exempted from import duties are those covered by multilateral or bilateral agreements for the exclusion of import duties. But due to their peculiarities, e-transactions may have certain tax obstacles applied to them with regard to: possible double taxation or double non-taxation. Also uncertainty may arise as a result of attempting to define some level of permanent establishment or a place in which to effectively manage taxable businesses operating through e-transactions.

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<th>Albania</th>
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14. Other obstacles related to cross-border e-transactions (import duties, customs and alike)

**General remarks**

Cross-border e-transactions in general are subject to any import duties, customs and excise (if applicable), that are applied to other, traditional cross border transactions. As mentioned above these import duties may be excluded by means of bilateral or multilateral agreements. Some opinions exist, at international level, that a switch to e-commerce will generate potential revenue losses, but so far there have not been any special regulations, or any studies, that have been made public on this issue.

In all referent countries there are not any extra customs or import duties imposed only on e-commerce transactions.

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<td>The customs law of Bosnia and Herzegovina is not in alignment with the European Customs Code in the area of free trade zones and intellectual property.</td>
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15. E-contracts and the protection of personal data

**General remarks**

The protection of personal data and privacy during negotiating and performing traditional contracts also requires attention in e-contracting. The protection of personal data between parties is guaranteed through the encryption of data. This is especially important when data is exchanged or stored by third parties who are involved in the process of contract realization. The term of personal data is defined as any data by which an individual person may be identified: address, name,
surname, age, telephone number, e-mail etc. It is very important that a company receiving any such data holds and uses it only for the purposes of the fulfillment of obligations arising from the contract. After the realization of a contract, particularly after the delivery of goods, a company is obliged to guarantee discretion and to not misuse any personal data for purposes which are not allowed.


In Croatia, data protection in e-contracting is stipulated in: the Law on Personal Data Protection (Official Gazette No. 103/03, 118/06, 41/08 and 130/11); the Law on Electronic Communications (Official Gazette No. 73/08 and 90/11); the Consumer Protection Law (Official Gazette No. 79/07, 125/07 and 75/09); the Consumer Credit Law (Official Gazette No. 79/09, 89/09 and 133/09); the Law on Payment Operation Services.

The main laws for data protection in e-contracting are: the Law on Personal Data Protection and the Law on Electronic Communications. From the time of the application of the law up to the present day there have been no serious infringements registered in the area of personal data and electronic commerce.

In Bosnia and Herzegovina, provisions for data protection are included in the Law of Electronic Signature and the Law of Consumer Protection.

In Macedonia, there are only two registered companies at the Ministry of Finance that issue electronic signatures: Clearing House, Clearing Interbank System KIBS Co. Skopje and Macedonian Telecom Co. Skopje. Possibly the increase in transactions made via the internet by the business sector and consumers will result in the establishment of other companies to issue electronic certificates.

At the moment there is only one certification-service provider in Montenegro: Posta Crne Gore. In Montenegro, the authority in charge is under the control of the Secretary for the Development within the Government of Montenegro. At the moment there are 1,000 digital e-signatures that are used by natural and legal persons.


16. The current situation operates using certification-service-providers as the issuers of (qualified) certificates related to electronic signatures;

General remarks

An electronic certificate presents a device that affirms an electronic signature and enables a person participating in an electronic transaction to prove his identity to other participants of that transaction; it is equivalent to an identity card.

In Albania an Authority on Electronic Certification has been set up, but regarding the situation in practice, only one certification-service provider has been registered: “Posta Shqiptare Sh.A.”

In Bosnia and Herzegovina, the authority in charge is the Office for Supervision and Accreditation and is part of the Ministry of Information Society. In Serbia, the authority in charge is the Agency for Information Society. It is estimated that in Bosnia and Herzegovina, 12,000 ordinary certificates and 100 qualified certificates have been issued.

In Croatia there is currently only one certification-service provider: Financial Agency (FINA, www.fina.hr).

In Macedonia there are only two registered companies at the Ministry of Finance that issue electronic signatures: Clearing House, Clearing Interbank System KIBS Co. Skopje and Macedonian Telecom Co. Skopje. Possibly the increase in transactions made via the internet by the business sector and consumers will result in the establishment of other companies to issue electronic certificates.

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Registered certifying bodies, authorized to issue qualified electronic certificates, in Serbia are:
- Post Office of Serbia – the first registered certifying body
- The Serbian Chamber of Commerce
- The Ministry of Internal Affairs
- HALCOM BG CA
17. Dispute resolution in connection with e-contracts (any national case law developed so far)

**General remarks**

In the referent countries there is no case law on disputes related to the settlement of e-contracts either by arbitration or in the court.

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<td>In Croatia there has been one decision made in a Croatian Supreme Court (No. 1227/93 from 18. 10. 1994)</td>
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18. Available statistics related to e-contracts (percentage of the population using Internet, turnover achieved via e-transactions, etc.)

**General remarks**

The percentage of internet usage and e-commerce transactions is increasing from year to year in the referent countries.

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<td>According to data from the Regulatory Agency of Communications in Bosnia and Herzegovina, in 2010 there were 522,364 Internet subscribers. The Agency estimated that 2,000,000 Internet users or 52% of the population in Bosnia and Herzegovina, in 2010, 42.8% of subscribers were using xDSL Internet and 25.2% were using dial-up internet.</td>
<td>The total number of internet users in Croatia in 2010 accounted for 14% of all business transactions. Internet users in Croatia usually buy from foreign online Web-Pages (44.4%), and 32.29% buy from Croatian online shops. According to Gemius Audience research, the percentage of people buying products from Croatian online shops in 2011 was 37%. According to the same research, in June, 2011, there were 1,955,877 Internet users above the age of 12. (<a href="http://www.audience.com.hr">http://www.audience.com.hr</a>)</td>
<td>Pursuant to the statistical data in the Republic of Macedonia in January 2011, 93% of the business entities equipped with computers and 88.6% had Internet access. Regarding electronic invoices suitable for automatic processing, business entities received more (9.3%) than they sent (6%). 58.9% had their own website and at 10.4% the website provided on-line ordering. The most frequently used e-government services during 2011, regarding business entities having Internet access, was forms (78.2%) and obtaining information (76.8%) from the government website. The most represented administrative procedures that were realized electronically (by e-return of completed forms) were recorded for employees’ social contributions (28.1%). Furthermore, 24% of business entities with Internet access in 2010 submitted purchase orders for goods and services on the Internet. In January 2011 half of all business entities with at least 10 employees had a policy for telephone usage, web usage; video conferencing instead of physical travel, and 31.4% had provided remote access to their employees to access resources such as e-mail, documents, and applications. This enabled a number of employees to work outside the business premises.</td>
<td>According to research from 2011, 40% of the population knows how to use a computer. There is no data for concluded e-transaction.</td>
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VI
UNFAIR CONTRACT TERMS IN GENERAL CONTRACT LAW
UNFAIR CONTRACT TERMS IN
GENERAL CONTRACT LAW

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I. INTRODUCTION

Christa Jessel-Holst and Tatjana Josipović

The present contribution which has been prepared for the Second Civil Law Forum South East Europe in Skopje (2012) may be seen as a continuation of a cooperation which has its seeds in the activities of the First Civil Law Forum in Cavtat (2010). Back then, a working group was constituted for comparative research on EU consumer contract law and its implications for the countries of the region of South East Europe. In this context, the working group has inter alia analyzed the transposition of the Unfair Contract Terms Directive 93/13/EEC in Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia. However, the matter may also be seen under a broader perspective. It goes without saying that standard contract terms have reached enormous significance in the legal practice. In the present time, which is a time of reform, the proper position of standard terms within the system of contract law is subject to international discussion. In all above-mentioned countries, the standard terms are regulated by two sets of norms, but the relationship between the general and special legislation differs substantially from country to country. De lege ferenda, additional options are on offer, up to full integration of standard contract terms into the Civil Code/Law of Obligations.

The topic of “Unfair contract terms in general contract law” has been prepared by a team which is almost identical with that from Cavtat. Prof. Tatjana Josipović has joined the editorial board, with Dr. Nada Dollani and Dr. Christa Jessel-Holst as other members. For the six national reports and the legal comparison, academics with profound expertise have been engaged. The list of authors includes Dr. Nada Dollani (Albania), Dr. Zlatan Meškić (Bosnia and Herzegovina), Dr. Emilia Mišćenić (née Čikara, Croatia), Dr. Neda Zdraveva, Dr. Nenad Gavrilo vić and (as the only new member) Borka Tuševska (Macedonia), Zvezdan Čadjenović (Montenegro) and Dr. Marija Karaniklić Mirić (Serbia).

For the national reports, a common structure was prepared in advance. As before, English has been used as the common working language. This has made it possible for the authors to closely cooperate with each other during the process of preparing their contributions.

Hamburg and Zagreb, 15 May, 2012
II. COUNTRY REPORTS
A. Unfair Contract Terms in the Contract Law of the Republic of Albania

Nada Dollani, Tirana

1. Legal debate in Albania whether to include the unfair contract terms in the general contract law within the Civil Code

Following the conclusions of the first conference of the Civil Law Forum for South East Europe where the working group on EU Consumer Contract Law pointed out the most common problems and shortcomings in the effective implementation of consumer contract law and proposed the integration of consumer contract law into the general law of obligations in order to raise the awareness of specific provisions applicable to the most common type of contracts and to avoid systematic discrepancies between the general civil law/law of obligations and special legislation on consumer protection, the Albanian administrative and legislative authorities have been quite receptive and active in the field of consumer protection. The Albanian legislator amended the Consumer Protection Act (CPA) on July 2011.1 The first aim of the amendments, as it is stated in the act’s title,2 is to completely harmonize the CPA with Directives 2008/483 and 2008/122.4 Furthermore, it seems that the legislator, being aware either of some systematic discrepancies or some accidental omissions in CPA resulting from the copy and paste transposition of the EU Directives, has tried to fill the gaps by amendments to the law of consumer protection, occasioned also by the problems faced by the Consumer Protection Commission (CPC) during its daily work on treating consumer complaints.5

Firstly, the legislator has amended inter alia the scope of application of the CPA by extending it to the service contract and by laying down the principle of “better protection”, providing that the provisions of CPA are not applied when other legal provisions in the respective field give more favourable treatment on protection of consumer rights,6 which in fact does not comprise any radical substantial amendment, as the same result could have been achieved by teleological interpretation,

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2 The title of this act approved by the Albanian Parliament refers to a footnote which states that this law is completely harmonized with EC Directives 2008/48 and 2008/122.
6 Article 1 of the Act No. 10 444/2011.
but in certain issues, like regarding certain unfair terms, it limits further the scope of CPA, as the Albanian Civil Code provides more favourable protection.\(^7\)

Secondly, quite paradoxically to its own intention,\(^8\) with regard to the unfair terms in consumer contracts, the Albanian legislator has limited the scope of consumer protection by replacing a previously probably unintended omission at the time of CPA adoption in 2008, addressing the assessment of unfair terms by transposing verbatim Article 4 (2) of Directive 93/13\(^9\) which reads as follows: “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.”\(^10\) Thus the core contract terms are excluded from any control and assessment for unfairness, if they meet the transparency conditions. Although the great importance of the principle of contractual freedom, which in fact was not mentioned during approval proceedings, cannot be denied, such amendment is a step backward to the extensive protection claimed by the legislator for the consumers, and probably unnecessary, as the omission of such provision was completely in line with ECJ ruling in *Caja de Ahorros*;\(^11\) where it was confirmed that Members States could offer better protection and subject such terms to the unfairness test.

Nevertheless, by the next amendment the legislator compensates by adding another unfair term to the fully transposed list contained in Annex (1) of Directive 93/13, while the exceptions of Annex (2) are not transposed by CPA. Unfair terms in addition to the previous list are considered those which “alter the terms of credit contracts, particularly method/methodology of calculation of the norm of interest and its elements, without previously having the consent of consumer”.\(^12\) Another amendment addresses the criteria of transparency of written contractual terms by providing: “In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must be drafted intelligibly in Albanian language and have a plain and distinguished appearance. The font used shall be “Times New Roman”, with the character size at least 10. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.”\(^13\) This amendment inserts a clearer obligation for businesses, which have to properly draw the consumer’s attentions with regard to the standard terms of contracts.

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\(^{8}\) According to the discussion in the parliamentary plenary session while adopting the law, one could sense the overemphasis on consumer rights as if they were basic human rights. All justifications for such amendment consisted firstly on consumer protection and secondly on approximation of CPA with the recent *acquis*, although there were not many debaters apart from two deputies in charge, who did not mentioned neither this amendment specifically, nor any concern for the principle of freedom of contract or any businesses’ interest. For further details see [http://www.parlament.al/web/Sesioni_i_katert_11681_1.php](http://www.parlament.al/web/Sesioni_i_katert_11681_1.php), Procesverbal dates 14.7.2011, p. 5-7; on the discussions in Permanent Parliamentary Commission on Productive Activity, Trade and Environment, see [http://www.parlament.al/web/Per_Veprimtarite_Prodhuese_Tregtine_dhe_Mjedisin_148_1.php](http://www.parlament.al/web/Per_Veprimtarite_Prodhuese_Tregtine_dhe_Mjedisin_148_1.php), Procesverbal i dates 8.7.2011, last visited on 15 November 2011.


\(^{10}\) This provision was not transposed and is added by the new Act 10 444/2011, under Art. 27 (3), as (3.1) of CPA No. 9902/2008.

\(^{11}\) ECJ judgment of 3. June 2010, C-484/08 – *Caja de Ahorros* y Monte de Piedad de Madrid v Asociacion de Usuarios de Servicios Bancarios (*Ausbanc*) [2010] ECR-00000, where ECJ ruled that Articles 4(2) and 8 of the Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subjectmatter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language.

\(^{12}\) Art. 5 (2) of new Act 10 444/2011 supra no. 1, which adds another unfair term to the list provided by Art. 27 (4) CPA No. 9902/2008.

\(^{13}\) Art. 6 of new Act 10 444/2011, which amends Art. 28 (1) of CPA No. 9902/2008.
Thirdly, apart from the transposition of the new Directives 2008/48\textsuperscript{14} and 2008/122,\textsuperscript{15} the other amendments concern some further and better transposition on contractual conformity on service contracts,\textsuperscript{16} on off-premises contracts,\textsuperscript{17} on distance contracts by making some appropriate adjustments.\textsuperscript{18}

Fourthly, some very interesting amendments are made with regard to injunctions, penalties and remedies the consumers might have at their disposal to enforce their rights. The penalties on administrative violations are raised considerably and the CPC has acquired competences of out-of-court dispute resolution, for i.e. to assess the damages and where appropriate to award compensation of damages.\textsuperscript{19} It is not quite sure whether this provision fits to the whole legal system, keeping in mind that the institution of civil liability is provided by the Civil Code and only the courts are competent to resolve claims between private parties, based on basic principles of civil procedure and other legal elements, which could hardly be assessed by an unspecialized administrative body, whose members are public servants, not necessary lawyers. Nevertheless, considering the passivity of courts in consumer issues, as well as consumer reluctance\textsuperscript{20} to direct their claims to court proceedings due to lack of confidence and probably due to high cost on initiating judicial proceedings, this solution, although inapplicable without further changes in legislation, seems reasonable, as far as all administrative decisions are subject to judicial control if so wished by the parties.\textsuperscript{21} Depending whether as damage shall be considered \textit{inter alia} the profit made by the trader through use i.e. of unfair terms, this solution seems in compatibility with some scholars’ proposals,\textsuperscript{22} i.e. the skimming off procedure.

By these amendments, the consumer rights and state intervention into the market surveillance are strengthened considerably, especially CPC competences in screening unfair terms used in consumer contracts. The consumers are now entitled, in any case, even if the contract provides otherwise,\textsuperscript{23} to address their claims to the prescribed bodies. In a sense, they are entitled to effective remedies, and any agreement with the trader on alternative dispute resolution with regard to any complaints of the consumer would remain ineffective. Furthermore the penalties on using unfair terms are highly increased.\textsuperscript{24}

Another development in the field of consumer protection is the surprising hyperactivity of the CPC,\textsuperscript{25} which functions under the Ministry of Economy, Trade and Energy. Starting from April

\begin{itemize}
\item \textsuperscript{14} Art. 44 and 45 of CPA are amended in conformity with the Directive on consumer credit agreements, by Art. 14 and 15 of new Act 10 444/2011.
\item \textsuperscript{15} Art. 42 and 43 of CPA are amended in conformity with the Directive on aspects of timeshare, long-term holiday product, resale and exchange contracts, by Art. 12 and 13 of new Act 10 444/2011.
\item \textsuperscript{16} Art. 7 of new Act 10 444/2011, which amends Art. 33 (1) of CPA No. 9902/2008.
\item \textsuperscript{17} Art. 8 of new Act 10 444/2011, which amends Art. 34 of CPA No. 9902/2008.
\item \textsuperscript{18} Art. 9 and 10 of new Act 10 444/2011, which amend Art. 36 and 37 of CPA No. 9902/2008.
\item \textsuperscript{19} Art. 19 of new Act 10 444/2011, which amends Art. 57 of CPA No. 9902/2008. This Art. regulates administrative violation and their penalties, while a last indent (5) is added, which provides for dispute resolutions and assessment and compensation of damages.
\item \textsuperscript{20} With regards to the consumer reluctance and the ineffectiveness of consumer legal remedies, compare a totally opposite and radical perspective in addressing consumer protection in a free market economy, in O. Ben-Shahar “One-Way Contracts: Consumer Protection without Law” European Review of Contract Law (ERCL) 2010/3, 221-249.
\item \textsuperscript{21} Art. 59 of CPA No. 9902/2008; Albanian Civil Procedure Code; Albanian Administrative Code.
\item \textsuperscript{22} H-W. Micklitz, “Reforming European Unfair Terms Legislation in Consumer Contracts”, ERCL 2010/4, 347-383, 382.
\item \textsuperscript{23} Art. 18 of new Act 10 444/2011, which amends Art. 56 of CPA No. 9902/2008.
\item \textsuperscript{24} Art. 19 of new Act No. 10 444/2011, which amends Art. 57 of CPA No. 9902/2008, provides that the violation of ....Art 27(4) [presumed unfair terms] are penalized by a fine up to 2% of general turnover of the previous financial year and not less than 500 000 Albanian Lekë (approximately 4500 Euro).
\item \textsuperscript{25} All the seventeen decisions of CPC could be found under http://www.mete.gov.al/rub.php?id=o&sid=243, last visited 20 November 2011.
\end{itemize}
2010, it has issued nearly seventeen decisions regarding consumer issues, which mainly deal with unfair commercial practices, but two of its decisions address unfair contract terms used by businesses in standard consumer contracts by considering some of the terms as unfair and repealing them. The first decision of CPC deals ex officio with the control of contractual terms in the standard water supply contract posed by Water Supply- Canalisation [(sha)JSC], branch of Korça, whose shares are owned by the State. According to the defendant, the standard contractual terms were based on a Council of Ministers Decision (CMD) 28, nevertheless the CPC found them contrary to the CPA 9902/2008 and issued an injunction by ordering the company to adjust the standard contract within three months from the date of the decision. More concretely the CPC found the inclusion in the standard water supply contract of unfair terms laid down by CPA, Art. 27 (4, b, c, d, e), which correspond to the unfair terms laid down to the Annex of 93/13 Directive (b), (c), (e), (g).

The other CPC decision was issued due to a consumer’s complain against a private financial institution, Alpha Bank, concerning a credit agreement in respect of the methods of calculating the rates of interests. The CPC after scrutinizing the consumer agreement and its annex found that some of the terms constituted misleading practices and omissions contrary to Art. 15 of CPA and were not presented in a plain and intelligible language, in accordance with Art. 28 of CPA, furthermore according to the CPC laconic reasoning, one contractual term were considered unfair according to Art. 27 (4, g, gj) of CPA. As a conclusion the CPC, in this case, issued a penalty of 170 000 Albanian Lekë for the violations, considered a term of the standard contract as unfair, thus invalid (repealed) and issued an injunction for the adjustment of the violations and non-repetition of such practices in the future. By offering a wider protection to the consumer Albania has not transposed Annex (2) of 93/13 Directive according to which lit. (j) a presumed unfair term is applied without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately. The positive side of CPC decisions could be seen in the effectiveness and speed, the incentive and the real intention to address and resolve consumer complains, through law enforcement, although such administrative decisions are always subject to judicial scrutiny and the courts approaches are still not known with regard to such issues. We will return infra to this issue with reference to the nature of unfair term.

To sum up, it could be said, that the debate considering consumer contract law is not missing in Albanian legal environment, but for the time being due to the political situation the implementation of consumer contracts in the Civil Code, which requires an absolute majority to be

26 The initial decisions issued by CPC are reported at CLFSEE Collection of Studies and Analyses, Volume III, 407-550, Belgrade 2010, p. 416.
28 CMD No.96 of 21.2.2007.
30 Although laconic, such reasoning corresponds to some international theoretical proposals on the link between transparency of unfair term and unfair commercial practices by omissions. See S. Orlando, “The Use of Unfair Contractual Terms as an Unfair Commercial Practice”, ERCL 1/2011, 26-56.
31 Which reads as follows: (g) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; (gj) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided; which correspond to lit. (j), (k) of the 93/13 Directive Annex (1).
32 Approximately 1500 Euros.
33 Annex (2) (b), subparagraph (j) of 93/13 Directive.
34 Just to bring to the attention of the readers that in the last legislature, the opposition has almost abandoned the participation in the Parliament.
amended\textsuperscript{35}, is out of any question or discussion. Nevertheless, provisions addressing unfair standard terms in contracts are present in the Civil Code, which could be applied either to consumers or businesses, but they could not be observed, controlled and screened the same way as consumer contracts by an administrative body, which is responsible for controlling unfair terms only in consumer contracts. It must be noted that Albanian legislation and authorities lack awareness on the balance that should be achieved in the market, so necessary in a developing economy, taking into consideration that the main actors in such economies, besides consumers, are the small businesses, which in the majority of cases do not differ so much from the consumers. The existence of legal or administrative measures which are of an extreme nature,\textsuperscript{36} leads to a contradiction between the intention of the legislator to strengthen the protection of consumer rights, and the realistic outcome from implementation of such protective measures,\textsuperscript{37} not to mention the issues of enforcement in practice, assuming that what is mentioned \textit{supra} are isolated cases, whose destinies in final enforcement are still unknown. All these inconsistencies and contradictory situations are the result of the lack of deepness in the reasons and philosophy behind the whole consumer issue, as well as lack of a clear visions and objectives. All concerns of the politicians focus on the harmonization and approximation of legislation with the \textit{acquis}, without even trying to understand the true needs for such a normative system on consumer protection, and without being aware that an inconsistent and unsystematic approach in reality does not achieve the intended result of harmonisation and approximation. So it is recommendable to find a median way to address the consumer issues which go together with the competition against market failures,\textsuperscript{38} by finding the proper balance between contradicting interests of business and consumers, thus achieving a contractual justice, with due respect to the principle of contractual freedom, potentially by protecting also the small businesses which often find themselves in no better positions than consumers. In fact, more than from unintended omission, or unawareness of legislator, this legal situation results from the failure to apply properly the principles of law-drafting techniques and procedures, thus leading to frequent amendments, probably representing personal views and knowledge of international experts participating in working groups. Badly drafted legislation may not achieve its objective, or may achieve it expensively, or may lead to expensive litigation to resolve textual ambiguities. Further, such unsatisfactory implementation of legislation may also reduce its acceptance by addressees. Importantly, the legal vacuum and discrepancy created by the dismantling of the former legal system when coupled with inadequate enactment of new legal norms may disorientate the people, the courts and the public administration.\textsuperscript{39}

2. Unfair contract terms in B2B contracts

In order to have a clearer and broader perspective on the actual Albanian legal situation, it would be appropriate to mention that due to the political history and economic underdevelopment, the Albanian legal environment has missed the wide western debate on standard contract terms

\textsuperscript{36} See discussion in the parliament \textit{supra} fn. 8.
\textsuperscript{37} F. Paparatis, 175 on limitation of CPA scope by other provisions.
and their limitations, the importance of such terms, as well as the possible implications in private law.40

With regard to the unfair contract terms, although there is not any explicit reference to the term “unfair”, the Albanian Civil Code (CC)41, after the model of the Italian Civil Code, which was one of the first Civil Codes in Europe to provide control over general contractual terms,42 provides the basic rules on monitoring general terms in contracts which are applicable to all parties, be it consumers, traders, natural persons, juridical persons, whether public or private, acting on any kind of purpose, whether personal or professional. All transactions containing general terms are subject to a fairness test under Art. 686 of the CC,43 although by a careful reading of all provisions under this heading, one could understand by a strict interpretation that only standard contracts (contracts of adhesion) used in a massive production environment, intending to discipline certain contractual relations are subject to these provisions.44 According to 686 CC, first indent, “general contract terms, which are drafted by one contractual party, have effects [emphasis added] against the other party if, at the moment of conclusion of contract, the latter knew or should have known those terms by showing ordinary diligence.” This provision is related to the effects of general/standard contract terms.

This article is an improved version of Art. 1341 of the Italian Civil Code, as it has inserted an extra paragraph, second indent, which provides: “There are invalid [emphasis added] (null and void), general terms that cause a loss or disproportional disadvantage/detriment to the interests of the contracting party, especially when they differ essentially from the principles of equality and impartiality provided for in Civil Code provisions, which regulate the contractual relationships.” Thus, the CC systematically tries to impose and guarantee the balance between the conflicting interests of the parties. Such provision gives a general assessment with respect to the invalidity of a contractual general (standard) term, by referring to the contractual balance, formally achieved by the principle of parties equality, and through cause (contractual consideration), which expresses the economical and social function of contract,45 as well as by default provisions regulating a typical contract,46 which abstractly expresses what the parties would have agreed under ideal circumstances in exercising their party autonomy and freedom of contract. The cause doctrine is used also by the French courts on “re-balancing” of an unbalanced B2B contract, which sometimes goes further than what is allowed under specific unfair term legislation.47

The third paragraph of Art. 686 of CC imposes a black list of contractual terms48 which do not have legal effects [emphasis added] upon condition that (1) they are in favour of the party who

40 Albania is one of the few countries in Europe which has passed from a backward feudalism to communism, and from there to the East European transition, thus not experiencing any industrial revolution as was common to West Europe and as a consequence missing the legal debate on standard terms. Due to the political ideology the private law was almost extinguished so that many private law institutions and regulations are hardly properly understood in legal practice; standard terms are such an unknown and obscure category. For a legal background on Albanian private and commercial law see C. Boglia, ‘The New Albanian Act on Business Associations: Ongoing Legal Reforms in Commercial and Private Law”, 20 Review of Central and East European Law 1994/6 p. 657–676. I would like to bring to the attention of Albanian readers as a proper, broad and worldwide understanding of the issue of standard contract terms K-H. Neumayer; Standard Contract Terms, Int.Enc.Compl.L. VII, ch 12 (1976) s. 12-4 – 12-101.
41 Albanian Civil Code was approved by Act No. 7850 of 29.7.1994, OG RA1 No. 11/94.
43 The general terms of contracts are regulated under the Part V, Title I, Chapter II “Interpretation of Contract”, Articles 686-688.
46 P. Nebia, Unfair Contract Terms in European Law, Hart Publishing, Oxford 2007, 162 where the methods of adjudication in Italian Courts are described.
48 This black list is exposed under question 3 of this report.
has pre-drafted them, and unless (2) they are expressly approved in writing by the other party. This paragraph follows almost verbatim Art. 1341, second paragraph, of the Italian Civil Code, with the exception of altering one term. Such alteration seems logical as the Albanian CC is much more recent than the Italian one, so that the legal experience was reflected in the wording of the provision. Therefore the term “... silent prolongation or renewal of the contract” of Art 1341 Italian CC is omitted in Art 686 and another term is added “... arbitration clauses or avoidances from judicial competences”.

Thus, the ineffective/invalid, black list of general terms escape judicial control when they are expressly approved in writing by the other party. In Consumer contracts, this should be understood only when such terms are negotiated, so that a signature under a certain pre-formulated standard text does not suffice, even though it is signed on every page, but it must result that such terms are brought explicitly to the other party’s attention, that the party has understood and fully agreed to them.49

Furthermore, in contracts concluded by signing modules or forms, which aim to regulate uniformly certain contractual relationships, the added terms on these forms prevail over initial terms, even if the initial ones are not repealed.50

The contra proferentem rule is provided for by Art. 688 CC, stating that “in any case, terms included in general contract terms or in standard forms, which have been posed by one of the contractual parties, are interpreted in favour of the other party, in case of doubts.” Such a rule is also provided by CPA in its Art. 28, as amended, by connecting it to the transparency principle. The CC in this case offers a wider protection as it does not subject the contra proferentem rule to the transparency principle, but just to the condition that the terms must have been drafted by the other party. It has been completely unnecessary to transpose such a principle from Directive 93/13, because it was already provided by Albanian legislation. However, it is argued that such a rule alone is a weak weapon against clearly drafted rules or ambiguous rules, still detrimental to the consumer. A more favourable interpretation is not always desirable to the consumer, as the consumer could be better protected, while a term is interpreted against him by causing a significant imbalance contrary to the requirement of good faith, thus rendering the term unfair, so the remaining contract terms put him in better position.51

What is mentioned supra enables the court, even ex officio, in accordance with the general provisions on invalidity of juridical acts, to declare the invalidity of contractual terms whether in B2C or B2B relations, as such provisions have a general application to any contractual party. In such a case the contract itself remains in force, as in accordance with Art 111 of CC, when the cause of invalidity affects only a part of the juridical act, this remains valid in its other parts, except when, according to the content of the juridical act, such parts are inseparably related to the invalid part of the juridical act. The Albanian CC provides a consistent solution regarding the partial invalidity of a legal term, as it ensures the survival of the juridical act even without the invalid part. The reasons behind relates to the logic that invalidity in this case is in favour of the weak party who subjects himself to pre-formulated terms, even without knowing them, so it would seem irrational in this case to render the whole contract invalid, thus enabling the strong party to claim restitution. This would cause the opposite effect from what the provision intents to achieve.52 Some debates in the Italian legal doctrine, that ineffective terms are not invalid terms, but ineffectiveness is a new deliberately selected term to present a new concept, and one should not try to fit new concepts to old categories,53 are

50 Art. 688 of CC.
52 H. Kötz, 141.
not relevant to the Albanian legal situation, so far, as the legal terminology with regard to this issue, although with slight variations is consistent from the linguistic perspective. In any case, regarding the B2C contracts, the continuance of the contract without the unfair term is ensured explicitly.54

The Albanian courts are reluctant to use the above mentioned tools, unless claimed by the parties, due to the principles of civil procedure.55 Generally, there is a propensity towards claiming contractual invalidity; the control of unfair or general contract terms is not a preferable tool, while declaring invalidity of contract grounded on classical principles (whether absolute or relative) is quite preferred either by the parties or by the courts.56

The Albanian Civil Code, being a contemporary one, provides all necessary principles for the achievements of a contractual justice.

3. Definition of unfair contract terms and its concretization in the black or grey list; role of courts in interpreting unfair contract terms

The legal definition of unfair term is found only in CPA, namely in Art. 27 (1) which has transposed Art. 3 (1) of 93/13 Directive but reads slightly different: “a contractual term which has not been individually negotiated shall be regarded as unfair if it causes a significant and distinguished imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.” The “good faith” concept is omitted and another useless word to stress the imbalance “distinguished/visible” is added. A term shall always be regarded as not individually negotiated if it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. Pursuant to Art 27 (2) CPA, the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the unfairness test for the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. On the other side the CC provides a definition of invalidity of the general/standard term by stating “General terms which cause a loss or disproportional disadvantage/detrimend to the interests of the contracting party are invalid (null and void), especially when they differ essentially from the principles of equality and impartiality/imbalance provided for in Civil Code provisions, which regulate the contractual relationships”.

Obviously, the definition of the unfair term, on the one side, and of the invalid general contractual term, on the other, does not differ substantially. They could have been perfectly coordinated. But as it is, the Albanian legal system appears with two parallel sets of norms, which regulate the same subject matter, one applicable only to consumers, and the other applicable to all, including consumers. It would have been more desirable to merge such provisions in order to avoid distortion and discrepancies in the field of private law. One single set of norms regulating the general contract law is a fortiori a yearlong endeavour of the European Union, which recently has come up with a new Proposal for a Regulation on a Common European Sales Law (CESL), which although limited in

54 Art 28 (2) CPA which has transposed Art. 6 of 93/13 Directive provide: “In case the term is considered unfair, it is invalid from the moment of the contract conclusion. The other contractual terms remain binding on the parties and the further execution of the contract is possible”.
55 Art. 6 of Albanian Civil Procedure Code No. 8116/1996 provides as follows: “the court … shall decide/find on everything it is claimed and only on what is claimed”.
56 If one could have a look at the research tools of Tirana District Court, whose research engine is based on Article numbers of the Civil Code, one would see that Articles on general contractual terms do not even appear in such research mechanism, http://www.gjykatatirana.gov.al/, last visited 22 November 2011.
57 Art. 686, § 2 of CC.
scope as it concerns only cross border transactions on sales and service contracts, integrates provisions for both B2C and B2B transactions.

Both CPA and CC contain only a list of unfair terms, which appears to be a black list, although the formulation of the relevant provisions is very laconic. Article 27 (4) transposes the whole list of Annex (1) of the 93/13 Directive and due to the most recent amendments of the CPA, another term is added. Both CPA and CC contain only a list of unfair terms, which appears to be a black list, although the formulation of the relevant provisions is very laconic. Article 27 (4) transposes the whole list of Annex (1) of the 93/13 Directive and due to the most recent amendments of the CPA, another term is added.59 It is not explicitly stated whether such a list is exhaustive, but considering that Art. 28 of CPA contains general provisions on assessing and defining unfairness, it means that other terms which are not included in the list and distort the criteria set out by the relevant provisions to the detriment of consumers, might be declared as unfair by the court. The authorities shall not be confined while assessing the unfairness of a non-negotiated term by such a list.

In a similar way the CC provides a black list of ineffective terms under its Art 686, third paragraph, pursuant to which: those terms do not create legal effects which, in favor/advantage of him who has pre-formulated them, establish (i) limitations of liability, (ii) the possibility to withdraw from the contract, or (iii) to suspend its performance, or (iv) which impose on the other party extinctive time limits or (v) restrictions on the right to raise counterclaims, or (vi) on contractual freedom in relation to the third parties, (vii) arbitration clauses, (viii) or derogations from the judicial competence, unless they are explicitly/expressly approved in writing by the other party”. The terms contained in this black list are drafted more generally, leaving room for interpretation lato sensu, thus sometimes offering even better protection on the party who did not formulated them, i.e., any limitation of liability whether material or personal is precluded by CC.60 Although, in the Italian legal doctrine and court practice, such a list is considered as exhaustive, based on the exceptional character of the provision (Art. 1341 (2) of Italian CC) with regard to the general principle of freedom of forms,61 such interpretation should not be held true for the Albanian CC, since as has been mentioned supra, another paragraph is added to Art 686 CC (following Art. 1341 of the Italian CC consisting only of two paragraphs). Therefore the courts shall not be confined by such a list, as they may use general criteria, such as significant imbalance or substantial inequality which might arise from standard term contracts, to evaluate the unfairness of a term, even when such a term is not included in the list.

Furthermore the ECJ held in Commission v Sweden that the Annex list only contains an indicative and non-exhaustive list of terms which may be regarded as unfair. A term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair.62

4. Circumstances of relevance for the fairness test

The need for the judicial control over standard contractual terms is disputed today in legal doctrine, although the reasons proposed for unfairness control by various theories highly differ from each other.63 The classical view justifies such a control by weaker party protection argument and unequal bargaining power between sellers and customers;64 some other justifications concern

59 See above 1. By now, Art. 27 (4) of CPA contains 18 unfair terms from letter a-m.
60 F. Parapatis, 173.
63 For a summary and respective criticism to each theory see M. W. Hesselink, 131-147.
64 Such a view is strongly stressed also by ECJ; See also, M. Kenny, J. Devebvey, L. Fox O‘Mahony, Unconscionability in European Private Financial Transaction: Protecting the Vulnerable, Cambridge University Press 2010.
better distribution of the outcomes which could be achieved through contract law; other theories propose their justifications with regards to market failures by stressing the information asymmetries and the necessity of a duty to disclose information; another approach is paternalism, a week form of which is found also in the German idea that a default rule should be used as a yardstick of control, and some other arguments relate to social value policy considerations, by sharing a social justice or contractual justice incentive through stressing the principle of good faith, fair dealing, solidarity and respect for others, which in fact could help for the achievement of the substantial equality and substantial freedom of contracts.

As the Albanian legislation presents two parallel sets of norms, the two regulations will be discussed in context. Art. 686-688 of CC and Art. 27-28 of CPA, set out the criteria for substantive and formal control of invalid/unfair terms.

Pursuant to CPA, the subjective scope of unfair terms is established by Art. 2 and is extended to the relations between traders and consumers regarding goods and services. At this, the objective scope of unfair terms provisions is determined by two limitations:

(a) Non individually negotiated terms

Fairness control does not apply to terms which have been individually negotiated. The notion of the term not individually negotiated requires that the term is not negotiated, so potentially it is imposed on the consumer even if it is used only in one transaction, while the standard term contract is drafted for general use to regulate in a uniform way certain contractual relationships (687 CC). A term is considered as “not negotiated” first, when it has been drafted in advance and second, when the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. Nevertheless, the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this provision to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. This provision suggests that the application of the fairness test might not be limited to the “standard contract”, but could be extended also to contracts used only once, although considering *ratione persona* the general scope of CPA, one could hardly imagine any non-standard type of contract pre-formulated by the trader.

(b) Core terms: subject matter or price

Pursuant to new amendments of CPA, Art. 4(2) of the Directive was transposed literally in Art. 27 (3.1) CPA. Due to such amendment the scope of application of the unfairness test has been limited even further, which is in fact a step backward, as the protection of consumer is lowered down, considering that due to recent ECJ practice, the states are not refrained from offering bet-

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67 M.W. Hesselink, 139.
68 Ibid., 142; H. Rösler, 732-735.
71 P. Nebia (2007), 134-155.
ter protection to consumer and extending further the control over unfair terms. Furthermore this provision of the Directive has been introduced in the last moment under German influence, in order to exclude from the scope of application of the directive all aspects of the transaction which result directly from the parties' contractual freedom. Due to a general outcry of German lawyers with respect to market economy and contractual freedom the application of the Directive 93/13 was limited to not individually negotiated terms, by excluding also the essentialia negotii, while in other countries, like France the courts are empowered to control all contractual terms. Nevertheless the provision does not aim to regulate the core term as long as this is expressed in clear and comprehensible language. Furthermore Recital 19 of the Directive 93/13 suggests that although an assessment of unfair character shall not be made of terms which describe either the main subject matter of the contract or the quality/price ratio of the goods or services supplied, but the main subject matter of the contract and the price/quality ratio may still be taken into account in assessing the fairness of other terms. In such a way an indirect control of the price is admitted. Furthermore, the Directive 93/13 as amended by the new Directive on Consumer Rights recognizes such phenomena by requiring Member States to inform the Commission when they extend the unfairness assessment to individually negotiated terms or to the adequacy of price or remuneration.

The new Common European Sales Law in Art. 7 regulates more broadly the definition of a "not individually negotiated" term stating that a contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.

The fairness test consists of two types of control, substantive and formal. The substantive control is based on the criteria of significant and distinguished imbalance in the parties' right and obligations to the detriment of the consumer. The CPA indicates also some circumstances which must be taken into account while assessing the unfairness of a contractual term, such as:

a) the nature of the goods or services for which the contract was concluded;

b) the time of conclusion of the contract;

c) all the circumstances attending the conclusion of the contract;

d) all the other terms of the contract or of another contract on which it is dependent.

Apart from these criteria, CPA introduces also the black list of unfair terms, which has grown longer by the new amendments. Although the authorities have at their disposal a general clause to assess the unfairness, and will not be limited to the list, one argument in favour of such a list is to have clearer indications of what is permitted and what not, in order to help the practitioners in drafting the contracts on the one side, and the consumer agencies and authorities on the other. The list is much longer in the (proposed) Common European Sales Law, and divided into a black and

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72 C-484/08 – Caja de Ahorros op.cit.
74 H. Kötz, 144-145.
77 H. Kötz, 145.
a grey list.\(^{78}\) Although this list is criticized,\(^{79}\) it could help in the uniform interpretation of unfairness by indication of more concrete terms thus enabling the courts to use either deduction or induction to assess unfairness.

The CPA has excluded the “good faith” criteria, although traces of such a concept are found in the CC, however not related to the effectiveness-validity of a standard/general contractual term. At this point the CPA is reconciled with CC.

It is not easy to decide the exact meaning and practical application of the ‘significant imbalance’ test. Because of the lack of practice and considering that this is a European concept transposed from the 93/13 Directive it would be helpful to refer to some authors who have explored such conceptions. Nebia explains that:

“It is evident that ‘significant imbalance’ involves a lack of symmetry in parties’ rights and obligations or that the seller’s or supplier’s rights or remedies are excessive and disproportionate; and that, on the contrary, ‘balance’ means that each risk placed on the consumer should be weighed against one placed on the business: for instance, a customer may buy goods which appear to carry a full warranty but find that the clause make the supplier sole judge of whether or not the goods are defective. The imbalance is that the seller can invoke a legal remedy against the buyer if the latter does not pay, but the buyer has no legal redress against the seller if the seller denies that the goods are faulty….a clause should be judged unfair if, although it is compensated by a lower price, it exposes the customer to an unacceptable degree of risk. Applying this principle to ‘significant imbalance’ would mean that terms are fair when they could be accepted by rational agents who, without knowing on which side of the transaction they might stand, had to imagine themselves as parties to the transaction. Contracts which fail the test should not be upheld unless the losing party was consciously engaged in risk taking. Accordingly, it could be suggested that a term causes a ‘significant imbalance’ when it involves a risk that not only one customer would be reluctant to take, but so would most customers be.”\(^{80}\)

Kötz tries to explain such a concept by considering that a contract term may be regarded as invalid if the other party had no real chance of affecting its substance, by arguing that the absence of such chance is not due to the bargaining power or economical superiority of the business party, but to the fact that the transaction costs of checking the general terms and comparing them with those offered by others and making counterproposals leading to further negotiations would exceed any possible advantage the party might gain. Besides that the other businesses would not offer better terms. Such behaviour is rational but it may be exploited by the business party. His conditions should accordingly be treated as “unfair” or “unreasonable” if they are disadvantageous in comparison with the terms which would have been agreed if the parties had been able to negotiate them in a world where transactions cost were zero. In such a world, risk would be allocated to the party which could avoid them at the cheaper cost. So if the customer would avoid a certain risk by cheaper cost than the business party, then he would better accept the risk than a higher price the business would have offered, had he to bear the risk. Such reasoning would not apply if no preventive action were possible, or were so only to disproportionate cost. In such a case reasonable parties would allocate the risk to the party which could more cheaply guard themselves against the possible harm, and especially insure against it more cheaply.\(^{81}\) Such arguments are supported also by economical

\(^{78}\) COM(2011) 635 final, Art. 84 (black list and Art. 85 (grey list).


\(^{80}\) Nebia (2007), 150.

\(^{81}\) H. Kötz, 146-147.
analysis of law theories, which offer reasons for judicial control, its limits and equality in treatment of consumer and commercial contracts.\textsuperscript{82}

Moreover, the ECJ so far has not offered any guidance as to the meaning of the fairness test in the 93/13 Directive. In \textit{Freiburger Kommunalbauten} the ECJ was asked to rule on the validity of a clause obliging the consumer to pay the price to the supplier before performance to which it replied that it is to the national court to decide whether such a contractual term satisfies the requirements to be regarded as unfair.\textsuperscript{83} That the ECJ in this case refrained from ruling on the application of general criteria to a particular term must be considered in the light of the particular circumstances of the case in question. The ECJ refused to give any help and guidance on whether the meaning of a particular vague, abstract or open ended concept which is used by the 93/13 Directive includes a certain case group.\textsuperscript{84} By referring to national law on assessment of unfairness the ECJ has legitimated the use of the national private law default rules as a yardstick for unfairness. Such a concept is used by Albanian the CC when providing that the invalidity of the standard term shall be assessed as against loss or disproportionate disadvantage that cause inequality and imbalance to one of the parties contrary to the principles contained in CC. Therefore the default rules may be considered as to what parties would have agreed, if they had a chance to negotiate. Such an argument is in favor to the paternalistic approach.

With regard to the formal control the CPA with the recent amendments introduces a re-drafted transparency requirement providing that when terms offered to the consumer are in writing, these terms must be drafted intelligibly in Albanian language and must have a plain and distinguished appearance. The font used shall be “Times New Roman”, with the character size at least 10. In any case of ambiguity the interpretation is in favour of consumers. The new wording of CPA is more specific than the one provided by the 93/13 Directive, aiming to further specify the transparency requirement by defining what is the meaning of “intelligible” on the one hand and “plain” on the other. Such a provision aims to raise the attention of the consumer to the standard terms. Such principle is rooted deeply in the EU law, since the first two programs for consumer protection and information policy of the Community.\textsuperscript{85} Right to information is one of the most emphasized rights by the EU, and duties to inform are included in almost every directive. The sanction for infringement of the transparency requirement consists of a considerable fine on which the CPC shall decide.\textsuperscript{86} The next principle introduced by this provision is the \textit{contra proferentem} rule, which is quite understandable and clear under private law, although not always helpful to achieve its aim, as a term might be better unfair/invalid than interpreted in favour of the consumer.\textsuperscript{87}

5. \textbf{Time limits for invalidation}

The law is tacit on this issue, but assuming that unfair terms are invalid (null and void) contractual terms, according to the general principles they are not subject to prescription. The juridical act which is absolutely invalid does not cause any legal consequences. Such invalidity is introduced by law in the general interest as a sanction against contracts which infringe the mandatory rules

\textsuperscript{82} B. Schäfer & P. C. Leyens.
\textsuperscript{86} Art. 57 as amended of CPA.
\textsuperscript{87} H. Kötz, 141.
Such an act does not have the strength of a valid juridical act. Absolute nullity is a matter/situation of fact, and the court could just notice the invalidity. The court decision in such cases has just a declaratory effect. When the competent court while processing a case, notices that a juridical act is absolutely invalid, it limits itself only to the declaration/certification of invalidity and decides on the merits of the case to solve the conflict between the parties related to the corresponding legal relationship. The very nature of the absolute invalidity inflicts a variety of consequences: the null and void juridical act could not be made valid through a consecutive other act neither by consent or approval, nor by the elapse of any prescription time, nor with the extinction of the ground of invalidity later on. The invalidity of a juridical act could be claimed by anyone that has an interest; it could be held against the other party or to any third party, even acting in good faith, who pretends rights resulting out of an invalid juridical act. The absolute invalidity is declared \textit{ex officio} by the court even if this is not claimed by the interested party or even against his wish. Nevertheless, the courts usually tend to overstress Art. 6 of Civil Procedure Code and confine themselves only to the claims of the parties, thus bypassing such duty to the detriment of public policy.

Such a stand is also contrary to the ECJ practice which in \textit{Cofidis} ruled that 93/13 Directive precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair. The ECJ found that fixing a time-limit for the court’s power to find of its own motion that an unfair term is illegal is contrary to the objectives of the 93/13 Directive. The ECJ also stresses that to allow Member States to introduce such time-limits, which might differ from each other, would also be contrary to the principle of the uniform application of Community law (§ 34). It is therefore apparent, that such a situation is liable to affect the effectiveness of the protection intended by Articles 6 and 7 of the 93/13 Directive (§ 35). To deprive consumers of the benefit of that protection, sellers or suppliers would merely have to wait until the expiry of the time-limit fixed by the national legislature before seeking enforcement of the unfair terms they would continue to use in contracts. A procedural rule which prohibits the national court, on expiry of a limitation period, from finding of its own motion or following a plea raised by a consumer that a term sought to be enforced by a seller or supplier is unfair is therefore liable, in proceedings in which consumers are defendant, to render application of the protection by 93/13 Directive excessively difficult (§ 36).

6. The “ineffectiveness” or the “non-binding nature” of an unfair term

On the example of Art. 686 CC, we see that within a single provision the different words are used \textit{[have effect/effective, invalid, without effects/ineffective]} although due to systematic interpretation the black list terms set forth in the third paragraph are supposed to be interpreted under the light of the second paragraph which is a general clause to understand what is meant by ineffective/invalid or in consumer terminology “unfair”. Regarding the classification and consequences this pro-

\begin{enumerate}
\item Art. 92 CC.
\item A. Nuni, 337-338.
\item There are quite a lot of cases by mobile communication companies against their clients, whose residence is not in Tirana; nevertheless the Tirana District Courts decides against such defendants, in their absence by accepting the juridical clause set by standard contract although in violation of CC and the CPA, even contrary to what is ruled by ECJ case law on jurisdictions clauses i.e. Oceano, Mostaza Claro, Pannon, Pénzügyi Lízing, etc. Although Albania is not a Member State of EU, it aspires to accede, therefore the courts could be the best intermediaries to harmonise the legislation with the \textit{acquis communautaire}. See \url{http://www.gjykatapirimi.gov.al/}. See also Decision of the Supreme Court Nr.11243-01473-00-2006 i Regj. Themeltar, Nr.00-2009-405 i Vendimit (8) of 5.2.2009 on an opposite statement without any valid argument to what is stated under this question at \url{http://www.gjykataelarte.gov.al/}, last visited 28 November 2011.
\end{enumerate}
vision should be applied in connection with the general part of CC, which provides the categories of invalidity of a juridical act which are absolute or relative and partial or total, as there is no other category provided by the legislation. From a language perspective no inconsistency to the terminology used is apparent; in the general part it is stated that the invalid juridical act does not create any legal consequences, while in the provision regulating standard terms it is stated that they “have no legal effects/effect” in the first and third paragraph and “are invalid” in the second paragraph. The term “effect” and “consequence” are very close synonyms in Albanian language. So the invalid standard terms are quite similar to absolute invalidity although there are certain difficulties which are not solved, as such category is rarely brought before the courts. The difficulties arise while considering “unfair terms”. Pursuant to Art. 28 (2) CPA, in case the term is regarded unfair, it is considered so with ex tunc effect. Other contractual terms remain binding on the parties and the further enforcement of the contract is possible. From the features of the unfair terms and absolute invalidity of a juridical act results an excessive similarity considering that the protection of consumer rights is a matter of public policy/ordre public either for their welfare or to achieve substantial freedom or to fight market failures. The wording of Art. 28 (2) CPA appears contradictory, since in the first part of the sentence the proper word is used which indicates absolute invalidity, whereas in the second part of it a term is used which is not characteristic for the absolute invalidity, but rather for the relative one. Nevertheless, the provision eradicates any consequences of the unfair term, even if its character is misinterpreted. Such provision transposes Art. 6 of 93/13 Directive, together with its intentional vagueness, which has left matters deliberately unclear in order to leave room to national legislation to fit it in their own conception easier.92

Since the Albanian CC shows some similarities with the Italian CC, it would be appropriate to mention at least briefly some of the legal debates in Italian doctrine, in order to demonstrate the differences and autonomy of Albanian CC. Firstly it is debated whether the ineff ectiveness fits to the nullity of contract or not, and some argue that the legislator has aimed to create a new category not subjected to partial nullity, because declaring the whole contract invalid against the interest of consumer could be rather risky. This is not true in Albanian legal reality, as the category of partial nullity (Art. 111 CC) offers an objective criterion for the maintenance of the juridical act diversely from Art. 1419 of Italian CC which offers a subjective criteria. Secondly, with regard to the argument that the nullity is relative because it is established in the interest of the weaker party by protecting it, the Albanian CC recognises a protection, which causes absolute invalidity, for i.e. children under the age of fourteen. Moreover the ECJ has stressed the high level of protection which the 93/13 Directive confers on consumers by extending the protection to cases in which a consumer who has concluded a contract containing an unfair term fails to raise the unfair nature of the term, be it because he is unaware of his rights or because he is deterred from enforcing them on account of the costs which judicial proceedings would involve.93 Thirdly, the prevailing opinion in Italy considers the unfair terms as not being subject to prescription although this is not undisputed. It could be seen similarly in Albania,94 as such view is also in conformity with the ruling in Cofidis.

The Common European Sales Law has been criticised because it has not clarified the situation; at least it should have included and systemized the issues already settled by ECJ.95 In fact, CESL has answered only two of the many questions which might be raised with the regard to unfair terms.

93 Ibid. § 34 Cofidis.
and their proper effect and classification. Thus, CESL has already answered by Art. 79 in the affirmative that the contract remains binding without the unfair term if it can be maintained. Whether the other terms of the contract could be modified while one term is unfair, the CESL replies implicitly in negative. With regard to other questions such as whether unfairness is subject to time limit; which rule must be applied instead of the rule set by the unfair clause; whether “not bindingness” shall operate ipso jure or should be claimed by the party, or be rendered as such by unilateral declaration; whether the court is entitled or even obliged to declare ex officio the unfairness or to be just indifferent if the unfairness is ascertained; whether the court should refuse to apply the unfair term, even when the party disadvantaged by it does not intend to challenge such a term; whether the court should simply avoid applying such term, or could modify it and thus make it not unfair; whether an unfair term could be rendered binding ex post by confirmation by the disadvantaged party after the conclusion of contract.96 These are all issues raised out the categories and concepts provided so far by the domestic legislation, regarding the invalidity of a contract or a contractual term. Probably the European Union and ECJ will create an autonomous category of non-bindingness.

7. **Ex-officio declaration of the contract term as unfair**

Grounded on all the reasons stated above the courts have a possibility to declare ex officio a term as unfair. There is a very scarce court practice in Albania on standard terms and almost no practice on consumer contracts. Nevertheless the state authorities, such as the Consumer Protection Commission, have made successful use of their competences in such matters97 which shows that the courts could do much better.

Attention must be paid to ECJ case law, as the rights of a consumer in a contract are a very important issue and the question of protection against the unfair terms is of great concern on EU level, as Art. 7 of the 93/13 Directive requires the Member States to introduce adequate and effective means to prevent the use of unfair terms. Such means shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms. Member States have chosen different ways of implementation98 of this provision. Among such effective means could be the obligation of the national courts to declare terms as unfair ex-officio.

On several occasions, the ECJ has had to deal with the issue of whether national civil courts are allowed or even required to test, ex-officio, the unfairness of potentially unfair contract terms. A landmark decision is *Oceano Grupa*,99 where the ECJ held that the effective protection required by the 93/13 Directive could only be achieved if the national court had the power to determine, of its own motion, whether a term of a contract is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts. The ECJ regarded that power as necessary for ensuring effective consumer protection. It expressed concern that there was a real risk that the consumers would be unaware of her/his rights or encounter difficulties in enforcing them.

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96 Ibid.


In the subsequent cases brought before the ECJ, the question arose as to whether national courts are merely allowed to examine the unfairness of a potentially unfair contractual term on their own motion or whether they are required to do so. In Mostaza Claro\textsuperscript{100}, the ECJ held that, according to the 93/13 Directive, a national court seized of an action for annulment of an arbitration award must determine of its own motion whether the arbitration agreement is void and annul that award where that agreement contains an unfair term. This is the case even where the consumer has not pleaded invalidity in the arbitration proceedings but only in the action for annulment. The ECJ found that the mandatory provisions of the 93/13 Directive have the status of public policy rules,\textsuperscript{101} which apply on the same level as the competition law rules. As a result, a national court must apply these rules of its own motion in cases where national law would require the court to apply national public policy rules of its own motion.

The ECJ affirmed its previous position on this issue in its judgment in Pannon.\textsuperscript{102} This case once again concerned an exclusive jurisdiction clause that had not been individually negotiated. The ECJ emphasized that an unfair contract term is not binding on the consumer and that it is not necessary for that consumer to have successfully contested the validity of such a term beforehand. The ECJ also stated that the role of the national court under EU law is not limited to a mere power to rule on the possible unfairness of a contractual term but instead creates an obligation to examine that issue of its own motion where the necessary legal and factual elements are available. The ruling also clarified the question whether the national court must declare an unfair contract term null and void – even if the consumer expressly wishes to be bound to this clause. The Court pointed out that the national court is not required to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.

Also in Pénzügyi Lízing Zrt,\textsuperscript{103} the ECJ went further by imposing an obligation on the national court to investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.

To sum up, it may be concluded, that although the legislator has provided two parallel sets of rules with respect to the parties who are subjected to standard term contracts, the courts could have the power to combine and reconcile such sets of norms and apply them uniformly to all contractual parties, as the Albanian CC provides a sufficient ground to be interpreted in compliance and under the light of the ECJ jurisprudence, thus achieving the real harmonization and approximation of legislation required by the Stabilization and Association Agreement with the EU, a goal that the legislator has failed to achieve properly. In this way, at least the courts could help to discourage further distortion of private law.


\textsuperscript{102} ECJ judgment of 4 June 2009, C-243/08 – Pannon GSM v Erzébet Sustikné Győrfi.

B. Unfair Contract Terms in the Contract Law of Bosnia and Herzegovina

Zлатан Мешкић, Зеника

1. Legal sources relevant for the analysis

Before the transposition of the Directive 93/13 in the legal system of Bosnia and Herzegovina the general contract terms were regulated in the Yugoslav Law of Obligations of 1978. Articles 142-144 of the Yugoslav Law of Obligations provided protection for the contractual party who did not determine the general terms by declaring the general terms binding only if that party was acquainted or should have been acquainted with their content at the time of conclusion of contract, if their clauses pass the fairness test, and only to the extent that the individually negotiated clauses are not in conflict with the general terms. The protection of the Yugoslav Law of Obligations applied to pre-formulated contract clauses in all kind of contractual relations (B2C, B2B, B2P and P2P contracts). Further on, unclear clauses should according to Article 100 of the Yugoslav Law of Obligations be interpreted in favour of the party who did not pre-formulate or propose them. Since the split of Yugoslavia this Act by virtue of succession has remained applicable in two slightly different versions in each entity of Bosnia and Herzegovina, as the Law of Obligations of the Republic of Srpska and the Law of Obligations of the Federation of Bosnia and Herzegovina. Since the provisions relevant for this analysis do not differ, in order to ensure more clarity this text will only refer to “Laws of Obligations of Bosnia-Herzegovina (BLO)”.

The provisions of the Directive 93/13 were introduced into the legal system of B&H in the first Consumer Protection Act of B&H adopted in 2002, which was due to the lack of application in practice, replaced in 2006 by the current Consumer Protection Act (CPA). The Directive 93/13 is transposed in Articles 93-96 of the CPA of 2006. The general clause is transposed in Articles 94 and 95 of the CPA. Under Article 94 CPA the trader may not use contractual terms that are unfair or would cause damage to the consumer. Such contractual clauses are void. According to Article 95 CPA the contract clause which was not personally negotiated shall be regarded as unfair if: it causes a significant inequality in the rights and obligations of the parties to the detriment of the consumer; the fulfilment of the contractual obligations would cause a significant breach of the consumer’s legitimate expectation; the term goes contrary to the principles of good faith and fair dealing.

Firstly this kind of transposition seemingly mistakes the terms which were individually negotiated, for the terms which were personally negotiated, i.e. negotiated without an intermediary. Secondly, the formulation of the provision of Article 95 CPA does not reveal whether the mentioned
criteria of significant inequality in rights and obligations, the breach of legitimate expectation, good faith and fair dealing need to be fulfilled alternatively or cumulatively. The unclear relation between the criteria of good faith and significant imbalance in the general clause of Article 3 (1) of the Directive 93/13 is transferred to Article 95 of the CPA, with some further dilemma. Article 95 of the CPA names the legitimate expectations of the consumer as an additional requirement, which is not listed in Article 3 (1) of the Directive, and would therefore by cumulative application of the criteria cause that the CPA requires a higher standard than the Directive 93/13. Legitimate expectations are a new principle in the field of the obligation relations in B&H, they are very generally formulated without further explanation, and consequently hardly justiciable for the legal practice. This principle was probably transferred from the first Proposal of the Directive 93/13 in 1990, which listed three criteria for the fairness test very similar to the ones we can now find in Article 95 CPA. In the context of this argumentation it is interesting to mention that the Proposal for the Directive of 1990, which for unknown reasons obviously influenced the Bosnian legislator, determined the three criteria as alternative.

As the next criteria Article 95 of the CPA names the principles of good faith and fair dealing. This needs to be understood as cumulative requirement of the breach of both principles, although the Directive listed only good faith, what again makes it harder for the consumer to establish the un fairness of a contract clause under the CPA than under Article 3 (1) of the Directive 93/13. The only possibility to avoid the conclusion that the transposition of the general clause in Articles 94 and 95 of the CPA is contrary to the Article 93 (1) of the Directive, is to try to interpret the provisions of the CPA in line with the Directive, a method of interpretation established in court practice of the ECJ and also required by Article 70 of the Stabilisation and Association Agreement signed by B&H on the one side and the EU and its member states on the other. This would lead to the conclusion that the criteria set in Article 95 need to be understood as alternative. Furthermore, the interpretation that the criteria of Article 95 CPA need to be fulfilled cumulatively would mean that the CPA offers less protection to the consumer than Article 103 of the BLO which gives to every contracting party by declaring a contract clause null and void simply if it is contrary to the principle of fair dealing. The alternative application of the criteria of Article 95 of the CPA naturally does not solve the problem that the lack of clarity and concision of the provision leads to legal uncertainty, and what is even more regretful, ineffectiveness of the protection in practice.

113 M. Povlakić, 162.
115 S. Petrić, „Institut opći uvjeti poslovanja u potrošačkom pravu Bosne i Hercegovine“, in edition in the process of printing ???, 25.
116 Ibid.
118 Article 70 of the SAA: “The Parties recognize the importance of the approximation of the existing legislation of Bosnia and Herzegovina to that of the Community and of its effective implementation. Bosnia and Herzegovina shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis. Bosnia and Herzegovina shall ensure that existing and future legislation will be properly implemented and enforced”; Stabilization and Association Agreement between Bosnia and Herzegovina, of the one part, and the European Communities and their Member States, of the other part, OG of Bosnia and Herzegovina - International Agreements, No. 5/08; See Z. Meškić, “Osnivanje Vrhovnog sud za BiH”, Sarajevo 2011, 132.
Parallel to the development of the CPA, the work on a reform of the BLO resulted in a Draft Law of Obligation Relations of the Federation of B&H/Republic of Srpska, later published as Draft Law of Obligations of Bosnia and Herzegovina 2006 (BDLO 2006). The BDLO 2006 would have transposed fourteen Consumer Protection Directives, including the Directive 93/13. However, the political will for a uniform Law of Obligations on the state level seems questionable until now. The latest attempt was started on January 8th, 2010, when a new Draft Law of Obligations (BDLO 2010) was adopted by the government, but did not pass the parliamentary procedure. The inclusion of a large number of consumer protection provisions in the BDLO 2006 was subject to criticism, which is why the BDLO 2010 transposed only nine Consumer Directives, but still contained the reformed provisions on general terms transposing the Directive 93/13.

For the purposes of this analysis the Proposal for a Regulation on a Common European Sales Law will be taken into consideration as well as the Draft Common Frame of Reference.

2. Legal debate in Bosnia and Herzegovina whether to include the unfair contract terms in the general contract law within the Law on Obligations.

By adopting the CPA in 2002 and later the CPA 2006, B&H joined states such as France and Austria, which transposed the Directive 93/13 in a separate codification of consumer law. Nevertheless, the provisions on general conditions of the BLO remained applicable and consequently B&H now has two parallel valid Acts which regulate the unfair contract terms. The transposition of the Directive 93/13 in the CPA’s 2002 and 2006 did not prevent the Bosnian legislator from continuing its work on the reform of the existing provisions on general contract terms in the BLO. The CPA 2002 even provided in its Article 140 that the Articles 48-110 of this law should be applied only until the adoption of a new Law of Obligations of B&H. The legislator was aware of the ongoing work on the new Law of Obligations and the intention to transpose most of the consumer Directives, including the Directive 93/13, in the new Law of Obligations. However, since the first BDLO was finished in 2003 and later published in 2006, but due to lack of political will was not adopted neither on the state nor on the entity level, the new CPA 2006 does not contain a similar provision on the temporary character of its Articles which transpose Directives which were intended to be transposed in the BDLO. The BDLO 2006 (Articles 184-190) and BDLO 2010 (Articles 158-163) contain much more detailed provisions on general conditions, transposing the Directive 93/13 under strong influence of German law.

Consequently, it seems that the Bosnian legislator on the question of the appropriate legal source for unfair contract terms concluded that it would be best to develop two parallel systems of protection of the party not formulating the general conditions. This immediately raises the question of the relation of these two Acts. Article 1 (2) of the CPA states that “On relations and cases falling within the scope of consumer protection which are not regulated by this Act, the provisions of the

122 See B. Morait/A. Bikic, Objašnjenja uz Nacrtn Zakona o obligacionim odnosima, in Cooperation with GTZ, Sarajevo 2006.
124 Ibid.
127 M. Povlakic, 141.
Act on Food, Act on General Product Safety and the appropriate provisions of Acts which regulate the obligations relations shall apply. In the case of doubt or collision of norms, the provision which provides a higher level of protection to the consumers shall apply”. Again we can see that the legislator intentionally does not name the Acts which regulate the obligation relations, because he was aware of the ongoing reform process of the current laws on obligations at the entity level, and at the same time uncertain about its outcome. Secondly, Article 1 (2) ensures the principle in dubio pro consumente, requiring a decision in concreto on which provision of which Act is more favourable for the consumer. Article 1 (2) of the CPA needs to be read together with Article 2 of the CPA, which states that the “consumer may not waive his right or be deprived of his rights given by this Act”. Therefore, the provisions of the CPA are considered to be mandatory and may be derogated by the provisions of the consumer contract or the application of other Acts, only if the contract or the other Act is granting a higher level of consumer protection. Even though Article 1 (2) of the CPA may successfully solve conflicts between the CPA and the BLO from the perspective of the interest of consumers, by ensuring for them the highest possible protection in each case, it could cause problems in practice in case this would lead to the application of the CPA to some provisions of the consumer contract and of the BLO to other provisions of the same contract, depending on which provisions are more favourable to the consumer.

While the Bosnian legislator clearly expressed his view, that the regulation of general contract terms at least additionally needs to be incorporated into the generally applicable BLO, the legal science does not have a clear vision, what is in the current legal situation quite understandable. Namely, the superficial approach of the legislator to the transposition of the Consumer Directives in the CPA resulted in the unsystematic and somewhat erratic CPA on the one side, and the well established and highly appreciated system of the BLO on the other side. Under these circumstances, the idea that the introduction of consumer provisions into the BLO would endanger its system almost suggests itself. No wonder this argument was used in the political debate on the adoption of the BDLO 2006 which transposed fourteen consumer Directives and has led to the reduction of the number of consumer directives transposed in the BDLO 2010.

In the following some of the deficiencies of the regulation on unfair contract terms in the CPA will be briefly described. Article 93 (1) and (4) of the CPA defines under which conditions the general unfair terms are binding upon the party who did not formulate them. This issue is not regulated by the Directive 93/13. Therefore, the Bosnian legislator used the solution contained in Article 142 of the BLO as the starting point and tried to develop it further. Unfortunately, the new provision may cause more misunderstandings in practice than Article 142 of the BLO which was adopted almost 25 years earlier. The deficiencies of Article 142 BLO can be compensated by a very stable view of the legal practice and science, which for Article 93 CPA simply has not been developed yet. Namely, Article 93 (1) states that “Contract provisions are binding upon the consumer only if he was familiar with the content of the contract, or if he should have been familiar with the contract terms at the time of the conclusion of the contract”. According to Article 93 (4) “the consumer is considered to have been familiar with the contract provisions if the trader warned him and they were available to the consumer”. The bad language of the provision by using such imprecise legal formulations as “warning by the trader”, or by using “contract provisions” and “contract terms” in the same context, making them seem like synonyms, allows for many different interpretations of the provision. One possible interpretation is that Article 93 (1) and (4) contains the general conditions for the conclusion of consumer contracts and not merely the requirements for the binding nature of the contract. 

128 Z. Meškić/A. Brkić, 66.
129 This phenomenon is known from the Private International law as ’dépeçage’.
terms as this is the case in Article 142 BLO. On the other hand, if to the focus is on the fact that Article 142 BLO served as a model for Article 93 CPA, one might come to the conclusion that the general reference to “contract provisions” is an editorial mistake.

Another example for poor legislative quality is Article 95 of the CPA, which transposed the general clause of Article 3 (1) of the Directive 93/13. Under Article 95 CPA the fairness test shall be applicable only to “contract provisions which the consumer did not stipulate personally”. It is not necessary to further elaborate that the formulation “contract provisions not personally stipulated” of Article 95 CPA, which intends to transpose the formulation “contract terms not individually negotiated” of Article 3 (1) of the Directive, can lead to wrong interpretation in legal practice which has no tradition in consumer protection.

Finally, the CPA did not exclude contracts related to employment, to succession rights, to rights under family law, to incorporation and organization of companies and partnership agreements as provided by recital 10 of the Directive 93/13, nor did it exclude contractual terms which reflect mandatory, statutory or regulatory provisions and the provisions or principles of international conventions as provided by Article 1 (2) of the Directive 93/13. When looking at these failures of the Bosnian legislator to transpose the limitations of the scope of application in Articles 93-96 of the CPA together with the possibility that Article 93 of the CPA applies to all contract provisions rather than only to the ones the consumer did not negotiate individually, it becomes clear that the legislator did not understand the purpose and the meaning of the Directive 93/13.

The proposals of the DBLO 2006 and 2010 contain provisions whose content is of a higher quality. The unfair terms are regulated in Articles 184-190 of the BDLO 2006. Article 184 BDLO 2006 provides a definition of standard clause contracts, while Article 185 BDLO 2006 determines under which criteria the general conditions of standard clause contracts shall become an integral part of a contract. Both issues are not regulated by the Directive 93/13. The following Articles on the non-binding character of unusual provisions in general standard clause contracts (Article 186 BDLO 2006) and the black list of unfair terms (Article 188 BDLO 2006) were imported from German law. One important difference is that the § 308 BGB contains a “gray list” and § 309 BGB a “black list”, while both lists are transposed in Article 188 BDLO 2006 as “black list.” The same “black list” is taken over from the BDLO 2006 in Article 96 of the current CPA. Article 187 BDLO 2006 transposed the general clause of Article 3 (1) of the Directive 93/13, by declaring a provision of the standard clause contract to be unfair, if it considerably harms the contracting party of the party who formulated it, contrary to the principles of good faith and honesty as well as to good business practice. It shall be deemed that considerable harm is inflicted if a provision of the general conditions of contracts shall create considerable inequality of contractual rights and obligations to the detriment of the contracting party of the party who formulated it, namely when it considerably departs from the legitimate expectation of that other party or constrains the essential rights and obligations in a manner which threatens the achievement of the purpose of the contract. Further on, Article 189 of the BLO regulates the legal effect of non-inclusion and invalidity of the general conditions. Finally, Article 190 excludes the B2B contracts from the scope of application of the previous Articles and contains a special regime of protection for B2C contracts. The BDLO 2010 in its Articles 158-163 has retained the concept of the BDLO 2006, but left out the “black list” entirely and added a general clause imported from Article 143

131 Z. Meškić/A. Brkić, 63.
133 M. Povlakić, 161.
134 Z. Meškić/A. Brkić, 75.
of the BLO which is partially contrary to the general clause taken over from the BDLO 2006 (Articles 161 and 162 of the BDLO 2010).\textsuperscript{135} The preceding analysis of the CPA and the BDLO leads to the question whether the transposition of the same Directive 93/13 in two separate acts is necessary for the legal system of B&H\textsuperscript{136} and will not cause more conflicts of laws than higher level of protection. This complex legal regulation of unfair terms seems even less acceptable considering that the legal practice in B&H has yet to discover the practical importance of the provisions of the CPA on general contract terms. Two opposite conclusions seem plausible: That it would be better to transpose such important provisions of general relevance for the contract law in the BLO, or alternatively, that the CPA needs to be reformed in order to gain importance in practice. In the view of prof. Povlakić the development of the minimum incorporation of the consumer provisions in the BDLO 2010 in comparison to the BDLO 2006 shows that the legislator at least for now has decided in favour of the transposition of the Consumer Directives in a separate consumer code.\textsuperscript{137} However, the experience of nine years since the adoption of the first CPA in 2002 demonstrates that this development cannot contribute to a closer connection between consumer contract law and the law of obligations which is necessary for the recognition of the importance of this area in legal practice.\textsuperscript{138}

3. Unfair contract terms in B2B contracts

In B&H the transposition of the Directive 93/13 was done in Articles 93-96 of CPA whose scope of application is limited to B2C contracts. Consequently, the BLO is the only valid act regulating unfair contract terms which apply to B2C, B2B, B2P and P2P contracts. The provisions of the current BLO remained the same as in the Yugoslav Law of Obligations of 1978 and were therefore created without any influence of the Directive 93/13 or EU Law in general. Articles 142 and 143 of the BLO apply to general conditions formulated by one party of the contract and contained in a standard contract or being referred to by the contract. Thereby, the BLO corresponds to the German, Dutch and Portuguese legal system.\textsuperscript{139} The BLO pursues the protection of the party not formulating the general conditions on three levels, as it is common in the area of unfair terms:

1. by setting preconditions for the binding effect of the general contract terms;
2. by controlling the content of the general contract terms; and
3. by interpreting the general contract terms in favour of the party who did not formulate them.\textsuperscript{140}

The general contract terms are binding for the party who did not formulate them if he was aware or should have been aware of their content (Article 142 (3) BLO). The evaluation of the binding effect takes place at the time of the conclusion of the contract, whereas the party stipulating the general contract terms needs to ensure their publication before the conclusion of the contract in order to provide the possibility to the other party to become acquainted with them (Article 142 (2) BLO). It is assumed that the general contract terms were known to the party who agreed on them, if they were given to that party before the conclusion of the contract or if they were published

\textsuperscript{135} M. Povlakić, 157.
\textsuperscript{136} A. Šabić, 151.
\textsuperscript{137} M. Povlakić, 166.
\textsuperscript{138} Ch. Jessel-Holst/G. Galev (ed.), 559.
\textsuperscript{139} H. Schulte-Nölke in cooperation with Ch. Twigg-Flesner, M. Ebers (eds), EC Consumer Law Compendium – Comparative Analysis, Universität Bielefeld 2008, 351; see: http://www.eu-consumer-law.org/index_en.cfm
\textsuperscript{140} Z. Meškić/A. Brkić, 81.
according to the regulated or the usual way.\textsuperscript{141} This presumption is rebuttable and the burden of proof lies with the party who claims that the general contract terms were not known to him.\textsuperscript{142} In case of a conflict between the individually negotiated clauses and the general contract terms, the former shall prevail (Article 142 (4) BLO). Article 143 BLO allows an \textit{ex post} control of the fairness of the general contract terms, by providing that their provisions are null and void if they are contrary to the purpose of the concluded contract itself or to fair business practices. The same applies to the contracts which contain general terms approved by the competent authority.\textsuperscript{143} Finally, with regards to the methods of interpretation of the general contract terms Article 101 BLO contains the \textit{in dubio contra stipulatorem} or \textit{in dubio contra proferentem} rule, according to which unclear provisions shall be interpreted in favour of the party who did not formulate them.\textsuperscript{144} This provision is restricted to the cases when the contract is concluded according to the contents printed in advance or when the contract was prepared in some other way and proposed by one contractual party.\textsuperscript{145}

The BDLO 2006 drifted away from the concept of the unanimous protection of the party who did not formulate the general contract terms of the current BLO and almost completely transferred the German system from the §§ 305-310 BGB to Articles 184-190 BDLO. Although the German legal system still primarily aims to prevent that the stipulator of the general contract terms by derogating the dispositive law inadequately puts the other party at a disadvantage, since the transposition of the Directive 93/13 the consumer protection developed to the second important principle in the provisions on unfair contract terms.\textsuperscript{146} As a consequence the provision on the preconditions for the binding effect of the general contract terms in Article 185 BDLO 2006 and the “black list” of unfair terms in Article 188 BDLO 2006 do not apply to B2B contracts (Article 190 BDLO 2006). The same concept was kept in BDLO 2010 with the difference that this draft does not contain a “black list” of unfair terms, and that Article 163 BDLO 2010 contains an editorial mistake which could unfortunately lead to the complete exclusion of B2B contracts from the scope of application.\textsuperscript{147} However, the definition of general contract terms (Article 184 BDLO 2006), the provision on unusual contract terms (Article 186 BDLO 2006), the general clause of fairness (Article 187 BDLO 2006) and the legal consequences of non-inclusion and invalidity (Article 189 BDLO 2006) also apply to B2B contracts. Article 190 (2) BDLO 2006 widens the scope of application of Articles 186-189 BDLO 2006 to cases when the pre-formulated contract terms were designated for one time use, if the contract in question is a B2C contract and the consumer could not exert his influence on their substance. For all other contracts in accordance with Article 184 BDLO 2006 the protection applies only to general contract terms.

\textsuperscript{141} S. Perović/D. Stojanović, \textit{Komentar Zakona o obligacionim odnosima} – knjiga prva, Beograd 1980, 455.

\textsuperscript{142} B. Vizner, \textit{Komentar Zakona o obveznim (obligacionim) odnosima}, Zagreb 1978, 584.

\textsuperscript{143} The most cases in the court practice in B&H are related to the General contract terms on the delivery of electric power; Supreme Court of B&H, Pž. 112/87, 3. 8. 1988. – Bilten Vs BiH 2/89, 62; Supreme Court of the Federation of B&H, Pž. 250/99, 11. 4. 2000. – Bilten Vs FBiH 1/00, 32; Cantonal Court Sarajevo, Gž. 200/99, 14. 4. 1999. – Bilten sp KsS 3/2001, 18; Z. Meškić/A. Brkić, 70.

\textsuperscript{144} With regards to the general contract terms in insurance contracts see Supreme Court of B&H, Pž. 598/88, 10.7. 1989. – Bilten Vs BiH 3/89, 60.


\textsuperscript{146} O. Palandt/P. Bassenge et. al., \textit{Bürgerliches Gesetzbuch}, München 2009, 5305, 406.

\textsuperscript{147} Additionally, the changes in the draft have obviously been made in a superficial manner on various occasions, and e.g. the exception of the scope of application with regards to B2B contracts contains an editorial mistake. Namely. Article 163 BDLO 2010 states that Articles 153-155 will not apply to B2B contracts, although these Articles do not regulate the unfair terms at all, but only the Articles 158-163 BDLO 2010. However, if the legislator meant the Articles 159-162, this would completely exclude B2B contracts from the protection. If the BDLO 2010 aims to keep the system established under the BDLO 2006 in the BDLO 2010, only Article 159 which contains provisions on integration of general contract terms should be excluded with regards to B2B contracts. Therefore, besides the error in enumeration, two other mistakes have been made. Firstly, Article 190 BDLO 2006 excluded B2B contracts from the scope of application of the Articles 185 and 188 (not: 185-188), and secondly, as Article 188 of the BDLO 2006 contained a “black list” which has been left out in the new Draft, the new provision on exclusion of B2B contracts in Article 163 BDLO 2010 does not need to mention a second Article besides the Article 159 BDLO 2010 at all (the second Article in BDLO 2006 was Article 188).
terms pre-formulated for a multitude of contracts. Furthermore, with regards to B2C contracts Art. 190 (2) BDLO 2006 determines a legal presumption that the general contract terms were stipulated by the business person.

The most interesting novelty in the area of unfair terms in the BDLO 2006, which is not influenced by the Directive 93/13, but directly imported from §305c BGB, is Article 186 BDLO 2006 on unusual contract terms. It prevents provisions in the general contract terms from becoming an integral part of the contract, which are under the circumstances, and particularly because of the appearance of the contract, so unusual that the contracting party to the stipulator does not need to expect them. Article 186 BDLO 2006 requires two conditions to be fulfilled in order to declare a general contract term non-binding. The provision of the general contract terms in question needs to be unusual, i.e. to be objectively contrary to the development of the negotiation or to substantially differ from the common general contract terms. Additionally, the provision needs to be surprising for the other contract party, e.g. because it was hidden on an unexpected place in the contract. The BDLO 2010 kept the identical provision in its Article 160.

The BDLO 2006 and 2010 may be criticized for regulating in much detail the protection of unfair terms with regards to B2C contracts, although the Directive 93/13 has already been transposed in the CPA, while they at the same time narrow down the protection in B2B contracts, e.g. with regards to the question when the general contracts terms become binding, which is covered by the current BLO, but is excluded in B2B contracts from the scope of application in the BDLO 2006 and 2010. The Bosnian legislator obviously did not take into consideration that the German legal system, which served as the role model for both Drafts, transposed the Directive 93/13 only in the BGB and not, as this is the case in the legal system of B&H, additionally in a separate consumer code. The criticism is legitimate, if the B2B contracts due to an editorial mistake should completely be left out of the scope of application of the Articles 159-162 BDLO 2010, as described above. In my view, this concept is further evidence that the legislator of B&H has not definitely decided where to transpose the Directive 93/13.

If the editorial mistake should be corrected before adoption, the concept of the BDLO 2006 and 2010 would correspond to the modern development in the area of unfair contract terms. The most recent Proposal for a Regulation on a Common European Sales Law (ESL) also provides different levels of protection for B2C contracts on the one hand and B2B contracts on the other hand with regards to several aspects within the field of unfair terms. The legislator of the EU shares the opinion that in general the provisions on consumer provision need to be of mandatory character, while provisions on B2B contracts should primarily follow the principle of the freedom of contract. However, the field of unfair terms is a typical example where the European Sales Law seeks to provide a degree of protection for the weaker position of the SME-s in B2B contracts under certain circumstances. As a consequence, the ESL provides in Article 70 (1) as a general rule that the contract terms are binding for the party who did not stipulate them only if that party was aware of them, or if the party supplying them took reasonable steps to draw the other party’s attention to them, before or when the contract was concluded. However, according to Article 70 (2) ESL a mere reference in a contract to the contract terms does not fulfil the criteria of Article 70 (1) ESL when it is used in a B2C

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148 O. Palandt/P. Bassenge et. al., §305c, 415; B. Morait/A. Bikić, 33.
149 O. Palandt/P. Bassenge et. al., §305c, 416; B. Morait/A. Bikić, 33
150 A. Šabić, 151.
151 Ibid.
153 Ibid.
contract, but it satisfies the standards with regards to all other contracts. Furthermore, while Article 83 (1) of the ESL which is applicable to B2C contracts repeats the general clause of Article 3 (1) Directive 93/13, under Article 86 (1) ESL not individually negotiated contract terms in B2B contracts are considered to be unfair, if they are of such a nature that they grossly deviate from good commercial practice, contrary to good faith and fair dealing. The “gross deviation from good commercial practice” is a standard which is more difficult to fulfill than the “significant imbalance in the parties’ rights and obligations” (Article 3(1) Directive 93/13 and Article 83 (1) ESL)). However, if we compare it to the protection of unfair terms in the UNIDROIT-Principles of International Commercial Contracts 2004 as the apparently most recognized set of rules for B2B contracts, it is less strict than the principle of “gross disparity” of Article 3.10 of the UNIDROIT-Principles which implies elements of both procedural and substantive unfairness. The UNIDROIT-Principles, which are by the Expert Group of the European Commission named as one of the role models for ESL, with regards to standard terms only provide protection in case of “surprising terms” (Article 2.1.20. UNIDROIT-Principles), with the same meaning as the “unusual terms” in Article 160 BDLO. The principle of “gross disparity” of Article 3.10 of the UNIDROIT-Principles, as the provision which is the most appropriate legal basis for the establishment of unfairness of the standard terms, applies to all contract clauses and not just to standard terms. Likewise, the UNIDROIT Principles subject the incorporation of standard terms to the general rules on formation (Art. 2.19), with the result that a mere reference to the standard terms will normally suffice to incorporate them in the contract, what is not the case in Article 70 (1) ESL. It must be mentioned that the national legal systems beside the provisions on unfair contract terms already contain a more general system of protection in case of contract provisions which are contrary to the principles of good faith, or good commercial practise, or further protection which concretises these principles as e.g. in the case of usurious contracts. Every member state, and even future member states such as B&H, already had to transpose Article 3 (1) of the Directive 93/13 with its formulation „causes a significant imbalance in the parties’ rights and obligations arising under the contract“, and now it may become possible to apply the new general clause for B2B contracts in Article 86 (1) ESL declaring contract terms unfair in case of a “gross deviation from good commercial practice” before the national courts. It is questionable whether the inclusion of so many new further concretisations of the principles of good faith and good commercial practise make it even possible for the national court to recognize what are the different levels of protection that these concrete formulations provide, if there is a difference at all.

Nevertheless, the contra proferentem rule (Article 65 ESL; Article 4.6. UNIDROIT-Principles; Article II-8:103 DCFR; Article 5:103 PECL; Article 114 BDLO 2010) and the rule on preference for individually negotiated contract terms (Article 62 ESL; Article 2.1.21 UNIDROIT-Principles; Article II-8:104 DCFR; Article 5:104 PECL; Article 158 (3) BDLO 2010) seem to be a unanimous standard. Therefore the distinction between B2C contracts with the principle in dubio pro consumentem in Article 64


156 European Commission-Expert Group, 3.5.2011., A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’, 5.


ESL and the B2B contracts with the principle *in dubio contra proferentem* rule in Article 65 ESL seems unnecessary.

4. Definition of unfair terms and its concretisation in the black list; role of courts in interpreting unfair contract terms

The CPA of Bosnia and Herzegovina generally provides in its Article 94 that “a trader must not require contractual clauses that are unfair or that would cause damages to the consumer. Such contractual clauses are void.” The criteria for the unfairness test are determined in Article 95 CPA. Clauses that are not “personally negotiated” shall be regarded as unfair if: they cause a significant inequality in the rights and obligations of the parties to the detriment of the consumer; if the fulfilment of the contractual obligations would cause a significant breach of consumers’ legitimate expectation; if the terms go contrary to the principles of good faith and fair dealing. As described above, the limitation to “personally negotiated” clauses, which suggests that protection is given only with regards to contract terms negotiated without an intermediary, is a result of a wrong translation of the term “individually”. The three criteria used in the fairness test of Article 95 are not linked with a conjunction, such as “and” or “or”, which would clarify whether the criteria shall apply alternatively or cumulatively. This has led to much criticism in legal science, because it additionally hinders the application of such important provision in practice.\(^\text{159}\) As proposed above, the only way to avoid that Article 95 CPA provides a lower level of consumer protection than Article 3 (1) of the Directive 93/13, and is therefore a bad transposition of this provision, is to try to interpret the provisions of the CPA in line with the Directive, and thereby conclude that the criteria shall be understood as alternative. By this method of interpretation a court could provide the minimum level of protection guaranteed by the Directive 93/13 to a consumer *in concreto*, but it does not solve the problem that the bad formulation of the provisions in Articles 94 and 95 CPA makes it difficult for the protection in the field of unfair terms to gain a more important place in practise.

Article 143 of the BLO contains a general clause providing that “clauses in general terms are void if they are contrary to the purpose of the concluded contract or the principle of fair dealing.” This provision applies regardless of a possible approval of the contracts which contain general terms approved by the competent authority. The protection under Article 143 BLO is restricted to preformulated general contract terms (Article 142 (1) BLO). Neither Article 95 CPA nor Article 143 BLO excludes any subject matter listed in Article 4 (2) Directive 93/13 from its scope\(^\text{160}\).

Article 161 of the BDLO 2010 has the same content as the Article 143 of the existing BLO. However, Article 162 BDLO with the title “prohibition of an unreasonable disadvantage” sets new criteria for the unfairness test, stating that “the provisions of the general terms in standard contracts are void, if they unreasonably disadvantage, contrary to the principles of good faith and fair dealing, the other party to the contract with the user.” The Article goes on by providing that the “unreasonable disadvantage is considered to exist, if a provision of the general contract terms causes significant imbalance in contractual rights and duties to the detriment of the contracting party of the party who formulated them, or which significantly deviates from his legitimate expectation, or limits important rights and duties inherent in the nature of the contract in such way to jeopardize the attainment of the purpose of the contract”. Article 162 (3) transposed the exception of the Article 4 (2)

\(^{159}\) S. Petrić, “O problemu nepravednih odredaba.,” 224; M. Povlakić, 162; A. Šabić, 160; Z. Meškić/A. Brkić, 71.

of the Directive 93/13 stating that Article 162 BDLO does not apply to clauses of the general contract terms, whose content was taken from valid provisions or that were individually negotiated, if the other party could influence their content. It further does not apply to clauses related to the subject of the contract or the price, if these clauses are clear, understandable and easily discernible. It is interesting to observe that the whole concept of the protection in the area of unfair terms was almost literally transferred from the German BGB, but the legislator of B&H decided to move away from this model only regarding the general clause. Namely, § 307 BGB which served as a basis for Article 162 BDLO, also contains a prohibition of a significant damage, but does not name the legitimate expectations or significant imbalance in contractual rights and duties as criteria. Since these two criteria are the same as in Article 95 CPA and this time the legislator used the conjunction “or” when listing the criteria, the BDLO which was prepared at the same time as the CPA 2006 is a further argument for the alternative application of the criteria of Article 95 CPA. The third criteria of limitation of important rights and duties which jeopardizes the attainment of the purpose of the contract is the only one which is different from Article 95 CPA, and at the same time, the only one which has been transferred from § 307 (2) BGB. The other criteria of § 307 (2) BGB, that the provision is not compatible with essential principles of the statutory provision from which it deviates, was not incorporated into Article 162 BDLO. However, in the opinion of prof. Bikić and Morait, who were members of the drafting team, when establishing that the unreasonable disadvantage is contrary to the principles of good faith in the sense of Article 162 (1) BDLO, the contract terms must be compared with the statutory provision which would have applied, if the contract term in question had not been concluded.161 This view reflects the missing criteria from § 307 (2) BGB.162

The DBLO 2010 caused new problems by taking back the general clause of Article 143 of the currently valid BLO into Article 161 BDLO 2010, and at the same time, keeping the new general clause which was drafted for the BDLO 2006 in Article 162 BDLO. It opens new questions regarding the mutual relation of the two general clauses, but it is already certain that they are at least partially contrary to each other.163

The general clause of Article 3(1) of the Directive 93/13 is concretized in the indicative list of those contract clauses which may be regarded as unfair. There was an extensive discussion in science about the legal nature of the list, caused by the unclear formulation of Article 3(3) Directive 93/13, but also because of the changing character of the list through the history of its formation164, where the opinions varied between a mandatory „grey minimum list“ or just a list with exemplary function.165 The ECJ finally clarified in Commission/Sweden166 that the list is of indicative and illustrative character. Another much disputed question was whether the member states where obliged to transpose the list, again caused by an unclear provision in recital 17 of the Directive 93/13 saying that the scope of the terms contained in the list may be the subject of amplification or more restrictive editing by the Member States in their national laws. This provision was used in order to argument in favour as well as against the existence of the obligation to transpose the list in the national law.167 The ECJ stated in the same case that the member state have to choose a form and method of

161 A. Bikić/B. Morait, 33.
162 O. Palandt/P. Bassenge et. al., §307, 424.
163 M. Povlakić, 157.
164 Z. Meškić (2008), 73.
implementation of the list that offer a sufficient guarantee that the public can obtain knowledge of it, and therefore argued in favour of the obligation to transpose the list.\textsuperscript{168} Bosnia and Herzegovina transposed the list in the Article 96 CPA, but the terms listed strongly deviate from the list of the Directive.\textsuperscript{169} The reason is again that the legislator of B&H used the lists provided in §§ 308, 309 of the BGB and literally transferred them into Article 96 of the CPA. However, while the BGB differentiates between a grey list in § 308 and a black list in § 309, the Bosnian legislator transposed both lists together as a black list in the Article 96 CPA. Article 188 of the BDLO 2006 contained the same black list as Article 96 CPA, but the list was left out of the BDLO 2010. This seems reasonable considering that two identical lists, which are both applicable only to B2C contracts in two separate codes, are not necessary. The Regulation on ESL contains an exhaustive black (Article 84 ESL) and grey list (Article 85 ESL) which could become directly applicable in the member states, in cases when the contracting parties choose the ESL as the applicable law to their contract.

5. \underline{Circumstances of relevance for the fairness test}

The general clause of the Directive 93/13 aimed to ensure a generally applicable and objective control system which is oriented towards consistent and reliable value measures.\textsuperscript{170} The fairness test should include measures of content such as the otherwise applicable provision of dispositive law, purpose of the contract or commercial practice, as well as circumstances which attended the conclusion of the contract.\textsuperscript{171} According to Art. 4(1) Directive 93/13 the unfairness of a contractual term shall be assessed by considering the nature of the goods or services for which the contract was concluded, the circumstances attending the conclusion of the contract at the time of its conclusion, and in relation to all the other terms of the contract or of another contract upon which it is dependent. The provision is transposed in Article 93 (2) CPA, but unfortunately this has been done in such an unhandy manner, that it can hardly be of any use in practise. Article 93 (2) CPA states that „contract provisions need to be understandable and in connection to other provisions in the same or another contract between the same parties by taking into account the nature of the goods or services and all other participants related to the conclusion of the contract.” The inclusion of the requirement that contract provisions need to be understandable is obviously an attempt of the Bosnian legislator to transpose the first sentence of the Article 5(1) of the Directive, which is not transposed anywhere else. It is unclear why the legislator tried to transpose Articles 4(1) and the first sentence of 5(1) in the same provision of the CPA.\textsuperscript{172} The only correct part of the transposition in Article 93 (2) CPA is the instruction to take into account the nature of goods and services. However, considering that Article 93 (2) CPA nowhere mentions the term “interpretation” or in any other way establishes a link to the fairness test regulated in Articles 94 and 95 CPA, for legal practitioners who are not familiar with the Directive, even the correct part of the transposition will be useless. The order that contract provisions need to be in connection to other provisions of the same contract, can be understood as a reference to the systematic interpretation,\textsuperscript{173} although again the legislator does not use the word “interpretation”. More confusing and simply wrong is the general order of Article 93 (2) that contract provisions need to be in connection to provision of other contracts between the same parties, because contracts on different affairs between the same parties do not need to have any connection.\textsuperscript{174}

\begin{flushright}
170 K. Baier, 27.
171 R. van Gool, 71.
172 A. Šabić, 162.
173 M. Povlakić, 159.
174 A. Šabić, 161.
\end{flushright}
Nevertheless, the worse fate had the criteria to take into account the circumstances attending the conclusion of the contract at the time of its conclusion, which due to false translation mutated into taking into account all other participants related to the conclusion of the contract. In most cases there will simply be no other participants and it is regretful that the legislator was unable to transpose an important interpretation tool from Article 4 (1) Directive 93/13 even though simply a correct translation of the provision would suffice. The BLO does not contain any provisions on circumstances that need to be taken into account when assessing the fairness of general contract terms.

The BDLO 2006 and 2010 did not use the opportunity to correct the mistakes made in Article 93(2) CPA. Both drafts did not directly transpose Article 4 (1) of the Directive. However, Article 137 of the BDLO 2006 and Article 113 of the BDLO 2010 regulate which circumstances shall be taken into account when interpreting any contract provision, without restriction to the terms which were not individually negotiated: a) circumstances of contract conclusion, including prior negotiations; b) conduct of contracting parties, even after the conclusion of contract; c) nature and purpose of the contract; d) interpretation that had been applied to similar provisions and the practice they established mutually; and e) the meaning usually ascribed to the provisions and terms in the respective trade. The list of circumstances is not exhaustive. This list at least partially corresponds to the new list of circumstances proposed in Articles 83 (2) ESL with regards to B2C contracts and 86 (2) with regards to B2B contracts. The legislator of the EU should reconsider whether providing two similar lists of circumstances that need to be taken into account, with the only difference that the fact whether the transparency rule of Article 82 ESL, whose application is restricted to B2C contracts, was respected, may be taken into account only with regards to B2C contracts, is really a good legislative technique.

6. Time limits for invalidation

The Directive 93/13 is until now only transposed in the Articles 93-96 CPA which contain no provisions on the statute of limitations. Article 94 CPA provides that all contract provisions which are unfair are null and void. Article 1 (2) of the CPA states that “On relations and cases falling within the scope of consumer protection which are not regulated by this Act, the provisions of the Act on Food, Act on General Product Safety and the appropriate provisions of Acts which regulate the obligations relations shall apply”. Therefore, the remedies on invalidating unfair contract provisions and a possible time limit fall under the general regime of the BLO. Under Article 110 BLO the right to invoke nullity cannot expire. Consequently, the nullity of an unfair term cannot be subject to the statute of limitation. Every person with legal interest has the timely unlimited right to invoke nullity of the unfair contract provision in the sense of Article 94 CPA (Article 109 BLO). Article 143 BLO also provides that unfair general conditions are null and void, and therefore the exclusion of time limitation applies to this provision as well. With the adoption of the BDLO in the version of 2006 or 2010, the legal situation with regards to this issue would remain the same.

When transposing Art. 7 (2) of the Directive 93/13 in Article 120, 122 (2) and (4) of the CPA, the Bosnian legislator empowered the competent court to order the termination of any act or practice that is contrary to the provisions of this law or other regulations and which harms the common interests of consumers. Pursuant to Article 122 (2) the court has the jurisdiction to order the publica-

175 M. Povlakić, 159.
176 Ibid.
177 A. Bikić/B. Morait, 28.
178 A. Bikić, Obligaciono pravo-opći dio, Sarajevo 2007, 178.
179 M. Povlakić, 157.
tion of the judgment, in whole or in part in the media, or to request a corrective announcement by the respondent, whereas Article 122 (4) gives qualified bodies the possibility to initiate proceedings before the competent court jointly or individually against the traders of the same economic sector or their associations which use or recommend the same practice or setting of similar unfair conditions. The CPA again does not regulate any time limitation for these remedies. When these remedies are related to the nullity of unfair contract terms in accordance with Article 94 CPA, e.g. when the competent court terminates an unfair practice or declares general contract terms null and void and publishes such judgment, they shall in accordance with Article 110 BLO not be subject to the statute of limitation. The same applies for the collective proceedings of consumer protection associations and other competent bodies when they invoke nullity of the unfair contract provision.180

7. The “ineffectiveness” or the “non-binding nature” of an unfair term

Article 6 (1) of the Directive 93/13 provides that unfair terms used in a B2C contract shall not be binding for the consumer. This provision is transposed in Article 94 (1) CPA by determining that all unfair contract terms are null and void. The “non-binding” character of an unfair term is therefore in the legal system of B&H transposed as absolute nullity181. Article 143 BLO contains the same sanction for unfair terms. This is consistent with the general provision on nullity of contracts contrary to mandatory provisions, public order or good business practices of Article 103 BLO, considering that Articles 94 CPA and Article 143 BLO concretize this provision for contract clauses which were not negotiated individually.182 The legal consequence is that the unfair contract term is considered to have not been concluded and that its nullity existed from the beginning (ex tunc).183 This is in accordance with the established practise of the ECJ.184 It is questionable whether Article 143 (2) BLO, stating that the court can reject the application of either some specific provisions of general conditions that deprive the other party of the right to file objection, or of other provisions on the basis of which this party loses rights from the contract or loses deadlines, or which are unfair or too strict, provides absolute or relative nullity. This provision may be understood as providing further possibilities to declare a contract term null and void, other than being contrary to the purpose of contract conclusion itself or to fair business practices which are listed in Article 143 (1) BLO.185 The other possibility is to interpret the wording “the court can reject the application” as a case of relative nullity (voidability).186 However, the legislator did not define the persons legitimated to invoke nullity, he did not determine any time limitations for such remedy and he only refers to the court, what could suggest that Article 143 (2) contains an ex officio obligation of the court.187 These arguments speak in favor of the interpretation that Article 143 (2) BLO in consistency with Article 94 CPA and Article 143 (1) BLO provides absolute nullity as the sanction for unfair term and is consequently also in line with the practice of the ECJ.

Furthermore, Article 105 (1) BLO provides that nullity of a certain contract provision shall not imply nullity of the contract itself, if the contract is sustainable without this provision, unless the

181 S. Petrić, “O problemu nepravednih odredaba.”, 226; M. Povlakić, 162.
182 Z. Meškić/A. Brkić, 70.
183 A. Bikić, 178.
185 M. Povlakić, 156; A. Šabić, 146.
187 Ibid.
provision was a condition or a decisive motive for concluding the contract. Even if the legally void provision was the condition or decisive motive for making the contract, in case the nullity was established in order to eliminate a void clause from the contract and consequently maintain its validity as to the remaining part, the contract can survive (Article 105 (2) BLO). This provision on partial nullity is in accordance with Article 6 (1) of the Directive 93/13. However, the additional condition, that the clause was neither a condition nor a decisive motive for entering the contract makes it harder for a consumer contract to outlive the fact that one of its terms is null and void.188

The BDLO 2010 also provides absolute nullity as a sanction for unfair contract terms in its two general clauses (Article 161 and Article 162 BDLO 2010). Article 189 BDLO 2006 provided legal consequences of non-inclusion and invalidity of contract terms designed by the German model of §306 BGB. According to Article 189 BDLO 2006 the contract remains valid without the non- incorporated or invalid contract term and the matter which was regulated by the eliminated contract term, shall be determined by the provisions of dispositive law. The reduction of the unfair term to its valid part was explicitly forbidden (Article 189 (3) BDLO 2006). The contract shall not remain valid if upholding it would be an unreasonable hardship for one party or the purpose of the contract could not be attained (Article 189 (4) BDLO 2006). However, this Article did not survive the changes in the newer BDLO 2010. Therefore, the sanctions for unfair terms would with the adoption of the BDLO 2010 remain the same as in the valid BLO.

8. Ex-officio declaration of the contract term as unfair

The CPA only determines in its Article 94 CPA that the legal sanction for unfair terms is nullity. However, Article 109 BLO explicitly states that the court considers the nullity ex officio. The nullity may be invoked by any party who has legal interest and this right cannot be subject to statute of limitations (Article 110 BLO). A possible court decision on the nullity of contract terms has only declarative effect.189 These provisions remained the same in the BDLO 2006 and 2010.

Article 109 (2) BLO allows the public attorney to request the declaration of existence of nullity. With regards to B2C contracts, Article 101 CPA obliges the Ombudsman for consumer protection inter alia to investigate activities on the market directed towards the consumer, ex officio or on the basis of complaints, and to recommend the use of certain general terms in the agreements that are used in specific business sectors.

Such clear legal situation on this matter is in line with the established practise of the ECJ. The judgment which in the most concrete way illustrates the obligations of the national court under Article 6 (1) of the Directive 93/13 is Pénzügyi Lizing.190 Here the ECJ held that the national court has to determine on its own motion whether or not the contested term was individually negotiated between a seller or supplier and a consumer and thus falls within the scope of application of the Directive 93/13. If this is the case, in the second stage of its investigation, the court has to assess, again ex officio, whether such term is unfair according to national legislation which transposes Articles 3 and 4 of the Directive. This judgment is the result of the development of ECJ practice over the last decade, which started with Océano Grupo.191 This line of ECJ decisions confirms that the system of

189 A. Bikić, 178.
control over the nullity of contracts provisions established under the Yugoslav Law of Obligations (later BLO) is in conformity with EU Law. Since both the BLO and the CPA provide nullity of the contract terms as a sanction for their unfairness, the same EU Law conform system applies, at least from the legislative point of view, to the area of general contract terms. However, even with a much better transposition of the Directive 93/13 than in the current CPA, this task may prove difficult for the national courts to fulfil. Due to such bad transposition of the Directive 93/13 in the CPA, the national courts should overcome three burdens in order to achieve the goals of the Directive 93/13: 1. They must apply a code on consumer protection which is, with the exception to the provisions on consumer credit, still mostly unknown; 2. The courts must apply provisions on unfair terms whose importance was despite quite clear provisions in the very appreciated Yugoslav Law of Obligations never fully recognized in B&H; 3. And as the most difficult of the three, the courts must interpret Articles 93-95 CPA in line with the Directive, because otherwise most of the provisions will not be understandable for legal practitioners, at least not in the correct way.

192 A. Bikić, 178.
193 M. Povlakić, 137; Z. Meškić (2010), 42.
C. Unfair Contract Terms in the Contract Law of the Republic of Croatia

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1. Legal debate in Croatia whether to include the unfair contract terms in the general contract law within the Law on Obligations.

In the Croatian legal system there are currently two sets of positive legal rules regulating unfair contract terms which complement each other. One concerns the control of the standard pre-formulated contract terms regulated in the Civil Obligation Act\(^\text{194}\) (COA), which existed even before the process of approximation of the Croatian existing legislation to the European consumer protection \textit{acquis} and is applicable to all kinds of contractual relationships, involving either natural or legal persons or both as contracting parties (B2C, B2B, B2P and P2P contracts). Thus before the transposition of the Council Directive 93/13 on unfair terms in consumer contracts\(^\text{195}\) (Directive 93/13) into the Croatian legal system, provisions on unfair contract terms concerned only the control of general contract conditions in standard pre-formulated contracts regulated within the COA of 1978 in ex Arts. 142 to 144.\(^\text{196}\) The new COA of 2005 has taken over the content of ex-Arts. 142 to 144 into new Arts. 295 to 296 under the Title “VII. General Contract Conditions” in Part Two, Title VIII. on Contractual Obligations, Chapter 1. General Provisions of the COA. Provisions of the COA have subsidiary significance for consumer contracts and are to be applied except as otherwise provided for B2C contracts by the Consumer Protection Act (CPA)\(^\text{197}\) (Art. 2 (2) CPA). A second set of legal rules concerning unfair terms in consumer contracts is prescribed in Arts. 96 to 106, Chapter XI. of the CPA, which transposes the Directive 93/13 into the Croatian legal system,\(^\text{198}\) and following the concept of Directive 93/13 restricts the content review to B2C contracts.\(^\text{199}\) The transposition of the Directive 93/13 and of most other EU consumer protection directives into the CPA\(^\text{200}\) was a direct consequence of complying

194 Civil Obligation Act, \textit{Official Gazette of the Republic of Croatia} (OG), No. 35/05, 41/08, 125/11.
196 See the Civil Obligation Act, OG 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01 which transposed Yugoslav COA, OJ SFRJ 29/78, 39/85, 46/85, 45/89, 57/89, through Law on Transposition of Civil Obligation Act, OG 53/91. The COA of 1978 was repealed by Civil Obligation Act enacted in 2005, OG No. 35/05, 41/08, 125/11.
197 Consumer Protection Act, OG No. 79/07, 125/07, 79/09, 89/09, 133/09 and 78/12.
198 Directive 93/13 was for the first time transposed in CPA of 2003 (OG No. 96/03), which was in 2007 repealed and replaced by the new CPA (OG No. 79/07, 125/07, 79/09, 89/09, 133/09 and 78/12).
199 Croatian CPA is applicable to contracts concluded between a trader and a consumer (B2C transactions). Under Art. 3 9th indent CPA the consumer is natural person who concludes the legal affair or acts on the market outside of its commercial, business, craft or professional activity. Under Art. 3 15th indent CPA trader means any natural or legal person who concludes the legal affair or acts on the market within its commercial, business, craft or professional activity, as well as person acting in the name or on the behalf of the trader. The concept of trader includes companies and single traders, but also all the other natural and legal persons, who act on the market within their business or professional activity (farmers, craftsman, public services, local and regional self-government, self-employed like free artists, architects, lawyers etc.).
200 While the CPA transposes Directives 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 and 2005/29, the Directives 90/314 and 1999/44 are transposed in the COA. For transposition of Directive 2008/48, the legislator adopted a separate Consumer Credit Act, OG No. 75/09 and 112/12.
with the obligation to align the Croatian existing legislation with the acquis communautaire, which is stipulated in Arts. 69 and 74 of the Stabilisation and Association Agreement signed between the Republic of Croatia, on the one part, and the European Communities and their Member States, on the other201 (SAA) on 29. October 2001.

The decision of the Croatian legislator to regulate consumer protection law within the special piece of legislation was at first motivated by the thought of shielding the COA from new and different concepts of EU law and from frequent amendments, which could endanger or at least relativize its fundamental legal institutes and systematic. Another reason for this approach was also the fear of concealing the European origin of national provisions, when EU directives are implemented excessively, what could make the directive’s consistent interpretation more difficult.202 However, despite all mentioned arguments the COA took over certain consumer contracts directives, e.g. Directive 90/314 and Directive 1999/44, and used them for the modernization of already existing provisions. The argumentation of the Croatian legislator was based on the fact that the personal scope of application of these directives enables extension to persons other than consumers. For example, since the rules on seller’s responsibility for material defects were already regulated in the COA, the Croatian legislator transposed some of the provisions of Directive 1999/44 excessively, by widening their field of application ratione materiae to all onerous contracts concluded not only in B2C but also in B2B and in P2P relationships (Arts. 400 et seq. COA).203 Such transposition of the Directive 1999/44 resulted in the creation of certain separate rules which are only applicable to consumer transactions within the COA.204 Thus, although there is currently no ongoing legal debate in Croatia whether to include the specific consumer protection legislation on unfair contract terms into the general contract law within the COA, a similar argumentation could be applied here too.205 Such reasoning is even more persuasive because of the fact that, during the process of harmonization with the Directive 93/13, the Arts. 295 to 296 COA were also amended in order to comply with its requirements, which led to similar and complementing legal solutions on unfair contract terms in the CPA and the COA.

When comparing the legal framework of the mentioned two sets of provisions on unfair contract terms, there are numerous common features. Art. 295 (1) COA defines general contract conditions as contractual terms that have been formulated “for a larger number of contracts” that one party (drafter) proposes to the other contracting party before or at the time of entering into the contract, regardless of whether they are included in a form contract (standard contract) or referred to in the contract. General contract conditions complement individually negotiated clauses

201 Stabilisation and Association Agreement between the Republic of Croatia, of the one part, and the European Communities and their Member States, of the other part, OG - International Agreements of the Republic of Croatia, No. 14/01.
203 The COA provisions on sale contracts are applicable to all contracts of sale, i.e. also applicable to all non–gratuitous contracts. Art. 5 of the CPA prescribes that the trader shall fulfill a consumer contract in accordance with the CPA and COA provisions and that in the case of material defects of the product or with regard to the service provided, the relations between consumers and traders shall be regulated by the provisions of the COA relating to responsibility for material defects of the product.
205 This idea was rejected with regard to Arts. 142-144 COA of 1978, see Baretić M., “Nepoštene odredbe u potrošačkim ugovorima” (Unfair Contract Terms in Consumer Contracts), in Dika M./Pogarić Z. (ed.), Obvezne treće poboštne obveze u sustavu potrošačkih ugovora (Trade Obligation in the System of Consumer Protection), Narodne novine, Zagreb, 2003, p. 60; Slakoper Z., “Nevaljanost pojedinih odredaba općih uvjeta ugovora s posebnim osvrtom na potrošačke ugovore” (Invalidity of Certain General Contract Terms Provisions with Special Emphasis on Consumer Contracts), Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 2001, Vol. 1, p. 204.
laid down between the contracting parties of the same contract, and, as a rule, they are equally binding (Art. 295 (2) COA). According to Art. 295 (5) COA general contract conditions are binding for a contracting party if that party was acquainted or ought to have been acquainted with them at the time of the conclusion of the contract. Subsequently, Art. 296 (1) COA prescribes that "any provision of the general contract conditions shall be void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded, even if the general contract conditions including such provisions are approved by an authority". Art. 102 (1) CPA prescribes that "an unfair contractual term is null and void", and Art. 96 (1) CPA stipulates that a contractual term which has not been individually negotiated shall be regarded as "unfair" if, contrary to the requirement of good faith, it causes a significant imbalance in the contractual parties' rights and obligations, to the detriment of the consumer. However, unlike the COA, the CPA does not restrict the control of unfairness to standard terms formulated "for a larger number of contracts" only, but in accordance with the transposed Directive 93/13 its provisions are also applicable to pre-formulated individual contracts for single use. However, it puts special emphasis on pre-formulated standard terms of the trader, by regulating in Art. 96 (2) CPA that a certain contractual term shall be deemed not individually negotiated if it has been drafted in advance by the trader and the consumer has therefore not been able to influence its content, "particularly when it is a term of the pre-formulated standard contract of the trader". In case of a unique regulation of unfair contract terms within the COA these differences could easily be overridden by an appropriate approximation of the COA provisions. By encompassing also individual contracts for single use, the true goal of Arts. 295-296 COA would be accomplished, i.e. the protection of the party who couldn't influence the content of the contract, irrespective of whether the terms were pre-formulated for a larger number of contracts or just for the individual contract.

There are numerous other CPA and COA provisions on unfair contract terms that share similarities, like provisions on criteria to be taken into account when assessing the contract (Art. 98 CPA, Art. 296 (2) COA), or regarding the exclusion of specific contractual terms from unfairness test, like contractual terms based on mandatory provisions (Art. 96 (5) CPA, Art. 296 (3) COA), or regarding the contra proferentem rule (Art. 101 (1) CPA, Art. 320 (1) COA). Apart from slight amendments in order to approximate these COA provisions to the requirements of the Directive 93/13, no major interventions would be necessary. Finally, since the CPA as lex specialis contains no detailed special provisions on nullity (e.g. invoking nullity, time period for invoking nullity etc.) or provisions on compensation for damage etc., the general rules of the COA apply.

This is another good reason for regulation of unfair contract terms within the COA. Although the main differences concern the field of application, especially the personal scope, special higher standards for the protection of consumers could be limited to B2C contracts by means of introduction of certain special provisions for consumers, what already happened with the COA rules on seller’s responsibility for material defects.\(^{207}\) The remaining provisions on unfair contract terms,  

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\(^{206}\) The requirement for the contracting parties to act in good faith as a fundamental principle of Croatian contract law is laid down in Art. 4 COA under the national term načelo savjesnosti i poštenja (principle of conscientiousness and honesty) and is acceptable as an equivalent for "good faith" in the CPA (Arts. 3 and 96) and for "good faith and fair dealing" in the COA (Art. 296 (1)), which are both used in official translations of the CPA and the COA. See Šarčević S./Čikara E., "European vs. National Terminology in Croatian Legislation Transposing EU Directives", in Sarčević S. (ed.), Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues, Zagreb, 2009, p. 211.

\(^{207}\) Such approach is also to be found in the new Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Brussels, 11. October 2011, by differentiating between provisions for B2C and B2B contracts. E.g. it regulates in Art. 80 that the unfairness test does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in contracts between a trader and a consumer in so far as the trader has complied with the duty of transparency set out in Art. 82, while it prescribes the same rule for contracts between traders without requiring the fulfillment of the transparency condition.
as demonstrated above, could then excessively transpose the Directive 93/13 and be applicable not only to B2C but also to B2B relationships. Such transposition would also be in accordance with the prerequisites of the Directive 93/13, which after amendments through the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, is still based on minimum harmonisation principle. Beside necessary amendments regarding the personal scope of application concerning definitions of “consumer” and “trader”, it would also be necessary to introduce a provision which would in accordance with the recital 10 of the Directives 93/13 preamble exclude the application of consumer protection rules on contracts relating to employment, succession rights, family law rights and contracts relating to incorporation and organization of companies or to partnership agreements.

The inclusion of the unfair contract terms in the general contract law by uniting the two currently existing sets of positive legal rules within the COA would also contribute to richer court practice. Currently there is a significant lack of court practice based on the CPA provisions. Croatian courts are rather applying the COA provisions and protecting consumers as every other person, ignoring at the same time the existence of special consumer protection provisions. On the other hand, there are numerous court decisions on unfair terms in standard pre-formulated contracts according to the COA provisions. This is understandable, having in mind the real possibility of contracts concluded even in B2B relationships, where one of the contractual parties in monopolistic


209 One could follow the current solution in the CPA, which does not expressly exclude these contracts from the application of its provision on unfair contract terms, since their exclusion already results from the scope of application ratione personae, namely because a subject of these contracts cannot fall under the CPA definitions of consumer and trader. The transposition beyond the scope of the Directive 93/13 would also mean widening of unfairness control from contracts on sale of goods and supply of services within the meaning of Art. 1 (1) of the Directive 93/13 to all contracts, with the exception of certain enumerated contracts.

210 To our knowledge, there are just a few court judgments concerning the CPA provisions. See County Court in Zagreb, Gž. 5173/10–2 of 23. November 2010 (public services); County Court in Zagreb, Gž. 7188/08–2 of 21. April 2009 (public services); County Court in Varaždin, Gž. 1074/08–2 of 4. August 2008 (sale of goods); County Court in Varaždin, Gž. 1052/08–2 of 12. June 2008 (consumer credit); High Commercial Court of the Republic of Croatia (VTSRH), Pž 3114/05–3 of 26. October 2007. Beside the possibility of consumer protection in procedures initiated by individual actions (in the Civil Procedure Act of 1976, with subsequent amendments OG 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 as incorporated by Act of 1991 with its amendments in OG No. 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11), the CPA regulates in Part V. alternative consumers’ dispute resolution (Chapter I) and protection of collective interests of consumers (Chapter II). Consumer access to justice includes beside court procedures and ADR (ad hoc arbitration committees, Croatian Chamber of Economy, Croatian Chamber of Trades and Crafts etc.), also administrative procedure. The first case of protecting consumer rights based on the CPA was the case “Ponikve” regarding the provision of public services, where the Croatian Competition Agency adopted the Decision UP/I 030-02/2004-01/66, OG No. 135/05. See also Administrative Court of the Republic of Croatia, Decision Us-4052/2004-7 of 21. February 2008; Misdemeanor Court in Zagreb, Decision XVII-G-12636-04 of 25. July 2006; Misdemeanor Court in Zagreb, Decision XVII-G-12636-04 of 25. July 2006. Before the last CPA amendments (OG No. 79/09) which have abolished this possibility, the protection against unfair contract terms was also granted through misdemeanor responsibility. Competent inspectors of the ministries and of the State Inspectorate were entitled to impose a fine in the amount of HRK 10000 to 100000 (cca. EUR 1370 to 13700) on a legal person which used unfair contractual terms.

position imposes unfair contractual terms on the other party, especially on small or medium-sized enterprises (SME). This is another important argument which could contribute to possible future legal debate on incorporation of the consumer contracts provisions on unfair contract terms into the COA.

A possible argument against the unique regulation of unfair contract terms within the COA could be the fact that the COA cannot fulfill the requirements of Art. 7 of the Directive 93/13 regarding procedure for protection of collective interests of consumers. However, these rules on procedure against a person, who acts contrary to provisions on unfair contract terms, could continue to be regulated in Arts. 131-141b CPA. Since Art. 131 CPA prescribes the same procedure also for protection of consumer interests regarding seller’s responsibility for material defects that is regulated in the COA, the same solution could be introduced also with regard to unfair contract terms. As Prof. Josipović emphasized correctly, the separate regulation of consumer and general contract law hinders the creation of a consistent contract law system appropriate to market relationships. Unified regulation of unfair contract terms within the COA would bring more transparency and systematic to Croatian contract law and consequently enable more effective protection and enforcement of granted rights in practice.

2. Unfair contract terms in B2B contracts

As already mentioned, the Croatian legal system knows one set of legal rules concerning unfair terms in consumer contracts prescribed in Arts. 96 to 106 CPA, and another set of legal rules regulating the control of the standard pre–formulated contract terms in Arts. 295 to 296 COA. While the CPA provisions restrict the content review to B2C contracts, the COA provisions on control of fairness of general contract conditions are applicable to all kind of contractual relationships, namely to B2C, B2B, B2P and P2P contracts. As to the question of applicability of the unfair contract terms provisions to B2B contracts, the answer would be confirmative. The use of pre-formulated standard terms within the B2B contracts is the ordinary way of dealing between traders, and Art. 295 (1) COA defines general contract conditions as contractual terms that have been formulated for a larger number of contracts and which one party (drafter) proposes to the other contracting party before or at the time of entering the contract, regardless of whether they are included in a form contract (standard contract) or “referred to” in the contract.

212 In September 2011 association “Franak” initiated before the Commercial Court in Zagreb the proceeding for the protection of the collective interests of clients of nine Croatian banks, claiming that the terms in their credit contracts (usually pre-formulated with general contract conditions) are unfair and thus null and void. Since the relevant association has no standing to apply for injunction in court according to Regulation on determining of persons authorized to initiate the proceeding for the protection of the collective interests of consumers (OG No. 124/09), the action was dismissed. However, association “Franak” signed the agreement on collaboration with Croatian Union of the Consumer Protection Associations “Consumer”, which is an entity qualified to initiate such a proceeding. See http://udrugafranak.hr/index.php/component/k2/item/download/16, last visited on 15. February 2012.

213 For more details see Čadjenović Z./Čikara E./Dabović Anastasovska J./Dollani N./Gavrilović N./Karanikić M./Melkić Z./Zdraveva N., Unfair Terms Directive (93/13) in: Jessel-Holst Ch./Galev G. (ed.), op.cit., p. 484. See also Art. 131 (1) CPA: “Any qualified entity is entitled to initiate the proceedings for the protection of the collective interests of consumers against a person who acts contrary to provisions of Articles 30 to 115 of this Act, provisions of Articles 400 to 429, Articles 881 to 903 of the Civil Obligations Act, provisions of Article 8, 9 and 14 of the Electronic Commerce Act, provisions of Article 15, 17 to 18a and 34 of the Electronic Media Act and provisions of Article 5 to 15 of the Ordinance on advertising and providing information on medicinal, homeopathic and medical products.”

214 The incorporation of rules on consumer contracts into the general act on obligations by applying them to all consumer contracts or eventually to all the other contracts could according to Prof. Josipović positively affect further modernization of contract law. See Josipović T., „Das Konsumentenschutzgesetz – Begin der Europäisierung des kroatischen Vertragsrechts“, in: Grundmann S./Schauer M. (ed.), The Architecture of European Codes and Contract Law, 2006, p. 129.
General contract conditions can be incorporated in B2B contracts also implicitly when the
general contract terms of traders with monopolistic position are raised to the level of trade usages.\textsuperscript{215} Pursuant to Art. 12 (2) COA, in B2B obligation relationships the trade usages which are ordinarily ap-
plied by traders in such relations apply, unless the parties excluded their application explicitly or im-
plicitly. The rule is however only applicable under the limits set out in Art. 295 (5) COA, requiring that
the contracting party knew or should have known the content of the general contract conditions
at the time of the contract conclusion. This emphasizes the importance of control of unfair terms in
general contract conditions in B2B contracts even more. A similar reasoning can also be found in Art.
86 of new Proposal for a Regulation on a Common European Sales Law, according to which in B2B
contracts a contract term is unfair only if it forms part of not individually negotiated terms and is of
such a nature that its use grossly deviates from good commercial practice, contrary to good faith and
fair dealing. When defining B2B relationships the Proposal stipulates that the Common European
Sales Law may be used only in B2B relationships where all contracting parties are traders and at least
one of those parties is SME. Similar \textit{ratio} can be found in Arts. 295 to 296 COA with regard to fairness
control of general contract conditions in B2B contracts.

This leads us to answering the second question concerning provisions on the declaration of
invalidity of an unfair contract term applicable to both B2C and B2B contracts. As explained, the CPA
provisions on this subject matter are restricted to B2C contracts. The CPA prescribes in its Art. 102
(1) that “an unfair contractual term is null and void” and in its Art. 102 (2) regulates the partial nullity.
The COA on the other hand contains a provision applicable both to B2C and B2B contracts which
declares a general contract term “void if it, contrary to the principle of good faith and fair dealing,
causes evident inequality in rights and obligations of the parties to the detriment of the contracting
party of the drafter or if it compromises the achievement of the purpose of the contract concluded,
even if the general contract conditions including such provisions are approved by an authority” (Art.
296 (1) COA). Without explicit proclamation of such a general contract term as “unfair”, the COA de-
clares the term that fulfills the conditions set out in Art. 296 (1), either in B2C or B2B contracts, invalid.
These conditions correspond to the requirements of Art. 3 (1) of the Directive 93/13 and even go
beyond its level of protection by declaring the general contract term void, if it compromises the
achievement of the purpose of the contract concluded. Since the purpose of the contract must be
determined by court interpretation on a case by case basis, this ground for nullity of general contract
terms was criticized in practice and literature.\textsuperscript{216} In connection with Art. 296 COA, Art. 324 (1) COA
also regulates partial nullity for all types of contracts by prescribing that if “one clause of a contract
is void, this shall not result in rendering the contract void, provided that the contract may survive
without such void clause and that the clause was neither a condition nor a decisive motive for enter-
ing into the contract”, and even if it was, the contract shall remain valid, “where nullity is established
in order to eliminate a void clause from a contract” (Art. 324 (2) COA).

Moreover, the posed question could also be observed from another angle and it could be
argued, that there are other sporadic provisions in the COA and other special acts applicable both
to B2C and B2B contracts, which concern different subject matters and sanction with invalidity such
contract clauses, that at the same time also fulfil prescribed legal conditions for an unfair contract

\textsuperscript{215} According to Art. 12 (1) COA any agreed trade usages and mutually developed practices shall apply to obligations between trad-
ers. This provision shows the influence of Art. 1:105 (1) as general provision of Principles of European Contract Law (PECL), which
regulates, that the parties are bound by any usage to which they have agreed and by any practice they have established between
themselves.

\textsuperscript{216} See Slakoper Z., \textit{Nevaljanost pojedinih…} (Invalidity of certain…), op.cit., p. 197.
It should also be mentioned that both the CPA and the COA contain further provisions on legal consequences of unfairness of contract terms which will be elaborated in more detail later on (see below 6.). Beside declaration of unfair term of general contract conditions null and void under Art. 296 (1) COA, the judicial control of general terms could have also other implications on B2B contracts. If the court establishes that the contracting party was not or should not have been acquainted with the general contract conditions at the time of conclusion of the contract, they will be not legally binding on that party (Art. 295 (5) COA). Furthermore, if the court finds that there is a conflict between the general contract conditions and individually negotiated provisions, according to the mandatory provision of Art. 295 (3) COA the latter shall be valid. However, it needs to be recognized that the determination of such a conflict will not be an easy task for the court, since the individually negotiated provision and the provision of general contract conditions will rarely be in obvious direct conflict. The courts also play a special role when interpreting general contract conditions by applying the contra proferentem principle in disputes concerning B2B transactions. Pursuant to this principle, where a contract is concluded according to a previously printed content, or it was prepared and proposed by one contracting party, the court shall interpret any unclear clause in favour of the other contracting party (Art. 320 (1) COA).

3. Definition of unfair contract terms and its concretization in the black or grey list; role of courts in interpreting unfair contract terms

Following the normative approach of the Directive 93/13, the Croatian legislator approximated provisions on general contract conditions in the COA and introduced in the CPA the so called general invalidity clause which defines criteria the court will use on a case by case basis when deciding on (in)validity of a certain contract term. As a consequence of literal transposition of Art. 3 (1) of Directive 93/13 into Art. 96 (1) CPA, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the contractual parties' rights and obligations, to the detriment of the consumer. This legal definition of unfair contract term, which concerns only B2C contracts, is unlike COA provisions on general contract conditions also applicable to pre–formulated individual contracts for single use. Art. 296 COA, which is applicable to both B2C and B2B contracts, restricts its fairness control only to standard terms formulated “for a larger number of contracts” (Art. 295 (1) COA) and without explicit proclamation of unfairness declares a term of general contract conditions which fulfills the conditions set out in its paragraph 1, null and void. Pursuant to Art. 296 (1) COA any provision of the general contract conditions shall be void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded.

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217 E.g. Art. 345 COA regulates one possible situation by prescribing that at the request of an interested contracting party a court may annul the contract clause on exclusion or restriction of liability for ordinary negligence, if such agreement arises from a monopolistic position of the debtor or else from inequality in relations between the contracting parties in general. Furthermore, Art. 408 (2) COA regulates that a provision of the contract limiting or excluding liability for defects of things shall be void if the seller was aware of the defect and failed to notify the buyer thereof, and also where the seller imposed such a provision by making use of his monopolistic position, or with regard to a consumer contract. The COA contains similar provisions in Art. 528 (2) regarding lease contract and in Art. 558 (2) regarding rental contract. Also, under Art. 435 (2) COA if at the time of entering into the contract the seller was aware or could not have been unaware of a defect to his right, the provision of the contract on limitation or exclusion of liability for legal defects shall be void. Finally, there are also general COA provisions required under Art. 322 (1) COA on the nullity of each contract (contrariety to the Constitution of the Republic of Croatia, to the mandatory provisions or the society moral), COA provisions on defects of intention (Arts. 279 et seq. COA) and COA provision on excessive loss (Art. 375 COA) that allow the consumer to apply for annulment of the contract.

218 Art. 83 (1) of the new Proposal for a Regulation on a Common European Sales Law retained basically the same definition.
even if the general contract conditions including such provisions are approved by an authority.\textsuperscript{219} Thus, Art. 296 (1) COA transposes the requirements out of Art. 3 (1) of the Directive 93/13 in the first part of the sentence and adds the already mentioned, criticized ground for nullity regarding the achievement of the purpose of the contract. The interpretation of the concrete purpose of the contract represents a difficult and complicated task for the national court, which has to determine both the legal objective purpose of the contract and those goals which the parties are trying to achieve. Such an interpretation must be pursued according to general COA provisions on interpretation and by taking into account the common intention of the contracting parties (Art. 319 (2) COA).\textsuperscript{220}

Both of these legal definitions from Art. 96 (1) CPA and Art. 296 (1) COA are not applicable to individually negotiated contract terms.\textsuperscript{221} According to Art. 96 (2) CPA a certain contractual term shall be deemed not individually negotiated if it has been drafted in advance by the trader and the consumer has therefore not been able to influence its content, particularly when it is a term of the pre-formulated standard contract of the trader. An equivalent provision is contained in Art. 296 (3) COA according to which the provision on nullity of unfair standard terms in Art. 296 (1) COA shall not apply to those provisions of general contract conditions, which were subject to individual negotiations before the conclusion of the contract in the course of which the other party could have affected the content of such provision. However, the fact that certain aspects of a term or specific contractual term have been individually negotiated, whereas an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract of the trader, shall not exclude a possibility that the rest of the contract terms be assessed as unfair under Art. 96 (3) CPA. Pursuant to Art. 96 (4) CPA if the trader claims that a certain contractual term in a pre-formulated standard contract has been individually negotiated, the burden of proof in this respect shall lie with it.

Another exclusion from unfairness test concerns contractual terms on the subject matter and the price of the contract, if these are clear, understandable and highly visible (see Art. 99 CPA and Art. 296 (3) COA). Both provisions can be criticized, since the Croatian legislator transposed literally Art. 4 (2) Directive 93/13 without taking into account certain explanations from the preamble of the Directive, which could have been helpful for the courts when applying these provisions. By taking over the explanation out of recital 19 of the Directive 93/13 which specifies that the unfairness test does not apply to “the quality/price ratio of the goods or services”, a better understanding of the provision could have been achieved, in the sense that the fairness of other contract terms concerning price calculation or way of payment etc. can be examined.\textsuperscript{222} By introducing the second explanation from the same recital according to which “the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms”, it could have been clarified to courts that these provisions, although not separately but in combination with

\textsuperscript{219} See for example judgment of the Supreme Court of the Republic of Croatia, VSRH, Rev 1000/2006-2 of 11. July 2007: “Regulation (on criteria for compensation of investments made by lessee), which is not a delegated act, can have the significance of general contract conditions. (…) The term of general contract conditions (Regulation) according to which a lessee has a right to receive compensation for invested means only if the agreed rent is ten times higher than the initial one” was evaluated as unfair and too harsh to lessee.

\textsuperscript{220} Art. 319 (2) COA: “When interpreting a controversial clause of a contract, the mutually agreed intention of the parties must be considered rather than the literal meaning of the expressions used, and the controversial clause must be understood in accordance with the principles of the law of obligations established by this Act.”


\textsuperscript{222} This is confirmed in the Report on the implementation of Directive 93/13, p. 15: “The terms laying down the manner of calculation and the procedures for altering the price remain entirely subject to the Directive.” In its earlier practice, before obligation of harmonization under SAA, the Supreme Court of the Republic of Croatia in its judgment VSRH, Rev 409/1996-2 of 10. February 2000, applied the corresponding provision of ex-Art. 143 COA of 1978, that “the court is not authorized to examine the adequacy of price calculation, which the parties determine according to their free will.”
certain other contract terms can lead to unfairness to the detriment of the consumer.\textsuperscript{223} The recent practice of the European Court of Justice (ECJ) (now: Court of Justice of the European Union)\textsuperscript{224} and legal developments confirmed that excessive transposition of both Art. 3 (1) and Art. 4 (2) of the Directive on exclusion of specific contractual terms, would be in accordance with the Directive 93/13. Art. 32 of the Directive 2011/83/EU on consumer rights imposes on a Member State that adopts provisions in accordance with the minimum harmonisation principle (Art. 8 of the Directive 93/13) the obligation to inform the Commission thereof, as well as of any subsequent changes, in particular where „those provisions extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration“. Also in its judgment \textit{Caja de Ahorros}, the ECJ stated: “Art. 4(2) and 8 of Directive 93/13/EEC (…) must be interpreted as not precluding national legislation, (…) which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language\textsuperscript{225} The new Proposal for a Regulation on a Common European Sales Law makes the (un)fairness control of the main subject matter of the contract or of appropriateness of the price to be paid in B2C contracts conditional upon the trader’s fulfillment of the transparency requirement (Art. 80), while excluding such a test for B2B contracts.\textsuperscript{226} A further exclusion from unfairness test concerns contractual terms by which mandatory statutory provisions or provisions and principles from conventions which are binding upon the Republic of Croatia are included in the contract (Art. 96 (5) CPA) and provisions of the general contract conditions, the content of which was taken over from applicable regulations (Art. 296 (3) COA). Beside mandatory provisions the COA also encompasses dispositive provisions of applicable legislature, which cannot be examined by the court when they are included in general contract conditions.\textsuperscript{227}

Beside legal definition of an unfair contract term, Art. 97 CPA contains an indicative and non-exhaustive list of contractual terms which may be declared unfair by the court in each individual case on the basis of conditions regulated in Art. 96 CPA. Because of the limits of the EU competence in the field of consumer protection set up by the subsidiarity and proportionality principles

\textsuperscript{223} See Petrić S., „Opći uvjeti ugovora prema novom ZOO“ (General contract conditions under the new COA), in Slakoper Z. (ed.), \textit{Bankovni i finansijski ugovori} (Banking and Financial Contracts), Pravni fakultet Rijeka, Rijeka 2007, p. 56. Nevertheless, the necessity of restrictive interpretation of this provision can be deduced from the grey list of unfair contract terms in Art. 97 CPA, which enumerates certain contract terms on additional rights and obligations of contracting parties concerning subject matter and price of the contract.

\textsuperscript{224} Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17. December 2007 amended the name and the structure of the ECJ, introduced changes concerning appointment of judges and Advocate-Generals, concerning competences etc.


\textsuperscript{226} See Proposal for a Regulation on a Common European Sales Law, Art. 80 (2): Section 2 (Unfair contract terms in contracts between a trader and a consumer) does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.

\textsuperscript{227} This is in accordance with recital 13 of the preamble of Directive 93/13: “(…) whereas in that respect the wording ‘mandatory statutory or regulatory provisions’ in Article 1 (2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established”. See also reference for a preliminary ruling from the Oberlandesgericht Oldenburg (Germany) lodged on 6 January 2011 in case C-8/11, \textit{Johann Bilker and Others v EWE AG}, where the referring court asked whether Art. 1(2) Directive 93/13 to be interpreted as meaning that statutory or regulatory provisions are not subject to the provisions of that directive even in the case where a seller or supplier refers in his contractual terms and conditions to statutory or regulatory provisions which were adopted in respect of a different consumer group and a different type of contract.
(Art. 5 (3) and (4) TEU (ex Art. 5 (2) and (3) TEC))\textsuperscript{228} the European legislator regulated in Annex of the Directive 93/13 the so called “grey list” of unfair contract terms.\textsuperscript{229} The minimum harmonisation principle contained in Art. 8 of the Directive 93/13 allowed national legislators the transposition of the list either as grey (contract terms which are presumed to be unfair) or as black (contract terms which are always unfair), or even as a combination of both. On the contrary, the optional Proposal for a Regulation on a Common European Sales Law regulates for B2C contracts both a grey (Art. 85) and a black list of unfair contract terms (Art. 84).\textsuperscript{230} The CPA transposed in Art. 97, by a grey letter rule, nineteen terms from Annex No. 1 lit. a–q of the Directive 93/13,\textsuperscript{231} which need not necessarily be considered unfair and conversely, if they don’t appear in the list may nevertheless be regarded as unfair.\textsuperscript{232} Thereby, the wording of the CPA grey list slightly differs from the wording of the Annex

\textsuperscript{228} See consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C 83/01 of 30. March 2010.


\textsuperscript{230} The problem of competence limitation will most probably not arise with regard to the proposed legal basis of Art. 114 TFEU, because of the “optional” nature of the Proposal for a Regulation on a Common European Sales Law. Pursuant to its Art. 3 the parties may agree that the Common European Sales Law governs their “cross-border contracts” for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.

\textsuperscript{231} According to Art. 97 CPA contractual terms which, subject to conditions referred to in Art. 96 CPA “may be regarded as unfair are, for instance:– term limiting or excluding the liability of a trader for the damage caused by the death or personal injury of a consumer, if the damage resulted from the trader’s harmful act, – term limiting or excluding the rights of the consumer vis-à-vis the trader or other third person in the event of total or partial non-performance of the contract, including the provision excluding the offset of consumer’s debt against the debt which the trader has against the consumer, – term by which the consumer undertakes to fulfil the contract, whereas the fulfilment of the trader’s obligation is subject to a condition whose fulfillment depends exclusively on trader’s will, – term providing that the trader retains sums paid by the consumer where the latter decides not to conclude the contract, or when he or she does not fulfil the contract, without providing for the consumer the same right in the event that the trader decides not to conclude the contract or does not fulfil the contract, – term by which the consumer undertakes to pay compensation for failure to fulfil which is substantially higher than actual damage, – term enabling the trader to rescind the contract on a discretionary basis, where the same right is not provided for the consumer, – term enabling the trader to retain the sums paid for services not yet performed by him, where it is the trader himself who rescinds the contract, – term enabling the trader to cancel a contract of indeterminate duration without giving reasonable cancellation period, except where there are justifiable grounds for cancellation, – term providing that a contract of fixed duration will be extended for an indeterminate or determinate period of time unless the consumer declares, before the termination of the contract, that he or she does not want an extension of the contract, if the deadline fixed for the consumer to declare so is unreasonably short, – term imposing upon the consumer certain obligations, when the consumer had no opportunity of becoming acquainted with that provision prior to the conclusion of the contract, – term allowing the trader to unilaterally alter contractual terms without a valid reason which is specified in the contract, – term providing that the price of goods or service is to be determined at the time of the supply of the goods or at the time of the rendering of the service, or term allowing the trader to increase the price, without in both cases giving the consumer the right to rescind the contract if the actual price is substantially higher than the price agreed upon at the time of the conclusion of the contract, – term giving the trader the right to assess whether the product sold or service rendered is in conformity with the contract, – term giving the trader the exclusive right to interpret all or some terms of the contract, – term excluding or limiting liability of the trader for obligations undertaken for it by its agent or term by which a duty to honour these obligations is subject to compliance with certain formalities, – term obliging the consumer to fulfil his or her contractual obligations, even in situations where the trader did not fulfil its contractual obligations, – term allowing the trader to transfer, without the prior agreement of the consumer, rights and obligations under the contract on the third person, if the consumer is thus placed in the less favourable position, – term excluding, limiting or encumbering the consumer’s right to realise his or her contractual rights before the court or other competent body, particularly the term obliging the consumer to submit dispute to arbitration not envisaged by the applicable law, term preventing presentation of the evidence favourable to the consumer or term shifting burden of proof on the consumer when, according to the applicable law, burden of proof should lie with the trader.”

\textsuperscript{232} This is in accordance with ECJ judgment of 7. May 2002, C-478/99 - Commission of the European Communities v. Kingdom of Sweden (2002) ECR I-04147: “As regards the annex referred to in Article 3(3) of the Directive, the annex in question is (…) to contain an indicative and non-exhaustive list of terms which may be regarded as unfair. (…) In any event, in order to achieve the twofold objective pursued and to satisfy the requirements of legal certainty, it is essential for this list to be published as an integral part of the provisions of the Directive.”
to the Directive 93/13.233 The CPA does not regulate exceptions prescribed in Annex No. 2 of the Directive 93/13 that allow to states to make certain exceptions from listed terms used by suppliers of financial services and thus the CPA provides a higher level of consumer protection.234 The COA on the other hand introduces neither a black nor a grey list of unfair contract terms, restricting itself only to a general invalidity clause. Since the courts are obliged to observe nullity ex officio (Art. 327 (1) COA), meaning also nullity of an unfair contract term, the introduction of such an indicative list could have been helpful to Croatian courts when interpreting the meaning of criteria from the general invalidity clause in Art. 296 (1) COA. Using the existing legislative framework courts can use the so called grey list of Art. 97 CPA only when deciding on unfair contract terms in B2C contracts, what will rarely be the case, because the courts are ignoring special consumer protection legislation. To our knowledge, there are no court judgments concerning the CPA provisions on unfair contract terms.235 However, ex-Art. 143 COA of 1978 contained in its paragraph 1 a general invalidity clause and in its paragraph 2 the indicative list of unfair terms in general contract conditions. Because of strict obedience of the pacta sunt servanda principle the courts are not fond of declaring nullity of terms in general contract conditions, which has led to quite moderate court practice concerning ex-Arts. 142 to 144 COA of 1978.236 Nevertheless, respective judgments led to a conclusion that beside the general invalidity clause the indicative list of unfair contract clauses was of great use to them. Since neither the COA nor the CPA definitions of unfair contract term specify what is to be understood under evident or significant imbalance in the contractual parties’ rights and obligations, this task is also left to the courts to decide it in each individual case.237 According to Prof. Petrić this problem will especially arise with regard to inominate contracts, since there are no legal provisions about them that reflect the legislator’s opinion on what is to be considered a balanced position in the contracting parties’

233 E.g. transposition of Annex No. 1 lit. b misses the word “inappropriately”, with regard to excluding or limiting the legal rights of the consumer, while transposition of Annex No. 1 lit. i misses the word “irrevocably” and doesn’t qualify consumer’s opportunity to become acquainted with a contract term as “real”. When transposing of Annex No. 1 lit. p, instead of saying “where this may serve to reduce the guarantees for the consumer”, Art. 97 18th indent CPA speak about a term which may “bring the consumer to a less favorable position”.


235 However within the framework of alternative consumers’ dispute resolution there are numerous judgments of e.g. Court of Honour of Croatian Chamber of Economy or of Court of Honour of Croatian Chamber of Trades and Crafts etc. In the latest judgment of Court of Honour of Croatian Chamber of Economy No. P-I-50/10 of 25. March 2011, confirmed after appeal with the judgment No. PŽ-II-13/11 of 7. October 2011, Court of Honour decided that the bank P.B.Z. d.d. is responsible for concluding un unclear and incomplete credit contract with the consumer A.D. because parties were prevented to individually negotiate at the time of contract conclusion and because the contract didn’t contain exact parameters and method of calculation of these parameters which influenced the banks Decision on alteration of contractual interest rates. As a consequence an imbalance between parties’ rights and obligations occurred, based on unilateral augmentation of contractual interest rates. The Court of Honour decided that the provisions of the pre-formulated contract on alteration of interest rate and on currency risks fulfill prerequisites of ex-Art. 81 CPA (now: Art. 96) on unfair contract terms.

236 See supra footnote No. 18.

237 See judgment of County Court in Zagreb, Gž. 3662/02 of 23. November 2004: “When the court examines whether a term of general contract conditions is too harsh on the other party, it needs to determine objectively if it reflects that what is presumed to be common in a certain branch, e.g. it needs to evaluate the common interests of whole circle of users in relation to the interests of draftee of the conditions, in order to evaluate to what extent a certain term of general contract conditions damages the concrete party in the dispute.” See Order of the High Commercial Court of the Republic of Croatia (VTSRH), Pž 3670/04-3 of 24. October 2006: “It is considered that the author of general contract conditions respected the principle of conscientiousness and honesty, if he proceeded honestly and fair to the other party and took its interest always into account. Thus, the court shall be obliged to take into account all different interests that arise in connection with the contract, to estimate negotiation positions and strength of parties, to determine if one of the parties was forced to conclude a certain contract.”
rights and obligations. Herewith, we come to the last rhetorical question, if the courts should be bound by the black or grey list of the unfair contract terms. The experience of some EU Member States demonstrates that the introduction of a black or grey list can also have some negative consequences, since the courts were apt to hold only on terms listed therein. There were cases where the courts uncritically declared contractual terms from the list null and void in any case, or denied nullification of any other clause that wasn’t listed therein, which caused a lower level of protection for the other contracting party.

4. Circumstances of relevance for the fairness test

Beside general circumstances required in Art. 322 (1) COA for the nullity of each contract (contrariety to the Constitution of the Republic of Croatia, to mandatory provisions or to society moral), the CPA by way of transposition of Art. 4 (1) of the Directive 93/13, into its Art. 98 introduced a provision stipulating additional circumstances that should be taken into consideration by the courts while evaluating the unfairness of a contract term. When assessing whether a specific contractual term is fair, the nature of the good or service for which the contract was concluded, all circumstances before and during the conclusion of the contract, other terms of the contract as well as of some other contract which represents the main contract in relation to the contract being assessed shall be taken into account. Also, the grey list from Art. 97 CPA has a certain indicative effect in the assessment of fairness of a clause in B2C contracts. Similarly the COA regulates in Art. 296 (2) that “in evaluating whether a provision in general contract conditions is void, it is necessary to take into account all circumstances before and at the time of conclusion of the contract, the legal nature of a contract, the type of goods or services that constitute the performance, other provisions of the contract and the provisions of another contract with which such provision of the general contract conditions is linked”. All these additional circumstances should be taken into consideration by the courts when deciding whether a certain contract term is contrary to the principle of good faith. Beside this requirement the condition of significant imbalance in the contractual parties’ rights and obligations must cumulatively be fulfilled in order to declare a contract term null and void. Although there are no special guidelines in the CPA or the COA for the interpretation of this question, when a contract term is contrary to the principle of good faith, the general principle stipulated in Art. 4 COA requires from both parties always to take into account each other’s interests when drafting and concluding a contract and when performing contractual duties and fulfilling contractual obligations.

238 Petrić S., Opći uvjeti… (General standard…), op.cit., p. 50. According to Prof. Petrić the fulfillment of this task will be easy when the imbalance between parties rights and obligations is intensive, e.g. clauses in general contract conditions which deprive the other party from rights regulated for a certain type of contracts, clauses which exempt the drafter of general contract conditions from liability or restrict its liability unilaterally, clauses which ascertain to one contractual party rights not granted to it by mandatory provisions, clauses on right to unilaterally or even unlawfully cancel the contract etc.


240 According to Art. 322 (1) COA a contract that is contrary to the Constitution of the Republic of Croatia, to mandatory laws or to society moral is null and void unless the objective of the infringed rule refers to some other legal consequence or the law provides differently in such case. The Constitutional Court of the Republic of Croatia decided in its Decision U-III 380/2001 of 5. May 2004 (OG No. 65/04) that an agreement of unproportionally high interest rates in a credit contract is against basic principles of civil law, i.e. principle of conscientiousness and honesty, principle of equality of parties to obligations, principle of equal value of performances and that contracted obligations are against society moral.

241 Furthermore, the ECJ held in its judgment of 1. April 2004, C-237/02 – Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ulrike Hofstetter und Ludger Hofstetter [2004] ECR I-3403, para. 21 that “the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.”
Thus, the enumerated circumstances will be helpful to courts when deciding whether the mentioned requirements are met. Their task will be even more facilitated if they adopt the Commissions interpretation of Art. 3 (1) of the Directive 93/13, according to which, the contract clause that created significant imbalance to the detriment of the other party cannot be consistent with the principle of good faith.

However, some of the additional circumstances were already criticized in Croatian legal theory and practice. According to the first requirement when assessing whether a specific contractual term is fair, the court must take into account “the nature of the good or service”, which is the object of performance. Due to transposition of Art. 4 (1) of the Directive 93/13, Art. 98 CPA uses the more appropriate term “nature”, while Art. 296 (2) COA uses a more narrow term speaking about the “type” of goods or services. When evaluating the fairness of a term in general standard conditions the court should not restrict itself only to the type of the contracts object but also evaluate all its other characteristics. The requirement for the court to take into account “all circumstances before and during the conclusion of the contract” was found as too narrow, since the circumstances can aggravate for the contractual party also after conclusion of the contract. There are also criticisms pursuant to which this requirement is of no relevance, because most of these contracts are concluded as pre-formulated standard contracts without possibility of negotiation on the content of the clause. Opposite to the Art. 98 CPA, Art. 296 (2) COA further mentions explicitly “the legal nature of a contract”, which is a basic requirement for the court when deciding on a certain contract. The last additional circumstance concerns the most complicated task for courts, namely taking into account other terms of the contract as well as some other contract which represents the main contract (CPA), i.e. the provisions of another contract with which the provision of the general contract conditions is linked (COA). Applying systematic interpretation the court must observe the concrete contractual term not as an isolated clause but as an integral part of the contract or of linked contracts as a whole. The court can only then decide whether the contractual term is unfair, i.e. whether its disadvantages can be compensated by advantages of other contract terms. In this way a certain contractual term which seems to be unfair, can be evaluated as fair in connection with other terms of the same contract or vice versa. This complicated task requires from the court to compare and interpret rights and obligations of contractual parties which are often, like by linked agreements, different with regard to their content, especially since these can be concluded between different contracting parties. Finally it is interesting to notice that the new Proposal for a Regulation on a Common European Sales Law retained basically the same additional circumstances in Art. 83 (2) for B2C contracts and in Art.

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242 The preamble of the Directive 93/13 contains explanations in recital 16: “(…) whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account”.

243 Beside this one, there are two other possible interpretations, one of which includes the mentioned possibility of cumulating these two requirements and another allows the alternative fulfillment of requirements. See Čadjenović Z./Čikara E./Dabović Anastasovska J./Dollani N./Gavrilović N./Karanikić Mirić M./Meškić Z./Zdraveva N., op.cit., p. 467.

244 The concept is to be interpreted as encompassing performance that may consist in giving, acting, omitting or toleration (Art. 269 (1) COA) and all objects of a contractual obligation, meaning all services and all things (movables, immovables and rights) (Art. 2 of the Act on Ownership and Other Real Rights, OG No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09).

245 See Petrić S., Opći uvjeti… (General standard…), op.cit., p. 54.

246 The other contractual party could use clausula rebus sic stantibus regulated in Arts. 369 COA et seq. Possible improvement of circumstances should not affect the once established nullity of a contractual term, if a cause of nullity disappears after conclusion of the contract. See Art. 326 (1) COA pursuant to which a void contract shall not become valid, if a cause of nullity disappears in the future.

247 See Petrić S., Opći uvjeti… (General standard…), op.cit., p. 54.
86 (2) for B2B contracts, with one additional circumstance regarding B2C contracts in Art. 83 (2) (a) concerning traders’ compliance with the transparency duty.

5. Time limits for invalidation

In accordance with the requirements of the Directive 93/13 and the ECJ practice, the relevant provisions of the CPA and the COA do not prescribe a time limit for remedies on invalidating an unfair term or a contract which contains an unfair term. Pursuant to the mandatory provision of Art. 6 (1)248 of the Directive 93/13, the state shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding for the consumer, and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. In its judgment Cofidis, the ECJ came to the conclusion that the Directive 93/13 precludes a national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair.249 Compared to the ECJ judgment Cofidis, neither the COA nor the CPA contain in their general provisions or in their provisions on special types of contracts, a rule prescribing a limitation period for invalidating an unfair contract term. Namely, both the CPA and the COA contain provisions on legal consequences of unfairness of a contractual term (Art. 102 CPA, Arts. 322 et seq. COA). However, the CPA as lex specialis contains no special detailed provisions with regard to nullity, like provisions on invoking nullity, time period for invoking nullity etc. According to Art. 2 (2) CPA, unless otherwise provided in the CPA, B2C contracts shall be subject to provisions of the COA as lex generalis. General provisions of the COA on the nullity of contracts (Arts. 322 et seq. COA) contain the rule on time period for invoking nullity in Art. 328. Pursuant to this provision, the right to invoke nullity does not lapse, i.e. the time period for invoking nullity is unlimited.

6. The “ineffectiveness” or the “non-binding nature” of an unfair term

In accordance with requirements of Art. 6 (1) of the Directive 93/13, the Croatian legislator regulated in Art. 102 (1) CPA that “an unfair contractual term is null and void”. The COA contains a corresponding provision in Art. 296 (1) (in connection with Art. 322)250 regulating nullity of unfair contract terms in general contract conditions.251 Although Art. 6 (1) of the Directive 93/13 raised the question of the concept of nullity of an unfair term, the ECJ practice rejected the concept of relative nullity and confirmed the concept of absolute nullity in its judgments Océano, Cofidis and Mostaza Claro.252 The latter concept was also followed by the Croatian legislator who prescribes absolute nullity as a consequence of unfair contract terms. Furthermore, according to the principle utile per inutile non vitiatur contained in Art. 6 (1) of Directive 93/13, Art. 102 (2) CPA regulates that the nullity of a certain contractual term does not entail the nullity of the contract itself, if the contract can survive


250 See supra footnote No. 47.

251 Old Art. 143 COA regulated two consequences of unfair terms in general contract conditions: absolute nullity and a possibility for the court to deny the use of e.g. set aside a particular term that is not null and void but is unfair or too harsh (relative nullity). See judgment of High Commercial Court of the Republic of Croatia (VTSRH), Pž 7102/2003 of 19. September 2007: “The court can deny the application of certain terms of general contract conditions which are unfair to one of the contracting parties, in other word which are contrary to the principle of equal value of performances”. See also judgments of Supreme Court of the Republic of Croatia: VSRH, Rev 819/1996 of 7. March 2000, VSRH, Gzg 19/2004-2 of 25. February 2008.

without the null and void term. Same consequences are prescribed in Art. 296 (1) COA in connection with Art. 324 COA (partial nullity) within the COA general provisions on the nullity of contracts (Arts. 322 et seq. COA). Art. 324 (1) COA regulates partial nullity for all types of contracts by stipulating that if “one clause of a contract is void, this shall not result in rendering the contract void, provided that the contract may survive without such void clause and that the clause was neither a condition nor a decisive motive for entering into the contract”. In case the nullity is established in order to eliminate a void clause from a contract and to maintain the validity of the contract, the contract shall remain valid even if this void clause was a condition or a decisive motive for the contract (Art. 324 (2) COA). A corresponding provision can be found in the new Proposal for a Regulation on a Common European Sales Law, according to whose Art. 79, a contract term which is supplied by one party and which is unfair (...) is not binding on the other party (para. 1) and where the contract can be maintained without the unfair contract term, the other contract terms remain binding (para. 2). Thus special CPA and general COA provisions on the nullity reflect the idea of the Directive 93/13 regarding maintenance of the contract in the best interest of the weaker contracting party, when it is possible for the contract to survive without the unfair contract term (partial nullity).

Like the Directive 93/13 itself neither the provision of the CPA nor of the COA contain rules on partial retention, i.e. preservation of the unfair clause with a content which is still permissible, e.g. on alteration, amendment and adjustments of unfair terms in contracts. However, Art. 329 COA contains a rule on usury contracts, under which the damaged party may request from the court the reduction of the contractual obligation to a just amount within five years from the conclusion of the contract. The court shall meet this request if possible, and the contract shall be valid with the corresponding alteration. Also, Art. 354 COA regulates the possibility for the court to reduce the sum of the contractual penalty at the request of the debtor, if it finds that the sum is disproportionately high with regard to the value and the significance of the subject of the obligation.

Finally, just like the provisions of the Directive 93/13, neither the CPA nor the COA contains a rule on unfairness e.g. nullity of written contract terms which are contrary to the requirements of Art. 5 of the Directive 93/13, namely not drafted in plain, intelligible language. Art. 100 CPA regulates that „when the law or an agreement of the parties provides that the contract must be in a written form, the contractual terms must be written clearly and understandably and must be easily noticeable”. By prescribing that the contractual terms must be “easily noticeable”, the Croatian legislator introduced a higher level of consumer protection, covering different trader techniques like clauses in small print etc. Although the same provision cannot be found in the COA with regard to general standard terms, it might be argued that Art 295 (4) COA follows the equivalent reasoning by prescribing that „general contract conditions must be published in a usual manner”. The problematic

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253 Upon revision in case VSRH, Rev 749/2006-2 of 10. October 2006, the Supreme Court of the Republic of Croatia abolished judgments of Municipal and County Court in Zagreb and referred the case back to lower court instance. Although the courts of lower instance dismissed the action because of expired five years time period, the Supreme Court found that the plaintiff rightly argues that the agreed interest rate of 30% (lowered to 15%) is null and void in the amount which goes beyond 9% and that the right to invoke nullity does not lapse.

254 Similarly to the original text of this provision from the Directive, Art. 31 (2) of the Commission’s Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final, introduced new transparency requirement, pursuant to which contract terms must be “made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract”. This provision has not entered into the Directive 2011/83/EU of the European Parliament and of the Council of 25. October 2011 on consumer rights.

255 There are views in legal theory that the recital 20 of the preamble of Directive 93/13 restricts the interpretation rule to clauses that have not been drafted in plain language, which further implies that for plain, but unintelligible clauses there are no legal consequences. Such an interpretation of the Directive would, however lead to very unusual consequences. For instance, Art. 101 (1) speaks about “dubious or unintelligible contractual terms”, while Art. 320 (1) COA mentions “unclear clauses”. 

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issue here certainly is the meaning of “in a usual manner.” This provision is followed by Art. 295 (5) COA that stipulates, that general contract conditions are binding for a contracting party if that party was acquainted or should have been acquainted with them at the time of the conclusion of the contract. This provision serves inter alia for the fulfillment of the purpose of Art. 295 (4) COA, i.e. of the transparency requirement. Since the lack of transparency cannot lead to unfairness i.e. invalidity of a certain term, the only consequence for the breach of the transparency requirement is to be found in the interpretation rule of Art. 5, 2nd sentence of the Directive 93/13. This rule was transposed in Art. 101 (1) CPA, which prescribes that “dubious or unintelligible contractual terms are interpreted in a manner that is more favourable to the consumer”. This rule is however not applicable in proceedings for the protection of collective interests of consumers initiated according to Art. 131 CPA, which restricts its use to procedures initiated by individual actions only (Art. 101 (2) CPA). An equivalent contra proferentem rule can be found in Art. 320 (1) COA, which regulates that “where a contract is concluded according to a previously printed content, or where a contract was prepared and proposed by one contracting party, any unclear clause shall be interpreted in favour of the other contracting party.”

7. Ex-officio declaration of the contract term as unfair

As described above, Art. 102 CPA contains only one rule on the nullity as a consequence of unfairness of the contractual term in B2C contracts. However, it contains no special detailed provisions concerning nullity, like provisions on consequences of nullity, on subsequent disappearance of the cause of nullity, on invoking nullity, on time period for invoking nullity etc. These are regulated in the general provisions of the COA on the nullity of contracts (Arts. 322 et seq. COA) which are thus applicable to all contracts. With regard to these matters, unless otherwise provided in the CPA, the COA provisions apply as lex generalis (Art. 2 (2) CPA). According to Art. 327 (1) COA on invoking nullity the court examines the matter of nullity ex officio and any interested party may invoke nullity. According to Art. 327 (2) COA even a state attorney is entitled to request the establishment of nullity. Although the latter provision is applicable to all contracts, the primarily purpose of this provision on state attorney control were most probably B2B contracts. However, there is no doubt about its relevance for the private consumer contract law, especially regarding the large number of contracts which public sector undertakings acting as traders conclude through pre-formulated contracts with

256 Prof. Petrić points out that there are more possible interpretations of the wording of the provisions, which could include publication in official journals or publication in business premises of the drafter of general contract conditions. The question has also been raised whether general contract conditions should be made available only to the concrete contracting party or to the wider public. The validity of general contract conditions is not made conditional upon their publication. Their validity depends on the fulfillment of requirements from Art. 295 (5) COA. See Petrić S., Opći uvjeti… (General standard…), op.cit., p. 38.

257 Recital No. 20 of the Directive 93/13 provides that “the consumer should actually be given an opportunity to examine all the terms”. Also, Annex No. 1 lit. i stipulates that a term that “irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract” may be deemed unfair.

258 The new Proposal for a Regulation on a Common European Sales Law regulates with regard to B2C contracts a duty of transparency for contract terms not individually negotiated. Art. 82 stipulates that where a trader supplies contract terms which have not been individually negotiated with the consumer (...) it has a duty to ensure that they are drafted and communicated in plain, intelligible language. Beside consequences in form of the mandatory interpretation rule of Art. 64, Article 81 of the Proposal prescribes the mandatory nature of the whole Chapter 8 on unfair contract terms. Art. 64 regulates that where there is a doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.
The nullity of a contract term does not render the consumer contract void in its entirety, if the contract can survive without such void clause (Art. 102 (2) CPA; Art. 324 (1) COA). Except for provisions on usury contracts (Art. 329 COA) and on contractual penalty (Art. 354 COA), there are no rules on the matters of alteration, amendment or adjustments of unfair contract terms. The provisions of the Croatian law on unfair contract terms are thus in accordance with the developed ECJ jurisdiction, according to which the national courts must have the power to review the fairness of a contract term on their own initiative. As stated in Oceano the aim of the mandatory provision of Art. 6 (1) of the Directive 93/13, which requires states to lay down that unfair terms are not binding on the consumer, could not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. As further acknowledged in Oceano, the effective protection of the consumer may be achieved only if the national court has the power to evaluate unfair contract terms of its own motion. Although in its judgments Claro and Cofidis, the ECJ went a step further by arguing that the national court has an obligation to evaluate unfair contract terms ex officio, the ECJ cases Pannon, Rodríguez and Pohotovost made this obligation conditional upon the actual possibility of the national court to examine the unfairness of a contract term with regard to the availability of necessary legal and factual elements. The concretization of this obligation came in the recent ECJ judgment Pénzügyi Lízing, where firstly, the obligation for the national court to investigate of its own motion whether a contract term falls within the scope of Directive 93/13 was established, and secondly, the obligation for the national court to assess of its own motion whether a contract term is unfair was achieved only if the national court has the power to evaluate unfair contract terms of its own motion.

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259 This concerns primarily public sector undertakings which provide public services because of their enterprise (company) status. According to Art. 24 (1) CPA public services shall mean: electricity distribution and supply, natural gas distribution and supply, thermal energy distribution and supply, fresh water supply, waste water drainage and purification, public passenger transport, postal services, maintenance of cleanliness, municipal waste disposal, maintenance of cemeteries and crematories, including transport of the deceased, chimney–sweeping craft, and public telecommunications services. There were several opportunities for the Constitutional Court of the Republic of Croatia to decide on constitutionality and legality of general contract conditions of public services providers prescribed in their ordinances, like for instance in Decision U-II/2188/2011 of 9. July 2003. The Constitutional Court established that Art. 50 (1) of Ordinance on General Contract Conditions for Providing Telecommunication Services is inter alia contrary to the principle of equal value of performances (ex Art. 15 COA (now Art. 7 COA)) and abolished this provision. The provision stipulated that the telephone subscription fee is remuneration for readiness of telecommunications system.

260 The procedure can be initiated against an individual trader, a group of traders from the same economic sector, traders' chambers, against traders' interest associations or against the drafter of the traders' code of conduct. The court decision shall determine, define and order cessation of infringement, order removal of detrimental consequences and prohibit similar behavior in the future with respect to all consumers. The damaged consumer can initiate an individual procedure for compensation or procedure for contract nullity etc. See Tomljenović V./Čulinović Herc E./Butorac Malnar V. (eds.), Republika Hrvatska na putu prema Europskom pravosudnom području, Rješavanje trgovačkih i potrošačkih sporova (The Republic of Croatia on its Way to the European Judicial Area, Settlement of Commercial and Consumer Disputes), Rijeka, Pravni fakultet Sveučilište u Rijeci, 2009.


confirmed. Although a rich practice of the Court of Justice of the European Union on unfair contract terms gives detailed guidelines to our national courts regarding application and interpretation of transposed provisions, this could in the near future represent a difficult task for them.

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264 See the ECJ judgment of 9 November 2010, C-137/08 – V&B Pénzügyi Lízing Zrt. v Ferenc Schneider, OJ C 013, 15.01.2011., p. 0002. The Court has not adopted the Opinion of Advocate General Verica Trstenjak regarding the third additional question referred, where Advocate General stated that beside the general obligation for the courts to examine the fairness of terms on their own motion, there is no obligation to determine legal and factual circumstances needed for this examination, where national procedural law permits such an examination only on application by the parties and the parties have not made any application to that effect.

265 See Opinion of Advocate General Trstenjak delivered on 14 February 2012 in Case C618/10, Banco Español de Crédito, SA v Joaquín Calderón Camino where AG pointed out that Directive 93/13 is to be interpreted to the effect that it does not require a national court, in the context of a national order for payment procedure, to give a ruling of its own motion and in limine litis on whether a term concerning interest on late payments in a consumer credit agreement is not binding, provided the assessment of whether that term is unfair can be transferred, in accordance with the national procedural rules, to an inter partes procedure to be initiated through an appeal brought by the debtor, in which the national court is given the opportunity to obtain the legal and factual elements necessary to conduct such an assessment. AG also confirmed that Art. 6(1) of Directive 93/13 precludes a national provision which authorises the national court to modify a consumer agreement so as to replace an unfair contractual term by another term which is not to be regarded as unfair. In another case C453/10 Advocate General Trstenjak in Opinion delivered on 29.11.2011, Jana Pereničová, Vladislav Perenič v S.O.S. financ, spol. sro AG held that Art. 6(1) Directive 93/13 does not concern the question whether the invalidity e.g. nullity of whole credit contract containing numerous unfair terms is a more advantageous legal consequence to the consumer, but nothing precludes states to prescribe such a consequence in their national legislation. AG also found that quoting in the credit contract a lower annual percentage rate (APR) than is in fact the case represents an unfair commercial practice, which national judge can take into consideration as an additional circumstance while evaluating the unfairness of a contract term.
D. Unfair Contract Terms in the Contract Law of the Republic of Macedonia

Neda Zdraveva, Nenad Gavrilović, Borka Tuševska, Skopje/Stip

1. Legal debate in Macedonia whether to include the unfair contract terms in the general contract law within the Law on Obligations/future Civil Code.

The answer to the question what would constitute a contract term in the recent years, especially with the introduction of the e-commerce, is changing. Traditionally a contract is understood as a legal act that the parties have negotiated and agreed upon. The changes in the manners of trade of goods and services have brought a new light to this definition. Very often in the contemporary trade the parties (only) agree to what has been proposed and drafted by the other party. This provides for an opportunity such position to be misused to the detriment of the other party, which does not have the time or the knowledge to properly understand the meaning of specific contract clauses. The law is not and cannot be silent on this situation. Its role is to provide grounds for fair dealings and equality of the parties. The legal mechanisms for the assessment of the fairness of specific contract terms exist for this purpose.

The issue of the unfair contract terms in the Macedonian legislation is regulated by two sets of rules – the rules of the Law on Obligations (hereinafter: LOO), as *lex generalis*, and the rules of the Law on Consumer Protection (hereinafter: LCP) as *lex specialis*.

The LOO regulates the general rules of the contracts and within this ambit the unfair contract terms regardless of the contracting parties, while the LCP regulates the issues related to the consumer contracts. Thus, the provisions of the LCP related to unfair contract terms apply only on contracts B2C. However the Law on Obligations provides for options and rules for review of unfair clauses in B2B contracts. The P2B contracts are regulated in the Law on Public Procurements; however, the Law does not regulate the issues related to unfair contract terms.


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271 Law on Obligations, Official Journal of SFRY No. 29/78, 39/85, 46/85, 45/89 and 57/89.
applicable in Macedonia till 2001, in accordance with Article 5 of the Constitutional Law for the Application of the Constitution, and later on replaced by a new Law on Obligations from 2001 (subsequently amended), contained two articles regarding general terms and conditions of the contract. Neither of them included a detailed description or definition of unfair terms. Art. 130 of the LOO in its version of 2001 defined the “general terms” and their application. In Art.131 it is provided that any provisions of general terms that are contrary to the purpose of the contract or the morals, are null and void even if the general terms that are part of their content are approved by competent body. Further, the court could reject the application of individual provisions of general terms and conditions that deprive another party’s right to object, or provisions based on which a party loses contractual rights or deadlines or that are otherwise unjust or too strict for the party. In 2008, LOO was significantly amended. As stated in the Explanation to the Proposal for Amendments of the Law on Obligations, the main reason for the amendments was, in order to meet the obligations the Republic of Macedonia undertook, by signing the Stabilisation and Association Agreement, to create the necessary conditions for unimpeded and efficient trade of goods and services. This obligation, seen through the prism of the obligation for approximation of the national legislation with the Acquis, created the need for transposition of relevant directives into the Law on Obligations as the main legal act regulating the trade of goods and services. However, the process of transposition was understood as a process in which the compactness of the Law is taken into consideration as it is a systemic law that regulates the legal transactions in general. This was further explained with the fact that the directives, in particular, refer to reaching the goals and aims that they set rather to ad litteram inclusion of their provisions into the national legislation. One of the interventions made, with the amendments of the LOO, was in the provisions regulating the general contract terms (Art. 130) and absolute nullity of certain provisions of the general contract terms (art. 131) aimed at their approximation with the Directive 93/13.

As result, Article 131 was extended with two more paragraphs, and the existing paragraphs were re-drafted. Now the LOO provides clearly and in line with the Directive 93/13 sets the conditions for absolute nullity of provisions of general contract terms. Further it defines the issues that should be taken into consideration by the courts in the assessment of the provisions for the declaration of their absolute nullity. At the end, the provision defines the cases of the exclusion of the application of absolute nullity. The LOO does not provide for full transposition of the Directive 93/13 as it was already transposed in the consumer protection legislation.

The first Law on Consumer Protection from 2000 contained three articles covering the general issues related to unfair terms. The Directive was transposed, but the transposition was not complete. The LCP from 2004 (amended in 2007, 2008 and 2011) provides for full implementation of the Directive 93/13, containing 30 provisions (articles) related to the issues of the unfair contract terms. The LCP in Article 53, par 1 defines: As unfair contractual term shall be regarded a contractual term which has not been individually negotiated if contrary to the principle of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. The specific provisions of the LCP related to the unfair terms shall not be applied to individually negotiated terms; however the general rules on absolute nullity of the LOO could be applied.

273 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Macedonia, of the other part; signed on 26.03.2001; Offi cial Gazette of the Republic of Macedonia – International Agreements No.28/2001.
With the decision of the Government of the Republic of Macedonia in December 2010, a Committee for the development of Civil Code of the Republic of Macedonia was established. The first task of Committee is to assess the existing corpus of the Civil Law in Macedonia and first and foremost to decide the general content of the Civil Code. The Sub-Committee on the Law of Obligations is in process of revising, among other things, to what extent the specific consumer protection regulation shall be included in the Civil Code and how this will affect the other, related, issues of the contract law. In the process of decision-making the adoption of the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (hereinafter Consumer Rights Directive) and the Proposal for a Regulation of the European parliament and of the Council on a Common European Sales Law (hereinafter: the Optional Instrument) shall be taken into consideration. The Consumer Rights Directive adopted the targeted harmonisation approach, attempting to balance the issues in their importance for the internal market (so to speak, to balance the most important vis-à-vis the less important issues), thus requesting full harmonisation for the first and minimum harmonisation for the second. The adoption of such approach could affect the legislative approach in the transposition of the Consumer Rights Directive in the Member States. On the issue of the unfair contract terms the Consumer Rights Directive, except for the minor intervention on the notification issues regulated in Directive 93/13, remained silent. The position that was undertaken with the Proposal for Consumer Rights Directive in regard to the unfair contract terms found its way in the Optional Instrument, where now the regulation in tacit is extended to B2B contracts. However, the dilemmas (and criticism) on their (side) effects and application in the national legislation of the Member States remained. The Sub-Committee on the Law on Obligation is without any doubts that the adoption of the Optional Instrument will affect the national Contract Law. As for the current state of the EU legislation and the national legislation the position is that the Civil Code should contain only the general issues of the consumer protection, while the specific ones should remain in a separate regulation. On the issue of the unfair contract terms it is assessed that the current legislation is aligned with the existing EU legislation and the generalness of the rules contained in the Law on Obligations provides adequate framework for the protection of the parties affected by possible unfair contract terms.


278 The extension of the protection to certain businesses is now, as possibility, seen in point 13 of the Recital of the Consumer Rights Directive that provides “...Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises...”


280 Interview with prof. Gale Galev and prof. Jadranka Dabovic Anastasovska, coordinators of the Sub-Committee on Law of Obligations. The results of the review have been presented on a conference January 2012.
2. Unfair contract terms in B2B contracts

The control of the unfair contract terms in the Republic of Macedonia is regulated by the law on Obligations and the Law on Consumer Protection. The Law on Consumer Protection regulates the contract terms in the B2C contracts, while the Law on Obligations, as stated regulates all contractual relations. In the LOO, however the unfair contract terms are predominantly related to the general contract terms. Namely, the LOO operates with the term absolute nullity of a term of general contract terms, definition of which corresponds to the definition of unfair contract terms of the Directive 93/13 (Art. 3 (1)). The general contract terms, by Art. 130 (1) are defined as 'contract clauses compiled for a number of contracts which one of the contracting parties (compiler), before or at the time of the conclusion of the agreement proposes to the other contracting parties, regard-
less if they are contained in a formulary (standard) contract, or the contract refers to them'. The LOO further regulates that the general contract terms supplement the specific agreements (individually negotiated agreements) made by the parties, and as a rule oblige the parties in the same manner as the specific agreement (Art. 130, par. 2). The LOO, however conditions the obligatory force of the general contract terms, with the awareness of the other contracting party on their content stipulating that they 'oblige the other party if they have been (to the other party) or must have been known in the moment of the conclusion of the contract' (Art. 130, par. 5). The compiler, in this regard, is obliged to publish the general contract term in the usual manner (Art. 130, par. 4). The LOO also provides that in the case of discrepancies between the general terms and the specific agreements, the specific agreements prevail (Art. 130, par. 3). Having in mind these provisions of the LOO, the condition of Art. 3(1) of Directive 93/13 that a term in order to be regarded as unfair should not be individually negotiated, whereas under Art. 3(2) first sentence a term shall always be regarded as not individually negotiated where it has been drafted in advance, is fulfilled. The further requirements of Art. 3(1) of the Directive 93/13 for a contract term to be regarded as unfair, i.e. a) to be contrary to the requirement of good faith, b) to cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (in this case the other contracting party) are to be found in the provisions regulating the absolute nullity of certain provision of the general contract terms. As stated, Art. 131 has been amended in 2008 to provide for transposition of the Directive 93/13. The (new) Art. 131, par. 1, provides for absolute nullity of the provisions of general contract terms which 'contrary to the principle of good faith and fair dealing, cause a significant imbalance in mutual rights and obligations of the parties and as such create a possibility of damage to the contracting party of the compiler or if they endanger the accomplishment of the aims of the concluded contract, even in cases when the general contract terms that include this provisions are approved by a competent state body'. Further, the LOO provides that the courts may reject the application of certain provisions of the general terms that deprive the other party of the right to object, or those on the base of which the other party loses rights from the contract or loses the right in relation to deadlines, or those which are in other ways unjust or severely strict to the other party (Art. 131, par. 2). However, the nullity shall not be applied to the provisions of the general contract terms whose content has been taken from the applicable legislation or content of which has been negotiated so that the other party could have influenced their content, as well as on the provisions

281 The provision of par. 5 should be interpreted in accordance with Art. 15 of LOO. Namely, what should be considered as usual manner of publication of the general contract terms depends on the business in which they are applied, as well as on the commercial usages and practices that are established in the respective trade sector.

282 This provision corresponds to Art. 53, par. 1, of the LCP which defines as follows: As unfair contractual term shall be regarded contractual term which has not been individually negotiated if contrary to the principle of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. By this, basically, there is a word for word transposition of the concept of the Unfair Contract Term in the Macedonian legislation.

283 Similarly, the LCP in Art. 82 defines that the unfair contract terms are absolutely null.
of the essential elements of the contract provided that they are clear, understandable and easily perceivable (Art. 131, par. 4). These provisions are applicable both to B2B and B2C contract as the LCP acts as lex specialis in the field of the consumer protection i.e. the B2C, while the general provisions on contracting and liabilities arising out of contract are regulated in the Law on Obligations. This is in particular regulated by Art. 2, par. 1 of the LCP which provides that the provisions of the LCP do not affect the rights that the consumers have on the basis of other laws, and par. 3 which specifies that ‘unless differently regulated by this Law, on the contracts and other obligations in the trade of goods and services the provisions of the Law on Obligations shall be applied’. In regard to the unfair contract terms, the application of same provisions for the B2B and B2C contract is especially seen in the consequences of the absolute nullity of an unfair contract term. Namely while the LCP in Art. 82 defines that the unfair contract terms are null and void it does not stipulate the consequences. They are determined by the LOO via application of Art. 2, par. 2 of the LCP. Put this way, one concludes that the unfair contract terms in B2B and B2C have similar provisions on the general definition of an ‘unfair contract term’ and same provisions are applied in regard to the absolute nullity i.e. the provisions of Art. 95 – 102 of LOO.

3. Definition of unfair contract terms and its concretization in the black or grey list; role of courts in interpreting unfair contract terms

The Macedonian legislation has two definitions of unfair contract terms – one contained in the LOO and one in LCP, which beside the general definition provides a list of cases when particular contract terms will be considered unfair, thus null and void.

The LOO in Art.131, par. 1 provides that terms of general contract terms that contrary to the principle of good faith and fair dealing, cause a significant imbalance in mutual rights and obligations of the parties and as such create a possibility of damage of the contracting party of the compiler or if they endanger the accomplishment of the aims of the concluded contract, even in cases when the general contract terms that include this provisions are approved by a competent state body, shall be null and void. Further, the LOO provides that the courts may reject the application of certain provisions of the general terms that deprive the other party of the right to object, or those on the base of which the other party loses rights from the contract or loses the right in relation to deadlines, or those which are in other ways unjust or severely strict (Art. 131, par. 2).

Similarly, the LCP in Art. 53 par. 1, provides that as unfair contractual term shall be regarded a contractual term which has not been individually negotiated if contrary to the principle of good faith and fair dealing, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Further the LCP specifies that a particular contract terms shall be considered as not to be individually negotiated if it has been drafted by the trader and the consumer had no influence on its content, especially if it is a case of terms that are in advance formulated in a standard contract of the trader. The burden of proof whether or not a contract term is individually negotiated is placed upon the trader (Art. 53, par 2 and 3). Defining in general manner the unfair contract terms this way the LCP goes beyond the scope of the LOO and Directive 93/13, providing that even a term of an individual contract could be considered unfair, if the particular contract term has not been negotiated between the parties. As we will see, the ‘black

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284 Similarly, in accordance with Art. 53, par. 4 of the LCP the provision on the absolute nullity of the unfair contract terms shall not be applied to contracts in which mandatory provisions are included.

285 Art. 5, LOO: In the creation of the obligation relations and the fulfilment of the rights and obligations of those relations the parties are obliged to uphold the principle of good faith and fair dealing.
list’ of unfair contract terms provides that even individually negotiated terms, if they meet the criteria set depending on their object or effect, will be considered unfair and so absolutely null.

To conclude, the definitions provided in LOO and LCP are complementary and provide for full transposition of Art. 3(1) of Directive 93/13. Further on, the LCP specifies the cases when a contract term shall be considered unfair. Considering the broadness of the general definition of unfair contract term, set by Art. 53, par. 1 of LCP, it should not be considered that the list provided in the LCP is an exhaustive one and that it refers only to the contract terms which have not been individually negotiated. All other situations, that are not included, which meet the criteria set in Art. 51, par. 1 shall be considered as unfair and so absolutely null.

According to Art. 3(3) of Directive 93/13, the “Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.” This, so called grey list of Annex 1, in the Consumer Protection legislation in Macedonia is transposed, although not in its entirety as a ‘black list’. The LCP specifies 26 cases when a particular term shall be considered unfair and so null and void, without relating them to the general condition that they are not individually negotiated. Stipulating this way in the case of the B2C contracts, the LCP provides broader protection of the consumers. The LCP specifies as unfair the terms which have the object or effect of:

- Condition whose realisation depends solely on the will of the trader (Art. 54 of LCP, corresponding to point c of Annex 1 of Directive 93/13);
- Determination or increase of price based on elements determined by the trader (Art. 55, par 1 corresponding to point (l) of Annex 1 of Directive 93/13);
- Unilateral alteration of characteristics of the product or service to be provided by the trader (Art. 56 of LCP corresponding to point (l) of Annex 1 of Directive 93/13);
- Right of the trader unilaterally to determine or alter the period for delivery of the product or the service (Art. 57 of LCP, outside the ambit of Annex 1, provided in accordance with Art. 8 of the Directive 93/13);
- Right to determine whether the goods or services supplied are in conformity with the contract, or right to interpret any term of the contract (Art. 58 of LCP corresponding to point (m) of Annex 1 of Directive 93/13);
- Obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his or is in default (Art. 61 of LCP corresponding to point (o) of Annex 1 of Directive 93/13);
- Limitation of the right of the consumer to terminate the contract when the trader does not fulfil its obligations under guarantee (Art. 60 of LCP, outside the ambit of Annex 1, provided in accordance with Art. 8 of the Directive 93/13);
- Total or partial non-performance or inadequate performance (Art. 61 of LCP corresponding to point (b) of Annex 1 of Directive 93/13);
- Unilateral alteration of the terms of the contract (Art. 62 of LCP corresponding to point (j) of Annex 1 of Directive 93/13);
- Limitation of the right to terminate the contract in events of force majeure by compensation of damages (Art. 63 of LCP, outside the ambit of Annex 1, provided in accordance with Art. 8 of the Directive 93/13);
- Exclusion of the traders’ liability for damages in cases of fault or non-performance of obligation that is essential element of the contract (Art. 64 of LCP, outside the ambit of Annex 1, provided in accordance with Art. 8 of the Directive 93/13);

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286 The Directive 93/13 does not exclude the individually negotiated terms; see recital 16 of Directive 93/13.
287 Points (d), (g), (i) of Annex 1 of Directive 93/13 are not transposed.
Exclusion of liability for legal and hidden material deficiencies of the product (Art. 65 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13);

Forbidding compensation of the mutual obligations when conditions set by law are met (Art. 66 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13);

Imposing unreasonable period in which the consumer should notify the trader for the deficiencies of the product (Art. 67 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13);

In advance fixing the amount of compensation of damages – contractual penalty that the consumer should pay to the trader in case of non-performance of his obligation, while there is no such obligation for the trader (Art. 68 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13);

Setting indefinite period for performance of the obligation by the trader, without providing reasonable period for termination of the contract (Art. 69 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13);

Automatically extending a contract of fixed duration (Art. 70 of LCP corresponding to point (h) of Annex 1 of Directive 93/13);

Excluding or hindering the consumer’s right to take legal action; restricting the evidence available or imposing a burden of proof (Art. 71 of LCP corresponding to point (q) of Annex 1 of Directive 93/13);

Disproportionately high sum in compensation (Art. 72 of LCP corresponding to point (e) of Annex 1 of Directive 93/13);

Exclusion of liability in event of death or personal injury (Art. 73 of LCP corresponding to point (a) of Annex 1 of Directive 93/13);

Right to dissolve the contract on a discretionary basis and retain the sums paid for services not yet supplied in case of dissolving the contract by the seller (Art. 74 of LCP corresponding to point (f) of Annex 1 of Directive 93/13);

Limitation of commitments undertaken by agents (Art. 75 of LCP corresponding to point (n) of Annex 1 of Directive 93/13);

Inappropriate exclusion or limitation of the rights and duties of the consumer set by Law, in regard to the trader or third parties in cases non-performance or partial performance of the trader (Art. 76 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13);

Possibility of transferring his rights and obligations under the contract (Art. 77 of LCP corresponding to point (p) of Annex 1 of Directive 93/13);

Exclusion of the review whether contract term is unfair (Art. 79 of LCP, outside the ambit of Annex I, provided in accordance with Art. 8 of the Directive 93/13).

As for the control of the ‘fairness’ of certain contract terms, two mechanisms are available depending if the contract is B2C or B2B contract. In both cases it is the court that assesses whether a provision is unfair and so absolutely null. The differences are seen in the active legitimation for bringing an action (declarative) and the effects of such action. In the case of B2B contracts the action could be brought by the affected party, any person who has a legal interest and the public prosecutor (Art. 101, LOO). If the court finds that the particular provision meets the criteria for its declaration as absolutely void it shall declare it and the particular provision shall not have any effect. The absolute nullity of a certain provision shall not affect the contract in whole, if the contract could survive without the null provision and if this provision was neither the condition nor the determining factor.
for the contracting. By exception, even in the cases when the null provision was the condition or the
determining factor for the contracting, the contract may retain its force if the nullity was determined
exactly for the purpose the contract to be freed of it and its effect to continue. So, in the cases of B2B
contracts the declaration of the absolute nullity of a certain provision would affect only the contract
in which it is contained (Art. 97, LOO). In the cases of B2C contracts the action before the court could
be brought by the affected consumer, and the parties which in general have such right under the
LOO, but also could be a matter in a collective redress. However, the regulation of the collective
redress in regard to the unfair contract terms is ambiguously regulated in the national legislation.
Namely, the LCP, in Art. 83 provides that any person who has a justified interest in the consumers’
protection, as well as the consumers’ associations, may request from the court to declare as abso-
lutely null a contractual provision, if it is determined that such provision is unfair in accordance with
the law, which is in line with Art. 7 of the Directive 93/13. The procedure may be initiated against a
trader, a number of traders in the same business activity, as well as an association of the traders who
use such unfair provisions. The Law on Contentious Procedure, however, does not have a provision
recognising the legitimation of such parties to proceedings. The issue is further complicated with
the fact that the LCP does not contain a special provision on the effects of such action. On the other
hand, conflict in the regulation is caused with the introduction, in 2011, of new provisions in the LCP
regulating the collective redress. The newly introduced Art. 31- h determines that any authorised
body may propose to the competent inspectorate to initiate a procedure for the seizure of the ac-
tivities that are contrary, among other things, to the provisions of Art. 53-83 (the provisions regula-
ting the unfair contract terms). The procedure may be initiated against a trader or group of traders for
the same business activity. This does not preclude the competent authority to undertake procedure
on its own initiative. One could argue that it is the substantive law that provides the right of the
consumers’ organisations and the competent authority to initiate action for declaration of absolute
nullity in the cases of B2C contracts. However, the lack of procedural regulation may hinder the re-
alization of such rights. In addition, the effect of such action is not regulated. If one starts from the
inter partes effect of the obligations and the effect of the judgment only on the matter of the dispute
and the parties to the dispute, a question is raised how such action and consequently declarative
judgement could affect all of the (existing and future) contracts containing unfair contract terms.

There is lack of court practice, or better said publicly available court practice, which would
enable a qualitative review on the role of the courts in the interpretation of the unfair contract terms.
There is no available data on the number of court proceedings for declaration of contract terms as
absolutely null, and the substantive results of such proceedings. Although the Supreme Court of
the Republic of Macedonia publishes review of its decisions, only a limited number of judgments
are published. The authors of this text are not aware of any decision in regard to the unfair contract
terms that would provide insight of the courts position in the interpretation of the contractual terms

288 It is to be noted that the term ‘justified interest’ is not a usual term in the national legislation. The LOO operates with the term ‘legal
interest’.
23 April 2009 on injunctions for the protection of consumers’ interests, OJ L 110/30; the quality of the newly introduced solut ions is
disputable.
291 In accordance with Art. 33-i the list of authorised bodies for the protection of the interests of the consumers is determined by the
Government of Republic of Macedonia upon proposal from the Minister of Economy.
292 As result of this provision of the Law, the Consumers’ Organization of Macedonia assessed the general contract terms of the providers
of mobile telecommunication services. The findings were presented to the regulatory agency in the field (Agency for Electronic Com-
munications). As result, the agency issued new rulebook on the content of the General Contract Terms - Rulebook on the type and the
content of the data that the operators of the public communication networks and/or the providers of the public telecommunication
services are obliged to publish in regard to the general terms for the access and use, proves and tariffs and the parameters of quality
of the public communication services (Official Gazette of the Republic of Macedonia, No. 35/2011).
and the assessment of their (potential) unfairness. From legislative and theoretical point of view the courts should apply the specific and the general rules of the interpretation of the contract clauses. These rules are comparatively similar both for the B2B and B2C contracts. Namely the LOO provides, as general rule, that the contract clauses are applied as they are, however in the interpretation of the clauses the literal meaning of the used phrases should not be accepted. In the process of interpretation, the courts in these cases, should assess the intention of the parties and the clause should be understood in the light of the principles of the Law on Obligations (Art. 91). The LOO, however, regulates in particular the interpretation of contracts that have been concluded on previously determined content. This provision is in particular important in the light of the unfair contract terms as by LOO they are predominantly connected to the general contract terms and the formulary and standard contract. For this cases LOO in Art. 92 provides that in the case when the contract is concluded in accordance with content that has been determined in advance, or when the contract was prepared and proposed by one of the contracting parties, the unclear clauses shall be interpreted in favour to the other party. Similar provision can be found in the LCP, where in Art. 90 it is defined that the ambiguous or unclear provisions are interpreted in favour of the consumer as weaker party. Both acts provide for protection of the contracting party that did not influence the content of the contract considering this party as the weaker one. The interpretation rule is in line with Art. 5 of Directive 93/13. Such rules should be strictly followed by the court. They should be applied not only to the particular cases of legislatively defined unfair contract terms i.e. the ‘black list’, but to all terms that, as provided in the general definitions of the LOO and LCP, are: 1) not individually negotiated; 2) contrary to the principle of good faith and fair dealing, 3) cause a significant imbalance in mutual rights and obligations of the parties and as such create a possibility of damage to the contracting party of the compiler or if they endanger the accomplishment of the aims of the concluded contract, even in cases when the general contract terms that include this provisions are approved by a competent state body; or 4) deprive the other party of the right to object, or 5) on base of which the other party loses rights from the contract or loses the right in relation to deadlines, or 6) those which are in other ways unjust or severely strict to the other party.

4. Circumstances of relevance for the fairness test

The Directive 93/13 in Art.4 (1) defines (some) of the circumstances that shall be taken into consideration in the assessment of the (un)fairness. They include: the nature of the goods or services for which the contract was concluded, the circumstances attending the conclusion of the contract, and other terms of the contract, or of another contract on which it is dependent. This article has been transposed both in the LOO and LCP which define the circumstances for declaration of the absolute nullity of a particular unfair contract term.

In accordance with Art.131, par. 4 of the LOO the court in the assessment of the nullity shall take into consideration all circumstances that existed prior to and in the moment of the conclusion of the contract, the legal nature of the contract, the type of the goods and the services which are object of the obligation, the other provisions of the contract, as well as the provisions of another contract to which the provision of the general contract terms is related. Further specification of these circumstances and their meaning is not provided in the LOO. The LCP, in Art. 79, specifies that in the assessment of the unfairness of a provision the following is to be taken into consideration: the features of the product or the service that is object of the contract, all circumstances before and in

293 The LOO operates with the term of the type of the obligation rather than the nature of the obligation, and in this sense it should be understood that the term type is broader than the term nature.
the time of the formation of the contract, other contractual provisions as well as another contract, which in relation to the contract that is being asset represents main contract.

The legislator in both definitions correctly opted the term ‘before or during the conclusion’ of the contract as this is the relevant time for the assessment of the existing circumstances that may lead to nullity of a contractual term.\textsuperscript{294} The difference in the two definitions can be seen in regard to the ‘other contract’. Namely, LOO operates with the term ‘provision of another contract to which the term is related’ while LCP refers only to the main contract. We find the solution provided in LOO affords wider protection.

5. Time limits for invalidation

Under the LOO and LCP the legal consequence of unfair contract terms is its absolute nullity. The LCP does not regulate the issue of nullity in detail so the LOO is applied. The LOO, in Art. 102, defines that the right to request declaration of absolute nullity cannot be lost. This provision is in accordance with Art. 6 (1) of the Directive 93/13 and its interpretations, in particular the one of the case \textit{Cofidis} where ECJ took the position that the Directive 93/13 precludes a national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair.\textsuperscript{295} The general provision on the non-prescription of the time period for declaration of the nullity is applicable to all contractual relations. The regulation of the specific contracts does not include any particularities in this regard.

It is unclear, however, whether the affected party should observe the prescription periods for the use of the remedies available once the contract has been declared absolutely null with final court decision. In Art. 96 (par. 1 and 2) of the LOO it is provided that in case of nullity of a contract each party is obliged to return what was accepted as result of a performance of the contract, and if that is not possible or the nature of what has been performed opposes to the return, to give appropriate monetary remuneration in accordance with the prices at the time of the court’s decision, unless otherwise provided by law. The contracting party who has a fault for the nullity of the contract is liable for damages. Under the general rules of the Law on Obligations, for the return of the accepted or monetary remuneration the prescription term is 5 years i.e. 3 years when it is the case of trade of goods and services (Art. 360 i.e. Art. 363 of LOO). The damages may be requested in a period of 3 years (Art. 365, par 1). If the rights have been determined with a final court decision their prescription period shall be 10 years (Art. 368, par. 1).

6. The “ineffectiveness” or the “non-binding nature” of an unfair term

Art. 6 (1) of the Directive 93/13 and the related interpretation\textsuperscript{296} require national legislation to provide for absolute nullity of the unfair contract term, meaning that the unfair contract term shall not be binding on the consumer, while the contract shall continue to bind the parties if it can exist without the unfair term. The Macedonian legislation provided for such legislation. As stated above this is the case both for the Law on Obligations and the Law on Consumer protection (Art 131, par 1 and 2 of LOO, and Art. 82 of LCP).

\textsuperscript{294} The articles regulating the nullity (both absolute and relative) as determining circumstances consider those that existed in the time of the conclusion of the contract. It is a fact that the circumstances may change following the conclusion of the contract on detriment of one of the parties, however in those cases the party has other mechanisms available.


Question is raised on the extent of the application of the absolute nullity. Namely, Art. 131, par. 4 of the LOO provides for literal transposition of Art. 4 (2) of Directive 93/13 thus excluding from the nullity assessment the provisions of the general contract terms whose content is taken from the applicable legislation, or which have been individually negotiated and the other party could have influenced them, or the provisions on the essential elements of the contract if clear, understandable and easily seen. In the drafting the explanations of the Directive's Recitals (in particular 19) have not been taken into account in the specific unfair contract terms provisions as the issue of the nullity is in general regulated by LOO and it provides that in any case the contract clauses which are contrary to the constitution, the laws and the morality are absolutely null (Art. 95, par. 1, in connection to Art. 97, par. 1). In the set of the provisions that shall be used for the purpose of assessing if the contract term shall be null and void is the principle of equity of parties, that insists of the equal value of the rights and obligations. This provision, however, may be affected by the position of the ECJ and Art. 32 of the Consumer Rights Directive. The ECJ in its decision clearly provides for an opportunity for judicial review of the clauses related to the main contractual elements. Although the article imposes only notification obligation for the use of options provided in Art. 8 of the Directive 93/13 allowing higher standard of protection, referring it to "those provisions extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration" suggests that especially those should be taken into consideration when assessing the nullity. However, it is to be noted that when it comes to the B2C contracts these two options are used in the LCP.

7. **Ex-officio declaration of the contract term as unfair**

In accordance with Art.101, par. 1, it is a duty of the court to oversee the contractual provisions and to declare them absolutely null when the criteria are met. Such provision of the national legislation is in line with the practice of the ECJ. There is no sufficient evidence of the court practice in Macedonia in order to be able to assess the application of this principle.

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297 Art. 8, LOO: In the formation of bilateral contracts, the parties must have in mind the principle of equal value of the mutual obligations.

298 Articles 4(2) and 8 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language; Case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) [2010] (3.6.2010).

299 In decision for case Oceano Grupo - Joined Cases C–240/98 to C–244/98 – Océano Grupo Editorial SA v Murciano Quintero [2000] ECR I–04941, ECJ took the position that "The protection provided for consumers by Directive 93/13 on unfair terms in consumer contracts entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts. The national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term."

300 Јадранка Дабовиќ – Анастасовска Ј., ibid, p. 11.
E. Unfair Contract Terms in the Contract Law of Montenegro

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1. Legal debate in Montenegro whether to include the unfair contract terms in the general contract law within the Law on Obligations.

As pointed out at the first conference of the Civil Law Forum for South East Europe held in Cavtat (late 2010), there are two legal frameworks in Montenegro which in parallel are used for transposition of different pieces of acquis\textsuperscript{301} aimed at protecting the economic interests of the consumers when entering in contractual relations with the traders. These are first of all, the Law on Consumer protection and subsequently the Law on Obligations.

Montenegro in May 2007 for the first time adopted its own Law on Consumer Protection (LCP)\textsuperscript{302}, while in parallel in 2008, changes occurred in the general contract law as well. With the adoption of the new Law on Obligations\textsuperscript{303} a certain set of relevant provisions of the consumer acquis have been transposed, resulting in its application (in subordinate manner to LCP\textsuperscript{304}) in specific contractual situations. However, in accordance with the long standing legal tradition of Montenegro and of other countries from the region which had once been constituent members of former Yugoslavia, the Law on Obligations is designated for contractual relations notwithstanding what is the legal status of the contracting parties. Thus it applies to both natural and legal persons and to all type of contracts, whether B2B, B2C, B2P or P2P. In contrast to it, following the logic of the EU acquis the LCP applies only to B2C contracts.

In line with this general information on the existing legal framework one can state that both of these laws contain relevant provisions on unfair contract terms. However, when referring to Directive 93/13 its place of transposition is to be found in the LCP.

Under the IPA\textsuperscript{305} 2009 project cycle, a further step in harmonization of Montenegrin consumer legislation is taking place.\textsuperscript{306} Among numerous directives\textsuperscript{307} being subject of transposition

\textsuperscript{301} In accordance with Art. 72 of the Stabilisation and Association Agreement (SAA) between the European Communities and their Member States, on one part and the Republic of Montenegro, on the other part (OG RMN, No. 07/07) Montenegro has the obligation to ensure that its existing laws and future legislation will be gradually made compatible with the Community.

\textsuperscript{302} Law on Consumer Protection, OG RMN No. 26/07.

\textsuperscript{303} Law on Obligations, OG RMN No. 47/08.

\textsuperscript{304} Art. 6 of the Law on Consumer Protection stipulates that unless otherwise provided by it, the provisions of the Law on Obligations shall apply to obligation relations.

\textsuperscript{305} The Instrument for Pre-Accession Assistance is designed to create a single framework and to unite under the same instrument both Candidate and Potential Candidate Countries, thus facilitating the transfer from one status to another. The projects under this program are financed by EU Funds.

\textsuperscript{306} A valuable technical assistance is being provided in the area of consumer protection by the project “Accession to Internal Market” (AIM), co-funded by the EU and implemented by GIZ, one of the results being a “strengthened capacity for protection of consumer and efficient market surveillance”. Prof. dr. sc. Marko Baretić, Faculty of Law, University of Zagreb, was engaged as the key short term expert, collating all the inputs of other short term experts, while also preparing a chapter on unfair contract terms. Implementation of this IPA 2009 project was envisaged until 1st April 2012.

\textsuperscript{307} Beside directives, other sources of EU law are subject of transposition as well. This primarily refers to two EC Recommendations on resolving consumer disputes (98/257/EC and 2001/310/EC), and Regulation 2006/2004/EC (e.g. creation of the list of competent authorities responsible for enforcement of CP laws, as referred to in Art. 5 and Annex I of the Regulation).
in the new Draft LCP, full harmonization with Directive 93/13 has been proposed as well. It should result in the elimination of certain gaps as found during the preparatory activities for drafting the new LCP, namely the screening process and preparation of a corresponding table of concordance for the said Directive.308

Currently the new Draft LCP is subject of comments of different bodies within the intergovernmental procedure, where it is important to observe that official recommendations already submitted by the Ministry of Justice309 do not in any way question the proposed model of transposition of Directive 93/13, namely as one chapter of the new Draft LCP. For bodies other than public authorities (academic institutions, private sector or civil society), the planned public debate scheduled for June 2012 within the GoM process of adoption of a new Draft LCP is expected to reconfirm the general observation that no substantial debate about including the unfair contract terms in the general contract law exists at the moment.

However, in view of the upcoming period of Montenegrin process of EU accession, it is worth pointing out that the Law on Obligations from 2008 introduced one novelty which deviates from the above given statement that this piece of law is framed for contractual relations notwithstanding what is the legal status of the contracting parties and thus shall apply to all types of contracts, whether B2B, B2C, B2P or P2P.

Namely, like the former Yugoslav federal Law on Obligations,310 the provisions of Art. 486 - 515 of the Law on Obligations of Montenegro regulate the responsibility of the seller for material defects (non-conformity of the things (res) with the contract), including by mandatory requirements, that is: guarantees for machines, engines, apparatus of any kind, or of similar objects of a category of so-called technical goods. This represents the intention of the Montenegrin legislator to extend the EU rules on conformity with the contract and associated guarantees (Directive 99/44), apart from special provisions found in the LCP, to all other contracting parties, therefore not only to consumers. Yet, an important novelty in comparison to the former federal Law on Obligations, (and a kind of potential “poising pill” for future methods to Montenegrin harmonization actions, including acquis on unfair contract terms) is a provision of Art. 489 paragraph 4 which “surprisingly” introduces the concept of “consumer contract” and the term “consumer” (when acting as a buyer) by extending in such cases, when consumer is a party to the contract, the period for notification of material defect (nonconformity).311 During the discussion on the manner of full harmonization with Directive 99/44 this fact was presented by the experts to the Governmental Working Group for drafting the new LCP. The transposition of the revised Directive 99/44, as it was initially planned within the EU,312 by means of the Law on Obligations has been left for a better moment. The final outcome is that the new LCP

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308 A list of general recommendations for this and for other pieces of acquis which have been subject of a detailed review of the AIM experts can be found in presentations given on a two days event with the title “Seminar o Smjernicama za harmonizaciju potrošačkog zakonodavstva Crne Gore”, at http://www.aim.org.me/index.php/events/consumer-protection. Detailed gap analysis/recommendations are subject to a document that has been published and disseminated in March 2012, for the merit of planned public debate and process of adoption of the new Draft LCP on Consumer Credits (Montenegrin/English version is available at http://www.aim.org.me, last visited on 15 May 2012).

309 By the Decree on the Manner of Organization and Work of the State Administration OG MN No. 7/11 and 40/11, the Ministry of Justice is exclusively in charge for legislation regulating obligation relations. This means that within the Government of Montenegro (GoM), it is empowered to act as official drafter of the proposal of the law which, for example, might bring any potential amendments to the existing Law on Obligations.


311 “Art. 489 para. 4 stipulates that “As regards consumer contracts, a buyer who deals as a consumer shall not be bound to inspect or have a thing inspected, but immediately upon becoming aware is obliged to notify the seller of the existence of any visible defects, and not later than two months from the day when he discovered the defect, otherwise he shall lose the right entitled to him in this regard”.

contains a whole chapter on conformity and guarantee which eliminates gaps found in the Law on Obligations (and the existing LCP).

The true importance of the above cited paragraphs is that eventually any consumer protection directive could be fully transposed in the Law on Obligations by means of provisions providing exceptions when a consumer is party to the contract.\(^{313}\) In case of Directive 99/44 this has been well acknowledged by the members of Working Group. Thus, the above-mentioned provision of Art. 489 para. 2 could easily “poison” future legislative interventions in the Law on Obligations, in our case also on the issue of unfair contract terms. The future adoption of the Regulation on a Common European Sales Law definitely represents an optimal excuse for Montenegro for adjourning any final decisions.

2. Unfair contract terms in B2B contracts

As indicated above, while Directive 93/13 is primarily transposed in the LCP (and fully transposed with the new Draft LCP), meaning that these rules are relevant only in B2C relations, similar provisions which are also applicable to B2B, B2P and P2P contracts can be found in the Law on Obligations. Beside Art. 136-138 and general clauses which provide for a content review of standard terms (“adhesion contracts (standard contracts) and general terms”), one can find a separate chapter on nullity of contracts as a whole (Art. 101 – 108). Here, some of the provisions correspond to a large extent to certain provisions of Directive 93/13. From this perspective one can confirm that certain rules on unfair contract terms are applicable to both B2B and B2C contracts.

In terms of invalidity of the contract as a whole, the Law on Obligations stipulates that a contract which is contrary to compulsory regulations or public moral shall be null and void unless the purpose of the violated rule refers to another sanction, or unless the law provides for something else in the specific case (Art. 101 para. 1). Consequently, when elaborating standard contract terms, Art. 138 of the Law on Obligations stipulates that provisions of the general terms and conditions shall be null and void if they are contrary to the very purpose of the contract which is concluded, or to fair business usage. The Law on Obligations contains also other provisions which, similarly to those just mentioned, partially correspond to the Directive 93/13. An example can be found with regard to Art. 6 (1) of the Directive 93/13, in Art. 103 para. 1 of the Law on Obligations which provides that nullity of a contractual provision shall not imply nullity of the entire contract, if the contract can stand without the null provision and if such provision was neither a requirement for contract nor a motive decisive for entering into it.

Going back to Art. 136 - 138 of the Law on Obligations, we can observe some of the implications of judicial control of the general terms of the contract. These could refer to the principle of transparency,\(^{314}\) meaning that the general terms and conditions shall be binding for a contracting party if they were known, or should have been known to such party at the moment of entering into contract. Furthermore in case of a discord between general terms and conditions and particular agreements, the court would have to apply the latter.\(^{315}\) Finally, one of the implications can be derived from Art. 106 of the Law on Obligation which stipulates that: “a contracting party at fault for

\(^{313}\) Another interesting example can be found in LoO, Section 6 “Sale by Installments”: In para 1 of Article 551 a definition of the contract of sale by installments (of a movable thing) is given, while para. 2 limits the scope of application to contracts where the buyer is a natural person. Even though the second part of the EU definition of the consumer (“...is acting for purposes which can be regarded as outside his trade or profession”) is missing, this provision also represents a solid example of a potential manner in which the general contract law can embrace strictly consumer protection tailored provisions.

\(^{314}\) Art. 137 para. 2 and 3 of the Law on Obligations, OG MN, No. 47/08.

\(^{315}\) Art. 137 para. 4 of the Law on Obligations, OG MN, No. 47/08.
entering into a null and void contract shall be liable to the contracting partner (i.e. consumer) for loss suffered due to nullity of contract, if the latter was not aware or, according to circumstances, was not supposed to be aware, of the existence of the cause of nullity.”

3. Definition of unfair contract terms and its concretization in the black or grey list; role of courts in interpreting unfair contract terms

Art. 3(1) of Directive 93/13 provides for a definition of the standard of the unfairness test by stipulating that “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

The same definition is to be found in the LCP (and with a minor modification for the benefit of full harmonization in the draft new LCP as well). Such a definition, for the scope of B2B, B2P and P2P contracts can only in certain fragments be found in the Law on Obligations (e.g. Art. 138 para 1), as already explained above. In any case, the court may deny application of specific provisions of the general terms and conditions precluding the other party to raise objections, or of those on the ground of which such party is left without contractual rights or loses time limits, or those which are otherwise unjust or excessively strict towards such party. Furthermore, special rules on unfair terms relating to specific type of contracts can be found in the Law on Obligations as well. These are provisions on the nullity of (unfair) terms on: interest on interest; non-liability for non-conformity of things; contractual penalty in certain cases; reduced liability of transporter; settlement of business transaction, etc.

When referring to the list annexed to the Directive 93/13, the situation is unchanged since such list can only be found in the LCP. However, in contrast to the formulation in the existing LCP, where for the list of terms the type of “black” list has been used, the new Draft LCP is calling for an “indicative effect” in the assessment of the fairness of the relevant clauses and unambiguously defines the list as “grey”.

316 In comparison to Art. 101 para 1 of the new Draft LCP, the existing LCP has omitted the word “significantly” when regulating the distortion of balance, and so runs contrary to the Directive and widens the possibility for a term to be considered as unfair. It can be easily argued that the existing LCP has raised the level of protection for consumers since the imbalance does not have to be significant, but can be just a minor imbalance. However, in the interest of finding the appropriate balance and of making it easier for the courts to decide in an eventual case, this will be subject to amendments. In contrast to the LoO and the existing LCP, the new Draft LCP in its Art. 101 para 3 also intends to transpose the missing provision of Art. 3 (2) sub. para. 2 of Directive 93/13 which stipulates that the “fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.”

317 Art. 138 para. 2 of the Law on Obligations, OG MN, No. 47/08.

318 Now Art. 409 para. 1 of the Law on Obligations, OG MN, No. 47/08.

319 Now Art. 494 para. 2 of the Law on Obligations, OG MN, No. 47/08.

320 Now Art. 557 of the Law on Obligations, OG MN, No. 47/08.

321 Now Art. 763 para. 3 of the Law on Obligations, OG MN, No. 47/08.

322 However, there are other sectoral laws which also contain certain lists of prohibited clauses, albeit defined as unfair terms. An example could be found in Art. 102 para. 6 of the Law on Electronic Communications, Official Gazette of MN, No. 50/08, which defines that the operator of electronic communication cannot impose certain obligations on its users (this paragraph contains 7 different types of prohibited obligations).

323 Article 103 of the new Draft LCP which provides for a non-exhaustive list of unfair terms is formulated in a manner which faithfully corresponds to the one from the directive (“Contract terms that under the conditions of Art. 101 of this Law may be regarded as unfair are in particularly: ...”). The use of the term “in particular” is an ordinary way of national legal technique when intending to have a non-exhaustive list.
As regards court practice, the observation given at the conference in Cavtat that the courts are in favour of applying the Law on Obligations instead the LCP is still valid.324

4. Circumstances of relevance for the fairness test

From the existing provisions of the LCP it can be concluded that Montenegro does not have specific provision transposing Art. 4(1) or (2) of Directive 93/13.325 Again, the new Draft LCP is tailored in a manner which will eliminate this gap. Art. 104 of the new Draft LCP literally transposes the wording of Art. 4(1), while Art. 105 of Draft LCP transposes Art. 4(2) of the Directive 93/13. This means that the new LCP will provide tools for assessing the unfairness of a contractual term, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. Also, as stipulated by the directive the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, in so far as these terms are in plain intelligible language.

With regard to the Law on Obligations the courts are essentially bound by the basic principles, several of which are in direct or indirect way applicable to circumstances of relevance for the fairness test. Primarily this would refer to the principles of: good faith and honesty (Art. 4), prohibition of the misuse of a monopoly position326 (Art. 7), and application of fair business customs and practice (usage). Other relevant provisions are those that have already been cited above, such as Art. 101 para. 1, and Art. 138 which stipulates that provisions of the general terms and conditions shall be null and void if contrary to the very purpose of the corresponding contract or to fair business usage. The latter applies even if such general terms and conditions have been approved by the competent authority.327 In any case, the court may deny the application of specific provisions of the general terms and conditions precluding the other party to raise objections, or of those on the ground of which such party is left without contractual rights or loses time limits, or those which are otherwise unjust or excessively strict towards such party.328

With respect to the provisions of new Draft LCP an important momentum should be highlighted. Namely, based on the best practices which have been compiled by experts engaged within the above-mentioned AIM project329, members of the Working Group for the preparation of the new Draft LCP elaborated a proposal for further transposition of a provision of the Directive concerning non-assessment of the fairness of the nature of terms relating to the definition of the main subject

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324 For more details see Civil Law Forum for South East Europe.
325 Art. 4(1) stipulates that "the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent". According to Art. 4(2) of Directive 93/13 the "assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language".
326 This objection could often be raised, especially when certain public services are in question (e.g. water, electricity), in which cases contract terms are indeed formulated well in advance, leaving no option for the consumer to negotiate on them.
327 An example could be found in the Law on Electronic Communications, Official Gazette of MN, No. 50/08, Art. 102 paragraph 7 which defines the prior obligation of the operator to obtain the approval of standard contracts (and terms therein) by the Council of the Agency for Electronic Communications.
328 Art. 138 para. 1 and 2 of the Law on Obligations, OG MN, No. 47/08
329 Dr. Emilia Miscenic, LL.M., Institute of European and Private International Law, Faculty of Law, University of Rijeka, was engaged as a Short Term Expert within the IPA 2009 AIM project, Component II (Consumer Protection and Market Surveillance). The scope of her work primarily referred to selected advice on the preparation of the Draft Law on Consumer Credits, but the expert provided valuable support also for ad-hoc requests for interpretation on some most challenging provisions of different parts of the EU acquis.
matter of the contract and adequacy of the price and remuneration. As correctly pointed out, recital 19 of the Directive 93/13 indicates that: “...for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms”. As was referred by the expert, the Report on the implementation of Directive 93/13 provides that the “terms concerning the price do indeed fall within the remit of the Directive, since the exclusion concerns the adequacy of the price and remuneration as against the services or goods supplied in exchange and nothing else. The terms laying down the manner of calculation and the procedures for altering the price remain entirely subject to the Directive.” As the final Draft LCP introduces a provision which provides for “assessment of contractual terms relating to formation and altering the price, as well as methods (way) of payments”, Montenegro as of today opted to follow some Member States having the same idea (Latvia, Luxembourg, Greece, Sweden, Finland, Denmark etc.). In contrast to the mentioned EU member states which for the same reasons have not transposed Art. 4 (2) of the Directive, the Montenegrin legislator opted for a more straightforward provision, which beside being of help to the courts when applying unfair contract terms provisions is also aimed at eliminating grounds for any possible interpretative problems which could compromise future implementation of the new LCP.

Finally, since the LCP is silent on exclusion from review of the terms reflecting the principles and provisions of international conventions, the courts in Montenegro should until the adoption of the new Draft LCP duly take in consideration Art. 9 of the Constitution of Montenegro. Namely, Art. 9 of the Constitution stipulates that ratified and published international agreements and generally accepted rules of international law are a constituent part of the internal legal order, have primacy in relation to national legislation, and are directly applicable when differing from the internal legislation. This in turn means that if a contract (particularly in the area of transport) contains terms which reflect principles or provisions of relevant international conventions, these terms could not be found by the court unfair even if they satisfy the cited criteria as prescribed in the LCP or Law on Obligations.

5. Time limits for invalidation

Directive 93/13 remains silent in regard to time limits for the remedies on invalidating an unfair contract term or a contract which contains such term. The LCP and new Draft LCP equally exclude this issue.

However, the Law on Obligations in its Art. 108, titled “Unlimited Right to Claim Nullity” stipulates that the right to claim nullity shall not expire. It should be recalled that the general provisions of both LCP and the new Draft LCP contain a rule which refers to the Law on Obligations and regulates that unless otherwise provided by LCP, the provisions of the general contract law shall apply to obligation relations.

Apart from this, Article 107 para. 1 of the Law on Obligations stipulates that beside contractual parties, nullity can be claimed by every interested person, while para. 2. of the same article

331 For example such is the case with Spain which has not transposed the rule of Art. 4(2) of Directive 93/13. This “silence” has produced problems of interpretation, where case law used different approaches and provoked contradictory solutions (for more see: H. Schulte-Nölke (ed.), Consumer Law Compendium, University of Bielefeld, 157).
entities also the state prosecutor to invoke nullity of a contract or a contractual term. It should be noted that in all these cases we are primarily speaking about the individual actions and protection of individual interest or the cumulation of interest of more individuals who have been harmed (e.g. by unfair contract terms), whereas in case of collective interests other entities are empowered to take action (consumer NGO’s) in order to invoke the nullity of a contract or a contractual term.333

6. The “ineffectiveness” or the “non-binding nature” of an unfair term

As provided in the text mentioned above, the LCP (including the new Draft LCP) and the Law on Obligations contain provisions on the nullity or voidability of contractual terms. Thus, both LCP (Art. 66 para. 1) and the new Draft LCP (Art. 102 para. 1), as well as Art. 138 para. 1 of the Law on Obligations match the wording of Art. 6 (1) of Directive 93/13. A faithful transposition in regard to the consequence for the contract as whole is ensured as well.334

Beyond these provisions the LCP stays silent, whereas the Law on Obligations provides more provisions once a contract is found null and void. The consequence of the nullity of the contract is that each contracting party is to restitute to the other what has been received on the ground of such a contract, and if this would not be feasible, or if the nature of that what has been performed prevents the restitution, an adequate redress in money shall be granted according to prices at the time when the court passed its decision, unless otherwise provided by law.335

However, if a contract is null and void because of its contents or purpose being contrary to compulsory regulations or public moral, the court may, entirely or partially, deny the request of the party which did not act in good faith for the restitution of that what has been given to the other party; the court may also direct the other party to hand over the value received on the ground of the prohibited contract, to the municipality in whose territory such party has its seat of business, residence or domicile. In both cases, the court shall take into account the good faith of each and both parties, the significance of the endangered property or interests, as well as the existing conceptions of morality.

7. Ex-officio declaration of the contract term as unfair

Both the LCP and the Law on Obligations contain provisions on the ex officio observance of the unfairness of contract terms by the courts, which entitles them to invoke nullity of a contract or a contractual term336. Art. 114 para. 4 LCP stipulates that “if the court also finds that another pre-formulated provision of the contract under dispute is unfair, it shall render it null and void ex officio” According to Art. 107 para. 1 of the Law on Obligations the court shall keep in view the nullity ex officio, while it may be claimed by every person interested”.

The new Draft LCP does not propose a solution similar to Art. 114 of the existing LCP. Rather, it will build on the already mentioned provision which stipulates that unless otherwise provided by

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333 In a much more consistent manner than the existing LCP the new Draft LCP in Art. 117-129 tries to transpose Directive 2009/22/EC, and provides for the protection of collective interests of the consumers. As explained by the recital 3 of the Preamble of this Directive “Collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement. This is without prejudice to individual actions brought by individuals who have been harmed by an infringement.”

334 See LCP (Art. 66 para. 2), the new Draft LCP (Art. 102 para. 2) and the Law on Obligations (Art. 103 para. 1). Art. 103 para. 2 LoO furthermore provides that the contract shall remain valid even should the null provision be a requirement or a decisive motive of contract, after nullity was established exactly in order for the contract to be exempted from such provision and to become valid without it.

335 Art. 102 para. 1 of the Law on Obligations.

336 Para. 2. of the same article entitles the state prosecutor as well to invoke nullity of a contract or a contractual term.
the LCP, provisions of the general contract law shall apply to obligation relations. This in turn means that the general contract law will apply (e.g. Art. 107 LoO) where court practice has a long tradition in the application of this provision.337

337 When at that time the Federal Court (of then SRJ) confirmed the ruling of the Supreme Court of RMN it found that the "Cited provision of the pledge contract being concluded contrary to the legal act makes the same null and void so that the contract is in that part, rightly found by the second instance court, absolutely null and void and does not produce legal effects. ... By keeping in view ex officio the permissibility of performance of the parties, the Supreme Court of Montenegro has acted correctly when denying legal protection of this provision, while it has rightfully concluded that the fact that the term is null and void in the light of Art. 105 of the Law on Obligations do not imply nullity of the very contract..." (Federal Court, Gsz. 19/94 from 24.11.1994).
1. Legal debate in Serbia whether to include the unfair contract terms in the general contract law within the Law on Obligations/future Civil Code.

Traders may acquire significant advantage in consumer contracts by defining in advance contract terms that are not individually negotiated with a consumer. Yet, if their misuse is prevented, these standard terms may alleviate contract formation, and also work to the benefit of consumers. The Unfair Contract Terms Directive338 sets up the possibility to control the fairness of standard terms in consumer contracts. It aims to prevent significant imbalances in the rights and obligations of consumers on the one side and traders on the other.

Under the rules of the Directive, a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, and all of this to the detriment of consumer. The consumer is not bound by the term that is found unfair under the criteria prescribed by the Directive. The Annex of the Directive contains an indicative list of standard terms that may be considered unfair. Furthermore, the Directive requires terms to be transparent, meaning that they should be drafted in plain and intelligible language. Any vagueness caused by the way in which contract term has been put into words shall be interpreted in favor of consumer. The European legislator avoids to explicitly state if the rules of the Directive also apply to the individually negotiated terms.

Legal debate on whether to transpose the Unfair Contract Terms Directive into the existing Serbian Code of Obligations (CO)339 does not exist at this point. The same goes for the prospective Serbian Civil Code (fn. 345 and 346).

In October 2010, the National Assembly of the Republic of Serbia passed the new Act on Consumer Protection (SACP)340, which was intended to serve as an umbrella law on consumer protection. The new piece of consumer legislation brings in the rules on unfair contract clauses, which heavily rely on the Unfair Contract Terms Directive,341 and reflect the intention of the Serbian legislator to implement the Directive into national law.

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340 Consumer Protection Act, Official Journal of RS No. 73-10. Legal basis for redefining the system of consumer protection in Serbia and drafting the new piece of consumer legislation may be found in Article 90 of the Serbian Constitution (Official Journal of RS No. 83-06), and in Article 78 of the Law on Ratification of the Stabilization and Association Agreement between European Communities and their Member States on the one hand, and the Republic of Serbia on the other (Official Journal of RS No. 83-08).
341 Chapter V (Article 44-48) of the SACP.
The SACP aims to fully transpose into Serbian law a number of EU directives, regulations and recommendations, or at least their provisions relevant to the issues of consumer protection.\textsuperscript{342} Still, the preferred legislative technique is quite segmented, as some of the most important issues of consumer protection, such as consumer credit, were left out from the SACP and regulated by the separate pieces of legislation.\textsuperscript{343} However, under Article 41 of the Law on Protection of the Consumers of Financial Services (LPCFS), the provisions of the SACP on unfair terms in consumer contracts, including the enforcement provisions, shall apply accordingly to the matters of consumer credit and other financial services governed by the LPCFS.

In keeping with the recent lawmaking in the sphere of consumer protection, there is no record of debating over the idea to incorporate the rules on unfair contract terms in the general contract law. Moreover, the likelihood of amending the CO in order to transpose any other EU consumer directive is low. Such idea is not seriously considered at this moment.

As a final point, according to the writings of the Serbian Civil Code Drafting Commission, founded by the Government in 2006,\textsuperscript{344} the prospective Serbian civil codification should stay clear of the consumer matters, at least when it comes to the issues pertaining to the law of obligations.\textsuperscript{345}

2. Unfair contract terms in B2B contracts

The question of including B2B transactions under the unfair contract terms protection especially comes into focus in the light of the Proposal for a Regulation on a Common European Sales Law (PRCESL).\textsuperscript{346} The PRCESL contains a section on the unfair contract terms in contracts between traders (Article 86). It relates to the pre-formulated terms of such a nature that their use grossly deviates from good commercial practice, contrary to good faith and fair dealing. Conversely, the Unfair Contract Terms Directive and the Consumer Rights Directive\textsuperscript{347} do not include B2B transaction in their respective fields of appliance.

Scope of application of the SACP rules on unfair terms is determined, among other things, by the pertinent definitions of consumer and trader. In that sense, the SACP definition of consumer precludes application of the SACP unfair terms provisions to B2B transactions. Under Article 5, para 1.1 of the SACP, consumer is a natural person who acquires goods or services in the market, for purposes that are not related to his business or other commercial activity. Along the same lines, consumer contract is defined as any contract concluded between trader and consumer (Article 5, para 1.3 SACP). To sum up, the provisions of the newly enacted Serbian umbrella law on consumer protection do not apply to B2B transactions in general, and the same is true for its particular rules concerning the unfair terms in consumer contracts.


\textsuperscript{343} Law on Protection of the Consumers of Financial Services, Official Journal of RS No. 36-11.

\textsuperscript{344} Odluka o obrazovanju posebne Komisije radi kodifikacije građanskog prava i izrade Građanskog zakonika, Official Journal of RS No. 104-06, 110-06 and 85-09.


However, there are some provisions of the Serbian CO which may invoke either nullity or voidability of a contract as a whole, or that of a single contract term. These rules rely on the good faith argument, and on the principle of proportionate obligations of the contracting parties.

The provisions of the CO apply both to B2B and B2C transactions. To be more precise, the CO does not discern the two, and normally applies irrespective of the parties being legal or natural persons. The Code contains certain provisions specifically relating to the so-called commercial contracts (B2B transactions). Still, it has no special provisions regarding consumer contracts, or natural persons as consumers. In other words, the CO does not make reference to ‘consumers’ or ‘consumer rights.’ Also, the CO does not cover procedural issues: it says nothing on administrative control, or judicial review of the unfair terms, and it certainly does not consider any kind of collective action. Court decisions are binding only to those who are parties to the dispute.

First of all, the CO includes three articles concerning general terms and conditions, which may come about as a part of the adhesion contract. These provisions are applicable both to B2B and B2C transactions.

1) Under Article 143 of the CO, the provisions of the general terms and conditions (GTC) that are contrary to the very purpose of the contract, or that are against good business practices, shall be null and void, even if they have been approved by the authorities. Furthermore, the court may deny application of a particular provision of the GTC which precludes the party from filing demurrers. The court may also reject to apply any particular provision of the GTC if, on account of this provision, the party is deprived of her contractual rights, time limits, or if the provision is unfair or harsh.

2) Under Article 142 of the CO, the GTC stipulated by one party to the contract, either as a part of the adhesion (standard form) contract, or being referred to by the contract, shall complement the individually negotiated clauses in the same contract, and shall be binding as those. The GTC must be made public in a usual way. Party to the contract is bound by the GTC if she was, or must have been aware of them at the time of contract formation. In case of discord between the GTC and the individually negotiated terms, the latter shall apply.

3) Under Article 100 of the CO, unclear provision of the contract of adhesion shall be construed to the benefit of the other party, that is, against the interests of the party who imposed it. This is, obviously, the contra proferentem doctrine of interpretation of the ambiguous contract terms.

As far as the meaning of ‘unfair’ is concerned, whenever the CO refers to unfairness of any kind, it is left to the courts to determine the standard of fairness. The CO neither defines, nor enumerates possible unfair terms.

There are other rules of the CO, applicable to both B2B and B2C transactions, that command either nullity or voidability of contract under certain conditions. For instance, Article 103, para 1 of the CO contains general rule on nullity of contracts that are opposed to mandatory provisions, public policy (ordre public), or good usages (boni mores). Under Article 105 of the CO, nullity of one contractual provision shall not render the contract void in its entirety, if the contract can stand without the null provision. The CO also prescribes that the court shall declare nullity of a void contract by virtue of its office (ex officio), and that every (legally) interested party may claim nullity of a null and void contract before the court, including the public prosecutor (Article 109 of the CO). The right to claim nullity of a null and void contract shall not expire – there is no time-limit to this right (Article 348 The CO applies to all types of contracts, unless there is a special provision concerning commercial contracts. ‘Commercial contracts’ are contracts between companies, other legal persons and/or shop owners or other registered entrepreneurs, who are contracting in their professional capacity. Cf. Article 25 of the CO.

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110 of the CO). Finally, as already mentioned, Article 100 of the CO introduces the *contra proferen-
tem* doctrine of contractual interpretation, stating that pre-formulated contracts shall be construed against the interests of the party who imposed it. In B2C transactions this boils down to construing the contract against the trader.

The perception that pre-formulated terms should be controlled for their fairness is rooted in the idea that unfair terms further deteriorate the position of a weaker party to the contract – the one which is financially feeble and less informed. A number of rules of the CO are designed to shield the proportion between mutual obligations arising from the contract, and these apply *both to B2B and B2C transactions*. For instance: (1) Should mutual obligations arising from the contract be in obvious disproportion at the time of contract formation, the contract shall be voidable for one year from its formation, on request of the party to whose detriment the disproportion goes (*Laesio enormis*, Article 139 of the CO); (2) Usury contract shall be null and void (Article 141 of the CO); (3) *Rebus sic stantibus* rule covers the situation where disproportion between mutual contractual obligations of the parties arises after the date of contract formation, due to the legally relevant change in circumstances (Article 133 of the CO). These are the rules that apply both to the standard terms and to the individually negotiated terms of any synallagmatic contract. However, such rules are not more than classical instruments of contract law, and they offer no special protection to the consumer.

To sum up: The provisions of the newly enacted SACP do not apply to B2B transactions. However, the CO contains rules on nullity of the provisions of the general terms and conditions (GTC) that are contrary to the very purpose of the contract at hand, or against good business practices, even if the GTC have been approved by the authorities. The court may disallow application of a particular provision of the GTC that precludes the party from filing demurrers. The court may also reject to apply a particular provision of the GTC if it deprives the party of her contractual rights, time limits, or if the provision is *unfair* or harsh. These rules are now well settled and considered classic, and they *apply to B2B, B2C and P2P transactions*. The same goes for the CO rules with respect to nullity of the usury contract, voidability of contract in case of legally relevant change in circumstances of its formation (*Rebus sic stantibus*), voidability as a consequence of *Laesio enormis*, and other private law remedies aimed at protecting the principle of proportionality of mutual obligations of the parties to the contract.

### 3. Definition of unfair contract terms and its concretization in the black or grey list; role of courts in interpreting unfair contract terms

Oddly enough, the newly enacted SACP contains a definition of contract term as such, regardless of its (un)fairness. Under Article 5, para 1.24 of the SACP, contract term is broadly defined as any term of consumer contract, which the consumer either negotiated, or could have negotiated individually with the trader, as well as a term which was drafted in advance by the trader, or by a third party. This definition should have been placed at the beginning of Chapter V of the SACP (*Consumer protection in exercising rights under the contract which contains unfair terms*), as its purpose was to expand the protection envisaged by the Unfair Contract Terms Directive to each and every term of consumer contract, irrespective of whether it was individually negotiated, or drafted in advance by the trader, or by a third party. The fact that contract term is defined at the very beginning of the law, and not at the beginning of the relevant chapter, makes the purpose of having such definition less clear.

In the course of public debate over the then forthcoming reform of legislation in the sphere of consumer protection, it has been deliberated whether or not the SACP rules on unfair contract terms should apply only to pre-formulated terms, *i.e.* the terms which were drafted in advance by the trader, or by a third party, and whose substance the consumer has therefore not been able to
influence (Article 3, para 2 of the Directive). The Serbian legislator empowered (and compelled) the courts to control the fairness of any contract term, as long as it belongs to a consumer contract. In other words, protection against the unfairness of contract terms is extended to the individually negotiated terms, to avoid difficulties of delineation which often occur in the practice of the Member States. This seemed appropriate for the contemporary commercial practices, especially on-line, where the consumer may have an option to select from the pre-ticketed boxes, but never truly negotiates – quite the opposite, a lack of his outright agreement to a term causes transaction to be discontinued.

Along with the cited definition of contract term (Article 5, para 1.24 of the SACP), which aims at expanding the protection initially guaranteed by the Unfair Contract Terms Directive, the SACP further specifies the criteria of unfairness.349 In that respect, the SACP makes a clear distinction between mandatory and circumstantial criteria of unfairness.350

1. Mandatory criteria of unfairness. Under Article 46, para 2 of the SACP, contract term is considered unfair if: (1) results in a significant disproportion in obligations of the contractual parties to the detriment of the consumer; (2) causes execution of the contract to be disadvantageous to the consumer without justifiable explanation (the trader bears the burden of proving the existence of such explanation); (3) causes execution of the contract to substantially differ from what the consumer legitimately expected; (4) is contrary to the transparency requirement; or (5) violates the requirements of good faith. This list of attributes that characterize a term as unfair is phrased alternatively. In other words, any one of the itemized points would be enough to qualify a term as unfair. This means, for example, that contrary to the cumulative wording of Article 3, para 1 of the Directive, the “significant disproportion between the mutual obligations” and the “violation of the requirements of good faith” shall be assessed alternatively under the SACP, and any of these flaws would suffice for labeling the term unfair. Furthermore, the SACP list of mandatory criteria contains three alternative grounds of unfairness, unknown to the Directive: a term causing execution of the contract to be disadvantageous to the consumer without justifiable explanation; a term causing execution of the contract to diverge from the legitimate expectations of the consumer; a term violating the transparency requirement.

The transparency requirement is set in Article 44 of the SACP, and has been taken over from the Commission Proposal for a Consumer Rights Directive.351 It states that contract term shall be binding on the consumer in so far as the consumer has agreed to it, and to the extent that the term is expressed in plain, clear and intelligible language, and understandable to a reasonable person as informed and experienced as the particular consumer. The trader shall get the consumer acquainted with the contract term prior to the conclusion of the contract, in a manner which gives the consumer real opportunity to become aware of the content of the terms, with due regard to the means of com-

349 The SACP definition of unfairness is somewhat broader than the one contained in Article 3, para 1 of the Directive, which reads: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”


munication used. Consumer’s consent to a term may not be inferred from the consumer’s failure to opt out from it.352

2. Circumstantial criteria of unfairness. These criteria are subject to the use of the term, and must be weighed up against the particular state of affairs. Circumstantial decisive factors of unfairness are (1) the nature of the goods or services to which the contract pertains; (2) the circumstances of the contract formation; (3) other terms of the same consumer contract, or of another contract to which the consumer contract is linked; (4) the manner in which content of the contract was agreed upon, and the manner of informing the consumer of the content of the contract in view of the transparency requirements (Article 46, para 3 of the SACP).

The SACP contains the so-called black and gray lists, largely inspired by the Commission Proposal for a Consumer Rights Directive.353 These lists are are indicative, not exhaustive. The courts (and the out-of-court settlement bodies under Chapter XII of the SACP) are bound, but not limited by them. In other words, the court must apply the list ex officio and find (in case of the black list), or presume (in case of the gray one), the listed term not to be binding on the consumer. However, the court may also find a term not on the list to be null and void, based on the general clause of Article 46 SACP.354 This goes both for the collective and the individual litigation.355 Some of the items from the list are obviously redundant, as they are already captured by the compulsory provisions of either general contract law, or consumer law. For example, a contract term giving the trader the right to exclusively interpret the contract terms, or to unilaterally alter the terms of contract, including the characteristics of goods or services, could be found null and void under the general contract law.

Black list is established in Article 47 of the SACP. The following terms shall be considered null and void: excluding or limiting liability of the trader for death or personal injury caused to the consumer through an act or omission of that trader; limiting the trader’s obligation to perform or honor the obligations that the trader’s agent has undertaken or making these commitments subject to compliance with a particular condition which depends exclusively on the trader; excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes to arbitration in a manner which is contrary to the provisions of the SACP; preventing or restricting the consumer’s ability to acquire evidence, or imposing on the consumer the burden of proof which, according to the law, should lie with the trader; giving the trader the right to establish whether the goods or services supplied are in conformity with the contract or to exclusively interpret the contract terms.

Gray list is set up in Article 48 of the SACP. The contract terms that shall be presumed to be unfair unless proven otherwise are: excluding or limiting the legal rights of the consumer vis-à-vis the trader or another party in the event of total or partial non-performance by the trader of any of the contractual obligations, including the consumer’s rights of offsetting a debt owed to the trader against a claim which the consumer may have against him; allowing the trader to retain all that

352 In the same spirit: “Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader’s main contractual obligation. If the trader has not obtained the consumer’s express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.” Article 22 (Additional payments), Consumer Rights Directive.

353 The black and gray lists (and the transparency requirements) were excluded from the final text of the newly adopted Directive on consumer rights. Under the new Directive, the Member States only have duty to inform the Commission of taking the advantage of Article 8 of the Unfair Contract Terms Directive (the minimal clause). Cf. Art 32 of the Directive on consumer rights.

354 When it comes to court decisions based on the newly introduced SACP rules on unfair terms in consumer contracts, they are in short supply. At this point, this may still be attributed to the fact that the SACP has been relatively recently enacted.

he has received from the consumer where the latter fails to conclude or perform the contract; without guaranteeing the consumer the same right; requiring the consumer who fails to fulfill his contractual obligation to pay compensation to the trader that significantly exceed the harm suffered; allowing the trader to unilaterally rescind the contract at any time, where the same right is not granted to the consumer; authorizing the trader to unilaterally rescind an open-ended contract without leaving the consumer a reasonable cancelation period, except where the consumer does not meet his contractual obligations; automatically renewing a fixed-term contract where the consumer does not indicate otherwise and has to give an inappropriately long notice to terminate the contract in comparison to the agreed contract duration; authorizing the trader to increase the agreed price at will without giving the consumer the right to terminate the contract in such a case; obliging the consumer to fulfill all his obligations under the contract where the trader has failed to fulfill all his obligations; authorizing the trader to transfer his obligations under the contract to a third party without the consumer’s consent; restricting the consumer’s right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader; authorizing the trader to unilaterally alter the terms of the contract, including the characteristics of the goods or services; unilaterally amending contract terms communicated to the consumer on a durable medium, by communicating new terms, to which the consumer has not consented, by means of distance communication.

The Serbian legislator decided not to take over Article 4, para 2 of the Unfair Contract Terms Directive, under which the assessment of the unfair nature of the term shall relate neither to the definition of the main subject matter of the contract, nor to the adequacy of the price and remuneration (Article 4 of the Directive). Consequently, under the SACP, the courts may ex officio monitor the fairness, and the resulting nullity, of the unilateral price variation, determination clauses, charges for services (not) rendered, etc. In any case, this exclusion falls under the minimum clause of Article 8 of the Directive.

4. Circumstances of relevance for the fairness test

Article 4, para 1 of the Unfair Contract Terms Directive lays down some circumstances that shall be considered by the judge in determining unfairness. These are: (1) the nature of the goods or services for which the contract was concluded, (2) the circumstances attending the conclusion of the contract, and (3) other terms of the contract, or of another contract on which it is dependent.

The newly enacted Serbian legislation on unfair terms in consumer contracts also lists the circumstances that must be taken into consideration by the courts while assessing unfairness of a term (Article 46, para 2 of the SACP). These circumstances have already been mentioned here as the circumstantial criteria of unfairness. They depend on the use of the term, and have to be appraised in view of the specific contractual situation.

Along these lines, the court should take into consideration the following: (1) the nature of goods or services to which the contract relates, (2) the circumstances (as of the time) of contract formation, (3) other terms of the same contract, or terms of the linked agreement, (4) the way in which

356 This phrasing opens up the question of unfairness of the term which allows the trader to keep something, but not all that he received from the consumer who failed to conclude or perform the contract.

357 Under Article 80, para 2 of the PRCESL, unfair contract terms in contracts between a trader and a consumer are excluded from the fairness test as to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid, in so far as the trader has complied with the duty of transparency.

358 M. Karanikči, H.-W. Micklitz, N. Reich, 185-186.

359 Case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) [2010] ECR I-(3.6.2010).
the content of the contract was agreed upon, as well as (5) the manner of informing the consumer of the content of the contract in view of the transparency requirements. Obviously, the SACP directory of the relevant circumstances to be considered by the courts in assessing unfairness is somewhat broader than the one stipulated by the Directive. It includes the way in which the parties reached the agreement over the substance of the contract, as well as the way in which the trader responded to his information duties.

The mechanism is as follows: the court must take into account all of the listed circumstances while inspecting the grounds for declaring a term null and void, i.e., while checking the term for any of these faults: a significant disproportion in mutual obligations to the detriment of the consumer; lack of justifiable explanation for the fact that execution of the contract is detrimental to the consumer; substantial divergence of the execution from the consumer’s legitimate expectations; lack of transparency; violation of the requirements of good faith.

Finally, under Article 45 of the SACP, if there is any doubt regarding the meaning of a term, the interpretation favorable to the consumer shall prevail. Here, the SACP confirms the contra proferentem rule of construction imposed by Article 100 of the CO, only now in the sphere of consumer protection, and irrespective of whether the term was pre-formulated or individually negotiated. This rule of construction should apply not only to the term suspected to be unfair, but also to other terms of the same consumer contract, and to the terms of the linked agreements, both of which represent circumstantial criterions of unfairness.

5. Time limits for invalidation

Under Article 46, para 1 of the SACP, unfair contract terms are null and void. In other words, the SACP opted for nullity as a civil law sanction against the unfairness of terms in consumer contracts: unfair term shall be void, and not voidable. However, the SACP only prescribes special conditions of nullity in the consumer context, and not the consequences thereof. Once the court has determined a term in consumer contract to be unfair and thus null and void, the effects of such finding shall be governed by the general contract law, that is by the rules regarding the consequences of nullity, set down by the CO.

As mentioned before, the right to claim nullity of a null and void contract shall not expire (Article 110 of the CO). Put differently, there is no time-limit to this right. The court shall declare nullity of a void contract by virtue of its office (ex officio). Each (legally) interested party may claim nullity of a null and void contract before the court. This includes the public prosecutor (Article 109 of the CO). Moreover, the right to assert nullity of an unfair term in consumer contract is unlimited in time for each of these claimants, and not only for the consumer.

On top of the right to claim nullity of an unfair term, there are other legal remedies against unfair terms in consumer contracts, such as an order issued by the court to discontinue the practice of unfair contracting, or to publish the injunction in the public media at the expense of the trader. To be more precise, under Article 137, para 1 of the SACP, consumer whose rights or interests have been infringed may file a petition to institute procedure for injunction against the unfair contract term.360 Under Article 137, para 2 of the SACP, in case of violation of collective interests of consumers, the same petition may be filed by the consumer organizations, or the associations of consumer organizations, registered with the ministry in charge of consumer protection in accordance with the requirements of Article 129 of the SACP.

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360 Injunction may also be sought against the unfair commercial practices, and to skim off the ill-gotten gains.
Before filing the abovementioned petition, the applicant shall give prior notice inviting the opposing party to settle the dispute in an out-of-court procedure (Article 144, para 1 of the SACP). After the petition is filed, the court may issue provisional measure at the request of the applicant, ordering the trader to discontinue the use of the term in question in dealing with consumers. This measure may remain in force until the end of the court procedure (Article 145 SACP). In injunction proceedings the court may: declare the unfair term null and void, order the trader to immediately discontinue the practice of using the unfair term, and direct the injunction against the unfair term to be published in public media at the trader’s expense.

6. The “ineffectiveness” or the “non-binding nature” of an unfair term

The Unfair Contract Terms Directive orders the Member States to lay down that unfair terms in B2C transactions shall not be binding on the consumer, and that the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term (Article 6, para 1 of the Directive). According to the ECJ interpretation of this rule, unfair terms need to be qualified as null and void by the national laws of the Member States. Considering these terms as only voidable would not suffice.361

In Serbia, under the rules of general contract law, if entering into a specific contract is prohibited (under the law, ordre public or good usages) to only one of the contracting parties, the contract shall remain in force, while the one party that entered the contract in spite of prohibition shall suffer further legal consequences (Article 103, para 2 of the CO). Strictly speaking, in most of the cases, unfair terms in consumer contracts are prohibited solely to the trader. Only sometimes agreeing upon such terms is prohibited to both parties. Still, even when prohibition relates to barely one of the parties, the contract shall be null and void, if there is a special provision of the law (either the CO, or some other law) prescribing nullity as a private law remedy (civil sanction) for the particular situation. In case of unfair terms in consumer contracts, such special provision exists in Article 46, para 1 of the SACP.

Under Article 46, para 1 of the SACP, unfair contract terms are **null and void**. The Serbian legislator decided on nullity as a legal remedy against the unfair terms in consumer contracts. This means that, under the SACP, unfair contract terms shall be void, and not voidable. However, and as it was stated before, the SACP only prescribes special conditions of nullity in the consumer context, and not the legal effects thereof. Once the court has determined a term in consumer contract to be null and void due to its unfairness, further legal consequences of such finding shall be governed by the CO rules on the effects of nullity.

The term that is either unfair according to the the criteria set down in Article 46 of the SACP, or lacking transparence as laid down in Article 44 of the SACP, is **not binding on the consumer**. Still, such term shall not render the contract void in its entirety, if the contract can stand without the null provision (Article 3, para 3 of the SACP and Article 105, para 1 of the CO). A contracting party at fault for nullity of the contract shall be liable to the other party for damages caused by the fact that the contract was null and void, if the other party did not know (as of the time of contract formation), or under the then existing circumstances could not have known for nullity (Article 108 of the CO). Furthermore, subsequent disappearance of the prohibition of a term or other reason for its nullity shall not render such term legally binding (Article 107, para 1 of the CO).

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As already stated, unfair terms shall not be binding on the consumer. Furthermore, if the consumer contract cannot stand without the provision which is null due to its unfairness, nullity of such provision shall make the contract void in its entirety. Consumer may not incur any obligation arising from a term, or a contract, which qualifies as null and void. The fact that no obligation may originate from the void contract does not necessarily imply that such contract has no legal effects whatsoever. If the parties have partially or completely executed the contract which is null and void, Article 104 of the CO applies: (1) If at time of contract formation both of the contracting parties have acted in good faith with respect to the grounds of nullity, each of them shall be obliged to return what they previously received on the basis of the contract that turned out to be null and void. If restitution is not possible due to the nature of performance, an adequate monetary compensation should be paid instead, calculated by using the prices at the time of court decision. (2) However, the court may deny restitution request of the party to the null and void contract which has not acted in good faith as regards the grounds of nullity. (3) The court may also direct the party to hand over the value received under a prohibited contract, to the municipality in whose territory such party has its seat of business, residence or domicile. In deciding on one of the three options, the court shall consider good faith of each of the parties, or lack of thereof, significance of the endangered property or interests, and the existing social conceptions of morality.

7. Ex-officio declaration of the contract term as unfair

As previously stated, the SACP only sets down the special conditions of unfairness, and consequential nullity, of terms in consumer contracts, and not the legal consequences thereof. Further issues relating to nullity, such as legal effects of nullity, conversion, subsequent disappearance of the grounds for nullity, liability for damages caused by nullity, time-limits for invoking nullity, etc., are governed by the general rules of contract law, or more precisely, by Articles 103–110 of the CO. Under Article 109 of the CO, the court shall declare nullity of the void contract of its own motion. The court has the obligation (not only the power) to evaluate the unfair contract terms ex officio. This includes duties of the court to firstly investigate if the SACP provisions on unfair terms apply to the case, and secondly, to examine the unfairness of the term.\footnote{This seems to be in accordance with the relevant ECJ judgments. Cf. Joined Cases C–240/98 to C–244/98 Océano Grupo Editorial SA v. Murciano Quinteto [2000] ECR I–04941; Case C–473/00 Cofidis v. Fredout, [2002] ECR I–10875; Case C–168/05 Elisa María Mostaza Claro v. Centro Móvil Milenium SL [2006] ECR I–10421; and the recent Case C–137/08 VB Pénzügyi Lízing Zrt. v Ferenc Schneider, OJ C 13 from 15.01.2011, p.2, where the Grand Chamber held: “The national court must investigate of its own motion whether a term [...] falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.”} In addition, each (legally) interested party may claim nullity of a null and void contract before the court. This includes the public prosecutor. The right to claim nullity of a null and void contract shall not expire (Article 110 of the CO). The same is true when the court acts ex officio. In other words, there is no time-limit as to the possibility to either invoke, or determine nullity.

Addendum

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\footnote{This seems to be in accordance with the relevant ECJ judgments. Cf. Joined Cases C–240/98 to C–244/98 Océano Grupo Editorial SA v. Murciano Quinteto [2000] ECR I–04941; Case C–473/00 Cofidis v. Fredout, [2002] ECR I–10875; Case C–168/05 Elisa María Mostaza Claro v. Centro Móvil Milenium SL [2006] ECR I–10421; and the recent Case C–137/08 VB Pénzügyi Lízing Zrt. v Ferenc Schneider, OJ C 13 from 15.01.2011, p.2, where the Grand Chamber held: “The national court must investigate of its own motion whether a term [...] falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.”}
III. COMPARATIVE ANALYSIS
A. Legal debate whether to include the unfair contract terms in the general contract law within the Civil Code/future Civil Code/Law of Obligations

Nada Dollani, Tirana

1. Legal Debate in the European Union

The most recent development on European Union level is the Proposal for a Regulation on a Common European Sales Law of 11.10.2011. According to the Proposal Regulation, CESL is applied as an optional instrument, which can be offered by the businesses and chosen by the other party, consumer or SME in cross border transactions. Nevertheless the Member States of the European Union are free to give broader application regarding the personal scope, i.e. between traders, and non-cross-border transaction. Regarding the subject matter this instrument is applied for the sale of goods, for the supply of digital content and for the provision of related services. The most important development in such an Instrument for the purpose of our discussion is that the provision regulating the unfair contract terms in CELS (Part III/Ch. 8, Art. 79-86), include both B2C and B2B contracts, although, regarding the meaning of unfairness, a distinction is made between B2C and B2B, concerning the circumstances which must be taken into account while assessing a contractual term as “unfair”.

2. Legal Debate in Participating States

In all Participating States, general terms of contracts are regulated by two sets of norms, which introduce a distinction between B2C contracts and other contracts. The norms contained in Civil Code/Law of Obligations are applied to all contractual parties, while unfair contract terms are regulated by Consumer Protections Acts applied only to B2C contracts. Nevertheless the policy considerations by the legislators and endeavours for legal improvement in the field of unfair term in contractual relations are continuing in almost all Participating States in order to eliminate inconsistencies, gaps and vagueness created by the previous implementation of acquis communautaire.

In Albania, recent amendments have been introduced to CPA. The amendments concerning unfair contract terms aim at the better protection of consumers and the full transposition of Directive 93/13. On the one hand, in order to have a more systematic legal system, the principle of “better protection” has been introduced in CPA, on the other hand the legislator has excluded

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366 Article 83 and 86 of CELS.
the contractual core terms (\textit{essentialia negotii}) from judicial and administrative control. Some further amendments consist of a clearer norm on the transparency principle as well as an addition to the black list provided for in CPA concerning the alteration of the terms of credit contracts, particularly method/methodology of calculation of the norm of interest and its elements, which shall not take place without previously having the consent of consumer.\textsuperscript{367} Meanwhile, no possibility of merging the unfair terms provision in the Civil Code is considered, although the Albanian Civil Code contains some elements derived from the \textit{acquis communautaire}.

In Bosnia, proceeding to approve a BDLO, which included unfair contract terms and transposed Directive 93/13 failed in 2010, due to lack of political consensus. The Bosnian legislator has shown some willingness to include unfair contract terms in the general Law of Obligation, if we consider the temporary character of the provisions regulating unfair terms provided by the previous CPA of 2002, but such efforts failed to achieve a conclusion. This failure constrained the legislator to opt for a separate Act on Consumer Protection in 2006. Still, such an Act leaves room for improvements due to its poor formulation and the inconsistencies it creates while read together with BLO. The doctrinal proposals suggest that, although the Bosnian legislator at the present situation has decided in favor of the adoption of a separate consumer code, due to the general relevance of unfair terms in contract law, such terms should be either included in the Law of Obligations or the actual CPA needs further amendments in order to gain importance in practice.

The Croatian legislator while choosing to transpose the Directive 93/13 in a separate act, has introduced the appropriate amendments in the Civil Obligation Act (Art. 295-296) at the time of adoption of CPA, in order to bring such provisions in compatibility and have them complement each other. Despite the fact that there are two separate sets of norms regulating the general contract terms and unfair terms, there are no discrepancies between the COA and CPA.

In Macedonia, due to the obligations set out by the Stabilization and Association Agreement with the EC and its Member States, the unfair contract terms in B2C contracts are regulated by CPA of 2004 which has undergone several amendments in 2007, 2008 and 2011 and by now provides full harmonization with Directive 93/13. This situation has affected also the Law of Obligation, which after the initial adoption in 2001, was significantly amended in 2008 in order to secure a better compactness of the legal norms. \textit{Inter alia} the amendments consisted also in regulating the general contract terms and absolute nullity of certain provisions aimed at their approximation with the 93/13 Directive. The legal debate on improving civil law regulations still continues in Macedonia. According to a governmental decision, a committee has been established in 2010 for the drafting of a Civil Code. While the preparatory work of the committee is continuing, so far it is assessed that the Law of Obligation offers adequate protection of the parties from unfair standard terms and that specific consumer issues should remain in a separate regulation, although it is accepted that the legal development on European Union level, like CELS, might have an impact in drafting a new Civil Code.

In Montenegro, although the Law of Obligation was adopted in 2008 and has transposed some relevant provisions of consumer \textit{acquis}, it contains only few provisions which regulate the general contract terms applied to all contractual parties, while Directive 93/13 is transposed by the CPA of 2007. At the present time a further step in harmonization of consumer legislation is introduced by adoption of a new draft of CPA, which is subject to comments and discussion by relevant legal bodies. Such a new draft aims at the full harmonization of Directive 93/13 and elimination of gaps and discrepancies of the present legal situation. Such development shows that no substantial debate exists on whether to include unfair terms in the Law of Obligations.

\textsuperscript{367} Art. 5 (2) of amending Act 10 444/2011, which adds another unfair term to the list provided by Art. 27 (4) CPA No. 9902/2008.
In Serbia, the CPA was adopted at the end of 2010 which intended to implement a certain number of EU Directives in the field of consumer law, including Directive 93/13, although some other consumer issues like consumer credit are regulated by separate specific legislation. According to the Serbian Civil Code Drafting Commission, established in 2006, the civil codification should stay clear of consumer matters. Considering that the CPA is quite a new act, there is not any ongoing legal debate regarding the idea to incorporate unfair contract terms rules in the general contract law. It seems that Serbian legislator has followed the French model by adopting a separate act on consumer issues.

3. **Main views in addressing unfair terms**

According to one school of thought the argument of weaker party protection is offered. It is argued that there is an inequality of bargain power between consumers and traders. The consumer finds himself in an intellectual and economic inferiority; he/she lacks technical knowledge and information in comparison with the trader. So in order to achieve an effective equality of the parties it must be interfered in the market by regulation of unfair contract terms. This is the perspective of France which has regulated the unfair terms in a separate act (Code de la Consommation 1993), where the motive for intervention lies in the need to prevent the abuse of power to the detriment of the more vulnerable party, the consumer.\(^\text{368}\) Such a view is also supported by the ECJ perspective/practice.\(^\text{369}\)

The other school of thought bases its argument on the fact that standard terms which are often used in the market transaction, present the danger of depriving one party of revising the terms of contract, thus an outside control on fairness of the transaction preventing market failure is necessary. This view is represented by the German BGB, whose provisions apply to standard terms and conditions not individually negotiated including B2B contracts.\(^\text{370}\) Another additional argument to support this view is that the control of standard terms, on one hand, is necessary to prevent market failure, which otherwise risk to collapse because the bad terms would drive out the good ones.\(^\text{371}\) On the other hand, the contractual parties are protected from the unfair use of general contract terms through judicial control of such terms.

4. **Inclusion of unfair terms in Civil Code/Law of Obligations?**

In the Balkan region a concern to keep clean the general contract law from consumer issues prevails. Why is this view challenged?

Firstly, standard/unfair terms are not only a consumer matter but they have a relevance to the general contract law and exchange of goods and services. Contract is the most important tool in realizing parties’ economic interest in the market and standard terms are part of it. Secondly, two sets of provisions distort the systematic regulation and coherence of private law. Thirdly, the risk of non-observation and inapplicability of unfair terms by courts exists in practice, as the experience in the region has shown so far. Further arguments concern to the irrelevant distinction between B2B

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\(^{370}\) P. Nebbia, (2007), 34.

and B2C with regard to standard terms. There is a generally accepted view on the usefulness and importance of standard terms in a mass production economy, because they reduce the transaction costs, spare time and money. An equal behaviour in the market of consumers and businesses is observed with regard to such terms. No lawyer or law professor, despite the intellectual capacity to challenge the standard terms offered by traders, ever does so while buying. No business, despite of the strong economic power does not observe/challenge the standard terms of its suppliers or subcontractors, so the unequal bargain power or economic or intellectual inferiority are no plausible argument for making a distinction between B2B and B2C contracts. Control of unfair terms is necessary in order to discourage their use in the market, which could lead to market failure. Therefore it is presumed that the use of standard term is closely connected to the market and that their control is important not only for consumer protection as the weaker party. Furthermore, from a social point of view – SME are not in a better position than consumers. In legal theory it is proposed that for achieving a social market economy, businesses and consumers should be treated equally and unfair terms control shall be used as means towards that goal (Article 3 TEU).

Last, but not the least, the separate regulation of consumer and general contract law hinders the creation of a consistent contract law system appropriate to market relationships. Unified regulation of unfair contract terms within the Civil Code/Law of Obligations would bring more transparency and systematic to contract law and consequently enable more effective protection and enforcement of granted rights in practice.

372 Ibid., 142.
373 The incorporation of rules on consumer contracts into general act on obligations by applying them to all consumer contracts or eventually to all the other contracts could according to Prof. Josipović positively affect further modernization of contract law. See T. Josipović, „Das Konsumentenschutzgesetz – Beginn der Europäisierung des kroatischen Vertragsrechts“, in: S. Grundmann/M. Schauer (ed.), The Architecture of European Codes and Contract Law, 2006, p. 129, cited in Croatian Report.
B. Unfair Terms in B2B Contracts

Zlatan Meškić, Zenica

1. B2B contracts as a separate question

The Proposal for a Regulation on a Common European Sales Law (ESL) as well as the Draft Common Frame of Reference (DCFR) provide for a different control of fairness with regards to B2B and B2C contracts. This new development in the regulation of unfair contract terms in the EU private law raised the questions whether the national laws of the participating states also differentiate between unfair terms in B2B and B2C contracts, and whether such differentiation would be justified.

The comparative analysis will be presented based on the theory that the protection of parties not stipulating the contract terms is usually provided on three levels: 1. by setting conditions for the binding effect of the general contract terms; 2. the fairness test; and 3. by the in dubio contra proferentem rule.

2. Scope of application of the provisions on general contract terms in B2B contracts

After dissolution of the Socialist Federal Republic of Yugoslavia, the newly formed states retained in some form the existing rules of the former Yugoslav Law on Obligations of 1978 (YLO). Prior to the transposition of the Unfair Contract Terms Directive 93/13 in the national laws of the former Yugoslav states, the national laws retained the provisions of the Articles 142-144 YLO which regulate the general contracts terms. These provisions apply to all kind of contractual relations (B2C, B2B, B2P and P2P) without differentiating between them. In B&H and Serbia, the former Article 142 YLO remained unchanged, and applies to general conditions “determined by one contractor”. In Croatia and Macedonia, this provision evolved and applies to general conditions defined as “contractual terms that have been formulated for a larger number of contracts that one party

378 Since the split of Yugoslavia the YLO by virtue of succession remained applicable in two slightly different versions in each entity of Bosnia and Herzegovina, the Law of Obligations of the Republic of Srpska (OJ of the Republic of Srpska, No. 17/93, 57/98, 39/03, 74/04) and the Law of Obligations of the Federation of Bosnia and Herzegovina (OJ of the Republic of Bosnia and Herzegovina, No. 2/29, 13/93, 13/94 and Official Journal of the Federation of Bosnia and Herzegovina, No. 29/03.) The provisions relevant for this analysis do not differ.
380 Article 295 (1) of the LO enacted in 2005, Official Gazette No. 35/05, 41/08.
381 Article 130 (1) of the LO, Official Gazette RMac No. 18/2001.
proposes to the other contracting party”. In Montenegro the control applies only to “adhesion contracts (standard contracts) where one party pre-formulates the elements and terms of the contracts through one general and permanent offer (general terms), and the other party only enters into such offer”. Finally, the Albanian Civil Code (CC) follows a different legal tradition than the former Yugoslav states, and provides protection in the case of, general conditions of the contract, prepared by one of the contracting parties.

Article 70 (1) ESL and Article II.-9:103 (1) DFCR follow the concept of the Directive 93/13 and refer to “not individually negotiated contract terms”. However, in addition it is required that the contract terms are supplied by one party. In Article 3 (2) of the Directive 93/13, this is only one of the possible cases within the scope of application.

3. The binding effect of general contract terms in B2B contracts

The Directive 93/13 does not regulate the question under which conditions the general contract terms become binding for the consumer, and therefore the provisions on the binding effect of the general contract terms remained unchanged in the national laws on obligations of the former Yugoslav states. They set three conditions for the binding effect of general contract terms. Namely, the general contract terms 1. must be included in the contract or referred to in the contract; 2. must be published in a usual manner; and 3. the party who did not formulate them must have been aware or should have been aware of their content. The Albanian Civil Code (CC), only requires the last named condition stating in Article 686 of the Albanian CC, first indent, that the “general contract terms (...) have effects against the other party if, at the moment of conclusion of contract, the latter knew or should have known those terms by showing ordinary diligence.” Article 70 ESL and II.-9:103 (1) DFCR partly correspond to both legal standards, in the former Yugoslav states as well as in Albania, by requiring that, “the other party was aware of them (the contract terms), or if the party supplying them took reasonable steps to draw the other party's attention to them”. However, while the conditions in the national laws of former Yugoslav states are set cumulatively, Article 70 ESL and II.-9:103 (1) DFCR consider the other party to be aware of the contract terms, if the stipulator somehow drew his attention to them. On the one hand, the Albanian CC and the LO of the former Yugoslav states are less strict, by providing that the other party is bound by the contract terms “if he should have been aware of their content”. On the other hand the LO of the former Yugoslav states additionally requires the party stipulating the general contract terms to ensure their publication before the conclusion of the contract in order to provide the possibility to the other party to become acquainted with them. Thereby, it is assumed that the general contract terms were known to the party who agreed on them, if they were given to the party before the conclusion of the contract or if they were published according to the regulated or the usual way. Finally, the LO of the former Yugoslav states also provides that the contract at least needs to refer to the contract terms. According to Article 70 (2) ESL

382 Article 136 of the LO, OG MW, No. 47/08.
384 It could be understood by a strict interpretation that only standard contracts (contracts of adhesion) used in a massive production environment, intending to discipline certain contractual relations are subject to these provisions. Thist results from a combining reading with Art. 687 CC. See G. Cian & A. Trabucchi, Commentario Breve al Codice Civile, CEDAM, 2010, Art. 1341, 1523.
385 Article 142 of the LO in B&H and Serbia; Article 295 of the Croatian LO; Article 130 of the Macedonian LO; Article 137 of the Montenegrin LO.
386 S. Perović/D. Stojanović, Komentar Zakona o obligacionim odnosima – knjiga prva, Beograd 1980, 455; This presumption is rebuttable and the burden of proof lies with the party who claims that the general contract terms were not known to him; B. Vizner, Komentar Zakona o obveznim (obligacionim) odnosima, Zagreb 1978, 584.
a mere reference to the contract terms suffices except in the case of B2C contracts, while II.-9:103 DCFR considers the mere reference in the contract not to be enough.

4. Fairness test

The fairness test of the contract terms in Croatia and Macedonia is a combination of the provisions of the Article 3 (1) Directive 93/13 and Article 143 (1) YLO. According to their LO a contract term is unfair, if it contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded, even if the general contract conditions including such provisions are approved by an authority. The general clause of fairness of the YLO still applies in B&H, Montenegro and Serbia, and declares provisions to be unfair if they are contrary to the purpose of contract conclusion itself or to fair business practices, even if a competent body approves the general conditions containing them. Article 682 (2) of the Albanian CC provides for a different control of fairness, and considers general terms to be unfair, if they cause a loss or disproportional disadvantage/detriment to the interests of the contracting party, especially when they differ essentially from the principles of equality and impartiality provided for in Civil Code provisions, which regulate the contractual relationships. Especially the test of fairness based on the principle of impartiality seems to be uncommon.

Article 86 (1) ESL and II.-9:406 DCFR bring completely new developments with this regard, firstly by providing a separate fairness clause only applicable to B2B contracts, and secondly by introducing a new test of fairness based on the nature of the term, the use of which “grossly deviates” from good commercial practice, contrary to good faith and fair dealing. The introduction of a new general clause of the Directive 93/13 combined with the previous general clause of the YLO, as this was done in Croatia and Macedonia already raises the question of how to differentiate between the level of protection provided by these clauses and the level of protection provided by other general clauses of the national provisions on obligations, such as Article 103 YLO which contains a general rule on nullity of contracts that are opposed to mandatory provisions, public policy, or good usages or usurious contracts regulated in Article 141 of the YLO. The new question would be whether the “gross deviation” from good commercial practice, contrary to good faith and fair dealing sets a different standard, and whether the national courts would be able to recognize such difference.

The national laws of the participating states additionally show some particularities. E.g. the black list from the Article 686 (3) of the Albanian CC is applicable to B2B contracts. Furthermore, the Draft Law of Obligations of B&H imported the protection in case of surprising terms from the German CC.

5. In dubio contra proferentem rule

All of the national laws of the participating states contain a rule stating that unclear provisions in pre-formulated contracts shall be interpreted in favor of the party not formulating them. However, the in dubio contra proferentem rule contained in the national laws of the participating

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387 Article 296 (1) of the Croatian LO and Article 131 (1) of the Macedonian LO.
388 Article 143 (1) of the Serbian and Bosnian laws on obligations and Article 138 (1) of the Montenegrin LO.
390 Article 688 of the Albanian CC; Article 100 of the LO of Serbia and B&H; Article 320 of the Croatian LO; Article 98 of the Montenegrin LO.
states, does not differentiate between B2B and B2C contracts. Such differentiation is unnecessary. Article 64 ESL which provides for the interpretation of unclear provisions in favor of the consumer is already covered by Article 65 ESL, which contains the *in dubio contra proferentem* rule.
C. Definition of Unfair Contract Terms, List, Role of Courts

Neda Zdraveva, Skopje

The standard what shall be considered an unfair contract term has been set with the Directive 93/13/EEC. The provision of Art. 3(1) fixes, in a general way, the criteria for assessing the unfair character of contract terms, providing that "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer." Based on this definition it is to be concluded that unfair contract term is a term in consumer contracts which has not been individually negotiated and causes significant imbalance in the parties’ rights and obligations, whereas that imbalance is contrary to the principle of good faith and is to the detriment of the consumer. The Court of Justice of the European Union in its practice related to the Directive 93/13/EEC did not provide for any further interpretation which may serve as a supplement to the concept of unfair terms.

The analysis of the legislation of the participating States shows that the legal definition of the unfair contract terms is provided both in the general contract law (Law on Obligations/Civil Code) and the specific consumer protection legislation of the participating states. Namely in all participating states the Law on Obligation/Civil code regulates the unfair contract terms within the scope of the provisions dealing with the nullity and voidness of the general (pre-formulated) contract terms, while the Law on Consumer Protection provides for specific definition related to consumer contracts.

The general contract law, in all participating states provides for a definition where from it could be drawn that as unfair contract term in a general contract term (pre-formulated agreement) shall be considered a term which is 1) pre-compiled by one of the parties, which could be interpreted as not individually negotiated), 2) contrary to the principles of good faith or equality, and 3) to the determined of the other contracting party.

The specific consumer protection legislation in Albania, Bosnia and Herzegovina, Croatia, Macedonia and Montenegro provides definition of unfair contract term, while in Serbia it also provides additional the criteria for the assessment of the fairness of a contractual term. The review of the legislation shows that the main criteria for assessment as provided in the Directive 93/113/EEC could be found in the definition of all participating states. The ‘not individually negotiated’ criterion

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392 Laws on obligations of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia.
393 Civil Code of Albania.
395 The Consumer Protection Act of Serbia in Art. 5, para. 1.24 defines contract term and in Art. 46 par. 2 and 3 defines the mandatory and circumstantial criteria for the assessment of unfairness.
exists with minor modifications, as in Bosnia and Herzegovina the literal term used is ‘not personally negotiated’, while in Macedonia and Serbia the application is extended to the individually negotiated terms as well. The two criteria ‘significant imbalance of rights and obligations’ and ‘to detriment to the consumer’ exits in all participating states. It is to be noted the Serbian legislation further expands the criteria for unfairness providing two additional mandatory criteria and including circumstantial criteria for the assessment of (un)fairness.

The Directive 93/13/EEC (Art. 3(3) and Annex 1) provide an indicative and non-exhaustive list of the terms which may be regarded as unfair. The legislation of the participating states in this regard differs. In some of the countries it has been transposed as ‘grey list’ – meaning an indicative list of what may be considered as unfair contract term. As such it could be found in the legislation of Croatia and Montenegro. The legislator in Albania, Bosnia and Herzegovina and Macedonia transposed the list as a ‘black list’ – meaning an indicative list of what shall always be considered as unfair. In Serbia, the legislator opted an approach to include both ‘black’ and ‘grey’ list of contract terms that shall i.e. may be considered unfair.

In all countries the courts are bound, but not limited by the lists of terms which will be or may be considered as unfair. Considering the fact that the legal consequence of the existence of unfair contract term is that it shall be null and void the courts will act ex officio. The court will find a contract term null and void if it is included in a black list or will presume it in case of the grey one. The court, however, will not be bound by this list only; based on the general definition it may find that a contractual term is null and void if it falls under the general definition of unfair contract term. The analysis of the practice in the participating states shows that the courts will be more in favour of applying the general contract law rather than the specific consumer protection legislation.
D. Assessing Unfairness of a Contract Term and Time-Limits of Invalidation

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1. Circumstances of relevance for the fairness test

In all participating states the relevant sources are to be found in national provisions transposing Art. 4 (1) of the Directive 93/13. According to this provision the unfairness of a contractual term shall be assessed by considering the nature of the goods or services for which the contract was concluded, the circumstances attending the conclusion of the contract at the time of its conclusion, and in relation to all the other terms of the contract or of another contract upon which it is dependent.

Most of the participating countries have transposed the said provision of the Directive in their consumer protection legislation, where one can find solutions that are broader than in the Directive and solutions which obviously can impede the efficient implementation in practice. In the case of Montenegro, the existing LCP does not contain a specific provision transposing Art. 4(1) of the Directive, but the new Draft LCP is tailored in a manner which literally transposes its wording.

Beside the national provision that corresponds to Art. 4 (1) of the Directive, in evaluating the unfairness of a contract term the national courts are also bound to respect general principles of their general contract law. One such general principle which can be found in Art 3 (1) of the Directive and is at the same time common to all participating states, is the principle of good faith. It requires from both parties always to take into account each other's interests when drafting and concluding a contract and when performing contractual duties and fulfilling contractual rights.

Also, the black or grey list (depending on the transposition method of the Annex of the Directive in the participating states) is relevant for the national courts while evaluating the fairness of a contract term. These lists are primarily intended to have a certain indicative effect in the assessment of fairness of a clause in B2C contracts.

Finally, since the legislative technique in transposing Art. 4 (2) of the Directive differs among the participating states, from the courts’ perspective it is recognized as vital to refer to this issue as well.

396 Art. 93 para. 2 of the CPA of Bosnia and Herzegovina; Art. 97 of the Croatian CPA; Art. 79 of the Macedonian LCP; Art. 46 para. 2 of the Serbian ACP.
397 This could be stated for the Serbian ACP since according to Art. 46 para. 2 courts should take into consideration the following: (1) the nature of goods or services to which the contract relates, (2) the circumstances (as of the time) of contract formation, (3) other terms of the same contract, or terms of the linked agreement, (4) the way in which the content of the contract was agreed upon, as well as (5) the manner of informing the consumer of the content of the contract in view of the transparency requirements.
398 In the case of Bosnia and Herzegovina, Art. 93 para. 2 BLO due to false translation instead of the wording “circumstances attending the conclusion of the contract” stipulates “taking into account all other participants related to the conclusion of the contract”.
399 The ECJ clarified that the list is of indicative and illustrative character (see ECJ judgment of 7 May 2002, C-478/99 - Commission of the European Communities v. Kingdom of Sweden [2002] ECR I-04147, para. 22).
According to Art. 4 (2) of the Directive “assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language”. In Bosnia and Herzegovina, Montenegro and Serbia, Art. 4 (2) has not been transposed neither by consumer protection legislation nor in general contract laws that have subordinated application. While in Croatia Art. 4 (2) of the Directive has been transposed by both CPA and COA, in Albania it is done by CPA and in Macedonia by LOO.

In all countries that have transposed Art. 4 (2) of Directive a heavy criticism is placed on the fact that certain explanations found in the Directive’s preamble and the Report on the implementation of Directive 93/13 have been disregarded by national legislators, thus not making it helpful for the courts when applying relevant national provisions. Namely, general opinion is that if national legislators would have included the second explanation from recital 19 of the Directive according to which “the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms”, the courts would have a clear indication that these provisions, not separately but in combination with certain other contract terms can lead to unfairness to the detriment of consumers. More important, such an approach would be in line also with the ECJ judgment in the case Caja de Ahorros.

On the other side in Serbia, the national legislator intentionally decided not to take over Art. 4 (2) of Directive in SACP with the aim to enable courts to ex officio monitor the fairness, and the resulting nullity, of the unilateral price variation, determination clauses, charges for services (not) rendered, etc. In Bosnia and Herzegovina the lack of exclusion of matters listed in Article 4 (2) of the Directive has been generally approved in domestic legal science as a step toward better protection of consumers. This type of approach is close to that found in some EU member states having the same idea where non-transposition of Art. 4(2) is supposed to result in main subject-matter of the contract and the adequacy of price also being subject to judicial review.

400 However, Article 162 (3) of the BDLO transposed the exception of the Article 4 (2) of the Directive 93/13 stating that Article 162 does not apply to clauses of the general contract terms, whose content was taken from valid provisions or that were individually negotiated, if the other party could influence their content. It also does not apply to clauses related to the subject of the contract or the price, if these clauses are clear, understandable and easily discernible.

401 Art. 99 of CPA and Art. 296 (3) of COA.


403 Art. 131 (4).

404 Recital 19 of the Directive 93/13 indicates that: “...for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/ratio may nevertheless be taken into account in assessing the fairness of other terms”.


406 ECJ judgment of 3. June 2010, C-484/08 – Caja de Ahorros y Monte de Piedad de Madrid v Asociacion de Usuarios de Servicios Bancarios (Ausbanc) [2010] ECR-00000. The ECJ stated: “Art. 4(2) and 8 of Directive 93/13/EEC (…) must be interpreted as not precluding national legislation, (…) which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject-matter of the contract or the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in plain, intelligible language”.

407 For more details see N. Misita, Osnove prava zaštite potrošača Evropske zajednice, Sarajevo 1997, 269; Z. Meškić, „Nepravednost odredbi potrošačkih ugovora o kreditu sa promjenjivim kamatnom stopom-odluka Suda Evropske unije, 3. juna 2010., C-484/08, Caja de Ahorros y Monte de Piedad de Madrid/Asociación de Usuarios de Servicios Bancarios (Ausbanc)” , Nova Pravna Revija 1-2/2010, 42

408 Latvia, Luxembourg, Greece, Sweden, Finland, Denmark etc. For more see H. Schulte-Nölke (ed.), Consumer Law Compendium, University of Bielefeld, p. 386 – 394.
In Montenegro, the final version of the new Draft LCP expected to be adopted by end of July 2012 introduces provisions which correspond to recital 19 of the Directive 93/13 and the Report on its implementation. While transposing Article 4 (2) of the Directive the Draft LCP provides for derogation in the same article by allowing “assessment of contractual terms relating to formation and altering the price, as well as methods (way) of payments”. In this manner the Montenegrin legislator opted for a different legislative technique, which beside being of help to the courts when applying these provisions is also aimed to eliminate grounds for any possible interpretative problems which could compromise future implementation of the LCP, as it could be the case of a mere exclusion of Art. 4 (2) of the Directive.

2. Time limits for invalidation

Directive 93/13 remains silent as regards time limits for the remedies on invalidating an unfair contract term or a contract which contains such a term. To this extent, the sole relevant provision is Art. 6 (1) of the Directive 93/13, which stipulates that the state shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding for the consumer, and that the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair terms.

However, the relevant provisions of the consumer protection laws or the general contract laws of the participating states do not prescribe a time limit for remedies on invalidating an unfair term or a contract containing an unfair term. Such stipulations and stands are in accordance with the ECJ judgement in Cofidis where it is ruled that Directive 93/13 precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair. This is how under Article 110 of the BLO of Bosnia and Herzegovina the right to invoke nullity cannot expire. Consequently, the nullity of an unfair term cannot be subject to the statute of limitation. The same is regulated in other countries: Croatia (Art. 328 of the COA), Macedonia (Art. 102 of the LOO), Montenegro (Art. 108 of the LoO) and Serbia (Art. 110 of the CO). In the case of Albania the law is tacit on this issue, but according to the general principles, assuming that unfair terms are invalid (null and void), they are not subject to the statute of limitation.

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409 Art 105 (1) of the Draft LCP.
410 Art 105 (2) of the Draft LCP.
411 For example such is the case with Spain which has not transposed the rule of Art. 4(2) of Directive 93/13. This “silence” has produced problems of interpretation, where case law used different approaches and provoked contradictory solutions (for more details see Hans Schulte-Nölke (ed.), Consumer Law Compendium, University of Bielefeld, p.157).
412 ECJ judgment of 21 November 2002, C–473/00 – Cofidis v. Fredout, [2002] ECR I–10875. There the ECJ found that fixing a time-limit for the court’s power to find of its own motion that an unfair term is illegal is contrary to the objectives of the Directive 93/13. The ECJ also stressed that to allow member states to introduce such time-limits, which might differ from each other, would also be contrary to the principle of the uniform application of Community law.
413 This article defines that the right to request declaration of absolute nullity cannot be lost.
E. Legal Consequences of Unfairness of Contractual Terms

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1. The “ineffectiveness” or the “non-binding nature” of an unfair term

As already mentioned, the legal systems of all six Participating States contain two sets of provisions regulating unfair contract terms. Accordingly also the regulation of legal consequences of unfairness of contract terms can be found prescribed in their special Consumer Protection Acts, that transpose Directive 93/13 and in their Laws on Obligations i.e. Civil Obligations Act and in Albania in its Civil Code, within provisions regulating the control of the general contract terms and conditions and general provisions on nullity applicable to all kind of contractual relationships. When it comes to Directive 93/13, the relevant provision is to be found in Art. 6(1), pursuant to which, the state shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding for the consumer, and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. Although the way in which Art. 6(1) is phrased opened up the question of the proper concept of nullity of an unfair term, the established ECJ practice in cases Océano, Cofidis and Mostaza Claro until recent Pénzügyi Lízing, confirmed the concept of absolute nullity as a civil law sanction for using an unfair term in consumer contracts.

In accordance with Directive 93/13, legislators of all six Participating States prescribed in their CPAs that an unfair contract term is null and void (Art. 102(1) of the Croatian CPA, Art. 94 (1) of the Bosnian CPA, Art. 66 (1) of the Montenegrin LCP, Art. 82(1) of the Macedonian LCP, Art. 46(1) of the Serbian CPA, Art. 28 of the Albanian CPA). However, the wording of Art. 28 of the Albanian CPA is considered ambiguous in Albanian legal theory and inconclusive on the question whether this is a case of absolute or relative nullity. Corresponding rule can be found prescribed in provisions of Participating States` COAs on nullity of individual provisions of general contract terms and conditions (Art. 296 (1) of the Croatian COA, Art. 143(1) of the Bosnian LO, Art. 138(1) of the Montenegrin LoO, Art. 131(1) of the Macedonian LoO, Art. 296(1) of the Serbian CoO, Art. 686 of the Albanian CC) in connection with general provision on nullity of contracts (Art. 322 (1) of the Croatian COA, Art. 103 of the Bosnian LO, Arts. 101-108 of the Montenegrin LoO, Art. 95(1) of the Macedonian LoO, Art. 103(1) of the Serbian CoO, Art. 92 of the Albanian CC).

Some of Participating States inherited from the former Yugoslav Law on Obligations of 1978 the provision according to which the court can set aside i.e. reject the application of either some specific provisions of general conditions that deprive the other party of the right to file objection, or of another provision on the basis of which this party loses rights from the contract or loses deadlines, or which are unfair or too strict (Art. 143(2) of the Bosnian LO, Art. 138(2) of the Montenegrin LoO, Art. 131(2) of the Macedonian LoO, Art. 143(2) of the Serbian CoO). Although it is questionable whether such a provision provides for absolute or relative nullity, the national reporters speak more in favour of absolute nullity. The rule pursuant to which the contract continues to bind the parties if it is capable of existing without the unfair and thus non-binding term is laid down in most of Par-
participating States CPAs (Art. 102(2) of the Croatian CPA, Art. 66 (2) of the Montenegrin LCP, Art. 82(2) of the Macedonian LCP, Art. 3(3) of the Serbian CPA, Art. 28 of the Albanian CPA) and in all COAs regarding all types of contracts (Art. 324(1) of the Croatian COA, Art. 105(1) of the Bosnian LO, Art. 103(1) of the Montenegrin LoO, Art. 97(1) of the Macedonian LoO, Art. 105(1) of the Serbian CoO, Art. 111 of the Albanian CC). However, later provisions deriving from the Yugoslav Law on Obligations of 1978 provide usually that nullity of a certain contract provision shall not imply nullity of the contract itself, if the contract is sustainable without this provision, unless the provision was a condition or a decisive motive for concluding the contract. Like the Directive 93/13, neither provision of the CPAs or of the general contract law of any of Participating States contains rules on alteration, amendment and adjustments of unfair terms or on splitting terms into valid and non-valid parts. However, all COAs contain provisions on usury contracts and on reduction of the contractual penalty sum, where the court can at the request of the party reduce unfair contractual obligation of the party if it fulfills certain conditions comparable to those on unfair contract terms.

2. Ex-officio declaration of the contract term as unfair

In most of the Participating States, special CPAs contain no detailed provisions concerning nullity (like provisions on certain consequences of nullity, on invoking nullity, on time period for invoking nullity etc.), which are prescribed in general contract law as lex generalis. According to these general provisions on nullity the courts of Participating States have the obligation to watch nullity ex officio and any interested party may invoke nullity, even a state attorney (Art. 327 of the Croatian COA, Art. 109-110 of the Bosnian LO, Art. 107 of the Montenegrin LoO, Art. 101 of the Macedonian LoO, Art. 109 of the Serbian CoO, Art. 92 of the Albanian CC). Moreover, Art. 114(4) of the Montenegrin LCP contains a provision that stipulates that if the court also finds that another pre-formulated provision of the contract under dispute is unfair, it shall render it null and void ex officio. The right to claim nullity does not expire and the court shall declare the unfair contract term null and void ex tunc (Art. 328 of the Croatian COA, Art. 109-110 of the Bosnian LO, Art. 108 of the Montenegrin LoO, Art. 102 of the Macedonian LoO, Art. 110 of the Serbian CoO, Art. 92, 105 and 113 of the Albanian CC). Provisions of all Participating States regulating obligation for national courts to watch nullity of a contract term on their own motion are in accordance with the relevant ECJ judgments, especially confirmed in recent case Pénzügyi Lízing where the Grand Chamber held: “The national court must investigate of its own motion whether a term [...] falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair.” However, as observed in national reports this task may prove difficult for the national courts of Participating States to fulfil, because they are ignoring special consumer protection legislation. Furthermore, the courts of Participating States are not even fond of declaring provision in general contract terms and conditions null and void. Finally, the courts would need to interpret mentioned provisions in line with the Directive 93/13 as amended by Directive 2011/83 and rich ECJ practice which interprets provisions on unfair contract terms, what could represent a difficult task for them.
ANNEXES

I

RECENT DEVELOPMENTS IN THE FIELD OF CIVIL LAW IN SOUTH EAST EUROPE
DEVELOPMENT OF CIVIL LAW IN BOSNIA AND HERZEGOVINA

Abstract

The author of the present paper tries to present in general lines the processes of reform and the directions of development of legislation in Bosnia and Herzegovina in the sphere of civil law. Indispensable in considering this problem is taking into account the constitutional order of Bosnia and Herzegovina and/or distribution of jurisdiction between the State, the Entities and the Brčko District of Bosnia and Herzegovina. In not a single one of mentioned legal systems the general part of civil law was regulated in an comprehensive way, but the different matters are dealt with by means of numerous particular laws. Consequently, a brief survey is offered along these lines of these pieces of legislation as well as of subject-matters of their regulation. Fundamental reforms have been carried out in the ares of law of property (things, objects of property) which was done under the conspicuous influence of Croatian legislative solutions, which is particularly true for the Republic of Srpska and the Brčko District of Bosnia and Herzegovina, while the reform of the law of property in the Federation of Bosnia and Herzegovina was still restricted in scope. In spite of several attempts in this direction, no new law has been adopted in the area of law of obligations that would replace the law inherited from the previous State. However, there is no doubt that in all analysed systems of law, numerous legislative acts have been enacted for regulating different matters and relations falling in the broad scope of the law of obligations, including special laws covering certain types of contracts. Development of civil law in Bosnia and Herzegovina in course of two preceding decades has been marked by significant reforms, but the the question arises as to whether their overall effect has been reduced by fragmentation of civil law legislation, the number of laws in the civil law field and the horizontal discrepancy between them. This, at the same time, is one of the reasons for serious consideration of the possibility and the necessity of codification of civil law.

Key words: civil law, property law, obligation law, capacity of having personal rights. rights of property, contracts.

1. Introduction

The law, and particularly the positive law solutions, reflect the state of affairs in the sphere of legislation, but also the circumstances and conditions in society as a whole in a given period of time. In relation to certain solutions, the legal and historical continuity were possible to be realized, while others, due to their inadequacy, have been rejected long ago and replaced by new and different ones. Transition of domestic society and its adapting to European legal values cause significant changes in the legislation as well. Consequently, it is quite understandable to make and to present a survey of the state of affairs in the area of civil law legislation in order to create an appropriate basis for considering the directions of its development and ensure the prerequisites for articulating specific goals intended to be achieved.
Bosnia and Herzegovina is a composite and a kind of a *sui generis* State (consisting of the Republic of Srpska – hereinafter: RS, Federation of Bosnia and Herzegovina – hereinafter: FBiH, and the Brčko District – hereinafter: BD BiH. Exactly due to these reasons it is, first of all, indispensable to present the legislative distribution of jurisdiction between the various levels of State power. In conformity with the Constitution of Bosnia and Herzegovina and the constitutions of the Entities, the legislative jurisdiction in the area of civil law is vested with the RS and BiH (article III, paragraph 1, and article 3 of the BiH Constitution, article 68, point 6 of the RS Constitution, article III of the Constitution of FBiH). Applicable in the territory of the BD BiH are laws that are enacted by the District Assembly and/or those Entity laws which, according to the Writ of Supervisor¹ are considered laws of BD BiH, and laws of the Socialist Republic of Bosnia and Herzegovina (hereinafter: SR BiH) as well as laws of the Socialist Federal Republic of Yugoslavia (hereinafter: SFRY), unless they have been annulled, completely or partially, by a decisions or a legislative act of the BD BiH (art. 76 of the Statute of BD BiH and paragraph 39 of the Final Decision of Arbitration Tribunal, point 2 of Annex of the Final Decision of the Arbitration Tribunal, paragraphs 1 through 3, and paragraph 5, point a/ of the Writ). However, and in spite of rather clear, and predominently constitutional norms, it happens quite often that legislative bodies at various levels of State power enact laws relating to the same matters or same areas of relations that are not always and in their totality brought into mutual accord.

### 2. General Part of Civil Law

Legal system of Bosnia and Herzegovina (including the legal systems at all levels of State power), in terms of analysis of development of civil law, finds its support in the legal tradition of Republic of Srpska, Bosnia and Herzegovina and Socialist Federal Republic of Yugoslavia, and/or first Yugoslavia, where, as far as the territory of Bosnia and Herzegovina is concerned, the valid law was the 1811 Austrian General Civil Code (*Allgemeines buergerliches Gesetzbuch – ABGB*). Along these lines one may conclude that the ABGB has had, and continues to have, considerable influence on domestic civil law, but not in terms of systematics, since in the ABGB, just as in the Serbian 1844 Civil Code (SCC), actually applied was the institutional systematization of civil law, while in the positive civil law the accepted method was the Pandects system.² Since in not a single legislation in Bosnia and Herzegovina exists a civil law codification and since in the framework of the inherited legal values the Pandects systematics of civil law rules has been accepted, it is a fact that in every Entity legislation and/or legislation of Brčko District of Bosnia and Herzegovina, the area of civil law is characterized with the fact of implementation of particular legislative acts (laws) that regulate the general part of civil law broken down by branches such as property law, obligation law, family law and inheritance law. Consequently, there exists in the BiH legislation no law that would in a comprehensible way regulate the matter of the general part of civil law; instead, the relevant rules are included in several legislative acts, and predominantly in the Law on Obligation Relations (Contract and Torts Law) – hereinafter: LOR³. These matters include the following: the principle of misuse of law,⁴ contractual capacity of persons,⁵ liability in the sphere of torts,⁶ deficiencies of will

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¹ The Supervisor’s Writ is an instrument of abolishing the Entity laws in the area of Brčko District and of proclaiming the termination of legal force of inter-entity border within the District, of 4 August 2006 (hereinafter: Writ).

² Which, for instance, was accepted in the 1896 German Civil Code (*Buergerliches Gesetzbuch – BGB*).


⁴ Art. 13 of LOR.

⁵ Arts. 54 – 59 of LOR.

⁶ Arts. 159 – 160 of LOR.
(intention of parties), condition (requirement), time limit (deadline), agency (representation), nullity, voidableness, etc. Other laws of that nature include the ones regulating the property law relations – Law on Property Rights (prohibition of misuse of law, things, i.e. right to own objects of property), Law on Ownership Law Relations (prohibition of misuse of law), Law on Ownership and other Property Rights (prohibition of misuse of law, things – objects of property rights), but also the Family Law (acquiring business capacity). However, not all institutes of the general part of civil law are regulated by the above mentioned laws. Thus, for instance, relevant for the form of legal transactions, in addition to requirements specified by other regulations, are the following legislative acts: Notary Public Law, Law on Electronic Legal and Business Trade of BiH, Law on Electronic Signature, Law on Electronic Business Operation of RS.

2.1. Capacity of Natural Persons to Be Holders of Rights (Legal Subjectivity)

Every natural person is a holder of rights and is vested with legal capacity. The exception to that rule includes a child conceived at the moment of opening of inheritance who was deemed to have been born, if born alive. Death and/or declaration presuming death of missing person are grounds for the termination of legal capacity of natural persons. Matters of acquiring, restricting and forfeiting of business capacity of natural persons are regulated by provisions of the Family Law. Capacity for entering into contract and capacity to be liable under the tort rules are regulated by provisions of the LOR. Testamentary capacity (capacity to be a testator) pertains to persons able of reasoning after reaching the age of fifteen, as far as RS is concerned, and the age of sixteen – in

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7 Arts, 60 – 66 of LOR.
8 Arts, 74 – 76 of LOR.
9 Arts. 77 – 78 of LOR.
10 Arts. 84 – 88 of LOR.
11 Arts. 103 – 110 of LOR.
12 Arts. 111 – 117 of LOR.
13 "Official Herald of RS", nos. 124/08, 58/09 and 95/11 – hereinafter: ZSP. From now on the abbreviations in the following text relating to domestic laws are not going to be translated but will be kept as indicated in original text.
14 Art. 4 of ZSP.
15 Arts, 5 – 14 of ZSP.
16 "Official Gazette of FBiH", nos. 6/98 and 29/03 – hereinafter: ZV FBiH.
17 Art. 5 of ZV FBiH.
18 "Official Herald of BD BiH, nos. 11/01, 8/03, 40/04 and 19/07 – hereinafter: ZV BD BiH.
19 Art. 3 of ZV BD BiH.
20 Arts. 6 – 15 of ZV BD BiH.
22 Art. 108 of PZ RS, art. 157 of PZ FBiH, art. 139 of PZ of BD BiH.
23 Notary Public Law of RS ("Official Herald of RS", nos. 86/04, 2/05, 74/05, 76/05, 91/06, 37/07, Decision of Constitutional Court of RS, nr. U-60, of 5 July 2007); Notary Public Law of FBiH ("Official Gazette of FBiH, nos. 45/02 and 13/09) and Notary Public Law of BD BiH, nos. 9/03 and 17/06.
24 "Official Gazette of BiH, nr. 88/07.
26 "Official Gazette of RS", nr. 59/09.
28 Arts, 108, 114, 203/2, 207/1, 209, 211, 231/3, 285 of PZ RS; arts. 11, 57, 137, 157, 191/1, 92, 194, 196/1, 265 of PZ FBiH; arts. 26, 53, 120, 122, 139, 177/1, 241 of PZ BD BiH.
29 Art. 56 nd/or arts. 159 and 160 of LOR.
the FBiH (Federation of Bosnia and Herzegovina) and BD BiH (i.e. Brčko District). Contract of labor may be concluded by a natural person after reaching the age of fifteen and having generally a sound health, and after obtaining consent of one of the parents or legal representative. The Entity legislations and the legislation of BD BiH provide that minors may have a special business capacity such as: exercising the right to free parenthood after meeting the requirement of ability of reasoning; after the consent by a minor older than ten in the case of instituting an incomplete adoption; after reaching the age of fifteen a minor, after meeting certain conditions, may independently agree to medical treatment and/or medical measure; also regulated is the matter of recognition of paternity and/or maternity to be recognized to a minor exceeding the age of sixteen, as far as the law of the Republic of Srpska is concerned; the same right pertains also to a minor able to understand the nature and meaning of the statement of recognition of paternity and/or maternity; consent with the recognition of paternity and/or maternity has to be given in case of a minor exceeding the age of sixteen, as far as the Republic of Srpska is concerned; the same right shall pertain also to a minor exceeding the age of fourteen and able to understand the meaning of the statement of recognition, as far as Federation of Bosnia and Herzegovina is concerned.

2.2. Capacity of Legal Entities to Be Holders of Rights (entitled to Legal Subjectivity)

Legal entities too have the legal capacity. They acquire it in various ways (as a rule, by being filed in a court register), depending on the legal entity’s character (commercial company, association of citizens, health-care institutions, State bodies and agencies, institutions in the sphere of culture, sports organizations, etc.) as well as on the way of their establishing (by means of an act of foundation, such as contract or decision, by operation of law or on the ground of decision of a State agency). Legal capacity of legal entities, as a matter of fact, is connected with the kind of their activity and/or purpose of establishment.

Legal and business capacities of commercial companies in the RS and FBiH are regulated by the Law on Commercial Companies, while in the District by the Law on Enterprises of BD BiH.

30 Art. 64/1 of ZN RS and/or art. 62/1 of ZN SR BiH.
31 Art. 151/1 of the FBiH Labor Law (“Official Gazette of FBiH”, nos. 43/99, 32/00, 29/03).
32 Art. 14/1 of the Law of Labor of RS (“Official Herald of RS, nr. 55/07 – consolidated text); art. 10/1 of the Law on Labor of BD BiH” (“Official Gazette of BD BiH. Nos. 19/06, 19/07 and 25/08). In that case a minor may manage his property and dispose of his income and earnings realized by work (art. 84, paragraph 3 of PZ of RS; arts. 137/3 and 1 5/1 of the Law on Labor of FBiH; art. 120/3 and art. 10/1 of PZ BD BiH.
33 Art. 5/1 of PZ RS.
34 Art. 145/2 of PZ RS. According to PZ FBiH and PZ BD BiH, in addition to required age of ten, it is necessary for the minor to be able to understand the meaning of adoption (art. 103/2 of PZ FBiH, art. 87/2 of PZ BD BiH).
35 This is the case with legislations of RS and BD BiH as far as contagious diseases or diseases of dependence caused by narcotics are concerned, or in the case of doubt in this respect (art. 25/3 of the Law Health Protection of RS, “Official Gazette of RS, nr.106/09; and art. 31/3 of the Law on Health Protection of BD BiH, “Official Gazette of BD BiH, nr. 38/11), while in the legislation of FBiH – in all cases except in cases of invasive diagnostic and therapeutic procedures, surgical treatment and interruption of pregnancy (art. 22/5 of the Law on Rights, Duties and Responsibilities of Patients - “Official Gazette of FBiH, nr. 40/10.
36 Arts. 114 and 126 of PZ RS, art. 57 of PZ FBiH, art. 53 of PZ BD BiH.
37 Arts. 119 and 125 of PZ RS, arts. 60/2 and 63/1 of PZ of FBiH, art. 52/3 of BD BiH.
National Assembly of the Republic of Srpska has adopted in October 2011 the Draft Law on Amending the Family Law of the RS by means of which, among other matters, it was specified that minors will have a limited business capacity after reaching the age of fourteen (article 5), which was also the case with the legislations of FBiH and BD BiH (arts.157/5 and 188/2 of PZ FBiH, arts. 139/5 and 169/2 of PZ BD BiH.
39 “Official Herald of BD BiH, nos. 11/01, 10/02, 14/02, 1/03, 4/04, 8/03, 19/07 and 34/07.
Commercial companies acquire legal capacity by being filed in the court register. Mentioned laws, among other matters, regulate the following: establishing of commercial companies, managing the companies, rights and duties of founders, partners and shareholders, merging and reorganization (status changes and changes of legal form of commercial companies) and liquidation of commercial companies. Capacity for entering into contract is regulated by provisions of the LOR, which applies also to the capacity to be liable under the tort law. For specific commercial companies, due to their business activity or structure of capital, applicable are particular regulations, such as: Law on Public Enterprises, Law on Banks, and Law on Micro-credit Organizations. Law on Legal Entities Established by BD BiH. In addition to commercial companies, the capacity to be holders of right also pertains to associations of citizens and foundations, as well as to institutions in various areas of social activities and organization. Establishing, registration, internal organization and termination of work of associations and foundations are regulated by the Law on Foundations. Finally, the above mentioned capacity to be a holder of rights pertains to agricultural and/or farming cooperatives as well.

In the areas of education, science, culture, sports and physical culture, standard of living of pupils and students, health protection, social care of children, social protection, social security, health protection of animals, health protection of plants, etc., various corresponding institutions are established, together with organizations and alliances, and they all are holders of rights. The matters of establishment, organization, work and other matters important for institutions, organizations or services in various areas of social acivity and organization are subject to application of the following laws: Law on Public Service System, Law on Health Protection, Law on Sports, etc. The same capacity regarding rights pertains also to republic bodies and agencies (ministries, republican administration), republican administrative organizations (agencies, institutions, directorates) and local self-government units (towns and municipalities). This complex of matters is regulated by the following legislation: Law on Republic Administration of the RS and Law on Local Self-Government of RS, Law on Federal ministries and other Bodies of Administration, Law on Principles of Local

40 Art. 8 of ZPD RS, art. 5 of ZPD FBiH, art. 4 of the Law on Enterprises of BD BiH.
41 Art. 54 of LOR.
42 Arts. 170 - 172 of LOR.
43 Law on Public Enterprises of RS ("Official Herald of RS, nos. 75/04 and 78/11); Law on Public Enterprises of FBiH ("Official Gazette of FBiH. Nr.8/05); Law on Public Enterprises of BD BiH ("Official Herald of BD BiH, nos. 15/06, 15/07, 19/07, 1/08 and 24/08; Writ of Supervisor of amending the Law).
44 Law on Banks of RS ("Official Herald of RS, nos. 44/03 and 74/04); Law on Banks of FBiH ("Official Gazette of FBiH, nos. 39/98, 32/00, 48/01, 27/02, 41/02, 58/02, 13/03, 19/03 and 28/03); Law on Banks of BD BiH ("Official Herald of BD BiH, nos. 5/03 and 19/07.
45 Law on Micro-credit Organizations of RS ("Official Herald of RS, nr. 64/06); Law on Micro-credit Organizations of FBiH ("Official Gazette of FBiH, nr. 20/00.
46 "Official Herald of BD BiH", nos 10/02, 19/07 and 2/08.
47 Law on Associations and Foundations of RS ("Official Herald of RS", nos. 52/01 and 42/05), Law on Associations and Foundations of FBiH ("Official Gazette of FBiH", nr. 45/02); Law on Associations and Foundations of BD BiH ("Official Herald of BD BiH, nos. 1/02 and 19/1 ("Official Herald of BiH, nos. 32/01, 42/03, 63/08 and 76/11)
48 Art. 14/1 of the General Law on Cooperatives of BiH ("Official Gazette of BiH, nr. 18/03); art. 11/01 of the Law on Agricultural Cooperatives of RS ("Official Herald of RS", nos. 73/08, 116/09 and 78/11); art.2/1 of the Law on Farming Cooperatives of BD BiH ("Official Herald of BD BiH, nos. 19/02, 19/07 and 2/08.
49 "Official Herald of RS", nr. 68/07.
50 Law on Health Protection of RS; Law on Health Protection of FBiH ("Official Gazette of FBiH") nr. 46/10); Law on Health Protection of BF Bih.
52 "Official Herald of RS, nos. 118/08, 11/09 and 74/10.
53 "Official Herald of RS", nos. 101/04 and 118/05.
54 "Official Gazette of FBiH, nos. 19/03, 38/05, 2/06 and 61/06.
Self-Government in the Federation of BiH. At the end, although not less important, legal subjectivity (exercising rights and duties) pertains also to political parties.

### 2.3. Codification of Civil Law

According to available information, there is no indication of existence of a public standing of official and competent institutions in the Entities and the BD BiH relating the idea, the project and the strategy whose purpose or integral part would be to draft a civil code. However, in contrast to official institutions, a debate is going on in legal theory and professional circles about the needs and possibilities, and/or advantages and shortcomings of drafting and implementation of a possible civil law code. Consequently, the scientific and professional public is mainly positively inclined relating to this issue, suggesting that, after carrying out legislative reforms and completing the transitional period in the area of law, this society should invest efforts to realize the codification of civil law, after carrying out also the harmonization of domestic regulations with the acquis communautaire.

### 3. Property Law

As already emphasised, the Constitution of Bosnia and Herzegovina provides that the legislative jurisdiction in the area of property law is vested with the Entities. The same solution applies to the Brčko District as well. Consequently, the Entities and the District BiH have enacted corresponding laws and this fact has put an end to the implementation of the Law on Basic Property Law Relations.

#### 3.1. Reform of Property Law

Legislation in the area of property law (‘law of things’ in Serbian legal terminology) in the Republic of Srpska was reformed by means of enactment of the Law on Property Rights (ZSP), that entered into force on 1 January 2010. This Law, as a piece of general regulations, covering the property law relations, includes the following matters: acquisition, use, disposal and termination of the right of ownership (articles 17 through 138) as well as other property law rights, such as: right of pledge (articles 139 through 185), rights of servitude (articles 186 through 263), praedial encumbrances, i.e. mortgage (articles 264 through 285), right of construction (article 286 through 302), and/or actual possession (articles 303 through 323). Legal rules otherwise applicable to the right of ownership appropriately apply to other property rights as well, unless otherwise prescribed by particular regulations, or unless their nature implies otherwise. The ZSP, among other matters, provides the unified character rules of the rights of ownership, regardless of their hoder; this Law also establishes a new concept of the sectional title (kind of apartment ownership), as well as the definition of the notion of immovable property according to which the principle to apply is the superficies solo cedit. The
new solutions in the property law legislation of the Republic of Srpska include also those concerning the right of construction, and/or the right of praedial encumbrances (mortgage).

Actually applicable in the Brčko District of BiH is the Law on Ownership (ZV BiH) by which the following matters are regulated: acquisition, contents, protection and termination of property rights, i.e. the right of ownership (articles 16 through 73 and articles 91 through 112), the right of construction (articles 74 through 90), the right of pledge (articles 125 through 137), the rights of servitude, i.e. easement (articles 138 through 166), the right relating to various types of mortgage (articles 167 through 185) as well as the matter of actual possession (articles 113 through 124). This codification, almost of the same character as the reform carried out in the Republic of Srpska, is a manifestation of strong influence of the Croatian and/or Austrian legislation in the area of property law.

The reform of property law was carried out also in the FBiH through the enactment of ZV FBiH. However, that Law does not regulate 'things' as objects of property; it also fails to include certain property law institutes that have found their place in the ZSP (namely, the right to construction, personal servitudes, ownership of apartments on the ground of sectional title, neighbouring rights). The ZV FBiH regulates the conditions and ways of acquiring ownership, exercising, protecting and terminating the rights of ownership (articles 2 through 54) relating to objects of property, i.e. chattels and real property, real servitude (articles 55 through 65), the right of pledge (articles 66 through 74) as well as the institute of actual possession of property (articles 75 through 86). Consequently, it is possible to conclude along these lines that the reform of property law in FBiH remains still limited in its scope and that not all of the expected results have been achieved.

3.2. Immovable Property and Real Property Rights Record-Keeping

As far as land register law is concerned, one may conclude that this is an area where great efforts have been invested in carrying out important reforms in all legislations of Bosnia and Herzegovina. Thus, the Law on Survey and Cadastre of Immovable Property (hereinafter: ZPKN) was enacted in the Republic of Srpska; that Law replaced the former Law on Books of Title, the Law on Survey and Cadastre of Immovable Property, and the Law on Maintaining Survey and Land Cadastre. According to the new Law, the cadastre of immovable property, as a matter included in the jurisdiction of the Republic Administration for Geodetic and Property Law Affairs of the RS, shall keep records relating to the following matters: right of ownership, right of pledge, real servitudes, beneficial occupation, i.e. usufruct, encumbrances relating to immovable property, right of construction, concessions, right of rent agreed upon by contract for a period not exceeding five years, as well as the obligation rights that, from the moment of filing, may challenge the third persons’ claims. Actually applicable in the FBiH is the Law on Books of Title of FBiH which regulates the matter of

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62 Arts. 286 – 302 of ZSP.
63 In course of debating the issue of reform of property law legislation in the RS there were controversial ideas of introducing still another new institute – that of the debt connected with pieces of land. In spite of the view that the law should include that institute as well, it turned out that the law-maker was in favor of the contrary standpoint. The same outcome relating to that institute was noted also in the property law legislation in the BD BiH.
64 Still, there are plans that, until the enactment of corresponding laws in the matters of neighboring rights, personal servitudes and mortgage, regulations to be applied would be the legal rules of the ABGB (article 94 of ZV FBiH),
65 “Official Herald of RS”, nr. 6/12.
66 “Official Herald of RS”, nos. 67/03, 46/04, 109/05 and 119/08.
67 “Official Herald of RS”, nos. 34/06, 110/08 and 15/10.
68 “Official Herald of RS”, nr. 19/96 and nr. 15/10.
69 Art. 5 of ZPKN.
70 Arts. 62/02, 90 and 93/01 of ZPKN.
71 “Official Gazette of FBiH”, nos. 19/03 and 54/04.
keeping the books of title and establishing of books of title as well as the way of filing of immovable property and rights relating to immovable property in the books of title in the FBiH. In the BD BiH there exists also the Law on Land Registry and Rights Relating to Immovable Property of the BD BiH; this Law regulates the contents of the book of title, the entry, matters of procedure in the sphere of books of titles, cadastre survey, cadastre territorial units, cadastre classification and determination of quality of land, maintaining the cadastre survey, procedure for establishing, operating and maintaining the Land Registry as well as the rights relating to lands in the territory of BD BiH. The Law on Filing of Property Rights Concerning Immovable Property Owned by BD BiH, on its part, regulates the way of filing of property rights involving immovable property owned by BD BiH.

### 3.3. Remaining Legislation

In the addition to the above mentioned legislative acts, there exist also other more detailed regulations in the field of property law. They concern various matters and, due to that fact, they have the characteristic of particular laws, i.e.:

Building sites and the construction business (the Law on Building Sites of RS, the Law on Regulation of Space and Business of Construction of RS, the Law on Building Sites of FBiH, the Law on Construction Business of FBiH, the Law on Town and Country Planning and Business of Construction of BD BiH, the Law on Legalization of Unlawfully Constructed Buildings in the BD BiH).

Agricultural land (the Law on Agricultural Land of RS, the Law on Agricultural Land of FBiH, the Law on Agricultural Land of BD BiH).

Expropriation (the Law on Expropriation of RS, the Law on Expropriation of FBiH, the Law on Expropriation of Immovable Property).

Other matters were also regulated by the following particular laws: the Law on Fortests of RS, the Law on Waters of RS, the Law on Mining of RS, the Law on Mining of FBiH, the Law on Waters of FBiH, the Law on Forests of FBiH, and the Law on Forests of BD BiH.
The matter of legal regulation of property law relations between spouses is covered by particular legal rules as well. Thus, their joint property (acquiring and/or legal qualification of joint property, managing and disposing of joint property as well as partition of joint property) and/or matrimonial acquests (acquiring of matrimonial acquests, managing such acquests and partition of matrimonial acquests) and/or matrimonial acquisitions, managing the matrimonial acquisitions and partition of matrimonial acquisitions).

The prohibition of disposal of State property was imposed in 2005 by the Office of the High Representative – OHR, while later on these temporary prohibitions of disposal of State property have been amended and extended. According to the latest amendment, the prohibition shall remain valid until acknowledging an acceptable and sustainable settlement of the matter of partition of State property between the State of Bosnia and Herzegovina and other levels of power to be reached by the Managing Board of the Peace Implementation Council in Bosnia and Herzegovina. Exempted from temporary prohibition of disposal is the State property being the subject of the Law regulating the matter of privatization of State capital in enterprises, of the Law on Initial Balance of Situation and of the Law on Privatization of State-owned Apartments. The RS law-maker has enacted the Law on Determining and Transferring the Right of Disposal of Property to Local Self-government Units by means of which he has transferred particular property to the local self-government units, while, on the other hand, an intention was also present to regulate the status of remaining State property in the RS territory. This was done by enacting the Law on the Status of State Property in the Territory of Republic of Srpska which falls under the prohibition of disposal. In spite of the above mentioned decision of the OHR, the National Assembly of RS has adopted that Law considering that it was concordant with the Constitution of BiH. By its Writ of 5 January 2001, the OHR has ordered the suspension of that Law.

93 Provisions applicable to property law relations between spouses are also, under particular conditions, applied to property law relations between out-of-wedlock partners. The property acquired by work of illegitimate partners that lasted for a considerable period of time is deemed their joint property; this property, in case of its partition, is subject to the rules otherwise applicable to married spouses (article 284 of PZ RS). Property acquired by illegitimate partners in course of out-of-wedlock communion that has lasted three years at the minimum, or where in course of such communion a child has been born, is subject to regulations covering marital acquests and/or matrimonial acquisition (article 263 of PZ FBiH, and/or article 240 of PZ BD BiH).

94 Articles 270 through 277 and 281 of PZ RS.
95 Articles 251 through 253 and 255 through 257 of PZ FBiH.
96 Articles 228 through 230 and 232 through 234 of PZ BD BiH.
97 To be true, there exist particular provisions in the ZSP and ZV BD BiH relating to public property, but this is done only to indicate its equality with other owners unless particular laws regulate otherwise (article 22/1 ZSP, article 15/1 of ZV BD BiH).
98 The Law on Temporary Prohibition of Disposal of State Property of BiH ("Official Herald of BiH, nos. 18/05, 29/06, 85/06, 32/07, 41/07, 74/07, 99/07 and 58/08), the Law on Temporary Prohibition of Disposal of State Property of FBiH ("Official Gazette of FBiH", nos. 20/05, 17/06, 62/06, 40/07, 70/07, 94/07 and 41/08).
99 The General Law on Privatization of Enterprises and Banks in RS ("Official Herald of BiH: nr. 14/98 and nr.14/00, the Law on Privatization of State Capital in Enterprises of RS ("Official Herald of RS", nos. 51/06, 1/07, 53/07, 41/08 and 58/09), the Law on Privatization of Enterprises of FBiH ("Official Gazette of FBiH", nos. 27/97, 8/99, 20/00, 32/00, 45/00, 54/00, 61/01, 27/02, 33/02, 28/04, 44/04, 42/06 and 4/09), the Law on Privatization of Enterprises in BD BiH ("Official Herald of BD BiH", nos. 2/04, 19/07 and 2/08).
101 The Law on Privatization of State-owned Apartments of RS ("Official Herald of RS", nos.11/00, 20/00, 18/01, 35/01, 65/01, 47/02, 65/03, 3/04, 17/04, 70/04, 2/05, 67/05, 118/05, 70/06, 38/07, 60/07, 72/07 – consolidated text, 59/08 and 58/09, Law on Sale of Apartments with Tenancy Title of FBiH ("Official Gazette of FBiH", nos. 27/97, 11/98, 22/99, 27/99, 7/00, 32/01, 56/01, 61/01, 15/02 and 54/04).
102 *Official Herald of RS*, nr. 70/06.
103 *Official Herald of RS*, nr. 135/10.
4. Obligation Law

On the ground of article 12 of the Constitutional Law on Carrying out the RS Constitution, applicable in the RS, until the new laws conformable with the RS Constitution are enacted, shall be the laws and other regulations which have been applied in the SR BiH if they were not contrary to laws enacted by the National Assembly of the Republic of Srpska. On the ground of the above provision, adopted as a valid law in the Republic of Srpska is the Law on Obligation Relations (Contract and Torts Law). This Law has been amended several times, but these changes cannot be qualified as a reform of obligation law. At the same time, article IX, point 5 of the FBiH Constitution specifies that applicable in FBiH shall be all the regulations which, until entering into force of that act, were not contrary to it, and they shall remain valid until competent bodies of State power of FBiH decide otherwise. Consequently, the Contract and Torts Law (LOR), with certain amendments that were not considerable and had no reform character, continued to be implemented in the FBiH. That Law is applicable in the BD BiH as well, and the relevant ground is paragraph 5 of the Writ which, in contrast to the Entities’ laws, provides that this solution does not suspend the implementation of those regulations of SR BiH (former Socialist Republic of Bosnia and Herzegovina) and SFRY which, on the day of entering into force of that Acr, were actual laws and regulations in the territory of BF BiH. Accordingly, a legislative reform in the area of obligation law did not take place in BD BiH either.

In the middle of 2003 the work on drafting a Law on Obligation Relations of the Republic of Srpska and Federation of Bosnia and Herzegovina came to an end. The drafting was a task entrusted to a Working Group nominated by the Ministry of Justice of the RS and Ministry of Justice of FBiH in coordination with the GTZ Organization. The Working Group was chaired by Professor dr. Helmut Ruessman. However, after a public debate has been completed, the competent bodies of the Entities’ power decided to withdraw the Draft from the legislative procedure. The same destiny happened to the Draft Law on Obligation Relations that has again been withdrawn from legislative procedure – this time in the Parliamentary Assembly of Bosnia and Herzegovina.105

4.1. Relationship between the Law on Obligation Relations (LOR) and Other Laws Regulating the Matter of the Law of Obligations

For the area of obligation relations the Law on Obligation relations is a general law, i.e. lex generalis. There is no doubt that other laws and regulations are also applicable to matters of obligation relations. These laws and regulations regulate certain particular matters by means of rules prescribing special solutions differing from those existing in the Law on Obligation Relations (LOR); these laws and regulations cover also the matters not regulated by the provisions of LOR. In these situations it is appropriate to apply the lex specialis derogat legi generali principle. In order to clarify the state of affairs in the multiple legislations of Bosnia and Herzegovina, we are going to present in the following text the laws which are relevant in some respects in the field of obligation law; we are also going to present in a summary way the subject-matters of their regulation.

The matter of consumer protection is regulated by the Law on Protection of Consumers106 which, among other matters, covers the following: sale of products and rendering of services, warranties for products and services, contracts concluded outside of business premises, sale on the ground of distant contracts, unjust terms and conditions in the sphere of consumer contracts, etc.

104 “Official Herald of Serbian People in B-and-H”, nr. 21/92.
105 In contrast to the previous situation, controversial in this case was also the constitutional ground for enactment of this law stated as the arguments of Parliamentary Assembly of BiH in the preliminary debate.
106 “Official Gazette of BiH, nr. 25/06.”
At the beginning of 2012 this Consumer Protection Law has entered into force. Following matters, among others, are regulated by that Law, such as: basic rights of consumers at the moment of purchasing goods and buying services, protection of consumers’ safety against the risk for life and health, obligation of performing commercial (trade) business activity in a fair manner, sale of products and rendering of services, declarations accompanying the products, liability and warranty for products and services, unfair business practices, etc. However, the protection of consumers, at least partially, is also the subject-matter of other pieces of legislation. For instance, the Law on Banks, in all three legislative bodies in BiH provide for protection of rights and interests of users of banking and other related services resulting from them. Along these lines, particular attention is paid to that matter in the latest amendments of the Law on Banks of RS.

The area of insurance is covered by several Entity-level legislative acts, i.e.: the Law on Insurance Companies and the Law on Insurance Companies in Private Insurance Field which laws regulate the following matters: establishment of company, business operation, supervision and termination of work of insurance companies, protection of insured persons (and entities), kinds of insurance. Other laws in this sphere include: the Law on Mediation in the Area of Insurance; the Law on Mediation in the Area of Private Insurance (which regulate the matter of mediation in the area of insurance, conditions for obtaining license for engaging in these business transactions – branch offices and broker transactions in the sphere of insurance as well as supervision over performance of insurance mediation transactions); the Law on Liability Insurance for Motor Vehicles and other Compulsory Liability Insurance; the Law on Liability Insurance for Motor Vehicles and other Compulsory Liability Insurance (whose subject-matter of regulation is liability insurance for motor vehicles as well as other types of compulsory liability insurance).

In course of several previous years the matter of leasing too has been regulated by the Entities’ legislations, i.e.: leasing transactions (of financial and operational types), requirements for establishment, business operation and termination of work of the lease grantor, rights and duties of parties to the leasing transaction, termination of contract of leasing, registration of property rights concerning the subject-matter of leasing, duty of information, revision and supervision of business operation of the lease grantor.

In addition to mentioned laws and as far as regulating the wider area of obligation law is concerned, the following regulations are applicable as well: the Law on Concessions, the Law on Contracts of Carriage in the Railway Transport of the Republic of Srpska, the Law on Conditions and Way of Settlement of Obligations on the Ground of Old Foreign-Exchange Savings by Issuing

107 “Official Herald of RS”, nr. 6/12.
108 The Law on Banks of RS (“Official Herald of RS”, nos. 44/03, 74/04 and 116/11), the Law on Banks of FBiH (“Official Gazette of FBiH, nos. 39/98, 32/00, 48/01, 27/02, 41/02, 58/02, 13/03, 19/03 and 28/03 and the Law on Banks of BD BiH (“Official Herald of BD BiH”, nr. 5/03 and 19/07.
109 Art. 98a – 98dž of the Law on Banks of RS.
110 “Official Herald of RS”, nos. 17/05, 1/06, 64/06 and 74/10 – hereinafter: ZDO.
111 “Official Gazette of FBiH”, nr. 24/05 and nr. 36/10 – hereinafter: ZDOPO.
112 “Official Herald of RS”, nos. 17/05, 1/06, 106/09 – hereinafter: ZPPO.
113 “Official Gazette of FBiH”, nr. 4/02 – article 29 – 30, hereinafter: ZPPO.
114 “Official Gazette of FBiH”, nr. 22/05 – hereinafter: Law on Compulsory Insurance of FBiH.
115 “Official Gazette of FBiH”, nr. 22/05 – hereinafter: Law on Compulsory Insurance of FBiH.
118 “Official Herald of RS”, nr.50/10.
Bonds in the Republic of Srpska,\textsuperscript{119} the Law on Realization of Rights of Compensation of Material and Non-material Damage Caused in the Period of War Operations from 20 May 1992 through 19 June 1996,\textsuperscript{120} the Law on Settlement of Obligations on the Ground of Accounts Covering the Old Foreign-Exchange Savings in FBiH,\textsuperscript{121} and the Law on Settlement of Obligations on the Ground of Accounts of Old Foreign-Exchange Savings by issuing Bonds in BD BiH.\textsuperscript{122}

\subsection*{4.2. Implementation of General Trade Practices and Regulation of General and Particular Payment Deadlines}

Before entering into force of the Law on Obligation Relations (LOR), the General Trade Practices in the area of turnover of goods\textsuperscript{123} as well as the Special Trade Practices (in the areas of construction, tourist trade, and catering industry) had the character of a formal source of civil law. These trade usages were applied always, except in case their implementation was explicitly excluded by agreement of the contracting parties. By tentering into force of the LOR, the possibility of regulation of obligation relations by applying the trade usages was not eliminated, but the approach to that matter has been considerably changed. The law-maker has abolished the presumption of stipulating parties’ consent to the implementation of usages.\textsuperscript{124} In this way, the General and Special Practices in the trade of goods are applied only where parties to an obligation relationship have agreed to their implementation or where the circumstances of the case indicate their intention to that respect.\textsuperscript{125} In other words, trade practices may be applied also regarding those matters too, which are regulated by LOR, even where solutions expressed in them collide with the indefinite (dispositional) provisions of the LOR, but only if contracting parties have explicitly stipulated such solution.\textsuperscript{126}

Parties to an obligation relationship are free to determine a time limit for performing of obligations. Where the time limit is not specified in the contract, and where the purpose of transaction, the nature of obligation and other relevant circumstances do not require a specific performance time limit, the creditor may demand an immediate performance of obligation, while the debtor, on his/her part, may demand from the creditor to accept the performance without delay.\textsuperscript{127} Determination of the performance time limit may be left over to one of the contracting parties, while the other party is entitled to request that the court determines a reasonable time limit, if the party authorised fails to do that even after being duly admonished.\textsuperscript{128} In case of providing for settlement of obligation by means of effecting payment to the bank keeping the creditor’s account, the payment shall be deemed effected, i.e. the debt settled, after effecting remittance to creditor’s benefit, or after an order has been issued by debtor’s bank to put on creditor’s account the amount indicated in the order.\textsuperscript{129} By paying an amount owed by means of mail, if so stipulated by contract, the relevant obligation of debtor to the creditor is deemed performed by such payment of the amount owed. Where such way of payment is not specified in the contract, the debt shall be deemed settled after the creditor has

\textsuperscript{119} “Official Herald of RS”, nr.1/08.
\textsuperscript{120} “Official Herald of RS”, nos. 103/05, 1/09, 49/09 and 118/09.
\textsuperscript{121} “Official Herald of BiH”, nos. 28/06, 76/06 and 72/07.
\textsuperscript{122} “Official Herald of BD BiH”, nr. 16/09 and nr. 19/10.
\textsuperscript{123} “Official Gazette of FNRY”, nr. 15/54.
\textsuperscript{124} Article 1107/1.
\textsuperscript{125} Article 21/2.
\textsuperscript{126} Article 1107, paragraphs 2 and 3.
\textsuperscript{127} Art. 314 of LOR.
\textsuperscript{128} Art. 317/1 of LOR.
\textsuperscript{129} Art. 318/2 of LOR.
received the remittance. Should, however, special regulations or contract provide that payment will be effected by a credit card or in some other way, the payment shall be deemed effected after the debtor has paid in the amount owed by means of a credit card to the benefit of the indicated bank account.

4.3. Individual Contracts as a Subject-Matters of the Law of Commerce?

The Contract and Torts Law (LOR) provides that its provisions relating to contracts shall be applied to all kinds of contracts, unless otherwise expressly specified for the commercial contracts. According to law-maker’s standpoint, commercial contracts are defined as those kinds of contracts that are entered into by enterprises and other legal entities engaged in commercial activity. This type of contract includes also those concluded by shop owners and individual persons between themselves in course of performing, in the form of a registered line of business, certain commercial activity. There exists in domestic theory of law a wide concordance in terms of which one should not depart from the principle of unity of obligation law rules; in other words, the regulation of the matter of contract should remain an integral part of the Law of Contract and Torts, while, in perspective, it should become the part of a future Civil Code. The LOR provisions – Part II, regulate the matter of civil law contracts and/or commercial contracts, contracts in the sphere of tourist trade, contracts in the area of insurance and banking transactions (sale, exchange, sales order, loan, lease and rent), specific performance contracts, construction contracts, contracts of carriage, license contracts, contracts of deposit, warehouse contracts, orders, commission contracts, the institute of branch offices or trade representation bureaus, the business of mediation (brokerage), forwarding business activity, travel organization, mediation contract in the area of travel, allotment contract, insurance, pledge (security), guarantee, suretyship, assignation, banking money deposit, contract of deposit of securities, contract of bank current account, contract of bank safe, credits, letter of credit, bank guarantee, accommodation.

In other words, there are no intentions, both at the legislation and legal-theoretical levels, to “relocate” some of the nominated contracts into some special law and to regulate them in a special way; this solution applies also to the possible legislative act regulating the matters of commerce and trade. The Law on Commerce regulates the following matters: conditions for performing the business of trade and commerce and respective forms of the business, conditions for performing commercial services, the way of price formation, commercial record-keeping, disturbing the competition, prohibition of market restrictions, temporary market restriction measures, supervision, penal provisions, as well as other matters significant for performing the commercial business. Having in mind the conception of the Law on Obligation Relations (LOR) and the value of domestic tradition, it is possible to conclude that there are no ideas that some contracts should be taken out of that Law and be regulated by the Law on Commerce.

4.4. Contracts Regulated by Particular Laws

The implementation of the Law on Obligation Relations does not exclude the possibility of certain contracts or some of their elements to be regulated by special legal rules – i.e. laws (acts)
which would accordingly obtain the character of a *lex specialis*. However, one should make a distinction in this respect between contracts regulated by LOR and, at the same time, by some particular law, at the one hand, and those contracts which are not regulated by LOR but instead are the subject-matter of regulation by a *lex specialis* law, at the other. The text to follow will be a presentation of the matter of regulation of some particular contracts which are rather important and frequently used in legal transactions.

By amending the 2011 Law on Banks of the Republic of Srpska, whose purpose, among other things, was to ensure a better and a more efficient protection of rights and interests of users of banking services, the law-maker has specified also certain compulsory elements of the contract of credit, those of money deposit, savings account, of the procedure of opening and managing the bank accounts and relating to permitted exceeding of limit of the disposal of account means (kinds of relevant services, conditions of using the services, period of contracting the services, amount of nominal rate of interest, effective rate of interest, method of calculation of rate of interest, liquidated damages rate, and the like). Also provided are matters such as the procedure of entering into contract and additional elements to be applied exclusively in the case of contracts on credit (activities preceding the conclusion of contract; consent by beneficiary, bondsman, i.e. bailer and a third person guaranteeing the performance of relevant obligations of the credit beneficiary; relationship between the contract of granting the suretyship, contract of suretyship and contract of credit; waiver from the contract of credit, early remission of credit, and the like). Consequently, although the contract of money deposit and the contract of current bank account are regulated by provisions of the LOR, the law-maker still decided to regulate these contracts, in addition to the contract of credit and contract of money deposit, by special legal rules making part of the Law on Banks of the Republic of Srpska. Since this legislative act regulates the matters of status, i.e. since this is a law specifying the act of establishment, the work, the control and the termination of work of banks as well as controlling and regulatory competences of the Banking Agency of the Republic of Srpska, we do consider that such way of regulation – not to mention the numerous imperfections of certain solutions – made an unacceptable encroaching into the matter of obligation law legislation.

The contract of leasing in the Republic of Srpska is regulated by the Law of Leasing (ZL RS) and/or in the Federation (FBiH), by the Law on Leasing (LZ FBiH). According to these two laws there exist two kinds of leasing (operational and financial); other matters regulated by them include: the form of contract of leasing, compulsory elements of the contract of leasing, rights and obligations of parties to the leasing, termination of the contract of leasing. It is explicitly provided also that all matters not regulated by these laws, and those which concern the rights and obligations of parties to the contract of leasing, have to be subject to the provisions of the Law on Obligation Relations (particularly those otherwise applicable to the contracts of rent and/or sale with the installment payment way of paying the price).

As far as regulation of specific matters is concerned, the contract of insurance is dealt with in more details by the following legal provisions: of the ZDO and the ZDOPO, as far as protection of insured persons and entities is concerned; of the Law on Compulsory Insurance of RS and the Law on Compulsory Insurance of FBiH, as far as the following matters are concerned: level of

135 Art, 98z of the Law on Banks of RS.
136 Art, 98l – 98s of the Law on Banks of RS.
137 Arts, 24 – 51 of ZL RS, arts. 35 – 57 of ZL FBiH.
138 Art. 8 of ZL RS, art. 52 of ZL FBiH.
139 Arts. 23 and 24 of ZDO.
140 Arts. 23 and 25 of ZDOPO.
141 Arts. 7 – 12 and 29 of the Law on Compulsory Insurance of RS.
142 Arts. 8 – 13 and 22 of the Law on Compulsory Insurance of FBiH.
quality and quantitative scope of coverage in the case of liability insurance, settlement of compensation claims, right to recourse to be exercised against the insured party, other types of compulsory insurance of civil law liability.

The contract of partnership between public and private sectors in the Republic of Srpska is separately regulated by the following pieces of legislation: the Law on Public and Private Partnerships in the RS,143 the Law on Public and Private Partnerships in BD BiH;144 this particular matter is regulated in the FBiH by corresponding laws of the Cantons. These laws, and especially the Law on Public and Private Partnerships of RS where the contract of public and private partnerships is the subject of considerable attention, provide for various forms of models of contract of public and private partnerships (concession and private financial initiative); the scope of their regulation includes also the following matters: the content of the contract of public and private partnerships, protection of public partner, protection of private partner, consent to entering into contract, system of distribution of basic risks, etc.

The contract of concession is also adequately regulated in the Law on Concessions, i.e.: conclusion of such contract, duration of contract, contents of contract, rescission and termination of concession contract, transfer of concession.145

The Law on Copyright and Related Rights,146 in the framework of the particular part of contractual copyright law, regulates in the specific way the following matters: contract of publishing,147 contract of performance,148 and contract of creating a work on order.149

Finally, but not less important, it is necessary to note that the regulation of financial market (the Law on the Market of Securities150 enacted in the Republic of Srpska, and the Law on Market of Securities of the Federation of Bosnia and Herzegovina),151 includes also special provisions covering several kinds of contracts usually concluded in this particular area of business: contract of managing the securities portfolio,152 contract of performing of custody transactions,153 and contract of stipulating rights and obligations in carrying out the business of stock market brokers.154

5. Conclusion

The composite constitutional structure of Bosnia and Herzegovina and the existence of different conceptions raise frequently the questions of separation of legislative jurisdiction between the State, the Entities and the Brčko District of Bosnia and Herzegovina, and sometimes also impose the need for assessing the constitutionality of laws that have been actually enacted. Such legal and political practice entails significant implications in the sphere of civil law too.

143 “Official Herald of RS”, nos. 59/09 and 63/11; art. 10 and articles 13 through 19.
144 “Official Herald of BD BiH, nr. 7/10; art. 14.
145 Arts. 26 and 27 of the Law on Concessions of BiH, arts. 28 – 30 of the Law on Concessions of RS, arts. 29 and 30 of the Law on Concessions of FBiH, arts. 16 – 21 of the Law on Concessions of BD BiH.
146 “Official Herald of BiH”, nr. 63/10 – hereinafter: ZAP.
147 Arts. 85 – 94 of ZAP.
148 Arts. 95 – 97 of ZAP.
149 Arts. 98 and 99 of ZAP.
150 “Official Herald of RS”, nr. 92/06 and nr. 34/09 – hereinafter: ZTHV.
151 “Official Gazette of FBiH”, nr. 85/08 – hereinafter: ZTVP.
152 Art. 127 of ZTHV, articles 115 – 118 of ZTVP.
153 Articles 128 – 133 of ZHTV, articles 123 – 126 of ZTVP.
154 Articles 111 – 126 of ZTHV, articles 83 – 87 and 108 – 114 of ZTVP.
The general part of civil law is not regulated in any comprehensive way in any of mentioned legal systems, but different matters are regulated by numerous laws. On the other hand, fundamental reforms have been carried out in the field of property law, particularly in the Republic of Srpska and the Brčko District of Bosnia and Herzegovina. This has been carried out under the influence of Croatian and/or Austrian law. However, in spite of reforms that have been realized, the property law legislations are to quite a degree fragmented and are characterised by numerous regulations. There were no significant changes in the field of the law of obligations; the changes are expected with the enactment of a new Law by means of which the obligation relations would be regulated, replacing thus the Law inherited from the previous State – although, to be true, there were several attempts at various levels to that respect. However, the analysis of legal systems of Bosnia and Herzegovina points at the fact that numerous laws have been enacted, covering various matters and relations existing in the wider framework of obligation law, including the laws regulating in a particular way certain specific contracts.

Recognising the importance of reforms that were carried out, and without undermining their values, the fragmented character of the civil law legislation, the numerousness and the differences of a whole lot of laws and regulations falling in this area as well as the lack of their total horizontal concordance, represent some of the reasons leading one to the conclusion that it would be rather useful to seriously reconsider the possibilities, the needs and the suitableness of civil law codification.

Summary

The author makes efforts in the present paper to present the reform processes and the development of civil law in Bosnia and Herzegovina. Constitutional regulation in Bosnia and Herzegovina, and the distribution of jurisdiction between the State, the Entities and the Brčko District of Bosnia and Herzegovina contribute to the complexity of the whole problem treated in this text.

The general part of civil law is not regulated in a comprehensive way in any of mentioned legal systems in Bosnia and Herzegovina, but different matters are dealt with by numerous laws. However, fundamental reforms have been conducted in the field of property law, particularly in the Republic of Srpska and in the Brčko District of Bosnia and Herzegovina and these reforms were carried out under the remarkable influence of Croatian legislation. The reform of property law in the Federation of Bosnia and Herzegovina did not succeed to achieve the objectives that have been expected; they have also remained incomplete.

Until now no new specific legislative act has been adopted in any of the existing legal systems which act would regulate the matters otherwise already regulated in the Law inherited from the former State. However, one should recognize the fact that numerous laws have been enacted in the systems analyzed in the present paper and that they regulate many different matters falling into the broader area of the law of obligations.

Altogether, the development of civil law in Bosnia and Herzegovina in course of two preceding decades was marked by significant reforms whose overall effects were reduced by the fact of fragmentation of the entire civil law legislation, by the considerable number of laws in the field of civil law, and by discrepancy between these laws and regulations – which is but one of the reasons for the need of serious consideration of the possibility of codification of civil law.
DRAFTING A CIVIL CODE

1. The general civil code

What is the way your legislation regulates the matters that make part of the general civil law field conceived according to the Pandects system? Are there lex specialis legislative acts relating to the above question and, should there be any, please make a list of these acts, as well as indicate the matters they cover. (The question is relevant for the countries having no civil code). If a Civil Code is adopted in your country, or if it is currently in the process of drafting, please make a summary description of it along the general civil law lines.

The reception of the system of Pandects in conceiving the civil law rules, as applied in the 1896 German Civil Code (Buergerliches Gesetzbuch) and the structure of the General Part of that Code, in the Croatian theory of law has resulted in obtaining a structure of general part of civil law in terms of which that part included the rules which make the normative framework of regulation of the following matters: (a) the notion and the principles of civil law; (b) the sources of civil law; (c) the concept of the civil law relationship; (d) the holder of right (the civil law relationship); (e) the civil law in terms of capacity to be a holder of rights (i.e. in subjective sense); (f) the subject-matter of civil law relationship; (g) legal transactions, and (h) acquisition and forfeiture of rights. Due to the fact that the Republic of Croatia has no Civil Code and that the rules at issue are found in several pieces of legislation, one may assume in a most general way that these rules do exist mostly in the Law of Contract and Torts (Law on Obligation Relations).

However, at the same time, it is necessary to emphasise that the General Part of the Law of Contract and Torts is not complementary to the general part of civil law to a degree that would make possible the conclusion that the general civil law rules make the substance of the General Part of the Law of Contract and Torts. Still, numerous rules that, in terms of nomenclature, enter in the general part of civil law are situated in the LCT in its General Part. One should mention also that some of the

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2 According to the structure of BGB, the General Part, which encompasses paragraphs 1 through 240, includes rules that regulate: a) persons (paras. 1 through 89 covering matters relating to: natural persons, consumers and entrepreneurs (paras. 1 through 14) and legal entities (paras. 21 through 89); b) things (res) and animals (paras. 90 through 103); c) legal transactions (paras. 104 through 185) which include rules regulating: 1) business capacity, 2) indicating of intention (will), 3) contract, 4) condition and time limit, 5) representation and power of appointment, 6) consent and approval; d) time limits (paras. 186 through 193), e) unenforceability of claims due to statute of limitations (paras. 194 through 218); f) exercising of rights, self-defence, self-help (paras. 226 through 231), and g) claim insurance (paras. 232 through 240), naturally, in so far as these rules enter into general part.
3 According to Klarčić, P., Vedriš, M., Građansko pravo, XII edition (unchanged), Peoples Gazette, Zagreb, 2009, pp. XI-XVI. See also the structure of the Introduction to the Civil Law according to Slakoper and Gorenc (Bukovac Pucača) that includes: (a) introduction, (b) elements of legal relationship, (c) legal relationship and subjective right, and (d) legal ground of kinds of legal relationship. Slakoper, Z., Gorenc, V., in cooperation with Bukovac Pucača, Obvezno pravo, Opći dio, Novi informator, Zagreb, 2009, p. 10.
4 PG, nr. 35/05, 41/08 and 125/11 (hereinafter: LCT).
5 For more details on structure of the LCT, and particularly of its General Part, see infra chapter III. a) AD.
rules found in the general part of civil law are included in the Special Part of the LCT as well. In this respect one should add that some rules entering in the general part of civil law are also included in the Special Part of the LCT.

However, the Law of Contract and Torts is not the only positive law source containing the rules that make part of the general part of civil law. Rules covering institutes of that part are found also in the Law on Property and other Rights Relating to Property. Some are found also in the Law on Books of Title. Still others are in the scope of Family Law.

Civil law institutes of the general part of civil law are regulated also by means of particular rules found in a series of special regulations (of a lex specialis nature). Thus, for instance, in qualifying the types of legal entities as holders of specific rights it is necessary to consult the rules of the following prescriptions as well: article 4 of the Law on Commercial Companies relating to commercial companies; art. 2/2 of the Law on Associations relating to associations; art. 1/1 and art. 3/6 of the Law on Institutions relating to institutions; art. 3/1 of the Law on Cooperatives relating to cooperatives; art. 3/6 of the Law on Endowments and Foundations of endowments and foundations, etc.

There exist important rules regulating the matter of death of natural persons as parties to the civil law relationship in the Law on Taking and Transplanting Human Body Parts for Medical Purposes.

The LP (Law of Property) contains also a whole series of particular rules that, among other things, regulate the kinds of objects of property (res) as civil law objects. These are, for instance, the Law on Agricultural Land, the Law on Forests, the Law on Waters, as well as the Energy Law, the Law on Electronic Money, etc.

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6 See, for instance, for sources of law art. 12 of the LCT regulating the role of trade practices as a source of law; for holders of private law rights see rules on business and legal capacities of natural persons – articles 17 and 18 of the LCT, including art. 14/2 where trade contracts are defined (paragraph 3 is a general rule in terms of which the provisions of LCT apply appropriately to other legal transactions as well); for subject matters of civil law relationship see art. 19 of LCT regulating individual non-property values (rights of personality) and the like.

7 See, e.g. tort liability rules applying to natural persons – arts. 1050, 1054 and other articles of LCT, as well as art. 279/3 regulating the physical force as a form of deficiency of will (nullity), and the like.

8 Peoples Gazette - PG nos. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, and 153/09 (hereinafter: LP, i.e. Law of Property). First of all, these are rules covering things (res) as civil law subject-matters. See, for instance, art. 2/2 of LP determining that these are things (objects) making natural parts of Nature in terms of LP, that differ from people and serve their purposes, as well as everything else indicated by that Law as such. For immovable property see paragraph 3, art. 2 of the LP, and for movable property see paragraph 4 of the same provision.

9 PG, nr. 91/96, 114/01, 100/04, 107/07 and 152/08 (hereinafter: LBT). For land see art. 2/1 of LBT.

10 PG, nr. 116/03 (hereinafter: FL); for those relating to limitation of business capacity see art. 159 of FL regulating the partial restriction of that capacity.

11 According to Slakoper et al., Obvezno…, pp. 83-84.

12 PG, nos. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08 and 137/09 (hereinafter: LCC).

13 PG, nos. 88/01 and 11/02.

14 PG, nos. 76/93, 29/97, 47/99 and 35/08.

15 PG, nr. 34/11.

16 PG, nos. 36/95 and 64/01.

17 PG, nos. 137/04 and 45/09 (hereinafter: LTHBPMP).

18 PG, nos. 152/08, 21/10, 124/10 and 63/11 (hereinafter: LAL).

19 PG, nos. 140/05, 82/06, 129/08, 80/10 and 124/10 (hereinafter: LF).


21 PG, nos. 68/01, 177/04, 76/07, 152/08 and 127/10. (hereinafter: EL).

22 PG, nr. 139/10 (hereinafter: LEM). See, e.g., the definition of electronic money specified in art. 2/02 of that Law.
As far as forms of expressing the intention (will) of parties, i.e. of forms of legal transactions are concerned, it is important to note that there are special rules in the framework of the Law on Notary Public Institution, \(^{23}\) the Law on Electronic Signature,\(^ {24}\) etc.

Although the matter of expiration of validity of rights in terms of substantive law due to statute of limitations is regulated in the General Part of LCT, the statute of limitation matters concerning tax dues and contributions are regulated by the rules of the General Taxation Law,\(^ {25}\) etc.

Making a summary of the above text, one could conclude that the rules included in the general part of civil law are found in the Law of Contract and Torts, in its General Part, while some rules are situated in the Special Part, too; however, numerous are the rules that find their place in other legislative acts, primarily in LP and FL, but also in the LBT and within a wide repertoire of special regulations mentioned above for the sake of example only.

Are the matters relating to civil and legal capacities (subjectivity) of natural persons and legal entities (legal and business qualifications, and matters relating to torts) regulated by means of concrete laws (legislatively)? If so, please indicate legal acts covering these matters in the mentioned order.

Legal and business capacities of natural persons are regulated in the General Part of the LCT, by means of articles 17 and 18. Every natural person and every legal entity is able to be a holder of rights and obligations (art. 17/1 of LCT). Natural persons acquires the legal capacity by the fact of birth. Relevant in this respect is the rebuttable presumption specified in art. 17 of LCT in terms of which the child has to be presumed to be born alive. The fiction of *nasciturus pro jam nato habetur* is also regulated by law in paragraph 2 of article 17 of the LCT in terms of which it is assumed that a conceived child was actually born wherever its benefits were at issue, but provided that it was born alive. A natural persons ceases to exist by his/her death. Death takes place if, in the prescribed way and with certainty, the fact of death has been established on the ground of medical criteria indicating the termination of functions of brain (see art. 2/2 of LTTHBMP). The institute of declaring a missing person dead is regulated by the old republic 1974 Law on Declaring Missing Persons Dead and Proving of Death.\(^ {26}\) Regarding the evidence procedure applicable in this respect, art. 17/4 of LCT provides for a refuttable presumption in terms of which, in case of doubt as to the chronology of deaths of several persons in a single incident, it shall be considered that they all died at the same time, unless it should be found that one person has died before the other one.

Legal entities acquire legal capacity on the day of their foundation which, according to paragraph 5 of article 17 of LCT, is to be determined on the ground of particular regulations. In terms of art. 4 of the Law on Commercial Companies (LCC), a commercial company shall acquire the capacity of legal entity by the fact of being entered in the commercial registry, while deletion of the company from commercial registry results in the termination of capacity of legal entity. See *supra* articles listed for various types of legal entities.

General rules relating to legal capacity are found in art. 17 of LCT. In terms of paragraph 1 of article 18 of LCT, a person exercising legal capacity may create legally effective acts by manifesting his/her own intention. A natural person acquires that capacity after coming of full age, while a legal entity – unless otherwise specified (by art. 18/2) – on the day of its being established. There exist special provisions on acquiring business capacity in art. 120 of Family Law, according to which business capacity is acquired by coming of age (18 years, see paragraph 2) or by concluding a marriage

\(^{23}\) PG, nos. 79/93, 29/94, 162/98, 16/07 and 75/09.

\(^{24}\) PG, nos. 10/02 and 8/08 (hereinafter: LES).

\(^{25}\) PG, nos. 147/08 and 18/11.

\(^{26}\) PG, nr. 10/74.
before coming of age. It is possible that business capacity be acquired by a minor exceeding the age of sixteen who has become a parent (art. 120/3). There is a general rule in paragraph 3 of article 18 of LCT regulating legal effects taking place through manifesting the will (intention) of an underage person. According to that provision, such underage person may create acts having those legal effects that are provided for by law. This is the nature of art. 18 of the Labour Law27 which regulates the business capacity of such persons relating to entering into contracts of labour. A general rule in terms of which the one authorised to conclude contracts on behalf of person having no business capacity is the legal representative or the guardian of such person through manifesting his/her will (art. 18/4 of LCT), while particular provisions in this matter exist, for instance, in articles 159 through 166 of Family Law. These article contain specific rules authorising the court, in out-of-court proceedings, to partially or completely deprive of business capacity a person of full age who, due to spiritual hindrances or other causes, is unable to take care of his/her personal needs, rights and interests, or who puts in danger the rights and interests of other persons. Particularly important in substantive law terms is the provision of art 159/3 of the FL according to which – unless otherwise provided by law – court’s decision on partial deprivation of business capacity may include measures, acts and transactions that may not be taken by such person independently, for instance, disposal of property, salary or other permanent monetary income, managing of property, deciding on employment, making statements or taking actions relating to marriage, parental care and other personal abilities. However, transactions not listed in such court decision on partial deprivation of business capacity, may be performed independently by the person at issue (article 159/4 of Family Law).

According to paragraph 5 of article 18 of LCT, the will (intention) of legal entity is expressed by its bodies in the form of legal transactions and procedures within the framework of their competences. The doubt as to whether an entity has acted according to the above provisions is eliminated by paragraph 6, in terms of which there is a prerequisite in terms of which the entity has acted accordingly if a third person was not aware or, due to given circumstances, had no sufficient reasons to doubt, that the entity failed to proceed in conformity with competences of its body.

As far as the capacity to be held liable on the ground of tort rules of natural persons is concerned, one should take note of rules covering damage and rules concerning the liability for damage. See in this respect article 1051 of LCT. While beginning from the ground of fault, the LCT provides for the following rules of liability of minors: a minor of up to seven years of age shall not be liable for damage (paragraph 1); a minor of from seven to fourteen years of age is not liable for damage, unless it was proved that he/she was mentally competent at the time of causing the damage (paragraph 2); on the other hand, a minor reaching the age of fourteen is liable according to general tort liability rules (paragraph 3). Among the quoted rules there is also a rule specified in article 1050 in terms of which a person handicapped by mental illness or mental retardation, or by some other reasons, shall not be liable for damage caused to another (paragraph 1).28

In connection with these matters, it is a must to emphasize article 19 of LCT that introduced in Croatian law the rights of personality of legal entities on the ground of which paragraph 3 specifies that a legal entity exercises all rights otherwise characteristic of natural persons (art. 19/2 of LCT), except the ones characteristic of biological essence of natural persons, and especially the rights to reputation, honor, name, i.e. company firm, trade secret, freedom of engaging in business, and the like, and – under the conditions specified by law – the right to protection of rights of personality. Related to the above is also the right to obtain compensation for non-property (immaterial) damage (the matter will be presented infra).

27 PG, nos. 149/09 and 61/11.
28 See also paragraphs 2 and 3 of article 1050, arts. 1055 – 1062 for liability for another; see particularly art. 1062/2 according to which a legal entity is not liable for damage inflicted by its body to a third person in performing of or relating to performance of its functions.
In case a civil code is not enacted in your country, are there any ideas to regulate the civil law field as part of a single legislative act or code, or within the scope of various laws, conceived as the most appropriate method?

As indicated above in this text, a civil code was not enacted in the Republic of Croatia. It seems that at present there are no serious intentions and even discussions along that line; this does not mean that Croatian theory of law and Croatian practice are not open to reflections about an all-encompassing codification of civil law rules.

2. Property act

Is there in your country a general legislative act (law) regulating the right to property and other property rights? If there is no such law, which regulations do apply in the area of property law relations? Is there any particular property law or other property rights that are already included in the legislation body? Besides a general act, are there any other legislative acts that regulate the matters falling in the property law field? If the answer is affirmative, please indicate the legislative acts and subject-matters they cover.

The Republic of Croatia enacted in 1996 the Law of Property (LP) which entered into force on 1 January 1997. This Law, as a fundamental legal act covering property law relations, regulates, by applying the *numerus clausus* method, the following property rights: right to property29 (arts. 30 – 173 LP), right to servitude (arts. 174 – 245 of LP), encumbrances on property (arts. 246 – 279 of LP), right to build (arts. 280 – 296 of LP), and right to possessory lien (arts. 297 – 353 of LP).30 Article 34 of the LP contains the rules of keeping the right of property and of transferring such right as far as the matters of insurance is concerned.31 The Law on Books of Titles (LBT) entered into force at the same date as the LP (1 January 1997).

The above mentioned legislative acts make the positive law framework of general regulation of the matters of property law. However, it is important at the same time to emphasize that the general regulation of matters of property law, as introduced by the LP and LBT, is inspired by the Austrian Civil Code (*Allgemeines Buergerliches Gesetzbuch*)32 and the Law on Books of Title (*Allgemeines
Grundbuchgesetz) as well as by traditional grounds of the General Civil Code (hereinafter: GCC); in the meantime the regulation has been significantly fragmented through enactment of numerous legislative acts (laws).

The entering into force of the Law of Property and the Law on the Books of Title brought about significant reform of regulation of property law matters in the Republic of Croatia. The very skeleton of that regulation was made by the basic principles of individualistic conception of the socially-bound law of ownership (which in fact was the elimination of dualism of the general approach to regulation of ownership of things, i.e. objects of property and fragmentation of that right) and establishing legal unity in the sphere of real property law (affirmation of the principle of superficies solo cedit). Special attention has been paid to the rules of transformation of the books of title in order for them to become an EDP type of the books of title, and then also to affirm their authenticity and completeness, although there were some reservations concerning the delay of authenticity. In this way their role had to be strengthened in the direction of general regulation of books of title whose constitutive elements have to affirm the market and the economic developments. Important changes have also been introduced in the matters of property law guarantee, as a basic means of security of claims as well as in regulating the law of possessory lien.

The rules of Law of Property have established the structure of general regulation of ownership of things and holders of these rights, which rules are applied also to ownership of things subjected to some special legal regime, unless being contrary to these regimes (art. 1/5 of LP). The rules of special regulation are subject to the classical relationship between such type of rules and the general rules. However, not rarely, specific matters are regulated differently comparing to general

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34 Austrian General Civil Code (hereinafter: A.G.C.C.) was introduced in Croatia and Slavonia by Imperial Patent of 29 November 1852 and has remained in force until 1918. It was implemented without subsequent Novels under the title OGZ, while the version with Novels was applied in Dalmatia only. The Novels were enacted in 1914, 1915, and 1916. Gavella, N., Alinčić, M., Klarčić, P., Sajko, K., Tumbri, T., Stipković, Z., Josipović, T., Gliha, I., Hrvatsko građanskopravno uređenje i kontinentalnoevropski pravni krug, University of Zagreb Law School, Zagreb, 1994, pp. 10-11 and 17. Further in the text: Gavella, et al. Hrvatsko građanskopravno… A.G.C.C. was followed by the General Book of Titles Law of 25 July 1871 (which entered into force on 15 February 1872) on the ground of provisional book of titles order of 15 December 1855, namely on the ground of the 1863, 1864 and 1867 Book of Titles Law. See Košutić, M., Gruntovno pravo, Zagreb, Land Printing Office, 1919, p. 16. GCC was applied in Croatia all the way until 6 March 1941 by means of the 1945 Law on Invalidity of Legislation Enacted before 6 April 1941 and in Course of Enemy Occupation (Official Gazette of FPRY, 86/46), when it has lost legal force so that its provisions were applied as legal rules until the enactment of corresponding regulations covering the civil law matters.

35 See on the matter of development of property law in Croatia in Gavella, N., Josipović, T., Gliha, I., Belaj, V., Stipković, Z., Stvarna pravo vol. 1, II revised edition, People’s Gazette, Zagreb,2”, pp. 11-16 (hereinafter: Gavella, N. et al., Stvarna). The enactment of the Law of Property was the final step in the transformation of rights covering things owned by state, i.e. society that existed in various forms in the 1945 – 1991 period, into the right of property in terms of which the holder of right has been determined (articles 359 through 365 of LP). The category of social ownership and its transformation into the right of property was rather extensively and systematically elaborated in Simonetti, P., Prava na građevinskom zemljištu, University of Rijeka Law School, Rijeka, 2008, and Simonetti, P., Prava na nekretninama, same publisher, 2009. The special Law on Compensation for Property Confiscated in Course of Yugoslav Communist Rule (PG, nos. 92/96, 92/99, 80/02 and 81/02. correction) regulated the matters of denationalization, i.e. restitution and compensation for the property taken away from former owners in the 1945 – 1991 period, which property has been transferred into state, social and/or cooperative ownership. The matters of denationalization was extensively and systematically elaborated by Simonetti, P., Denacionalizacija, University of Rijeka Law School, Rijeka, 2004.

36 Gavella, op. cit., p. 17.
37 For more details see Josipović, T., Modernizacija stvaropravnih osiguranja tražbina, Round Table “Modernization of Croatian Property Law“, CASA, Zagreb, 2007, pp. 58 – 81. See particularly the chapter covering the need for introducing new models of property law guarantees of claims and new models of disposal of such means of guarantee, pp. 78 – 80.
rules, while particular complications do arise where “special regulations redirect the development of property law guarantees otherwise provided for by the general rules”\(^{38}\).

Thus, there exist special provisions providing for particular regulation of certain things (objects of property). This is for instance the case with the following pieces of legislation: Law on Islands,\(^{39}\) Law on Mining,\(^{40}\) Maritime Law,\(^{41}\) Law on Archival Material and Archives,\(^{42}\) Law on Electronic Communications,\(^{43}\) Law on Roads,\(^{44}\) LAL, LF, LW, LEM, etc.\(^{45}\) One of the characteristics of special regulation rules concern the fact that they are not necessarily always of the private law nature. In other words, these special regulations include a considerable number of public law rules so that, as a rule, one may speak of mixed nature legal provisions. Quite important in this respect are the public law rules covering immovable property as the subject-matter of property law relationship, and particularly those relating to the area of the Law on Urban and Country Planning and Construction,\(^{46}\) Law on Treatment of Unlawfully Constructed Buildings,\(^{47}\) then to rules of measuring and cadastre which make part of the Law on State Measurement and Cadastre and Real Property Cadastre,\(^{48}\) etc. As far as private law rules of regulating these matters are viewed separately, it is possible to make a general conclusion that most frequent subject-matter of their regulation is the definition of the concept of things they involve, such as the cases specified in the Law on Lease and Sale of Business Premises,\(^{49}\) the Law on Apartment Renting,\(^{50}\) etc.

There exist also specific substantive law rules covering the property law nature in the 1996 Distraining Law,\(^{51}\) namely in the 2010 Distraining Law,\(^{52}\) in the part dealing with providing security of claims: then, for instance the rules of voluntary judicial and notary public rights of pledge on the ground of parties’ agreement, the rules on the ground of compulsory (involuntary) judicial right of pledge based on preliminary measures and measures ordered by court in the proceedings relating to specific claim security matters and the like.\(^{53}\) Distraining rules cover also the matter of \textit{jus cogens} rights of pledge based on distraining procedure relating to specific security instruments.\(^{54}\) The rules

\(^{38}\) Gavella, N., \textit{op. cit.}, p. 55.

Analyzing the reasons and examples of disturbance happening due to inconsistencies of the general regulation of this matter, Gavella elaborates the following cases: a) where entirely necessary special regime rules depart, without proper reasons, from the general regulation; b) where special regime rules disregard the rules of property law guarantees, including the civil law nature of such guarantees; c) where in the special regulations entirely different concepts are applied in terms of scope and substance, as compared to those used in the property law regulation of this particular matter, and the like, \textit{op. cit.}, pp. 42 – 49.

\(^{39}\) PG, nos. 34/99, 149/99, 32/02 and 33/06.

\(^{40}\) PG, nos. 75/09 and 49/11.

\(^{41}\) PG, nos. 181/04, 76/07, 146/08 and 61/11 (hereinafter: ML).

\(^{42}\) PG, nos. 105/97, 64/00 and 65/09.

\(^{43}\) PG, nos. 73/08 and 90/11.

\(^{44}\) PG, nr. 84/11.


\(^{46}\) PG, nos. 76/07, 38/09, 55/11 and 90/11.

\(^{47}\) PG, nr. 90/11.

\(^{48}\) PG, nos. 16/07 and 124/10.

\(^{49}\) PG, nr. 125/11.

\(^{50}\) PG, nos. 9/96, 48/98 and 66/98.

\(^{51}\) People’s Gazette, nos. 57/96, 29/99, 42/00, 173/03, 194/93, 151/04, 88/05, 121/05, and 67/08 (hereinafter: DL).

\(^{52}\) PG, nos. 139/10 and 125/11 (hereinafter: DL/10). That Law entered into force completely on 1 January 2012.

\(^{53}\) For the case of compulsory judicial right of pledge based on a security measure, see arts. 257-261 of the DL and arts. 261-264 of DL/10; for he compulsory judicial right of pledge based on preliminary measure see arts. 283-292 of DL and arts. 300-308 of DL/10; for voluntary right of pledge base on court and/or notary public agreement between the parties, see arts. 261-273 of DL and arts. 265-277 of DL/10).

\(^{54}\) For instance, as far as real property is concerned – art. 97 of DL (art. 148 of DL/10); for chattels - art. 185 of DL, namely art. 293 of DL/10; for monetary claim – art. 152 of DL, art. 155 of DL, namely art. 98of DL/10 and art. 101 of DL/10); for shares – art. 196 of DL (art. 222 of DL/10); for securities – art. 198 of DL (art. 226 of DL/10).
of LCT apply to the right of pledge on the ground of operation of law; these rights may be acquired under specific conditions and relating to specific things by the following persons: a lessor (art. 565 of LCT), carrier (art. 692 of LCT), warehouse keeper (art. 750 of LCT), appointee (art. 777 of LCT), commission agent (art. 500 of LCT), forwarding agent (art. 868 of LCT), administrator of inspection (art. 875 of LCT), etc. Some other pieces of legislation provide for special and narrow categories of the right of pledge, for instance: art. 143/3 of the Inheritance Law,55 art. 946 of LAL,56 art. 86 of the Law on Bill of Exchange,57 art. 23 of the Law on Cheque,58 art. 495 of the Law on Capital Market,59 articles 31, 42, and 43 of the Law on Protection and Preservation of Objects of Cultural Value,60 art. 5 of the Law on Financial Insurance,61 etc. It is worthwhile mentioning that the regulation of the right of pledge relating to movable property and rights has been considerably advanced by entering into force of the Law on the Registry of Rights of Pledge relating to claims of creditors secured by movable property in judicial and notary public procedures.62 Should one summarize the above text, although there is no doubt that the sedes materiae of property law in the Republic of Croatia the Law of Property and the Book of Titles Law, this matter is also regulated by a whole series of provisions to be found in particular regulations which – as witnessed by numerous examples – often disturb the consistency of the general regulation of property law.

3. The law on obligations

These questions concern the countries of former Socialist Federal Republic of Yugoslavia

Is a new Law on Obligations adopted in your country, or the 1978 SFRY Law was accepted as a national law?

On 8 October 1991, the day the Republic of Croatia became a sovereign and independent state, the 1978 Yugoslav Law of Contract and Torts (Obligation Relations Law)63 was the Croatian national Law by means of the Law on Taking Over the Law on Obligation Relations.64 By that (Croatian) Law65 the institutes, the principles and the provisions that were characteristic of socialist legal order were eliminated and amended.66 Provisions relating to institutes of social ownership, associated labour, self-management and self-management type agreements have been abolished. The notion of organization of associated labour has been replaced by constructing one’s own legal constitution that was based on principles of market economy, guaranteeing of the right of property; the remaining provisions of the 1978 LCT were possible to be applied only where they were not contrary to the Constitution and the laws and regulations of the Republic of Croatia. Quite a number of provisions have found their relevance in the 1991 LCT since that Law included modern and progressive solu-

53 PG, nos. 48/03, 161/03 and 35/05 (hereinafter: IL).
54 PG, nos. 181/04, 76/07 and 146/08 (hereinafter: LAL).
55 PG, nos. 74/94 and 92/10 (hereinafter: LBE).
56 PG, nr. 74/94 (hereinafter: LCh).
57 PG, nos. 88/08, 146/08 (correction) and 74/09 (hereinafter: LCM).
58 PG, nos. 69/90, 151/03, 157/03, 100/04, 87/09 and 88/10 (hereinafter: LPPCV).
59 People’s Gazette, nr. 76/07 (hereinafter: LFI).
62 PG, nr. 53/91.
65 Klaric, T., Josipovic, T., Silja, I., Matanovac, R., Ernst, H., Teorijske osnove građanskog prava, Građansko pravo i pripadnost hrvatskog pravnog poretka u kontinentalnoevropskom pravnom krugu, University of Zagreb Law School, Zagreb, 2005, p. 237.
tions not requiring changes at the time of being taken over by Croatian legislation. This to quite a degree was the consequence of the fact that former Yugoslav 1978 Contract and Torts Law was drafted under the influence of Swiss Law of Obligations (Obligationengesetz, hereinafter: OR)\(^{68}\), Italian Civil Code (Codice Civile),\(^{69}\) and Unified Rules of international sale of goods, in other words, under the influence of the Vienna Convention on International Sale of Goods (CISG).\(^{70}\) The 1978 LCT was designed by applying the monistic conception of the law of obligations, so that it was equally applicable to civil law contracts and contracts in the sphere of commercial law entered into by both legal entities and natural persons.\(^{71}\) After being taken over into Croatian legislation, the 1991 LCT has been amended several times. By means of the 1994 Law on Amending the Obligation Relations Law,\(^{72}\) provisions have been introduced in the 1991 LCT covering the matter of partnership (Chapter XIII A) which until that time was not regulated by positive law of the Republic of Croatia since applicable in these matter were the provisions of the A.G.C.C. (GCC)\(^{73}\) relating to partnership, considered as legal rules.\(^{74}\) The next change of the 1991 LCT concerned the deletion of provisions relating to pledge (Chapter XXVII, arts. 966 through 996) provided for by means of art. 394 of the LP since the latter Law has completely regulated the matter of pledge in the legal order of the Republic of Croatia (RC). After that, the provision of article 180 of the 1991 LCT relating to liability for terrorist acts, public demonstrations and manifestations was also deleted.\(^{75}\) Added were the provisions indicating subsequent enactment of regulations relating to liability of the Republic of Croatia for damage that took place in course of the Homeland War (art. 184b) and damage that took place in the former SFRY for which the SFRY was liable (art. 184b).\(^{76}\) Also amended were the provisions relating to acquiring without ground,\(^{77}\) to liquidated damages and to application of foreign currency clauses.\(^{78}\)

For the purpose of modernization of the law of obligations and its bringing into accord with the European legal acquis, a new LCT has been enacted in 2005 which came into force on 1 January 2006. That is to say, the harmonization of current Croatian legislation with \textit{acquis communautaire} has taken place as a consequence of obligations assumed on the ground of article 69 of the Agreement on Stabilization and Accession concluded between the RC and the European Communities and their


\(^{68}\) Complete title of the OR reads as follows: \textit{Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)}, vom 30 März 1911, BBl. 1905 II I, 1909 III 725, 1911 I 845, BBl. 2004 4471.

\(^{69}\) GU. N. 79 del 4 aprile 1942.


\(^{72}\) PG, nr. 3/94.

\(^{73}\) The rules of GCC were applicable to obligation relations until 1 October 1978, i.e. until the entering into force of the 1978 LCT (art. 1109). Since that time certain GCC rules were applied in case of legal lacunae – which was the case with matters of partnership, loan and gift. After the independence of the Republic of Croatia the GCC legal rules were implemented on the ground of the Law on Way of Implementation of Regulations Enacted before 6 April 1941 (PG, nr. 73/1991). The requirement for implementation of the GCC provisions was their conformity with the Constitution and Laws of the Republic of Croatia. More on the subject in Gavella, N. \textit{et al.}, \textit{Hrvatsko, op. cit.}, pp. 50, 144-145. This provision was deleted by the Law on Amending the LCT,\(^{74}\) According to the Law on Taking Over the Obligation Relations Law (PG, nr. 53/91) the application of provisions of the GCC were conceived as application of rules of law (paragraphs 1175 through 1216) on condition they were in accordance with the Constitution and the laws of the Republic of Croatia.

\(^{75}\) This provision was deleted by the Law on Amending the Obligation Relations Law. PG, nr. 7/96.

\(^{76}\) Both provisions were added by the Law on Amending the Obligation Relations Law, PG, nr. 112/99.

\(^{77}\) The Law on Amending the Obligation Relations Law, PG, nr. 73/91.

\(^{78}\) Josipovic, T., \textit{Rekodifikzirazin ... op. cit.}, p. 222.
Member States, signed on 29 October 2001. As a consequence, the LCT has taken over a whole series of directives from the field of European Contract Law, but has also introduced an entire series of new conceptional solutions otherwise not existing in the 1991 LCT. Summarizing the above text, it is possible to conclude that tendencies of development of Croatian law of obligations has taken the road of being formed, at one hand, through taking over directives of the European law of contract and, on the other hand, through the introduction of new reforming conceptions in determining solutions for certain obligation law institutes.

If a new national law was adopted, please:

a) indicate the new solutions that distinguish the new law from the 1978 Yugoslav Law.

New solutions in the LCT may be represented as solutions giving effect to the following: 1) structural changes, 2) changes of terminology, 3) solutions implemented for the first time by means of the LCT, and 4) solutions amounting to substantial change of institutes otherwise already regulated by the LCT 1991.80

Ad 1) Structural Changes

The structure of the LCT, compared to that of the 1991 LCT, has been changed. The LCT is drafted in three parts and includes a total of 1165 article. The first part under the title ‘General Part’ encompasses the general rules applicable to all obligation relations. This Part includes seven chapters, i.e.: I) basic principles, II) parties to obligation relations, III) originating of obligations, IV) kinds of obligations, V) effects of obligations, VI) changes in an obligation relationship, VII) termination of obligations. The second part, under the title ‘Particular Part’, includes the following chapters: VIII) contractual obligation relations (which is divided to the section encompassing general provisions and the section dealing with specific contracts), and IX) extra-contractual obligation relations (i.e. torts). The third part includes transitional and concluding provisions.

Ad 2) Changes of Terminology

Numerous changes of terminological nature have been made in the LCT in order to bring into accord the legal terms with the requirements of contemporary Croatian language of law. Thus, for instance, the term ‘nullity’ is spelled differently (only in Croatian language – not relevant in English – translator’s remark); terms ‘substantive’ and ‘non-substantive’ damage are replaced by terms ‘property damage’ and ‘non-property damage’; also changed is the term ‘good businessman’ (again, the change is irrelevant in English, i.e. ‘dobar gospodarstvenik’ instead of ‘dobar privrednik’); the term ‘contract in the sphere of economy’ is replaced by ‘commercial contract’; also changed were terms such as ‘commission contract’, ‘partnership contract’, ‘contract of license’, ‘bank guarantee’ – which changes again in fact concern only the expressions in Croatian only – translator’s remark).

Ad 3) Solutions Introduced for the First Time by the Law of Contract and Torts

In Chapter II of the LCT – Parties to Obligation Relations, the following matters are regulated for the first time: legal capacity (art. 17 of LCT) and business capacity (art. 18 of LCT) of natural per-
sons and legal entities, as well as the rights of personality (capacity of being a holder of rights) – art. 19 of LCT. Rights of being holders of legal right are recognized both to natural persons and legal entities and they are specified in the text of Law in articles 19/2 and 19/3 as examples. This leaves the possibility of development of this area of law and of emerging of new kinds of these rights which at present are not expressly specified in the LCT.\(^{81}\) The provision relating to capacity to be a holder of rights is especially important due to introduction of the concept of immaterial (non-property) damage defined as a violation of the rights of personality (art. 1046 of LCT). This opens a possibility of appearing of various kinds of such kind of damage depending on which rights of personality has been infringed upon.

Furthermore, the LCT regulates the matter of individual contracts that were not included in the text of the 1991 LCT. These are: the contract of gift (donatio) – arts. 479-498 of LCT, the contract of loan (arts. 508-517 of LCT), the contract of leasing (arts. 553-578 of LCT), the contract of maintenance for life (life interest) – arts. 579-585 of LCT, the contract of maintenance until the moment of death (arts. 586-589 of LCT). The last two contracts have been regulated in the LP (i.e. Property Law), but they were taken over in extenso by the LCT.

The LCT includes also the matter of imposition (art. 302 of LCT) as an accessory ingredient of the legal transaction carried out for free, which otherwise was not regulated by the 1991 LCT.

Ad 4) Solutions introducing a substantive change in the institutes already regulated by the 1991 LCT.

The provision relating to fair trade usages, specified in article 21 of LCT, and regulating the matters of customs and trade practices, has been amended. Here the novelty is that contractual relations between merchants are subject also to the practice already established by them in carrying out mutual business (art. 12/1 of LCT). Also introduced was the concept of commercial contracts (art. 14/2 of LCT). This concept is not identical in substance with the concept of contract in the sphere of economy specified in the 1991 LCT (art. 25 of LCT). In case of such contracts it is necessary that both parties are professionally engaged in commercial activity falling within their specific line of business, or that such activity was related to it, while in the case of commercial contracts it was sufficient that only one of the parties is engaged in such activity.

Considerable and substantive changed in the LCT concern the matters of monetary obligations and interest. A new way of rate of exchange calculation was introduced in the case of stipulating the clause in terms of which monetary obligation is to be calculated in foreign currency (art. 22/2 of LCT). Also changed was the manner of calculation of liquidated damages and interest; this was a consequence of the need to bring this matter into accord with the Directive 2000/35\(^{82}\) on prevention of delay in payments in the sphere of commercial contracts. The rate of prescribed liquidated damages is connected with the discount rate of the Croatian National Bank (hereinafter: CNB), but there is a difference in its application depending on the type of contract at issue – commercial contracts or other civil law contracts (art. 29/2 of LCT). The rate of interest, provided for by contracting parties in their contracts, is connected with the rate of liquidated damages (art. 26 of LCT) and there is again the difference between commercial and other, civil law contracts. Anatocism is prohibited, although

\(^{81}\) More on capacity to be a holder of rights in Gavella, N., Osobna prava, University of Zagreb School of Law, Zagreb, 2000, pp. 13-62; Radolović, A., Pravo osobnosti u novom Zakonu o obveznim odnosima. Review of the University of Rijeka School of Law, vol. 27, nr. 1 (2006), pp. 129-170.

there are some exceptions (there is no prohibition of anatocism in the case of monetary deposits of banks and other financial institutions – art. 27/3 of LCT).

A new solution exists also in the regulation of liability for damage taking place during the stage of negotiating a memorandum of understanding. The solution in the old 1991 LCT – one of the rare instruments regulating this particular matter – has been changed as well. The LCT expressly provides for liability for damage where negotiations are carried out contrary to the principle of fair trade and honesty (art. 251/2 of LCT), or where, contrary to that principle, a party desists from negotiations (art. 251/3 of LCT); according to the old Law such type of liability existed only if a party at issue desisted from negotiations without justified reasons, or where negotiations were carried out without genuine intention to enter into contract (which is but only one of the aspects of conduct deemed contrary to the principle of fair trade and honesty). This solution was inspired by art. 2/301 of the Lando Principles.\footnote{Česić, Y., Gorenc, V., Kačer, H., Momčinović, H., Pavić, D., Pešutić, A., Slakoper, Z., Vidović, A., Vukmir, B., Komentar Zakona o obveznim odnosima, PRIF, Zagreb, 2005, p. 346.}
The provisions relating to grounds of contractual obligation (art. 51 of the 1991 LCT) and those on nullity of contract due to lack or inadmissibility of ground (art. 52 of LCT) are left out of the LCT. In conformity with such approach, the case of misunderstanding of the ground is no more a reason for invalidity of contract (art. 282 of LCT).

As far as provisions relating to application of threat and force are concerned, the LCT specifies expressly that a contract entered into by applying force (vis absoluta) shall be null and void (art. 279/3 of LCT). One should mention, however, that the 1991 LCT did not specify the element of force as a reason for nullity of legal transaction, mentioning only threat as such reason (art. 60 of 1991 LCT).

According to LCT, error is an essential element also where there is error relating to the subject-matter of contract (art. 280/1 of LCT); that solution did not exist in the 1991 LCT (art. 61 of LCT 1991). At the same time, a contracting party being in error may claim annulment of contract due to essential error, independently of his/her own fault (art. 280/2 of LCT), while according to the 1991 LCT it was necessary that there was no fault of the party in error (art. 61/2 of 1991 LCT).

As far as provisions on disagreement are concerned, in addition to the fact that misunderstanding relating to ground was no more a necessary requirement for nullity of contract, the disagreement concerning the subject-matter of contract specified in 1991 LCT (art. 63 of 1991 LCT) was replaced by the requirement that, in order to claim nullity, the disagreement has to be over an essential element of contract (art. 282 of LCT). This is a case of wider conception of the subject-matter of obligation.\footnote{Klarić, P., Promjene obveznog prava, op.cit., p. 243.}

The LCT includes also the provision on concluding a contract electronically (art. 293 of LCT) – unknown to the former 1991 LCT. The use of electronic signature, necessary for taking place of such contract, is not regulated by the LCT, which only refers the matter to a particular law (art. 293/3 of LCT).\footnote{This is the Law on Electronic Signature.}

More significant changes in the LCT are made in the matter of general conditions of contract (arts. 295 and 296 of LCT). These provisions are brought into accord with provisions of Directive 93/13/EEC relating to unfair provisions in consumer contracts. However, these provisions concerning the general conditions of doing business apply not only to consumer contracts, but also to all other contracts.\footnote{Klarić, P., Promjene obveznog prava, op. cit. p. 243,
As compared to the 1991 LCT, solutions of this matter (arts. 142 – 144 of 1991 LCT) also brought about the change of definition of general conditions (art. 295/1 of the 1991 LCT); furthermore, the element of nullity is introduced as a single sanction for unfair provisions relating to general conditions (art. 296/1 of LCT), together with the provision in terms of which the circumstances were specified as criteria for assessment of nullity (art. 296/3 of LCT).87

According to LCT, conceived as a necessary condition is now the fact that is decisive for the effect of contract (art. 297 of LCT), and not only for the origination or the termination of contract – as previously regulated by the 1991 LCT (art. 74 of LCT 1991).

According to LCT, a procurator needs no anymore a special authorization to conclude a contract of a chosen court (arbitration) (article 315/4 of LCT).

Also changed were the provisions relating to nullity of contract (art. 323/1 of LCT). There is no more a possibility for the court to order the other party to hand over to the municipality the objects of property which were handed over by such party after receiving such property on the ground of a prohibited contract – which has been the solution provided for in the 1991 LCT (art. 104/2 of 1991 LCT). At the same time, according to LCT, it is no more possible for the court to deny the demand of a party in bad faith to obtain restitution of an object of property handed over by such party to other party on the ground of a prohibited contract (nemo auditor).

Also redefined was the concept of vis major (see articles 346 and 1067/1 of LCT). It is expressly stated in the Law that vis major is an event which is: external, unforeseeable, extraordinary, impossible to be prevented, obviated or avoided, while the requirement for imposing the contractual liability is that such event has taken place after the moment of entering into contract. According to previous regulation (1991 LCT), the institute of vis major was described only as an event that was impossible to be prevented or avoided, while contractual liability also depended on the fact that such event has taken place after entering into contract (arts. 263 and 177/1 of the 1991 LCT)

A considerable novelty in this context is that a creditor, in case of violation of contractual obligation, is entitled according to LCT, in addition to compensation of property damage, to equitable compensation of non-property (immaterial) damage88 (art. 346/1 of LCT). The 1991 LCT provided to creditor only the right to compensation of property damage (art. 266/1 of the 1991 LCT). Croatian law-maker followed in this matter the solutions offered by Lando Principles in terms of which a contracting party suffering damage is explicitly entitled to compensation of non-property damage caused by failing to perform a contractual obligation (art. 9.501).

Stipulated damages according to LCT may be provided for in the contract in the case of debtor’s failure in performance or delayed performance of an obligation or, as the case may be, of his/her incomplete fulfillment of the obligation (art. 349/1 of LCT); in terms of the 1991 LCT, the stipulation of such damages was provided for only in the case of debtor’s failure to meet his obligation or his/her delay in this respect (art. 270/1 of LCT 1991).

According to LCT, the facts of impossibility of realization of purpose of contract and the criterion of equity are no more causes for rescission or alteration of contract due to hardship (considerable change of circumstances) – which was specified by the 1991 LCT (art. 133/1 of 1991 LCT). Instead, the emphasis now is placed on the extraordinary (unusual) circumstances due to which discharging of contract becomes excessively aggravated or where it would inflict an excessive loss (art. 369/1 of LCT).

87 Loc. cit.
88 More on this subject in Radolović, A., Naknada neimovinske štete zbog povrede ugovora, in Barbić, J., Cnič, I., Dika, M., Klarić, P. Radolović, A., Naknada štete u primjeni novog zakona o obveznim odnosima, People’s Gazette, Zagreb, 2005, pp. 73-117.
As far as the institute of excessive damage (disproportion) is concerned, a new solution is provided for according to which commercial contracts may not be contested due to violation of the equivalency principle (art. 374/5 of LCT).

Certain changes are also introduced in the institute of liability on the ground of substantive deficiencies in discharging a contract (arts. 400-432 of LCT). The changes concern primarily the consequences of taking over and of bringing into accord of provisions of the LCT with the Directive 1999/44/EC in specific aspects of sale of consumer goods and guarantees. However, relevant provisions covering the liability for substantive defaults in discharging the obligations that are changed under the influence of Directive are applicable not only to consumer contracts, but also to all other contracts. The LCT increases the number of cases characterized by defaults that are relevant (art. 401 of LCT); it also excludes the duty of inspection of things in case of a buyer being the consumer (art. 402/3 of LCT), as well as extends to two months the time limits within which a buyer, in the case of contracts that are not commercial contracts, is obliged to inform the seller about the defaults (art. 404/1 of LCT); it also extends the time limits for the taking place of liability of seller for concealed defaults, in which case there is a special distinction between the sale of new (two years after handing over of goods – art. 404/2) and the sale of used goods (the parties may also stipulate one year as the time limit in this case – art. 422/1 of LCT).

A new solution is applied also in case of the institute of guaranteeing the proper functioning of the goods (warranty). Thus, it is necessary to issue a guarantee paper (warranty) for every kind of goods, i.e. thing (art. 423/1 of LCT), and not only for the so-called technical goods, as was provided for in the 1991 LCT (art. 501/1 of 1991 LCT).

Specific changes in the LCT, as compared to the 1991 LCT, have been made also in the case of contractual relations. Thus, it is possible to stipulate in the contract a sale coupled with the right to keep the right of ownership (retention) as far as all things are concerned, including the objects of immovable property (462/1 of LCT). As far as contract of construction is concerned, the change refers to extending of meaning of the concept of unforeseen works which the contractor is authorized to perform without previous consent by the principal (art. 624/2 of LCT). Also made were the changes in the partnership contract; they include the following matters: bringing in of stake into the partnership property (art. 641 of LCT), joint management of partnership (art. 744 of LCT), the right of supervision of business operation of partnership (art. 645 of LCT), inheritance of rights and obligations of partners (art. 656 of LCT), the effects of leaving and debarment from partnership (art. 652 of LCT); furthermore, the assumption of continuation of partnership is provided no more (art. 655 of LCT), as well as certain rules of the order of settlement (art. 658 of LCT).

In the matter of contract of carriage (arts. 661-698 of LCT) one should mention the introduction of duty to make a bill of lading (art. 668 of LCT) which – according to previous 1991 LCT – was also present, but the term itself (in Croatian) is now slightly different. Also changed are the articles covering the liability of carrier for damage caused: for instance, his liability on the ground of fault replaced the strict (objective) liability for loss of and damage to shipment (art. 683 of LCT) as well as for delay (art. 687 of LCT). The changes are made also of the rules of liability of hotels for safe-keeping of guest property, then of those relating to destruction of or damage to property specified in that respect in the Law (art. 738 of LCT), or to property the hotel manager is obliged to accept for safe-keeping (art. 739 of LCT). Furthermore, the principal, according to LCT, is no more entitled to request the lowering of commission that was stipulated (art. 783/2 of LCT). The contract of trade representation (agency) was also changed as a consequence of taking over the Directive 86/653/EEC relating to self-employed commercial agents. In such a way the LCT has introduced a new definition of the contract of commercial agency (art. 804 of LCT), as well as redefined agent’s obligations (arts. 811-816 of LCT) and principal’s obligations (arts. 817-826 of LCT); also introduced was the right to
special fee (arts. 830-832 of LCT) as well as the provisions concerning the prohibition or the restriction of engaging in that activity (art. 834 of LCT). Also changed was the definition of the mediation contract (art. 835 of LCT). Specific changes relate to the contract of travel organization (arts. 881-903 of LCT); this was done primarily as a consequence of taking over the Directive 90/214/EEC on tourist package arrangements (the concept and the form of contract, obligations of the travel organizer, quantitative limitation of amount of liability for damage, traveller’s insurance, traveller’s obligations, substitution of travellers, change of price and rescission of contract).

Certain provisions of the contract of insurance (art. 921-989 of LCT) are also changed, and more particularly the definition of the contract which now is made simpler; also defined in a more precise way was the distinction between various notions of insured case and risk, including the way of entering into contract of property insurance (it is specified that such contract is concluded by accepting the offer of insurance), while the life insurance contract still remained subjected to requirement of signing the insurance policy – as was provided by the 1991 LCT. Introduced in the LCT was also the duty of insurer to compensate the damage and to pay the interest in case of his delay in paying the insured sum. The changes relate also to the bankruptcy of the insured party and to indicating the insurance beneficiary. In the matter of liability insurance it is specified that the insured sum shall also serve for reimbursing the costs of measures taken at the request of the insurer or under the agreement with him for the purpose of protection against the unjustified or excessive requests of third persons. Also changed are the provisions relating to letters of credit (arts. 1028-1038 of LCT); this was done in conformity with rules of the International Chamber of Commerce in Paris.89

Changes in the regulation of the matter of torts, i.e. liability for damage caused outside the sphere of contract, are rather considerable as compared to solutions existing in the 1991 LCT. Most significant change concerns a new definition of non-property (immaterial) damage (art. 1046 of LCT). The so-called objective conception of non-property damage was accepted according to which the non-property damage is expressed by infringing the right of personality.90 Physical and spiritual pain and anguish are no more the forms of non-property (formerly non-material) damage and they are replaced by circumstances that, in addition to other circumstances, are considered in determining equitable monetary compensation. A new solution is also the already mentioned right of legal entities to non-property damage caused through infringement of the right to personality. Also made more precise in the text of Law is the formulation of the day of maturity of claim to equitable monetary compensation as well as of the day of submitting a request in writing and of filing the action with the court (art. 1103 of LCT) – the detail that was not regulated in the former Law. Another novelty is expressed in the possibility of inheriting and transferring (ceding) of the non-property damage claim, the only requirement being that the request in writing or the action with the court have to be filed by the entity suffering damage (art. 1105 of LCT); previously, the inheriting and ceding were possible only where the right to non-property damage has been recognized by a final court decision or by an agreement in writing. The circle of indirectly wronged parties entitled to equitable monetary compensation in the case of death or serious disability is made wider, and it now includes: grand-fathers, grand-mothers and grand-sons (arts. 1101/1 and 1101/2 of LCT). A new solution concerns also the recognition of that right to parents in the case of loosing their conceived but not yet born child. The rules relating to liability for damage caused by a moving motor vehicle (arts. 1068-1072 of LCT) are made more complete by the provisions regulating the definition of motor vehicle, joint and several liability of co-owners and joint owners of the motor vehicle, the notion of third persons, liability in case of unauthorized use of motor vehicle and liability relating to person being a passenger in the motor vehicle.

89 Ibid., p. 248.
90 Loc. cit.
Substantial changes and additions were made in the institute of liability of producer for defective products (arts. 1073-1080 of LCT) which was specified in the 1991 LCT under the title: ‘liability of producer for defective things’ (art. 179 of 1991 LCT). In this way that institute has been brought into accord with the Directive 85/574/EEC, of 25 June 1985, relating to equalizing of laws of Member States and covering the matter of liability for defective products, which Directive has been amended by the Directive 1999/34/EEC. The liability for defective products is of strict (objective) nature also in terms of the LCT. It is limited to specific cases of damage only. The LCT includes also the definition of product (art. 1074 of LCT), of producer and/or of the person to be held liable (art. 1076 of LCT); at the same time it regulates the case of liability of several persons for damage caused by defective product (art. 1077 of LCT), the reasons for exemption from liability (art. 1078 of LCT), prohibition of contractual exemption or limitation of liability (art. 1079 of LCT) as well as the time limits for exercising the right to compensation of damage caused by defective products (art. 1080 of LCT).

Certain changes are introduced in the institute of acquiring without ground. Added are the decisions of the court or some other competent authority (art. 1111/1 of LCT) as one of the grounds for acquiring benefit. The provisions relating to securities remained unchanged, although according to the 2005 LCT the securities may also have the form of electronic record as specified by the corresponding law (art. 1135 of LCT).

b) were there interventions in the text of Law in order to bring it into accord with relevant European law, and if so, which were the directives serving in the process of bringing into accord and in what way this has been done?

Introduced in the LCT were solutions that were adopted as a result of bringing into accord its text with directives of the European Union relating to the European Contract Law. These include the following solutions: Directive 85/374/EEC on bringing into accord the laws and other regulations of Member States concerning the liability for defective products (arts. 1073 through 1080 of LCT);91 Directive 86/653/EEC on bringing into accord of regulations of Member States relating to commercial agents (arts. 804 – 832 of LCT);92 Directive 90/314/EEC on tourist package arrangements (arts. 881 through 903 of LCT);93 Council Directive 90/13/EEC, of 5 March 1993, on unfair provisions in consumer contracts (arts. 295 and 296 of LCT);94 Directive 1999/44/EEC on specific aspects of sale of consumer goods and related guarantees (arts. 400 through 422 of LCT);95 Directive 2000/35/EC on combating the delay in commercial payment transactions (arts. 21 – 31 of LCT).96 In the case of all mentioned directives, except the Directive 85/374/EEC, this was the matter of minimum harmonization which permitted to the law-maker to carry out the reception into national law by keeping current provisions and receiving new ones to a degree of protection higher than the one prescribed by directives. Consequently, the Croatian law-maker, engaged in the process of bringing into accord the specific matters with the Croatian legislation in the field of law of contract has, in fact, on many occasions, surpassed the minimal standard prescribed by directive. This is, for instance, the case with article 888 of LCT which extends a protection wider than the one specified by article 5 of Directive

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90/314/EEC relating to liability of travel organizer for the entire damage caused by him/her to passengers through failing to perform relevant obligations or partial or through imperfect failure in this respect. Liability in this case is based on the principle of strict (objective) liability. The same is done by the Croatian law-maker also in the case of Directive 99/44/EEC where he introduced in the provisions of LCT relating to substantive defaults in the contract of sale the extension of application of some of the Directive provisions to all payment contracts. Furthermore, in contrast to article 1/2b of Directive 99/44/EC, which limits the application of the Directive to consumer goods conceived as being any tangible movable thing, the provisions of LCT relating to substantive defaults are applicable to all goods, both movable and immovable as well as to rights that are made equal to goods,\textsuperscript{97} and to all kinds of services.\textsuperscript{98}

c) are the solutions applied in the principles of the European obligation law (Lando Principles), or those specified in the recent Draft Common Frame of Reference, implemented, supplementing thus the Obligations Law; and if so, please indicate the relevant regulations which are included in these legislative acts.

The principles of the European contract law – the so-called Lando Principles (PECL) – which are the result of work of the Commission for European Contract Law established on the initiative of Professor Ole Lando, have found their reflection in specific rules of the LCT.\textsuperscript{99} Thus, art. 12/1 of LCT specifies that trade practices should apply to obligation relations between merchants who have stipulated it for the purpose, but also those usages which were adopted in their mutual practice. Such solution is applied also in art. 1.105, para. 1 of Lando Principles.

By using as a model the Lando Principles (art. 2.301), the changes were introduced in the provisions relating to liability for damage in case of entering into memorandums of understanding (art. 251 of LCT. It is consequently specified that any conduct of negotiations or any desisting from them contrary to the principle of good faith and honesty\textsuperscript{100} shall be considered as a ground of liability.

The LCT recognizes to creditors the right to equitable compensation of non-property damage caused through failing to perform a contractual obligation (art. 346/1 of LCT). This provision too was introduced by the model of Lando Principles recognizing the same right to compensation of non-property damage due to failure to perform a contractual obligation (art. 9.501).\textsuperscript{101}

Solutions existing in the Common Frame of Reference (hereinafter: CFR), as an „opt-in“ instrument designed to include common provisions and terminology of the European Contract Law,\textsuperscript{102} are not included in the provisions of LCT. More precisely, since numerous reports\textsuperscript{103} suggest the standpoint of the Commission that this project may be qualified as a „handbook“ or a „toolbox“ intended to be used in changing and adopting new legal acts within the frame of revision of the valid \textit{acquis},

\textsuperscript{97} See art. 2 of the LP (Law of Property) quoted above.
\textsuperscript{100} Lando Principles articulate the good faith principle which finds its equivalent in Croatian law in the principle of good faith and honesty specified in article 4 of the LCT, but in essence these concepts are not entirely identical. See on that subject: Šarčević, S., Miščenić, E., \textit{Uporaba europskoga ili nacionalnega nazivlja pri preuzimanju direktiva EU-a u hrvatsko zakonodavstvo}, in: Bratanić, M. (editor), \textit{Hrvatski jezik na putu u EU}, Croatian Unversity Printing Office, 2011, p. 124.
\textsuperscript{101} Klarić, P., \textit{Promjene obveznog prava}, op. cit., p. 244.
the Croatian law-maker was right in not taking in consideration these provisions until the future role and position of CFR in the European contract law are clarified. Along these lines, and in relation to the 2010 Green Book of the Commission on Options Aimed at Advancement towards a European Contract Law intended for consumers and merchants, a Group of Expert was nominated in order to assist the Commission in the choice of specific parts of the Draft which directly or indirectly refer to the law of contract, as well as in amending, revising and completing specifically selected provisions in the process of drafting a future instrument of the European contract law.

Are the solutions appearing in the practice of highest courts in your country applied in drafting the provisions of the Law of Obligations? If so, please indicate the matters (areas) where mentioned solutions are applied.

Applied in the LCT are also specific solutions having their origin in court practice. A typical example in this respect is the contract of maintenance until death (arts. 586 through 589) of LCT which contract originally was not regulated by law, instead being recognized by court practice as a separate contract different from contract of maintenance for life. While taking in consideration the fact of long time practical existence of contract of maintenance until death, this matter has been for the first time regulated in Croatian law in the 2003 Law on Property (LP). The LCT has taken over, in their entirety, the provisions of the LP.

In its provisions covering the liability for substantive defaults, the LCT has solved the problem that emerged in the practice of courts relating to the question of rules to be applied in the matter of liability for damage caused by performance burdened by a substantive default. According to the relevant provision of the Law, the buyer is entitled to compensation of damage also on the ground of general liability rules as, including the damage done to other property owned by him, independently of whether a subsequent performance did take place, or regardless of lowering the price or, as the case may be, of rescission of contract (art. 410/2 of LCT).

However, the LCT introduced also the solutions that were contrary to the practice of courts which has developed before its enactment. The relevant example is found in the provision concerning the capacity of being sued in the case of instituting court proceedings aimed at refuting debtor's legal transactions. According to LCT, persons having the capacity of being sued include the debtor and the third persons involved in taking such legal transactions or deriving benefit from such transactions, which solution included the universal successors of mentioned parties (art. 69/2 of LCT). The court practice that has developed on the ground of the 1991 LCT rules, did not consider whether a debtor had the capacity to be sued, because the creditor was not entitled to claim the annulment of a legal transaction taking place between debtor and a third person (indeed, such legal transaction was permitted), so that it was also unnecessary that debtor and a third person should become jointly interested parties with the capacity to be sued.

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105 COM (2010), 1 July 2010.


107 Opinion of principle of the extended session of the Federal Supreme Court, of 11 January 1957, nr. 8/57, Collection of Decisions of Federal Supreme Court and Supreme Economic Court, II/1-VIII.

Please present, separately, the innovations (if any) relating to general questions concerning obligations and contracts.

Following are innovations introduced by the 2005 LCT in the sphere of general matters relating to already treated obligation relations:

- There is an express provision in terms of which relations between merchants are subject to mutually developed practice (art. 12/1 of LCT).

- Definition of commercial contract is changed, so that this kind of contract is now distinguished from the contracts in the sphere of economy (economic contracts). Commercial contracts are those entered into by merchants engaged in the framework of mutual business activities belonging to the line of business of at least one of the parties, or are related to performance of these business activities (art. 14/2 of LCT).

- A new way of calculation of the rate of exchange is introduced in the case of stipulating calculation of monetary obligations in foreign currency (art. 22/2 of LCT).

- The way of calculation of liquidated damages and interest stipulated in contract is changed in order to bring it into accord with provisions of the Directive 2000/35\(^\text{109}\) concerning the combating delayed payment in the sphere of commercial contracts (arts. 21-31 of LCT).

- According to the new Law, there exists liability in the case of memorandums of understanding where negotiations are conducted contrary to the principle of good faith and honesty, or where a party, contrary to that principle, desists from negotiations (art. 251/3 of LCT).

- Also accepted was the provision on concluding contracts by electronic way (art. 293 of LCT) – which was unknown in the former 1991 LCT.

- Definition of general terms and conditions is altered (art. 295/1 of LCT); the institute of nullity is introduced as a single sanction to cope with unfair provisions inserted in the general terms and conditions (art. 296/1 of LCT), including the list of circumstances to be considered in assessing the nullity (art. 296/3 of LCT).

- A creditor is now entitled to equitable compensation of non-property damage in the case of violation of contractual obligation (art. 346/1 of LCT).

- Damages may be stipulated in the contract also in the case of debtor’s failure to duly perform his/her obligations, and not only in cases of failing to perform or of delay (art/ 349/1 of LCT).

- The procedure of rescission of contract or its amending is made simpler in cases of hardship (change of circumstances). The relevant circumstances must be of such a nature as to cause excessive difficulties in the performance of contract, or to be apt to inflict an excessive damage (art. 369/1 of LCT).

- Liability for substantive defects in contract performance is extended to new cases in order to bring it into accord with the Directive 1999/44/EC as far as sale of consumer goods and warranties are concerned (art. 401 of LCT); the duty of inspection of goods is also excluded from the LCT in cases the buyer has the status of consumer (art. 402/3 of LCT); in addition, the time limits within which a buyer in non-commercial contracts is obliged to notify the seller are extended to two months (art. 404/1 of LCT); the extension of time limits is now also provided in the case of liability of seller for concealed defects; this is followed with the difference between selling new things (two years from the day of sale – art. 404/2 of LCT) and selling the used ones (where parties may stipulate one year as a time limit – art. 404/3); also extended was the time limit after who expiration the buyer ceases to be entitled to claim liability on the ground of substantive defects in performance (art. 422/1 of LCT).

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There is now a duty to issue a warranty for every kind of goods, i.e. things (art. 423/1 of LCT) and not only for the so-called technical merchandise – which provided for by the 1991 LCT.

Following are innovations, already elaborated in the earlier text, which are introduced by the Law of Contract and Torts (LCT) in matters of contract:

- Certain contracts not included in the LCT 1991 are now regulated; these are contract of gift (donatio) (arts. 479 – 498 of LCT), contract of loan (arts. 508 –517 of LCT), contract of lease (arts. 553 – 578 of LCT), contract of maintenance for life (life interest – arts. 479 – 585 of LCT), contract of maintenance until death (arts. 586 – 589 of LCT).

- Sale coupled with retaining the right of ownership may be stipulated for all goods, including immovable property (art. 462/1 of LCT).

- In the contract of construction the substance of the notion of urgent and unforeseen works is changed by specifying those works that the contractor is authorised to perform without previous consent of the principal (art. 624/2 of LCT). Liability for soundness of the building is replaced with liability for essential requirements relating to the building in construction (art. 633 of LCT). This liability is applied to the constructor who carries out the construction, and the architect, but also to the person in charge of supervising the works (art. 633/4 of LCT), which is an innovation as compared to the old way of regulation. The matter of determining the so-called crucial requirements for the building in construction is not particularly regulated by the LCT. However, these should be the ones specified in articles 14 through 16 of the Law on Urban Planning and Construction, meaning the following six properties of a building: 1) mechanical resistance and stability, 2) protection against fire, 3) hygiene and health and environmental protection, 4) safety in using the building, 5) noise protection, 6) energy saving and thermal protection. Mentioned requirements are the result of implementing the Directive 89/106/EEC relating to construction products indicated in the Supplement I of the Directive.

- Also changed are provisions covering the partnership contract and particularly the matters of: bringing in of shares to partnership property (art. 641 of LCT), joint management of partnership (art. 644 of LCT), right of supervision over business operation of the partnership (art. 645 of LCT), effects of leaving out and exclusion of partner from partnership (art. 652 of LCT), effects of the presumption of continuation of partnership has been omitted from the text (art. 655 of LCT), inheriting of rights and obligations of partners (art. 656 of LCT) as well as the effects on the rules concerning the order of settlement (art. 658 of LCT).

- Making a bill of lading is introduced as the obligation in the contract of carriage (art. 668 of LCT); also introduced is the liability of carrier on the ground of fault in case of loss and damage done the shipment (art. 683 of LCT) as well in case of his delay (art. 687 of LCT).

- liability of inn-keepers is provided for perishing and damaging the property (things) now enumerated in the law (article 739 of LCT).

- The principal (giver of order) is entitled no more to request lowering of compensation stipulated in contract where such compensation would be disproportionate to services rendered.

- A commission agent is no more entitled to demand lowering of stipulated commission should the compensation be disproportionate to the transaction done and the result achieved.

110 See on the matter of crucial requirements for a building: Vukmir, Ugovor o gradjenju i uslugama savjetodavnih inženjera, RRiF, Zagreb, 2009, pp. 431-436.

- The contract of commercial agency (arts. 804 – 834 of LCT) is amended as a consequence of taking over the Directive 86/653/EEC relating to self-employed commercial agent (new definition of contract is provided together with changed duties of the agent and the principal (giver of order); also introduced is the right to special fee of the agent as well as the provision on prohibition or limitation of performance of business activity.

- Changes were also made in regulating the contract of organized travel (arts. 881-903 of LCT); the amendments involved the notion and the form of contract, obligations of travel organizer, quantitative limitation of liability for damage, passenger’s insurance, duties of passenger, substitution of passengers, the change of price and the breach of contract. These amendments are due to taking over of provisions of Directive 90/214/EEC covering tourist package arrangements.

- As far as insurance contract is concerned (arts. 921 – 989 of LCT), the change includes the definition of the contract itself, which is now made simpler; more precise distinctions apply also to the concepts of insured event and of risk, as well as to the way of entering into contract on property insurance (it is now specified that this contract is concluded by the fact of accepting the offer for insurance, while the conclusion of contract of life insurance continues to be subject to the requirement of signing the insurance policy. The insurer is liable to compensate possible damage and to pay liquidated damages in case of delay in paying the insured sum. The changes affect also the bankruptcy of insured entity (person) and the beneficiaries of insurance. According to new solution in the area of liability insurance the rule is now that the insured sum has to be used for reimbursing the costs of measures taken at insurer’s request or, as the case may be, taken by agreement with him, in order to ensure protection against unjustified and excessive claims of third persons.

Also amended were the provisions of the LCT relating to letters of credit (arts. 1028 – 1038 of LCT); this was done in conformity with rules of the International Chamber of Commerce in Paris.

Do your laws regulate also the part relating to treaties entered into by the Government, and if the answer is positive, please indicate these treaties as well as describe in a summary way the most important solutions in these treaties.

As already mentioned in the above text, the former 1978 Law of Contract and Torts (Law of Obligations) included a series of progressive solutions which, among other things, was the consequence of influence of provisions of the unified law of international sale created as a result of elaboration by the United Nations Commission for International Trade Law (UNCITRAL), and/or of the influence of the Vienna Convention on International Sale of Goods (CISG). These provisions have kept their place in the LCT as well. Thus, for instance, there exist common characteristics or similarities between the LCT provisions and provisions of the CISG Convention relating to stipulation of price in the contracts. According to article 55 of the Convention, in a properly concluded contract, even where the price was neither expressly nor implicitly specified, or where there are no provisions in the contract according to which it could be determined, it is considered that the parties have tacitly accepted a price which, at the moment of entering into contract, was regularly paid in a given line of trade for the same goods sold under similar circumstances. A corresponding rule is accepted also in article 384/2 of the LCT whose text runs like this: “Where the price in a commercial contract of sale is not specified, or where there are no sufficient data on the ground of which the price could be determined, the buyer shall be obliged to pay the price charged regularly by seller at the time of entering into contract, while should there be no such price – the reasonable price.” Furthermore, the price reasonable in terms of art. 384/3 of the LCT, shall be the current price at the time of entering


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into contract, while should it be impossible to determine it, this shall be the price to be determined by court on the ground of circumstances of the case at hand.\footnote{For more details see: Baretić, M., Nikšić, S., \textit{Croatia}, \textit{in: Ferrari, F., The CISG and its Impact on National Legal Systems}, Sellier, Muenchen, 2008, p. 93.}

**What is the nature of relationship between the \textit{lex specialis} acts regulating the wider scope of the law of obligation and the Law on Obligations (Contract and Torts Law). Please indicate most important particular laws and subject-matters of their regulation.**

The Croatian law in general, and the part regulating the obligation relations in particular, follow the approach of particular regulations known as \textit{lex specialis derogat legi generali}. Consequently, the rules of particular legislative acts have the priority and are applied where a certain matter (institution) is regulated by a special prescription. Application of general rules shall take place, traditionally, in the presence of the following presumptions – cumulatively: a) if a matter is not regulated by the rules of particular regulations, and/or b) where these rules do not regulate otherwise. There are cases in which this rule of applying the LCT rules as a general prescription is provided for in the legal text in an explicit way, so that these rules assume classical, so-called supplementary function; this is for instance the case with the Law on Consumers’ Protection\footnote{PG, nos. 79/07, 125/07 – correction 79/09.} (art. 2/2) which specifies that, unless otherwise regulated by its provisions, the obligation relationships between consumers and tradesmen shall be subject to LCT provisions. The Law on Consumers’ Crediting\footnote{PG, nr. 75/09.} regulating the contract of consumer credits is, for instance, a \textit{lex specialis} compared to LCT in the matter it regulates.

In addition to the mentioned solution of “clean” cases of obligation law rules of private law nature, there exist numerous instances of prescriptions that encompass the rules of predominantly private law (obligation law) nature, but together with them (i.e. parallel with them), such prescriptions contains also rules of public law character. Some prescriptions of such mixed nature predominantly include the rules of private law nature, while other also those of public law character. This kind of prescriptions are included in the following laws: the Leasing Law,\footnote{PG, nr. 135/06.} the Insurance Law,\footnote{PG, nos. 15/05, 87/08, and 82/09.} the LAL, the LES, the Law on Electronic Trade,\footnote{PG, nos. 173/03, 67/08, and 36/09.} etc. whose title clearly imply also the field of application based on the \textit{ratione materiae} principle. An adequate example in this respect is the GTL (general taxation Law) regulating the so-called expiration of duty due to statute of limitations in the matter of tax payment. In other words, according to the rules of that Law, all issues relating to such expiration of validity due to statute of limitations not regulated by the GTL shall be settled by the LCT rules, naturally, under the above mentioned presumptions.

**Is the matter of application of (general and particular) payment time limits as the source of obligation law regulated by your legislative act (specific law)? (Is such application included implicitly or is it necessary for it to be explicitly agreed upon, or is it unequivocally a result of circumstances?).**

In the Republic of Croatia the regulation of the matter of payment time limits depends on making distinction between performing the obligation on the ground of civil law contract or on the ground of a commercial contract.

\footnotesize

114 PG, nos. 79/07, 125/07 – correction 79/09.
115 PG, nr. 75/09.
116 PG, nr. 135/06.
117 PG, nos. 15/05, 87/08, and 82/09.
118 PG, nos. 173/03, 67/08, and 36/09.
Applicable in the case of a civil law contract is the basic LCT rule relating to the time of fulfillment of all kinds of obligations, including those expressed in money (obligation of payment). According to that rule, the contracting parties themselves freely stipulate the payment time limit (art. 173/1 of LCT). A debtor is obliged to meet his monetary obligation (duty of payment) until the deadline that has been agreed upon.\(^\text{119}\)

Where the payment time limit is not particularly stipulated in the contract, the debtor is obliged to perform his monetary obligation within the legally prescribed deadline (art. 173/2 of LCT). Should there be no such deadline, various circumstances shall be taken in consideration (the purpose of the transaction, the nature of obligation, etc.) in order to determine it (art. 173/3 of LCT).

Where the obligation of payment stems from a commercial contract, applicable until recently has been the provision of article 174 of the LCT covering the matter of performance of monetary obligations in such type of contracts; this rule was introduced in the LCT as a consequence of adopting the Directive 2000/35/EC relating to combatting the delay in payment in the sphere of commercial contracts. However, after entering into force of the Law on Time Limits of Performance of Monetary Obligations (1 January 2012), the provision of art. 174 of LCT was derogated, and the rules in that article were considerably changed. In addition, violating the prescribed time limits is at present subject to fines of the infraction procedure character.\(^\text{120}\)

According to LTLPM, entrepreneurs may stipulate the time limit for performance of monetary obligation that may not exceed sixty days (art. 2/1 of LTLPM), while in a contract between an entrepreneur and a public law entity where the public law entity is a debtor, the time limit for performance of monetary obligation may not exceed thirty days (art. 3/1 of LTLPM).\(^\text{121}\) A more extended time limit for performing a monetary obligation may be stipulate only exceptionally. Should the time limit for performance be not stipulated in the contract, the debtor is obliged to perform his monetary obligation (duty of payment) within a 30 day time limit (art. 2/3 of LTLPM). As far as creditor is concerned, he/she has no duty to call the debtor to perform his/her obligation; the debtor must act accordingly on the ground of the Law itself. Contracting parties are free to stipulate the payment time limits that are shorter than the maximum ones prescribed by law (30 and/or 60 days), but the possibility of agreeing on a more extended time limit is restricted. A more extended time limit may be stipulated by the contracting parties only where this would not cause an obvious inequality of their rights and duties at the detriment of the creditor (art. 4/4 of LTLPM). In a contrary case, such term in the contract would be null and void. Also null and void are the provisions whose aim is to exclude, limit or make conditional the right to liquidated damages of the creditor in the case of debtor's delay in performance of his/her monetary obligation (art. 4/1 of LTLPM). Along these lines, null and void are also the provisions stipulating the date of reception of invoice or of some other corresponding request for payment (art. 4/2 of LTLPM).\(^\text{122}\)


\(^\text{120}\) PG., nr. 125/11 (hereinafter: LTLPM.

\(^\text{121}\) In terms of articles 2/4 and 3/1 of the LTLPM, the 30 day time limit and/or 60 day time limit begin to run: 1) from the day the debtor has received the invoice or some other corresponding request for payment, 2) from the day the creditor has performed his obligation, then if it is impossible to determine the day of reception of the invoice or some other corresponding request for payment, or if the debtor received the invoice or some other corresponding request before the creditor has performed his obligation, 3) from the day of expiration of time limit for inspecting the subject-matter of obligation where contract or statute provide a specific time limit for such inspection, while the debtor has received the invoice or some other corresponding request for payment before the expiration of that time limit.

\(^\text{122}\) Implementation of the Law is supervised by the Financial Police (art. 5 of LTLPM). Failing to make payment within the prescribed time limits amounts to an act of infraction. A debtor failing to perform a monetary obligation within the prescribed time limits shall be punished for infraction by a fine of from 10,000 to 1,000,000 kunas (art. 6/1 of LTLPM), while a person in charge of the debtor – by a fine of from 1,000 to 50,000 kunas (art. 6/2 of LTLPM).
Are there some ideas in your country, by following the example of some European countries, to regulate the part of the Obligation Law containing the matter of contracts, i.e. special contracts, within the framework of the Law on Commerce?

The system of obligation relations in the Republic of Croatia is built on the monistic regulation conception. There are no initiatives in legal theory as to departing from such model of regulation of obligation relations; on the contrary, such system is still supported. Consequently, the provisions of the LCT are applicable to all kinds of contracts, unless otherwise expressly specified for commercial contracts (art. 14/1 of LCT). All obligation relations (civil law contracts and commercial contracts) are subject to the rules of LCT. This Law itself explicitly distinguishes the cases in which its provisions apply exclusively to commercial contracts. Another condition in this respect involves the rule in terms of which if specific contracts are regulated by a special law, the provisions of the LCT shall still apply to such contracts as a lex generalis, but only relating to all those matters that are not dealt with particularly by the special law. The LCT rules are applicable to the category of non-named contracts as well.

The actual Law on Commerce regulates the terms and conditions of carrying out the commercial activity in domestic market; it also specifies the requirements for engaging in foreign trade business, the measures of protection relating to imports and exports, the measures restricting the performance of commercial activity, working-hours in the commercial business, prohibition measures in suppressing the unfair trade as well as supervisory and administrative measures (art. 1 of the Law on Commerce – LC). In conformity with the above, contractual relations are not the subject of regulation by the LC, since that Law primarily encompasses legal relations of public law character in the sphere of commercial business.

If these contracts remain in the obligation law area, are there certain solutions applying the lex specialis approach in your country concerning commercial contracts, in addition to those encompassed by the Law on Obligations (Contract and Torts Law) of former SFRY?

The obligation relations, including those relating to contracts, are regulated in the Republic of Croatia by a single Law of Obligations (Law of Contract and Torts – LCT). Certain number of obligation relations are regulated by the rules enacted in particular regulations, but they too, in a subsidiary way, as a lex generalis, are subject to provisions of the LCT. As far as relations in the area of contracts regulated by particular legislative acts are concerned, there is a distinction between those completely regulated by LCT and those whose specific contractual areas are regulated by special prescriptions. Typical examples in this respect are the LAL and some other laws that include specific provisions regarding the contract of agricultural land leasing. Contracts of sale, lease and rent are generally regulated by LCT. The mentioned particular regulations relating to contract of lease, contract of sale and/or contract of rent provide for particular provisions relating to certain subject-matters of these contracts, such as: business premises, farming land, apartments and the like. The other kind of particular regulations (lex specialis) includes prescriptions regulating relations in the area of contract not covered by the LCT. The example of such kind of regulation is found in the Law on Leasing which, as a lex specialis law, regulates the contract of leasing (arts. 35 – 51 of Law on Leasing - LL), but also other matters relating to the business of leasing (such as: leasing companies, financial reports, supervision over leasing companies, risk management and the like – art. 1 of LL).

124 Josipović, T., Rekodifiziran... op. cit., p. 222.
125 For instance, the contract of leasing, which is regulated by the Law on Leasing, PG, nr. 135/06/
126 PG, nos. 87/08, 116/08 and 114/11 (hereinafter: TL).
127 PG, nr. 135/06 (hereinafter: LL).
However, characteristic of the implementation of this Law is the fact that rights and obligations of the parties engaged in leasing business operations are subject to provisions of the general part of the LCT, unless otherwise specified by the LL (art. 39 of LL). Consequently, even in case of the contract of leasing, the Law on Leasing is a *lex generalis*, meaning that relations in the area of contract treated by special regulations may not be viewed independently of general regulation of the matter of obligations, i.e. contractual relations. This is but another proof of the importance of monistic regulation of relations in the area of contract in the Republic of Croatia.

Along these lines it is worthwhile mentioning the idea of the need to regulate the insurance contract by a particular law, outside the LCT. In other words, this is a special contract relating to a particular business activity (insurance operations) that resulted in developing a separate branch of law (the insurance law). Solutions in this respect do exist in comparative law: many European countries have particular laws covering the matter of insurance (France, Switzerland, Austria); these particular laws regulate this kind of contract since it is characterized by a considerable number of special institutes different from other obligation law institutes. In addition, contemporary market conditions and the needs of insured persons and entities have given rise in practice to some types of insurance contract that require more precise normative regulation which is now missing. These particularities concern for instance: legal protection insurance, travel insurance, patients’ insurance, various kinds of liability insurance, transportation insurance, insurance in case of professional incapacity for work and the like. In any case, should Croatian law-maker fail to decide to enact new regulations in this area, the existing provisions of LCT covering the insurance contract should be supplemented by some particular new kinds of this contract. Such approach should include taking in consideration also the directives that regulate specific insurance transactions.

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1. General Civil Law, i.e. Civil Code

What is the way your legislation regulates the matters making part of the existing civil law – according to Pandects law system? Are there some legislative acts of *lex specialis* type in relation to the above question and, if the answer is positive, please indicate such laws as well as what is the subject-matter of their regulation? (This question concerns the countries having no civil code). If a civil code is adopted in your country, or if it is currently in the process of drafting, please present the situation in a summary way along the lines of general civil law.

Are the matters relating to civil law subjectivity (capacity to be a holder of rights) of natural persons and legal entities (legal and business qualifications as well as those connected with tort rules) regulated by means of laws? Should this be the case, please state legal acts regulating these matters in the mentioned sequence.

If a civil code was enacted in your country, do any ideas exist as to regulate the area of civil law as the part of a single law and/or code or, possibly, within the framework of various law as a most appropriate method?

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The matters making the part of general civil law according to the Pandects system of law are not regulated in our law at one and a single place. There is no particular law encompassing the common rules and principles valid for all parts of civil law, such as provisions relating to personal and status rights of natural persons and legal entities, or provisions regulating the matters of time limits, statute of limitations in the sphere of claims as well as other related matters.

Legal subjectivity (capacity to hold rights) of natural persons and legal entities is regulated by means of a single law. This regulation relating to legal and business capacities of natural persons and legal entities is effected in the Law on Obligation Relations (Contract and Torts Law) and, more precisely, these matters are introduced in Macedonian legislation by the Law on Amending the Law on Obligation Relations („Official Gazette”, nr. 84, of 11 July 2008). A number of provisions covering business capacity of natural persons, provisions concerning deprivation and limitation of business capacity, including the institute of guardianship, are placed in the Family Law („Official Gazette”, Nr. 83, of 24 November 2004 (consolidated text). The provisions relating to capacity to be liable on the ground of tort rules are included in the Law on Obligation Relations, in section 2/ „Inflicting Damage”.

There exists in Macedonia the idea of civil law codification, so that there is now a State project concerning the action of drafting a civil code.
2. The Law on Property

Is there in your country any general law to regulate the right to property and other property rights? Should there is no such law, which regulations are applicable to deal with property law relations? Is there any particular law regulating the matter of property and other property rights that have been already included in the legislation? In addition to a general law, are there any other laws regulating the matters included the property law area? Please quote the laws relevant in this respect as well as the subject-matters they regulate.

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A general Law regulating the matters of right of ownership and other property law rights (right of pledge, right of servitude and praedial encumbrance) is the Law on Ownership and other Property Rights (“Official Gazette”, nr. 18/2001, with amendments – “Official Gazette”, nr. 92/2008, “Official Gazette” nr. 139/2009 and “Official Gazette”, nr. 35/2010. The only property right which is not regulated in the general Law is the right to long-term tenancy of a construction site; this matter is regulated by means of a lex specialis, i.e. the Law on Construction Sites (“Official Gazette”, nr. 17, of 11 February 2011, with amendments published in the “Official Gazette”, nr. 53, of 14 April 2011). There exist other laws of the lex specialis type regulating other kinds of property right. Thus, the right of pledge is covered by the Law on Contractual Pledge (“Official Gazette”, nr. 5/2003), while the matter of real property encumbrance is regulated in the Inheritance Law (“Official Gazette”, nr. 47/1996) within the part concerning the institute of endowment which is qualified as a kind of real property encumbrance.

3. The Law on Obligations

Is a Law on Obligations adopted in your country, or the 1978 SFRY Law relating to this matter is accepted as a national Law? If a new national Law was adopted, please indicate: a) the new solutions that distinguish it from the 1978 SFRY Law; b) were there interventions in that Law in order to bring it into accord with the European law, and if this is the situation – with which directives such harmonization has been carried out and in what way; c) whether solutions included in the principles of European Obligation Law (Lando Principles), and/or those found in the Draft Reference Frame are applied for the purpose of supplementing the Law on Obligations; if the answer is positive, please indicate the reference regulations which are included in these legislative acts.

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The Law on Obligation Relations of SFRY has been implemented in the Republic of Macedonia until 2001, when (a new) Macedonian Law on Obligations entered into force. The implementation in the 1991 – 2001 period was possible on the ground of article 5 of the Constitutional Law Relating to Implementation of the Macedonian Constitution. Activities in the direction of enacting a Macedonian law in this matter began in 1996, and already in 1997 the Ministry of Justice has made a Bill to amend the Law on Obligation Relations. The work on this text was intensified in 1998 in the
framework of the USAID Project for sustainable environment through a special Focus Group which was established for this purpose. According to the conception of that Group there was no need to work on amending the Law on Obligations, but that a better way to follow was to draft a new Law on Obligation Relations. In 1999 the Ministry of Justice has instituted a Working Group for making a proposal, i.e. draft of the Law on Obligation Relations. The Working Group was aware that the task entrusted to it was just a first stage in the realization of codification of Macedonian civil law. Being also aware that the task was rather too complex and sizeable in comparison with the time limits set for it, it was decided that it was necessary in this, conditionally conceived, first stage, to introduce the urgent and indispensable changes only, while deeper changes had to be left out for the second stage of carrying out the wider project of codification.

The Law on Obligation Relations was adopted in the Assembly of the Republic of Macedonia at the session held on 22 February 2001. Following are the new solutions in that Law:

1) the introductory provision of the Law, in article 1, was made simpler;
2) defined as parties to the obligation relations are both natural persons and legal entities;
3) the definitions of obligation law principles are adapted to the new legal and political system;
4) the provisions of articles 118 through 120 relating to self-management agreements are deleted;
5) new articles – 167 and 168, are introduced; they concern the bringing into accord these legal matters with the Civil Convention against Corruption of the Council of Europe and/or European Convention for Indemnification of Victims of Criminal Offences Committed by Violence;
6) article 169 was included in the text of Law; it concerns the matter of liability for damage caused by international military and other organizations;
7) the provisions of articles 1099 through 1105, since they were formerly introduced because of the unitary character of the State, were deleted;
8) the category of “morals of socialist self-managing society” was replaced by the category of “fair usages”;
9) classical definitions of the contract of sale, interchange (barter) and loan were returned into the legal text by means of deleting from the previous definition the words “right of disposal”;
10) regardless of the status of a buyer, the form of the sale of immovable property is now formulated by words “in writing”;
11) also regulated is the contract of donation (gift); this is done in articles 555 through 569; also regulated are the matters of partnership (commonage), in articles 667 through 703, commodatum (articles 603 through 618), the contract of maintenance for life (article 1029 through 1035), and the contract of settlement of property during testator’s life (articles 1022 through 1028);
12) changes are introduced in the way of regulation of monetary obligation relations involving the modification of solutions in the sphere of market economy; more specifically, these changes concern the principle of monetary nominalism and legal validity of foreign exchange means and index clauses as well as the way of calculation of interest, both the one specified in the contract and the one expressed as liquidated damages;
13) the enactment of the Law on Pledge Relating to Chattels and Rights (“Official Gazette of Republic of Macedonia”, nr. 21/98), caused the termination of validity of provisions of the
former Law relating to the matter of contract of pledge of chattels (article 966 through 996), so that they were deleted from the actual text;

14) article 540 (which is now article 528) is changed in order to be brought into accord with the new legal and political order;

15) according to the transitional and concluding provisions, the entering into force of the Law on Obligation Relations brought about the termination of validity of the 1975 Law of Trade in Lands and Buildings, together with the relevant amendments, since the matter of form of contract of trade in immovable property was already regulated by the Law.

There were several amendments of the Law on Obligation Relations after its coming into force.

According to the Decision of the Constitutional Court of Macedonia (U. nr. 121/2001, “Official Gazette of the Republic of Macedonia”, nr. 78/2001), a part of article 191 (equitable compensation of damage in special cases) has been abolished; this was done in the part reading: “as well as a person being the victim of some other criminal offence against the dignity of personality and morals”, while the corresponding ground was the fact that the actual Criminal Code of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia”, nr. 37/96 and nr. 80/99) did not provide for such criminal offences.

By the 2002 Law amending the Law on Obligation Relations (“Official Gazette of the Republic of Macedonia”, nr. 4/2002) three new articles have been introduced (23-a, 23-b and 23-c); they concern the electronic messages and designing and form of offers and acceptance performed by means of electronic message. In article 191 which was also the subject of intervention of the Constitutional Court of Macedonia, a change was introduced according to which liability was extended also to a perpetrator “of other criminal offence committed against freedom and gender morals”. Furthermore, there was intervention in article 3 of the Law on amending the Law on Obligation Relations regulating the matter of liability for damage caused by terrorist acts, street demonstrations of manifestations, so that, according to the new solution, the liability was passed to the local self-government administration. Several months later, in terms of the Decision of the Constitutional Court of Macedonia (U. nr. 67/2002, “Official Gazette of the Republic of Macedonia”, nr. 59/2002), that article was deleted and the relevant assignment of reasons was based on the conception in terms of which security issues are now the matters in the jurisdiction of the State, so that State is the only entity to be held liable for damage in the cases indicated in article 166.

By amendments enacted in 2003, two paragraphs of article 546 were deleted (the matter of interest in case of contract of loan) because the question they regulated was already dealt with the general rules covering the matter of interest.

Changes of the Law we are presenting which took place in 2008 (“Official Gazette of the Republic of Macedonia”, nr. 94/08) are significant and many-sided. The basic idea of these changes was the process of bringing into accord these matters with the European Union law and regulation of matters in the sphere of civil law that still were not the subject of legislating. In bringing into accord the Law on Obligation Relations with the law of the European Union (which is an obligation stemming out of the Agreement on Stabilization and Association concluded by Macedonia), it was considered that the Law on Obligation Relations is a system Law regulating in a coherent way the matters of trade of goods, services and rights, so that every intervention should be carried out in the manner that will not disturb the balance achieved. Naturally, also considered was that the objective of relevant directives was not to transfer ad literam into national legislation the solutions specified in directives; instead, the national legislation should be adapted so as to always have in mind the need of realizing the genuine goals provided for by the directives. Some of the changes and amend-
ments in general were indispensable in order to meet the needs of practice which became aware of the shortcomings of certain solutions currently in use as well as of the need for some matters to be regulated by law.

Altogether, the following changes and amendments have been realized:

1) In Chapter I (Basic Provisions) the obligation law principles were amended along the following lines: some definitions were reformed in order to make them more precise, while also some new principles have been introduced, such as: the principle of protection of rights of personality, the principle of equity and the principle of prohibiting the self-willed, arbitrary protection of one's own rights. The changes and additions made clearer the defining of application of customary law rules and practices as far as obligation relations are concerned. The same interventions were made as far as commercial contracts were concerned.

2) Chapter II includes changes in the direction of defining the grounds for creation of obligation relations helping in completing and making more precise the relevant definitions and terminology; also introduced are the definitions of legal and business capacity. This Chapter was also a subject of harmonization with the European Union law in the following specific matters:

a) The issue of electronic mail is regulated by means of intervening in the text of article 20, so as to delete articles 23-a, 23-b and 23-c. In addition, and in concordance with Directive 2000/31/EC, for certain aspects of services of information society, and particularly relating to electronic commerce in the Internal Market, a new Law on Electronic Commerce has been adopted encompassing these matters.

b) Also changed was the definition of the notion of general offer (article 25), emphasizing the importance of the time limit specified for its validity. In drafting that definition, the lawmaker also considered the definition under 2.201(3) of the Principles of European Law of Contract.

c) Having in mind the solution of the First Directive of the Council, of 9 March 1968, relating to companies (68/151/EEC), the changes have been made of the Law that mean the abandoning of the *ultra vires* theory.

d) Also amended were the provisions relating to general terms and conditions of contracts (article 130) with the aim to bring them into accord with the Directive of the Council 93/13/EEC, of 5 April 1993, covering the matter of unfair provisions in the consumer contracts.

e) Provisions concerning the liability for defective products (liability of producer of defective goods) are changed in order to bring them into accord with Directive 99/34/EC on defective products as amended by the Directive 99/34/EC.

f) Also introduced in the Law were the provisions on liability for damage caused by animals and on liability for damage caused by buildings.

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2 First Council Directive 68/151/EEC, of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65, 14.3.1968, pp. 8 – 12.


g) Liability for incorporeal (immaterial) damage is defined in accordance with the principle of protection of rights of personality (which was newly introduced), as a liability for violation of personal rights of natural persons but also of legal entities. At the same time the circle of persons who are entitled to compensation of damage in the case of death and serious disability of a closely related person is extended.

3) With the purpose of approximation with the provisions of Directive 2000/35/EC on prevention of late payment in commercial transactions, fundamental changes were made of the provisions relating to interest stipulated in the contract and to liquidated damages. The changes primarily concerned the determination of interest rate, the way of calculation of interest and of the highest amount of the permitted interest rate, although on that occasion only a part of the Directive was transferred which concerned the way of calculation of the amount of interest rate.

4) As far as the contract of sale is concerned, the amendments introduced deal with the matter of liability for malfunctioning of product (thing), with the aim of harmonizing it with the Directive 85/374/EEC on liability for defective products, as amended by the Directive 99/34/EC.

5) The changes carried out in the case of contract of construction are aimed at making clearer certain provisions relating to the matter of liability.

6) Chapter XXIII dealing with the matter of contract of representation (agency) is changed with the purpose of implementing the standards set by the Directive 86/653/EEC on co-ordination of laws of the Member States relating to the area of self-employed commercial agents. These changes primarily concern a more precise definitions of legal status and rights and duties of self-employed commercial agents.

7) The intervention in the matter of contract of settlement of property in course of testator’s life was inspired by practical experience. In other words, according to the new solutions, a court or a notary public is now obliged to prevent the testator of this type of disposal of property to keep for himself/herself or for his/her spouse the right to usufruct.

8) According to Recommendation No. R (86) 12 of the Committee of Ministers to Member States concerning the measures to prevent and reduce the excessive workload in the courts (point II), changes have been introduced that open the possibility for the contracts of maintenance for life and contracts of settlement of property in course of testator’s life to be entered into before the notary public as well.

The subsequent amendments of the Law on Obligation Relations concerned some matters of interest, but the basic principle of determining the relevant interest rate, taken over from the Directive 2000/35/EC, remained unchanged.

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10 Recommendation No. R (86) 12 of the Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts (adopted by the Committee of Ministers on 16 September 1986 at the 39th meeting of the ministers’ deputies).
Are the solutions existing in the practice of law of highest courts in your country implemented in drafting the provisions in the Law of Obligations? Should this be the case, please state the matters (areas) they are applied in. Describe, one by one, the innovations (if any) relating to general issues in the sphere of obligations and/or contracts.

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Solutions of legal practice of highest courts in Macedonia are applied in the process of drafting the provisions of the Law on Obligation Relations. They concern the solutions of court practice of the Federal Court of former Yugoslavia in the 1946 – 1991 period, the Supreme Court of Yugoslavia, and the Commercial Federal Court, including the judicial practice of the supreme courts of former Yugoslav republics and autonomous provinces, as well as the practice of the Macedonian courts and judicial practice of the Supreme Court of the Republic of Macedonia in the period between 1991 and today. The reason for accepting these solutions in our Law on Obligation Relations is the fact that Macedonian Contract and Torts Law (the Law on Obligations) has been developing for decades, parallel with the law of former Yugoslav republics and the Federation itself where judicial practice of highest courts has been a rather significant element of legal activity. Before the enactment of the 2001 Law on Obligations, a valid law in Macedonia has been the 1978 Contract and Torts Law (Law of Obligation Relations), namely a Yugoslav federal Law that was implemented all the way until the enactment of the 2001 Law on Obligations which, in terms of structure and content, was in the most part analogous to the 1978 Contract and Torts Law. Following is the list of matters in which the solutions existing in judicial practice have been incorporated in our Law of Obligations:

- the provisions on acceptance of offer,
- the misunderstanding as a reason for missing the conclusion of contract,
- the provisions on earnest money,
- the provisions relating to particular form of the letter of procuration,
- the provisions concerning the rescission of formal contracts,
- the provisions of legal validity (full force) of contracts lacking the prescribed form,
- cases of voidableness of contracts,
- the requirement for elimination of danger of damage,
- liability for another,
- reduction of the amount of damages,
- compensation of immaterial (incorporeal) damage,
- the provisions concerning strict (absolute) liability,
- clearing (offsetting) of claims falling under the statute of limitations,
- novation (executory accord),
- recognizing in writing of obligations falling under the statute of limitations and the institute of debt security,
- calculating the amount of liquidated damages, and other related matters, etc.

Innovations in our Law of Contract and Torts concern the following matters: protection of personal rights of natural persons and rights of legal entities; regulation of the institute of equity.
in a general way, i.e. as a matter of principle; provisions relating to legal and business capacities of natural persons and legal entities; conceptual and substantive changes of the institute of liability for immaterial damage; provisions relating to equitable monetary compensation; the matter of liquidated damages; provisions regulating the issue of liability for defective products; damage caused by animals, buildings and the like.

Following are the particular innovations in the area of contracts that have to be mentioned as well: consent of parties’ will (meeting of minds) with the offer, contracts entered into by persons having no business capacity, contract of ordering, contractual liability for immaterial damage.

Do your laws regulate also the part concerning contracts in the sphere of autonomous practice. If the answer is positive, please indicate such agreements and describe in a summary way the most important solutions found in these contracts.

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The only contract in the sphere of autonomous practice regulated by a particular legislative act in Macedonian law is the contract of leasing. This contract is regulated in the Law on Leasing (“Official Gazette of the Republic of Macedonia”, nr. 04/02, of 25 January 2002) and the Law on amending this Law (“Official Gazette of the Republic of Macedonia” nr. 49, of 25 July 2003 as well as in the subsequent laws on its amendments published in: “Off. Gazette of the R. of Macedonia”, nr. 13, of 02.02.2006; “Off. Gazette of the R. of Macedonia”, nr. 88/08, of 16.07.2008; “Off. Gazette of the R. of Macedonia”, nr. 35, of 2.03; and “Off. Gazette of the R. of Macedonia”, nr. 51, of 13.04.2011. The subject-matter of the Law on Leasing are the way and the conditions of exercising the leasing relating to chattels and immovable property, as well as the rights and obligations of the parties to the contract of leasing. Elaborated in this Law are the basic notions such as determining the status of lease grantor, the character of capital sum as well as all other important and detailed elements of that kind of contract.

Other contracts known in the sphere of autonomous legal practice, such as contract of factoring, contract of forfeiting and contract of franchising and the like, are not regulated in Macedonian law, so that there is no particular legislative act (law) to cover these matters. However, there exist certain provisions concerning the factoring contract, and they are found in the following laws:

The Law on Financial Companies (“Official Gazette of Macedonia”, nr. 158, of 09.12.2010 and its amendments published in the “Official Gazette”, nr. 53, of 14.04.2011) defining the business of factoring as a financial activity where, on the ground of contract concluded in writing, financial companies (factor) purchase claims undue for payment from another domestic or foreign legal entity, with or without consideration (counter-value). Connecting it with the contract of factoring, this Law refers to the application of the Law on Obligation Relations, unless otherwise regulated by its provisions. The Financial Companies Law does not include particular provisions regulating the contract of factoring. However, the Law on Banks, on its part, (“Official Gazette”, nr. 67, of 01.06.2007) specifies the institute of factoring as a financial activity that may be performed by banks, both in the country and abroad.
What is the nature of relationship between the *lex specialis* acts regulating the wider scope of the obligation law and the Law on Obligation Relations? Indicate the most important laws in this respect as well as the subject-matter of their regulation.

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The objective and the content of Macedonian Law on Obligations are specified in article 1 regulating the foundations of obligation relations, the matter of contracts as well as other crucial elements of obligations in the sphere of trade in goods and services. The answer to the question relating to implementation of other legislative acts (particular laws) to the area of obligation relations is provided by article 16 according to which obligation relations regulated by other laws and international treaties, ratified by the Republic of Macedonia, are subject to provisions of the Law on Obligations as far as matters not regulated by such laws or international treaties are concerned. The provisions of the Law on Obligation Relations concerning the matters of contracts are applicable to all kinds of contracts, unless otherwise expressly provided in the case of commercial contracts. At the same time, the provisions of that Law relating to contracts apply to other legal transactions as well. Following are the most important acts of a *lex specialis* type regulating the matters in the area of obligations:

- the Law on Property and other Property Rights regulating the matters of acquiring property rights on the ground of legal transaction; the right of pre-emption; contracts of managing the property in the case of some variants of form of property; certain cases of tort liability for damage and the like;
- the Law on Pledge on the Ground of Contract containing predominantly the provisions of the obligation law character;
- The Law on Consumers Protection, which predominantly includes provisions of the obligation law character;
- the Law on Agricultural Land, the Law on Construction Sites, and the Law on Housing, which laws include the provisions concerning the relations in the sphere of renting;
- the Law on Copyright and other Related Rights, and the Law on Industrial Property, in the part covering the contracts of transferring of rights.

What is the situation like in the area of implementation of (general and particular) trade usages as obligation law source, viewed in the optics of regulation in your Law (whether the application is implied or it has to be explicitly negotiated or, as the case may be, it is unequivocally a result of existing circumstances?).

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The issue of application of general and particular trade usages in Macedonian law is still a controversial one in spite of certain positive steps in the direction of wider implementation of trade practices after the adoption of the 2008 Law on amending the Law on Obligation Relations. In other words, the original version of the Macedonian Law on Obligation Relations adopted in 2001 includes
in its article 15, the formulation identical with that found in article 21 of the 1978 federal Law on Contract and Torts (Obligation Relations Law of former Yugoslavia). Moreover, the 2001 Macedonian LOR, in its article 1139, has taken over from the 1978 federal Law, in the form of transitional and concluding provision, the norm of article 1107 of that Law. This oversight was corrected in 2008 when that provision was deleted, so that this duality between article 15 and article 1130 of the LOR has been eliminated. Furthermore, also changed was the formulation of the original text of article 15 of the 2011 Macedonian LOR while having in mind that this provision corresponded to the original conception of article 21 of the 1978 federal LOR. In such a way, after the amendments brought about by the 2001 LOR, the law-maker took the position of principle according to which obligation relations had to be governed by general and particular trade usages wherever their implementation was stipulated by contract or wherever this was indicated by the circumstances of the concrete case (article 15, paragraph 3 of the LOR). Practically speaking, the new solution introduced by the 2008 LOR did not really change anything, so that subjective theory (contracting parties’ intention as a decisive factor) for the implementation of trade usages continues to be valid. This is true in spite of traces of the objective theory noted in the implementation of trade usages in the formulation of article 15, paragraph 2 of the LOR, according to which the trade usages shall be applied in the sphere of obligation relations between merchants only after such usage was provided for in the contract, with the proviso that they were trade practices already established between them as a usual custom, and were not contrary to indefinite standard norms (ius dispositivum. However, that very formulation of the innovation of the 2008 Macedonian LOR reflects in reality the force of the subjective theory of trade usages; it also reflects the fact of making the distinction between codified trade customary rules (usages) and non-codified trade customary rules. Consequently, the approach of Croatian lawmaker (expressed in article 12, paragraph 2 of the Croatian LOR) was not accepted in Macedonian law.

Are there ideas in your country, following the model of certain European countries, to regulate the part governing contracts in the Law on Obligations, i.e., the matter of particular contracts, within the framework of the Law on Commerce? Should these contracts remain in the area of obligation law, are there certain solutions of the lex specialis type in your country relating to commercial contracts – in addition to those included in the 1978 Law on Obligation Relations of former SFRY?

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Speaking of possible debate concerning the idea of drafting a commercial code, the dominant orientation in Macedonian theory of law and in legal practice is that of the necessity to regulate the matters of obligation relations in a unified way, as indeed specified in article 17, paragraph 1 of the Law on Obligation Relations. Bearing that standpoint in mind, it is not possible to conclude that there exists some particularly articulated tendency of regulating the commercial contracts by means of a separate commercial code. This is a direct consequence of the so-called process of commercialization of civil law, including the fact that particular rules relating to commercial contracts that differ from civil law contracts are rather small in number. A good example in this respect is found in the provisions of the LOR relating to regulation of the contract of sale. Along the same lines, a question may arise relating to numerous contracts as to whether they are of commercial or of a civil law nature. This is especially true for certain kinds of contracts, such as the contract of commission shop sale, which, depending on the status of contracting parties involved, may be qualified both as com-
mercial and a civil law contract. This, more or less, has been the reason for accepting the solution in terms of which particular regulation of commercial contracts and a separate commercial code were not necessary.

Finally, as far as the *lex specialis* approach is concerned, it is a fact that there exist numerous particular laws regulating the matter of commercial contracts. This is, for instance, the case with the contract of leasing, which is regulated by means of the Law on Leasing. Particular laws also regulate other contracts in various branches of carriage business (the Law on Inland Navigation, the Law on Obligation Law and on Basic Substantive Law Relations in the Area of Air Navigation, the Law on Contracts of Carriage in Road Traffic, the Law on Contracts of Carriage in Railroad Traffic). In this respect it is necessary to mention also the Law on Industrial Property which includes several provisions relating to contracts of license. Such state of affairs is not specific for commercial contracts only, having in mind that there are some *lex specialis* rules covering civil law contracts as well (the Law on Construction Sites, the Law on Agricultural Land, the Law on Housing, etc.).
DEVELOPMENT OF CIVIL LAW

1. General Civil Law

In what way your legislation regulates the matters that make part of the area of general civil law, in terms of the Pandects system of law? Are there some legislative acts of the lex specialis nature relating to the above mentioned question and, should that be the case, indicate these laws as well as the subject-matters they regulate.

There is no unified civil law codification in our legislation, so that, instead, the matters of property, obligations, family and inheritance laws are regulated by means of particular legislative acts (laws) such as: the Law on Property Law Relations (“Official Gazette of Montenegro”, nr. 19/09, the Law on Obligation Relations (“Official Gazette of Montenegro”, nr. 47/08), the Family Law (“Official Gazette of the Republic of Montenegro”, nr. 01/07), and the Law on Inheritance (“Official Gazette of Montenegro”, nr. 74/08). The matter of the general part of civil law, according to Pandects systematics, is regulated in our legal system the above mentioned laws and, more particularly, by the Law on Obligation Relations. There is no legislative act of the lex specialis character that would regulate in a separate way the matters encompassed by the general part of civil code in terms of the Pandects systematics.

Are the matters relating to civil law and legal subjectivity (capacity of being holders of rights) of natural persons and legal entities (legal and business qualifications as well as the capacity to be liable on the ground of torts) regulated by legislative acts? If the answer is positive, please indicate, by the same sequence, the legal acts covering these matters.

The matter of acquiring a complete or partial business capacity is regulated by the Family Law (articles 13 and 66), while the business capacity to enter into contracts as well as the capacity to be liable according to the tort rules are regulated by the Law on Obligation Relations (articles 49 through 52 and articles 152 through 163 of the LOR). Tort liability capacity is also regulated by the Law on Obligation Relations (articles 164 through 166).

The matter of acquiring legal and business capacities by legal entities is regulated by particular laws, depending on the kind of legal entity at issue (the Law on Commercial Companies – “Official Gazette of the Republic of Montenegro”, nr. 06/02 and nr. 40/11), the Law on Non-governmental Organizations (“Official Gazette of Montenegro”, nr. 39/11). Legal capacity is acquired by legal entities on the ground of their establishment and the corporate charter, as well as by approval or registration. The business capacity of legal entities is related to the legal capacity, meaning that legal entities may undertake the kinds of transactions that are aimed at the realization of objectives they were established for; they may also engage in legal transactions for the purpose of acquiring, changing or terminating of the rights and obligations included in their line of business. Depending on their kind, legal entities may obtain a general or a special business capacity.

In the event a civil code was not enacted in your country, are there some ideas about regulating the area of general part of civil law as part of a single legislative act, i.e. code, or about doing that within the framework of various laws as a most appropriate method?
There are ideas of carrying out a codification of civil law in Montenegro and of regulating the general and common matters in the general, introductory part of the code.

2. Property Law

Is there a general law to regulate the right to property and other property rights? If there is no such legislative act, which regulations apply to property relations?

There exists a law regulating the right of ownership and other property rights; this is the Law on Property Law Relations ("Official Gazette of Montenegro", nr. 16/09). The subject-matter of this Law includes the right of ownership and other rights of property, possession (actual) of chattels and immovable property as well as the procedure of acquisition of property, its transfer, and protection and termination of these rights. That Law is divided into the following parts: I – Basic provisions, II Things (objects of property), III – Acquiring and termination of the right of ownership, IV – Protection of the ownership right, V – Right of co-ownership, VI – Common property right, VII – Right to apartment on the ground of sectional title, VIII – Right of servitude, IX – Neighborhood rights, X – Right of pledge, XI – Possession actual, XII – Rights of foreign citizens, XIII – Transitional and concluding provisions.

In addition to a general law, are there any other laws regulating the matters included in the property law area? Where such laws exist, please indicate them as well as the matters they regulate.

In addition to the above mentioned Law, there exist some particular laws too, which regulate certain property rights. These are: the Law on State-owned Property ("Official Gazette of Montenegro", nr. 21/09 and nr. 40/11), the Law on Restitution of Property Taken Away and Indemnification ("Official Gazette of the Republic of Montenegro", nos. 21/04, 49/07, 60/07 and 12/07), the Law on Housing and Servicing of Apartment Buildings ("Official Gazette of Montenegro", nr.04/11), the Law on Expropriation ("Official Gazette of the R. of Montenegro", nos. 55/00, 12/02 and 28/06; "Official Gazette of Montenegro", nr. 21/08), the Law on Waters ("Official Gazette of R. of Montenegro", nr. 27/07 and nr. 32/11), the Law on Forests ("Official Gazette of Montenegro", nr. 74/10 and nr. 40/11), the Law on Sea Possession Management ("Official Gazette of R. of Montenegro", nos. 14/92, 51/08, 73/10 and 40/11).

3. Contract Law

Is a law on obligations adopted in your country, or the 1978 SFRY Law covering this matter was accepted as a national Law?

The new Law on Obligation Relations has been adopted in Montenegro ("Official Gazette of Montenegro", nos. 47/08 and 04/11). In essence, the solutions existing in the former 1978 Law on Obligation Relations were accepted in the new Law, although the new Law includes a number of different solutions, including additions.

a) If a new national Law was adopted, please indicate new solutions that distinguish the new Law from the 1978 SFRY Law in this matter.

There is a difference in formulating the freedom of regulation of obligation relations in the new Law. Instead of formerly applied terms public policy and fair customs and usage, as limits for reg-
ulation of obligation relations, now used are the terms *coercive regulations* (*jus cogens*) and *morals of society*. The practice has proved that the notions of public policy and fair custom and usage were not precise enough in their definitions, so that they are not used any more in comparative law and in the Principles of European Contract Law. More precise definitions were also included to cover the following matters: damage, fault, *rebus sic stantibus* clause, standard clause contracts (contracts by adhesion), liability on the ground of dangerous activity. As far as deficiencies of will are concerned, the Montenegrin Law on Obligation Relations provides a different solution in the case of coercion, so that this element is now the ground for nullity of contract. There are innovations in the text in prescribing the possibility of making legally relevant statements by means of various communication devices, which also includes the expression of will (intention) by electronic mail in conformity with the Law on Electronic Commerce and the Law on Electronic Signature. The Law on Obligation Relations also introduced the concept of liability on the ground of violating the rights of personality of legal entities, and not, as the case was until now, of natural persons only.

This Law regulates also some kinds of contracts that have not been dealt with legislatively until now, i.e.: *donation* (*gift*), which formerly was processed on the ground of legal rules derived from former civil codes and, more particularly, from the 1888 General Property Code and General Civil Code; *tenancy of apartment* which, until the enactment of the Law, out of practical reasons, was regulated in the Law on Sectional Title Ownership of Apartments (the place it does not belong to according to the very nature of the matter); *renting of business premises* (also the matter not regulated before, causing thus a certain legal gap in spite of general provisions of the Law on Obligation Relations relating to the institute of lease; *gratuitous loan* (*commodatum*) – until now treated by applying the legal rules stemming from former civil law legislation; *partnership* (until now not regulated completely, although the practice has imposed that need long ago); *cession or distribution of property during testator’s life* (until now regulated by the Law on Inheritance, although quite incompletely); *maintenance for life* (the solution applied is identical to the one covering the institute of cession and distribution of property during testator’s life); *life annuity*, although there are no legal provisions relating to this kind of rent so that the only solutions were the ones – quite appropriate – suggested in the Sketch Law on Obligations and Contracts drafted in pre-war Yugoslavia). On the other hand, the contract of pledge (*pignus*) was not included in the Law. A new solution exists also as the institute of *damage caused by animals* (whose regulation did not exist in the former Law, regardless of good solutions in the mentioned Sketch); *liability for damage caused by buildings* (here the assignment of reasons remains the same as the one for liability for damage caused by animals); *liability of producers of defective goods* (*products*), which was introduced as a result of harmonization with the European Union directives.

b) were there interventions in the Law in order to bring it into accord with relevant European law, and if so, which directives were involved in the process, and in what way?

As a new solution, the Law includes also several provisions concerning the matter of liability of producer for defective products. This was a consequence of the need for bringing into accord its text with the following European Union directives: Directive 1999/44/EC concerning certain aspects of sale of consumer goods and of pledges; Directive 85/374/EC relating to liability of producers for defective products, as amended by the Directive 1999/34/EC; Directive 2000/35/EC concerning prevention of delay in payment in case of commercial contracts. This was done only to a degree necessary for harmonizing the Law on Obligation Relations since the remaining matters were the subject-matter of regulation of the Law on Consumer Protection. Provisions relating to standard clause contracts were drafted on the model of provisions of Directive 93/13/EC.
Provisions concerning the matter of liability for substantive defaults were amended primarily in order to bring them into accord with the Directive 1999/44/EC. Although that Directive covers the area of consumer protection, its provisions were taken over in the way that would make them refer also to contracts which were not of consumer nature. This method was appropriate to prevent unnecessary fragmentation of the civil law regulation viewed in general sense. This was also the way of regulating the matter of producer’s liability for defective products. Such approach has made possible the harmonization with the provisions of Directive 85/374/EC.

c) Are the solutions included in the principles of the European Obligation Law (the Lando Principles), or in the recent Draft Common Reference Frame, implemented in order to supplement the Law on Obligations? If the answer is positive, please indicate the reference provisions that were included into these legislative acts.

Using as a model the Principles of Contract Law, the provisions concerning preliminary liability (the one in the stage of negotiating and making a memorandum of understanding) have been amended. Significant amendments were made as well in the matter of interpretation of contract, while considering in the process the corresponding solutions of Principles of European Contract Law. Along these lines, the rules for determining the intentions of contracting parties were formulated (in article 96 of the Law on Obligation Relations), together with specifying the circumstances relevant for the issue of interpretation (circumstances characteristic of the moment of entering into contract, preliminary negotiations, conduct of contracting parties after the conclusion of contract, nature and purpose of contract, interpretation that was already applied by contracting parties relating to similar provisions as well as practiced in mutual relations, the meaning usually ascribed to provisions and terms (expressions) in a given profession or line of business, including the interpretation that has possibly been applied to similar provisions, as well as the principle of fair dealing and honesty (article 97 of the LOR).

Are the solutions existing in the legal practice of highest courts in your country applied in drafting regulations included in the Law on Obligations?

Court practice and legal opinions of the Supreme Court of Montenegro and supreme courts of the states of former Yugoslavia, expressing the actual decision-making principles, have been applied in the process of drafting the provisions of the Law on Obligation Relations in Montenegro.

Do your laws regulate also a part of law relating to Government treaties and, if the answer is positive, please indicate such treaties as well as describe summarily the most important solutions specified in these treaties.

The Law considered in the present text does not include provisions existing in the international treaties entered into by Montenegro with other countries. Montenegro has concluded a number of bilateral and multilateral treaties relating to specific obligation relations. For instance, Montenegro has signed the Free Trade Agreement with the EFTA countries, with the European Union, with the CEFTA countries, and with Russia. The procedure of acceding of Montenegro to the World Trade Organization (WTO) is now in its final stage.

Following are some laws relating to ratification of international treaties by Montenegro:


What is the nature of relationship between the *lex specialis* acts regulating the wider scope of the general obligation law, and the Law on Obligations?

The Law on Obligation Relations is a general (*lex generalis*) legislative act and its rules apply to relations not regulated by particular legislative acts in a given area of law.

What is the way of regulation in your Law of the matter of implementation of (general and particular) payment time limits, conceived as the source of obligation law? (Is such implementation implicit or it must be explicitly agreed upon, or, as the case may be, is unequivocally a result of given circumstances?).

The Law on Obligation Relations accepted the rule in terms of which obligation relations are subject to trade usages if the parties to obligation relations have stipulated their application in the contract, or where the circumstances of the case give rise to conclusion that their application was intended by them (article 14, paragraph 2 of the LOR). The provision specified in the General and Particular Trade Usages specifying the presumption of contracting parties to have agreed to the application of trade usages unless having them explicitly excluded, shall not be applied any more after entering into force of the Law on Obligation Relations. The General Trade Usages ("Official Gazette of FNRY", number 15/1954) are not going to be applied after entering into force of the Law on Obligation Relations in matters regulated by that Law. Where general or particular usages, or other kinds of business customs, are contrary to indefinite (dispositional) norms specified in the Law on Obligation Relations, the provisions of that Law shall apply, unless the contracting parties have explicitly stipulated the application of trade usages and/or other trade customs (article 1203 of LOR).

Are there ideas in your country, while following the model of some European countries, to regulate a part of the Law on Obligations relating to contracts, i.e. the special contracts, within the framework of the Law on Commerce?

For the time being there are no ideas of regulating these contracts within the framework of the Law on Commerce.

If these contracts are going to remain in the area of obligation law, are there some solutions of a *lex specialis* nature in your country relating to commercial contracts, in addition to those included in the Law on Obligation Relations of former SFR of Yugoslavia?

*Here are some cases of actual particular (lex specialis) laws:*

The Financial Leasing Law ("Official Gazette of Montenegro", nos. 8/09, 73/10 and 40/11); the Concessions Law ("Official Gazette of Montenegro", nr. 8/09); the Law on Contracts of Carriage in Road Traffic ("Official Gazette of Montenegro", nr. 53/09); the Law on Road Traffic Carriage ("Official Gazette of R. of Montenegro", nr. 45/05 and nr. 75/10); the Law on Contractual Relations in Railroad
Traffic ("Official Gazette of Montenegro", nr. 41/10); the Law on Obligation Relations and Foundations of Property Law Relations in Air Traffic ("Official Gazette of Montenegro", nr. 18/11); the Law on Electronic Commerce ("Official Gazette of the R. of Montenegro", nos. 80/04, 41/10 and 40/11); the Foreign Trade Law ("Official Gazette of the R. of Montenegro", nr. 28/04 and nr. 37/07); the Law on Consumer Protection ("Official Gazette of the R. of Montenegro", nos. 26/07, 73/10, and 40/11).
ANNEXES

II

LIABILITY FOR MATERIAL DEFECTS
**LIABILITY FOR MATERIAL DEFECTS**  
*Country Report for Albania*

**Introduction**

The terms of reference and the questionnaires provided by both professors (Meliha Povlakić and Jelena Perović) require that the country report of Albania provides an assessment of the legal framework for the liability of sellers in contracts of sale, and of the other associated rights of any parties in a contract of sale regarding material defects and the non-conformity of goods within a contract. As required by the terms of reference the report will contain information concerning the following issues:

1. Concept of lack of conformity and the liability of sellers in sale contracts
2. Criteria for the determination of the conformity of goods
3. Buyers’ knowledge of lack of conformity, buyers’ duties
4. Relevant time for the determination of conformity
5. Contract clauses on exclusion and/or limitation of the liability of sellers
6. Buyers’ remedies
7. Consumers’ issues

Answers to the above questions and issues can be found in the Albanian Civil Code (Law No.7850, dated 29.7.1994 amended, (CC). and in the Albanian Law on Consumer Protection (Law No.9902 dated 17.04.2008 amended (CPL)). The report will provide a general assessment of the respective provisions of both laws along with some theoretical considerations. Unfortunately there is no written analysis on either the application of the respective provisions of the Civil Code or on the provisions of Consumer Protection by the Albanian courts. Judges confess that they have received very few complaints that are connected to the Contracts for the Sales of Movable /Property, and that there are very few or almost no judicial cases that have been based on the provisions of the Law on Consumer Protection. Individuals who are consumers have a tendency to use the provisions of the civil code rather than using the provisions of the Law on Consumer Protection when it comes to the Contract of Sale of Goods.¹

1. **Concept of lack of conformity and the liability of sellers in sales contracts**

The Civil Code (CC) and the Law on Consumer Protection (CPL) constitute the basic legal acts of the Albanian regulatory framework for the liabilities of sellers regarding the non-conformity of goods in a sale contract.

¹ Interview with a judge from the civil section of the Tirana District Court, 17.11.2011
The CC lists the duties of sellers selling goods as guaranteeing the buyer for conformity in any contract as one of the key obligations under the Contract for the Sale of Movable Property/ a sale contract of movable property (goods) (Art. 710 of the CC). Such a general obligation is further explained in Article 715 of the CC. Under Article 715 of the CC the seller is obliged to deliver goods as per the quality, quantity and type foreseen in the contract; they should also be packed and installed as determined in the contract (Art. 715 of the CC).

The conformity of goods with the contract is assessed in accordance with the general requirements for conformity under the CC (Art. 715, 1st indent). A presumption of conformity is expressed in a negative way (lack of conformity): goods are presumed not to be in conformity with the contract if they are not fit for the specific purpose of use as provided in the contract, unless otherwise provided by an agreement. In cases when this cannot be determined, goods will be deemed not to be in conformity with the contract if they are not fit for general use as are other goods of the same type. In addition goods are deemed not to be in the conformity with the contract if they are not installed and packaged in a general manner in which other goods of the same type are packaged or installed. When such a general manner of packing or installation cannot be found, the goods have to be packaged and installed in a manner that guarantees their full protection and preservation (Art. 715 of the CC).

The Law on Consumer Protection also contains a provision regarding the conformity of goods for the Consumer Sale Contract. Article 29 of the CPL stipulates a general obligation according to which sellers are obliged to deliver goods in conformity with a contract of sale. Goods are presumed to be in conformity with a contract if: they comply with the description given by the seller and so long as they possess the qualities of the goods which the seller has held out to the consumer through a sample or mode; if they are fit for any particular purpose for which the consumer requires them and which reasons are made known to the seller by the buyer at the moment of the conclusion of contract and which the seller has accepted; if they are fit for the purpose for which goods of the same type are normally used; if they show the quality and the performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. Incorrect installation is also considered as being lack of conformity; if the installation of goods is part of a contract it becomes part of the seller’s responsibility. Lack of conformity for incorrect installation will also apply even in a situation where the installation falls under the responsibility of the consumer, or is done by the consumer, but that it was incorrectly completed due to shortcomings in the installation instructions.

2. Liability of sellers for lack of conformity / Criteria for the determination of the conformity of goods

Article 716 of the CC stipulates that the seller is liable for any defect or non-conformity that exits at the time the risk passes from seller to buyer, and also for the time after it. The seller is also liable for defects or non-conformities that are determined after the time of delivery and which are part of his responsibility, including the guarantee period during which goods should be fit for the purpose of normal use, or for a particular purpose, or during which time the goods are supposed to preserve their quality and characteristics (Article 716, 2nd).

The Albanian legal doctrine distinguishes between two types of defects: visible defects and invisible defects. Visible defects are considered to be those that can be easily seen/ identified by the
buyer at the moment of buying the goods. This implies a situation in which the buyer is immediately aware of the defects of the goods at the time he/she gets them.\(^2\)

Invisible defects of goods are considered to be defects that are not identified by the buyer at the time of buying, but that become evident at a later moment or during their use. Such a distinction is important for the determination of the liability of the seller regarding the defects or the non-conformity of goods.

That being said, it can be stressed here that it is generally accepted that the seller is not liable for the visible defects of goods because it is presupposed that the buyer should have seen them or is aware of them, with the exception of cases when defects diminish the quality that was foreseen in the contract, thus making them impossible or unfit for use/destination. (Last paragraph of Article 715 of the CC states that: “A seller will not be liable for the defects of goods at the moment of concluding a contract if a buyer is aware of them or has not obtained information through his own fault.”).

The same rule is included in the CPL which underlines that the seller should be relieved of any liability for defects in goods that the consumer was aware of, or that he could not reasonably be unaware of, or of any similar lack of conformity, or if any such lack of conformity originated from materials supplied by the consumer (Article 29/5 CPL).

3. **Buyers’ knowledge of lack of conformity, and buyers’ duties**

Both the CC and the CPL provide for a possibility that the seller should be exempt from liability due to non-conformity or due to the defects of the goods, if the buyer at the moment of concluding a contract is aware, or was not informed due to his own fault, or could not have reasonably been unaware of the defect or non-conformity. The one exception that is made to this rule concerns the quality of goods. Under this provision the seller is liable for the defects of goods if any such defects are related to the quality of the goods; a level of quality that was expected according to the contract or because of information provided by the seller. The CPL(29.5) adds an additional element to such a case in comparison with the general rules of the CC. It foresees that if a buyer is aware or could not reasonably be unaware of a lack of conformity, or if the lack of conformity derived from materials supplied by the consumer (Article 29/5 CPL).

4. **Relevant time for the determination of conformity**

According to the CC (717) the buyer, unless it is not otherwise foreseen in other laws, or by the parties, has 10 days to notify a seller regarding the defects of goods from the moment he/she discovers any such defects. The buyer is obliged to specify the nature of the defects. The buyer loses his right to claim against the defects of goods if he does not notify the seller within two years from the moment of the delivery of goods provided that such a time limit does not contradict with the guarantee period foreseen in the contract. However, the Civil Code contains an exception to these general time limit rules for the right of claim of a buyer. Article 718 of the CC states that the seller will not profit from the rules of Article 717 (meaning that the time limit is not applicable) if the defects of the goods are related to the fact that he was aware of them, or could have been aware of them, and he/she did not make his/her concerns known to the buyer.

A two year period is also foreseen by the Law on Consumer Protection (Article 30 of the CPL), according to which the seller is held liable where any lack of conformity becomes apparent within

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2 See M. Semini Law on Obligation and Law on Contract, 16
two years as from delivery date of the goods. In the second paragraph of this article it specifies that if a lack of non-conformity becomes apparent within a period of six months from the delivery of goods, any such non-conformity shall be presumed as having existed at the time of delivery, unless the presumption is inconsistent with the nature of the goods or with the nature of the lack of conformity.

5. **Contract clauses on the exclusion and/or limitation of the liability of sellers**

   Article 715 of the CC stipulates that a seller cannot be held liable for defects in goods that are known to a buyer at the moment of the conclusion of a contract, except when defects are related to the quality of goods according to the contract or according the seller’s information. There is no other specific rule regarding the limitation of totally excluding the liability of a seller. The Albanian Civil Code makes reference to the *force major* as a condition for the exclusion of civil liabilities of parties in some specific contracts such as in the Transportation Contract (Article 889).

6. **Buyers’ remedies**

   The Albanian Civil Code distinguishes two separate situations for determining buyers’ remedies according to the degree of non-conformity. The civil doctrine distinguishes between a substantial breach of contractual obligation and an unsubstantial breach of contractual obligation. A substantial breach of contractual obligation comprises cases under which the defects of goods are of a nature that totally hampers the object of the contract by heavily impairing the rights of the buyer. A substantial breach of contract does not necessarily mean a total breach of the contract; it can also be a partial breach of the contract but in any case it is classed as a substantial breach when it causes non fulfilment of the buyer’s rights.

   Despite the aforementioned, Article 722 of the CC stipulates that in cases where the delivery of defective goods constitutes a substantial breach of contractual obligation, the buyer may ask for not only the repair or replacement of goods but also for a reduction in price or for the dissolution of the contract. A request for repair or for a replacement can be done by the buyer at the time of the detection of the defect (Article 717 of the CC) or within a reasonable time period. The buyer should give the seller reasonable time to fulfil his obligation. During the agreed reasonable time period the buyer is not allowed to use any other form of remedy unless he has been informed by the seller that he will not fulfil his obligation. In any case the buyer has the right to seek compensation for damage (Article 722 of CC).

   An unsubstantial breach of obligation, as defined by Article 723 of the CC, implies a situation in which the delivery of defective goods constitutes an unsubstantial breach of contract which may not necessarily impair the buyer’s rights or the general good will of the contractual parties. In such cases the buyer may require the replacement or the repair of defects, or possibly a reduction in price. Again, as in the cases of substantial breaches, the buyer is supposed to provide the seller with a reasonable time period to comply with any such obligations; if the seller does not comply with the first point (the repair or replacement of goods with defects) within the time limit provided by the buyer, the latter then has the right to ask for a reduction in price. In any case the buyer can claim for damage compensation (Article 723 of the CC).

   The Consumer Protection Law (CPL) does not distinguish between substantial and non-substantial breach of contracts. Whatever the kind of lack of conformity, the consumer is entitled to have

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3 See M. Semini, Law on Obligation and Contracts 2006. p.17
goods brought back to a level of conformity free of charge: by repair or replacement, or to have an appropriate reduction made in the price, or to rescind the contract regarding the defective goods. It is important to stress that the CPL provides a step by step approach for buyers’ complaints. It first require a buyer to ask for the repair or for the replacement of the defective goods free of charge unless it proves to be impossible or disproportionate (Article 31.4 of the CPL).

The solution is deemed to be disproportionate if it imposes costs on the seller which, in comparison with alternative solutions, are unreasonable taking into account the value of the goods if there were no lack of conformity, the significance of the lack of conformity and whether any other alternative solution could resolve the situation without significant inconvenience to the consumer. The term free of charge refers to the necessary costs incurred to bring goods up to a level of conformity, particularly postage costs, labour, materials etc. (Article 31.4 of the CPL). Any general obligation such as a repair or replacement must be completed within a reasonable time period and without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods (Article 31.5). The duration of the legal guarantee period as foreseen in Article 30 of the CPL is automatically extended after any repair to cover the possibility of the future reappearance of the same defect. If this does occur, the consumer is entitled to claim for replacement instead of another repair.

A second option for the consumer is an appropriate reduction in the price or to rescind the contract. Such an option can be used when the consumer is neither entitled to having the goods repaired or replaced or if the seller has not completed the repair or replacement according to paragraph 4 (Article 30.6 of the CPL). In any case the consumer cannot claim to rescind the contract if the lack of conformity is minor (Article 30.7 of the CPL). The period of time that is required to complete the claim or to repair the goods is added to the guarantee period (Article 30.8 of the CPL).

As a general rule a seller is obliged to accept a complaint made by a consumer in any location in which his activity takes place or is represented unless someone else has been charged with handling the repair. The seller will immediately, or within three working days, decides on whether to accept a complaint (Article 31.2 of the CPL).

7. Consumers’ issues

Consumers’ issues in sale contracts are part of the above analysis.
LIABILITY FOR MATERIAL DEFECTS
Country report for Bosnia and Herzegovina

1. **Comparison of the lack of conformity in accordance with the CISG and the liability for material defects in the legislation of Bosnia and Herzegovina - background**

The most important part of the Convention on Contracts for the International Sale of Goods hereinafter also: CISG) contains provisions regulating the rights and obligations of the contracting parties and the consequences of the failure to perform the obligations i.e. those rights that one contracting party is entitled to should the other contracting party fail to perform its contractual obligations. It can be said that the backbone of the Convention is comprised of regulations that refer to disturbances in performance of the obligations and they represent a closed system disabling the application of national regulations; as to issues not regulated by the Convention, the substantive laws of member states apply referred to in any concrete case by the collision rules.\(^1\) The Convention does not distinguish between types of disturbances in performance: it adopts a concept typical of North European and common law legal systems that do not distinguish between different types of contract breaches\(^2\), establishing thus the single notion of the breach of contract that encompasses various breaches such as failure to perform, delay in performance or breach of accessory obligations.

The breach of contract happens every time a contracting party fails to perform its contractual obligations, either principal or accessory. The seller must deliver goods (art. 30, 31 CISG), at the agreed place (art. 31 CISG), on the agreed time or within the appropriate time period as of contract conclusion (art. 33 CISG), free from any claim of a third party (art. 40, 41 CISG) and in the agreed state (art. 30, 35 CISG). Therefore, the obligation of the seller to deliver the goods, which are of characteristics required by the contract, is stipulated in the general part of the Convention, while the special part provides its concretization, in the provision of art. 35 of the Convention.

The provision of art. 35 is the central provision for the liability of the seller for conformity of goods. Inseparability of the provision of art. 35 from the general part of the convention is noticeable also in terms of its reliance on the provision of art. 25 of the Convention, defining the fundamental breach of contractual obligations. The provision of art. 25 is of key importance for liability of the seller for non-conformity of goods, as the application of certain rights of the buyer on the grounds of existence of non-conformity of goods directly depends on whether the breach of obligation which entails non-conformity is fundamental or not. For instance, the right of the buyer to request from the seller the delivery of other goods without defect or termination of contract shall be possible only in the case when the delivery of goods not in conformity with characteristics required by the contract represents a fundamental breach of contract.

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Law of Contracts and Torts treats the liability for material defects primarily in the general part, imposing the general liability of the transferor (tradens) in bilateral contracts to the acquirer (accipiens) for material (and legal) defects in performance. Namely, art. 121 entitled „Bilateral Contracts“ deals with the particular effects of bilateral contracts in terms of liabilities for material and legal defects in performance. It should be noted that the Law of Contracts and Torts here regulates the liability for material and legal defects in performance (provisions of art. 121 LCT) as a general liability institute for performance in general, and not exclusively as liability for material and legal defects of goods. This would practically mean that the debtor of due performance of obligation is accountable to the creditor whenever the performance that may be in form of giving (assigning) of goods or rights, an action, omission or toleration has a certain material (and legal) defect. Performance that may consist in giving, acting, omitting or toleration in the widest sense as a subject of the debtor’s obligation shall be understood as a completed action, not an ongoing action; a defect cannot exist as a lack of ongoing action, because only the result of performance can have a defect. For instance, the action of delivery of goods cannot be subject to defect, only the delivered goods.

It is a fact, however, that the liability institute for defects on goods (material and legal) started developing in the light of sales contracts, therefore the mention of liability for material and legal defects is most often associated with sales contracts and liability for defects on goods subject to the sales contract. The rule from the provision of art. 121 LCT is probably in most part conditioned by this fact. This provision underlines that the provisions of the Law of Contracts and Torts on liability of the seller for material defects shall adequately apply to obligations of the transferor, unless other provisions apply in the concrete case. Pursuant to the above, we can say that the liability for material defects on goods is considered part of a wider institute of liability for material defects of performance.

In this light, the following can be said as to the liability concept for non-conformity of goods in accordance with the Convention and liability for material defects in accordance with the Law of Contracts and Torts (hereinafter also: LCT, the Law):

3 The law of contracts and torts was codified in the former state by the adoption of the Law of Contracts and Torts (hereinafter also: the Law, LCT) on March 30, 1978. This Law entered into force on October 1, 1978 and was transposed into the legal system of Bosnia and Herzegovina in 1992 by the Regulation with Force of Law (Official Gazette RBiH, no. 2/92), and it gained its legal force based on the confirmation of regulations with force of law (Official Gazette RBiH, no. 13/94). At the present, the Law of Contracts and Torts in Bosnia and Herzegovina does not exist at the state level, but both entities, the Federation of Bosnia and Herzegovina and Republika Srpska have their entity LCTs. These laws were published in entity official gazettes and are valid for: the Federation BiH: Official Gazette SFRJ, 29/78, 39/85, 45/89 and Official Gazette RBiH, 2/29, 13/93 and 13/94, and Official Gazette FBiH, 29/03 and Republika Srpska: Official Gazette SFRJ, 29/78, 39/85, 45/89 and Official Gazette RS, 17/93, 57/98, 39/03, 74/04. The Law on Contracts and Torts of Bosnia and Herzegovina is in preparation.

4 There are debates about the notion of material defect because it greatly associated with matter and the material, and therefore causes the misunderstanding that a defect can only be assigned to a corporal thing and not the result of performance that may consist in acting, omitting, or toleration. For more: Slakoper, Zvonimir, in: Komentar Zakona o obveznim odnosima, Zagreb, 2005, p. 531 (also: Slakoper, Komentar ZOO).

5 The title of Section 5 „Bilateral Contracts“ seems inadequate for at least the reason that it is not possible to equate the category of bilateral contracts with the term of bilateral obligations payment contract within which the transferor is accountable to the acquirer for the physical and legal defects in performance. The title indicates that the rules on liability for material and legal defects in performance should also be applied in cases of the so called incomplete, or non-payable bilateral obligations contracts, however paragraph 1 of article 121 clearly indicates that these rules apply only to complete bilateral obligations payment contract.


7 Slakoper, Komentar Zakona o obveznim odnosima, Zagreb, 2005, p. 530.

8 For more on the problems in application of LCT provisions on liability for material defects in other bilateral contacts, see: Slakoper, Zvonimir, Primjena odredbi Zakona o obveznim odnosima o odgovornosti prodavatelja za materijalne nedostatke na razne vrste ugovora. Zbornik Pravnog fakulteta Sveučilišta u Rijeci, br. 1 (2004) (hereinafter also: Slakoper, Primjena odredbi LCT...).

9 Petrić, op.cit. p. 88.
- the Convention and LCT use different terminology: CISG deals with non-conformity of goods, and LCT uses the term material (factual) defect;
- with regard to systems of regulations being compared, we can note that in certain understandings the provisions of the Convention relating to non-conformity (primarily art. 35) are not independent, but integrated into the general part of CISG, as they rely upon and are linked to the provision of art. 25 regulating the fundamentality of the breach of contract. In LCT, the general part of the law contains the principle of the provision in art. 121 that generally addresses the liability for material and legal failures to perform, however, the provisions in the special part (Arts. 488-500) represent a set of rules not relying on the provisions from the general part of the law. It can be said that the domestic legislator fully regulated the liability of the seller for material defects in the special part, while the general part of the law tackles other types of failure to perform the obligations entirely or in part (impossibility to perform, delay in performance);
- the Convention does not differentiate between various possible breaches of contractual obligations, it rather includes different types of failures to perform the contractual obligations into the concept of the breach of contract. The Law of Contracts and Torts does not recognize such a unified concept of the breach of contract, and it stipulates a more precise differentiation of individual categories of disturbances in performance, and regulates them separately.

2. **Non-conformity in accordance with CIGS Article 35, paragraph 1 – Properties required by the contract: defects in quantity, quality, description, and packaging**

   Pursuant to the provision of art. 35, para. 1 of the Convention, the seller must deliver the goods which are of quantity, quality and description required by the contract. In this way, non-conformity with the contract includes, besides defects in quality, also defects in quantity, delivery of other goods (aliud) and defects in packaging. In this part, the Convention differs greatly from the solutions provided by a range of national legislations, as these often start from a much more detailed differentiation of certain types of failure to perform entirely or in part. It should be underlined that non-conformity cannot be determined applying the terminology characteristic of national legislations.

   Pursuant to art. 35 para. 1 of the Convention, when assessing conformity of goods with the contract, the first aspect to take into account should be what the parties agreed to in the contract. In other words, the quantitative and qualitative determinations that the parties stipulated in the contract shall be paramount, and in this regard the Convention’s solutions start from the subjective determination of the term defect.

   The agreement of the contracting parties on the characteristics of goods may follow expressly, but also implicitly, primarily by reference to certain standards. Characteristics of the subject of the contract can be agreed on individually, but they can also stem from general business circum-

14 Schwenzer, op.cit. p. 417.
stances of the seller or the buyer. In certain cases the characteristics of goods must correspond with those shown in advertisements in which the seller points to concrete properties of goods.\(^{15}\)

The description of the properties of the goods must not be particularly detailed, but the more precise the agreement, the easier it will be to respond to the question of crossing the so-called fundamental breach of contract threshold and opening the path to certain rights of buyers.\(^{16}\) Any departure, even the one not affecting the value of goods or its usage or functioning shall constitute non-conformity with the contract.\(^{17}\)

It is the seller’s primary obligation to deliver goods in the quantity required by the contract. Any departure thereon from the quantity required by the contract shall be deemed non-conformity with the contract, and not a partial failure to perform or, for instance, delay in part of delivery.\(^{18}\) Just as the delivery of quantity lesser than required by the contract, delivery of goods in the quantity greater than required by the contract shall constitute non-conformity. It is up to the buyer to decide as to whether the excess quantity shall be accepted or not (art. 52 para. 2 CISG). Should the buyer decide to accept the goods or fail to inform the seller on defects in time limits referred to in art. 39 CISG, the buyer shall pay for the accepted quantity excess in accordance with art. 52 para. 2 CISG.\(^{19}\)

Departures from the agreed quantity, allowed and common in certain fields do not constitute non-conformity.

The term quality includes, along with the purely physical features of goods, also all factual and legal relations that refer to the relation of the good with its environment.\(^{20}\) In some cases qualitative non-conformity can be the delivery of goods not having the agreed origin\(^{21}\) or delivery of goods not accompanied by adequate documentation.\(^{22}\) When it comes to quality, any departure from what the parties stipulated in the contract, regardless of whether of poorer or better quality than required by the contract, shall mean non-conformity of goods with contract. Departures from the agreed quality that are common in certain fields shall not be taken into account.\(^{23}\)

Besides departures in quantity and quality, delivery of goods of other type than required by the contract is also considered non-conformity. Should the seller deliver sugar instead of flour, it shall not be deemed that he fully failed to perform the obligation of delivering sugar, but that he failed in performing the obligation in conformity with the contract.\(^{24}\) The Convention does not differentiate irregular performance (peius) from delivery of goods other than the contracted ones (aliud).\(^{25}\)

\(^{15}\) Schwenzer, op.cit. p. 417.

\(^{16}\) Schlechtriem, Peter, Internationales Kaufrecht, Tübingen, 2007, p. 100.

\(^{17}\) Pilz, Burghard, Internationales Kaufrecht, München, 2008, p. 249.

\(^{18}\) Pilz, op.cit. stri. 250.

\(^{19}\) Pilz, op.cit. p. 250.

\(^{20}\) Schwenzer, op.cit. p. 418.


\(^{22}\) Two types of documentation should be distinguished. The first type contains user manuals, installation manuals and documents clarifying characteristics, functions, or usage of goods. This type of documentation follows the goods and any deliver not having this documentation shall be in non-conformity with the contract. The second type contains documents that the seller is obligated to hand over to the buyer in accordance with Art., 34 of the Convention and the hand over of these documents represents an obligation separate from the obligation to deliver goods in accordance with the contract.


\(^{24}\) Schwenzer, op.cit. p. 418-419.

\(^{25}\) Pilz, op.cit. p. 249.
Should the contracting parties reach an agreement with regard to packaging of goods, departures for the contracted matters shall constitute non-conformity of goods in light of art. 35 of the Convention.

**Contracted properties of goods pursuant to the Law of Contracts and Torts.** Pursuant to the law of Bosnia and Herzegovina, in the case when contracting parties agree on features of goods, departures from the agreed shall constitute material defect pursuant to the provision of art. 479 item 3 of the Law of Contracts and Torts. Sales contract most often means existence of an agreement between contracting parties as to the properties of goods subject to it. The agreement of contracting parties can be either expressed or implicit.

The contracting parties primarily agree upon the quality of goods (Latin *qualitas*), as a set of properties based on which it is possible to distinguish not only goods of different type, but also goods of the same type. Descriptive contracting of quality is possible, where contracting on properties of goods in sufficient detail automatically means the detailed knowledge thereon. Agreeing on quality according to the producer’s specification is common in practice, which, if existent, is mandatory, and it can also happen that properties are contracted according to the title or origin (geographical) of the concrete product.26

Although very rare, shortage or excess in the quantity of goods in relation to the contracted quantity can mean defects in the quality of goods. Pursuant to the provision of art. 492 para. 1, lesser quantity means that the seller delivered to the buyer smaller quantity of goods in relation to the one required by contract. A material defect shall not exist always when lesser quantity of goods was delivered. For instance, should the seller deliver to the buyer 250 kg instead of 300 kg of cement, performance will be partial and the buyer can request from the seller the remaining 50 kg that were paid for. Should the seller, however, deliver to the buyer a door of dimensions smaller than required by the contract (e.g. of 200 cm height instead of 210 cm) this shall constitute a material defect.

Similarly, delivery of goods in quantity greater than required by the contract can constitute a material defect. Should the seller deliver to the buyer goods in quantities greater than required by the contract, the buyer can, for instance, come in a situation where storage of excessive goods may incur additional costs. Domestic legislation mentions the delivery of goods in larger quantity than required by the contract in terms of possible material defect only with regard to commercial contracts; therefore, pursuant to art. 493 LCT, when the seller of specified goods delivers to the buyer a quantity larger than required by the contract, and the buyer fails to state that he rejects the surplus over reasonable time course, it shall mean that the buyer accepted the surplus and he shall be obligated to pay the set price for it. The law does not regulate situations of delivery of greater quantity in civil law contracts.27

Should the goods other than required by the contract (aliud) be delivered, this shall not constitute a material defect, but failure to perform the obligation and/or delay in performance, and provisions of LCT on liability of the seller for material defects of goods shall not apply.28

It is clear from the above that the notion of material defect in domestic law does not, as a rule, include the departures from the quality required by the contract and in certain situations quantity required by the contract, while delivery of goods other than those required by the contract and defects in packaging are not included in this notion.

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27 Slakoper, O primjeni odredaba ZOO..., p. 451, 452.
3. **Criteria for establishing conformity of goods (art. 35 para. 2 CISG) – goods fit for purposes for which goods of the same description would ordinarily be used, goods fit for any particular purpose, conformity with sample or model, packaging/protection of goods in a manner usual for such goods**

When contracting parties do not agree on properties of goods, the primary, subjective determination of the notion of conformity is replaced by the range of objective criteria, among which particularly important is the purpose for which the goods will be used; in principle, these are assumptions on the properties of goods that would be agreed upon by reasonable contracting parties had they taken into account the necessity of such an agreement.29

Pursuant to the provision of art. 35 para. 2 CISG goods are deemed in non-conformity with the contract when they are not fit for use for which goods of the same properties would ordinarily be used. Should the goods be used for some, but not all purposes considered ordinary for such goods, the seller has the obligation to inform the buyer thereon. As a rule, the seller is not liable in cases when the goods are used for ordinary purposes, but are not fit for use for some other purposes, not considered ordinary, that might be possible and that arise occasionally.30

Whether goods are fit for the ordinary purposes of use is assessed primarily with regard to whether the goods are fit for further sale or circulation.31 On the EU internal market the most often applied provision is art. 2 II d) of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, according to which the goods subject of a consumer contract must show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labeling. What is deemed characteristics of goods enabling their ordinary use shall be determined in each concrete case according to objective criteria. For instance, inflatable swimming pools must be watertight, glass dishes in households heat resistant, and products with validity date must be usable during a given period after their delivery.

A disputable issue appeared in practice relating to whether goods being fit for their ordinary use can be equated with the category of medium quality goods in cases of generic goods. Though this might be understood in the continental and American law, such equating is not typical of the English law where we have the category known as *merchantability*, that refers to properties or groups of properties of goods enabling their further trade or further release into circulation. Different legal standards have been approximated in light of adopting the category of *reasonable quality* in the English law.32

It always comes as interesting to address the question of which criteria should be taken into account when assessing the conformity of goods for the ordinary use, those existing in the country of origin of the buyer or those characteristic of the country of origin of the seller. When the particular purpose of things is lacking, i.e. where the ordinary purpose is the governing one, if international customary rules exist that define the properties of a certain type of goods they shall be taken into account. Neither are there problems when equal standards apply in the country of origin of the buyer and country of origin of the seller, for instance, in trade relations among resident operators of EU member states. In the case when the standards in the country of origin of the buyer are stricter than in the country of origin of the seller, it is the responsibility of the buyer to inform the seller thereon.

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29 Schwenzer, op.cit. p. 417.
30 Piltz, op. cit. p. 254
31 Bernstein/Lookofsky, op. cit. p. 83.
32 Schwenzer, op.cit. p. 421.
In a reverse situation, the differences should not even be considered, except in the case when the buyer pays particular attention to the standards applicable in the country of origin of the seller, and this should exclusively affect the price.

An important issue is also the adherence to the national public-legal regulations protecting the interests of employees, consumers, environment etc. As long as in line with these regulations the goods must have properties that in accordance with the trade customs are not ordinary for such types of goods, or different regulations apply in the country of origin of the seller and country of origin of the buyer, opinions of theoreticians and practitioners are divergent. German\(^{33}\) and Austrian\(^{34}\) case law states that the seller is not obligated to adhere to the regulations applicable in the country of origin of the buyer or country in which the goods will be used, even in cases when the buyer notifies the seller that the goods will be used in country X as the place of its final destination. The buyer would have to, in order to constitute the sellers liability for conformity of goods with such regulations, explicitly inform the seller on such regulations in the contract they are concluding. On the other hand, there are opinions according to which the fact that the buyer notified the seller about the country where the goods will be used obliges the seller to adhere to regulations of that country in terms of the properties of concrete goods.

For the seller to be liable for the non-existence of those properties that make the goods non-fit for particular purpose, the buyer must inform the seller on such properties, expressly or implicitly; such properties must not be required by the contract, it is sufficient that the seller is informed thereon. It is easy to assess whether the seller performed the obligation relating to particular purpose of goods where such an obligation was expressly stated. In cases when the seller could have been, but was not aware of the particular purpose of goods, the capability of a reasonable seller to recognize the intended particular purpose of goods should be taken into account.\(^{35}\)

In order to apply the provision of art. 35 para. 2 b CISG, the assumption must be realized that the buyer relied or could have reasonably relied on the expertise and judgment of the seller. Such an assumption is realized at all times when the seller is a specialist or an expert for production or procurement of goods that the buyer intends to use for particular purpose. The fact that the buyer himself is a sufficient expert does not justify the seller, but this situation may not apply when the buyer has more expertise than the seller.\(^{36}\) Reliance of the buyer on the expertise and judgment of the seller does not apply in cases when the buyer participates in the selection of goods, influences the goods production process, provides clear instructions to the seller and similar, because a conflict arises between the properties required by the contract referred to in para. 1 and properties required for the particular purpose of the goods referred to in para. 2 art. 35 of the Convention.\(^{37}\) Reliance of the buyer on expertise and judgment of the seller is fully unjustified in situations in which the seller informs the buyer on the fact that he is not the producer of goods and only releases it into further circulation and does not have the necessary expert knowledge, as well as in those situations where expecting such expert knowledge would be unjustified in the business field of the seller.

The seller is liable to the buyer for non-conformity of goods with a sample or model. The sample means lesser quantity of goods extracted from a larger quantity and it should have, as a rule, all characteristics of the goods, while the model serves for the presentation of goods to the buyer when it is not possible to present the goods themselves and it can have all or many, but also just a

\(^{33}\) BGH, 8.3.1995, CISG-online 144
\(^{34}\) OGH, 13.42000, CISG-online 576 =IHR 2001, 117, 120
\(^{35}\) Schwenzer, op.cit. p. 424.
\(^{36}\) Schwenzer, op.cit. p. 424.
few of the characteristics of goods being sold.\footnote{For cases of non-conformity of properties of goods required by the contract, properties necessary for ordinary use of goods and those required for the particular purpose on the one hand, and the sample or model on the other, see: Schwenzer, op.cit. p. 425.} Provision of art. 35 para. 2 c CISG does not apply in the case when a sample or a model was presented by the buyer instead of the seller, or when the buyer first orders a smaller quantity of goods for trial and then a larger quantity of the „adequate quality”\footnote{Schwenzer, op.cit. p. 425.}

In the end, the seller is liable to the buyer, in accordance with the provision of art. 35 para. 2 d of the Convention for packaging of goods, in the sense that lack of ordinary or adequate packaging constitutes non-conformity of goods with the contract. The goods must be packaged in the usual manner, assessed in accordance with the customs characteristic for certain fields, having in mind that the aim of packaging is reflected in the adequate protection of goods during transport. Should such customs be non-existent, goods shall be packed in an adequate manner. Adequacy of packaging is determined according to type of goods, type and duration of transport etc.

Solutions in the Law of Contracts and Torts. In comparison with the solution in the Convention, the Law of Contracts and Torts first regulates situations in which properties have not been agreed.

Therefore, pursuant to the provision of art. 479 item 1, goods have a material defect when they lack properties necessary for its ordinary use or circulation. This is a dispositive regulation that defines the minimum of properties of the goods, where the parties have not agreed on it or where such properties have not been regulated: should there be no agreement or regulation on the properties the goods must have, they should be adequate for the ordinary use or circulation, depending on whether the buyer procures goods for his own use or has the intention of releasing them into circulation.\footnote{Vizner, op.cit. p. 1594.} The seller may not refer to the lack of knowledge on the properties that the goods should have for regular use or circulation.\footnote{Kapor, Vladimir, in: Komentar Zakona o obligacionim odnosima, Beograd, 1980. godine, p. 971.}

The material defect shall exist, pursuant to the provision of art. 479 item 2, also where due to the lack of agreement of contracting parties or lack of adequate regulation, the seller hands over the goods not having properties necessary for particular purpose for which the buyer is procuring, and of which the seller knew or could not have been unaware.\footnote{Pursuant to the decision of the Supreme Court of Croatia, Rev-2032/81 dated Feb 23, 1982 (PSP 21/1982, p. 78) the seller of a barrel is liable for its defect of leaking liquid, as liquid tightness is a property needed for the regular use of a barrel, and it is therefore not necessary for the contracting parties to particularly agree upon such characteristics.} Liability of the seller is conditioned by the idea that the particular purpose for which the buyer is procuring, was known or must have been known to the seller. It is sufficient that the seller knew or must have known of the buyer’s intention of particular use in the period before the maturity of the obligation to hand over the subject matter of the contract, in the sense that there was time to prepare the handover of the goods with the concrete properties.\footnote{Thus the decision of the Supreme Court of Bosnia and Herzegovina (VSBiH, Pž-292/88 dated Jun 26, 1989, Bulletin VSBiH 4/1989, decision 86): „If the seller knew or could have known that he is delivering the goods to the buyer that are no adequate for the particular purpose for which the buyer is buying them, he shall be liable for the material defects even when the buyer failed to report them in due time“.} The seller is informed on the particular purpose, as a rule, when it is required by the contract, however, it suffices that this use was only known to the seller (for instance, when the contracting parties have a permanent business relation and if the buyer fails to state the purpose of the goods, the seller can assume that the intention of the buyer is to use the concrete goods for the same purpose as the purpose of the previous procurement of the goods).\footnote{Vizner, op.cit. p. 1594.} In the case of dispute
on whether the goods were bought for particular purpose or not, the burden of proof lies upon the buyer\(^{45}\).

In the provision of art. 479 para. 3 LCT the legislator addresses the existence of material defect, along with the properties of goods required by the contract, whenever the subject matter of the contract does not have the regulated properties. Regulations defining properties of goods can be imperative and dispositive. Regulating properties of goods by imperative norms is usually motivated by the attempts to protect the public interest, while dispositive norms apply in cases of the lack of agreement between contracting parties. A particular importance among the regulations defining properties of goods is assigned to the regulations on standards for certain products. Standards are measures according to which quality of certain products is oriented and unified. Today we differentiate between international and national standards, and European standards in Europe, and we often speak about standards that apply in particular regions of a country (so called regional standards), as well as standards typical for certain industrial branches (branch standards). International standards are considered the most important as they directly influence the national standards; international standardization is implemented by the International Organization for Standardization, and the Institute for Standardization of Bosnia and Herzegovina is involved in its work. State (national) standards are defined at the state level; the state level standards in Bosnia and Herzegovina are marked by the abbreviation BAS\(^{46}\), adopted by the Institute for Standardization of Bosnia and Herzegovina\(^{47}\) and its application is voluntary, except in those cases when the application is mandatory in accordance with special regulations.\(^{48}\) A regulation imposing the mandatory application of a standard must refer to a BAS standard.\(^{49}\)

A defect shall exist, pursuant to the provision of art. 479 item 4, also when the seller delivers the goods to the buyer that are not equal to the sample or model, except in the case when the sample or model were presented for the sake of information. If the departures from the sample or model are not required by the contract or stipulated by customs, goods must be in conformity with the sample or model.\(^{50}\)

When solutions of CISG and LCT are compared, it is obvious that LCT, unlike CISG that in determining the non-conformity starts from the properties of goods required by contract, primarily speaks of situations where the properties of goods are neither required by contract or regulated, thus the definition of material defect, prior to the departures from the agreed, mentions departures in characteristics that the goods must have for their regular use or circulation, or the particular purpose that the seller knew or must have known of.

LCT does not include the cases of departure from the ordinary or adequate packaging in the notion of material defect, as was noted earlier.

4. Exclusion of liability of the seller in accordance with CISG

Pursuant to solutions provided in the Convention, there are two possibilities in which the liability of the seller for non-conformity of goods shall be deemed excluded.

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\(^{46}\) Art. 11 para. 2 of the Law on Standardization of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 19/01.

\(^{47}\) Art. 11 para. 1 of the Law on Standardization of BiH.

\(^{48}\) Art. 13 para. 1 of the Law on Standardization of BiH.

\(^{49}\) Art. 13 para. 2 of the Law on Standardization of BiH.

\(^{50}\) It is impossible to achieve an identical sample to the goods subject of the contract, and therefore the practice allows for minimum departures from the sample when these are negligible and inevitable, and common in operations involving the concrete type of goods.
First, the case when the buyer knew or could not have been unaware of the lack of conformity pursuant to art. 35 para. 3 of the Convention. The buyer who fails to note the lack of conformity that he could not have been unaware of, acts with neglect that is deemed a higher level of neglect than the gross neglect.51

In the second case, the seller is not liable for the lack of conformity when he fails to examine the goods within time limits referred to in art. 38 and report on noted defects within time limits referred to in art. 39 of the Convention. The point of the obligations of buyers from arts. 38 and 39 CISG is to leave the seller an opportunity to remove the lacks of conformity of goods, prepare for a dispute with the buyer and, of course, become aware as of a point in time of the rights stemming as his rights from the contract.52

The category of reasonable time referred to in art. 39 para. 1 CISG, and the duration of the time limit are set for each particular case, taking into account the type of goods and the rights that the buyer intends to apply. Time limits are counted from the moment the buyer discovers the defect, or from the moment he must have discovered the defect.

Solutions provided by LCT. The BiH seller, pursuant to the provision of art. 480 para. 1 LCT, is not liable for defects referred to in art. 479 items 1) and 3) if at the moment of contract conclusion the buyer knew or could not have been unaware due to his neglect or negligence53; in other words, the seller is not liable for the visible defects when they consist of the lack of necessary properties of goods for their regular use or circulation, or when they consist of the lack of property or feature of goods that have been expressly or implicitly required by contract or regulated. In the remaining two cases referred to in art. 479, i.e. where the goods do not have properties for particular use that the seller knew or must have known of (art. 479 para. 2), or when the goods lack conformity with sample or model (art. 479 para. 4) the domestic legislator regulates unconditional liability of the seller.54

In Bosnian and Herzegovinian law, the buyer who fails to complain about visible defects within time limits set in art. 481, or hidden defects within time limits defined by provisions of art. 482 LCT shall lose all the related rights based on the existence of material defects.

5. CISG on contractual clauses on exclusion/limitation of liability of the seller

Pursuant to the provision of art. 6 of the Convention, the contracting parties may exclude the application of the Convention, or, subject to art. 12, derogate from or vary its legal effects.

As the provisions of art. 45 of the Convention are dispositive in nature, derogations are possible as long as such derogations are agreed upon individually by the contracting parties. The Convention does not regulate the issue of validity of contract provisions contained in general business requirements that have not been individually negotiated, but which would exonerate the seller from obligations stemming from art. 45 CISG, therefore, the relevant law applies in line with the collision rules. This is usually the law that applies to a contractual relation when the provision of the Convention are not applicable. The contracting parties most often define the governing law in agreement, and in lack of such agreement, the law of the seller’s country shall apply.55

51 Schwenzer, op.cit. p. 427.
52 Nau, op.cit. p. 168.
53 Možina, Damjan, Uslovi i vremenska ograničenja odgovornosti prodavca za materijalne nedostatke, Evropski pravnik, 1/2008, p. 11.
54 Više kod: Radišić, op.cit. p. 155.
The contracting parties have the right to the derogation from provisions of art. 48 CISG on the right of the buyer to subsequent performance of the contract, even when such derogations are stated in the general business requirements, as long as they are not violating the basic principles of the Convention. Extension of the seller’s liability for subsequent performance would also be allowed. On the other hand, the provision of the general requirement would be disputable should the buyer be authorized to terminate the contract in case of the breach of obligations by the seller, particularly in the case of delivery of goods lacking conformity. Provisions departing from those of the Convention that regulate the buyer’s right to the termination of the contract are also allowed. However, the provision in general business requirements based on which the seller deprives the buyer of the right to leave a subsequent time limit for performance, should there be failure to perform the obligation of delivery of goods, and to terminate the contract after the subsequent time limit expires with no success, is problematic. On the other hand, the contractual clause in general business requirements based on which the buyer, in case of the lack of conformity of goods that is of minor importance, has the exclusive right to price reduction is allowed. Just as in the previous rights, the right to price reduction can be excluded in agreement of the contractual parties, as well as in the general business requirements.

The contract can also regulate the scope of liability for the damage, having in mind the dispositive nature of the provisions in art. 74 of the Convention. Thus, the contracting parties can arrange a lump sum amount for the damage or limit the liability for damage. Where these provisions are part of the general business requirements, their inclusion in the contract is decided upon in accordance with the provisions of the Convention referring to contract conclusion (art. 14, 18 CISG). Contracting parties are free to contract a damage lump sum or a contractual sanction; regulations on the admissibility, control, and protection of the other party can be found in the law relevant according to collision rules. The governing law shall be determined in accordance with the collision rules lex fori.

Substantial control of contractual provisions limiting or excluding the liability of the seller shall be performed in accordance with the governing national law. Rules of the governing national law referring to the dispositive regulations in that law or to certain principles thereon need to be harmonized with the Convention that applies to the concrete contractual relation.

**Solutions provided by LCT.** As the legal provisions on the liability of the seller for material defects are of dispositive nature, their application can be excluded or limited by the contract. The LCT provides this possibility in the provision of art. 486 para. 1.; the liability of the seller can be excluded or limited for all material defects, both visible and hidden. In commercial affairs, the liability of the seller is most often excluded or limited by introducing the „telle-quelle“, „as is“ etc. clause in the contract; in such cases the buyer buys goods from a certain storehouse, without separating parts that are better. In the case that the buyer is buying under the clause „seen and approved“ it is understood that he examined the goods and accepted to buy them in the given state. Both situations mean exclusions of liability for visible defects of goods.
In certain cases, the contractual exclusions or limitations shall not be possible, or the contractual provisions that foresee exclusions or limitations of seller's liability shall be deemed null and void. Pursuant to art. 486 para. 2 LCT those contractual provisions on exclusion or limitation of the seller's liability for material defects shall be null and void: 1) if the defect was known to the seller, but he did not inform the buyer about it, and 2) in cases when the seller imposed the stipulation of those provisions in the contract using his special monopoly position.

A buyer who waived his right to terminate the contract shall keep other rights due to these material defects, pursuant to art. 486 para. 3.

6. Comparison of the buyer’s rights based on non-conformity in CISG and the right based on material defects in the Law of Contracts and Torts

Rights of the buyers in non-conformity according to CISG. In cases when the seller delivers goods to the buyer that can be considered goods that lack conformity in light of art. 35 CISG, and the seller’s liability was not excluded, the buyer shall be entitled to the rights referred to in the provision of art. 45: right to request due performance (arts. 46, 47, 51 CISG), right to terminate the contract unilaterally (arts. 49, 51 CISG), right to price reduction (arts. 50, 51 CISG), right to claim damages (art. 74 CISG). The Convention provides for such solutions that primarily ensure due performance of the contract, i.e. its maintenance in force.62

1. Right of the buyer to request due performance of the contract

Should the seller deliver goods with defect to the buyer, the buyer’s right to request performance transforms into his right to request the removal of defects or delivery of goods without defects.

The buyer’s right to request due performance of the contract is conditioned by a range of assumptions. First, the obligation of the seller to deliver the goods in conformity may not be performed (art. 46 para. 1 in connection with art. 45 para. 1 a CISG). The buyer will not be able to exercise the right to performance of the contract when he has resorted to a remedy inconsistent with this requirement (for instance, right to terminate the contract). The buyer will not be able to exercise his right to subsequent due performance when the national court acting in the given case of non-performance would not in natura decide in favor of it according to the national law. The seller will not have the obligation to deliver other goods without defects in the case of objective impossibility of subsequent performance, nor in the case when it is determined, taking into account the circumstances of the concrete case, that it would be unjustified to expect this from the seller with regard to expenditures (costs, efforts) incurred thereon to the seller.63

a) Right of the buyer to request the handover of substitute goods without defects

The right to request delivery of substitute goods without defects in accordance with the provision of art. 46 para. 2 CISG is conditioned by, as already noted, first that one delivery of goods lacking conformity was performed and now the second one is needed. Delivery of substitute goods without defects is limited to generic goods.64

Another precondition that must be met for the buyer to successfully exercise his right to delivery of substitute goods without defect is that the delivery of goods not conforming with the

62 Müller-Chan, op.cit. p. 517.
63 Müller-Chan, op.cit. p. 519.
64 For more: Müller-Chan, op.cit., Comment art. 46 CISG, margin number 22 ff.
contract must constitute a fundamental breach of contract in light of art. 25 CISG: the breach must be such that the buyer cannot be expected to keep the delivered goods and to get satisfaction from price reduction or compensation of the damage caused by the reduced value of goods.\textsuperscript{65} The buyer, pursuant to the provision of art. 82 para. 1 CISG must be able to restitute the delivered goods unchanged; exceptionally, pursuant to art. 82 para. 2 CISG the buyer owes the seller a counter-value of the usage of goods.

It should be stressed that the right granted by court to delivery of conforming goods/goods without defects is possible only in cases when a national court subsequently allows performance \textit{in natura} and in accordance with national regulations. The background of the solution is a compromise made with solutions existing in the American law, where courts allow performance \textit{in natura} as \textit{specific performance} only in exceptional cases when the creditor proves the existence of a special interest to exercise the right to subsequent delivery of goods without defects.\textsuperscript{66}

The buyer is not authorized to request the delivery of substitute goods without defects when this right is contradictory to other rights he intends to exercise, for instance, the right to price reduction or termination of contract, nor where the seller pursuant to the provision of art. 79 CISG is not liable for the circumstances that caused the failure to perform the delivery of the goods without defects.\textsuperscript{67}

The right of the buyer to request delivery of substitute goods without defects is bound by certain time limits. Pursuant to art. 46 para. 2 the request for replacement of goods must be submitted by the buyer together with the notification to the seller on the defect or within reasonable time as of the notification.

Should the substitute goods lack conformity (and have defects) the rights of the buyer referred to in Art 45 CISG are reinstated. However, should the new defect have adequate objective weight, the buyer is authorized to immediately terminate the contract.\textsuperscript{68}

b) Right of the buyer to request remedy of defects on delivered goods

The buyer has, except for delivery of substitute goods without defects, pursuant to art. 46 para. 3 CISG, the right to request remedy of lack of conformity/defect; remedy can mean repair, but also changes in certain comprising parts of goods. Right to remedy of defect can be exercised both for generic and individually determined goods.

Right to remedy of defects is limited by the impossibility to remedy, and is not exercisable when it would be unjustified to expect from the seller to remedy the defect, having in mind the efforts that the seller should invest into the remedy in concrete case.

Time limits to pursue the right to remedy defects are the same as time limits for the right to replace goods (art. 46 para. 3 CISG).

If the defect is not remedied upon the request of the buyer, the buyer is authorized to remedy the defect himself or to confer the remedy to a third party, and the payment of costs of remedy of defect shall be requested from the seller in form of compensation of damages (art. 45 para. 1 b CISG), where he is obligated to prevent incurrence of unnecessary costs (art. 77 CISG).

\textsuperscript{65} OLG Frankfurt, 18.1.1994. CISG-online 123.
\textsuperscript{66} Nau, op.cit. p. 170.
\textsuperscript{67} Nau, op.cit. p. 170.
\textsuperscript{68} Müller-Chan, op.cit. p. 527.
2. Right of the buyer to request price reduction

This is the right in function of maintaining the contract in force in the sense that the contract, following the delivery of goods lacking conformity, is adapted to the new circumstances and is therefore subject to price reduction. Price reduction as the right of the buyer of goods with defects is characteristic for continental European legal systems; this right is replaced by the right to damages in the countries with Anglo Saxon legal tradition.69

The buyer exercises this right by a unilateral statement of will in accordance with provisions of art. 27 CISG. The buyer reduces the price in the ratio of the value of actually delivered goods in the moment of its delivery and the value of the owed, i.e. goods without defects in that same moment; other type of calculation of the amount of price reduction is not allowed.70

3. Right of the buyer to unilateral termination of contract

The buyer has the right to termination of contract in a few cases.

The buyer is entitled to this right where, pursuant to the provision of art. 49 para. 1 a CISG, the seller fails to perform any of the obligations from the contract or the Convention, and such failure represents a fundamental breach of the contract, if the seller did not deliver goods during the subsequent time limit provided by the buyer based on para. 1 art. 47 CISG or did not state that the delivery will be performed in such specified time limit.

**Failure to deliver goods as failure to perform obligations of the contract.** Failure to deliver goods means failure to provide the buyer with direct or indirect possession of the subject matter of the contract. The failure in itself does not however always represent grounds for termination: failure to deliver must at the same time be a fundamental breach of the contract. Incapability to perform the obligation of delivery of goods, regardless of whether it was initial or subsequent, with or without fault of the seller, as a rule, constitutes a fundamental breach of the contract.71 The reasons stated in the grounds for failure to perform this obligation by the seller are irrelevant to the right to termination due to failure to perform the obligation of delivery of goods (art. 79 CISG).

The dilemma as to the failure to deliver constituting a fundamental breach of the contract stops in the case of provision of art. 49 para. 1 b CISG, as it says that the buyer has the right to terminate the contract if the seller failed to deliver goods in the additional time limit provided by the buyer pursuant to art. 47 para. 1 CISG. The buyer has this right pursuant to the above provision also in the case when the seller states that the delivery will not be performed in the additional time limit provided by the buyer.

**Divisible obligations and delivery of goods by installments.** In the provisions of art. 51 the Convention regulates cases of absence of part of delivery in divisible obligations or the existence of defects only in part of the delivery, and in the provisions of art. 73. it regulates the absence of part of delivery in obligations that stipulate delivery by installments. In cases of absence of part of delivery in divisible obligations or delivery of goods that have defects only in one part, the buyer will be entitled to the rights referred to in Arts. 46 through 50 CISG exclusively in terms of the absent or part of delivery with defects. The buyer has the right to terminate the entire contract only under the condition that partial performance or the lack of conformity constitute a fundamental breach of contract. Similar solutions are contained in the provisions of art. 73 CISG. When the seller fails to per-

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69 Müller-Chan, op.cit. p. 566-567.
70 Zerres, op.cit. p. 71.
form his obligations in relation to only one delivery, subject to contract on delivery by installments, the buyer has the right to terminate the contract only in relation to that particular delivery, provided that such a breach constitutes a fundamental breach of the contract (art. 73 para. 1 CISG). Should the seller breach his obligations in relation to a single delivery, and the buyer can find grounds to conclude that the seller will commit fundamental breaches in the future installment, the buyer may terminate the contract for future installments (art. 73 para. 2 CISG). The buyer shall have the right to terminate the contract in respect of deliveries already made or of future deliveries, if by reason of their interdependence, those deliveries could not be used for the purpose contemplated at the time of the conclusion of the contract (art. 73 para. 3). The provisions of art. 73, in comparison to art. 51 CISG, grant the buyer the exclusive right to terminate the contract.

Delivery of goods lacking conformity. Delivery of goods lacking conformity can constitute a reason for contract termination, provided that it constitutes a fundamental breach; fundamental breach of contract is linked to grave defects that cannot be remedied in a reasonable time with reasonable efforts of the seller, and the buyer cannot use the goods. Termination of the contract is the ultimate resort, *ultima ratio*, among the rights available to the buyer and can be resorted to, in principle, when it is no longer possible to save the contract.72

The buyer loses his right to terminate the contract when he fails to declare that the contract terminated within certain time limits; art. 49 para 2. CISG regulates this. The buyer's rights are not bound by time limits in cases when the breach of contractual obligation is the failure to deliver.

The buyer exercises the right to terminate the contract by a unilateral declaration of will submitted to the seller. Legal consequences of contract termination are regulated in art. 81 CISG. The contract does not cease to exist following the termination, it is transformed into a binding relation within which the contracting parties, released from contractual obligations, have the duty to restitute whatever they received under the contract.

Pursuant to the provision of art. 82 para. 1 CISG, the buyer is not authorized to require termination of contract if it is impossible for him to make restitution of the goods substantially in the condition in which he received them, except when application of Art 82. para. 2 is possible, particularly if it was not due to his omission that the goods cannot be restituted substantially in the condition in which he received them, or when goods have deteriorated as a result of the examination.

4. Right of the buyer to claim damages

The right of the buyer to claim damages is regulated in the provision of art. 45 para. 1 b CISG. The provision of this Article in terms of legal consequences refers to the provisions of arts. 74-77 CISG, that stipulate the breach of contractual obligation by either the seller (art. 45 para. 1 b CISG) or the buyer (art. 61 para. 1 b CISG); differentiation of principal and associated obligations is not constitutive of the right to claim damages. The compensation of damages pursuant to solutions provided by the Convention is based on the principle of full compensation (total reparation) and includes both the regular damage and the loss of profit.

The right to claim damages coexists with other rights that the buyer is entitled to on grounds of lack of conformity in delivery of the subject matter of the contract. However, exercise of this right might depend on what other rights the buyer intends to employ (Arts. 75 and 76 CISG); the cumulation of rights must not lead to compensation to the buyer that would exceed the actual damage, therefore the claim for damages in fact limits the compensation that remains for the buyer following

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72 Nau, op.cit. p. 172.
the application of some other right that he is entitled to. The Convention does not contain regulations on matter of pre-contractual liability, mostly due to the fact that these matters have been differently solved in national legislations.\(^73\)

The seller owes the compensation of damages regardless whether damage was incurred by his fault or not; the seller's liability is strictly defined.\(^74\) The provisions of art. 79 CISG regulate exemptions from liability.

Possible types of damage incurred by breaches of contractual obligations are damages due to failure to perform (for instance, damage incurred to the buyer when he pays for repair of goods with defects), associated damage (incidental damages, *Begleitschaden*, for instance, damage suffered by the buyer due to storing of goods delivered with delay or with certain defects) and damage as a consequence of the breach of contractual obligations (consequential losses, *Folgesachaden*, for instance, damage incurred to the buyer when he sells the goods to a third party, but is not able to hand it over to the third party due to delay in delivery or delivery with defects by the seller).

Damage is calculated in concrete terms. The abstract calculation of damages, pursuant to the provisions of art. 76 in terms of the difference between the contract price and the market price, without the possibility of the seller complaining that the sale for coverage has not been undertaken, represents an exception from the rule on concrete calculation of damages.\(^75\) Concrete damages are calculated in the moment of adopting the judgment.

The strict, objective liability of the seller is softened by the damage foreseeability category by the seller at the moment of contract conclusion, in light of the circumstances of which he then knew or ought to have known (art. 74 para. 2 CISG). Foreseeability, in principle, incorporates the three forms of regular damages (damages due to failure to perform, incidental damages – depending on whether the seller had to count on measures that the buyer has undertaken as his reaction to the breach of the contract or not, and consequential damages), and the loss of profit only when the seller had to count on further alienation of goods subject matter of the contract.\(^76\)

The Convention stipulates also the provisions on damages when:

a) following contract termination, buying was performed for purpose of coverage, and the buyer is claiming the difference between the contract price and the price in the substitute transaction (art. 75 CISG) and b) following the termination of the contract, there was no substitute transaction, but the goods have their market price, and the buyer may claim the difference between the contract price and the market price at the time of contract termination, as well as any further damages under art. 74 CISG (art. 76 CISG).

**Comparison with solutions provided by LCT. In general.** The Law of Contracts and Torts regulates the rights of the buyer in cases of material defects on goods sold, in provisions of arts. 488 through 500. The buyer has the same rights as the buyer of goods lacking conformity in accordance with the Convention: namely, the right to require due performance in light of delivery of substitute goods or remedy of the defect, the right to price reduction, termination of the contract and cumulatively with the listed rights, the right to claim damages.

However, the requirements that must be met in order to be entitled to certain rights are somewhat differently defined. LCT entered into force in 1978, and the Convention in 1980. Therefore the solutions provided in the LCT are to a certain extent compliant with solutions of the Hague Uniform Law on the International Sale of Goods.

\(^73\) Stoll/Gruber, op.cit. p. 700.
\(^74\) Zerres, op.cit. p. 71.
\(^75\) Stoll/Gruber, op.cit. p. 707.
\(^76\) Stoll/Gruber, op.cit. p. 712.
Even though it is usually considered that the buyer has the freedom to choose the right that the law guarantees when the seller hands over goods with material defects, specific limitations certainly exist. Similarly to the Convention, LCT promotes the maintenance of contract in force, and favors the requirement for due performance of contract. In other words, the gradation of buyer’s rights starts with those rights that are in the function of maintaining the contract in force, the right to require remedy of defects or the right to require delivery of substitute goods without defects.\(^{77}\)

These rights are the primary rights of the buyer: the law obliges the buyer to first require due performance of his obligation and the unsuccessful expiry thereon, after which the contract is terminated ipso iure, unless the buyer without any delay informs the seller that he requires the performance of the contract; the LCT does not stipulate any additional requirements, such as fundamentality or impossibility to remedy the defect. It is important to note here the domestic case law, according to which the termination of the contract is the final means available to the buyer in cases of material defects of goods and, in principle, the contract may be terminated only if the buyer provided the seller with the subsequent adequate time limit to perform the contract, i.e. to remedy the defect or deliver substitute goods.\(^{80}\) In certain situations, the buyer is not obligated to provide the seller with the subsequent adequate time limit for performance, namely, when the seller informed the buyer, after receiving a notification on defects, that he shall not perform the contract or where the circumstances of the case indicate that he will again not perform the contract in the subsequent time limit. In such a situation, when the buyer is not obligated to provide the seller with the subsequent adequate time limit for performance, it could be conditionally said that he can freely decide as to the rights he will apply.\(^{81}\)

The first and fundamental precondition for the exercise of rights of the buyer on the grounds of material defect is, pursuant to the provision of art. 488 para. 1 LCT, notifying the seller in a timely manner and accurately about the defect.\(^{83}\) A similarity can be seen here of solutions provided by the LCT and CISG, as the Convention also provides that certain rights of the buyer may be exercised provided that the seller has been notified in a timely manner about the discovered non-conformity of goods (art. 39 CISG). There is a departure from CISG in the provision of art. 500 LCT, according to which the rights of a buyer who notified the seller on time about existence of defects, shall expire one year after the day of sending the notification to the seller, unless the seller deceived the buyer, preventing him from using those rights. The preclusive time limit shorter than the three year limit for prescription of claims relating to contracts on goods and services is justified by the intention to prevent buyer’s speculation as to whether to apply certain rights or not, i.e. to shorten the time provided to the buyer to decide about opting for a certain right.\(^{84}\)

\(^{77}\) Perović, Obligaciono pravo, Beograd, 1980, p. 397.

\(^{78}\) Radišić, op.cit., str. 156.

\(^{79}\) Slakoper, Komentar LCT, op.cit. p. 644.

\(^{80}\) VSH, Rev-2432/82 od 5.5.1983., PSP 23/1984, p. 95.

\(^{81}\) Jelčić, Olga, Odgovornost za materijalne nedostatke i garancija za ispravno funkcioniranje prodane stvari, Naša zakonitost, 9-10, 1988, p. 1132.

\(^{82}\) Kapor, op.cit. p. 985.

\(^{83}\) The matter of notification is dealt with under item 9.

\(^{84}\) Kapor, op.cit. p. 998.
The basic difference between solutions provided by CISG and LCT is in the exercise of rights of buyers on grounds of non-conformity of goods/existence of defect of goods in relation to the requirement in CISG that certain rights can be applied provided that there was a fundamental breach of contract, in light of art. 25 CISG.

**a) The right of the buyer to require subsequent due performance of contract**

1) The first right of a buyer stated in art. 488 para. 1 item a) is the right to claim the removal of defects or delivering of another item without defect from the seller. This is the right of a buyer that enables the contract to remain in force, and is at the same time conditioned by the possibility of removing the defect. As to the question whether it should be subjective or objective impossibility, in lack of provisions of LCT that would provide an answer to this question, it is justified to accept the standpoint according to which the seller would be released from the obligation to remove the defect only in case of objective impossibility: the obligation of the seller would remain should the seller claim it impossible for him to remove the defect, and the removal would be possible in a different place. The burden of proof that the defect is impossible to remove lies on the seller, and the buyer may prove that the defect can be removed in a different place. The right to removal of the defect is conditioned also by the cost-effectiveness of its removal, and though the LCT does not mention explicitly this factor, it should definitely be taken into account.

2) The right of the buyer to require due performance of the contract in terms of subsequent delivery of goods without defects is not conditioned in the LCT by the requirement that the defect must constitute a fundamental breach of the contract; LCT solution integrates the understanding according to which the efforts and costs for the seller are taken into account when requiring delivery of substitute goods, and the buyer is prevented from using this right in every case, including those where such actions are not necessary. The right to delivery of substitute goods without defects is not limited to generic goods, nor is it conditioned by the possibility of restituting goods in an unchanged state (art. 496 LCT).

**b) The right of a buyer to price reduction.** The buyer has the right to price reduction of goods with defect (bonification). The price is reduced, pursuant to the provisions of art. 498 LCT, for the amount that constitutes a difference between the value of goods without defects and value of goods with defect. The time of contract conclusion is used for the calculation of the value. The burden of proof that the value of goods was reduced lies on the buyer. If the buyer paid the full price before discovering the defect, he shall have the right to restitute a part of the price, as well as the legal interest rate from the day of payment until the restitution of the amount due to price reduction.

As to the price reduction, there is a departure from the Convention in terms of calculating the price reduction. Pursuant to the provisions of art. 498 LCT the price is reduced according to the ratio between value of the goods without defects and value of defected goods in the moment of contract conclusion, while provision of art. 50 CISG stipulates that the relevant time for calculation of the value of goods is the time of delivery of goods. The provision of art. 499 LCT defines that the

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86 Kapor, op.cit. p. 986.
87 Kapor, op.cit. p. 997; Vizner, op.cit., p. 1632. In this light, the decision of the Supreme Court of Montenegro, Rev-299/03 dated Nov 23, 2006, (Bilten VSRCG 2007, p. 61-62); „Price reduction shall be done according to value of goods without defect and value of goods with defect at the time of contract conclusion, not at the time of the judgment.”
88 Vizner, op.cit. p. 1632.
89 In that light, decision of the Supreme Court of Republic of Croatia, Rev-262/01 dated Jul 5, 2001.
buyer who procured the price reduction due to existence of some defect can terminate the contract or claim a new price reduction if another defect is discovered subsequently.

c) **The right of the buyer to terminate the contract.** According to LCT, the right to terminate the contract is also not conditioned by existence of material defect that constitutes a fundamental breach of contract; the threshold for the right to terminate the contract is set at a much lower level in Bosnian and Herzegovinian law than is required by the Convention. The requirement to be met for a unilateral termination of contract by the buyer is, pursuant to the provision of art. 490 para. 1 LCT, provision of a subsequent adequate time limit to the seller\(^90\) for the performance of his obligation, except in cases referred to in paragraph 2 of this article.

Paragraph 2 of art. 490 LCT releases the buyer from the obligation to provide subsequent adequate time limit in cases when the seller informs the buyer, after receiving the notification on defects, that he does not intend to remove the defects or where this is obvious from the circumstances of the concrete case.

The importance assigned to the provision of the subsequent adequate time limit pursuant to solutions in the Convention is lesser than the importance that the LCT assigns to its relevant provision. The buyer, pursuant to the provision of art. 47 para. 1 CISG can provide the seller with a reasonable time limit for performance of any of his obligations. It should be underlined that provision of the subsequent time limit for due performance of obligations is not an obligation or a duty of the buyer.\(^91\) Provision of the subsequent time limit is, however, most important for the breach of contract in light of failure to deliver in time limits referred to in art. 33 CISG. Should the seller fail to deliver goods in these time limits, provision of subsequent time limit may, if it is unsuccessful, enable the buyer to terminate the contract. In all other cases of the breach of contract by the seller, particularly in delivery of goods lacking conformity, the right of the buyer to terminate the contract depends exclusively on whether the lack of conformity can be established as a fundamental breach of contract in light of art. 25 CISG. Provision of subsequent time limit for performance, according to the Convention, is of particular importance in another situation, namely, when the delivery of goods lacking conformity constitutes a fundamental breach of contract, but the buyer decides to keep the contract in force by requiring performance in subsequent delivery of goods in conformity or remedy of the lack of conformity, missing thus the time limit to declare termination. The buyer that then decides to apply his right to unilateral termination of contract shall provide the seller with a subsequent reasonable time limit for due performance of his obligation.\(^92\)

Should the seller fail to perform the contract in the subsequent time limit, the contract shall be terminated by law, but the buyer may, pursuant to the provision of art. 491 LCT, keep it in force by his declaration that he must submit without delay. The termination shall occur only after the expiration of the unsuccessful subsequent time limit for due performance, provided that the subsequent time limit was reasonably long or longer than reasonable; if the time limit were shorter, the contract would be deemed terminated but only after the expiration of a reasonable time limit, and not the one set by the buyer. Termination occurs once the time limit expires, and no other actions are required, such as filing of a lawsuit.\(^93\)

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\(^90\) Duration of the time limit is determined in each particular case, but in general it should not be long. The seller should be provided with a subsequent time limit sufficient to perform the delivery of goods to the buyer, where goods are ready for delivery; when determining this time limit the time necessary to prepare the goods for delivery needs not be taken into account. In practice, this time limit is usually 8 to 15 days as of the day the seller is notified thereon.

\(^91\) Schlechtriem, op.cit. p. 133.

\(^92\) Müller-Chan, op.cit. p. 532.

\(^93\) Slakoper, Komentar ZOO, p. 656.
The Law of Contracts and Torts contains also rules regulating situations in which only part of the delivered goods have defects or goods were delivered in quantity lesser than required by the contract (partial defect – art. 492 LCT), or were delivered in quantity exceeding the one required by contract (art. 493 LCT), and of sale of several goods or groups of goods under one contract and at one price (art. 494 LCT).

When comparing provisions of art. 492 LCT with provisions of art. 51 CISG, the following is worth noting:

- pursuant to the provision of art. 492 para. 1 LCT, the buyer shall have the exclusive right to terminate the contract in respect to the part of goods with defect or the missing quantity of goods; on the other hand, according to the provision of art. 51 para. 1 CISG the buyer in these same cases has all the rights pursuant to the provisions of art. 46 through 50 CISG;

- the buyer has the right to terminate the contract pursuant to the provision of art. 492 para. 2 LCT only if the stipulated quantity of delivered goods is an integral part, or if the buyer has some justified interest to take the goods agreed upon or the entire quantity, while according to the provision of art. 51 para. 2 CISG the buyer has the right to terminate the contract in its entirety only if the failure to make delivery complete or in conformity with the contract amounts to a fundamental breach of the contract;

- one can automatically notice the different concepts of liability for the defect according to LCT and for the lack of conformity according to CISG: LCT does not define the delivery of lesser quantity as material defect and does not provide the buyer with all the rights assigned to him based on existence of material defect, while CISG includes lesser quantity in material defects. Also notable is the importance that CISG assigns here to the fundamental breach of contract.

As to the delivery of quantities greater than required by the contract, LCT and CISG stipulate almost identical solutions, LCT in the provision of art. 493, and CISG in the provision of art. 52 para. 2. The buyer, pursuant to both the provision of art. 493 para. 1 LCT and the provision of art. 52 para. 2 CISG may reject the surplus. The difference is in the fact that provision of art. 493 para. 2 LCT obligates the buyer to declare in a reasonable time limit that he rejects the surplus, otherwise it shall be assumed that it is accepted and he shall be obligated to pay for it, while the provision of art. 52 para. 2 CISG only states that the buyer who accepts the entire excess quantity or part of the excess quantity must pay for it at the contract rate.

LCT does not contain the provision in the part referring to liability for material defects on the contract with delivery by installments, but the rules on termination of the contract with delivery by installments are contained in the general part of LCT in the provisions of art. 129 LCT, while CISG regulates the right of the buyer to terminate the contract with delivery by installments in its part of entirety in the provisions of art. 73. On the other hand, LCT in art. 494 contains explicit provisions on the right of the buyer to terminate the contract when several goods or a group of goods have been sold through one contract and at one price, and only some of them are defected.

Pursuant to the provisions of art. 495 LCT the buyer loses the right to terminate the contract due to defected goods when it is not feasible for him to return the goods or to return them in the same state as when he accepted them (para. 1), except when goods are completely or fully ruined or damaged due to defect that justifies the termination of contract or due to some event that the buyer is not liable for (para. 2). The buyer shall have the right to terminate the contract when the buyer cannot return the goods or cannot return them in the state he received them and when the goods have been completely or partially ruined or damaged due to examination, or if the buyer prior to revealing the defect consumed or altered one part of goods during its regular use, as well
as when damaging or altering is insignificant (para. 3). In this part, solutions provided by LCT are in compliance with the solutions of CISG art. 82.

The buyer who, due to impossibility to return the goods or to return them in state in which he accepted them, lost the right to terminate the contract, shall keep, pursuant to art. 496 LCT, other rights provided by the law due to existence of material defect.

Consequences of the termination of contract are regulated in the general part of LCT, in the provisions of art. 132 LCT dealing with effects of termination.

d) The right of the buyer to claim damages

Cumulatively to one of the above rights, the buyer, pursuant to the provision of art. 488 para. 2 LCT, also has the right to claim damages. Damage is compensated in accordance with the provisions contained in the general part of the law, regulating the right to damages due to the breach of contractual obligations (arts. 262-269 LCT). LCT also contains special provisions under the heading Damages in Case of Cancelling the Sale (Arts. 523-526), including the provisions on damages due to termination when the sale or purchase for the purpose of covering has not been performed (art. 524 LCT) and when it has been performed (art. 525 LCT).

7. Lack of conformity at the time when the risk passes to the buyer and after the passing of the risk

The seller, pursuant to the provision of art. 36 para. 1 CISG, is liable for any lack of conformity of the goods which exists at the moment when the risk passes to the buyer. The moment when the risk passes to the buyer is defined in accordance with the agreement of the contracting parties or based on customary rules, as well as in accordance with provisions of arts. 67-69 of the Convention. The seller is liable also for the lack of conformity that is not apparent at the moment when the risk passes to the buyer, but only after that time; this situation regularly appears when the goods have hidden defects.

The seller shall be liable for lack of conformity after the risk is passed pursuant to art. 36 para. 2 CISG when he caused the lack of conformity by breaching a contractual obligation. The breach of contractual obligation can arise before the risk is passed (for instance, due to inadequate transport), as well as after the risk is passed (lack of conformity that arises, for instance, when the seller takes over the containers containing the goods and damages the goods during the process).

Pursuant to the provision of art. 36 para. 2 CISG the seller is also liable for any lack of conformity which occurred after the risk was passed due to a breach of guarantee provided by the seller that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose, or will retain specified qualities or characteristics. The seller may provide declaration of guarantee expressly or implicitly. Express guarantee is most often the one provided by the producer of specific goods and it is time bound. Implicit guarantee, characteristic of food products and medicines, is problematic as it renders it impossible to precisely determine the validity period of the product. In cases like these, the validity period is usually a reasonable period adapted to the circumstances. The Convention failed to address this time period, as it was impossible to adopt more general criteria that would go beyond those characteristic for specific cases.94

Solutions provided by LCT. Pursuant to the provision of art. 478 para. 1 LCT the seller is liable to the buyer for defects that existed on the subject matter of the contract at the moment when

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94 Schwenzer, op.cit. p. 437.
the risk was passed on the buyer. Equally to CISG, LCT also obligates the seller to be liable for those defects that were not visible at the time the risk was passed (hidden defects), but appeared after that time. The seller, pursuant to para. 2 of this article, is liable also for defects that appear after the risk was passed on the buyer, if they result from the origin that existed prior to this. Domestic legislation is in this respect similar to those legislations according to which a contract produces exclusively legal obligation effects and in which the defect needs to exist at the moment the risk is passed from the transferor to the acquirer. The seller, according the Bosnian and Herzegovinian law, is liable, pursuant to art. 500 LCT, for defects that appear after the risk was passed by breach of guarantee.

8. Obligation of the buyer to examine the goods – comparison of art. 38 CISG and relevant rules in domestic law

Solutions provided by CISG. The provision of art. 38 of the Convention says that the buyer must examine the goods subject matter of the contract. In general, this obligation is important as it represents the basis or requirement for declaring lack of conformity referred to in art. 39 CISG. The time period for the buyer to examine goods pursuant to art. 38 matches the time period in which the buyer, pursuant to the provisions of art. 39 CISG, should have determined the existence of defect. Time limits to notify on the lack of conformity referred to in art. 39 CISG start at the moment in which the buyer must have determined the existence of defect, as well as time limits during which the buyer must declare will to terminate the contract, pursuant to art. 49 II b CISG.

The obligation to examine the goods refers to the lack of conformity of goods in light of art. 35 of the Convention and it exists regardless of how obvious the lack of conformity is.

The examination can be done by the buyer, alone or with the seller, or by the person authorized by the buyer. Examiners can be also neutral third parties appointed by the contractor or state institutes.

When defining the mode of examination, preference is given to the agreement of contracting parties, followed by customs; should there be no agreement or customs to determine the mode of examination, it shall be done in accordance with the type, quantity, packaging and all other features of the concrete case, having in mind the objective criteria, and not subjective factors that might be known to the seller, such as insufficient expertise of the buyer of the lack of necessary infrastructure in the place of examination.

In delivery of greater quantities of goods, the buyer must not examine the entire quantity, only the representative items. This sometimes includes opening of cans, defreezing the frozen goods, opening the packaging, in quantities proportionate to the contract quantity. In some cases, the buyer must also perform processing of goods as trial or putting them in trial operation.

The buyer must, pursuant to the provision of art. 38 para. 1 of the Convention, examine the goods within as short a period as is practicable in the circumstances. The intention was to set a flexible time limit, having in mind varieties of subjects of sales contracts. Particular speed is needed with perishable goods; in cases of examination of goods with long validity period, national legislations provide different interpretations; German judiciary is famous for its strictness in interpreting time limits for examination and complaints, opting for shorter time limits, unlike the French courts.

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95 Perović, Obligaciono pravo, 1980, p. 393.
96 Schwenzer, op.cit. p. 445.
97 Schwenzer, op.cit. p. 447.
98 For more on different types of goods: Schwenzer, op.cit. p. 448.
99 Reinicke, op.cit. p. 98.
for instance.\textsuperscript{100} In cases in which the defect can be easily discovered, the case law defines a so-called mean value by setting a time limit of 5 working days.\textsuperscript{101}

Time limits for examination start at the moment of delivery. In cases of early delivery, the buyer cannot be expected to make an early examination, while in case of the late delivery, it should be determined in each case whether the buyer could easily adapt to the delayed delivery.\textsuperscript{102}

Time limits for examination of goods, if the contract involves carriage of the goods start, pursuant to the provision of art. 38 para. 2 CISG, after the goods have arrived at their destination.

Pursuant to the provision of art. 38 para. 3 CISG, if the goods are redirected, time limits will start only after the goods have arrived at the new destination. Redirecting occurs when the goods prior to reaching their initial destination are redirected to another destination. The same applies to further sale of goods: time limit referred to in art. 38 para. 1 CISG starts after the goods have arrived at the final destination.

It is important to underline that the precondition to delay the start of the time limit is the fact that the seller knew or ought to have known of redirection or redispatch. The seller is regularly informed thereon when he is in the capacity of the trader – mediator. In all other cases, the buyer must in fact warn the seller about the intended redirection or redispatch.

The start of the time limit for examination, however, can be moved only in cases where the buyer had no prior opportunity to examine the goods. As to the opportunity of the buyer to examine the goods prior to redirecting or redispatch, it depends on the time the goods spent with the buyer before its further dispatch, but also on its packaging; in cases when the packaging of goods necessary for its protection in further transport must be opened or when the containers must be reloaded for the purpose of the examination, which is time consuming and costly, the examination will be postponed until the goods reach the destination.\textsuperscript{103}

\textit{Comparison with solutions provided by LCT}. The Law of Contracts and Torts regulates the examination of subject matter of the contract in provisions of arts. 481, 483 and 485. Similarly to the Convention, examination of the goods, together with the notification on defects, is a requirement for the buyer to exercise his rights on grounds of material defects. The provision of art. 481 para. 1 LCT says that the buyer must examine the received goods in an ordinary manner or have them examined as soon as possible in the regular course of affairs. The examination is in fact an action that serves to determine defects that must be notified if the buyer is to keep the rights on the grounds of material defects. However, domestic case law also provides that the goods must not be examined for the defect to be notified when the buyer determined with certainty the existence of defect prior to receiving the goods.\textsuperscript{104}

LCT does not depart significantly from art. 38 para. 1. CISG. Instead of stipulating as short a period as is practicable in the circumstances, LCT provides that the examination will be performed „as soon as regular circumstances allow”. In this way, LCT obligates the buyer to undertake the examination at the earliest possible time according to the regular circumstances, i.e. the buyer must act immediately and must not delay the examination, therefore this solution is considered in compliance with CISG. In the provision of art. 485, LCT mentions the examination without delay, and it is assumed that the omission of this terminology in provision art. 481 LCT is most probably an editing

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{100} Schwenzer, op.cit. p. 449.
\item \textsuperscript{101} Pilz, op.cit. p. 266
\item \textsuperscript{102} OGH, 14.1.2002, CISG-online 643.
\item \textsuperscript{103} Schwenzer, op.cit. p. 542.
\item \textsuperscript{104} Kapor, op.cit. p. 977.
\end{itemize}
\end{footnotesize}
mistake.\textsuperscript{105} As the law is silent on the place of examination, in line with the above, the buyer shall have the obligation to examine the goods where that will be possible; the place can be the seller’s warehouse as well in case when it is the set place of delivery or, for instance, the dispatch station, but it is most often the place of destination i.e. the buyer’s warehouse.

The law does not regulate the manner of examination separately. For matters not regulated in the Law of Contracts and Torts, the domestic law applies the General Usances for Trade in Goods, so these matters are solved by reference to the Usances that address the examination of goods in sufficient detail. Examination of goods are addressed in the Usances as quality assurance, and pursuant to Usance no. 147, examination should be performed by a commission or in another credible manner, in particular: by expert examination, comparison with the sample, chemical analysis, physical measurements, sample extraction. The examination of the originally packaged goods is limited to the examination of the package. Domestic case law dealt with many disputes related to the notion of original packaging.\textsuperscript{106} Domestic solutions, in line with the above, that do not find it necessary to open the original packaging of goods depart somewhat from the solutions and interpretation of the Convention, that stipulates that such an examination is in some instances necessary despite the fact that after it the goods will not be fit for use, at least not in respect of further trade in these goods.

Pursuant to Usance no. 149, minutes are drafted on the conducted examination. According to the practice, the minutes are drafted during the hand over; the minutes drafted eight days after the determination of quality shall not be credible.

Pursuant to the provision of art. 481 para. 3 LCT, the examination of the goods is delayed in case it is redispached without reloading until the goods reach the destination, provided that the seller knew or ought to have known of this possibility. To delay the time limit for the examination, LCT requires redispach of goods without reloading by the buyer and that the seller knew or ought to have known of this possibility at the time of contract conclusion. LCT does not explicitly regulate the situation of redirecting of goods referred to in art. 38 para. 3 CISG, and in respect to redispach, it stipulated lack of reloading, while the Convention speaks of lack of reasonable opportunity for examination.

LCT departs here from the solutions provided by the Convention. Though the comments to LCT most often treat cases of redispach as cases of sale by the buyer to a third party and related dispatch without reloading\textsuperscript{107}, cases of redispach without further sale by the buyer should be included in cases of dispatch subject of provision of art. 481 para. 3 LCT, for instance when the buyer needs the goods in some place other than the place where he initially needed them according to the contract.

An important difference with regard to CISG is that pursuant to the provision of art. 38 para. 3 CISG it is irrelevant for the examination in redispach whether goods have been reloaded or not, unlike in art. 481 para. 3 LCT. The solution of LCT is in this respect harmonized with art. 38 para. 3 of the Hague Uniform Law on the International Sale of Goods.

Pursuant to the provision of art. 483 LCT time limits for the examination of the goods start as of the delivery of repaired goods, delivery of substitute goods, replacement of parts etc.

Pursuant to the provision of art. 482 para. 2 LCT the seller’s liability for material defects in goods expires six months after the delivery of goods, except where the parties agreed on the extension of this period. The time limit is the preclusive time limit and the court respects it ex officio. The buyer will not lose the right to refer to a defect even when the buyer failed to examine the goods

\textsuperscript{105} Kapor, op.cit. p. 977.
\textsuperscript{106} Kapor, op.cit. p. 978.
\textsuperscript{107} Kapor, op.cit. p. 979.
without delay or when the hidden defect appeared after the expiration of the six months period in case of the seller’s negligence, pursuant to the provision of art. 485 LCT.

9. **Obligation of the buyer to notify on lack of conformity/material defect – comparison of art. 39 CISG and relevant domestic regulations**

**Solutions provided by CISG.** The provisions of art. 39 of the Convention speak of notification on the lack of conformity. Pursuant to the provisions of this Article, the buyer must: a) within reasonable time, b) after he has discovered the lack of conformity or ought to have discovered it, and c) at the latest within a period of two years from the date on which the goods were actually handed over to the buyer d) give the seller notice on the lack of conformity, and e) to specify the nature of the lack of conformity. The notice must contain sufficient description of the lack of conformity to enable the seller to understand the defect and to take adequate steps, such as preparation of evidence contesting the buyer’s notice or subsequent performance of the contract by delivery of goods in conformity or remedy of the lack of conformity. General statements expressing the buyer’s dissatisfaction with the delivered goods, not containing the description of the lack of conformity, shall not be considered a valid notice in light of art. 39 CISG. The buyer must address the lack of conformity in terms of quantity and quality of delivered goods, as well as the delivery of goods not required by the contract (aliud). It is the buyer’s obligation to inform the seller on the scope of goods delivered in exceeding quantity that has the lack of conformity.

The notice does not have to be in a given form. Pursuant to art. 2z of the Convention the risk of notice not reaching or being delayed, as well as reaching but amended, shall lie upon the seller, provided that the notice was sent via means of communication appropriate for the circumstances.

The buyer must not invite the seller in the notice to examine the goods not must he immediately opt for one of the rights referred to in art. 45 of the Convention. However, as the right to subsequent due performance of contract and the right to terminate the contract is conditioned by the buyer sending the declaration as to what right he intends to apply within reasonable/appropriate time after the notice or the discovery of the lack of conformity or possibility thereon, it is advised that the buyer should do this together with sending the notice on lack of conformity.

Pursuant to the provision of art. 39 para. 1 CISG, the buyer must give notice to the seller on the lack of conformity within a reasonable time limit after he has discovered it or ought to have discovered it. When defining a reasonable time limit, circumstances of the case are taken into account, as well as trade customs. An important factor is whether goods are perishable or not.

The time limit starts at the moment when the buyer discovered or ought to have discovered the lack of conformity. To answer the question when the buyer ought to have discovered the lack of conformity, we must begin with the lack of conformity itself. Lacks of conformity that were not discovered in the regular examination, i.e. the hidden ones, must be notified within a reasonable time limit as of the moment when the buyer discovered or ought to have discovered them.

Along with the relative time limit for the notice on lack of conformity in the provision of art. 39 para. 2 CISG, the Convention stipulates the objective time limit of two years referred to in art. 27. The time limit is applied in situations when the lack of conformity could not have been discovered in the regular examination, and the buyer did not discover it or ought not to have discovered it even later, as well as in cases when the buyer has a reasonable justification for failure to send a notice referred to in art. 39 para. 1 CISG (art. 44 CISG). After the expiration of the two-year preclusive time

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108 Pilz, op.cit. p. 257.
limit, the buyer can no longer rely on the rights from art. 44 CISG. Application of this time limit is not possible if the seller was negligent in light of provisions of art. 40 of the Convention.

This is a preclusive time limit, not subject to suspension or termination, and the court handles it ex officio. This time limit starts at the moment of the factual handover of the goods to the buyer.

The preclusive time limit from art. 27 of the Convention shall not apply in situations where the contracting parties agreed on guarantee time limits longer or shorter than the two-year preclusive time limit. This preclusive time limit may not be replaced by the limitation period based on lack of conformity of goods. The limitation period is not regulated by CISG, but the provisions of the UN Convention on the Limitation Period in the International Sale of Goods from 1974. The contracting parties shall be bound by this 1947 Convention if they are seated in state party, and where collision rules of one of the state parties refer to the application of this Convention.

The 1974 Convention does stipulate a four-year time limit for limitation, that starts at the moment of delivery of the goods, and there is no collision with art. 39 para. 2 CISG in the application of 1974 Convention. The problem arises when the national law contains limitation periods that are shorter than the two-year time limit referred to in art. 39 para. 2 CISG. Such national legislations are recommended to apply the general limitation periods for rights based on lack of conformity of goods. However, this problem with time limits is reflected in the duration that is too long for the circumstances of the international business.110

As the solution is not provided, contracting parties are advised to define the limitation periods in the contract, having in mind the provisions of art. 39 para. 2 of the Convention.

The buyer loses the right to rely on lack of conformity of goods when he fails to send a notice in compliance with the provisions; in such a case, it will be considered that the buyer agreed to accept the goods with lack of conformity. There is an exception to this rule, addressed in provisions of art. 40 CISG. Pursuant to this Article, consequences of failure to send the notice on lack of conformity do not apply when the lack of conformity is based on facts that the seller knew or could not have been unaware of and which he did not disclose to the buyer.

_Solutions provided by LCT_. Pursuant to the provision of art. 481 para. 1 LCT, the buyer must notify the seller on all visible defects within eight days, and in case of commercial contracts, without delay111, otherwise the buyer will lose all rights stemming from this ground. Hidden defects, as well as defect that could not have been discovered in a regular examination, and which appeared after the goods were accepted by the buyer, the buyer must notify to the seller within eight days in order not to lose his rights, and in case of commercial contracts, without any delay. It is obvious that the notice on the defect within the given time limits is a prerequisite for the buyer to rely on rights stemming from the grounds of existence of material defects.

Therefore, the time limits for sending the notice in defects are different in respect to civil legal contracts and commercial legal contract, and to visible or hidden defect.

When parties did not attend the examination, time limits start at the moment when the buyer had the opportunity, according to the regular course of affairs, to examine the goods and their

110 Schwenzer, op.cit. p. 464.
111 The category without any delay is relative, because the examination, as the primary way to determine the existence of defect, will depend on the nature of the goods and its quantity, as well as on the mode of examination; but it should be interpreted in such a way as to place an obligation upon the buyer to as soon as possible, without delay, examine the goods, determined the defects and notify the seller thereon. In commercial contracts, notice by the buyer is without delay only if it is sent on the same or the following day as of the day the defect was determined. The buyer is obligated, particularly in case of perishable goods, to take all measures, even extraordinary ones to perform the examination and send the notice as soon as possible.
duration is eight days, while in commercial contracts, the notice must be sent without any delay. In the case when both the buyer and the seller attended the examination\(^{112}\), the buyer, pursuant to the provision of art. 481 para. 1 LCT, must send the complaints on visible defects to the seller immediately\(^{113}\) or he will lose his rights.

In case of redispatch of the goods without reloading, where the seller knew or ought to have known of the possibility of redispatch, the buyer must, pursuant to the provision of art. 481 para. 3 LCT notify the seller on the defect as soon as he could have found out about it from his clients in the regular course of business.\(^{114}\)

Time limits for the notice are preclusive and the failure to respect them, in term of the proceeding, leads to the dismissal, not rejection of the complaint.\(^{115}\)

The notice on the defect must contain a detailed description of the defect (art. 484 para. 1 LCT) and, unlike in the Convention, an invitation to the seller to examine the goods. The obligation to invite the seller to examine the goods aims to protect the seller from ungrounded complaints by the buyer: it is less probable that the buyer who is aware of the obligation to invite the seller to examine the goods will complain on non-existent defect or falsely represent the defects, most often by magnifying them.

The notice on defect, by which the buyer complains on properties of the goods, must clearly state that the buyer does not approve such a delivery. The risk of due notice on defect, pursuant to the provision of art. 484 para. 2 LCT lies on the seller, provided that the notice was sent by usual means of communication.\(^{116}\)

The basic non-compliance with the solutions provided by the Convention exists in respect to the six-month preclusive time limit referred to in provision of art. 482 para. 2 LCT. According to this provision, the seller is not liable for the defect that appears after six months have passed from the delivery of goods, unless a longer time limit was agreed. The application of the general limitation periods that amounts to three years in mutual claims in commercial contracts is disputable due to its length.

\(^{112}\) The so called contradictory examination.

\(^{113}\) The term *immediately* means that the buyer must notify the seller on the complaints related to discovered defects immediately after the examination procedure if completed. These provisions apply regardless of whether the contract is commercial or not. If contracting parties are legal persons, it is deemed that the examination was attended by the buyer and the seller if their representatives or persons authorized to take legal actions of the hand over and receipt of the goods were present, most often these are procurement officers.

\(^{114}\) In that light, the judgment of VPSH, Př-909/82 dated Oct 12, 1982, PSP 7-8/1983, p. 18.

\(^{115}\) Slakoper, op.cit. p. 636.

\(^{116}\) Emission theories.
LIABILITY FOR MATERIAL DEFECTS
Country report for the Republic of Croatia

Part
Concept of a lack of conformity, i.e. liability for material defects in the countries of the South East Europe and European Law, PECL, CISG

In Croatian law liability for material defects is a general concept of civil obligations law, regulated in the Civil Obligations Law (National Gazette 35/05, 41/08). In nomo-technical terms this concept is set in such a way that that the basic provision has been placed in the part of the law regulating the effects of bilateral contracts. Liability of each of contracting parties for material and legal defects has been recognized (Art. 357, Para 1, of the Civil Obligations Law- COA), whereas concurrently reference is made to application of the rules on liability of the seller in sale contracts (Art. 357, Para 3 of COA), regulated in other part of the COA (Art. 400-437 COA). In addition to that, the COA retains special provisions on material defects in specific types of contracts as well (which are not sales contracts), but have some specific elements: loan contract (Art. 503, COA), lease contract (Art.525-531, COA), rental contact (Art.557-560, COA), contract for work (Art.604-611, COA) and construction contract (Art.631-632, COA). Liability for material defects constitutes an integral part of the contract only if related to payable legal actions, and in that respect reflects the general principle of equivalence of mutual recognition in obligatory legal relations. This form of liability was also regulated in the previous COA of 1978, promulgated as a federal law in the former Yugoslavia, and subsequently transferred in the legal system of the Republic of Croatia after the declaration of independence (1991). The said act was formulated under the influence of the CISG whose time of redaction coincided with that of the COA. Essentially the rules of the new COA do not divert from previous rules neither in nomo-technical nor in contextual terms. It can be said that discrepancies in those regulations have been caused by adjustment of old regulations to the Directive 1999/44 EC on certain aspects of the sale of consumer goods and associated guarantees.

However, it has been pointed out in the literature that Croatian lawmaker, in comparison to the Directive, did not accept the principle of “conformity”, i.e., a unique concept of violation of the contractual obligation, as was for example, was accepted in the CISG and PECL, but instead makes difference between the effects of non-performance from those of delay, default in performance, partial performance and intended impossibility of performance. (See Petrić, S.; Odgovornost za materialne nedostatke po novom Zakonu o obveznim odnosima, 27 Zb. PFRI 87, 101 (2006).) [Liability for material defects under the new Civil Obligations Act, 27 Zb, PFRI 87, 101 (2006)]

Criteria for determination of conformity of goods (discrepancies in quality, quantity, composition, packing, suitability for ordinary use, fitness for purpose)

The presence of conformity of goods is regulated in the COA by explicit enumeration of reasons for non-conformity. Article 401, Para 1, COA, does not mention the term “nonconformity” but instead stipulates seven reasons classified as situations when a defect is present:
1) If a thing lacks the qualities required for its regular use or circulation;

2) If a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where was known or should have been known to the seller.

3) If a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication;

4) Where the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only;

5) If the thing lacks qualities otherwise inherent to other things of the same kind and which the buyer could have reasonably expected in accordance with the nature of the thing, taking into consideration public statements of the seller, the manufacturer and their representatives on the qualities or characteristics of the thing (particularly in advertising or on labelling etc.);

6) If the thing has been badly assembled provided that the service of assembly is included in the performance of the contract of sale;

7) If bad assembly is a result of deficiencies in the instructions for assembly;

Contrary to the EC Directive setting forth in Art. 2 presumed conditions of conformity, the COA follows the principle provision on fulfilment contained in Art 342, Para 1, whereby the debtor is obligated to perform the obligation in good faith as stated in the contract, while the reasons for non-performance are contained in the cited article 401, COA. The same article, Para 3 states as a reason for a material defect a lack of qualities and characteristics previously agreed in an explicit or implicit manner, i.e. prescribed. This constitutes an extensive formulation essentially covering almost all cases of non-conformity with the contract. Hence, there is no high degree of nonconformity with regard to previously mentioned principle of “conformity” with the contract. Cited points 1), 2) 4) and 5) correspond to Art. 2, Para 2 (a)-(d) of the Directive, whereas Points 6) and 7) correspond to Art. 2, Para 5 of the Directive.

Concerning partial performance (comprising quantity related deficiency), there is a general rule contained in Art. 169, Para 1, COA stipulating that the creditor is not be obligated to accept partial performance (if it does not concern monetary obligation- Art. 169, Para 2, COA), unless otherwise indicated by the nature of the obligation. It arises from Art. 414, COA that is concerns material defects since this article defines the rights of the buyer in case of partial defects. Quantity related defects are treated in the same way as when the delivered thing is defective. Case law has confirmed the above, hence the duty of notification is extended to quantity deficiency within the same time limits, in the same way as when it concerns quality related deficiencies. (“VPS Pž 1631/85 of 4. 11. 1986.”)

The buyer is granted the right to terminate the contract only with regard to the missing part (Art 414, Para 1, COA), whereas the contract as a whole may be terminated only if the contracted quantity or delivered thing constitutes the whole, or if the buyer has a justifiable interest to be delivered the contracted thing or quantity as a whole (Art. 414, Para 2, COA).

Defects in composition and fitness for purpose may be encompassed under a more general reason from the cited Art. 401, Para 1, point 3, whereas a lack of suitability for ordinary usage is explicitly stated as a reason in the cited article 401, Para 1, Point 1, COA. Objections against delivery time, i.e. delivery beyond the contracted time, however, may not be qualified as material defects, but instead as delay (VSRH,[Supreme Court of the Republic of Croatia] Revt 127/03 of 26. 10. 2004.)
Buyer’s knowledge of the lack of conformity, duty of the buyer

Awareness of the buyer about defects usually produces negative effects with regard to liability. The seller is not held accountable for defects if the buyer was aware of the same at the time of entering into a contract or could not be unaware, pursuant to an explicit provision of Art. 402, Para 1, and COA. It is deemed that the buyer could not have been unaware of defects that a prudent and diligent person having the average knowledge and experience characteristic of a person of same occupation and profession as the buyer could easily have noticed in a usual examination of the thing. (Art. 402, Para 2, COA). With exception to this rule, the seller is held responsible for defects that the buyer could easily have noticed if he declared that the thing was free of all defects and had specific qualities or characteristics. (Art. 402, Para 4, COA).

Presumption derived from the cited Para 2 does not apply to consumer contracts (Art. 402, Para 3, COA), because the examination of things is not mandatory in consumer contracts, but instead only the duty of notification on behalf of the seller once a defect has been noticed.

The buyer has two basic obligations: 1) to inspect things and 2) to notify (report) on defects. Pursuant to Art. 403, Para 1, COA, the buyer is obligated to inspect the delivered thing in customary manner or have it inspected as soon as such inspection is possible in regular course of events, and to notify the seller about visible defects within the period of eight days, otherwise the buyer would lose the right granted to him in this regard. (Art. 403, Para 2, COA).

With regard to trade contracts, the time limit is shorter, determined as one “without delay”. When an inspection is carried out in the presence of both parties, the buyer is obligated to state his objections against visible defects to the seller immediately, or otherwise the buyer would lose the right granted to him in this regard. (Art. 403, Para 2, COA).

The obligation of inspection is postponed if the buyer takes part in the distribution chain. Pursuant to Art. 403, Para 3, COA, if the buyer forwarded the thing without reloading it, and the seller was aware or should have been aware of such possibility at the time of entering into the contract, the inspection of the thing may be postponed until its arrival at the new destination, in which case the buyer has to notify the seller of any defects as soon as, in the regular course of events, he was informed thereof by his clients.

The obligation of inspection is excluded in case of consumer contracts (Art. 403, Para 4, COA). The obligation of notification, however, is not excluded, because the buyer is obligated to notify the seller about visible defects within two months from the date of detection of a defect, and no longer than two years from the time of the risk being transferred on the consumer.

If defects are concealed, i.e. if the defects could not have been detected by means of inspection upon delivery, the buyer is obligated, under a threat of losing his right, to notify the seller within two months from the day when the defect was detected, and with commercial contracts – without delay. (Art. 404, Para 1, COA). It is the case, for example, when the buyer has bought an infested animal (VS Rev 580/83 of 15. 8. 1984) or an engine with excessive consumption of oil (VS Rev 1322/91 of 29. 10. 1991).

The time limit of two months applies both for consumer and non-specific civil contracts, whereas a shorter time limit applies only for commercial contracts. The time limit of two months relates only to concealed defects, whereas for visible defects the time limit is shorter (8 days), if related to non-specific civil contracts. With regard to consumer contracts, the time limit is always two months from the day of detection, since there is no obligation of inspection.

A notice of a defect, as a rule, is provided in writing, even though the form of notice is not specifically prescribed. However, it is stipulated that the buyer shall be deemed to have fulfilled his
duty of notifying the seller if a notice of defect sent by the buyer to the seller in a timely manner by a registered letter, telegram, and fax or in some other reliable way, is received late or not at all. (Art. 406, Para 2, COA). The buyer is not obligated to describe in detail the defect of a thing in the notice of defect and invite the seller to inspect the thing, except in respect of a commercial contract. (Art. 406, Para 1, COA).

Exceptionally, the buyer does not lose the right to invoke a defect even where failing to perform his obligation of inspecting a thing without delay or notifying the seller of the existence of a defect within a set period of time, if the buyer was aware or could not have been unaware of such defect. (Art. 407, COA).

**Relevant time to determine conformity**

The seller is liable for material defects of a thing at the moment of the transfer of risk to the buyer, regardless whether he was aware of them or not. (Art. 400, Para 1, COA). Risk of the thing (perishing by accident or being damaged) is transferred on to the buyer at the time of delivery. (Art. 378, Para 1, COA), and only exceptionally and irrespectively, if and when the buyer is in default. (Art. 379, Para 1, COA). The Directive, Art. 3, Para 1, refers only to delivery of a thing, even though Point 14 of Preamble underlines that this does not imply any changes in the rule on transfer of risk (if this rule were not to be harmonized).

The seller is also liable for all material defects arising after the transfer of risk to the buyer if they arose as a result of the cause that existed prior to it. (Art. 400, Para 2, COA).

In accordance to the rule arising from Art. 5, Para 3 of the Directive, the COA sets forth the presumption of a defect which may occur within the period of six months from the time of transfer of risk (Art. 400, Para 3, COA). The burden of proof is on the seller unless the contrary arises from the nature of a thing or the nature of a defect. (Art. 400, Para 3, COA).

Notwithstanding this, principally the seller is liable for all defects that may occur within the period of two years from delivery. In that case, upon expiry of the period of six months from delivery, it is the buyer who has to provide evidence about defects (because presumption is not valid). There are few exemptions from the cited rules:

1) in respect to commercial contracts defects have to be detected within the period of six months from the time of delivery (Art. 404, Para 2, COA).

2) in respect of second-hand things, the contractual parties may agree on a time limit of one year, or shorter than 6 months in respect of commercial contracts (Art. 404, Para 3, COA).

3) in any case the parties may extend the cited lime limits by contact (Art. 404, Para 4, and COA))

4) if the seller was aware of the defect, or he could not have been unaware (Art. 407, COA)

The time line of two years is uniquely applied on both consumer and non-specific civil contracts. Exceptions relate only to commercial contracts. On the other hand, the Directive prescribes a time limit of two years only for consumer contracts (Art. 5, Para 1, COA). Contractual reduction of a time limit in respect of second-hand goods covers any time limit but not shorter than a year, irrespective of an inapt formulation contained in Art. 404, Para 3, COA), since it concerns realisation of a possibility arising from Art. 7, Para 1 of the Directive. With respect of commercial contracts, however, there is no bottom limit; hence this provision is close to the one on exclusion or considerable limitation of liability (permitted in commercial contracts).
Contractual clauses on exclusion/limitation of liability of the seller

Given the fact that liability for material defects is an integral part of a sale contract and other payable legal actions, and that the general principle of party disposition is recognized in tort law, in principle liability may be excluded or limited (Art. 408, Para 1, COA). This possibility is, however, considerably narrowed down in two cases. Firstly, there is no possibility of limitation or exclusion of responsibility of the seller at all in consumer contracts. (Art. 408, Para 2, COA). Secondly, any limitation or exclusion is deemed void if: (1) the seller was aware of a defect but failed to notify the buyer, and (2) if this provision was imposed by the seller who took advantage of his monopolistic position (Art. 408, Para 2, COA).

In case law this rule was applied with the clause “bought as seen”, while it was ascertained that the seller was aware of defects but wrongly informed the buyer about the object of sale (a second-hand car, VSRH Rev 3770/93 of 29. 11. 1995.) V. and similar, and VSRH Rev 2335/90 of 27. 2. 1991, having applied the general usance 145 for trade in goods.

Legal remedies for buyers

The buyer has multiple choice of protection, if he has notified the seller about a defect in due time. He may request removal of a defect, delivery of another commodity without a defect (replacement), reduction of price or termination of the contract, whereas the choice in some cases may be limited. In any case, the buyer is entitled to the repair of damage in accordance to general rules on liability for damage, including damage caused by such defect to his other property (indirect damage). (Art. 410, Para 2, COA). The buyer may request that a defect be removed if such defect is removable, or otherwise he may exercise other rights. Replacement is possible if it concerns generic things. In view of the fact that requests are made alternatively, the buyer may insist on replacement even when removal of a defect (repair) is possible. Cost is born by the seller in both cases (Art. 410, Para 4, COA). Exceptionally, if removal of a defect, i.e. delivery of another thing without defect would cause inconveniences for the buyer, he is entitled to cancel the contract (immediately) or to request proportionate reduction of price (Art. 412, Para 3, COA).

The right to reduction of price is exercised by placing the value of goods without any defects and the value of goods with defects in proportion at the time of the conclusion of a contract. (Art. 420, COA).

Under the COA, termination of a contract due to material defects does not differ in principle from the general concept of termination. Consequences are the same (Art. 419, Para 1, COA). However, the right to termination is limited. Firstly, if a defect is negligible, the buyer is not entitled to terminate a contract (while retaining the entitlement to other rights) (Art. 401, Para 3, COA, and Art. 3, Para 6, Directive). Secondly, the buyer may terminate a contract only if a subsequent time limit granted to the seller to perform the contract had elapsed. (Art. 412, Para 1, COA). Exceptionally, the buyer may terminate a contract even without allowing for a subsequent time limit if the seller, after having been notified of the defects, informed the buyer of his intention not to perform the contract or if the circumstances of the particular case render it obvious that the seller will not be able to perform the contract even within the subsequent time limit, as well as in the case where the buyer due to default by the seller cannot achieve the purpose for which he entered into the contract. (Art. 412, Para 2, COA).

The allowance of a subsequent time limit for performance is a general rule pertaining to termination due to non-performance. Hence, the stated rules do no depart from the general regime. This is not about some a special system of gradual degree of protection of the buyer, but instead the
allowance of an appropriate subsequent time limit is universally incorporated into the concept of termination as such.

Termination due to non-performance takes place *ex lege*, by virtue of expiry of the given time limit (Art. 362, Para 3 and Art. 361, Para 1, COA). Pursuant to Art. 413, Para 1, COA, the consequence is the same, but the buyer may keep the contract in force if he intimates to the seller without delay that the contract is to remain in force.

Thirdly, the buyer loses the right to terminate a contract (while retaining all other rights- Art. 418, COA) due to defects of things if he is unable to return this thing or to return it in the condition he received it (Art. 417, Para 1, COA), unless the concerned thing was destroyed (Art. 417, Para 2 and 3, COA):

- due to defect which justifies termination, or
- due to an event not caused by him or any of person he is responsible for, or
- when exercising the duty of the buyer to inspect things, or
- if the buyer prior to detection of a defect used or changed one part of a thing in course of its regular use, and if damage or changes are of no relevance.

In the stated cases the buyer is liable to the seller for benefits he enjoyed from a thing (if so) (Art. 419, Para 2, COA).

Fourthly, the buyer has limited possibilities for termination in case of partial defects. These defects have been already mentioned *supra*. It is specifically envisaged that when several things or a group of things have been sold by one contract and for one price and only some of them have a defect, the buyer may terminate the contract only in respect of such things and not the remaining things. (Art. 416, Para 1, COA). However, if they make up a whole and their separation would be damaging, the buyer may terminate the entire contract, or if he states that the contract is cancelled only in respect of things with a defect, the seller on his part may terminate the contract also in respect of other things. (Art. 416, Para 2, COA).

In comparison to the Directive, the COA anticipates somewhat a less complex regulation. The Directive distinguishes between removal and replacement on one hand, and price reduction and termination, on the other hand. The primary way is repair or replacement (Art. 3, Directive), whereas the Directive, as well as the COA, treats these remedies alternatively, allowing the buyer the right of choice. Other rights are of secondary nature, hence if the buyer is not entitled to repair or replacement, or if the seller failed to repair or replace things in a reasonable time or without considerable inconvenience for the buyer, the buyer will be entitled to get a reduced price or termination of a contract (Art.3, Para 5, Directive).

The right to repair or replacement does not exist if the remedy is disproportionate (Art. 3, Para 3, Directive). The remedy is deemed disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account the value of goods would have if there were no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the consumer (Art. 3, Para 5, Directive).

At the first glance we could say that the COA does not contain corresponding provisions that in principal do not allow reduction of price or termination. Limitations with respect to termination of a contract are conditioned by the very concept of termination, and not by the concept of degrees of protection against material defects. Ambiguity arises from Art. 412, Para 3, COA, maintaining that “if a manner of elimination of a defect, i.e., delivery of another thing without defects could be incon-
venient for the buyer, he is entitled to terminate the contract or request proportionate reduction of price. “Evidently, this provision was inspired by the Directive, but it can be interpreted in two ways: as granting the right to the buyer to terminate the contract, i.e. to reduce price without any subsequent appropriate time limit; and that the buyer is entitled to reduction of price or termination of the contract under the presumption that repair or replacement are considered as inadequate. The latter interpretation is in line with the text of the Directive (but not with an objective of a higher degree of protection of consumers); or with other provisions on material defects, primarily with Art. 410, Para 1, COA.

The rights of a buyer who has notified a seller of the existence of a defect in due time will be extinguished after two years, counting from the day the notice was sent to the seller, unless the seller deceived the buyer into failing to exercise his rights (Art. 422, Para 1, COA). The buyer who has notified a seller of the existence of a defect in due time may after the expiry of this term, if he has not paid the price, request that the price be reduced or that he be compensated for damage, as objection against the seller’s request to be paid the price (Art. 422, Para 2, COA). In case law objection for the purpose of settlement with reduced price upon expiry of a time line has been accepted, provided that a notice is timely ((VTS Pž 1449/93 of 1. 6. 1994).

A time limit relates to preclusion, and not to limitation. According to the Directive it concerns statutory limitations (in translations into the French language the term “délai de prescription” is used, and “Verjährungsfrist” in German), this being a more favourable solution for the buyer than preclusion. It is not quite clear why the Croatian lawmaker insisted on preclusion. According to the Directive, a time limit runs from the day of delivery, and to the COA, from the day of notification.

In analysis of liability for damage which is independent of other rights related to liability for material defects, the literature states three types of damage: 1) direct damage due to defects (damnum quoad rem); 2) damage related to a thing (damnum circa rem), and 3) indirect damage (damnum extra rem), (See V. Vedriš, M. i Klarić, P.; Građansko pravo, 2008, pg. 422-423). Direct damage is a consequence of a defect, i.e. it is reflected in reduced value of a thing or its destruction. This request cannot be cumulatively added to others, because it is adequately covered with remedies. Damage related to a thing is usually a consequence of legal and factual action of the buyer who is convinced that there are no defects, such as the costs of transportation, storage, processing, and damage caused by delay in production, etc. Damage other than damage of goods relates to pecuniary and non-pecuniary damage as an unintended consequence of a defect.

Consumer Problems (questions)

Nowadays the Croatian legislator is motivated primarily with issues related to the protection of consumers in the COA, not covered by the previous law to the same extent. Moreover, most changes with regard to the previous law came about as a result of specific consumer regulations with regard to commercial contracts one hand, and non-specific civil contracts on the other hand.

Consumer contracts are defined under Art. 402, Para 3, COA as contacts a natural person as the buyer concluded outside his economic or professional activities with another natural or legal person as the seller, within the framework of his economic or professional activity. (consumer contacts).

As it has already been underlined, consumers are entitled to special protection by virtue of departure from general rules:

1) application of the rule on the obligation of inspection, as well as the presumption on defects that the buyer should have been aware of, have been excluded,
2) consumer is obligated to notify, but within an extended time (compared to other actors) of 2 months since the time of detection of a defect, but no later than 2 years from the time of transfer of risk

3) consumer contracts cannot contain a provision on exclusion or limitation of liability: such provisions are deemed void.

Regulations on the protection of consumers are indirect effects of the implementation of the cited Directive. It is important to note that the Croatian legislator adopted minimum standards of protection, since the duty of notification of the seller by the buyer is prescribed in the law, albeit with the shortest time limit (2 months) referred to in Art. 5, Para 2, COA (V.T. 19 of Preamble stating that the member states may adopt higher standards of protection).

Part
Comparison of the concept of defects in the CISG and liability for material defects in domestic legal systems – general

In Croatian law liability for material defects is a concept of tort law, regulated in the Civil Obligations Act (National Gazette, 3505, 41/08). In normo-technical terms this concept is set in such a way that the basic provision is placed in the part of the law regulating effects of bilateral contracts. Liability of each contracting party for material and legal defects in performance has been recognised as a general rule (Art. 357, Para 1, COA), whereas concurrently reference is being made to the application of a rule on liability of the seller in contracts of sale (Art. 357, Para 3, COA), which are regulated in another part of the COA (Art. 400-437, COA). In addition to this, the COA contains special provisions on material defects pertaining to some types of contracts (not contracts of sale) to which certain specificities are attributed. Those are: a contract of loan (Art. 503, COA), contract of lease (Art. 525-531, COA 05), contract of rent (Art.557-560, COA), contract for work (Art. 604-611, COA) and contract for construction (Art. 631-632, COA).

Contrary to this, the CISG is applied only on contracts of sale, and it does not concern a wider international law regulation (Art. 1, 3 and 4, CISG). Pursuant to Art. 3, Para 1, CISG contracts on delivery of goods to be manufactured or produced are considered as contracts of sale, unless the party who ordered such goods also assumed responsibility to deliver essential portion of material required for such manufacture or production. In addition, the CISG is not applied on some types of sale as well (Art. 2, CISG excludes application on goods bought for personal, family or household use, unless the seller was not aware or could not have been aware prior or at the time of entering into a contract that such was the purpose of usage; at a public auction; in case of forfeiture or some other court initiated proceeding, securities and money; vessels, speed boats with air bags and aircrafts; and electric power.

Liability for material defects constitute an integral part of the contract only if related to payable legal actions, and in that respect reflects the general principle of equivalence of mutual recognition in obligatory legal relations. This form of liability was also regulated in the previous COA of 1978, promulgated as a federal law in the former Yugoslavia, and subsequently transferred in the legal system of the Republic of Croatia after the declaration of independence (1991). The said act was formulated under the influence of the CISG whose time of redaction coincided with that of the COA the said act was formulated under the influence of the CISG whose time of redaction coincided with that of the COA. Essentially the rules of the new COA do not divert from previous rules neither in normo-technical nor in contextual terms. It can be said that discrepancies in those regulations have
been caused by adjustment of old regulations to the Directive 1999/44 EC on certain aspects of the sale of consumer goods and associated EU guarantees.

However, it has been pointed out in the literature that Croatian lawmaker, in comparison to the Directive, did not accept the principle of “conformity”; i.e., a unique concept of a breach of contractual obligation, as was for example, accepted in the CISG and PECL, but instead makes difference between the effects of non-performance from those of delay, default in performance, partial performance and intended impossibility of performance. (See Patrice, S.; Odgovornost za materijalne nedostatke po novom Zakonu o obveznim odnosima, 27 Zb. PFRi 87, 101 (2006).)

Conformity requirements (Art. 35.1. CISG) – contractual requirements: defects in quality, quantity, nature of goods, storage or packaging;

The presence of conformity of goods is regulated in the COA by explicit enumeration of reasons for nonconformity. Article 401, Para 1, COA," stipulates seven reasons classified as situations when a defect is present, *inter alia*, it is stated that a defect is present if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication. This formulation together with a general rule on performance contained in Art. 342, Para 1, COA, under which the debtor is obligated to perform his obligation in good will as stipulated, covers for the formulation contained in Art. 35, Para 1, CISG.

In respect of partial performance (encompassing a quantity defect), there is a general rule arising from Art. 169, Para 1, COA anticipating that the creditor is not obligated to accept partial performance (if it does not concern monetary obligation- Art.169, Para 2, COA), unless the nature of the obligation indicates otherwise. It can be derived from Art. 414, COA that is concerns material defects, since it refers to the rights of the buyer in case of partial performance. A quantity defect is perceived here in the same way as when part of a delivered thing has a defect. The aforesaid has been confirmed in case law, hence the duty of notification is extended to shortage of goods in the same time limits as when it concerns other defects related to quality ((VPS Pž 1631/85 of 4. 11. 1986)

The buyer is entitled to the right of termination only with regard to a missing part (Art. 414, Para 1, COA), whereas the entire contract may be terminated if the agreed quantity or delivered thing constitute a whole, or if the buyer has a justifiable interest to accept the contracted thing or quantity as a whole ( Art. 414, Para 2, COA). The CISG contains corresponding provisions as well (Art. 51). Pursuant to Art. 415, COA in case of a commercial contract of sale the seller of things determine as to their kind give the buyer a quantity in excess of what has been agreed, and the buyer fails to refuse it within a reasonable period, it is deemed that he has taken the delivery of the excess and he shall be bound to pay for it at the same price. The corresponding provision is contained in Art. 52, Para 2 of the CISG.

Defects related to quality (inadequate quality), inherent nature of things or packing may be encompassed under the cited point 3, Art, 401, Para 1, COA.

Criteria for determination of conformity (Art.. 35.2. CISG) – fitness for regular use, for specific use, sale by presentation of a model or sample, customary or appropriate packaging

The reasons contained in Art. 35, Para 2, CISG anticipate non-conformity if goods are not fit for the purpose for which goods of the same description would ordinarily be used; not fit for the particular purpose expressly or impliedly made known to the seller at the time of the conclusion of
the contract, except where the circumstances show that the buyer did not rely, or that it was unreason-
able for him to rely, on the seller's skill and judgement; do not possess the qualities of goods
which the seller has held out to the buyer as a sample or model correspond to the reasons stated in
Art. 401, Para 1, Point 1, 2, 4 and 5, COA. Case law points to cases in which distinctions in the above
sense are being debated upon, for example, a barrel leaking liquid is inappropriate since imperme-
ability is a characteristic required for regular use, and hence need not be specifically contracted (VS
Rev [Supreme Court, revised] 2032/81 of 23. 2. 1982).

The COA does not contain a specific provision stipulating a defect related to default pack-
ing or proper protection of goods customary for particular type of goods, or if there is no such way,
in a manner appropriate for preservation and protection of goods. However, the aforementioned
may be implied in general conditions. The COA, however, contains special reasons with reference
to assembly, and qualifies as a defect if a thing has not been assembled properly provided that the
service of assembly was included in performance of a contract of sale, and if improper assembly is a
result of deficiencies in the assembly manual.

When the seller is not liable for non-conformity? Knowledge of the buyer, failure to notify;

The seller is not held liable for defects if at the time of entering into the contract the buyer
was aware of them or could not have been unaware of them, according to the expressive provision
Art. 402, Para 1, COA. The same provision is contained in Art. 35, Para 3, CISG. The seller is not held
liable for defects if at the time of entering into the contract the buyer was aware of them or could not
have been unaware of them based on the explicit provision on Art. 402, Para 1, COA. The same provi-
sion is contained in Art. 35, Para 3, CISG. It is deemed that the buyer could not have been unaware
of such defects that a prudent and diligent person having the average knowledge and experience
characteristic of a person of same occupation and profession as the buyer could easily have noticed
in a usual examination of the thing (Art. 402, Para 2, COA). Exceptionally, the seller is also liable
for defect that the buyer could easily have noticed if he declared that the thing was free of all defects
and had specific qualities or characteristics. (Art. 402, Para 4, COA).

Presumption arising from the cited Para 2 does not apply to consumer contracts (Art. 402,
Para 3, COA), because the obligation of inspection of things does not exist in consumer contacts, but
instead only the duty to notify the seller once a defect has been detected.

According to Art. 39, Para 1, CISG, the buyer loses the right to rely on a lack of conformity
of the goods if he does not give notice to the seller specifying the nature of the lack of conformity
within a reasonable time after he has discovered it or ought to have discovered it. Under the COA
the buyer is obligated to notify the seller about visible defects within the period of eight days, or
otherwise he will lose the right granted thereof. With commercial contracts, a time limit is shorter,
defined as "without delay". When inspection has been performed in the presence of both parties, the
buyer is obligated to address immediately his remarks on visible defects to the seller, otherwise he
loses the right entitled to him in this regard (Art. 403, Para 2, COA).

The buyer loses the right to rely on a lack of conformity of the goods if he does not give
notice to the seller specifying the nature of the lack of conformity within a reasonable time after he
has discovered it or ought to have discovered it.

In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does
not give the seller notice thereof at the latest within a period of two years from the date on which
the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a con-
tractual period of guarantee. (Art. 39, Para 2, CISG). It appears from the above that the CISG foresees a time limit of two years as the ultimate period for detection of defects, the same is true for the COA, Art. 404, Para 2, COA stipulates that the seller will not be liable for defects arising after the expiry of two years since the thing was delivered, with exception of commercial contracts for which a time limit is six months.

**Contractual clauses on exclusion and/or limitation of liability of the seller**

Given the fact that liability for material defects is an integral part of a sale contract and other payable legal actions, and that the general principle of disposition is recognized in tort law, hence principally liability may be excluded or limited (Art. 408, Para 1, COA). This possibility is however, considerably narrowed down in two cases. Firstly, there is no possibility of limitation or exclusion of responsibility of the seller at all in consumer contracts. (Art. 408, Para 2, COA). Secondly, any limitation or exclusion is deemed void if: (1) the seller was aware of a defect but failed to notify the buyer, and (2) if this provision was imposed by the seller who took advantage of his monopolistic position (Art. 408, Para 2, COA).

In case law this rule was applied with the clause “bought as seen”, while it was ascertained that the seller was aware of defects but wrongly informed the buyer about the object of sale (a second-hand car, VSRH Rev 3770/93 of 29. 11. 1995.) V. and similar, and VSRH Rev 2335/90 of 27. 2. 1991, having applied the general usance 145 for trade in goods.

Contractual exclusion is permitted under the CISG with reference to Art. 35, Para 2 explicitly defining a different contracting.

**Comparison of legal remedies in case of non-conformity under the CISG and material defects under the domestic law**

The buyer has multiple choice of protection, if he has notified the seller about a defect in due time. He may request removal of a defect, delivery of other goods without a defect (replacement), reduction of price or termination of the contract, whereas the choice in some cases may be limited. In any case, the buyer is entitled to repair of damage in accordance with general rules on liability for damage, including the damage caused by such defect to his other property (indirect damage). (Art. 410, Para 2, COA). The buyer may request that a defect be removed if such defect is removable, or otherwise he may exercise other rights. Replacement is possible if it concerns generic things. In view of the fact that requests are made alternatively, the buyer may insist on replacement even when removal of a defect (repair) is possible. Cost is born by the seller in both cases (Art. 410, Para 4, COA). Exceptionally, if removal of a defect, i.e. delivery of another thing without defect would cause inconveniences for the buyer, he is entitled to cancel the contract (immediately) or to request proportionate reduction of price (Art. 412, Para 3, COA).

The right to reduction of price is exercised by placing the value of goods without any defects and the value of goods with defects in proportion at the time of the conclusion of a contract. (Art. 420, COA).

Under the CISG the right to remedy is limited in a sense that the buyer is not entitled to require the seller to remedy the lack of conformity by repair if this unreasonable having regard to all the circumstances. A request for repair either in conjunction with notice on the lack of conformity or within a reasonable time thereafter. (Art. 46, Para 3, CISG). The COA does not contain such limitations. In addition, pursuant to the CISG, he buyer may require delivery of substitute goods only if the lack
of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice on the lack of conformity or within a reasonable time thereafter. (Art.46, Para 2). There are no such limitations under the COA.

The CISG contains specific rules allowing for the seller to remedy any failure to perform his obligations provided that he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer (Art. 48, Para 1, CISG). The seller is granted the right to request the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller. (Art. 48, Para 2, CISG). The COA does not contain corresponding provisions.

The right to reduction of price is exercised by placing the value of goods without any defects and the value of goods with defects in proportion at the time of the conclusion of a contract. (Art. 420, COA). According to Art. 50, CISG, the buyer may, whether or not the price has already been paid, reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. The time of determination of comparative value is therefore different in the latter case since the time of delivery is taken as relevant, and not the time of conclusion of a contract.

Under the COA, termination due to material defects does not essentially differ from the general concept of termination. Consequences are the same (Art. 419, Para 1, COA). However, the right to termination is limited if:

1. If a defect is negligible, the buyer is not entitled to terminate a contract (but retains other rights) (Art. 401, Para 3, COA).

2. The buyer may terminate a contract only after having allowed the seller a subsequent adequate time limit to perform the contract (Art. 412, Para 1, COA). Exceptionally, a buyer may terminate a contract even without allowing for a subsequent time limit if the seller, after having been notified of the defects, informed the buyer of his intention not to perform the contract or if the circumstances of the particular case render it obvious that the seller will not be able to perform the contract even within the subsequent time limit, as well as in the case where the buyer due to default by the seller cannot achieve the purpose for which he concluded the contract. (Art.412, Para 2, COA).

According to the CISG, Article 49, Para 1, the buyer is entitled to terminate a contract under specific conditions:

- if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

- in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer or declares that he will not deliver within the period so fixed.

The above provisions agree with the provision of the COA, since the COA envisages that a buyer may terminate a contract even without allowing for a subsequent time limit if the seller, after having been notified of the defects, informed the buyer of his intention not to perform the contract (Art. 412, Para 2, COA). In other cases a mandatory subsequent time limit for performance of the contract is prescribed (Art. 412, Para 1, COA), but not in case that the seller informed the buyer of his intention not to perform the contract, (Art. 412, Para 2, COA).

The allowance of a subsequent time limit for performance is a general rule pertaining to termination due to non-performance. Hence, the stated rules do no depart from the general regime. This is not about some a special system of gradual degree of protection of the buyer, but instead the
allowance of an appropriate subsequent time limit is universally incorporated into the concept of termination of the contract as such.

Termination due to non-performance takes place ex lege, by virtue of expiry of the given time limit (Art. 362, Para 3 and Art. 361, Para 1, COA). Pursuant to Art. 413, Para 1, COA, the consequence is the same, but the buyer may keep the contract in force if he intimates to the seller without delay that the contract is to remain in force.

In view to the fact that the CISG does not stipulate a breach ex lege, the buyer loses the right to declare the contract avoid in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; in respect of any breach, within a reasonable time, after he knew or ought to have known of the breach; after the expiration of any additional period of time fixed by the buyer or after the buyer has declared that he will not accept performance. (Art. 49, Para 2, CISG)

Under the CISG, it is a general rule that the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. (Art. 47, Para 1, CISG). The same is true for the COA (Art. 362, COA), even with fixed-term contracts. (Art. 361, Para 2, COA). The CISG, however, limits the buyer, in a sense that the buyer may not, during that subsequent period, resort to any remedy for breach of contract. (but he retains the right to claim damages –Art. 47, Para 2, CISG).

Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance. The COA does not contain a corresponding provision, even those the same can be derived from the fact that the debtor is granted a subsequent time limit for performance of the contact.

3. The buyer loses the right to terminate the contract (while retaining other rights –Art. 418, COL) due to inability to return a thing or return it in the condition he received it. (Art.417, Para 1, COA), unless the thing was destroyed (Art.417, Para 2 and 3, COA):
   - due to defect which justifies termination, or
   - due to an event not caused by him or any of person he is responsible for, or
   - when exercising the duty of the buyer to inspect things, or
   - if the buyer prior to detection of a defect used or changed one part of a thing in course of its regular use, and if damage or changes are of no relevance.

In the stated cases the buyer is liable to the seller for benefits he enjoyed from a thing (if so) (Art. 419, Para 2, COA).

4. Concerning partial performance of the contract, actions of buyer in terms of termination of the contract are rather limited. This was discussed as length supra. It is specifically envisaged that if several things or a group of things have been sold by one contract and for one price and only some of them have a defect, the buyer may terminate the contract only in respect of such things and not the remaining things. (Art. 416, Para 1, COA). However, if they make up a whole and their separation would be damaging, the buyer may terminate the entire contract, or if he states that the contract is cancelled only in respect of things with a defect, the seller on his part may terminate the contract also in respect of other things. (Art. 416, Para 2, COA).

The rights of a buyer who has notified a seller of the existence of a defect in due time will be extinguished after two years, counting from the day the notice was sent to the seller, unless the seller deceived the buyer into failing to exercise his rights. (Art. 422, Para 1, COA). The buyer who has notified a seller of the existence of a defect in due time may after the expiry of this term, and if he has not paid the price, may request that the price be reduced or that he be compensated for damage, as
objection against the seller’s request to be paid the price. (Art. 422, Para 2. COA). In case law, objection for the purpose of settlement with reduced price upon expiry of a time limit has been accepted, provided that a notice is timely ((VTS Pž 1449/93 of 1. 6. 1994). A time limit relates to preclusion, and not to limitation.

In analysis of liability for damage as independent from other rights related to liability y for material defects, the literature states three types of damage: 1) direct damage due to defects (damnum quoad rem); 2) damage related to a thing (damnum circa rem), and 3) indirect damage (damnum extra rem), (See V. Vedriš, M. i Klarić, P.; Građansko pravo, 2008, pg.. 422-423). Direct damage is a consequence of a defect, i.e., it is reflected in reduced value of a thing or its destruction. This request cannot be cumulatively added to others, because it is adequately covered with remedies. Damage related to a thing is usually a consequence of legal and factual action of the buyer who is convinced that there are no defects, such as the costs of transportation, storage, processing, and damage caused by delay in production, etc. Damage other than damage on goods relates to pecuniary and non-pecuniary damage as an unintended consequence of a defect.

Non-conformity in case of transfer of risk and after transfer of risk (Art. 36, CISG)

Pursuant to Art. 36, Para 1, CISG the seller is liable for any lack of conformity which exists at the time when the risk passes onto the buyer, even though the lack of conformity becomes apparent only after that time. This provision corresponds to Art. 401, Para 1 and 2, COA. Under the CISG, the seller is also liable for any lack of conformity which occurs after the time of transfer of risk which is due to a breach of any of this obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics. According to the COA, the seller is also be liable for all material defects arising after the transfer of risk to the buyer if they arose as a result of the cause that existed prior to it. (Art. 400, Para 2, COA).

The COA additionally sets forth the presumption of a defect that may occur within the period of six months from the time of transfer of risk (Art.400, Para 3, COA). The burden of proof is on the seller unless the contrary arises from the nature of a thing or of a defect.

Notwithstanding this, principally the seller is liable for all defects that may occur within the period of two years from delivery. In that case, upon expiry of the period of six months from delivery, it is the buyer who has to provide evidence about defects (because presumption is not valid). There are few exemptions from the cited rules:

1) in respect to commercial contracts defects have to be detected within the period of six months from the time of delivery (Art. 404, Para 2. COA).
2) in respect of second-hand things, the contractual parties may agree on a time limit of one year, or shorter than 6 months s in respect of commercial contracts (Art.404, Para3, COA).
3) in any case the parties may extend the cited time limits by the contract (Art. 404, Para 4, and COA))
4) if the seller was aware of the defect, or he could not have been unaware (Art. 407, COA).

The time line of two years is uniquely applied on both consumer and non-specific civil contracts. Exceptions relate only to commercial contracts. Contractual reduction of a time limit in respect of second-hand goods covers any time limit but not a period shorter than a year, irrespective of an inapt formulation contained in Art.404, Para 3, COA). With respect of commercial contracts,
however, there is no bottom limit; hence this provision is close to the one on exclusion or consider-
able limitation of liability (permitted in commercial contracts).

**Duty of the buyer to examine goods**—comparison between CISG (Art. 38) and corresponding regulations in domestic law;

Pursuant to Art. 403, Para 1, COA, the buyer is obligated to inspect the delivered thing in a customary manner or have the thing inspected, as soon as possible in the regularly course of events. The same regulation is contained in Art. 38, Para 1, CISG.

The obligation of inspection is postponed if the buyer participates in distribution chain. Under Art. 403, Para 3, COA, if the buyer forwarded the thing without reloading it, and the seller was aware or should have been aware of such possibility at the time of entering into the contract, the inspection of the thing may be postponed until its arrival at the new destination, in which case the buyer is to notify the seller of any defects as soon as, in the regular course of events, he was informed thereof by his clients.

Art. 38, Para 2 and 3, CISG foresees a similar solution, but in a more complicated version. Generally, it is foreseen that if the contract involves carriage of goods, examination may be deferred until after goods have arrived at their destination. If goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after goods have arrived at the new destination.

The obligation of inspection is excluded in case of consumer contracts (Art. 403, Para 4, COA).

**Duty of the buyer to notify on non-conformity/material defects**—comparison between the CISG (Art. 39) and corresponding provisions in domestic law;

Pursuant to Art. 39, Para 1, CISG, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guaran-

A notice of a defect, as a rule, is provided in writing, even though the form of notice is not specifically prescribed. However, it is stipulated that the buyer shall be deemed to have fulfilled his duty of notifying the seller if a notice of defect sent by the buyer to the seller in a timely manner by a registered letter, telegram, and fax or in some other reliable way, is received late or not at all. (Art.

406. Para 2, COA). The buyer is not obligated to describe in detail the defect of a thing in the notice of defect and invite the seller to inspect the thing, except in respect of a commercial contract. (Art. 406, Para 1, COA).

Exceptionally, the buyer does not lose the right to invoke a defect even where failing to perform his obligation of inspecting a thing without delay or notifying the seller of the existence of a defect within a set period of time, if the buyer was aware or could not have been unaware of such defect. (Art. 407, COA).

The obligation of inspection is excluded in case of consumer contracts. The obligation of notification, however, is not excluded, because the buyer is obligated to notify the seller about vis-
ible defects within two months from the date of detection of a defect, and no longer than two years from the time of the risk being transferred on the consumer.

If defects are concealed, i.e. if the defects could not have been detected by means of inspection upon delivery, the buyer is obligated, under the threat of losing his right, to notify the seller within two months from the day when the defect was detected, and with commercial contracts –without delay. (Art.404, Para 1, COA). It is the case, for example, when the buyer has bought an / infested animal (VS Rev 580/83 of 15. 8. 1984) or an engine with excessive consumption of oil (VS Rev 1322/91 of 29. 10. 1991).

The time limit of two months applies for both for consumer and non-specific civil contracts, whereas a shorter time limit applies only for trade contracts. The time limit of two months relates only to concealed defects, whereas for visible defects the time limit is shorter (8 days), if related to non-specific civil contracts. With regard to consumer contracts, the time limit is always two months from the day of detection, since there is no obligation of inspection.
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LIABILITY FOR MATERIAL DEFECTS
Country report for Macedonia

1. Comparison of the concept of the lack of conformity in CISG with the relevant liability for defected goods in the domestic legal system – in general

The domestic legal system, or the Macedonian Law of Contracts and Torts, incorporates the concept of the Federal Law of Contracts and Torts from 1978. Namely, there is a difference between cases of failure to perform (entirely or in part) a contractual obligation and those of performance lacking conformity. Performance lacking conformity (performance with material and legal defects) is regulated separately in the provisions of LCT addressing the liability of the seller, while the provisions in the general part of the law (art. 110) extend the application of these rules to all bilateral contracts, unless provisions of specific bilateral contracts contain different rules. Therefore, there is a legislative tendency to separate cases of failure to perform and those of performance lacking conformity, however, this is not always possible in practice. In principle, the LCT concept is not very different from the concept accepted in CISG. This, of course, refers more to the matter of existence of material defects, or existence of non-conformity of goods. Differences do exist, however, in legal remedies, particularly with regard to requirements for individual legal remedies (termination, (due) performance, price reduction, damages). Having this in mind, we can say that the domestic legislator did take into account the provisions of CISG, or the provisions of earlier Hague Conventions. The source of non-compliance between the CISG concept and the concept of domestic legislation is, however, the solution of the latter that rejects the fundamental breach of contract and therefore creates an expressed duality between legal remedies in cases of lack of conformity and cases of failure to perform.

2. Requirements for conformity (art. 35(1) CISG) – requirements by contract, lack of conformity in quantity, quality, nature, containing or packaging

The general provision of art. 466 LCT stipulates that the seller is liable for material defects. The cases of material defects are explicitly regulated in art. 467 LCT. Thus, LCT does not accept the notion of a material defect referred to in art. 35(1) CISG, which stipulates the general obligation of the seller to deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Despite this lack of compliance, some provisions of the LCT provide a basis to conclude compliance with the CISG concept. First of all, requirements of the contract are covered by the provision 467(3) LCT, though only in terms of qualities and performance of goods. Lack of conformity in the quantity would normally be included in the general concept of (partial) failure to perform, but arts. 480 and 481 LCT address lesser and greater quantity as material defect. Qualitative defects are covered by the provision of art. 467 LCT, and therefore this part represents highest compliance with provisions of CISG. As to the
type of goods, the so-called *aliud* situation is disputable in the domestic law, because of interpretations that it constitutes lack of conformity and interpretations that it constitutes failure to perform. Finally, in terms of packaging or containing (the LCT does not regulate problems of packaging and containing for sales contracts, unlike the General Usances), it is generally clear that lack of conformity exists when the packaging or containing is a consequence of contractual provisions or trade customs. But it is unclear whether this constitutes a case of lack of conformity or failure to perform.

3. **Criteria for establishing conformity of goods (art. 35(2) CISG) – fitness for purpose of ordinary use, fitness for particular purpose, sale by sample or model, usual or adequate packaging**

According to domestic law (art. 467 LCT), a material defect exists if 1) the goods do not have necessary properties for its ordinary use or circulation; 2) the goods do not have necessary properties for particular use for which the buyer is procuring them, of which the seller is aware or could not have been unaware; 3) the goods do not have properties or features that were agreed upon or regulated, either expressly or implicitly; and 4) when the seller delivered the goods lacking conformity with the sample or model, unless the sample or model were presented for the purpose of information. This provision, in principle, covers cases referred to in arts. 35(1) and (2) CISG, but not entirely. Namely, the problem of packaging or containing remains, as well as the problem whether performance of the contract refers to qualities and performance of goods in a unified manner. It is important to note that situations from art. 467 LCT are enumerated, while the provision of art. 35(2) CISG applies unless the parties have agreed differently. Of course, the general provision of LCT on the dispositive character of the law remains (art. 14).

4. **When is the seller liable for lack of conformity? – Awareness of the buyer, failure to send a notice**

According to the rules of LCT, the seller is generally liable for material defects of goods regardless of whether he knew of the lack of defects (art. 466(1)). However, the seller is not liable for defects from art. 467 LCT, if the buyer knew or could not have been unaware of them at the moment of contract conclusion. This provision corresponds to art. 35(3) CISG. But, there is a difference as to the CISG concept in respect to quantity, quality or description required by contract, or packaging or containing required by contract. The provisions of LCT (arts. 469 and 470 LCT) and the provisions of CISG (art. 39(1)) both require a notice on defects.

5. **Contractual clauses on exclusion and/or limitation of buyer’s liability**

Pursuant to the provision of art. 474(1) LCT, contracting parties may limit or exclude the liability of the seller for material defects of goods. However, the provision of the contract on limitation or exclusion of liability for defects of goods is null and void if the seller knew of it and failed to inform the buyer thereon, and also if the seller imposed such a provision due to his special monopolistic positions (art. 474(2) LCT). In any case, the buyer that waived his right to terminate the contract due to defects of goods shall retain all other rights thereon (art. 474(3) LCT).
6. **Comparison of legal remedies in the case of lack of conformity in CISG and legal remedies in the case of material defect in domestic law**

According to domestic law, the buyer can 1) require from the seller to remove the defect or to provide substitute goods without defects (performance of the contract); 2) require a price reduction; or 3) declare the contract terminated (art. 476(1) LCT). The buyer can use these rights only if he informed the seller on the defect in a timely and adequate manner. Of course, in each of these cases, the buyer has the right to claim contractual damages (art. 476(2) LCT), as well as the right to claim subsequent deriving non-contractual damages (art. 476(3) LCT). However, the possibility of opting for termination shall be provided only if the buyer required, and did not receive, due performance within the subsequent appropriate time limit that the buyer provides to the seller (art. 478(1) LCT). Unsuccessful expiry of this time limit means termination of contract *de iure* (479 LCT). Termination of the contract by unilateral declaration of will is possible in cases when the seller informs the buyer, after receiving the notice on defects, that he will not perform the contract or the consequences of the concrete case indicate that the seller will not be able to perform the contract within the subsequent time limit (art. 478(2) LCT). The requirement for price reduction remains and is not conditioned by the prior requirement for due performance. Price reduction is performed in respect to the ratio of the value of goods without defects and value of goods with defects at the time of contract conclusion (art. 486 LCT). Legal remedies provided by the domestic law are also contained in CISG, the buyer can require due performance or price reduction or contract termination, as well as the claim for damages. It is important to note that the right of the buyer to contract termination exists only in cases of fundamental breach of contract (art. 49(1)(a) CISG). This is an important difference in respect to domestic law, notwithstanding the *de minimis* rule from art. 466(3) LCT, and having in mind that the domestic law provides for unilateral termination only as an exemption and that the application of termination without having provided the subsequent appropriate time limit for due performance is limited.

7. **Lack of conformity when the risk passes to the buyer and lack of conformity once the risk has passed to the buyer (art. 36 CISG)**

It is a rule in domestic law that the seller is liable for material defects of goods, if these defects exist at the moment when the risk passes to the buyer (art. 466(1) LCT). The seller is also liable for those material defects that appear after the risk has passed to the buyer, if they are the consequences of a cause that existed earlier (art. 466(2) LCT). The stated provisions, particularly the latter, provide a wide enough framework, which is in compliance with the provision of art. 36 CISG. Rules on guarantees (art. 489-495 LCT) however remain, but after the amendments of the LCT in 2008, they now do not refer only to the so-called technical goods.

8. **Obligation of the buyer to examine the goods – comparison of CISG (art. 38) and the relevant obligations in domestic law**

The buyer can refer to the liability of the seller for the lack of conformity of the goods only if he has examined the goods upon delivery, without any delay. Namely, art. 469(1) LCT stipulates that the buyer must examine the delivered goods in an ordinary manner or to have it examined, as soon as possible in the regular course of business and inform the seller about any visible defects within eight days, and in case of commercial contracts, without any delay, if he is to keep the rights stemming from these grounds. Generally, when the examination is performed in presence of both par-
ties, the buyer must inform the seller immediately on his complaints about visible defect on goods, or he will lose all related rights (art. 469(2) LCT). These legal rules are compliant with the provision of art. 38(1) CISG, they are even clearer. Art. 473 LCT clarifies that the examination should be performed without any delay. The rule from art. 38(2) CISG on the distance sale is not envisaged by LCT, but it is clear that it can be agreed to perform the examination in the place of destination. This would mean departure from the rule referred to in art. 460 LCT, that stipulates the case when the contract requires carriage of goods, but does not specify place of performance, and where the delivery will be performed by handing over the goods to the transporter or the person in charge of dispatch. Finally, art. 469(3) LCT contains a solution similar to the one in art. 38(3) CISG, but does not cover redirecting as is the case with the latter.

9. **Obligation of the buyer to send a notice on the lack of conformity/material defect – comparison of CISG (art. 39) and the relevant rules in domestic law**

Besides the examination, the buyer must, in order to apply his rights in respect to the seller, send a notice to the seller on the defect, either visible or hidden. Unlike the provision of art. 39(1) CISG, that stipulates a reasonable time limit, LCT provides a time limit of 8 days (in civil sale), and no delay (in commercial sale) (arts. 469(1) and 470(1) LCT). The buyer must specify in the notice the defect and invite the seller to examine the goods (art. 472(1) LCT). Should the notice on defect that the buyer sent in due time by registered mail, telegram or in another reliable manner, be late or fail to arrive to the seller, it shall be considered that the buyer performed his obligation to notify the seller (art. 472(2) LCT). Rules in domestic law are stricter than rules in CISG, particularly with regard to the provision of art. 39(2) CISG, as the seller is not liable for the defect that appear after the expiration of six months as of the day of delivery of goods, except when a longer time limit is set by the contract (art. 470(2) LCT), and the rights of the buyer who informed the seller on the existence of the defect in due time shall end following the expiration of one year, counting from the day of dispatch of the notice to the seller, unless the buyer was prevented to use them by fraud of the seller (488(1) LCT).

1. **The concept of the lack of conformity or liability for material defects in the states of South-eastern Europe and in the European law**

The domestic legal system, or the Macedonian Law of Contracts and Torts, incorporates the concept of the Federal Law of Contracts and Torts from 1978. Namely, there is difference between cases of failure to perform (entirely or in part) a contractual obligation and cases of performance of an obligation lacking conformity. Performance lacking conformity (performance with material and legal defects) is regulated separately in the provisions of LCT addressing the liability of the seller, while the provisions in the general part of the law (art. 110) extend the application of these rules to all bilateral contracts, unless provisions of specific bilateral contracts contain different rules. Rules of domestic law on liability for lack of conformity of goods, or material defects of goods, rely upon the concept of unified regulation of obligations (art. 17(1) LCT). In other words, rules of LCT apply to all types of sale of goods, either civil or commercial, unless commercial contracts are differently regulated. In principle, LCT rules apply to consumer sale, where the Law on Consumer Protection is a lex specialis and its provisions take precedence over the LCT, pursuant to art. 16 of the latter. However, the Law on Consumer Protection (art. 2(1)) provides for the right of consumers to decide whether they will base their request on this law or LCT, in the sense that the Law on Consumer Protection does not affect the rights of consumers stemming from other laws. In European sources, the rules of the Directive 1999/44/EC of the European Parliament and of the Council dated May 25, 1999 on cer-
tain aspects of the sale of consumer goods and associated guarantees (Directive 1999/44/EC) refer only to the sale of consumer goods to consumers. Rules of the Principles of European Contract Law (PECL) are general and refer to all types of contracts. The rules of the Draft Common Frame of Reference (DCFR) are also general, though they contain numerous specific rules on consumer contracts. Finally, this is also the approach of the Proposal for the Regulation of the European Parliament and of the Council on a Common European Sales Law (the Proposal), more precisely its Annex I.

2. **Criteria for determining the conformity of goods (departures in quality, quantity, composition, packaging, fitness for ordinary use, fitness in respect to purpose)**

The general provision of art. 466 LCT stipulates that the seller is liable for material defects. The cases of material defects are explicitly regulated in art. 467 LCT. The provision of 467(3) LCT covers the requirements by contract, but only with regard to qualities and performance of the goods. Lack of conformity in the quantity would normally be included in the general concept of (partial) failure to perform, but arts. 480 and 481 LCT address lesser and greater quantity as material defect. Qualitative defects are covered by provision of art. 467 LCT. As to type of goods, the so-called *aliud* situation is disputable in the domestic law, because of interpretations that it constitutes lack of conformity and interpretations that it constitutes failure to perform. When it comes to packaging or containing (the LCT does not regulate problems of packaging and containing for sales contracts, unlike the General Usances), it is clear in principle that lack of conformity exists when the packaging or containing is a consequence of contractual provisions or trade customs. But it is generally unclear whether this is a case of lack of conformity or failure to perform. According to domestic law (art. 467 LCT), a material defect exists if 1) the goods do not have necessary properties for their ordinary use or circulation; 2) the goods do not have necessary properties for the particular use for which the buyer is procuring them, of which the seller is aware or could not have been unaware; 3) the goods do not have properties or features that were agreed upon or regulated, either expressly or implicitly; and 4) when the seller delivered goods lacking conformity with the sample or model, unless the sample or model were presented for the purpose of information. Namely, there remains the problem of packaging or containing, but also the problem whether performance of the contract refers to qualities and performance of the goods in a unified manner. It is important to note that situations from art. 467 LCT are enumerated, but there is the general provision of LCT on the dispositive character of provisions of the law (art. 14). In respect to consumer sale, the Directive 1999/44/EC is not fully (or at least sufficiently clearly) transposed into the Law on Consumer Protection. According to art. 2(1) of the Directive 1999/44/EC, the seller must deliver the goods to the consumer, which are in conformity with the contract on sale. Presumption of conformity is covered by the provision of art. 2(2) of the Directive 1999/44/EC. These rules refer to the description of the goods, the qualities of the goods which the seller has held out to the consumer as a sample or model, fitness for any particular purpose of the goods, fitness for the purposes for which goods of the same type are normally used, and the quality and performance which are normal in goods of the same type. Furthermore, art. 1:301(4) PECL accepts the concept of ‘non-performance’ that denotes any failure to perform an obligation under the contract, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract. There is a difference between fundamental and non-fundamental non-performance, and the criteria for determining fundamentality of non-performance are provided in art. 8:103 PECL. Provisions of DCFR explicitly regulate rules on the lack of conformity of the goods, but there are special rules that relate to consumers. Conformity of the goods includes the quality, quantity, description, containing or packaging of the goods and that the goods are supplied along with any accessories (for details: art. IV.A.-2:301 IV.A.-2:304 DCFR). The rules of the Proposal also stipulate rules on the lack of conformity in respect to the quality, quantity,
description, containing or packaging and that the goods are supplied along with any accessories (for details: art. 99-101 of the Proposal).

3. **Awareness of the buyer about non-conformity, obligations of the buyer**

   According to the rules of LCT, the seller is generally liable for material defects of goods regardless of whether he knew of the lack of defects (art. 466(1)). However, the seller is not liable for defects from art. 467 LCT, if the buyer knew or could not have been unaware of them at the moment of contract conclusion. The buyer can refer to the liability of the seller for the lack of conformity of the goods only if he has examined the goods upon delivery, without any delay. Namely, art. 469(1) LCT stipulates that the buyer must examine the delivered goods in an ordinary manner or to have them examined, as soon as possible in the regular course of business and inform the seller about any visible defects within eight days, and in case of commercial contracts, without any delay, if he is to keep the rights stemming from these grounds. Generally, when the examination is performed in presence of both parties, the buyer must inform the seller immediately on his complaints about visible defect of goods, or he will lose all related rights (art. 469(2) LCT). Art. 473 LCT clarifies that the examination should be performed without any delay. Besides the examination, the buyer must, in order to apply his rights in respect to the seller, send a notice to the seller on the defect, either visible or hidden. LCT provides a time limit of 8 days (in civil sale), and no delay (in commercial sale) (arts. 469(1) and 470(1) LCT). The buyer must specify in the notice the defect of the goods and invite the seller to examine the goods (art. 472(1) LCT). Should the notice on defect that the buyer sent in due time by registered mail, telegram or in another reliable manner, be late or fail to arrive to the seller, it shall be considered that the buyer performed his obligation to notify the seller (art. 472(2) LCT). The seller is not liable for the defect that appears after the expiration of six months as of the day of delivery of goods, except when a longer time limit is set by the contract (art. 470(2) LCT), and the rights of the buyer who informed the seller on the existence of the defect in due time shall end following the expiration of one year, counting from the day of dispatch of the notice to the seller, unless the buyer was prevented to use them by fraud of the seller (488(1) LCT). Awareness of the buyer on the lack of conformity prevents the seller’s liability also in accordance with the provision of art. 2(3) of the Directive 1999/44/EC. The obligation to notify is optional in light of art. 5(2) of the Directive 1999/44/EC. Having in mind that the rules of PECL do not contain any special solutions in respect to non-conformity, the general provision of PECL on the principle of good faith and fair dealing apply to awareness of the buyer about non-conformity (art. 1:201) (see also art. 8:101(3), 9:102(3) and 9:303(2) PECL). Awareness of the buyer is relevant also according to the provision of art. IV.A.-2:307 DCFR. Notice on non-conformity is required by the provision of art. III. - 3:107 DCFR, but not for consumer contracts. The Proposal also finds the buyer’s awareness relevant in art. 104, but only in commercial sale. Also, the rules of the Proposal on examination of goods and the notice (arts. 121 and 122) apply only to commercial sales.

4. **Time fit to determine non-conformity**

   It is a rule in domestic law that the seller is liable for material defects of goods, if these defects exist at the moment when the risk passes to the buyer (art. 466(1) LCT). The seller is also liable for those material defects that appear after the risk has passed to the buyer, if they are the consequences of a cause that existed earlier (art. 466(2) LCT). According to the provision of art. 3(1) of the Directive 1999/44/EC the relevant time is the time of delivery. The PECL system has a general provision on the principle of good faith and fair dealing (art. 1:201) (see also art. 8:103(b) PECL). The
moment of the risk transfer, with certain particularities in respect to consumer sale, is relevant also according to art. IV.A. - 2:308 DCFR and art. 105 of the Proposal.

5. **Contractual clauses on exclusion of seller’s liability / limitation of seller’s liability**

Pursuant to the provision of art. 474(1) LCT, the contracting parties may limit or exclude the liability of the seller for material defects of goods. However, the provision of the contract on limitation or exclusion of liability for defects of goods is null and void if the seller knew of it and failed to inform the buyer thereon, and also if the seller imposed such a provision due to his special monopolistic positions (art. 474(2) LCT). In any case, the buyer that waived his right to terminate the contract due to defects of goods shall retain all other rights thereon (art. 474(3) LCT). The provision of art. 7(1) of the Directive 1999/44/EC stipulates that the provision of the contract in which the buyer waives his rights will be null and void before the non-conformity is discovered. Solution from art. 8:109 PECL provides that remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction. Art. IV.A. - 2:309 DCFR, in respect to consumer sales, contains a provision similar to the one in art. 7(1) of the Directive 1999/44/EC. A similar rule can also be found in art. 108 of the Proposal.

6. **Legal remedies available to buyers**

According to domestic law, the buyer can 1) require from the seller to remove the defect or to provide substitute goods without defects (performance of the contract); 2) require a price reduction; or 3) declare the contract terminated (art. 476(1) LCT). The buyer can use these rights only if he informed the seller on the defect in a timely and adequate manner. Of course, in each of these cases, the buyer has the right to claim contractual damages (art. 476(2) LCT), as well as the right to claim subsequent deriving non-contractual damages (art. 476(3) LCT). However, the possibility of opting for termination shall be provided only if the buyer required, and did not receive, due performance within the subsequent appropriate time limit that the buyer provided to the seller (art. 478(1) LCT). Unsuccessful expiry of this time limit means termination of contract in iure (479 LCT). Termination of the contract by unilateral declaration of will is possible in cases when the seller informs the buyer, after receiving the notice on defects, that he will not perform the contract or the consequences of the concrete case indicate that the seller will not be able to perform the contract within the subsequent time limit (art. 478(2) LCT). The requirement for price reduction remains and is not conditioned by the prior requirement for due performance. Price reduction is performed in respect to the ratio of the value of the goods without defects and value of the goods with defects at the time of contract conclusion (art. 486 LCT). Art. 3 of the Directive 1999/44/EC stipulates the rights to the repair or replacement, price reduction or right to terminate the contract, however, the requirement for due performance shall have precedence. PECL rules acknowledge the right to performance (art. 9:102), right to complaint of simultaneous performance (art. 9:201), right to terminate if non-performance is fundamental (art. 9:301), right to price reduction (art. 9:401) and right to claim damages (art. 9:501). A similar concept is accepted in the rules of DCFR, as well as the rules of the Proposal.

7. **Problems (issues) of consumers**

LCT does not specifically regulate the aspects of consumer protection, except in the principle of respecting the rights of consumers referred to in art. 12 of the law. As a rule, consumer sale is considered a civil sale. Of course, rules of the Law on Consumer Protection apply and the provisions
of the Directive 1999/44/EC are transposed in most part. The PELC system does not contain any spe-
cial rules on consumer protection. On the other hand, provisions of DCFR, as well as those of the Pro-
posal, contain numerous specificities of the consumer sale that we can note in answers to previous
questions. This was necessary, having in mind the scope of application of DCFR and the Proposal.
LIABILITY FOR MATERIAL DEFECTS
Country report for Montenegro

1. Concept of the lack of conformity respective liability for material defects in the SEE Countries and European Law
2. Criteria for determination of the conformity of the goods (discrepancy in quality, quantity, in nature, packing, fitness for the purpose of usual usage, fitness for particular purpose)
3. Buyer’s knowledge of the lack of conformity, duty of the buyer
4. Relevant time for determination of the conformity
5. Contract clauses on exclusion and/or limitation of the liability of the seller
6. Buyer’s remedies
7. Consumer issues

LIABILITY FOR MATERIAL DEFECTS
Part concerning CISG

1. Comparison of the CISG concept of lack of conformity with liability for defective goods in domestic legal systems – in general;
2. Requirements for conformity (art.35.1 CISG) – contractual requirements: discrepancies in quantity, discrepancies in quality, discrepancies in nature, containers or packaging;
3. Criteria to determine the conformity of goods (art.35.2 CISG) – fitness for the purpose for which the goods would ordinarily be used, fitness for a particular purpose, sale by sample or model, usual or adequate packaging;
4. When the seller is not liable for non-conformity? – awareness of the buyer, failure to give non-conformity:
5. Contract clauses on exclusion and/or limitation of liability of the seller;
6. Comparison of remedies for non-conformity under the CISG and remedies for material defects under the domestic laws;
7. Lack of conformity when the risk passes and lack of conformity after the risk has passed (art.36 CISG);
8. Duty of the buyer to examine the goods – comparison between the CISG (art.38) and the relevant rules of the domestic laws;
9. Duty of the buyer to give notice of lack of conformity/material defects – comparison between the CISG (art.39) and the relevant rules of the domestic laws;

1. The UN Convention on Contracts for the International Sale of Goods (CISG) is based on a principle derived from a unique concept of a breach of the contract, i.e. a unique set of sanctions
against breach of contractual obligations, depending whether it concerns a relevant or irrelevant breach of the contract. The Directive 1999/44 is based on this system as well.

Contrary this, the Law on Contracts and Torts, despite the set norm that the creditor is entitled to request performance of contractual obligations from the debtor, and the debtor is obligated to perform these obligations in good faith as stipulated in the contract (Art. 269, Para 1), distinguishes sanctions arising from particular instances of breach of the contract. Therefore, the system of liability for (qualitative) material defects is distinguished from the system of liability for non-performance of the contract (partial and total) under the LCT. In terms of sanctions, this law differentiates between breaches of the contract by non-performance, failure to perform within a time limit delay in performance).

The Vienna Convention treats *aliud* (delivery of different kind of goods) as delivery not in conformity with the contract and the seller has to suffer consequences of such delivery (liability for non-conformity). In our domestic law it remains to be topical what is *aliud*, and what is performance with a (material) defect, because in case of *aliud* regulations pertaining to non-performance of the contract are applied, whereas in the latter case regulations on liability for material defects are applicable.

Conformity with the contract is a different concept (principle) from that of material defects. Delivery of goods with material defects is not the subject of regulations on liability for material defects, but instead it is considered as a breach of contractual obligation of delivery without defects. A lack of conformity is present in cases, which under our law are principally considered as non-performance of (contractual) obligation, such as: delivery of different kind of goods, partial delivery, delivery of larger or smaller quantity of goods than the contracted one.

2. The CISG prescribes a rule under which the seller is obligated to hand over (deliver) goods in terms of quality, quantity and kind as agreed under the contract and packed or protected in a manner stipulated under the contract (Art. 35,1). The Draft Common Frame of Reference (DCFR), IV. A. -2:301, as well the pertinent provision of the Directive 1999/44 (Art. 2) are in the same vein.

Therefore contractual characteristics and quality of things constitute a decisive factor in determination of a defect, and not (objective) determination of quality, i.e., characteristics (this is why delivery of different kind of a thing that the contracted one is considered to be a material defect, and not non-performance, irrespective of the fact to what degree is this other thing different from the contracted one, since it diverts from the description of the thing provided under the contract.

Contrary to the above, Article 487, LCT when determining situations of material defects, does not rely on the general rule that the seller is obligated to hand over (deliver) the thing in conformity with the contract, but instead enumerates situations causing material defects. Therefore, a defect is not principally determined as a breach of conformity of things with the contract (as with the CISG), but instead defects are determined by enumeration of defects.

The list of defects contained in the LCT is mainly corresponding to provisions of Art. 35. 2, CISG, but there is difference between the LCT and CISG in determination of a situation when a thing does not have required characteristics for specific use required by the buyer, of which the seller was aware or could not have been unaware (Art. 487, Para 1, Point 2, LCT). In order to establish a defect referred to in Art. 35.2(b), CISG, the seller should have been informed about a specific purpose of goods (expressly or implicitly) at the time of conclusion of the contract. Under the LCT it is sufficient that the seller was aware or could not have been unaware. Also, under the CISG the seller is not liable if circumstances point to the fact that the buyer did not rely nor was it reasonable to rely on skills and judgement of the seller.
The LCT does not contain a provision related to packaging referred to in Art, 35.2 (d)- that goods are not in conformity if not packed or protected in a manner customary for that type of goods, or if there is no such way, in an appropriate manner to preserve and protect such goods.

The SLCT contains some new cases of material defects of things in comparison to the former Federal Law on Contracts and Torts (1978), which are not prescribed under the CISG. Pursuant to Art. 487, Para 1, Point 5,6 and 7, a material defect exists if: a thing does not have characteristics customary to things of that kind and what the buyer may reasonably expect in view of the nature of particular goods, particularly taking into account public promises about specific characteristics of the goods given by the seller, manufacturer and his representative (commercial ads, labels, etc.); if the thing was not properly assembled provided that the service of assembly is included in the sale contract and if default in assembly was caused by the lack of assembly manual.

These provisions of the LCT, with some variation, are based on provisions of Art. 2 of the Directive 1999/44 and are similar to provisions IV.A. – 2:302 (e) and (f) DCFR.

Under the next paragraph of the same article in the CISG the seller will not be held liable pursuant to Point (a) to (d) for any non-conformity of goods with contract if at the time of conclusion of the contract the buyer was aware or could not have been unaware of such non-conformity. - Art35 (3). The same content we can find in IV. A. -2; 307, DCFR. Almost an identical solution is contained in Art 488, Para 1, LCT. There is a difference since under the LCT, the seller is held liable despite the fact that the buyer was aware or could not have been unaware that the seller delivered the thing which was not equal to a sample or model (provision contained in Art. 488, Para 1).

5. The LCT contains regulations on limitation and exclusion of liability of the seller. Contracting parties may limit or entirely exclude the seller’s responsibility for substantive defects of the object. The contractual clause limiting or excluding liability for defects in goods shall be null and void if a defect was known to the seller, if he failed to notify the buyer thereof, or if the seller imposed such clause by using his particular monopoly position. Yet, a buyer forfeiting his right to repudiate the contract due to a defect in the goods shall keep the remaining rights on the ground of such defect. (Art. 494, LCT).

Contrary to the LCT, the Directive 1999/45 (Art. 7, Para 1) any contractual terms or agreements concluded with the seller limiting or excluding his rights are not binding on the consumer. The same is true for IV.A. - 2:309, DCFR.

6. Both the LCT and CISG envisage identical remedies available to the buyer in case of material defects, i.e. a lack of conformity. The buyer who duly informed the seller about a defect may: 1) require the seller to remedy the lack of conformity by repair or to deliver substitute goods without defects (performance of the contracts); 2) require reduction of the price: 3) declare the breach of the contract. In all the mentioned cases the buyer is entitled to compensation against damage (Art. 496, LCT). The same principles are contained in the CISG, Art. 45-52.

The LCT contains a rule, also found in the Directive 1999/45 (Art.3) that costs of removal of defects and delivery of goods without defects are born by the seller (Art. 496, Para 4, LCT).

Contrary to the LCT under which a breach of the contract due to material defects is regulated separately from the rule on breach of the contract due to non-performance, under the CISG, non-conformity as a ground for a breach of the contract is linked to a major breach of the contract. (Art. 49 with ref. to Art.25)
7. The seller is held liable for a defect if such lack of conformity exists at the time of passing of risk onto the buyer, or even after the risk has been transferred if a consequence of a cause which existed prior to that. (Art. 486, LCT). The similar solution is prescribed under the CISG, Art.36. Chapter 5, IV.A. of the DCFR regulates this issue.

8. Article 38, CISG prescribes that the buyer must examine the goods, or cause them to be examined; within as short a period as is practicable in the circumstances. The same duty is prescribed under Art 489, Para 1, and LCT as soon as “it is possible in regular course of events”. Contrary to the LCT, the second paragraph maintains that if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. The third paragraph is identical to Paragraph 3, Article 489, and LCT.

The LCT excludes the obligation of inspection of goods by the consumer as the buyer in contracts of sale (Art. 489, Para4, LCT). These provisions of the LCT are almost identical to those contained in IV.A. - 4:301, DCFR

9. Art. 39 (1), CISG stipulates that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. Under the LCT (Art. 489, Para 1), the buyer should notify the seller about visible defects without delay, and if both parties are present immediately (Art, 489, Para 2), otherwise the buyer will lose the right granted to him on that ground.

In case of concealed defects of goods, the buyer is obligated to give the seller a notice thereof immediately upon detection, without any delay, but at the latest within a period of 6 months since delivery of goods, unless a longer period was determined under the contract. (Art. 490, LCT). This time limit in the CISG (Art. 39.2) and DCFR (IV.A. – 4:302) is 2 years.
LIABILITY FOR MATERIAL DEFECTS
Part concerning CISG
Country report for Serbia

Topics to be elaborated
1. Comparison of the CISG concept of lack of conformity with liability for defective goods in domestic legal systems – in general;
2. Requirements for conformity (art.35.1 CISG) – contractual requirements: discrepancies in quantity, discrepancies in quality, discrepancies in nature, containers or packaging;
3. Criteria to determine the conformity of goods (art.35.2 CISG) – fitness for the purpose for which the goods would ordinarily be used, fitness for a particular purpose, sale by sample or model, usual or adequate packaging;
4. When the seller is not liable for non-conformity? – awareness of the buyer, failure to give non-conformity:
5. Contract clauses on exclusion and/or limitation of liability of the seller;
6. Comparison of remedies for non-conformity under the CISG and remedies for material defects under the domestic laws;
7. Lack of conformity when the risk passes and lack of conformity after the risk has passed (art.36 CISG);
8. Duty of the buyer to examine the goods – comparison between the CISG (art.38) and the relevant rules of the domestic laws;
9. Duty of the buyer to give notice of lack of conformity/material defects – comparison between the CISG (art.39) and the relevant rules of the domestic laws.

Ad 1

The UN Convention on Contracts for the International Sale of Goods (hereinafter called: the Vienna Convention) as well as the Serbian Law on Contracts and Torts (hereinafter called: SLCT) stipulates conformity of goods as one of the basic obligations of the seller. However, the concept of liability for delivery of goods not in conformity with the contract in the Vienna Convention differs from the concept of liability for material defects of things (goods) under the SLCT.

The Vienna Convention recognises the Anglo-Saxon system of unique liability for a breach of contractual obligations. The system of unique liability implies a unique set of sanctions against a breach of contractual obligations on behalf of the seller and buyer, irrespective of concrete cases of vital or less vital breaches of the contract. Thus Art. 45 (1) of the Vienna Convention envisages that in case of seller’s failure to perform any of contractual obligations or obligations arising from the Convention, the buyer is entitled to legal remedies foreseen under Art. 46-52 of the Convention, as
well as to the right to request compensation against damage. An analogue formulation related to
the rights of the seller in case of buyer’s failure to perform any of contractual or other obligations
arising from the Convention is contained in Art. 61 (1) of the Vienna Convention.

The Law on Contracts and Torts relies on a continental system of distinct liabilities, implying
different sanctions for individual instances of a breach of the contract (liability for material defects of
goods (Art. 488), liability for partial and total non-performance (Art. 499). However, albeit the system
of sanctions is separated in principle, it can be observed that essentially the SLCT tends to demon-
strate implicitly a tendency towards approximation of the two systems of liability, because the legal
regime of a breach of the contract in case of material defects of things (goods) corresponds to the
legal regime of a breach of the contract in case of partial, i.e., total non-performance.

Ad 2

The rules on conformity of goods constitute one of the main pillars of the Vienna Conven-
tion. Article 35 (1) of the Vienna Convention prescribes that the seller is obligated to deliver goods
as contracted in terms of quantity, quality and kind, and packed and protected as envisaged under
the contract. Therefore, the concept of conformity under the Vienna Convention anticipates equal
treatment of quantitative and qualitative defects of goods.

The same solution was envisaged by a Draft Code on the concept of conformity by profes-
sor Mihail Konstatinović, but the SLCT adopted a different concept of conformity, linking it only to
qualitative defects. On the other hand, the General Usances for trade in goods, as well as the Vienna
Convention, encompass a much wider concept of conformity. (General Usances, No. 115-134).

Article 35 of the Vienna Convention gives preference to subjective definition of conformity.
Namely, primary duty of the seller is to deliver goods of the same properties as determined under
the contract. Only if the parties failed to anticipate certain property or characteristic of goods, in-
structive rules contained in Para 2, Art. 35 of the Convention would be applied. However, the SLCT,
in its article 479 enumerates in detail situations in which delivered things (goods) will be considered
as defective. This difference in approach, at a glance, may lead us to conclude that the SLCT gives
priority to objective determination of non-conformity. If we closely examine cases referred to ma-
terial defects, we may notice that Art. 479, Para 1, Point 3, SLCT envisages that a material defect of
a thing (goods) will exists when a thing (goods) do not have properties and characteristics which
were agreed or stipulated expressly or by implication. Even though the SLCT does not regulate in a
“hierarchical” manner the relation between different cases of qualitative non-conformity, practical
advantage of properties and characteristics in conformity with the contract or other regulations can
be derived from the inherent nature of the grounds stated in Art. 479, SLCT. Therefore, we may con-
clude that in terms of qualitative characteristics of goods both the Vienna Convention and the SLCT
give preference to subjective regulation of conformity.

The SLCT does not contain specific provisions on packing or protection of things (goods),
but it may be concluded that such issues may be included in the concept of material defects when
derived from the contract, or other regulation or a trading custom.

Ad 3

Article 479, SLCT envisages that that a material defect relates to the situation when a thing
lacks the qualities required for its regular use or circulation, or a thing lacks the qualities required
for the specific purpose the buyer intends to use it for, of which the seller was aware or should have
been aware, if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication; or when the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only. These conditions correspond to the conditions prescribed under 35 (2) of the Vienna Convention to a certain degree. However, certain differences do exist.

Firstly, contrary to the Vienna Convention, the SLCT does not envisage that the seller be freed from liability for non-conformity with respect of specific use in case that the circumstances of the case indicate that the buyer did not rely, or that it was not reasonable to rely, on seller’s expertise and judgement.

Also, the SLCT does not envisage that there will be a material defect of a thing (goods) ipso iure in case that the same is not packed or protected in a manner customary for this type of the thing (goods), i.e. in a manner enabling preservation and protection of the thing (goods).

**Ad 4**

The SLCT anticipates three presuppositions for liability for material defects of things (goods) by the seller. Firstly, the seller is responsible for substantive defects in the goods existing at the moment of transfer of risk to the buyer (Art.478, Para 1). Exceptionally, the seller is also responsible for those substantive defects which arose after the transfer of risk to the buyer, should they be due to a cause which existed before that. (Art. 478, Para 2). This presupposition corresponds to the condition contained in Art. 36 of the Vienna Convention. Secondly, the seller is held liable for defects if such defects were determined by the buyer in a timely and due fashion (Art. 481). This presupposition corresponds to the condition contained in Article 38 of the Vienna Convention. Thirdly, the seller is liable for qualitative (and not quantitative) defects if the buyer duly forwarded his objections. (Art. 484). This presupposition corresponds to the condition contained in Article 39 of the Vienna Convention.

Similarly to the Vienna Convention (Art.35 (3)), the SLCT envisages that the buyer will not be liable for non-conformity of goods with contracted properties and characteristics, fitness for regular and specific use if at the time of conclusion of the contract the buyer was aware of defects or could not have been unaware. (Art. 480, Para 1). It should be noted, however, that the scope of effects of exclusion of seller’s liability in case of buyer’s knowledge (factual or assumed) on defects is much wider under the Vienna Convention than under the SLCT, because the Vienna Convention anticipates that the seller will not be liable for non-conformity of goods with a sample or model, as well as in case of inadequate packaging or protection. The SLCT does not envisage legally prescribed exclusion from liability in the stated cases.

**Ad 5**

Article 486, Para 1, SLCT prescribes that the negotiating parties may limit or entirely exclude the seller’s responsibility for substantive defects of the things. However, Para 2 therein envisages that a contractual clause limiting or excluding responsibility for defects of goods will be declared null and void if a defect was known to the seller, but he failed to notify the buyer thereof, or if the seller imposed such clause by using his particular monopoly position. However, the buyer forfeiting his right to repudiate the contract due to a defect in the goods will keep the remaining rights on the ground of such defect. (Art. 486, Para 3).
Pursuant to the SLCT (Art. 488) and the General Usances (NO. 154), in case of delivery of defective goods, the buyer is entitled to the following rights: firstly, to demand performance of the contract (elimination of defects or replacement of goods with goods without defects); secondly, to demand reduction of the price; thirdly, to terminate the contract. In addition to all the above, the buyer is also entitled to request compensation against damage.

The choice of the buyer to terminate the contract or to request reduction in the price is irrevocable and final. However, the same is true if the buyer requests replacement, i.e., repair of things (goods). Namely, if the seller upon request by the buyer should fail to replace (a thing) or goods or repair a defect within a reasonable time, the buyer will retain the right to request a breach of the contract or reduction in the price. (Art. 489). Since the SLCT does not contain a clear time limit within which the buyer is obligated to choose one of available rights with regard to non-conformity of delivery, it is believed that this time limit should be determined based on the general principles of good faith and honesty (Art. 12) and prohibition of misuse of such rights (Art. 13).

In contrast to the right of the buyer to repair of things (goods) and reduction of the price, which are not the subject of any limitations and are always possible in case of non-conformity upon delivery, the right to replacement of things (goods) and the right to a breach of the contract are somewhat limited. Firstly, the goods that are the subject of the contract have to be classified by its kind (individually determined things may be replaced only exceptionally). Secondly, the right to replacement of things, according to a prevailing position maintained in Serbian case law, may be exercised only if it concerns a substantive defect that would constitute an impediment to the use of a thing in line with its purpose (customary or specific). Thirdly, the buyer loses the right to request replacement of things (goods) if the same was at his disposal and he cannot return such goods in the same conditions as when delivered (unless the given things (goods) were destroyed or damaged during the inspection, etc.).

The right of the buyer to request a breach of the contract is subject to the following limitations: firstly, the same as with the right of the buyer to request replacement of things, the buyer loses the right to request a breach of the contract if the goods were at his disposal and he cannot return such goods in the same condition as when delivered (except if goods were destroyed of damaged when inspected, etc.). Secondly, the same as under the Vienna Convention, the buyer is obligated to allow for a subsequent time limit for performance of the contract on behalf of the seller (except in case of a fixed term explicitly contracted or derived from the nature of the business at hand). The duty of allowing for a subsequent time limit will not exist in case that seller’s attitude or his explicit statement point to his lack of intention to perform the contract. Notwithstanding the obligation of allowing for a subsequent time limit, the contract will be terminated by law upon expiry of a time limit (contractual or subsequent) (with the right of the buyer to keep the contract in force). This is important difference with regard to the Vienna Convention, which does not recognise termination of the contract ipso iure.

In case of gradual detection of defects, the buyer who once exercised his right to request reduction of the price due to established non-conformity may again request reduction of the price or termination of the contract.

In case that delivered goods have partial defects, the buyer may request performance of the contract in respect of part of goods which is not in conformity with the contract or to terminate the contract partially (in respect of part of goods impaired by a defect/defects). Exceptionally, in case of partial non-conformity the buyer may terminate the contract as a whole only if the contracted quan-
tity or delivered thing constitutes the whole, or if the buyer has a justifiable interest to be delivered the contracted thing or quantity as a whole.

Concerning successive deliveries, each lot has a separate legal destiny. Hence, the buyer may exercise his rights with regard to every individual lot with defects. At that, the buyer is entitled to breach the contract with regard to next lots to be delivered if it is clear from the circumstances of the case that the same will not be duly made. Exceptionally, the buyer is entitled to a breach of the contract as a whole (with regard to deliveries in conformity and the ones which are not in conformity), if the contracted quantity or sold goods constitute a whole and if the buyer has a justifiable interest to be delivered the contracted thing or quantity as a whole.

**Ad 7**

Article 478, Para 2, SLCT anticipates that the seller is also be responsible for those substantive defects which arise after the transfer of risk to the buyer, if due to a cause which existed before that. Despite somewhat different formulation, this provision is essentially identical to Art. 36(1) of the Vienna Convention. Rules of guarantee for proper functioning of goods (Art. 501, SLCT) are only applied with regard to technical goods for which the buyer received a written warrant.

**Ad 8**

Article 481, SLCT sets forth the obligation of the buyer to inspect (or to organise inspection) of things (goods). The inspection of goods is a precondition for exercising of rights of the buyer in case of non-conformity. Contrary to Art. 238 (1) of the Vienna Convention, the SLCT does not establish a time limit within which the inspection of goods has to be carried out. In the absence of a legal provision, Serbian case law takes a position that the inspection has to be carried out as soon as regular course of events permits it, which corresponds to the requirement contained in Art. 38(1) of the Vienna Convention. Postponement of inspection of goods until delivery to the final destination if transportation of goods is envisaged under the contract, permitted under Art. 38(2) of the Vienna Convention, is not explicitly prescribed under the SLCT. Postponement of inspection of goods in case of re-export is envisaged under the SLCT (Art. 481, Para 3) and in the Vienna Convention (Art. 38(3)) under the same condition- if at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispacht, examination may be deferred until after the goods have arrived at the new destination. Finally, Serbian commercial law anticipates one additional possibility for deferment of inspection of goods in comparison to the Vienna Convention- based on the General Usances (No. 138), the buyer may defer inspection of goods if the seller failed to send documents required for that purpose, unless it concerns defective or perishable goods.

**Ad 9**

Under the SLCT if the buyer detected non-conformity of goods by means of inspection, he is obligated to forward an objection to the seller in a safe and timely manner. These requirements correspond to those set forth under the Vienna Convention, Art. 39.

Under the SLCT the timeliness of an objection depends on numerous circumstances. If it concerns visible defects, the buyer is obligated to notify the seller without delay. If it concerns concealed defects, the buyer is obligated to notify the seller immediately upon detection, and not later
than in a legally prescribed guarantee period of six months from the day of delivery. (Art. 482, SLCT). The Vienna Convention envisages a much longer guarantee period of two years since the day of delivery (Art. 39 (2). If it concerns replacement of things, or replacement of a part or repair, time limits for objection run as if it were a new delivery of a thing, replacement or repair.

In terms of contents, a complaint notice should be detailed and not general. The same is true for sale of goods under the rules of the Vienna Convention.
LIABILITY FOR NON-CONFORMITY OF GOODS IN SALE CONTRACT IN SEE COUNTRIES IN COMPARISON WITH RELEVANT INTERNATIONAL INSTRUMENTS AND SOLUTIONS OF EUROPEAN LAW

Country report for Serbia


1. Concept of the lack of conformity respective liability for material defects in the SEE Countries and European Law
2. Criteria for determination of the conformity of the goods (discrepancy in quality, quantity, in nature, packing, fitness for the purpose of usual usage, fitness for particular purpose)
3. Buyer’s knowledge of the lack of conformity, duty of the buyer
4. Relevant time for determination of the conformity
5. Contract clauses on exclusion and/or limitation of the liability of the seller
6. Buyer’s remedies
7. Consumer issues

Ad 1

Delivery of goods in conformity with the contract is one of basic obligations of the buyer based on the Serbian Law on Contracts and Torts (hereinafter called SLCT) and relevant sources of European contract law. However, the concept of liability for delivery of goods with the lack of conformity in European contract law differs from the concept of liability for material defects of things (goods) in accordance to the SLCT.

The European contract law (Principles of European Contract Law- PECL), the Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees and a proposal on the Regulation on a Common European Sales Law) recognise the Anglo-Saxon system of unique liability for a breach of contractual obligations. The system of unique liability implies a unique set of sanctions against a breach of contractual obligations by buyers and sellers, irrespective of the fact whether in a concrete case it concerns a vital or minor breach of the contract.

The Law on Contracts and Torts relies on a continental system of distinct liabilities, implying different sanctions for individual instances of a breach of the contract (liability for material defects of goods (Art. 488), liability for partial and total non-performance (Art. 499). However, albeit the system of sanctions is separated in principle, it can be observed that essentially the SLCT tends to demonstrate implicitly a tendency towards approximation of the two systems of liability, because the legal regime of a breach of the contract in case of material defects of things (goods) corresponds to the legal regime of a breach of the contract in case of partial, i.e., total non-performance.
Ad 2

The rules on conformity of goods constitute one of fundamental pillars of the right of sale. Differences between individual systems of regulations may occur in respect of effects of the concept of conformity.

It should be noted that the SLCT contains a restrictive concept of non-conformity, since it is related only to quality and not quantity related defects of things. Hence, Art. 479, SLCT envisages that a material defect relates to the situation when a thing lacks the qualities required for its regular use or circulation, or a thing lacks the qualities required for the specific purpose the buyer intends to use it for, of which the seller was aware or should have been aware, if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication; or when the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only.

The Serbian Consumer Protection Act follows the same principle. Art. 51 therein defines conformity in the same way as Art. 2 of the Directive 1999/44. Pursuant to Para 2 Art. 51 of the Consumer Protection Act, it is assumed that goods are in conformity with the contract if corresponding to the description provided by the seller, and if goods have the same qualities as a sample shown to the buyer by the seller; if goods have the qualities required for the specific purpose known to the seller or should have been known to the seller at the time of conclusion of the contract; if goods have qualities required for its regular use or, in terms of quality and functionality goods correspond to customary qualities of this type of goods and to what the consumer may reasonably expect in view of the nature of particular goods and public promises about specific characteristic of the given goods given by the seller, manufacturer and his representative, particularly if such a promise was made by means of an advertisement or on the packaging.

Other sources of European Contract Law, however, define non-conformity in a unique way, encompassing in this concept both qualitative and quantitative defects of things. The unique concept of non-conformity is adopted in Art. 99 of the optional Regulation on a Common European Sales Law, as well as in the Draft Common Frame of Reference (Art. IV.A. - 2:301-IV.A. - 2:304).

Ad 3

The SLCT envisages that the seller will not be held liable for non-conformity of goods with contracted properties and characteristics, fitness for regular or specific purpose if at the time of conclusion of the contract the buyer was aware of such defects or could not have been unaware. (Art. 480, Para 1). Similarly, in order to exercise rights arising from the SLCT in case of non-conformity of delivered goods, the buyer is obligated to inspect goods duly and timely. (Art. 481) and forward to the seller his detailed objection in a timely and safe fashion. (Art. 482). In case of sale, a time limit for notification of the seller on visible defects of goods is eight days from the day of examination of things. If it concerns hidden defects, the buyer is obligated to notify the seller immediately upon detection of such defects, and no later than within the legally prescribed time limit of six months from the day of delivery.

The Consumer Protection Act, Art. 52, Para 3 envisages that the seller is not held liable for non-conformity if at the time of conclusion of the contract the consumer was aware or could not have been unaware that goods are not in conformity with the contract or if the cause of non-conformity is material supplied by the consumer.

The stated provision is in conformity with regulation of European Contract Law. Namely, knowledge, i.e., awareness of the buyer of defects prevents the liability of the buyer in lieu of Art. 2
(3) of the Directive 1999/44, as well as of Art. IV. A-2: 307 of the Draft Common Frame of Reference. The awareness of the buyer about non-conformity is relevant in lieu of Art. 104 of the optional Common European Sales Law, but only in respect of commercial sale.

**Ad 4**

Art. 478, Para 1, COA envisages that the seller is to be liable for material defects of a thing at the time of transfer of risk from the seller to the buyer, regardless of his awareness of a lack of awareness about it. Paragraph 2 therein envisage that the seller should be liable for material defects which may occur after risk has been transferred from the buyer, if such defects are a consequence of a cause which had existed prior to that. The same rules are envisaged under Art, 52, Para 1 and 2 of the Consumer Protection Law.

In addition to the moment of transfer of risk, the moment of delivery of goods is considered to be critical for determination of conformity. The time of delivery of goods is relevant for determination of conformity based on the Directive 1999/44 (Art.3), while the moment of transfer of risk ((with certain specificities in respect of consumer contracts) is relevant for determination of conformity pursuant to the Draft Common Frame of Reference (Art. IV.A. - 2:308) and the optional Common European Sales Law (Art.105).

**Ad 5**

Article 486 Para, SLCT prescribes that contracting parties may limit or entirely exclude the seller’s responsibility for substantive defects of the object. However, Para 2 of the same article envisages that a contractual clause limiting or excluding liability for defects in goods shall be null and void if a defect was known to the seller, if he failed to notify the buyer thereof, or if the seller imposed such clause by using his particular monopoly position. Yet, a buyer forfeiting his right to repudiate the contract due to a defect in the goods shall keep the remaining rights on the ground of such defect. (Art. 486, Para 2).

On the other hand, pursuant to Article 7(1), the Directive 1999/44 stating that any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller’s attention which directly or indirectly waive or restrict the rights of the buyer are to be deemed void. Similar provisions are contained in the Draft Common Frame of Reference (Art. IV.A. - 2:309), as well as in the optional Common European Sales Law (Art.108). Article 8:109 of the Principles of European Contract Law envisages of the provision on exclusion or limitation of liability for non-performance, unless such provision is in contradiction to the principle of good faith and honesty.

**Ad 6**

According to the COA (Art. 488) in case of delivery of goods which are not in conformity with the contract, the buyer is entitled to the following rights: firstly to demand that the seller performs the contract in its entirety (to eliminate the defect or deliver him other goods free of defects, secondly to demand reduction of the price; to terminate the contract. In addition to all the mentioned rights, the buyer is entitled to request compensation against damage.

The choice of the buyer to terminate the contract or to request reduction in price is irrevocable and final. However, the same is true if the buyer request replacement, i.e., repair of things (goods). Namely, if the seller upon request by the buyer should fail to replace (a thing) or goods or
repair a defect within a reasonable time, the buyer will retain the right to request a breach of the contract or reduction in price. (Art. 489). Since the SLCT does not contain a clear time limit within which the buyer is obligated to choose one of available rights with regard to non-conformity of delivery, it is believed that this time limit should be determined based on the general principles of good faith and honesty (Art. 12) and prohibition of misuse of such rights (Art. 13).

In contrast to the right of the buyer to repair of things (goods) and reduction of the price, that are not subject of any limitations and are always possible in case of non-conformity upon delivery, the right to replacement of things (goods) and the right to a breach of the contract are somewhat limited. Firstly, the goods that are the subject of the contract have to be classified by its kind (individually determined things may be replaced only exceptionally). Secondly, the right to replacement of things, according to a prevailing position maintained in Serbian case law, may be exercised only if it concerns a substantive defect that would constitute an impediment to the use of a thing in line with its purpose (customary or specific). Thirdly, the buyer loses the right to request replacement of things (goods) if the same was at his disposal and he cannot return such goods in the same conditions as when delivered (unless the given things (goods) were destroyed or damaged during the inspection, etc.).

The right of the buyer to request a breach of the contract is subject to the following limitations: firstly, the same as with the right of the buyer to request replacement of things, the buyer loses the right to request a breach of the contract if the goods were at his disposal and he cannot return such goods in the same condition as when delivered (except if goods were destroyed of damaged when inspected, etc.). Secondly, the buyer is obligated to grant a subsequent time limit for performance of the contract on behalf of the seller (except in case of a fixed term explicitly contracted or derived from the nature of the business at hand). The duty of granting a subsequent time limit will not exist in case that seller’s attitude or his explicit statement point to his lack of intention to perform the contract. Notwithstanding the obligation of allowing for a subsequent time limit, the contract will be terminated by law upon expiry of a time limit (contractual or subsequent) (with the right of the buyer to keep the contract in force).

In case of gradual detection of defects, the buyer who once exercised his right to request reduction of the price due to established non-conformity may request again reduction of the price or termination of the contract.

In case that delivered goods have partial defects, the buyer may request performance of the contract in respect of part of goods which is not in conformity with the contract or to terminate the contract partially (in respect of part of goods impaired by a defect/defects). Exceptionally, in case of partial non-conformity the buyer may terminate the contract as a whole only if the contracted quantity or delivered thing constitutes the whole, or if the buyer has a justifiable interest to be delivered the contracted thing or quantity as a whole.

Concerning successive deliveries, each lot has a separate legal destiny. Hence, the buyer may exercise his rights with regard to every individual lot with defects. At that, the buyer is entitled to breach the contract with regard to next lots to be delivered if it is clear from the circumstances of the case that the same will not be duly made. Exceptionally, the buyer is entitled to a breach of the contract as a whole (with regard to deliveries in conformity and the ones which are not in conformity), if the contracted quantity or sold goods constitute a whole and if the buyer has a justifiable interest to be delivered the contracted thing or quantity as a whole.

Similar rules are contained in Art. 54 of the Consumer Protection Act.
Ad 7

Basic consumer rights, conditions and means of consumer protection, rights and obligations of associations and alliances engaged in activities with the purpose of protection of consumers, establishment of a system of out-of-court settlement of consumer disputes, as well as the rights and responsibilities of state authorities in the area of consumer protection in Serbia are regulated under the Consumer Protection Act. The Consumer Protection Act to a great extent reflects transposition of the rules contained in Directive 1999/44 into the Serbian law.
ANNEXES

III

LIABILITY FOR LEGAL DEFECTS
LIABILITY FOR LEGAL DEFECTS
Country report for Albania

1. How is liability for legal defects defined in your legislation? Please refer to the relevant article(s) in the legislation. Have any judgments been made by the highest court that define this further? Please refer to any judgments made.

Liability for legal defects is generally understood as the obligation of the seller to deliver the goods to a buyer, free from third party rights and claims. In the Albanian Civil Code (hereinafter referred to as the Civil Code) and in Albanian High Court practice, there is no specific definition for the term “legal defects.” However, Albanian doctrine uses a corresponding term that is “warranty against eviction.” Eviction here means the disturbance or the loss of the buyer’s property rights whilst exercising his/her rights as an owner. Warranty against eviction is provided in Article 719 of the Albanian Civil Code, which says:

“The seller should deliver the goods to the buyer free from any right or claim from a third party, unless otherwise provided in the sale contract.”

The wording of Article 719 requires the seller to deliver the goods to the buyer, not only free from third party rights, but also from third party’s claims. A question we may pose is: “Do the legal terms ‘rights’ and ‘claims’ have different meanings, or are they just synonyms?”

There are grounds to believe that ‘rights’ and ‘claims’ in Article 719 of the Civil Code are not the same thing. Firstly, the grammatical interpretation of Article 719 of the Civil Code, viz. the use of the conjunction ‘or’, suggests two different categories that are applied as alternatives. Secondly, a teleological reading of the article supports this point of view. The purpose of warranty against eviction in Article 719 is based on the principle that the buyer shall enjoy the quiet possession and usage of goods, unprejudiced and undisturbed by a third-party, in order that the buyer may use the purchased goods as an owner. From this perspective, warranty against eviction would be very limited if it were restricted only to the ‘rights’ of third parties; frivolous claims disturb the quiet enjoyment of the buyer and the peaceful usage of goods, or may even lead to expensive litigation against the buyer. That is why the warranty against eviction should be extended, not only to include eligible rights of third parties, but also to include other claims. Although the law does not distinguish between the legal effects of ‘rights’ and ‘claims’, it is clear that, in both cases, they must affect the buyer.

1 PhD candidate
2 The Civil Code, Law No. 7850, dated 29.07.1994, Official Journal No.11, pg.491, amended by Law No. 8781, dated 03.05.2001, Official Journal No.24, pg. 757
4 Marina Semini, v.supra, ibid.
5 Article 719, Civil Code of Albania, Law No.7850, dated 29.07.1994, Official Journal No.11, Page 491
6 Andon Sallabanda, “E drejta e Detyrimeve (Kontrata e poasçme) dhe E drejta e Autorit,” Universiteti Shtetërór i Tiranës, Fakulteti i Shkencave Politike Juridike, Tiranë 1973, fq 27
Thus, we may conclude that any protection accorded to a buyer by Article 719 of the Civil Code is broad, and covers not only the warranty against eviction from rights of third parties, but also third party claims that may hinder or disturb the quiet possession of the buyer as an owner.7

Another comment on Article 719 of the Civil Code relates to the exclusion clause provided therein. The responsibility of the seller to deliver the goods to the buyer, as referred to above, free from rights and third party claims avails when it is not otherwise provided in the sale contract. In other words, this means that both the seller and the buyer may stipulate that a certain right that is held by a third party may encumber the object of the sale contract at the moment it is delivered to the buyer.

The legal effects of an agreement for the exclusion from warranty against eviction are dependent on the good or bad will of both the seller and the buyer. The agreement would be considered void if the seller, at the moment of the conclusion of the sale contract was aware, or should have been aware of the rights or claims of a third party, regardless of whether or not he had provided an agreement for the exclusion of warranty against eviction.8 Therefore an agreement for the exclusion of warranty against eviction is only valid if the seller is acting in bona fide. On the other hand, if the buyer was aware, or ought to have been aware of third party rights and claims, and despite this agreed to exempt the seller from warranty against eviction, the agreement would be considered valid.9 The buyer, for example, may agree to take goods which are subject to third party rights if he expects the rights of the third party to soon disappear, for example if goods were used to secure a small debt owed by the seller, the buyer might agree to buy the goods with the expectation that the seller would remove the encumbrance quickly.

The article does not require any specific form regarding the expression of will of parties in this case, thus the contracting general principles should be applied.

2. How are legal defects of goods and rights defined in your legislation? Please refer to the relevant article(s) in the legislation. Have any judgments been made by the high courts that define this further? Please refer to any judgments made.

2.1. Legal defects of goods in a sale contract

Third party rights on goods can fall into different categories; they can be real rights (ius in rem) or obligation rights (ius in personam).10 The rights in rem are rights, which can be exercised without the intervention of a third party and where third party obligation consists of abstaining from actions that prevent the implementation of the real right. Real rights, on the other hand, fall into two categories: principal real rights and auxiliary real rights (security rights). Principal real rights entitle a person, the subject of the right, to directly use the goods, and are divided into major and minor real rights. The only major real right is the right of property, while other minor real rights are considered to be servitudes, usufructs, the usage and right of housing.11 Auxiliary real rights (security rights) are

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7 A. Sallabanda. Ibid. For example, if the buyer loses his property rights over an object as a consequence of a court decision which recognizes the right of property of a third party, the buyer is considered as having been evicted.
8 Mariana Semini, v.supra, pg 14
9 Mariana Semini, v.supra, pg. 15
guarantees given to a creditor over the goods of a debtor, or of a third person, and are known as securities or real guarantees.12

Thus, returning to Article 719, a third party may claim a right in rem, i.e. a property right (a major real right) - claiming that he is the true owner of the goods- or claim a minor real right, such as the rights of servitudes and usufructs, or securities over the goods purchased by the buyer, like a pledge or a mortgage.

On the contrary, rights in personam require the intervention of another person (the debtor), in order that the owner of this right (the creditor) may implement them. These rights have a relative character and they ask the debtor, to give, to act or to abstain from actions in favour of the creditor.13 The opinion is held that these rights generally do not affect the buyer’s rights on goods, since they are personal rights against the seller. However, this is not always the case. For example, the buyer of a property may be disturbed in the full enjoyment of his property because he comes to know that the property he has acquired in lease. The right of a tenant to possess a leased object is a personal right he can demand from his landlord, but nevertheless, in this situation, it is a right that encumbers the object purchased by the buyer. The Albanian Civil Code in this situation gives priority to the tenant. Article 822 of the Civil Code provides: “The lease contract may be relied upon against a third party who has acquired the object in lease, provided that the lease contract has a specific date before the alienation of the object.” Thus, if the buyer was not aware, or could not have been aware of this situation, and the seller did not inform the buyer of the lease contract, the buyer only has the right to dissolve the contract and to ask for damage compensation.

2.2. Legal defects of rights in a sale contract

According to Article 705 of the Civil Code, “The object of a sale contract is to transfer the property of goods, or to transfer a right in return for a payment.” This means that through a sale contract it is possible to transfer movable and immovable property, real rights, and credit rights (i.e. the cession of a credit) in return for a payment.

By legal defects on rights, we would generally understand the rights and claims of a third party that encumber rights purchased by a sale contract, which deter and disturb a buyer in the quiet and peaceful enjoyment of his rights. While there are different provisions for the rights and claims of a third party over goods purchased in the Civil Code (viz. Articles 719,720,721,727 and 728), there is no specific provisions regarding third party rights and claims over rights, neither is there a provision for the liability of the seller in this concern. For example, according to Article 240 of the Albanian Civil Code, an usufructuary can transfer his right of usufruct to someone else for a definite period of time, or during the entire time of the usufruct’s existence- unless it is otherwise provided for in the act of the creation of the usufruct- in return for a payment. Nevertheless, there is no provision of warranty against eviction of the usufructuary-seller to the buyer of the usufruct in the whole of Title IV (Usufruct), nor in the General Provisions of the Civil Code. The same situation exists for other real rights and for security rights. The only exception to this is the transfer of credit provided in Article 505 of the Civil Code, which says:

“When the transfer of a credit is made with an encumbered title, the creditor is warrant for the existence of the credit at the time of its transfer.” Thus, it may happen that a creditor sells his credit rights to another person and that these credit rights, at the time of transfer, are already encumbered with a title. A creditor who transfers a credit is obliged to guarantee the existence of the

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12 Ardian Nuni, “Hyrje në të Drejtën Civile”, ibid, pg. 96
13 See Ardian Nuni and Luan Hasneziri, “Leksione të pronësisë dhe trashëgimisë”, Tirane 2008, fq 22-25
credit under these circumstances, in the same way as a seller guarantees a buyer against eviction in a sale contract of goods.

2.2.1 Legal defects of rights in other contracts

Warranty against eviction is also provided for in other contracts stipulated in the Albanian Civil Code. Below, there is a short description about the way that this warranty is provided for and about the specific conditions that have to be met regarding the liability for legal defects of a seller for the rights he/she has transferred.

a) Donation contract

Article 760 of the Civil Code provides that a donor is obliged to guarantee a recipient on the ownership of the goods donated, even against third party claims under three circumstances. First, if a warranty is expressly provided in the donation contract. Second, if the acquisition of the goods depends on the deceit or on the personal stance of the recipient. The third situation refers to a donation encumbering a recipient or a donation being made for compensation; in this case a warranty is set up to the value of the onus or to the extent of the promise made by the donor.

b) Lease contract

Article 810 of the Civil Code provides that a landlord is obliged to guarantee a tenant against disruptions that lessen the value of his enjoyment and his use of the goods, caused by a third party who claims to have rights over the goods. A landlord is not obliged to guarantee a tenant against a third party who does not claim rights over the goods. In this situation a tenant has the right to bring action against a third party on his behalf. Furthermore, in Article 811(1) of the Civil Code, it is provided that when a third party claiming rights over the goods in lease, causes disruption, the tenant is obliged to immediately notify the landlord, otherwise he can be charged to compensate for the damage himself. When a third party acts through a judicial procedure, a tenant is obliged to take part in the process, if summoned. Article 822 of the Albanian Civil Code addresses the situation when a leased object is alienated to a third party. The article says: "A lease contract may be relied upon against a third party who has acquired a leased object, provided that the lease contract is specifically dated before the alienation of the object." Furthermore, the acquirer of a leased object is obliged to respect the lease contract for the period determined in the contract. If a lease contract does not have a precise date, but the tenant was in possession of the object before the date of alienation of the object, the third person is obliged to respect the lease contract for the period that corresponds to the period of time determined in the lease contract. The seller is obliged to have previously informed the buyer of the lease contract he has with the tenant. The buyer and the seller can reach an agreement that goods will be delivered with these encumbrances that will end at the termination of the lease contract. Otherwise, if the buyer is not aware or could not have been aware of this situation, and the seller did not inform him of the lease contract, the buyer is entitled to dissolve the contract and to ask for damage compensation (the liability for legal defects on goods is stipulated in Articles 719-721, 727, 728 of the Civil Code. see infra, question 4).
c) Leasing contract

A warranty against a third party is also an essential element of a leasing contract. Article 12, point ë, of the Law on the Leasing Contract No. 9396, dated on 12.5.2005, states that a leasing contract must have “liability towards third parties”. Furthermore, Article 23 of this law regulates the liability of the lessor for intruding on the right of enjoyment of the goods and for legal defects. Para. 1 of Article 23 of this law provides that a lessor is obliged to guarantee a tenant full and quiet enjoyment of the goods. He is liable for third party claims over the goods, which oppose, intrude, or limit the full enjoyment of the goods by the tenant, if the tenant was not aware and accepted the goods without being aware of any such claims. Any condition of a leasing contract that limits or excludes the liability of a lessor from legal defects on goods is void. The second paragraph provides for a tenant to have an obligation to notify a lessor. Thus a tenant should notify a lessor about any claim made by a third party, as mentioned in the first paragraph, and should demands the release of goods from any such claims, within a reasonable period of time. Moreover, in paragraph 4 of Article 23 Law on Leasing it is stated that if the full enjoyment of the goods by a tenant is lessened or limited, and if a lessor does not fulfill the demands of the tenant as expressed in paragraph 2, the tenant has the right to dissolve the contract if its object cannot be performed properly, or alternatively he has the right to ask for a proportional reduction in lease payments. If the contract is without charge, the tenant can resolve it if he loses the enjoyment of the goods and if the lessor cannot fulfill his demands as expressed in Para.2, namely that third party claims should be released within a reasonable period of time. The last paragraph of Article 23 of this law states that a tenant does not have the right to seek damage compensation if he accepted the goods, or if his full enjoyment of the goods was limited or lessened, whilst being aware of these issues at the time that the contract was concluded.

3. What are the obligations of a purchaser with regard to legal defects (such as, but not limited to, notification of a seller)? Please refer to the relevant article(s) in the legislation. Has any judgments been made by the highest court that defines this further? Please refer to any judgments made.

Article 720 of the Albanian Civil Code foresees the obligations of buyers in cases of legal defects. This article provides that a buyer must inform a seller of the rights and claims of a third party encumbering the goods. In this case, the purchaser should specify the nature of the rights and claims of the third party, within a reasonable time from the moment he/she has become aware or ought to have become aware of these rights and claims; otherwise he/she loses the right of warranty against eviction provided in Article 719 of the Civil Code. Thus, if a third person brings a lawsuit to court, claiming that he/she is the true owner of the goods purchased by the buyer, the latter is obliged to notify the seller. If the buyer does not inform the seller about a lawsuit against himself, then the seller is freed from his warranty against eviction towards the buyer.

Article 720 does not specify how the buyer is to inform the seller, whether it be orally or in written form. The issue of notification is much more confusing in the context of recent developments in communication technology where other means, beside traditional ones, are used such as e-mail communication, text messages, and other types of social network. Since there is no definite form for notifying a seller, a buyer is free to use all available means to effectively inform the seller of the third party’s rights and claims. Thus, the specific moment at which the buyer informs the seller is the precise moment at which the notice sent from the buyer reaches the seller.

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19 Amended by Law No.9823, dated 29.10.2007 and Law No.9966, dated 24.7.2008
A buyer should not just notify a seller of a third party’s rights or claim, but should also specify their nature. A buyer does not need to provide a thorough analysis of the merits of a third party rights or claims; he should simply needs to notify the seller about the nature of the right or claims, and the steps that the third party has undertaken or intends to undertake. Notification by the buyer will enable the seller to take immediate measures to defend the buyer’s rights against the third party. If the buyer fails to give notice in time, this may also have consequences so far as his ability to claim damages is concerned.

Finally, Article 720 puts an obligation on a buyer to notify a seller within a reasonable time. What can be understood as a reasonable is assessed with respect to the complexity of the circumstances in each individual case (see further infra, question 6).

4. Which sanctions are imposed on a seller i.e. what is the scope of liability in the case of sales of goods? What sanctions are relevant in cases when the purchaser does not fulfill his/her obligation regarding legal defects? Please refer to the relevant article(s) in the legislation. Has any judgments been made by the highest court that defines this further? Please refer to any judgments made.

Article 721(1) provides that a buyer may suspend the payment of a contractual price when there are reasonable grounds to doubt that the goods, or a part thereof, may be returned to a third party unless the seller gives appropriate guarantees. Thus, if the goods purchased are encumbered with invisible real rights in favour of a third party that are not prescribed for in the contract, and the existence of which may lead to the vindication of the goods or part thereof from the third party, the buyer is entitled to suspend payment unless the seller gives appropriate guarantees that this burden will immediately be released from the goods. For example, a buyer may suspend the payment of the last instalment when there is reasonable ground to doubt that a third person, not the seller, is the real owner. The seller in this situation should bring appropriate guarantees to certify his own legal right, viz. by showing the contract which gives him property rights over the goods, and/or a copy of his mortgage statement or a cadastre entry; without this the buyer is entitled to suspend payment. However, the paragraph 2 of Article 721 defines that: “Payment should not be suspended when the risk was known by the buyer at the moment of the sale.” We can see in this paragraph that the buyer is required to have knowledge about ‘risks’ concerning the object or any part of it and that these may potentially be taken by a third party. This formula differs from other similar constructions of liability in cases of defects because it requires the buyer to have actual knowledge; thus, the question is whether the buyer did have knowledge of the third party rights and claims at the moment of sale rather than whether or not he ‘should have had knowledge.’

Moreover, Article 727 (1) of the Civil Code provides that when the object of a sale contract is returned to a third party (full eviction), the seller is obliged to compensate the buyer for the damage. According to this article, the seller is obliged to pay back the price of the goods to the buyer, even if the real price of the goods in the market has decreased due to usage or to damage. If the decrease in the price of the goods has results from the actions of the buyer, the buyer’s profit is subtracted from the price, except for any expenses provided for in Article 640 of the Civil Code. Therefore, the seller is obliged to compensate the buyer for the price he paid as well as court expenses, expenses incurred to avoid or reduce damages, expenses incurred to define liability and the extent of the damage, and reasonable expenses to reach a non-judicial solution for damage compensation.

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20 Article 744 of the Civil Code
21 Article 640 of the Civil Code
Conversely, when only a part of a purchased object is returned to a third party (partial eviction), according to Article 727 (2) the seller is responsible for paying damages in the same way as for a full eviction (Article 727(1)), if there are grounds to believe, from the given circumstances, that the buyer would not have concluded the contract.

5. Can the liability of a seller be limited and/or excluded and how? Are there any specific conditions for the limitation and/or exclusion of liability? Please refer to the relevant article(s) in the legislation. Have any judgments been made by the high court that defines this further? Please refer to any judgments made.

Under Article 720 (1) the buyer shall inform the seller of any third party’s rights or claims, specifying their nature, within a reasonable time from the moment the buyer is aware, or ought to have become aware of the situation. An interpretation *ad contrario* of this provision means that if the buyer does not provide a notice to the seller on the rights or claims of a third party, the seller is relieved from his/her obligation for warranty against eviction and shall, therefore, be excluded from liabilities for legal defects.

However, the second paragraph of Article 720, states that the seller cannot rely on lack of notification from the buyer, and consequently avoid the obligation of warranty if he/she was aware of a third party’s rights and claims, or their nature. In comparison with Article 718 of the Civil Code on product liability, it can be noticed that the construction used for the knowledge of the seller is limited here to ‘was aware’ (not also ‘could not have been unaware’). This means that it must be proved that the seller has actual and real knowledge regarding third party’s rights or claims, and not just potential or possible knowledge.

The phrase ‘or their nature’ at the end of Article 720 (2) can be seen as ambiguous. The use of the conjunction ‘or’ may lead us to think that there is a separate item regarding that the seller must have some knowledge. Surely, the words ‘nature’ and ‘rights or claims’ are not cumulative; the contrary would mean that the seller may not rely on the buyer’s failure to give notice if he knew the rights and claims of a third party but did not know their nature; this can be seen as illogical. However, ‘the nature’ of a right or claim cannot stand alone, but is intrinsically linked with these specific rights and claims. It is likely that the function of the term ‘nature’ is to stress that it is unnecessary for the seller to have a thorough knowledge of the merits of the rights or claims, but rather to know whether they are of a nature that is able to disturb the full and peaceful enjoyment of the buyer.

The second paragraph of Article 728 refers to a situation where a final court decision that recognizes the legal rights or claims of a third party is made against the buyer. When the buyer does not call the seller in a dispute he loses the warranty against eviction, but only if the seller can prove that he had been part of the proceedings he would had provided sufficient reasons to disprove any claims made by a third party.23 On the other hand, when the buyer has willingly recognized the rights of a third party, he loses his right of warranty against eviction if he cannot prove that there were insufficient reasons to hinder the vindication of the goods.24

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22 Article 718 of the Civil Code reads: “The seller cannot rely on the above provisions if the defects on goods concern facts of which he as not aware, or that he could not have been unaware of, and of which he did not inform the buyer.”

23 Paragraph 2, Article 728 of the Civil Code

24 Paragraph 3, Article 728 of the Civil Code
6. Do the rights of a purchaser related to the liability for legal defects have a time limit? Please refer to the relevant article(s) in the legislation. Has the highest court that defines this made any judgments further? Please refer to any judgments made.

As mentioned above, Article 720(1) of the Civil Code provides for the buyer to be obliged to provide notice to a seller regarding the rights or claims of a third party. The time limit constraint established in this article states that notice should be done ‘within a reasonable time from the moment a buyer is aware or ought to have been aware of a third party’s rights and claims.’ This period of notification is different from the time limit set for defects related to the non-conformity of goods. Article 717 of the Civil Code provides that a buyer loses his right to rely on the lack of conformity of goods if he does not give notice to the seller, specifying the nature of the lack of conformity, within ten days after he has discovered it, unless the law or the parties provide for another time-limit. In the second paragraph of this article it is stated that a buyer loses his right to rely on a lack of conformity of goods if he does not give the seller notification, at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with the contractual guarantee period. Thus, although both Articles 717 and 720(1) provide for an obligation to give correct notice, Article 720(1) does not specify a maximum period of time for giving notice as is required by Article 717 (two year limit). This may be because the concept ‘reasonable time’ depends on the circumstances of each specific case, and gives to the buyer a certain period of time prior to him giving notice in order to obtain information about the certainty, validity and nature of the claim. Nevertheless a buyer cannot delay giving notice for long as he will lose the opportunity to rely on the seller’s liability. Article 720(1) does not require an immediate notice to the seller, but instead leaves the buyer a certain time during which he can evaluate the third party claims, gather information or ask for a legal advice. This time starts when the buyer was aware or ought to have become aware of the third party rights and claims. The term ‘reasonable’ stresses that the buyer should not ignore the rights or claims of the third party, but should take the due time to consider them properly.

A decision has still not been made in the Albanian High Court regarding the meaning of reasonable time within which the buyer should notify the authorities about legal defects; thus there is still no authoritative interpretation of this term. But, if we read Article 720(1) of the Civil Code, the similarity it has with article 43(1) of the Convention of International Sales of Goods is clear. Some scholars, and also even some courts, that apply Article 43(1) of the CISG have set one month as the presumptive ‘reasonable time’ for a buyer to give notice; sometimes it is referred to as the ‘noble month’ approach, although the period of time might be longer or shorter depending on whether a party can demonstrate unusual circumstances. The opinion supported by the author of this paper is that, although one month is generally a reasonable period of time to notify a seller, the special circumstances of each case should prevail to determine whether notification has been made within a reasonable time.

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25 Emphasis added
26 Emphasis added
27 See Harry M. Flechtner, Buyer’s obligation to give notice of lack of conformity (Articles 38, 39, 40 and 44), in DRAFT UNCITRAL DIGEST AND BEYOND, at 377, 377-78.
7. In disputes over liability for legal defects what is the position of the parties (the seller, the purchaser and the third party; who has rights)? Are there any specific legal remedies against the decisions of the first instance court in the dispute? Are there any specifics or the execution of such judgments? Please refer to the relevant article(s) in the legislation. Has the highest court that defines this made any judgments further? Please refer to any judgments made.

7.1. The seller

In a third party action against the buyer related to goods purchased, the buyer must summon the seller in the dispute.28

The Civil Code of Procedures 29 (hereinafter referred to as the Civil Code of Procedures) in Chapter III, Articles 189 to 201, stipulates specific regulations regarding the intervention of a third party in the civil process. Article 191 (which concerns secondary intervention) states that: "Anyone may intervene in a dispute that takes place between other parties if he or she has an interest in supporting one of the parties, and may joining with this party in order to assist him/her in the dispute." Secondary intervention is intentional and voluntary. A seller, after being notified by a buyer about the dispute, may intervene in the process against him to defend his rights against third party claims. There would, however, be no changes made to the object of the dispute; it would proceed with the same trial before the court.30

Moreover, in Article 192: “Each of the parties may summon to a dispute a person with whom he or she thinks there is a common issue, or from whom a warranty or a compensation, related to the conclusion of the case, is required.” A third person (in this case the seller) is summoned by writ; the court secretary in cases lays this down in the preparatory session, or where the court session has already started. The judge is immediately notified of such a request; he then orders for the third party to be notified, possibly without even postponing the determined court session. The summons of a third person is allowed if he has a known domicile within the borders of the Albanian Republic, and as long as the dispute in the court of first instance has not terminated.31 It can be understood that in such a case, the intervention of a third party is obligatory. A party in a dispute may only summon a third party to intervene in order to avoid losing a trial, or to avoid any subsequent reversal of compensation by a third party in the future.32 In practice, in most cases, a seller who is a third party in a dispute will be summoned in court by a buyer in order to prevent his full or partial eviction, in accordance with this provision.

Regarding the procedural rights of a seller as a third party in a dispute between a buyer and another person, Article 195(1) of the Albanian Civil Code of Procedure provides that the seller has the right to take all procedural actions that are allowed to parties in the dispute, except for those that concern the disposal of the disputed object.

The court decision that is made after a second intervention or after the summons of a third party is effective against the seller.33

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28 Article 728 of the Civil Code
31 Article 192 (2) and (3) of the Civil Code of Procedure
32 Jani Vasili, ibid, page 102
33 Article 96 of the Albanian Civil Code of Procedures
7.2. The buyer

The buyer can make several objections regarding a third party during an action for the return of goods (actio reivindicatio): with the support of the seller, he may refute that the third party is the owner of the goods; that he was possibly the owner but that the seller became the actual owner because he won possession of the goods in good faith (Article 166),\(^{34}\) or that he gained possession by prescription (Article 168).\(^{35}\) If a buyer claims that he is the owner of the contested goods, he may not only choose to present his claim as an objection, but may also opt to bring a counter-lawsuit in the court in order to claim recognition as the real owner. If he claims that the seller has become the owner in good faith or by prescription, he has to prove that the seller transferred his rights on property to the buyer through a valid contract.

A buyer who is confronted by a third party claim may take action in order to cease disturbance of his purchased goods as is provided for in Article 312 of the Civil Code. This article states: “A person who is intruded upon during his possession of goods may ask, within a period of 6 months, to relinquish his possession of the goods or to be assured that no future repetition of his disturbance will take place in the future.

If possession is acquired by violence or through furtive means, action can be brought against a buyer within 6 months from the day that the violence or furtive behaviour ceased.

The cessation of intrusion cannot be requested by a person who has gained possession of goods by violent or furtive means.”

7.3. The third party

In the case of a full or partial eviction of goods, a third party may claim to have property rights (ius in rem majore) over the goods, or over a part of the goods that are in a buyer’s possession. The legal solution that is usually applied in such a case by a third party is to take action for the return of the goods (actio reivindicatoria). In order for the third party be eligible to ask for the revindication\(^{36}\) of goods, he must prove that he is the true owner and that the buyer possesses the goods without a title, thus being an illegal possessor. Revindication can only be used for goods that are individually defined and it does not apply to generic goods. The third party must first ask the court to declare void the sale contract between the buyer and the seller because the seller, not being the real owner, cannot transfer to the buyer a right he does not possess; then he must ask to vindicate the goods. A lawsuit for the revindication of goods is a real lawsuit: the buyer should not only recognize the right of property of the third party over the goods, but is also obliged to return to him the goods in question (movable or immovable). Article 728(1) of the Civil Code provides that a buyer, who is called upon by a third party who claims to rights upon the purchased goods, must summon the seller to

\(^{34}\) Article 166 of the Civil Code reads:

“A person, who, based on a legal action for the transfer of property acquires movable property in good faith in return for compensation, becomes the owner of that same object even if the seller is not the owner. However, the acquirer, even in good faith, does not become the owner when the object is stolen. The acquirer, in good faith, becomes the owner of the bearer’s security even if the goods have not been lost or stolen from a public legal person or from the owner. The above provisions are not applicable for moveables registered in the public registrar. An object is acquired free from third party rights if these rights are not derived from the title or from the good faith of the acquirer.

\(^{35}\) Article 168 of the Civil Code states that:

“A person who acquires goods in good faith, based on a legal action for the transfer of property that is not forbidden by law, becomes the owner of the goods after an uninterrupted period of possession of five years for movable goods, and ten years for immovable goods. When possession is not acquired in good faith, the terms of uninterrupted possession are doubled. Possession is also considered uninterrupted if the acquirer has transferred possession to another person. Public inalienable property can not be acquired by prescription”

\(^{36}\) Article 296 of the Civil Code
take part in the dispute proceedings. The seller may intervene as a second intervener or as a summoned third party, and should assist the buyer in the process. When a buyer does not follow this procedure, and if a final court decision is made against him, he loses his right to warranty against eviction if a seller, if involved in the dispute, proves that there were sufficient reasons to disprove an application made by a third party.

A third party may also claim to have other minor rights or security rights over the purchased goods. In such a case he has a choice of several actions that he can bring against a buyer:

- **The third party who has a servitude right:**

A person who has a servitude right may protect himself by *actio confesoria*, as provided for in Article 292 of the Civil Code. *Actio confesoria* aims to return servitudes to the person who exercises them; the situation is similar to *actio reivindicatio*. Article 292 states that: “A person who exercises a servitude has the right to judicial claim from anyone who opposes his right, the right to seek full reestablishment of his right, the right to stop intrusion and to seek damage compensation.” In *actio confesoria* the plaintiff is the owner of the dominant property; he has the right of servitude against the owner of the servant property who opposes the right of servitude. It is also stated that a person who has servitude can also bring before the court an *actio negatoria* against the buyer of a dominant property.

- **The third party as the usufructuary**

A third usufructuary that is in possession of goods can be defended through acting upon the cessation of intrusion during possession, Article 302 of the Civil Code and *actio confesoria*.

- **The third party as the creditor of a pledge:**

According to Article 548 of the Civil Code: “A creditor who has lost possession of goods in pledge, apart from possessive action, can use the *actio reivindicatio* in a case where the goods belongs to the pledgor.” It is stated that in addition to instigating either an action to have the goods returned (action reivindicatio) or a possessive action, the creditor of a pledge also has the right to raise the *actio negatoria*. Since the law gives the creditor of a pledge the right to demand the return of goods (action negatoria), the creditor of the pledge is also eligible to raise the *actio negatoria*.

- **The third party as the creditor of a mortgage**

In the Civil Code there is no explicit provision whether a buyer can alienate a mortgaged object (or a third person who has agreed to mortgage an object), in order to fulfill his obligation. The doctrine supports the idea that a debtor has the right to sell a mortgaged object without the consent of the creditor. Nevertheless, the creditor reserves the right to ask about the scope of his rights concerning a mortgaged object, despite the fact that the object has been sold to a third person. The

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37 Vedi *supra*, point 7.1 of Question No. 7
38 Article 728(2) of the Civil Code
41 Avni Shehu, ibid. page 91
42 A. Nathanaili & N. Bicoku, “Disa çështje të pronësisë dhe trashëgimisë,” Botim i Ministrisë së Drejtësisë, 1961, page 71
law does not stipulate the situation where a mortgaged object is sold to a third person— in this case the third party would risk having ownership removed. The doctrine bases solution on the fact that a mortgage contract is registered and that the buyer should, therefore, has knowledge that the object he is purchasing is encumbered by a mortgage. A buyer, under these circumstances, can choose to pay the price of the object to the mortgage creditor, thus retaining his ownership of the object, or he can ask the creditor to repay him the price he paid for the object, or to relinquish his title of ownership. The buyer would then take an action of regress towards the seller, or towards the third person that had mortgaged the object in order to be compensated.

7.4. Legal solutions to act against final court decisions and the execution of court orders

There is no particular legal solution to deal with final court decisions provided in Albanian legislation.

According to the execution of a decision, Article 311 of the Civil Code of Procedures provides that "When a court decision contains an obligation for a party to deliver goods of the same nature\(^{43}\) or, an obligation to perform a specific action, the court may define, within the decision, a time-period in which the execution of the decision must be completed." Regarding the execution of a decision, the general rules for execution that are provided for in the Civil Code of Procedures are applied. In Decision No. 1002, dated 04.2010, the Civil College of the High Court has interpreted the scope of Article 311 of the Civil Code of Procedures. The Court of First Instance, after having scrutinized an actio reivindicatio, decided on the return of goods to the plaintiff and determined a limited period of time for the execution of the decision. The Court of Appeal decided to supplement the decision of the Court of First Instance by adding a condition that the apartment should also be returned to the plaintiff along with the return of the money. The Civil College of the High Court stated that: "Under these circumstances, the Court of Appeal acted in a manner that was contrary to Article 311/1 of the Civil Code of Procedures. The provision made in this article concerns the determination of a time limit for the execution of a decision regarding the return of goods, but does not deal with the execution of other actions. By setting this condition, the Court of Appeal trespassed on the parameters of this provision."

8. Please provide a relevant national bibliography (articles, books, parts of books that deal with the issue of legal defects)


9. Important notes

If in your legislation and/or court practice there are any specifics that have not been included in this questionnaire please give details of them separately.

\(^{43}\) Emphasis added

\(^{44}\) Civil College of High Court, Decision No.1002, dated 4.10.2000, Series No.10, October 2000, page 34
If in your legislation there are any imminent changes (amendments) that will apply to regulations concerning liability for legal defects, please give details of them in footnotes attached to your answers. Please also provide a brief review of the reasons for any such amendments.

No data available for this question

Bibliography:

Books:


Laws:


Decisions of the High Court of Albania:

Civil College of the High Court, Decision No.1002, dated 4.10.2000, Series No.10, October 2000
LIABILITY FOR LEGAL DEFECTS
Country report for Croatia

1. How is the liability for legal defects defined in your legislation? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and its number!

The liability for legal defects is regulated as a general rule in Article 357 paragraph 2 of the Law on Obligations OG 35/05 and 41/08 (hereinafter LO), in the chapter regulating the effects of contracts obligating two sides. In a payment contract each of the contracting parties is liable for legal defects in the fulfilment and is obliged to protect the other party from the rights and requests by third parties, which would cause its right to be excluded or reduced. In legal literature it is pointed out that the issue of liability for legal (and material) defects is directly related to the violation of the principle of equal value of the obligations from Article 7 LO, and is thus connected to all payment contracts. By giving of the object with the legal defect the contractual obligation is fulfilled, although as a consequence of this fulfilment liability for legal defects arises. This is different from the cases when the contracted object of fulfilment is not given, because then we have overdue fulfilment or non-fulfilment of contractual obligation, due to which other legal consequences occur. The same is pointed out in legal literature for cases when the right which is the object of sales does not exist. The seller would also not be liable for legal defects then, but for non-fulfilment (if there is no evidence for exemption of liability). However, we then need to think how to interpret the part of the provision from paragraph 2 Article 430 of the LO according to which the seller of a certain right guarantees that it does exist. Maybe following this obligation there is room for interpretation that there is liability for legal defects even when the object for the fulfilment of the right does not exist. There is no available case law on this issue and a final answer cannot be given.

In paragraph 3 Article 357 of the LO it is regulated that on liability for legal defects the rule on seller liability shall apply, if not otherwise regulated for individual contracts. This liability is regulated in Articles 430 to 437 of the LO. Thus, the listed rules, contained in the special part of the LO provisioning the sales contract, using Article 357 paragraph 3 of the LO have become the general rules applied to all types of contracts with payment. According to this, the definition of liability for legal defects should be looked for in Article 430 paragraph 1 of the LO according to which the seller shall be liable to the buyer for all and any rights of third persons in the sold thing, which exclude, reduce or limit the rights of the buyer of the existence of which the buyer was not informed nor accepted a thing encumbered by such right. Further, in paragraph 2 of the same Article, the liability for legal defects of a transferred right is regulated and according to this provision the seller of a right shall guarantee that the right exists and that there are no obstacles to it being exercised. According to case law a transferred contract is not void only because seller is not the authorized person of this right. Such a contract obliges the parties and the termination may be requested under certain
circumstances by the acquirer to whom the seller is liable if there is a right that excludes the right of the acquirer (Supreme Court of RC, Rev. 2223/90 from 20.3.1991).

With the quoted provisions from Article 430 we expand the general definition of liability for legal defects from Article 357 paragraph 2 of the LO. It is also important to look at the provision from Article 436 of the LO according to which a seller shall be liable, in accordance with these rules, also in cases where there are special limitations of public legal nature of which the buyer was unaware, if the seller was aware of them or should have been aware of them, and failed to notify the buyer. Only all of this together is the full legal definition of liability for legal defects of the object of fulfilment, which is applied to all types of contracts with payment.

Further, it should be pointed out that in legal literature there is the opinion that provisions regulating liability for material defects can also be applied to liability for legal defects, but not all, and only on the ones regulating questions not explicitly regulated in Articles 430 to 437 of the LO and which can be applied taking into account the specifics of the liability for legal defects, and in a manner that is adequate to the different nature of these two types of defects.

Liability for legal defects in case law is also called protection from eviction (Country Court in Zagreb, Gž-4788/02, from 23.4.2004). According to this court decision: “In sales contracts eviction means legal violation due to buying of the acquired thing, and the violation is made on the basis of a right of a third party that existed before the acquisition by the buyer. Thus, it is necessary for a right of a third party to exist and that it excludes, reduces or limits the buyer’s right”. It can be said that in this case the court has further specified the definition of liability for legal defects naming it protection from eviction, and defining the term of eviction at the same time. The court has also clearly expressed the opinion that the right of a third party must exist prior to the buyer’s acquisition. In another decision (Country Court in Rijeka, Gž-1326/03, from 24.11.2004) the court has defined liability for legal defects naming it liability for eviction and stating: “Namely, the liability for legal defects (eviction) is nothing other than legal violation of the acquirer of the object from a third party, which actually excludes, reduces or limits the buyer’s right, and the third party in reality has some right on the thing, in this case in regards to the real-estates that are objects of sale. However, if the third party has never pointed out his right, i.e. his request to the acquirer of the object, then the parties cannot successfully call upon the institute of eviction. In other words, this means that for the existence of a legal violation it is not enough only to have the bare possibility of it occurring, but it is needed for it to have truly happened in reality, so it must be shown that the third party has a certain right to the bought object, which was not even proven in the contestation, let alone it having truly happened. Because of this, the parties in this procedure do not have a basis to invoke liability for legal defects and request in this sense the reduction of the price of the sold object or compensation for damage, for the simple reason that no third party has in this sense presented a judicial or extra judicial request that would create a legal violation.” The court in this case expresses the view that the mere possibility of a third party to present his request to the acquirer that would exclude him from the acquisition of a certain right or would reduce or limit the acquired right, by itself does not lead liability for legal defects. The third party must in reality present his request, judicially or extra judicially. Here the court also points out the opinion that the request of the third party does not necessarily have to be put in a court proceeding, but it is enough to present in any way that a third party has a right to a certain object (in this sense see the first part of the provision of Article 431 of the LO.) In legal literature it is pointed out that eviction can be judicial, in which the third party manifests his opinion on the existence of his right by undertaking a legal action in front of the court or another competent body, directed at realization or determination of his right, or extra judicial, in which the third party points out his requests extra judicially. Also, in legal literature it is usually pointed out that there is full and partial eviction. With full eviction the right of the third party fully excludes the right of the acquirer.
This can be, for example, in the case when the acquired object is in the ownership of the third party, and not in the ownership of the seller, i.e. when the acquired right does not belong to the seller but to a third party. Partial eviction occurs when the acquirer’s right to the object or the content of the acquired right are limited or reduced due to the right of a third party, which can be of contractual legal, real legal or inheritance legal nature.

Here it should be mentioned that the liability for legal defects exists if the buyer, i.e. the second acquirer was not informed of the defect, nor has agreed on the object of fulfilment having a legal defect (Article 430 paragraph 1 of the LO). According to the opinion expressed in legal literature, the knowledge of the seller, i.e. the second alienator, of the legal defects is not a precondition for the occurrence of his liability, unless when it is a case of special limitations of public legal nature. In this case it is looked whether the seller knew that they exist or that he knew that such limitations may be expected, and did not inform the buyer of that. On the other hand, the precondition for occurrence of liability for legal defects is the lack of knowledge of the acquirer of such defects, i.e. him refusing to take an object or acquire a right with a legal defect. The acquirer can learn of the legal defect from the seller or in another way. The seller shall thus not be liable for legal defects if the buyer knew of the legal defect and agreed to buy the object with the legal defect. This is confirmed in the revision decision of the Supreme Court of RC, Rev. 848/88 from 27.9.1989 in which the court states: “However, the condition for the seller’s liability in this case is that the buyer was not informed at the time of buying on the existence of rights of third parties on the objects he is purchasing, i.e. that he did not agree to buy an object burdened by such right. In this case, however, it has been determined that the plaintiff and the defendant knew that the said television set was not cleared through customs and the plaintiff as a buyer agreed to buy such a television set. Thus the defendant in the sense of the given legal provision is not liable as a seller for the defect that the object had at the time of selling to the buyer, and the plaintiff, as is justifiably pointed out in the revision, is requesting compensation of damages from the defendant without any basis.” According to this, in legal literature the rights of the acquirer arising from the liability for legal defects are connected to the principles of conscience and honesty arising from Article 4 of the LO. The acquirer must be in good faith during the acquisition and may draw upon his rights from the liability for legal defects only if he was not aware of them.

We should also point out that in the decision of the County Court in Zagreb, Gž-11222/00 from 10.6.2003 the court confirmed the viewpoint of the legal literature that the guilt for legal defects is not relevant for the occurrence of liability. The verdict states: “However, the condition for seller liability in this case was that the buyer was not informed at the time of buying of the existence of rights of third parties on the object he is buying, i.e. that he did not agree to buy an object burdened with this right. Since it has not been determined whether the buyer (plaintiff) knew, nor does he claim that this was the case, it is irrelevant for this dispute the issue of who is at fault with the defect. Thus, he as the seller in the sense of the given provision of the law is liable to the buyer.”

Seller liability on legal defects is transferred to his universal but not singular legal successors (Supreme Court of RC, Rev. 961/88 from 10.11.1988).

2. How are the legal defects of goods and rights defined in your legislation? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and the number!

According to Article 430 paragraph 1 of the LO the seller shall be liable to the buyer for all and any rights of third persons in the sold thing, which exclude, reduce or limit the rights of the buyer. According to paragraph 2 of the same Article the seller of a right shall guarantee that the right exists and that there are no obstacles to it being exercised. According to Article 436 of the LO
legal defects are also special limitations of public legal nature. According to everything said it can be
concluded that the legal definition of legal defect is that there is a legal defect when on the object
of fulfilment there is a right of a third party or some public legal limitation that disables the acquirer
from fully acquiring his rights or the right that he should acquire according to the contract.

The right of a third party can be any right that excludes, reduces or limits the right that the
acquirer should have acquired according to the contract. In this we must see which rights of third
parties can have effect at all against the acquirer. Thus, a legal defect as a rule are rights of third
parties of absolute nature, whereas relative rights of third parties present a legal defect only if in
the concrete circumstances they can have an effect against the acquirer. Limitations of public legal
nature exist when a public authority person in the performing of his public authority with a general
or special legal act excludes, reduces or limits the right of the acquirer or the authority that should
belong to him under the contract on the basis of the acquired right. An example of the limitation
of public legal nature we can give the case when the customs took away an acquired object since it
was not cleared through customs during import (Supreme Court RC, Rev. 848/88 from 27.9.1989).

According to case law (Supreme Court of RC, Rev 2726/94 from 14.5.1997, Rev. 560/95 from
18.6.1998, Rev. 1459/01 from 15.9.2004. and Rev. 152/00 from 28.5.2003) there is a legal defect when
the automobile has counterfeit documents (counterfeit traffic license) or counterfeit vehicle identi-
fication number, which disables the buyer from registering and using the automobile. Also, a legal
defect exists when the object of fulfilment is a stolen motor vehicle, due to which the competent
body has seized this vehicle from the buyer (Supreme Court of RC, Rev 3226/94 from 28.10.1997, and
Supreme Court of RC, Rev 2507/99 from 5.2.2002).

There is a legal defect in the case when the seller with a land registry extract presented to
the buyer that she is the sole owner of the apartment, whereas the apartment at the same time
belonged to the husband of the seller on the basis of marital property and the husband took the
apartment away from the buyer (Supreme Court of RC, Rev 473/03-2 from 19.7.2006). The Court
determined that: “...that the marital partner of the defendant in regards to the subject apartment
has the right to ownership that excludes the right of the plaintiff to, on the basis of the apartment
sales contract, acquire ownership over this apartment, that the plaintiff was not acquainted with this
circumstance at the time of concluding of the contract, that the plaintiff as a buyer has informed the
accused seller that her marital partner has an ownership right on the apartment, that the defendant
did not release the apartment from the legal ownership pretenses of her marital partner and that
the marital partner of the defendant has taken away the apartment from the plaintiff – leads to the
realization of material legal preconditions for imposing sanctions due to legal defects... i.e. that the
subject apartment sales contract is terminated according to law.”

According to case law there is a legal defect in the case when the right of ownership cannot
be turned into a right of ownership on a special part of the real-estate because the building was built
against the construction permit. Thus, the real-estate as subject of contract has a legal defect in the
sense of Article 430 of the LO on the basis of which the buyer has the rights from Article 432 of the
LO (Supreme Court of RC, Rev. 502/07 from 19.11.2008). On the other hand, the Supreme Court of RC
in revision case Rev. 1058/05 from 16.3.2006 stated that the fact that the real-estate subject of sales
was not registered in the land registry and that the seller was not registered as the owner is not unto
itself a legal defect that would give the buyer the right to terminate the contract.

If the acquirer knew of the previously defined legal defect, there is no liability of the seller
although the legal defect continues to exist by itself. Thus, such cases according to legal literature
can be equalized to non-existence of legal defects, because the effects of non-existence of liability
are equal to the effects on non-existence of legal defects. Thus the Supreme Court of RC in case Rev.
848/88-2 from 27.9.1989 decided that the seller will not be held liable for legal defects of fulfilment
3. **What are the obligations of the purchaser in case of legal defects (such as but not limited to notification of the seller)?** Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and the number!

When it is shown that a third party has the right to a thing that is the object of fulfilment in a contract with payment, the buyer, i.e. the second acquirer, the buyer shall notify the seller thereof, except where this is already known to the seller, and invite him to free the thing of such right or claim by a third party within a reasonable period or to deliver him, where the object of the contract are things determinate as to their kind, another thing free of a legal defect. The given obligation of the buyer is provided in Article 431 of the LO. As previously said, there is judicial and extrajudicial eviction. In this sense the third party can show in any way that he has the right to a certain thing or right that is the object of fulfilment. He does not need to prove this by submitting a suit in front of a court or competent body. The existence of the right of a third party can be determined in any way, and not only with a court decision. Thus, in any case when in any way it is shown that the third party has a right on the object of fulfilment, the buyer shall inform the seller thereof. According to legal literature, any extrajudicial manifestation of the position of the third party from which arises his understanding on the existence of a certain right of his on the object of fulfilment shall impose on the acquirer the obligation of informing the seller. However, according to legal literature, the acquirer's duty for informing cannot be understood as his obligation that corresponds to some right or request of the seller. The acquirer, according to the general provision from Article 348 of the LO on liability for not informing, would be liable to the seller for the damage incurred for failure to notify. (In Article 348 LO from the chapter on effects of contracts it is provided that a contracting party obliged to notify the other party about facts that have an impact on their mutual relationship shall be liable for the damage suffered by the other party as a result of the failure to notify it in time). According to the aforementioned it can be concluded that the notification of the seller is just a precondition for maintaining the acquirer's rights from the liability for legal defects. If in the legally prescribed time he does not inform the seller, he will lose the right to liability for legal defects. However, the acquirer will lose the rights from liability for legal defects if he has not informed the seller with the expiry of the preclusive deadlines for realizing the right from Article 437 of the LO, and in cases when they have initiated litigations with third parties themselves and lost them, if the seller proves was in possession of the assets in order to reject the request of the third party (Article 433 LO).

Informing of the seller, however, is not always necessary for the acquirer to realize his rights from the liability for legal defects. According to Article 431 the acquirer is not obliged to inform the seller if the seller already knows that a third person has a certain right on the object of fulfilment. This was confirmed by the Supreme Court in revision case Rev. 979/07 from 27.11.2007, pointing out that the buyer shall notify the seller when it is shown that a third person has the right to a certain thing, except where this is already known to the seller. According to case law the seller against whom a penalty procedure is initiated related to a sold object must know that there is a legal defect on the sold object, due to which the buyer is not obliged to inform the seller thereof (Supreme Court of RC, Rev. 285/06 from 17.10.2007). Further, informing the seller of the legal defect is not necessary in cases when the rights of third parties are obviously valid. Namely, according to Article 434 paragraph 1 of the LO the buyer shall be entitled to invoke the seller's liability for legal defects also where without having notifying the seller and engaging in litigation proceeding he
acknowledged a clearly valid right of a third person. According to case law: “The fact that the third party submitted a request for return of taken property is not an obvious valid right in the sense of Article 434 paragraph 1 of the LO, which would exclude, reduce or limit the right of the plaintiff as a buyer. The existence of the right of the third party must namely be indisputable, and the result of the administrative procedure that this third person has initiated is not certain. The right of the third person must be obvious. In this case there is only a possibility that the third person in the initiated procedure in front of the administrative body will acquire certain rights. The rights that eventually the third person will acquire do not have to lead to the exclusion, reduction or limitation of the plaintiff’s rights” (Supreme Court of RC, Rev. 668/05 from 14.6.2006). And, finally, informing the seller is not necessary if the seller does not have the assets to refuse the request of the third party. Then the acquirer can go into litigation with the third person without informing the seller. If he loses the litigation he may still call upon seller liability for legal defects. He will not have this possibility only when the seller proves was in possession of the assets in order to reject the request of the third party (Article 433 of the LO). According to legal literature, “litigation” in this sense means any legal proceeding and not necessarily a litigation procedure.

In Article 431 of the LO it is provided that where it becomes apparent that a third person has rights in a thing, the buyer shall invite the seller to free the thing of such right or claim by a third party within a reasonable period or to deliver him, where the object of the contract are things determinate as to their kind, another thing free of a legal defect. According to legal literature this is also not understood as an obligation of the acquirer, but as a right arising from liability for legal defects. Still, the acquirer must submit the request within the timeframe from Article 437 of the LO so that he does not lose the right to liability for legal defects.

4. Which sanctions are imposed to the seller i.e. what is the scope of the liability in the cases of sales of goods? Which are the sanctions in the cases when the purchaser does not fulfil his/her obligation in the case of legal defects? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and number!

As was mentioned in the answers to the previous questions, in order to realize his rights for liability from legal defects, the acquirer is obliged to inform the seller on the fact that it was shown that a third party has some right on the object of fulfilment that excludes, reduces or limits the right that according to the contract the acquirer was supposed to acquire, and invite him to free the thing of such right or claim by a third party within a reasonable period or to deliver him, where the object of the contract are things determinate as to their kind, another thing free of a legal. What is reasonable time in this situation should always be considered depending on the concrete circumstances in each case (Supreme Court of RC, Rev. 979/07 from 27.11.2007).

According to Article 432 paragraph 2 of the LO, if the seller does not meet the buyer’s request to free the thing of such right or claim by a third party within a reasonable period, the buyer may terminate the contract if due to this its purpose cannot be achieved. This provision regulates the rights of the buyer, i.e. the second acquirer, in case when there is extrajudicial eviction, i.e. in cases when the third party has not initiated any proceeding in front of court or other body for realization of his right that excludes, reduces or limits the acquirer’s right, but has extra judicially manifested his opinion that his right exists on the object of fulfilment. If reasonable time has passed and the seller did not fulfil the buyer’s request, and if due to the legal defect the purpose of the contract cannot be realized, the buyer may with one-sided expression of will terminate the contract. According to case law it is not necessary to request termination of contract in litigation. Also, the statement on the
termination does not have to be made in written form. The termination occurs with the statement of the buyer, if the preconditions for termination of contract due to legal defects have been realized. If there is dispute on whether the termination of contract in this case has generated a legal effect, the decision of the court would have a declaration and not constitution character (Supreme Court of RC, Rev. 152/00 from 28.5.2003). The Supreme Court of RC in revision case Rev. 1435/97 from 3.12.1997 stated: “It is the right decision of the courts that counterfeit vehicle identification numbers on the engine of the automobile that was object of sales contract have the meaning of a legal defect that limits the buyer’s right to unobstructed use of the thing, and in case of non-removal of this defect by the seller the purpose of the contract cannot be realized. Thus, if the seller on request of the buyer in a reasonable time does not free the object from this defect, the buyer is entitled to terminate the contract. This right, to terminate a contract, is the right to one-sided extrajudicial termination of contract, which means that the effect of termination is achieved with the statement of termination of contract itself, and in cases when court termination has been requested and a court decision was made regarding that, this decision does not have a constitution but a declaration meaning... Because in this case the statement of termination was given within the given time frame of one year, the suit request of termination of contract only has declaratory meaning, and can only relate to the establishment of the already happened termination of contract, it must be concluded that there was no loss of right by the plaintiff.” Further, in case law there is the opinion that the suit itself requesting the termination of a sales contract is a statement by the buyer for termination of contract, when such a statement has not been given prior to submission of the suit (Supreme Court of RC, Rev. 1391/99 from 19.11.2000, and Country Court in Dubrovnik, Gž-1426/06 from 20.11.2008).

It was said previously already that the acquirer’s duty from Article 431 of the LO to inform the seller on the legal defect and his obligation to request the removal of the legal defect or transfer of another object without defect do not create any right or request on the part of the seller. If the mentioned duties are not fulfilled in the preclusive deadline from Article 437 of the LO the consequence will be loss of right to liability for legal defects. Also, if it is a case of extrajudicial eviction, the omission of the acquirer to in accordance with Article 432 paragraph 2 in the time frame from 437 of the LO to terminate the contract with a one-sided expression of will, will also result in the loss of right for liability for legal defects.

On the other hand, if it is the case of court eviction Article 432 paragraph 1 of the LO shall apply. Thus, if a third party has initiated a procedure in front of court or another competent body for realization of his right that excludes the right of the buyer, and if the seller does not act on the request of the buyer and does not remove the defect or does not give another generic object without defects, which leads to taking away of the objects from the buyer, the contract shall be terminated by law. The Supreme Court of RC has, in the already mentioned case Rev. 473/03 from 19.7.2006 in which the marital partner took from the buyer the apartment on the basis of marital property, concluded that the apartment sales contract was terminated according to law on the basis of Article 432 paragraph 1 of the LO. The court decided the same when the competent body seized from the buyer the stolen automobile (Supreme Court of RC, Rev. 644/07 from 28.8.2997, Rev. 788/01 from 12.5.2004, Rev. 1054/92 from 9.9.1992, Rev. 1391/99 from 19.11.2000), and also in the case of the seized automobile acquired on the basis of an exchange contract (Supreme Court of RC Rev. 560/95 from 18.6.1998). In all of these cases the court has also concluded that the acquirer has the right to return of the paid price. This is a consequence of the application of general rules on the consequences from termination of contract, and not the special provisions on liability for legal defects.

The same provision prescribes what happens in the case when there is partial court eviction. Namely, if a third party has initiated a proceeding in front of court or another competent body, for realization of his right that reduces or limits the right of the buyer and if the seller fails to act in com-
pliance with the buyer’s request and does not remove the defect or does not give another generic object without defect, due to which the buyer’s rights are reduced or limited, the buyer may choose to terminate the contract or request a proportionate reduction of price (Article 432 paragraph 1 of the LO). Here the contract is not terminated by law, but by statement of will of the seller. According to legal literature, what is a proportionate reduction of price should be concluded taking into account the value of the object with legal defect that is the subject of fulfilment and its value without a defect.

In any case, the buyer shall be entitled to compensation for damage suffered in accordance with general rules on liability for damage (Article 432 paragraph 3 of the LO). In this, in the legal literature it is pointed out that it is a case of application of general rules for liability for damages due to breach of contract, and not the application of general rules for damages outside of the contract. According to case law the paid premium for Casco insurance (motor own damage insurance) for a vehicle that was seized from the buyer since it was stolen from a third person is a damage that the buyer is entitled to (Supreme Court of RC, Rev. 1054/92 from 9.9.1992). The buyer from whom the competent body has seized the bought vehicle because it was stolen has the right to request from the seller the return of paid price and compensation for damages (Supreme Court of RC, Rev. 1391/99 from 19.11.2000, and Rev. 2726/94 from 14.5.1997).

However, if at the time of entering into the contract the buyer knew of the possibility that the thing be taken away from him, or his right reduced or limited, he shall not be entitled to compensation of damage should this possibility be realised, but he shall be entitled to reimbursement or reduction of price (Article 432 paragraph 4 of the LO). We should also recall here the provision from Article 430 of the LO according to which liability for legal defects exists only when the buyer was not informed of the defect nor accepted a thing encumbered by such right. It seems that these two provisions are mutual conflicting. However, in the provision from Article 432 paragraph 4 of the LO it should be pointed out that the buyer only knows of the possibility that the thing be taken away from him, or his right reduced or limited. In cases when the buyer does not know of a legal defect but knows only of the possibility that such a defect exists, and this possibility is realized, then there will also be liability of the seller for legal defects. However, his liability is limited and he shall not be liable for compensation of damage incurred on the buyer, although the buyer shall be entitled to the other rights for legal defects. There is no available case law on this provision.

5. Can the liability of the seller be limited and/or excluded and how? Are there any specific conditions for the limitation and/or exclusion of the liability? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and number!

The regulation on liability for legal defects are dispositive in their nature and the parties can limit or completely exclude them with a (Article 435 paragraph 1 of the LO). This is one of the consequences of the principles of disposition, according to which the contracting parties freely regulated the contractual relations (Article 2 of the LO) and, unless they agree otherwise, the legal provisions on liability for legal defects shall apply. That is why this is one of the typical natural components of legal business.

Still, the freedom of contracting from Article 2 of the LO is limited with the provisions of the Constitution of RC, mandatory regulations and the moral of society, and account must also be taken of the other principles of obligation law. Both contracting parties shall act in accordance with good faith and fair dealing (Article 4 of the LO). The consequence of failure to respect this principle is provided in Article 435 paragraph 2: if at the time of entering into the contract the seller was aware
or could not have been unaware of a defect to his right, the provision of the contract on limitation or exclusion of liability for legal defects shall be invalid. The seller shall be held liable to the buyer when this provision was not included in the contract. The invalidity of this provision will not cause the invalidity of the entire contract. The law explicitly prescribes as consequence only the invalidity of that contract provision and no the entire contract.

The seller cannot validly release himself from the obligation not to commit a violation against the buyer factually or legally. This contract provision would be void. Because he is obliged to protect the rights of the buyer and requests of third parties, it is logical to be expected from him not to commit a violation against the buyer, legally or factually.

Because the liability for legal defects is regulated with dispositional rules, there is no limitation on the contracting parties agreeing on increased liability of the seller. Thus, in legal literature it is stated that even a defect that to a smaller extent limits the right of the buyer can lead to termination ex lege, if so agreed by the parties in the contract.

Case law for exclusion or limitation of liability for legal defects is almost non-existent. The literature states that the reason for this is that the contracting parties do not use at all or insufficiently use this possibility, either because they use typical forms of contracts (that do not contain this provision) or due to another reason.

From case law:

“Unimportant are the revision statements indicating the conscientiousness of the defendant indicating that he was not aware of the disputed defect, because for evaluation of the buyer's right the issue of conscientiousness or lack thereof is inconsequential. This issue can only have meaning in the application of the provision from Article 513 of the LO (now Article 435 of the LO), and this is not the situation in this case”.

From the rationale of the decision of the SCRC, Rev 3122/99 from 8 July 2003.
The same in the rationale of the decision of the SCRC, Rev 1435/97 from 3 December 1997.

6. Are the rights of the purchaser related to the liability for legal defects limited in time? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and number!

The realization of the right of the buyer from legal defects is limited in time with a deadline, which differs depending on whether it is a judicial or extrajudicial eviction.

The provision from Article 437 paragraph 1 of the LO regulates that a right of a buyer arising as regards to legal defects shall extinguish one year from the moment of becoming aware of a right of a third person. This is for extrajudicial eviction. In its nature, this deadline is preclusive and subjective. In legal literature it is not disputable on whether this is a preclusive deadline, but statute of limitations are also mentioned. Because there is no special objective deadline, it is pointed out that the general statute of limitations could be applied from Article 225 (e.g. in situations when a buyer has paid a third person an amount to renounce his obvious right, in which case he can request from the seller to compensate him for the paid amount – Article 434), as well as special statute of limitations for compensation of property damage from Article 230 of the Law on Obligations. The deadline is subjective, because it starts from the knowledge of the existence of the right of a third party, in which the manner of how the buyer found out about the right of the third party is irrelevant.
From case law:

“This right, to terminate a contract, is the right to one-sided extrajudicial termination of contract, which means that the effect of termination is achieved with the statement of termination of contract itself, and in cases when court termination has been requested and a court decision was made regarding that, this decision does not have a constitution but a declaration meaning. [...] Because in this case the statement of termination was given within the given time frame of one year, the suit request of termination of contract only has declaratory meaning, and can only relate to the establishment of the already happened termination of contract, it must be concluded that there was no loss of right by the plaintiff.”

From the rationale of the decision of the SCRC, Rev 1435/97 from 3 December 1997.

“It is the correct conclusion of the lower instance courts on the non-existence of circumstances on the side of the plaintiff as the buyer that would lead to termination of his right on the basis of legal defects. Namely, opposite to the revision, the plaintiff by sending the notification of seizure of the vehicle to the defendant, on the same day when it was seized, and this was 21 March 1995, respected the deadline from Article 515 paragraph 1 of the LO (now Article 437 paragraph 1 of the LO). [...] Also, in the opposite revision, the notification of the seizure itself, with a sent request for return of the full paid sales price for this vehicle, would represent expression of will for termination, which would occur in the given circumstances of seizure, and due to the nature of the defect itself, according to law invoking Article 510 paragraph 1 of the LO (now Article 432 paragraph 1).”

From the rationale of the decision of the SCRC, Rev 3122/99 from 8 July 2003.

If it is an issue of court eviction, we have two cases. In the first case, if the procedure was initiated before the expiry of the one year term from the knowledge of the buyer of the existence of the right of a third party, and the buyer has called the seller to get involved in the dispute, the buyer may realize the rights from the liability for legal defects within six months’ time from the moment when the court decision becomes final (Article 437 paragraph 2 of the LO). The deadline is objective and preclusive. After the expiry of this time, the buyer shall lose the right to terminate the contract with a one-sided statement, i.e. to request reduction of price and also loses the right to compensation of damage.

In the other case, when the procedure was initiated after the expiry of the one year term, the buyer shall lose the right from liability for legal defects because the Law explicitly prescribes a six month term only for the cases when the procedure was imitated before the expiry of the one year. This means that the buyer loses the right towards the seller, but it does not mean that the third person loses the right to the buyer.

If the thing was seized from the buyer in the procedure (total eviction) the buyer does not lose the rights that are generated as consequence of the termination that was made ex lege, irrespective of deadlines. The effects of termination of contract, amongst other things, are comprised of the fact that the party which has fulfilled the contract in full or in part has the right to request the return of what it gave (Article 368 of the LO). The request for return of what was given in the name of fulfilment of contract, regardless of whether it is a termination ex lege or one-sided termination, shall reach statute of limitations with the expiry of the general statute of limitations of five years, which starts running the first next day after termination of contract.

From case law:

“The buyer from whom the competent body has seized the bought motor vehicle because it was stolen, has the right to request from the seller return of paid price, because the seller (in this legal issue revident) is responsible as the seller of a thing with legal defects, and this is all in accordance with Article
508 paragraph 1 of the Law on Obligations (“Official Gazette”, no. 53/91, 73/91, 3/94 and 7/96 – hereinafter LO), because he sold the plaintiff a thing that a third person has a right on, which excludes the buyer’s right (thing belonging to another person). Sanctions for sale of things with legal defects seized from the buyer are prescribed in Article 510 paragraph 1 of the LO and the plaintiff according to the quoted provision could terminate the contract and as consequence of contract termination request the return of the paid price (Article 132. paragraph 2 of the LO)."

From the rationale of the decision of the SCRC, Rev 3226/94 from 28 October 1997.

“Namely, by termination of contract the litigation parties are free from their obligations (except the obligation for compensation of damage) and as the plaintiffs have partially fulfilled the contract they had the right to request from the defendant to return what they had given (Article 132 paragraphs 1 and 2 of the LO) and according to Article 361 paragraph 1 of the LO the statute of limitations on their receivable started running on the first day after the day when they had terminated the subject contract, and since then to the submission of this suit the five year statute of limitations has run out, which can undoubtedly be seen from the given decisive factors determined by the courts.”

From the rationale of the decision of the SCRC, Rev 1703/91 from 14 November 1991.

7. In the disputes for liability for legal defects what is the position of the parties (the seller, the purchases and the third party who is holder of the right)? Are there any specific legal remedies against the decisions of the first instance court in the dispute? Are there any specificities in the execution of these judgments? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment and number!

If a third party has initiated a court (litigation) procedure against the buyer for transfer of a thing for which he claims to be the owner (or requests the realization of another right that reduces or limits the right of the buyer, e.g. the right of service), the buyer should call the seller to come into the dispute on his side, that is inform him of the litigation with a submission through court (Article 211 of the Law on Litigation Procedure OG 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08 and 57/11, hereinafter: LLP). With this the buyer actually fulfils the obligation from Article 431 of the LO, which is comprised of informing the seller of the legal defect, unless the seller already knows of the legal defect. The consequence from not inviting the seller depends on the assets for objection at the disposal of the seller at the time of conducting of the procedure. If he could refute the request of the third party (e.g. with the objection that the plaintiff is not the owner of the thing, because the seller acquired ownership of the thing by usucaption), and the buyer did not invite him to come into the dispute, the buyer loses the rights from the liability for legal defects. The burden of proof in this case is on the side of the seller, because it is a general rule that the seller is liable for legal defects, even if the buyer did not invite him to come into the dispute, with the given exception (Article 433 of the LO).

The buyer could also be on the active side. For example, with a real ownership suit for transfer of things (reivindicatio) the buyer requests the third party (defendant) the transfer of things, and the third party objects that he and not the buyer (plaintiff) is the owner of the thing.

If the seller decides to become involved in the dispute, the legal order recognizes a specific position form him as intervener. The intervener is a person that has a legal interest that one of the parties in the procedure to be successful in the dispute, and it is enabled to participate in the litigation on that side. In liability for legal defects the issue is of an ordinary intervener, the litigation competences of which are different from the competences that the intervener has from the position.
of single co-litigator or sui generis intervener. The intervener may become involved in the litigation until the adoption of the final decision, and even until the end of the procedure due to an extraordinary legal remedy (Article 206 paragraph 1 and 2 LLP).

There are no specific legal remedies against a decision based on merits in a procedure where the intervener has participated, but the Law on Litigation Procedure recognizes the right of the intervener to independent submission of legal remedies – regular, but also extraordinary, if he has become involved in the litigation before the decision on the suit request became final (Article 208 paragraph 2 of the LLP). Since the intervener is not a party in the proceeding, the final decision cannot be enforced against him.

The thing can also be seized from the buyer in another procedure, for example, a criminal one (safety measure of seizure of objects).

In the procedure between the buyer and the seller for realization of rights of liability for legal defects, the buyer shall be the plaintiff and the seller shall be the defendant. The plaintiff may request the court with a declaration decision determine that the contract has been terminated (the termination occurred ex lege in case of total eviction or one-sided statement in the case of partial eviction) or may request reasonable price reduction, and is entitled to compensation of damage (Article 432 of the LO). There are no specifics regarding submission of legal remedies against decisions of first instance courts. Both parties may submit regular (complaint) and extraordinary (revision, repeating of procedure) legal remedies. Also, if the parties do not act on a standing verdict, it will be forcefully executed under the rules of enforcement law.

From case law:

“On the basis of these factual determinations it can be seen that the defendant is responsible as the seller of the thing with legal defect according to provision from Article 508 paragraph 1 of the Law on Obligations (“Official Journal”, no. 53/91, 73/91, 3/94 – hereinafter LO), because he sold to the plaintiff a thing on which the plaintiff cannot realize her right of ownership (registration and usage). When the plaintiff informed the defendant of this in accordance with the provision from Article 509 of the Law on Obligations, who did not act according to her request, it was properly determined (point 1 of the decision) that the contract was terminated (Article 510 paragraph 1 of the Law on Obligations). The effect of the termination is comprised of each party returning what they received (Article 132 paragraph 2 of the Law on Obligations) and that the buyer has the right for compensation of damage suffered (Article 510 paragraph 3 of the Law on Obligations).”

From the rationale of the decision of the SCRC, Rev 2726/94 from 14 May 1997.

If the seller participated in the dispute between the buyer and a third party as an intervener, the final decision adopted in this procedure has a specific procedural effect against him – intervention effect (Article 208a of the LLP), which means that the seller cannot claim that the previous dispute (in which he participated as an intervener) was not properly resolved. An intervention effect cannot be successfully initiated against the seller, if he was disabled from undertaking actions that would lead to a different resolution of the dispute. In this sense the Law on Obligations prescribes in which cases the buyer loses the right to invoke the liability of the seller for legal defects (Article 433 of the LO, v. supra), and it prescribes a special deadline in which the buyer can in such a case realize rights from liability for legal defects (Article 437. paragraph 2 of the LO, v. supra).

Finally the third party does not have the right to point out the invalidity of the sales contract made between the buyer and seller because he claims that he is owner of the sales object, since the sales of a thing owned by somebody else only binds the contracting parties. The rights of the buyer in case of sales of thing owned by somebody else are provided in Article 382 of the Law on Obliga-
tions. The buyer who did not know nor could know that the thing is owned by somebody else has
the right to terminate the contract, if this disables the realization of the purpose of the contract, as
well as request compensation for damage (Article 432 paragraphs 2 and 3 of the LO).

From case law:
"... when the object of sales is owned by somebody else, this fact does not give the third person
claiming to be an owner of the sold object the right to request the invalidation of the sales contract..."

From the rationale of the decision of the SCRC, Rev 1103/87 from 23 December 1987.
"... the selling of things owned by somebody else only binds the sellers..."
From the rationale of the decision of the SCRC, Rev 326/83 from 15 June 1983.

"... in case of selling of things owned by somebody else only the buyer from this contract is autho-
rized to request termination of the contract..."
From the rationale of the decision of the SCRC, Rev 391/83
"... on the other hand, neither the seller is actively competent to request termination of contract
for sale of real-estate because he was not the owner of the object..."
From the rationale of the decision of the SCRC, Rev 106/80 from 28 October 1986.

8. Please provide list of relevant national bibliography (articles, books, part of books
that deal with the issue for the legal defects).

Articles
1. Belanić, Loris, *Protection from eviction*, Almanac of the Faculty of Law of the University in
2. Belanić Loris, *Protection from eviction with overview of rules of real law in protection of faith in
   legal traffic*, I part, Law and taxes, 16(2007)9, pp. 34-44
3. Belanić Loris, *Protection from eviction with overview of rules of real law in protection of faith in
   legal traffic*, II part, Law and taxes, 16(2007)10, pp. 59-65
5. Momčinović, Hrvoje, *Seller liability for legal defects of sold things (Protection from eviction)*,
   Law in economy, 35(1996)1-2, pp. 147-159
7. Slakoper Zvonimir, *Liability for legal defects in the Law on Obligations and select legal orders*,
   Almanac of the Faculty of Law of the University in Rijeka, 28(2007)1, pp. 363-405.

Documents in books/parts of books
1. Klarić, Petar; Vedriš, Martin, *Civil Law: general part, real law, obligations law and inheritance
   law*, Zagreb: Official Gazette, 2009


**Comments on laws**


2. Gorenc, Vilim, *Comment on the Law on Obligations*, Zagreb: RRiF-plus, 2005

3. Perović, Slobodan; Stojanović, Dragoljub, *Comment on the Law on Obligations*, Gornji Milanovac: Culture Center and Kragujevac: Faculty of Law, 1980


**Other**


1. How is the liability for legal defects defined in your legislation? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

The Macedonian theory emphasizes that the goods, which sale is subject of contract, should have characteristics that enable the acquirer to have a property right that would not be excluded, limited or impeded due to existence of rights of third parties. Hence, if the goods are burdened with rights of third parties the liability for legal defects exists. In other words said, the liability for legal defects appears when the seller has sold somebody else’s goods as his/her own, or partially his/her goods as his/her own or a goods that is burdened with certain right (pledge, usufruct) as a free goods.1

The Law of Obligation does not provide explicit definition for liability for legal defects.2 The general obligation concerning the liability for legal defects is regulated in article 10, par. 2 of LO where it is stated that the contractual party is liable for the legal defects concerning fulfilment (along with the liability for material defects of fulfilment, regulated with article 110, par. 1) and he/she is obligated to protect the other contractual party from the rights and claims of third parties that could exclude or limit his/her right. According to article 110, par. 3 of LO this general liability for legal defects is related with the liability of the seller for liability for (material and) legal defects, unless the provisions concerning particular contracts provide otherwise.

In article 496, par. 1 of LO is stated that the seller is liable if the sold goods are burden by a right of a third party that excludes, reduces or limits the right of the buyer, and the buyer was not informed of its existence, nor has agreed to get goods that are burdened with such right. Additionally, according to paragraph 2 of the same article the seller of certain right guarantees that the right exists and that there are no difficulties for its realization. Provisions referring to the liability of the seller for legal defects are also applied for the exchange contract (art. 544, par. 2 of LO) and gift contract (art. 563, par. 1). The liability for legal defects is also applied with the lease contract.

In article 583 the LO defines the liability of the landlord in cases when a third party has certain right on the rented goods or on a part of it and addresses his/her claim to the lessee, and if

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1 Галев Г., Дабовиќ – Анастасовска Ј., Облигационо право, второ изменето и дополнето издание, ЦЕППЕ, 2009, стр. 571.
he/she arbitrarily take away the goods from the lessee (paragraph 1); when it is determined that the third party has a right that completely excludes the right of the lessee to use the goods (paragraph 2); i.e. limits the rights of the lessee (paragraph 3).

We don’t dispose with a case law of the highest court which specifies further the legal definition.

2. How are the legal defects of goods and rights defined in your legislation? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

According to article 496, par. 1 of LO the legal defects appear when the sold goods are burdened by a right of a third party that excludes, reduces or limits the right of the buyer. For transfer of rights, according to article 492, par. 2 of LO it is considered that there is a legal defect when the right that is sold does not exist, or has legal obstacles for its realization. These provisions also refer to legal defects of goods and rights that are subject of exchange (art. 544, par. 2) and gift (art. 562, par. 1). According to article 583, the leased goods are with legal defects when a third party claims certain right on the rented goods or on a part of it, and addresses its claim to the lessee, and if he/she arbitrarily deprive the goods from the lessee (paragraph 1); when it is determined that the third party has a right that completely excludes the right of the lessee to use the goods (paragraph 2); i.e. limits the rights of the lessee (paragraph 3).

We don’t dispose with a case law of the highest court which specifies further the legal definition.

3. What are the obligations of the purchaser in case of legal defects (such as but not limited to notification of the seller)? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

According to article 497 of LO when a third party claims a right on certain goods, the buyer, i.e. the contractual party of the exchange contract, i.e. the gifted party, is obliged to inform the seller about such fact, i.e. the other contractual party of the exchange contract, i.e. the giver, except in cases when the seller is already aware of such fact. Furthermore, the buyer is obliged to call the seller to free the goods from the rights and the claims of the third party in reasonable time, or to deliver him/her goods without legal defects, if the goods are determined by type. The obligation for notification exists also for liability for legal defects of lease goods (art. 583, par. 1).

According to article 502 of LO the seller is liable according to the rules for liability for legal defects in case when it comes to specific limitations that are of public nature and the buyer was not aware of such, if the seller was aware of their existence or was aware that such defects could be expected and did not inform the other party about that.
4. Which sanctions are imposed to the seller i.e. what is the scope of the liability in the cases of sales of goods? Which are the sanctions in the cases when the purchaser does not fulfil his/her obligations in the case of legal defects? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

Main sanctions that arise from the existence of legal defects are breaking of a contract, price reduction and liability for suffered damage.

- **A break of contract by law exists in the following case:**
  - If the seller does not act on the demand of the buyer in case when the goods are deprived from the buyer (art. 498, par. 1 of LO).

- **A break of contract by the choice of the buyer exists in the following cases:**
  - When the seller does not act on the demand of the buyer in a case of reduction or limitation of the buyer’s rights (art. 498, par. 1 of LO)
  - If the seller does not satisfy the buyer's demand to free the goods or the right from the claims of a third party in a reasonable time, the buyer can break the contract if its aim cannot be realized (art. 498, par. 2 of LO).

- **The buyer could ask proportional reduction of price in the following case:**
  - If the seller does not act on his demand in case of reduction or limitation of the buyer’s right (art. 498, par. 1 of LO).

- **Compensation of damage**
  - The buyer has the right of compensation of damage in any case according to the general rules for liability for damage (art. 498, par. 3 of LO). According to article 498, par. 4 of LO, the condition for the buyer to claim a compensation of damage is that in time of signing the contract he/she didn’t know of the possibility of depriving the goods or of the possibility of reduction or limitation of his/her right, and that possibility is realized. However, even in these cases the buyer has the right to demand return or reduction of the price.

  In a situation where the buyer, without noticing the seller, is engaged in a lawsuit with the third party and loses the case, according to article 499 of LO he/she can still cite to the liability of the seller for legal defects, unless the seller proves that he possessed means that could reject the claim of the third party. Furthermore, according to article 500, par. 1 the buyer has the right to refer on the seller’s liability for legal defect in cases when he/she recognized the apparent right of the third party without any notice or dispute. In case when the buyer pays the third party an amount of money so he/she would withdraw from his/her apparent right, according to article 500, par. 2 the seller can be released from his /her liability if he/she compensate the buyer the paid amount and the suffered damage.

  These rights are also acknowledged in the case law. According to the decision of the Supreme Court of Macedonia, No. 459/81 of 29.12.1981 “when the contract is broken because the goods were deprived from the buyer by third party, because it weren’t a property of the seller, the seller is liable for the total damage no matter if he was conscientious, that is did he/she knew that the goods he/she was selling were not his/hers. Similar to this, according to the decision of the Supreme Court of Macedonia, Gzz. No. 51/06 “for the legal defect of a vehicle, subject of a sale contract, the seller is liable no matter if he/she knew or could've knew. If the vehicle was deprived from the buyer, the contract is broken by the law and the buyer has a right of compensation of the suffered damage".
5. Can the liability of the seller be limited and/or excluded and how? Are there any specific conditions for the limitation and/or exclusion of the liability? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

The liability for legal defects may be limited or excluded if the legal conditions are fulfilled. According to article 501, par. 1 of LO the liability of the seller for legal defects may be limited or excluded with a contract. The limitation or the exclusion of the liability is conditional. According to par. 2 of the same article if in time of signing the contract the seller was aware or could not have been unaware with some defect concerning his right, the provision of the contract referring to the limitation or exclusion of the liability for legal defects is void. For legal invalidity of this provision, rules of article 95-102 of LO which regulates the invalidity are applied.

6. Are the rights of the purchaser related to the liability for legal defects limited in time? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

The Law of Obligation provides preclusion of buyer’s rights on the grounds of legal defects. Article 503, par. 1 of LO states that the buyer’s right on the grounds of legal defects expires one year after the awareness of the existence of a right of a third party. According to par. 2 of the same article, when the third party filed for a claim before the expiration of the time limit of one year and the buyer noticed the seller to intervene in the lawsuit, the right of the buyer expires after six months of the final completion of the lawsuit.

7. In the disputes for liability for legal defects what is the position of the parties (the seller, the purchaser and the third party who is holder of the right)? Are there any specific legal remedies against the decisions of the first instance court in these disputes? Are there any specifics in the enforcement of these judgments? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment.

In case of legal defects on goods that were subject of contract of sale, an eviction may occur. By definition, the eviction is a legal act of a third party (objection, action in material sense), that he/she on the grounds of a stronger right that existed at the time of signing the contract of sale, excludes or limits the buyer’s property right, who assumed that the property right was acquired in full and without limitations on the basis of the contract of sale.

When a third party claims particular right on the goods, which is a subject of the contract of sale, the third party may file a claim to the competent court, in other words, to bring a lawsuit against the buyer of the goods (property claim), claiming for return of the goods.

When it comes to disputes for liability for legal defects, the third party that pretends on particular goods, as a plaintiff, files a claim against the buyer, as the defendant. In this case, the seller of the goods may participate in the lawsuit as a third party. His position in the litigation may be as an intervenient, i.e. a third party, informed about the lawsuit.

The Law of Obligation of Republic of Macedonia (hereinafter LO)\(^3\) does not contain specific provisions referring to the position of the parties (the seller, the buyer and the third party who is

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\(^3\) Official Gazette of Republic of Macedonia, No. 18/01, 4/02, 5/03, 84/08, 81/09, 161/09.
a holder of a right or claims for a right) in lawsuits for liability for legal defects. However, from the provisions of LO governing the matter of liability for legal defects we can draw certain conclusions related to the position of interested parties in the civil litigation for liability for legal defects. The LO, in its provisions concerning the loss of the buyer’s right due to legal defects, provides a rule which states that the buyer may cite the seller to intervene in a lawsuit that was brought against him by a third party (art. 503, par. 2 of LO). The legal institute of participation of the intervenent in the civil litigation is governed by the rules of procedural law, which will be applied in the certain case (art. 194-197 of CPA). However, the following situation is possible: in a lawsuit that was brought by a third party against the buyer, under the provisions stated in CPA, the buyer may notice the seller for the lawsuit. In this context, the LO provides a provision which states that the buyer has the right to refer on the seller’s liability for legal defect in cases when he/she recognized the apparent right of the third party without any notice or dispute.

In a situation where the buyer, without noticing the seller, is engaged in a lawsuit with the third party and loses the case, he/she can still cite to the liability of the seller for legal defects, unless the seller proves that he possessed means that could reject the claim of the third party (art. 499, par. 1 of LO). In this case, in a possible lawsuit between the buyer (as plaintiff) and the seller (as the defendant), the seller can file an objection for misconduct of litigation.

Another possible situation is existence of a lawsuit between the buyer and the seller concerning the contract of sale, and the third party files a claim for main intervention against the buyer and the seller, who would have the position of co-litigants in that litigation (art. 188 of CPA).

As for the question of specific legal remedies against decision of first instance courts in the disputes for liability for legal defects, Macedonian legislation does not recognize specific provisions concerning particular (specific) legal remedies against decisions of the first instance courts.

Regarding the possibility of existence of certain specifics related to the enforcement of decisions in cases of liability for legal defects, the Macedonian law does not recognize such specifics.

8. Please provide list of relevant national bibliography (articles, books, parts of books) that deals with the issue of the legal defects.

- Галев Г., Дабовиќ – Анастасовска Ј., Облигационо право, второ изменето и дополнето издание, ЦЕППЕ, 2009
- Галев Г., Дабовиќ – Анастасовска Ј., Облигационо право –практикум книга прва, Просветно дело, Скопје, 2001

4 Art. 503 of LO: The buyer's right on the grounds of legal defects expires one year after the awareness of the existence of a right of a third party (par. 1), when the third party filed for a claim before the expiration of the time limit of one year and the buyer noticed the seller to intervene in the lawsuit, the right of the buyer expires after six months of the final completion of the lawsuit (par. 2).
The aim of research for this topic is to assess the level of coherence of the legal regulation and the court practice in the SEE countries related to the liability for legal defects. Please provide answers to the following questions:

1. How is the liability for legal defects defined in your legislation? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment!

In Article 116 of the Law on Obligations of Montenegro (“Official Gazette of Montenegro”, No. 47/08), entitled: „LIABILITY FOR MATERIAL AND LEGAL DEFECTS“, in paragraph 2 of this Article it is stipulated that: 

“The contracting party shall also be liable for legal defects in fulfilment and is obliged to protect the other party from rights and requests of third parties that would exclude or reduce its right.”

This is a positive legal expression of the known obligation of the seller to protect the buyer from eviction, i.e. the right of the buyer to request for protection from the seller in cases when an eviction request was made against him. From the provision mentioned here in which as ways of endangering the rights of the buyer acquired in a sales contract terms are used such as “excluded” or “reduced” we can without a doubt conclude that the legislator in the further development of this institute makes a difference between full and partial eviction.

In this place and in the context of further, i.e. more detailed, definition of the term protection from eviction we also give the decision of the Supreme Court of Montenegro, which indubitably confirms the opinion of case law on seller liability in cases when he was not aware of legal defects at the moment of sale of the thing and he did not bring it into question.

„The seller shall be liable for legal defects regardless of whether he was aware of them or not.“

(Judgment of the Supreme Court of Montenegro, Rev. No. 1166/09, from 18.11.2009)

Exceptionally, the provision from Article 523 of the LO, according to which: „the seller shall be liable for special limitations of public-legal nature that are not familiar to the buyer, if he was aware of them or knew they could be expected, and did not inform the buyer of them“, could be interpreted as an exception from the above, generally accepted rule established in case law, bearing in mind that with this provision the legislator implies that in the opposite case, i.e. in case that the seller was not aware of the limitations of public-legal nature and did not know that they could be expected, the seller is not liable for public-legal defects of the thing.
2. How are the legal defects of goods and rights defined in your legislation? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment!

In Article 516 paragraph 1 LO stipulates:

„The seller shall be liable if on the thing sold there is a right of a third party that excludes, reduces or limits the right of the buyer, and the existence of which the buyer was not informed, nor has he agreed to take the thing burdened with this right.“

Paragraph 2 of the same Article stipulates:

„The seller of another right guarantees that it exists and that there are no legal obstacles to its realization.“

These provisions make the definition of the legal defect for things in the positive law of Montenegro.

3. What are the obligations of the purchaser in case of legal defects (such as but not limited to notification of the seller)? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment!

In Article 517 of the LO there are provisions on the obligations of the buyer in cases when he determines the existence of legal defects on the sales object:

„When it is shown that a third party has the right to a thing that is the object of fulfilment in a contract with payment, the buyer, the buyer shall notify the seller thereof, except where this is already known to the seller, and invite him to free the thing of such right or claim by a third party within a reasonable period or to deliver him, where the object of the contract are things determinate as to their kind, another thing free of a legal defect.“

Additionally Article 275 of the LO prescribes:

„The contracting party obliged to inform the other party of the facts that influence their mutual relationship, shall be held liable for damage suffered by the other party because it was not informed on time.“

This provision, regarding the liability for failure to inform, but also regarding the missing deadlines for submitting the notification from Article 517 of the LO, should be interpreted in a way that according to it the buyer is also obliged to submit his notification to the seller without delays, and that in the opposite case he shall be liable for possible damages due to untimely fulfilment of his obligation.
4. Which sanctions are imposed to the seller i.e. what is the scope of the liability in the cases of sales of goods? Which are the sanctions in the cases when the purchaser does not fulfil his/her obligations in the case of legal defects? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment!

Article 518 of the LO, regarding sanctions for legal defects on an object of a sales contract, prescribes:

“(1) If the seller fails to act in compliance with the buyer’s request, in cases where the thing is taken away from the buyer, the contract shall be terminated by operation of law, while in cases where the buyer’s rights are reduced or limited, the buyer may choose to terminate the contract or request a proportionate reduction of price.

(2) Should the seller fail to comply with the buyer’s request to free the thing from rights or claims by a third person within a reasonable period, the buyer may terminate the contract if its purpose impossible to achieve as a result thereof.

(3) In any case, the buyer shall be entitled to compensation for damage suffered.

(4) If at the time of entering into the contract the buyer knew of the possibility that the thing be taken away from him, or his right reduced or limited, he shall not be entitled to compensation of damage should this possibility be realised, but he shall be entitled to reimbursement or reduction of price.”

Thus, in case of taking away of the thing from the buyer (total eviction) the contract is terminated by law.

In case of reduction or limitation of the buyer’s right (partial eviction), the buyer shall be entitled to request proportionate reduction of price. However, even in partial eviction the buyer has a right to terminate the contract if two conditions are met: that the seller did not meet the buyer’s request in a reasonable time, and that due to this fact the purpose of the contract cannot be realized.

In all cases of legal defects the buyer shall be guaranteed the right to compensation of damage, which moves the threshold, i.e. the scope and amount of the seller liability for legal defects, except in cases from paragraph 4 of the Article quoted above.

In the part of sanctions for the buyer in case of failure to fulfill obligations regarding legal defects, relevant is Article 519 of the LO:

“The buyer who, without having notified the seller, engages in unsuccessful litigation against a third person, may still invoke the seller’s liability for legal defects, unless the seller proves was in possession of the assets in order to reject the request of the third party.”

This seems to be a logical development of the legislator’s opinion from Article 275 of the LO, with which, as interpreted above (in answer to question No. 3), sets the basis for liability of the buyer for compensation of damage to the seller whom he did not immediately inform on the detected legal defects.

In the end, regarding the sanctions for legal defects of the sales object, it is important to mentioned a specific legal defect, which is regulated in the provision from Article 468 of the LO prescribing that:

“the selling of a thing owned by somebody else obliges the contracting parties, but the buyer who did not know or did not have to know that the thing is owned by somebody
else, may, if due to this the purpose of the contract cannot be fulfilled, terminate the con-
tact and request compensation for damage."

Thus, the selling of a thing owned by somebody else is not a basis for termination of the contract ex lege, but only in the case of total eviction – taking away of things from the buyer, and on the basis of an ownership suit by a third person, this would be total eviction and factual basis for termination of the contract ex lege. In this sense we have the example from case law:

„Selling of things owned by somebody else does not have as consequence absolute inva-

dility of the contract”.
(Judgment of the Supreme Court of Montenegro, Rev. Br. 17/2008, from 5.2.2008)

5. Can the liability of the seller be limited and/or excluded and how? Are there any

specific conditions for the limitation and/or exclusion of the liability? Please refer to
the relevant article(s) in the legislation. Are there any judgments from the highest

court that specify further the definition? Please quote the judgment!

Article 522 of the LO, explicitly prescribes:

„(1) A seller’s liability for legal defects may be limited or fully excluded by contract.
(2) If at the time of entering into the contract the seller was aware or could not have been
unaware of a defect to his right, the provision of the contract on limitation or exclusion of
liability for legal defects shall be invalid.“

The legislator has predicted the possibility for exclusion or limitation of the liability for legal defects, but not in situations when some of them were known or could have been known to the buyer.

However, not even with the exclusion of liability from paragraph 1 of the quoted Article can the seller in case of total eviction keep the price for himself, because this would lead to illicit enrichment of the seller, which would fulfil the condition for the buyer’s request for return of what was given or compensation of damage in case when restitutio in integrum is impossible. In this sense we have the opinion in the case law:

„With the coming into eff ect of total eviction the contract shall be terminated by law and
the seller cannot keep the price because he does not have a legal basis for this.“

6. Are the rights of the purchaser related to the liability for legal defects limited in time?

Please refer to the relevant article(s) in the legislation. Are there any judgments from
the highest court that specify further the definition? Please quote the judgment!

Article 524 of the LO provides a precise answer to the above question regarding the time limitation on the realization of the buyer’s right to protection from legal defects:

(1) “A right of a buyer arising as regards to legal defects shall extinguish one year from the
moment of becoming aware of a right of a third person.
(2) if the third person has initiated litigation proceedings before the expiry of this term, and
the buyer invited the seller to get involved in the proceedings, the right of the buyer shall
extinguish after six months following a final court decision.”
7. In the disputes for liability for legal defects what is the position of the parties (the seller, the purchaser and the third party who is holder of the right)? Are there any specific legal remedies against the decisions of the first instance court in these disputes? Are there any specificities in the execution of these judgments? Please refer to the relevant article(s) in the legislation. Are there any judgments from the highest court that specify further the definition? Please quote the judgment!

Practice shows that a third party that has set the eviction request as a rule appears as the plaintiff who, bearing in mind that the most disputed is the right to property, attempts in an ownership suit to return holding over the thing to which it has and in the procedure proves the right of ownership. As defendants regularly appear the buyer and the seller of the object owned by somebody else. In this context another excerpt from the already quoted judgment:

„According to this, unauthorized usage of their apartment does not prevent the plaintiffs as owner to, in an ownership suit, request the giving over into their holding the subject apartment, which is in the holding of the buyer, i.e. the second defendant, and such a request, in addition to others, has been presented in this legal matter.“
(Judgment of the Supreme Court of Montenegro, Rev. Br. 17/2008, from 5.2.2008)

There are no special legal remedies in these types of contracts in the positive law of Montenegro, nor are there any important specificities in the procedure for enforcement of verdicts in these legal matters.

8. Please provide list of relevant national bibliography (articles, books, parts of books) that deals with the issue of the legal defects.

Important notes

If in your legislation and/or court practice there are some specificities that are not included in this Questionnaire please state them separately.

If in your legislation there are immanent changes (amendments) to the regulation of the liability for legal defects please state them in a footnote of your answer to a relevant question. Please also provide a brief review of the reasons for the amendments.
SELLER LIABILITY FOR LEGAL DEFECT OF THINGS
Country report for Serbia

1. In Serbian law the liability for legal defects is defined in the provisions of the Law on Obligations from 1978 in Articles 508-515. It is in regard to:
   
   a) defining the term of legal defects (LO, Article 508, paragraphs 1-2),
   b) liability of the buyer to inform the seller that a third party has a right on the thing (LO, Article 509),
   c) listing of sanctions due to legal defects (LO, Article 510, paragraphs 1-4),
   d) explanations of cases when the buyer does not inform the seller on the legal defects of the thing (LO, Article 511),
   e) explanations of cases when the right of the third party is obviously founded (LO, Article 512, paragraphs 1-2),
   f) contractual limitation or exclusion of the seller’s liability (LO, Article 513, paragraphs 1-2),
   g) seller liability for legal defects due to limitations of a public-legal nature (LO, Article 514),
   h) loss of right (LO, Article 515, paragraphs 1-2).

2. The legal defect is defined as a legal situation when there are rights of third persons, which exclude, reduce or limit the rights of the buyer of the existence of which the buyer was not informed nor accepted a thing encumbered by such right (LO, Article 518, paragraph 1).

   At the same time, the seller of a right shall guarantee that the right exists and that there are no obstacles to it being exercised (LO, Article 518, paragraph 2).

3. The basic obligation of the buyer if a third person has rights in a thing, is to notify the seller thereof, except where this is already known to the seller, and invite him to free the thing of such right or claim by a third party within a reasonable period or to deliver him, where the object of the contract are things determinate as to their kind, another thing free of a legal defect (LO, Article 509.)

   The buyer shall be entitled to invoke the seller’s liability for legal defects also where without having notifying the seller and engaging in litigation proceeding he acknowledged a clearly valid right of a third person (LO, Article 512, paragraph 1).
4. Sanctions for legal defects can be seen when contracts are terminated by law if the seller fails to act in compliance with the buyer’s request, or in cases where the thing is taken away from the buyer (eviction), while in cases where the buyer’s rights are reduced or limited, the buyer may choose to terminate the contract or request a proportionate reduction of price (LO, 510, paragraph 1).

Should the seller fail to comply with the buyer’s request to free the thing from rights or claims by a third person within a reasonable period, the buyer may terminate the contract if its purpose impossible to achieve as a result thereof (LO, Article 510, paragraph 2).

In any case, the buyer shall be entitled to compensation for damage (LO, Article 510, paragraph 3).

However, if at the time of entering into the contract the buyer knew of the possibility that the thing be taken away from him, or his right reduced or limited, he shall not be entitled to compensation of damage should this possibility be realised, but he shall be entitled to reimbursement or reduction of price (LO, Article 510, paragraph 4).

The buyer who, without having notified the seller, engages in unsuccessful litigation against a third person, may still invoke the seller’s liability for legal defects, unless the seller proves was in possession of the assets in order to reject the request of the third party (LO, Article 511).

A seller shall be liable, also in cases where there are special limitations of public legal nature of which the buyer was unaware, if the seller was aware of them or should have been aware of them, and failed to notify the buyer (LO, Article 514).

Case law 1:
Judgment of the Supreme Court of Serbia, Rev. 742/2006 from 28.6.2006

Sentence: The seller is liable under the rules for protection from eviction and in the case when there were certain limitations of public-legal nature on the thing and the seller failed to notify the buyer thereof, and this liability will exist not only for the limitations that already exist at the moment of conclusion of contract, but also the ones that could be expected, if he knew that in the concrete case.

From the rationale: “According to the determined factual condition, the plaintiff has bought from the defendant during 1993 a passenger vehicle BMW type 352, produced in 1992 and registered under registration number JA..., for a sales price of 52,000 DM. After the contract of the parties, the subject vehicle According to the parties’ agreement the subject vehicle remained registered in the name of the defendant, and the defendant issued an authorization to the plaintiff to be able to on his account and his behalf to use the vehicle, register it, transfer and sell to third parties. The plaintiff during 1995 sold the same vehicle to VV for the same price: who sold the vehicle after that to GG. The subject vehicle was seized from this person by the Secretariat for Internal Affairs, because in the meantime a customs and felony procedure was initiated against the defendant, and in the customs procedure it was determined that the defendant had committed a customs violation, since during the import of the vehicle he acted in opposition to the provisions of the Law on Foreign Trade Operations (hereinafter: the Law) and in opposition to the Decision for Prohibition of Import of Used Motor Vehicles and Used Equipment (hereinafter: the Decision), and with a decision from customs office K. from 17.4.1997 the seizure of this vehicle was ordered. With a decision from the Federal Customs Administration from 8.9.1997 the complaint by the defendant on the first instance decision on seizure of the vehicle was refused, and with the decision of the Federal Court from 25.12.1998 the complaint by the defendant was refused on the final act of the
Federal Customs Administration. After seizure of the subject vehicle from GG, he litigated against VV from whom he bought the subject vehicle for return of the sales price, and after this VV as the buyer of the subject vehicle initiated a litigation against the plaintiff here on 30.5.2002 for return of the sales price of the subject vehicle. In this a court settlement was concluded between them on 25.11.2002, according to which the plaintiff in this case, as the defendant in the litigation, obliged himself to pay GG the amount of 16,000 Euros in dinar counter value until 30.3.2003. The plaintiff submitted the suit in this legal matter on 25.12.2002.

Starting from the thus established factual condition, which according to Article 398 paragraph 2 of the Law on Litigation Procedure cannot be disputed, the lower instance courts have in the opinion of the Supreme Court rightly concluded that the defendant is obliged to pay the plaintiff a dinar counter value of the amount of 16,000 Euros with the appropriate domicile interest from the date when the plaintiff has paid this amount to the buyer of the subject vehicle from VV and on the basis of the court settlement, and they have rightly applied the material law and provisions of Article 510 paragraph 3, Article 512 and 514 and Article 515 paragraph 1 of the Law on Obligations (hereinafter: LO), when they adopted the litigation request.

Namely, In addition to liability for legal defects, the seller shall be liable for legal defects of the thing. This is a consequence of the principle of value in giving in two-sided contracts, where the transferor is obliged to provide the acquirer not only the use, but also peaceful holding in which the buyer will not be legally violated on the basis of a right of a third party of which he was not informed, nor has he agreed to take the thus encumbered thing. However, in addition to this, the seller shall be held liable under rules of eviction also in the case when on the thing there were certain limitations of a public-legal nature and the buyer did not inform the seller. He will be liable not only for the limitations of public-legal nature that exist at the moment of conclusion of contract, but also ones that can be expected, if he was aware of this in the specific case. In this case the plaintiff did not know, nor he could have known how the defendant imported the subject vehicle, i.e. that it was imported in opposition to the provisions of the Law and the Decision, because the facts were determined only additionally in the procedure made against the defendant. Opposite to him, the defendant could have known or could have expected said limitations regarding the import and registration of the subject vehicle bearing in mind the manner in which the vehicle was imported, i.e. that he did not provide evidence that he bought the vehicle from an authorized organization, and did not notify the defendant as a buyer thereof. Related to this the plaintiff has a right to compensation of damage suffered according to Article 510 paragraph 3 and Article 512 of the LO. This right of the plaintiff has not reached statute of limitations in the sense of Article 515 paragraph of the LO since the plaintiff found out the existence of the rights of the buyer of the subject vehicle VV, to request the return of the sales price, only with the submission of the litigation against him on 30.5.2002, and from then until the submission of litigation in this legal matter one year has not expired."

Case law 2:


Sentence: The circumstance that the vehicle identification number in the vehicle is different from the vehicle identification number in the traffic license and that due to this registration of the vehicle is not possible until evidence is presented on the origin of the engine, has the significance of a legal defect.

From the rationale: “From the first instance court it was determined that plaintiff concluded with the defendant on 4.4.2000 a written contract on the sale of a vehicle type Z.101, which at the moment of sales was registered on 14.9.2000. When the registration expired the plaintiff tried to register the vehicle, but was informed in the service that she cannot register the vehicle since the vehicle identification number..."
number in the traffic license is different from the vehicle identification number of the vehicle. After this knowledge the plaintiff immediately informed the defendant for defects of the vehicle, but she refused to return the sales price, saying that she inherited the vehicle from her deceased father who passed away in November 1999 and who registered the vehicle on 18.9.1999, and that she did not change the motor in the vehicle, nor her father as well. On the basis of findings by a machine expert, the first instance court determined that the vehicle identification number of the vehicle is different from the vehicle identification number in the traffic license, and on the basis of the report by the Secretariat for Internal Affairs V. has determined that the registration of such a vehicle is not possible until evidence is presented on the origin of the engine.

In the aforementioned factual condition the first instance court has adequately applied material law, deciding that there is liability on the part of the defendant for legal defects on the thing she sold, because due to these defects there are limitations of public-legal nature due to which the plaintiff as a buyer cannot use the vehicle, in the sense of Article 514 of the Law on Obligations. Due to the aforementioned reasons, the first instance court has rightly decided that the vehicle sales contract is terminated and there is an obligation on the defendant to return the sales price.”

5. **A seller’s liability for legal defects may be limited or fully excluded by contract (LO, Article 513, paragraph 1).**

   However, if at the time of entering into the contract the seller was aware or could not have been unaware of a defect to his right, the provision of the contract on limitation or exclusion of liability for legal defects shall be void (LO, Article 513, paragraph 2).

   If a buyer has paid a third person an amount to renounce his obvious right, the seller may free himself from liability by reimbursing the buyer for the amount paid and damages suffered (LO, Article 512, paragraph 2).

6. **A right of a buyer arising as regards to legal defects shall extinguish one year from the moment of becoming aware of a right of a third person (LO, Article 515, paragraph 1).**

   However, if the third person has initiated litigation proceedings before the expiry of this term, and the buyer invited the seller to get involved in the proceedings, the right of the buyer shall extinguish after six months following a final court decision (LO, Article 515, paragraph 2).
ANNEXES

IV

REMEDIES FOR NON-PERFORMANCE IN SALES CONTRACTS - DAMAGE AND INTEREST
SOLUTIONS FOR BREACHES OF SALES CONTRACTS – LOSS AND INTEREST
Country report for Albania

1. In what case would the breach of a sale contract entitle parties to claim compensation for their loss? Is the right to claim compensation for loss a sole right, or is it a right that follows a breach of contract?

The above question is regulated by the Albanian Civil Code (Law No.7850, dated 29.07.1994, as amended). The Albanian Civil Code (ACC) regulates the sales contract in Articles 705-756. In order to have a better understanding of the rules that govern the sales contract and the parties right to claim compensation for losses suffered from the breach of such contract, we need to analyze not only the special rules that govern this particular contract, but also the legal rules that apply to a breach of contract in general.

According to the ACC, a contract has the force of law between parties. It can be dissolved or changed by mutual consent or for a cause permitted by law. A contract obliges the parties not only for what it provided for itself, but also for the effects arising from the application of the law. As it can be seen, in concluding a contract, the parties put themselves under an obligation that derives and is defined by the contract itself. They have an obligation to fulfill the contract conditions in good faith (bona fide). According to Article 422 of the ACC the creditor and debtor must behave correctly toward each other, with impartiality and according to the requests of reason.

If the debtor does not execute his obligation, or he does not execute it properly, this means that there has been a breach of the obligation that derives from the contract or from the law. A breach of contract causes an application of sanctions by the respective party.

Every non-fulfillment on the execution of obligations, obliges a debtor to compensate the creditor for the damage caused, except when he proves that non-fulfillment was not due to his fault. In this case the creditor has the right to:

a) specify the nature of the execution of the obligation, especially regarding the delivery of goods or the conduction of work, as well as to seek compensation for any damage caused by the delay of the late execution;

b) compensation for damages caused by the non-execution of obligations.

It is important to remember that the parties in a contract cannot add any special clauses to exclude or limit their responsibility for the non-fulfillment of an obligation. Any agreement that excludes or limits parties from the liability of the non-execution of obligations is invalid. When execution is made impossible due to the fault of the debtor, the creditor has the right to claim the compensation for the damage caused by debtor. The debtor is liable for failure to per-

1 Article 690 of the ACC.
2 Article 693 of the ACC.
3 Article 479 of the ACC.
form his contractual duties when, with intention or by negligence, he has created such circumstanc-
es that have made execution impossible or when he has not taken measures to prevent it.4

In relation to the question that we are analyzing here, Article 486 of the ACC provides that
damages for breach of contract by one party (debitor) consist of a sum equal to all the losses caused
by the reduction of property, as well as any profit that might have been extracted under nor-
mal conditions in the market (loss of profit). Compensation of losses also includes the repair of
any damage along with reasonable expenses to prevent or limit the damage, that are related
to the circumstances, based on the liability of the party, reasonable and necessary expenses to
determine the damage and liability, as well as expenses incurred in achieving an extra judicial
settlement to fulfill the obligations.

Conversely, in a bilateral contract, or in so called two-sided contracts, if one of the parties
fails to perform his contractual duties and the failure was not due to the fault of none of the parties,
in such case, none of them can hold the other party liable for the nonperformance or claim for dam-
ages, except in cases when it has been provided differently either by law or by the contract. Each
party has the right to claim from the other party to return what it was already given for the execution
of obligations.5

According to Article 492 of the ACC, if the debtor is in delay in paying the price, the creditor
has the right to claim the damages caused by it, and he is exempt from any liability if the execution
of his obligations later becomes impossible, except in cases when the execution of his obligation be-
comes impossible due to his own fault. When a debtor is late with payment, a creditor has the right
to ask for compensation for the damage caused, and is relieved from his responsibilities if the execu-
tion of his obligations later becomes impossible, except if the impossible nature of the execution of
his obligations is due to his own fault. In case of the debtors first delay, he is not obliged to pay the
interest. Article 450 of the Albanian Civil Code provides that damage caused by the delay of the pay-
ment of a certain amount of money should be recompened by matured interest, calculated from
the day the debtor's delay began, in the official currency of the country where the payment is made.
The percentage of interest to be paid is defined by law.

At the end of each year, matured interest is added to the sum of the obligation upon which
the calculation is made.

Legal interest is paid without a creditor being obliged to prove any damage. When the
creditor proves that he has incurred damage greater than the calculated legal interest, the debtor is
obliged to pay him the balance of the damage.

Also, according to Article 454 of the ACC, Article 450 of this code does not remove the credi-
tor's right to require recompense for damage caused by fluctuations in exchange rates since the day
the delay started.

The question regarding which case of breach of sales contract entitles parties to claim com-
penstation for loss, can be answered by saying that parties have the right to claim compensation for
loss in every case in which another party is responsible for a breach of contract that resulted in loss.
As we can see below, the right of compensation for loss is not the only right.

In Article 722 of the ACC it is provided that:

In cases where the delivery of defective property constitutes a substantial breach of contract-
tual obligations, the buyer has the right to ask:

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4 Article 480 of the ACC.
5 Article 488 of the ACC.
1) at the moment of challenge, provided in Article 717 of this code or within a reasonable time from this challenge, for the delivery of additional goods or for substitutional goods;

2) for the repair of goods when this is reasonable, taking into account all concrete surrounding circumstances. A demand for repair must be done at the moment of challenge provided in Article 717, above, or within a reasonable time from this challenge;

3) for a reduction in price;

4) to dissolve the contract.

The buyer must allow the seller a reasonable time to fulfill these obligations. During this time, the buyer cannot use any legal means to address the breach except if he is notified by the seller that he will not fulfill his obligations within the term provided.

**In any case, the buyer does not lose his right to indemnity**

Article 723 of the ACC provides that:

If the delivery of goods with defects is not a substantial breach of contract, the buyer can ask:

1) for the repair of goods; or

2) for a reduction in price.

The buyer must allow the seller a reasonable term for the fulfillment of these obligations. During this term, the buyer cannot use any legal means to address the breach except if he is notified by the seller that he will not fulfill his obligations within the term provided.

If the seller does not fulfill the demand provided for in point one of this article, within the term established by the buyer, the latter can ask for a price reduction of the above goods.

**In any case, the buyer does not lose his right to indemnity.**

Article 736 of the ACC provides that:

A seller can give the buyer extra time to fulfill his obligations. With the exception of cases where the seller has not received notice from the buyer that he will comply with his obligations within this period, the seller cannot use any legal means for the indemnity of the loss caused by the delay in fulfillment. However, the seller does not lose his right to compensation for damages caused by the delay.6

Article 743 of the ACC provides that:

If one of the parties is late in paying the price or any other amount, the other party has the right to ask for interest on this without influencing indemnity.

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6 In addition, Article 737 of the ACC provides that: the seller can consider the contract dissolved:

1) if the breach of a buyer's contractual or legal obligation is in fact a particularly substantial or essential breach;

2) if the buyer does not fulfill his obligation to pay the price or to take delivery of the things within the additional term established by the seller, or if he declares that he is not going to achieve this within this additional term;

If the buyer has paid the price, the seller loses the right to declare the contract dissolved if he does not request it:

1) in the case of the delayed fulfillment of a buyer's obligations, before he has become aware of the execution of his obligations;

2) in the case of another breach that is different from delayed non-fulfillment within a reasonable time;

a) after the moment when he knew about or should have known about such a breach;

b) after the termination of the additional term established by himself, or after the buyer has declared that he will not fulfill his obligations within this additional term.
Article 745 of the ACC provides that:
If a contract is dissolved, and if within a reasonable manner and time after the dissolution the buyer has made a substitute purchase or the seller has resold the things, the party that asks for indemnity can take the difference between the price provided for in the contract and the price of the substituting purchase or sale, along with all of the remaining recompense that is provided for in the preceding Article.

In case of sales with reserved ownership, Article 749 of the ACC provides that if the contract is dissolved due to the buyer's nonperformance, the seller must return the installments he has received, subject to his right to fair compensation for use of the goods and for damages. If it was stipulated that the installments paid should be retained by the seller as indemnity, the court, according to the circumstances, can grant a reduction of the agreed indemnity.

2. What is the definition of the concept of loss in your legislation – tangible and intangible losses respectively?
In compliance with your laws, are contractual parties entitled to compensation for tangible and/or intangible losses in case of a breach of contract?
Are there any particular requirements regarding loss liability where a breach of sales contract occurs?
According to which rules is liability extended and is the level of compensation for loss (tangible and/or intangible) specified in the case of a breach of sales contract?

Tangible loss is regulated by Articles 450 and 486 of the Albanian Civil Code, mentioned above. These articles provide the basis for a proper understanding of tangible loss that can be compensated to a party who suffers as a result of a breach of contract. Conversely, Albanian legislation does not provide any definition for the concept of intangible loss.

It is worth mentioning that the Albanian jurisprudence has dealt with the concept of extra-contractual damages in the unifying decision No.12, dated 14.09.2007; in this respect the Supreme Court of Albania has given some general guidelines that state that the lower courts should follow precedent for damage cases arising from automobile accidents. In its decision the Albanian Supreme Court addressed both the concepts of tangible and intangible loss. The interpretations of the unifying decision can be used, in analogy, if they are deemed proper, even in cases involving intangible loss from breach of sales contracts. In any case it should be stated again that Albanian legislation does not provide any definition of intangible loss, so it is up to jurisprudence to define it on a case law basis.

The Albanian civil law provides that parties are always entitled to compensation for tangible losses due to a breach of contract. Regarding intangible losses, the law does not expressly exclude or include them.

Regarding the question concerning requirements regarding loss liability where a breach of sales contract occurs, we can refer to Articles 722, 723, 736 and 737 of the Albanian Civil Code.

The rules that apply to determine the extent of liability and the level of compensation for losses (tangible and/or intangible) in the case of a breach of sales contract, are the same as the ones referred to in the answer to the first question.
3. **In which cases does a breach of contract imply a right of interest?**

How is the interest rate decided in the case of a breach (overdue fulfillment) of sales contract?

Answer the following questions respectively:


If there is a breach of contract, an obligation to compensate the damaged party arises. From the moment the obligation arises, the creditor has the right to request interest for the sum of money that corresponds to the indemnity, if the debtor does not fulfill his obligation. Article 450 of the ACC should be kept in mind in this case. This article also provides that the percentage of interest to be paid is defined by law. In fact, the Albanian Parliament has still not enacted any law that fixes the interest rate percentage. Conversely, the Albanian Supreme Court has delivered the Unifying Decision No.932, dated 22.06.2000 in which some criteria is given regarding the calculation of interest rates. In fact, this decision was delivered in a different set of circumstances (after the fall of the pyramid schemes in 1997), but it can still serve nowadays as a guideline to courts when making decisions about compensation for damages and for applications for interest to be paid to creditors by debtors. The Albanian Supreme Court have stated, in this decision, that the high levels of interest rates that are applied to loans is illegal; the highest rate that can be applied should correspond to the highest level of interest rate published by the Central Bank of Albania at the time of conclusion of a contract. Of course this decision regulates the interest rate used in loans, but courts can also use it as criteria when determining loss (the amount of money to be paid) in breaches of sales contracts. In this respect we can say that the amount of interest to be paid, in cases of breaches of sales contracts, is specified on a case by case basis, according to the interest rate published by the Central Bank of Albania. Courts rely on licensed accountants to calculate the specific interest in each individual case.

In relation to Directive 2000/35/EC of the European Parliament and of Council, of 29 June 2000, “On combating late payment in commercial transactions,” we should stress that Albanian civil legislation has not implemented the abovementioned directive. This does not mean that the legislation is not fully in compliance with the directive, but rather that a special law has not been enacted to incorporate the orientations of the directive in the civil legislation. Regarding Article 3 of the Directive, Article 450 of the ACC provides that:

“The recompense for damage caused by a delay in payment of a certain amount of money consists of matured interest from the day that the debtor’s delay began, in the official currency of the country where the payment is made. The percentage of interest to be paid is defined by law.

At the end of each year, matured interest is added to the sum of the obligation upon which the calculation is made.

Legal interest is paid without a creditor being obliged to prove any damage. When the creditor proves that he has incurred damage greater than the value of the legal interest, the debtor is obliged to pay him the balance of the damage.”

Article 686 of the Albanian Civil Code provides that:

“Standard conditions prepared by one of the parties are as effective to both if, at the time of the formation of the contract the latter knew of them, or should have known of them by using ordinary diligence.”
The general provisions that bring about loss or a disproportional infringement of the interests of contracting parties are effective especially when they differ essentially from the principles of equality and impartiality provided for in this code and when they regulate contractual relationships.

In any case, conditions are ineffective unless they are specially approved in writing, if they are established in favor of the party who prepared them in advance, if they limit liability, if they give the power to withdraw from the contract or to suspend its performance, if they impose time limits that involve forfeiture on the other party, if they limit the power to raise counterclaims, if they restrict contractual freedom in relation to third parties, arbitration clauses, or if they undermine the competence of the courts.

Article 479 of the ACC also provides that: “Any agreement that excludes or limits parties liability for the non-execution of obligations is invalid.”

In relation to Paragraph 5 of Article 3 of the Directive, civil legislation does not incorporate provisions that explicitly allow organizations that are officially recognized, or that have a legitimate interest in representing small and medium-sized enterprises, to take action according to the national law before the courts or before competent administrative bodies, on the grounds that contractual terms drawn up for general use are grossly unfair within the meaning of Paragraph 3 of the Directive. If other issues arise that have to do with unfair competition, then Law No.9121, dated 28.07.2003 “On the protection of competition,” as amended, will apply, or if someone is classified as a consumer, Law No.9902, dated 17.04.2008 “On the protection of consumers,” as amended, will find application.

According to Article 4 of the Directive, the Albanian Civil Code in Article 746 provides that:

“When something is sold on an installment basis the buyer acquires ownership of the thing upon payment of the last installment, assuming a level of risk from the time of delivery. The delayed transfer of ownership with the above conditions must be reflected in the contract.”

Article 747 provides that:

“The transfer of ownership according to the above provision can only be utilized vis a vis creditors of the buyer only if it is documented in writing with a date prior to the issuance of the credit.

If the sale involves immovable goods or movable registered goods, registration provisions apply.”

Article 748 of the ACC provides that:

“Notwithstanding any agreement to the contrary, default in payment of only one installment which does not exceed one-eighth of the total price does not result in dissolution of the contract, and the buyer retains the benefit of the time limit for subsequent installments.”

On the other hand, in Article 749 of the ACC, it is provided that:

“If the contract is dissolved due to the buyer’s nonperformance, the seller must return the installments he has received, subject to his right to fair compensation, for use of the goods and for damages.

If it was stipulated that the installments to be paid should be retained by the seller as indemnity, the court, according to the circumstances, can grant a reduction of the agreed indemnity.”

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7 This law regulates fair competition among enterprises and not unfair contractual terms, as described by the directive.
8 This law aims to protect consumers from fraud in commercial activities and is not designed to protect small and medium-sized enterprises when they are engaged in commercial activities.
In conclusion, we can say that to date no regulations relating to Article 5 of the Directive have been incorporated into Albanian legislation.

4. Is the damaged party entitled to claim for compensation for loss in addition to his right of interest, or are both rights excluded?

In the case of cumulative rights, does the payment of interest affect the determination of the level of compensation for loss and if so, in what way?

As we have stated above, in Article 450 of the ACC, it is provided that when a creditor proves that he has incurred damage greater than the value of the legal interest, the debtor is obliged to pay him the balance of the damage. In this respect, we can say that both rights are included, not excluded.

Regarding the second question above, we can say that the payment of interest affects the determination of the level of compensation for loss. In Paragraph 2 of Article 450 of the ACC it is provided that at the end of each year matured interest is added to the sum of the obligation upon which the calculation is made. This means that the sum of the obligation increases each year due to the application of legal interest. This is applied to the sum that results from adding interest to the original obligation. Therefore, year on year the sum that corresponds to the obligation on which legal interest is applied is greater than the one that was calculated the previous year, and so on.

Relevant literature (as written in Albanian language):

LIABILITY FOR BREACH OF CONTRACT – COMPENSATION OF LOSS AND DEFAULT INTEREST
Country report for Bosnia and Herzegovina

Abstract

There are two forms of civil liability: contractual and felony, with many joint (monistic theory) and/or different (dualist theory) characteristics. The Law on Obligations accepts the duality of the rules on civil liability by regulating the relation between tort and contractual liability as a relationship between general (tort liability) and special norms (contractual liability). The general precondition of contractual liability is breach of contract most frequently caused by non-fulfilment or overdue fulfilment of an obligation. Due to violation of contractual obligation the creditor has a right to compensation for damage, which the debtor owes in the form of the so-called predictable damage, but if he acted fraud, dolus or culpa lata he owes the compensation of the whole damage. Traditionally it was believed that contractual liability is reserved only for material damage, but according to the modernist theory of interpretation immaterial damage is also owed. For overdue fulfilment of monetary obligations the creditor is entitled to default interest (assumed damage) in order to achieve full or integral compensation for damage. The default interest can also be awarded for overdue monetary payment of immaterial damage.

Key words: contract, tort, liability, damage (material and immaterial), compensation, default interest.

1. Introduction

Liability for breach of contract, liability for breach of obligation, liability for damage caused by non-fulfilment of a previously taken obligation, liability for violation of contractual discipline or contractual liability is part of the wider term of “civil liability”. The term civil liability arises from the method of civil law and regulating principles according to which it is a property “sanction”, because it is enforced on the property of the debtor, in discrepancy to criminal or administrative law where the sanction has a personal character (enforcement on the person). The content of civil liability is obligation for compensation of damage of the liable person, and the damage itself may occur by violation of material and immaterial (personal) goods.

2 Babić, Ilija: Civil Law, Book 1, Introduction to Civil Law, Faculty of Law of the University in Banja Luka, Banja Luka, 2011, pp. 24-27; Stanković, Obren and Vodinelić, Vladimir: Introduction to Civil Law, third amended edition, Nomos, Belgrade, 1966, pp. 5-6; Popov, Danica: Civil Law, general part, Službeni glasnik, Belgrade, 2005, p. 36-36; Rašović, Zoran: Civil Law, 1, Introduction, Faculty of Law in Podgorica, Podgorica, 2006, p. 7;
In civil law the contract is the most important legal business used to create a single norm with civil law effect, ... it is the most explained, defined, classified and studied in the forms of obligations law. A contract is an act of moral and legal civilization, and pacta sunt servanda (agreements must be kept) is the basic principle of contractual law according to which the contract is law for the contracting parties, which are obliged to fulfil "what was agreed" and are liable for that fulfilment. This principle was also expressed in the provisions of the Law on Obligations (LO). The sense of liability for breach of contract is in the presumption that obligations exist, and through their violation (by non-fulfilment or inadequate fulfilment of the contractual obligation) damage is created for one of the parties in the obligation relation.

Another form of civil liability is extra-contractual, non-contractual or tort liability. This legal liability occurs by violation of the general legal duty for prevention of the causing of damages to others. Among legal theoreticians there are two main theories on liability for breach of contract and non-contractual liability. First is the so-called monistic, unitarian or theory of single liability, i.e. “theory of unity of guilt” according to which civil liability is unique and there are no differences between liability for breach of contract and non-contractual liability. Both civil liabilities occur through breach of some previous provision regardless of its source: contract or law. In fact the source is unique for both types of liabilities and it is in the legal obligation for prohibition of causing damages to other person in non-contractual liability, i.e. in the obligation for the contract to be fulfilled completely, as it is made, so that liability for breach of contract does not occur. The unique liability arises from the unique guilt with unique legal regime.

Representatives of the monist theory have only looked at what is common to the liability for breach of contract and non-contractual liability. In opposition to this, there is the dualist theory, a classical theory that clearly distinguishes these two forms of civil liability. Liability for breach of contract, i.e. compensation for damage is just one consequence of the contractual obligations. Namely, the basic presumption for liability due to breach of contract is the existence of a valid obligation from an obligations relationship, which was not fulfilled or was inadequately fulfilled. As a result of possible violation of contractual obligations, which is primary, arises the obligation for compensation of damage by the debtor, which is secondary. In discrepancy to this, in non-contractual liability there is no previous, earlier, taken over (contractual) obligation the non-fulfilment or inadequate fulfilment of which another obligation is created, which is compensation for damage. In non-contractual liability, the liability for compensation of damage arises, as we already said, on the basis of the legal provision itself on the prohibition for causing damage to others by the perpetrator.

4 Perović, Slobodan: Legal philosophical debates, NIU, Official Gazette SRJ, Belgrade, 1995, p. 221 and further.
5 Article 17/1: “Participants in an obligations relations are obliged to fulfill their obligation and they are liable for its fulfilment”; Article 148/1: “The contract shall create rights and obligations for the contracting parties”; Article 262/1: “The creditor in an obligations relationship is authorized to request from the debtor the fulfillment of the obligation, and the debtor is obliged to fulfill it conscientiously in all its parts”; Article 262/2: “When the debtor does not fulfill an obligation or is overdue with its fulfillment, the creditor is entitled to request compensation for damage incurred due to that”.
6 Morait, Branko: Obligations Law, Second Book (non-contractual obligations), Faculty of Law Banja Luka, Banja Luka, 2007, p. 67; Medić, Duško: Volume of compensation for damage due breach of contract, in: Discussions from civil and commercial law, Faculty of Legal Sciences, Paneuropean University APEIRON Banja Luka, Banja Luka, 2007, p. 137.
7 Article 16 LO: “Everyone is obliged to refrain from actions that may cause damages to others”.
10 Krulj, Vrleta: as above, p. 302.
(effect *erga omnes* – toward all). Thus, for a contractual obligation it is characteristic that it has occurred due to violation of rules created by the will of the parties, i.e. violation of some relative right, and for a non-contractual obligation that it has occurred due to violation of established general legal norm, i.e. some absolute right.\(^\text{12}\)

In addition to this basic, essential difference between liability for breach of contract and non-contractual liability, there are some other differences: the aim of compensation of damage in both types of liability is re-establishing the disrupted property balance, but in liability for breach of contract the aim of the compensation is to bring the creditor to the property condition he would have had the debtor fulfilled his primary (contractual) obligation, and in non-contractual liability the goal of compensation is for the damaged person to be brought to that property condition that would have existed had the damage never occurred. Connected to this, when compensating damage for violation of contractual obligations, the debtor is liable only for predictable damage (with the exception of cases when the damage was committed deliberately or due to gross negligence), while non-contractual liability is wider and covers the full (integral) compensation for damage caused. There is also a difference with the compensation of damage through contractual penalty and default interest, which exist only with liability for breach of contract. Then there are differences in the volume of liability, i.e. clause on the limitation or exemption of liability, which is not possible in non-contractual liability due to the imperative character of these norms, differences regarding the capacities of the parties, because one can be held liable for tort even without capacity to exercise rights, differences in the burden of proof, obsolescence etc.\(^\text{13}\)

LO also accepts the dualism of rules for civil responsibility and in Part 2 under the title “Causing Damages” (Articles 154-209) it regulates the non-contractual liability, and in Chapter III under the title “Effect of Obligations”, Part 1 under the title “Creditor’s Rights and Debtor’s Obligations”, and Part 1 under the title “Right to Compensation of Damage” it regulates the liability for breach of contract. The relation between these two groups of rules on liability is regulated in Article 269 (“Application of the provisions on causing damage”)\(^\text{14}\) as a relation between the general (norms on non-contractual liability) and special norms (norms on liability for damage caused).

### 2. Presumptions of liability for breach of contract

The most important general presumption of liability for breach of contract is that there was actual breach of the contract. A breach of the contract occurs when contracting parties do not act in accordance with the content of the contract, i.e. the breach of contract can occur either on the side of the creditor or the side of the debtor. Thus, for example, breach of sales contract occurs when the debtor does not fulfil his obligation at all or does not fulfil it in the predicted time or the agreed location etc. The creditor may cause breach of contract if he, for example, refuses to accept proper payment of the debt or requests the payment of the debt at a different time or in a different place, etc.

LO regulates the breach of contract in the part entitled “Effects of Obligations” (Articles 262-294). When a breach of contract occurs the contract does not automatically cease to exist because of that. It is so according to the LO, which contains special rules for cessation of obligations (Chapter ...

\[\text{\textsuperscript{12}}\text{Cigoj, Stojan: as above, p. 402.}\]

\[\text{\textsuperscript{13}}\text{V. Grujić, Nenad: Relationship of contractual and non-contractual liability for damage, Almanach of the Legal Faculty of the University in Niš, No. LII, p. 211 and further; Cigoj, Stojan: as above, p. 402 and further; Perović, Slobodan: Legal Philosophical Debates, pp. 169-176; Krulj, Vrleta: as above, p. 304-316.}\]

\[\text{\textsuperscript{14}}\text{Article 269 LO: “Unless otherwise prescribed by the provisions herein, on compensation for damage the provisions of this law shall respectively apply to compensation of non-contractual damage”.}\]

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IV: “Cessation of Obligations”, Articles 295-393) in the frames of which it does not predict breach of contract or obligations in general as a manner for the cessation. Thus, in case of breach of contract the "creditor’s rights and debtor’s obligations" continue to exist as basic (primary), just that now arises a new (additional, secondary, accessory) obligation consisted of compensation for caused damage. The identity of obligation has not been changed, only the content of the obligation has been changed.\footnote{Loza, Bogdan: Brach of Obligation, Pravni život, No. 1—12/1988, p. 1604.} This understanding is known as theory of subrogation, because the amount owed by the debtor for breach of contract is a surrogate of the primary effect, although this opinion is not fully acceptable.\footnote{Jankovec, Ivica: Types and consequences of inability to fulfil a contractual obligation, Institute for Social Sciences, Belgrade, 1982, p. 153.}

The most frequent case of violation of the basic obligation is when the debtor does not fulfil his obligation or is overdue on its fulfilment. The creditor in that case is entitled to, in addition to the right to request fulfilment of the obligation by the debtor, ask for compensation of the damage he has suffered due to that. This right of the creditor for compensation of damage as a general rule is regulated in Article 262/2 of the LO, while there is a whole set of individual provisions of the LO that contain the right of the creditor for compensation of damage, which is considered superfluous, because regardless of these individual provisions the general rule would apply.\footnote{Momčinović, Hrvoje: Contractual liability for damage, in Liability for damage, Inžinjerski biro d.d., Zagreb, 2006, pp. 66-67.} Namely, the provision from Article 262/2 of the LO shall apply to all cases when the debtor fails to fulfil his obligation or is overdue in its fulfilment regardless of the source the obligation was created from (contract, causing of damage, unfounded acquisition, business activity without mandate),\footnote{Tako and Vizner, Boris: Comment on the Law on Obligations, Zagreb, 1978, p. 1071; Đorđević, Živojin in Perović, Slobodan and Stojanović, Dragoljub: Comment on the Law on Obligations, Faculty of Law Kragujevac and Culture Center Gornji Milanovac, 1980, p. 757; Mitrović, D. in Blagojević, Borislav and Krušić, Vrleta: Comment on the Law on Obligations, second edition, Savremena administracija, Belgrade, 1983, p. 910.} which is why it is believed that it is more correct to entitle this liability as liability for damage caused for breach of existing obligation instead of "contractual liability for damage".\footnote{Momčinović, Hrvoje: Contractual liability for damage, Our legality, No. 9-10/1987, p. 1010.} In order for liability due to breach of contract to occur because the debtor did not fulfil his obligation fully or the fulfilment is partial\footnote{Perović, Slobodan: Legal Philosophical Debates, p. 177.} or he was overdue with its fulfilment, it is necessary for this obligation of the debtor to be previously determined, i.e. for there to exist an obligation relationship between the creditor and debtor. If the party suffering the damage and the party liable were in no obligation relationship before the damage occurred or the damage caused is not related in any way to the obligation relations of these parties, contractual liability for damage does not occur between them.\footnote{Jankovec, Ivica: Contractual Liability, Poslovna politika, Belgrade, 1993, p. 8.} This obligation relation must be in effect, i.e. to produce legal effect, and it should not be a void or null contract that was later terminated in the legal timeframe.

Liability for breach of contract can also arise when its explicit provisions were not violated, but the legal provisions applied as additional in the case when individual legal provisions are not regulated by contract.\footnote{Ibidem, p. 11.} This comes from the dispositive character of the provisions from Article 20 of the LO.\footnote{Article 20 LO: “Participants may provision their contractual relationship differently from the manner prescribed by this law, unless individual provisions of this law or its essence do not prescribe otherwise.”}

Every breach of contract, i.e. its non-fulfilment fully or partially or lateness in fulfilment, does not have as consequence the liability of one of the contracting parties for such a breach of contract.
In order to reach liability for breach, or as Professor Loza states, “in order for the content of the obligation to change due to its violation”, it is necessary for the damage to have really occurred. Whether this damage will be compensated, bottom line, depends on the creditor as well, firstly whether he will use his right to compensation of damage (Article 262/2 LO), and then whether he will succeed in proving its existence and amount. Additionally, the creditor must prove the causal link between the damage and the breach and the cause must be such that there would have been no damaging consequences without it.

In order for the debtor to be exempt from the liability for damage that he has caused to the creditor by breach of contract, for which liability there is a disputable assumption, he must prove the existence of certain circumstances that eliminate the illegality of his behaviour. In this sense the LO has accepted the so-called subjective – objective concept of debtor liability and his exemption from this liability. In Article 263 of the LO two preconditions are regulated that cumulatively exempt the debtor from liability: 1. that the inability to fulfil the obligation or the lateness in fulfilling the obligation to be related to circumstances occurring after conclusion of the contract, and 2. that these circumstances the debtor could not prevent, remove or avoid.25

Circumstances leading to inability to fulfil the obligation or the lateness in fulfilling the obligation are a situation in which the debtor came about, and it can comprise natural or legal reasons, temporary or permanent, full or partial, objective (when no one can fulfil a certain obligation) or subjective (when the debtor cannot fulfil the obligation). The circumstance should have occurred after the conclusion of the contract, irrespective of the will of the debtor, that the debtor could not prevent, remove or avoid it. The expressions “prevent, remove or avoid” should be interpreted as related both to the occurring of the circumstance and the consequences that this circumstance creates, i.e. the damage causes. This means that the debtor first proves that the occurrence of a certain circumstance was insurmountable for him, and then that he could not prevent, remove or avoid the resulting damage (consequence). In this the attention of the debtor is evaluated objectively, i.e. did he behave like a good businessman in the given situation, i.e. as a good host (Article 18/1 LO).

The liability of the debtor for damage caused to the creditor by breach of contract can be influenced by the contract itself. It is contractual expansion of debtor liability from Article 264/1 of the LO and cases for which regularly (“otherwise”) one would not be liable, but not in the direction of (disproportionally) greater compensation for damage than the one caused, which is in accordance with the principles of conscientiousness and fairness (see Article 264/2 LO).

Also the possibility has been regulated for contractual limitation and exemption of liability (Article 265 LO), but the debtor liability can only be excluded for ordinary negligence (culpa levis), and not for deliberate (dolus) or gross negligence (culpa lata). The exemption from liability is not unlimited even for ordinary negligence, and the exemption of liability clause is only allowed if it is the result of freely expressed will by the contracting parties and is not in opposition to the basic principles of the LO, which are the principles for prohibition of the creation and utilization of a monopoly position (Article 14), equality of parties (Article 11) and principle of conscientiousness and fairness (Article 12).

24 Loza, Bogdan: as above, p. 1604.
25 Article 263 LO (Exemption of the debtor from liability): “The debtor shall be exempt of liability for damage if he proves that he could not have fulfilled his obligation, or that he was overdue fulfilling the obligation due to circumstances that have occurred after conclusion of the contract that he could not prevent, remove or avoid”.
27 Loza, Bogdan: as above, p. 1607.
The contractual limitation of liability means that the debtor is liable for damage caused due to non-fulfilment or overdue fulfilment of contractual obligations, but not in the volume in which he would be liable if the clause for limitation of liability was not agreed (see Article 265/3 LO). Similarly to exemption, the limitation of liability is also not “unlimited” if the inability to fulfil the obligation was caused deliberately or due to gross negligence of the debtor (Article 265/4 LO). In addition to this general exemption in limiting liability, two individual cases are regulated when the determined amount is in “apparent disproportion” to the damage and “unless otherwise prescribed by law for the concrete case” (Article 265/3 LO), and the law prescribes, for example, payment of default interest for lateness in fulfilling monetary obligations (Article 277 LO), then liability of caterers (Article 724 LO) etc.

3. Scope of compensation for damage caused by breach of contract

Regarding the scope of compensation for damage caused by breach of contract it is necessary to make a difference between damage caused by ordinary negligence of the debtor and damage caused by fraud, deliberate non-fulfilment of obligations or non-fulfilment due to gross negligence of the debtor.

Ordinary negligence (culpa levis) is negligence due to action or inaction, which deviates from the behaviour of a particularly careful (conscientious) person, a negligence that would not be committed by a particularly careful person. A debtor acting with ordinary negligence is obliged to pay the creditor only for predictable damage, i.e. the damage that debtor knew or had to know will occur if he does not fulfil the contractual obligation to the letter. This is regulated with the provision from Article 266/1 of the LO and is only valid for contractual liability, whereas in tort liability, the person liable is obliged to compensate the full damage that can be attributed to the damaging activity. The rule of predictable damage is valid only if there is no agreed clause for limitation of debtor liability from Article 265 of the LO, since in this case the agreed amount is the predictable damage. Also, via contract the debtor liability can also be expanded (Article 264 LO) when the debtor is held liable for all damage and not only the predictable one.

LO differentiates two situations when the damage is predictable, and outside of these situations it is considered that the damage is unpredictable and the debtor is not held liable for it. One situation is related to damage that the debtor must have presumed would happen if he breaches the contract, because it is damage occurring in the normal course of matters if the contract is breached. Another situation is deviating from the normal course of things due to special (extraordinary) circumstances that the debtor did not have to now, but still knew.

In both situations the criterion for evaluation of the predictability of damage by the debtor for breach of contract is disputable. However, between the concrete (subjective) and abstract (objective) criteria, most authors selects the second, abstract criterion according to which the circumstances are assessed, bearing in mind the attention required in legal operations from an average
debtor, and not the personal characteristics and capacities of the debtor (concrete criteria). Thus, we start from the standard of a good host, i.e. good businessman, and in certain cases a good expert (see Article 18 LO).

Predictable damage occurring in the regular course of things is proved by the debtor according to the general rule for burden of proof, when a person claiming something is obliged to prove it as well, since the predictable damage limits the contractual liability and is in favour of the debtor. If the debtor does not act in this way, the creditor will request the damage that he really suffered. Predictable damage that deviates from the normal course of things due to special circumstances that the debtor was aware of, and which resulted in greater than normal damage for the creditor, the debtor is obliged to compensate. This damage, i.e. that the debtor was aware of these special circumstances, is proven by the creditor. In both cases the valid time for evaluating whether the debtor was aware of the circumstances is the moment of conclusion of the contract. In this the debtor does not need to know the amount, but just the possibility for damage occurring due to breach of contract. Also, the debtor is requested to take into account the real danger of damage, i.e. predictable is the damage that usually occurs during breach of contract. The debtor is liable only for the damage that is a direct consequence of the breach of contract, and not for damage due to a different cause (indirect damage).

It is an interesting question of application of provisions on the limitation of the debtor liability for predictable damage in case of non-fulfilment or inadequate fulfilment of monetary obligations. In answer to this question the relevant provision is the provision of Article 278/1 of the LO according to which “The creditor shall be entitled to default interest regardless of whether he has suffered any damage because the debtor is overdue”. Bearing in mind that default interest is the minimal compensation for damage that the creditor is entitled to in case the debtor is overdue in fulfilling the monetary obligation, then the debtor could not request the limitation of liability to an amount lesser than the amount of the default interest. If the creditor has suffered greater damage than the amount he would receive from the default interest, he has a right to request the difference until the full compensation (Article 278/2 LO). In this case, the provisions for limitation of debtor liability for predictable damages could be applied.

The rule of debtor liability for predictable damage cannot be applied if the debtor has caused the damage by fraud (fraus), deliberate non-fulfilment of obligations (dolus) or non-fulfilment due to gross negligence (culpa lata). In case of breach of contract due to fraud, deliberate non-fulfilment of obligations or non-fulfilment due to gross negligence the creditor is entitled to compensation of the entire damage, irrespective of whether the debtor was unaware of the special circumstances due to which it occurred (Article 266/2 LO). Here the guilt of the debtor is not presumed, so the burden of proof is on the creditor, and if he does not succeed in proving that the debtor acted fraus, dolus or culpa lata he will only be entitled to predictable damage.

Compensation for the damage that the debtor owes the creditor due to breach of contract can be reduced in two cases. The first case is when, due to breach of contract by the debtor, there is some profit for the creditor, in which case the profit is deduced from the damage (so-called profit compensation from Article 266/3 of the LO). The other case is when the contracting party which is making the charge for breach is undertaking all possible reasonable measure to reduce the damage, because otherwise the other contracting party will have a right to reduction of compensation (Article 266/4 LO). In addition to the two listed cases, the compensation of the debtor can also be reduced in case of guilt of the creditor (Article 267 LO).

35 Medić, Duško: Scope of compensation of damage caused by breach of contract, p. 140.
37 Jankovec, Ivica: as above, p. 287.
4. Compensation of material and immaterial damage caused by breach of contract

In our legal theory, practice and legislation one of the divisions of damage is to material and immaterial damage. As material damage ordinary damage is known (real or positive damage, *damnum emergens*) and gain damage (indirect damage, *lucrum cessans*). The rules for compensation in both types of material damage can apply both to predictable and total damage, which were mentioned previously. The compensation for damage is as a rule awarded in monetary form, and according to the manner of calculation it can be concrete and abstract.

In addition to compensation for material damage for violation of contract obligations, immaterial damage can also be awarded if the contracting party has suffered such damage. This possibility for compensation of immaterial damage in case of violation of contract obligation arises from the indirect provision of the LO. Namely the LO does not contain provisions directly regulating the immaterial damage in contractual relations. However, on the basis of the referring provision from Article 269 of the LO, its provisions are respectively applied to the compensation of immaterial damage according to the rules on tort liability (Part 2 of the LO entitled “Causing Damage”). This is a modernist interpretation of immaterial damage with contractual liability, since traditionally it was believed that contractual liability is reserved only for material damage. Previously it was considered that provision from Article 262/2 of the LO is related only to material damage and that Article 266/1 and 2 of the LO serves for implementation of this article, i.e. that the provision from Article 262/2 could relate both to material and immaterial damage, but that Article 266/1 and 2 are related exclusively to determining the volume of compensation of the scope of material damage.

Our legal theory has positioned itself differently on this issue, and some authors, under the influence of the property-legal character of the LO and civil law as a whole do not point out immaterial damage at all in contractual liability, while other authors leave the possibility for awarding monetary compensation for breach of contract obligations. Regarding the opinion of the case law on this issue it is almost non-existent. However, the given modernistic interpretation should present a modern concept of immaterial damage with contracting liability. This concept, *de lege lata* and/or *de lege ferenda* is accepted in many European legislations, as well as in the principles of European contractual law (so-called Land principles). A positive example in this direction is the Republic of Croatia, bearing in mind that it belonged to the same legal circle with uniform legislation in this area, which has with the Law on Obligations from 2005 in Article 346/1 explicitly regulated, in addition to compensation for ordinary damage and gain damage, the right of the creditor to “just compensation of non-property damage”. This solution was of course influenced by the acceptance of a different interpretation of Article 155 LO: “Damage is reduction of somebody’s property (ordinary damage) and prevention of its increase (gain damage), as well as inflicting physical or psychological pain or fear on somebody else (immaterial damage)” and Article 189/1: “The damaged party has a right to compensation of ordinary damage, as well as compensation of gain damage”.

38 According to Article 155 LO: “Damage is reduction of somebody’s property (ordinary damage) and prevention of its increase (gain damage), as well as inflicting physical or psychological pain or fear on somebody else (immaterial damage)” and Article 189/1: “The damaged party has a right to compensation of ordinary damage, as well as compensation of gain damage”.

39 On the term of ordinary damage and gain damage see, Babić, Ilija: *Obligation Law*, p. 194-196.

40 On concrete and abstract damage see, Babić, Ilija: *Obligation Law*, p. 198.


45 See Article 9, paragraph 2, point 501 of the Principles of European Contract Law recognizing the right to compensation of immaterial damage to the contracting party suffering the damage due to breach of contract.

ifferent concept (so-called objective instead of the previous subjective concept)\(^47\) of the immaterial
damage when violating the rights of persons in general,\(^48\) which is also the tendency in modern law.

The given recognition of contractual liability for immaterial damage is a consequence of ap-
lication of the social and legal function of the obligation-legal contracts. Namely, more and more
by concluding individual contracts (for example, contracts on organizing trips, contracts on hotel
services etc.), instead of material goods the desire is to acquire some type of pleasure, certain spiritu-
al enrichment (so-called leisure industry), where the person is not only a so-called \textit{homo consumens}
(consumer of mass goods), but also a so-called \textit{homo sensibilis} (enjoying immaterial goods).\(^49\)

In any event, accepting the opinion of immaterial damage u contractual law is the first step
in this direction that raises many other questions: predictability of immaterial damage, just mone-
tary compensation for breach of contract (problem of commercialization), limitation and expansion
of liability to immaterial damage etc.

5. Default interest and liability for breach of contract

Interest (interest, usury, profit, gain) is the price, i.e. fee paid for using other persons’ money
or other persons' exchangeable movable goods, regardless whether the said goods are used based
on legal operations, that is on some legal basis or not, which is given to things of that kind.\(^50\) Bearing
in mind the basis for occurrence (contract or law) we differentiate between contractual and le-
gal interests. Default (moratorium) interest is the legal interest owed by the debtor, in addition to
the principal, in case of being overdue\(^51\) in fulfilling the monetary obligation (Article 277/1 LO). It is
aimed at compensation of damage, i.e. it represents a sanction for untimely fulfilment of monetary
obligations, bearing in mind the nature of money as an owed thing.\(^52\)

The creditor is entitled to default interest regardless whether he has suffered any damage
due to the debtor being overdue (Article 278/1). Thus, this is presumed damage that the creditor
does not prove and it is enough only to prove that the debtor is overdue in the monetary obligation.
If the creditor due to the lateness of the debtor has suffered damage greater than what he would
receive in the name of default interest, he has the right to request the difference until the dull com-
ensation for the damage (Article 278/2 LO). In this case the creditor must prove that he has suffered
this greater damage.

The given provisions need to be related to provision from Article 266/1 of the LO regulating
the right of the individual to compensation of ordinary damage and gain damage, which is the one
that the debtor had to predict. Ordinary damage, in principle, is easy to prove. Namely, the liability
of the monetary obligation debtor is presumed due to the fact that he is overdue so \textit{ipso facto} the cred-
itor acquires the right to default interest. The creditor can also prove the compensation for damage

\(^47\) On the objective concept of immaterial damage see, Cmčić, Ivica: The right of a physical entity to remedy of non-property damage, in
\textit{Compensation for damage in the implementation of the new law on Obligations}, Narodne novine d.d., Zagreb, 2005, pp. 6-8.

\(^48\) Radolović, Oliver: Responsibility of caterers for damage due to violation of obligations from the direct hotel service contract, \textit{Almanac of the Faculty of Law of the University in Rijeka}, vol. 30, No. 2/2009, p. 1035 and further and Agency contract in hotel services: contractual liability of caterers in Croatian, European and international business practice, \textit{Pravni vjesnik}, No. 2/2010, pp. 7-35.

\(^49\) Klarić, Petar: Liability for immaterial damage due to breach of contract for organized travelling, \textit{Almanac of the Faculty of Law in Zagreb}, vol. 56, Special issue, 2006, p. 383.

\(^50\) Stanišić, Slobodan: Default interests for monetary compensation of immaterial damage, in \textit{Compensation for immaterial damage}, selected works from the meeting of the Association for Indemnity Law, Belgrade, 2008, p. 204.

\(^51\) “The debtor becomes overdue when he does not fulfill the obligation in the time predicted for fulfillment”, Article 324/1 LO.

higher than the amount of the default interest. However, gain damage is not presumed and it is not easy to determine, because according to the provision from Article 189/3 of the LO it must be determined what damage has occurred for the creditor due to the lateness of the debtor in order to achieve the full compensation for damage from Article 278/2 of the LO, and in relation to Article 266 of the LO, which has a corrective role\(^{53}\). The purpose of total or integral compensation for damage (see Article 190 of the LO) is to bring the creditor of the monetary receivable in the state he would be if the debtor had according to the normal course of things had performed his obligation when it became due.

In addition to compensation for full damage, the creditor can also request valorization of devalued monetary claim due to inflation (so-called inflation damage) in order to establish the principle of equal value of the given thing from Article 15 of the LO,\(^ {54}\) i.e. to compensate for the difference between the real paid value of the contractual obligation and the market value.

Default interest can be awarded also with immaterial damage for breach of contractual obligation, because this form of damage also has its place with liability for breach of contract, as mentioned before. Monetary compensation for immaterial damage is a main claim, and the compensation for overdue payment of the main receivable is the default interest, the occurrence and amount of which are directly dependent on the existence of the main receivable.\(^ {55}\)

Default interest is paid according to the rate provided in the Law on the default interest rate of the Republic of Srpska.\(^ {56}\) According to the provisions of this law, in case of lateness of debtor in fulfilling monetary obligations in domestic or foreign currency, he owes in addition to the principal also default interest on the debt until the day of payment according to the interest rate comprised of the rate of growth of retail prices for the period for which the default interest is calculated and a fixed rate of 0.05% per day (Article 3). The calculation of the default interest is made by multiplying the fixed daily rate of 0.05% with the number of days overdue and that rate is then multiplied with the amount of the principal debt increased by the interest according to the rate of growth of retail prices from the previous article. If the rate of growth of retail prices is zero or negative, only the fixed rate of 0.05% per day shall apply (Article 4). The Law on Amending the Law on Default Interest Rate regulates the calculation of interest on the monetary obligation expressed in dinars,\(^ {57}\) whereas the Law on Amending the Law on Default Interest Rate from 2008, replaces the words “retail prices” in Articles 3 and 4 of the basic law from 2001, with the words “consumer prices”.

\(^{53}\) Čolić, Borislav: Enforcing monetary contractual obligations, other monetary obligations, termination of contract due to non-fulfillment and compensation of damage, default, contractual and usury interests, problems in deciding in court procedures, Bulletin of case law of the Supreme Court of the Republic of Serbia, No. 2/1999, p. 161.

\(^{54}\) Ibidem, p. 174 and further.

\(^{55}\) Stanišić, Slobodan: as above, p. 212.

\(^{56}\) Law on the Default Interest Rate, “Official Gazette of the Republic of Srpska”, No. 19/01, 52/06, 103/08. The laws preceding this law, and were applied on the territory of the Republic of Srpska were the Law on Default Interest Rate, “Official Gazette of SFRY”, No. 57/89, and Law on Default Interest Rate, “Official Gazette of SFRY”, No. 32/93, 24/94 and 28/96, although for the second law there was no legal basis in the regulation of the Republic of Srpska, so that the law from 1989, in spite numerous difficulties, had to be applied until the adoption of the Law in 2001, see Stanišić, Slobodan, as above, pp. 208-209.

\(^{57}\) Article 1: “Interest shall not be calculated on monetary obligations expressed in dinars, but the principal debt will be converted to DEM, that is KM at the most favorable rate at which commercial banks have bought that currency at the location of fulfillment of obligations at the due date and on this converted amount default interest shall be calculated at an interest rate paid for not termed savings deposits (savings deposits on sight) in DEM, until the day of fulfillment of the principal debt, and latest until 18.05.2001, from which date the interest shall be calculated according to the provisions of Article 3 of the basic law”.

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\(^{54}\) Ibidem, p. 174 and further.

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\(^{56}\) Law on the Default Interest Rate, “Official Gazette of the Republic of Srpska”, No. 19/01, 52/06, 103/08. The laws preceding this law, and were applied on the territory of the Republic of Srpska were the Law on Default Interest Rate, “Official Gazette of SFRY”, No. 57/89, and Law on Default Interest Rate, “Official Gazette of SFRY”, No. 32/93, 24/94 and 28/96, although for the second law there was no legal basis in the regulation of the Republic of Srpska, so that the law from 1989, in spite numerous difficulties, had to be applied until the adoption of the Law in 2001, see Stanišić, Slobodan, as above, pp. 208-209.

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This manner of regulation of the establishment of the default interest rate, as well as its regulation in LO is not in accordance with the Directive on combating late payment in commercial transactions. Of course, this is another task for the legislators in the procedure for harmonization of the national regulations with the *acquis communautaire*.

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REMEDIES FOR BREACH OF SALES CONTRACT –
LOSS AND INTEREST
Country report for Croatia

1. In which case of breach of sales contract are the parties entitled to claim compensation for damage? Is the right of compensation for damage the sole right, or is it one of the rights that follow the breach of contract?

In the Republic of Croatia the sales contract has generally been regulated in the Law on Obligations (Articles 376-473 hereinafter: LO). When the sales contract is terminated due to breach of contract by one of the contracting parties, the other party shall be entitled to compensation for damage he has suffered due to that, according to the general rules on compensation for damage incurred by breach of contract (Article 445 LO). It is a special provision (lex specialis), which is valid for purchase and sales agreement, and which actually refers to the application of the general provision (lex generalis) on the obligation for fulfillment of contractual obligations and the consequences for default thereof from Article 342 LO. According to the general provision, the fundamental goal and effect of contractual relations is the right of the creditor to request the debtor for fulfillment of the obligation “conscientiously and to the letter”. If the debtor does not fulfill conscientiously or fully his obligation, the creditor has a right to request compensation for damage he has suffered due to that. With this formulation the Croatian legislator has clearly set the rule according to which for lateness or non-fulfillment of obligations the debtor is not released from the obligation for fulfillment, and that it remains and he still obliged to fulfill it and does not have the right to non-fulfillment or giving up on the agreement by compensating the damage to the creditor. The obligation for fulfillment as primary obligation remains (since the obligation ceases only when it is fulfilled, Article 160 LO), but a new, secondary obligation appears alongside it – the obligation for compensation of damage caused in consequence to the non-fulfillment or lateness with the primary obligation.

Case law:

“The seller shall be held liable when, disputing the validity of the sales contract, he disabled the usage of the sold automobile” VSRH Rev-1877/99 from 01.12.1999; “The seller shall be held liable to the buyer for damage because he delivered to him a smaller quantity of goods than agreed upon” VTS, PŽ-1501/93 from 16.11.1977; “If the seller was overdue in delivering the goods, the buyer shall be entitled to compensation of damage” VSRH Gzz-28/80 from 23.04.1980.

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2 The new Law on Obligations (OG 35/05, 41/08) came into power on 01.01.2006 replacing the old Law on Obligations from 1978, which was taken into the Croatian legislation in 1991 (OG 53/91, 73/91, 111/93, 3/94, 7/96, 91/96, 112/99, 88/91).
3 Since the Supreme Court of the Republic of Croatia (VSRH) still does not have significant case law adopted on the basis of the provisions of the new Law on Obligations from 2005, in this document we quote the case law according to the Law on Obligations from 1978/91 regarding the provisions that have only changed in their form but not in their content. For provisions of the Law that were changed in content and concept, the case law has not been quoted due to the reason given.

In addition to these general situations of termination of purchase and sales contracts, the Law on Obligations regulates two more specific situations for termination of purchase and sales contracts and compensation of damage. These are the following two situations:

a) Termination of contract when the good has a current price

When the sale has been terminated due to breach of contract by one of the contracting parties, and the good has a current price, the other party may request for the difference between the price set in the contract and the current price on the date of termination of the contract in the market of the place where the business was conducted (Article 446 paragraph 1). Current price is the price determined with the official records of the market in the location of the seller at the time where fulfillment should have occurred (Article 286 paragraph 1 LO). If on the market of the place in which the business is concluded there is no current price, for calculation of the compensation amount we take into account the market price that could replace this market in the given case, and the difference in transportation costs should be added to the price (Article 446 paragraph 2 LO). In legal literature this type of damage is entitled ABSTRACT DAMAGE. For creation of liability relations for this type of damage it is necessary: 1. for the contract to be terminated due to breach of contract by one of the contracting parties, 2. for the purchase and sales object have a current price. The term abstract damage comes from the presumption that the contracting party has suffered damage due to differences in current price. Simply put, when the buyer is obliged to pay a price that is lower than the current and the seller is responsible for termination of the agreement, the buyer has a right to request the difference between the price that he would be obliged to pay if the contract was not terminated and the higher current price. On the other hand, when the buyer is obliged to pay the price higher than the current price and is responsible for termination of the contract, the seller has a right to request the difference between the higher price that the buyer would be obliged to pay had the contract not been terminated and the lower current price. Thus, the difference between the individual amounts of prices (difference between the contracted price and current price) is the amount of abstract damage.

b) Termination of contract when a purchase or sale was made for settlement

Where the object of sale is a certain quantity of things determinate as to their kind, and one party fails to perform its obligation in due time, the other party may effect sale for the purpose of settlement, or purchase for the purpose of settlement and demand payment of the difference stipulate in the agreement and price of sale or purchase effected for the purpose of settlement. It is important that the sale or purchase for the purpose of settlement must be effected within a reasonable period and in a reasonable manner. It is also important that the creditor notifies the debtor on the intended sale or otherwise be liable for damage arising thereof (Article 447 LO). From the Article itself we can see that for damage to occur it is necessary: 1. for the object to be a substantial sum of goods determinate as to their kind, 2. for one party to be overdue, 3. for the other party to have made a sale or purchase due to settlement, 4. that the purchase, or sale for settlement to have been done in reasonable time and in a reasonable manner. In legal literature this type of damage is entitled concrete damage. This is because the contracting party performing the sale, or purchase for settlement can ask under the given preconditions the other party for the difference in the contract price and sales price, i.e. purchase that he has really made for purposes of settlement. Thus, the difference between individual amounts of prices (the difference between the contracted price and the price achieved purchasing or selling) is the amount of the abstract damage. It is important that the notification on the intended purchase or sale is not a precondition for occurrence of damage liabil-
ity, but the party that did not inform the other party of the intended sale or purchase for settlement can be held liable to the other party for the damage thus incurred.

However, in addition to compensation for damage in accordance with the stipulated rules, a party not in breach of the contract shall be entitled to compensation for excess damage, if suffered (Article 448 LO).

2. **What is the definition of the concept compensation for damage and loss/damage in your legislation – the tangible and intangible one? In accordance with your laws, are the contractual parties entitled to compensation for tangible and/or intangible damages in case of breach of contract? Are there any particular requirements regarding the liability for damages where a breach of sales contract is made? According to which rules are the liability extent and the compensation amount for damages (tangible and/or intangible) specified, in case of breach of contract?**

   a) **General on the system of damage liability in Croatia**

   In the Republic of Croatia the general rules on damage liability, including definitions of terms such as: definition of degree of liability and determination of the amount of damage compensation are regulated in the Law on Obligations as general regulations of obligations law (Articles 1045-1110 LO). In addition to this some specific relations for damage liability are regulated in certain special law, such as the Law on Protection of the Environment that regulates the damage liability for polluting the environment; the Customs Law provides that if by searching the items or personal search the traveler is caused damage, the traveler is entitled to compensation of thus incurred damage by the Republic of Croatia; Law on the System of State Administration provides for liability of the Republic of Croatia where citizens have a right to compensation of expenses incurred due to failure to perform an official action, and the decision on the request for compensation of such expenses is made by the manager of the procedure who invited the party to a certain action in the legal procedure etc. However, even on the damage liability in these special regulations, the general provisions shall apply and general concept of the damage liability relations, which are regulated with the Law on Obligations.

   According to the general rules of the Law on Obligations for the damage liability relation to occur it is necessary to fulfill the **following preconditions:**

   1) to exist clearly determined subjects of the damage liability relation – a party doing the damage and a damaged party;

   2) for a certain damage to have occurred with the damaged party. In this the law defines damage as reduction of somebody's property (ordinary damage), prevention of its increase (gain loss) and violation of personal rights (non-property loss);

   3) to exist a damaging activity of the party causing the damage. The damaging activity can be breach of some contractual obligation (contractual liability for damage), civil tort (extra contractual liability for damage) and from violation of negotiations prior to concluding a contract (pre-contract liability for damage).

   4) for there to be a causal link (causal nexus) between the damaging activity as cause and the damage as consequence,

   5) for the condition of illegality of the damaging activity to be satisfied. Here we speak of:

      a) illegality in the objective sense: the damaging activity is opposite to some legal rule;
b) illegality in the subjective sense: the damaging activity was committed by guilt of the defendant. LO stipulates that damage shall exist where a defendant has caused damage intentionally or by acting carelessly (Article 1049. LO), where LO differentiates between ordinary and gross negligence.

Regarding the types of liability for damage the fundamental rule of the Croatian legal system related to liability for damage is the **subjective liability where the guilt is presumed**, unless otherwise provided. In other words, a person who has caused damage to another person shall compensate for this damage, unless he has proven that the damage has not occurred as a result of his own fault (Article 1045 paragraph 1 LO). In this only ordinary negligence is presumed (Article 1045 paragraph 2) whereas gross negligence and intent must be proven. Since fault is looked for as a presumption, it is **SUBJECTIVE liability for damage**. However, our law recognizes also **OBJECTIVE liability** for damage where fault is not looked for (illegality in the subjective sense) as a general presumption, but only illegality in the objective sense. Thus, for things or activities representing a major source of danger for the environment liability shall be imposed regardless of the fault (Article 1045 paragraph 3 LO). But, liability shall also be imposed regardless of the fault in other cases prescribed by the law (Article 1045 paragraph 4 LO) such as liability for dangerous things or dangerous activities (Article 1063-1067 LO), liability caused by a motor vehicle in operation (Article 1068-1072 LO), liability for defective product (Article 1073-1080 LO), liability of parents for children until seven years of age (Article 1065 paragraph 1 LO) etc. In addition to subjective and objective liability for damage, the LO additionally recognizes: 1. pre-contractual, contractual and extra-contractual liability for damage, 2. own liability and liability of others, 3. liability of several persons for damage: separate and solidary, 4. as well as some other special cases as liability for not providing necessary help, liability regarding the obligation for concluding a contract, liability related to conducting activities of public interest.

b) Characteristics of liability for damage in sales agreements

**ba) What is the definition of the concept of loss/damage in your legislation – the tangible and intangible one?**

In the Croatian legal system damage has been defined as loss of a person's assets (pure economic loss), halting of assets increase (loss of profit) and violation of privacy rights (non-material damage) (Article 1046 LO). Additionally LO regulates personality rights stipulating that every physical or legal entity has a right to protection of their personality rights under the provisions provided by law. Under personality rights are understood to be the right to life, to physical and mental health, reputation, honor, dignity, name, privacy of personal and family life, etc. A legal entity has all the stated personality rights, other than the rights related to the biological character of a natural person, in particular the right to reputation and a good name, honor, name or firm name, business secrecy, freedom to conduct business, and other (Article 19 LO). It is important to mention that the listed personality rights are not a closed list, and that other personality rights not explicitly put in a legal provision can be violated as well. This legal solution of the LO from 2005 is different from the solution of the LO from 1978, which limited personality rights and definition of non-material damage exclusively to the right that were then explicitly listed in the law.

Case law:

“From a seller who has not fulfilled the contract and transferred to the buyer the sold real-estate, the buyer may request, if the seller is unable to fulfill this contract, compensation for damage in the amount of the price of such an object at the time of the verdict.” VSRH Rev-284/89 from 28.06.1990.
In accordance with your laws, are the contractual parties entitled to compensation for tangible and/or intangible losses in case of breach of contract?

Compensation for damage in case of non-fulfillment or overdue fulfillment of a contract is generally regulated in the provisions of Articles 342-349 LO. Where a debtor does not perform an obligation or is late with the performance, the creditor is also entitled to request compensation for the damage suffered thereby (contractual liability for damage, Article 342 paragraph 2 LO). This is a general rule (lex generalis). In this the creditor has a right to ask for tangible and non-tangible damage. This novelty was introduced in the Law on Obligations from 2005 (according to LO/78 only compensation for tangible damage could be requested) and thus there is no newer case law particularly related to the compensation of non-tangible damage due to violation of sales contracts.

Are there any particular requirements regarding the liability for damages where a breach of sales contract is made?

Where a sale has been terminated due to the breach of contract by one contracting party, the other party shall be entitled to compensation for damages suffered as a result in accordance with general rules on compensation for damage arising from breach of contract (Article 445 LO). The same applies when the thing has a current price or a sale has been made for settlement or a purchase has been made for settlement or purchase for settlement under special preconditions (Articles 446-447, see answer under 1). These provisions prescribe special rules (lex specialis) in case of termination of sales contract, which compounds the general provisions on compensation for damage due to non-fulfillment or overdue fulfillment of the debtor’s obligation from Article 342 LO (lex generalis, see answer under 1 and 2 bb).

The difference between general and special provisions is not great, but we can still point out two differences:

- First, without a special rule on the termination of sales contract (Article 445 LO) the right to compensation for damages suffered would be evaluated in accordance with general rules on compensation for damage arising from lateness or non-fulfillment (Article 342 LO). According to this only the creditor would have right to compensation for damage. Introducing a special rule for compensation of damage in sales contracts the right to compensation has also been expanded to cases when the contract was terminated due to breach of contract of one contracting party, which means that the obligation can be violated by the creditor as well, and that is why according to the special sales rule, the right to termination and compensation of damages is also entitled to the debtor.

- Second, in order for the obligation for compensation of damage to occur from a sales contract it is not sufficient only for lateness, non-fulfillment or non-informing to happen, but according to the special rules the sales contract must truly be terminated.

According to which rules are the liability extent and the compensation amount for damages (tangible and/or intangible) specified, in case of breach of contract?

The degree of liability and the amount of compensation for damages is regulated in the Law on Obligations. In this, LO as the fundamental principal presumes only the lowest degree of fault –
ordinary negligence, whereas gross negligence and intent have to be proven (unless it is objective liability for damages).

Regarding the scope of compensation for damages due non-fulfilment of obligations the creditor has a right to **compensation of ordinary damage and loss of profit (property damage)** and **just compensation for non-property damage**, which the debtor must have predicted at the time of concluding of the contract as a possible consequence of breach of contract having in mind the facts that were then known or had to be known to him (Article 346 paragraph 1 LO). Here we have an obligation for compensation only of so-called PREDICTABLE DAMAGE. So the liability for breach of contractual obligations is quantitatively limited since it is not equal to the full volume of damage, but only to the extent that could be predicted at the moment of conclusion of the contract. The criteria for assessing predictability or unpredictability we take the objective criteria for evaluation of the debtor as a responsible and conscientious businessman, i.e. good householder from Article 10 of the LO. However, In case of fraud or deliberate non-performance or non-performance due to gross negligence, the creditor shall have the right to request from the debtor compensation for the entire damage that was caused due to breach of the contract, regardless of the fact that the debtor did not know of the particular circumstances resulting in the damage caused (Article 346 paragraph 2 LO). This is an obligation of compensation of the so-called TOTAL DAMAGE. Fraud, intent and gross negligence must be proven. Where a breach of obligation, apart from the damage, gives rise to a certain benefit for the creditor, it shall be taken into account to a reasonable extent in determining the volume of compensation. This is the special institute of compensation of damage with benefit realized (**compensatio lucri cum damno**).

Finally, when evaluating the amount of compensation for damage caused by breach of contractual obligation the court must take care of the behavior of this person invoking the right to compensation of damage. Thus the party invoking the breach of contract is obliged to take **all reasonable steps to reduce the damage** caused by such breach, otherwise the other party may request a decrease of the compensation (Article 346 paragraphs 3-4 LO). However, where a creditor or a person for whom the creditor is responsible is at fault for contributing to the caused damage or its scope or for making the position of the debtor more onerous, the compensation is proportionally reduced (Article 347 LO).

How are damages corrected? **Property damage is corrected by restitution to the previous condition**, and if it does not eliminate the damage completely, or the establishment of the previous condition is not possible, then the damage is corrected with **compensation in cash** (Article 1085 LO). The exact amount of **real damage** shall be determined with respect to the prices at the time of delivery of court judgment, unless otherwise provided for by the law. In assessing the amount of profit lost, a profit which could have reasonably been expected under the normal or special circumstances shall be taken into account, the realization of which has been prevented by acting or failing to act on the part of the defendant (Article 1089 LO). Liability to compensate for damage shall be considered due as of the time of damage occurrence (Article 1086 LO).

**Non-property damage** (damage of personality rights) is corrected with a **disclosure of the judgment or its modification** if it can attain the purpose of achieving a just pecuniary compensation (Article 1099 LO). However, if this purpose cannot be achieved by disclosure of the judgment then the non-property damage will be corrected with **just pecuniary compensation** that the court will award if the severity of the violation and the circumstances of the case justify this. In deciding on the amount of just pecuniary compensation, the court shall take into account a degree and duration of the physical and mental pain and fear caused by the violation, the objective of this compensation, and the fact that it should not favor the aspirations that are not compatible with its nature and social purpose. In the event of violation of reputation and other personality rights, the court shall,
where if finds that this is justified by the seriousness of the violation and circumstances, award a just pecuniary compensation, irrespective of the compensation for material damage and in the absence of the latter (Article 1100 LO). It is interesting that the court shall, at the request of an injured party, also award a just pecuniary compensation for future non-material damage, if it is certain that it will continue into the future (Article 1104 LO). The liability of a just pecuniary compensation shall mature as of the date of submitting a written request or claim, unless the damage has been caused subsequently (Article 1103 LO).

Case law:

“When the debtor defaults an obligation or is late in its fulfillment, the creditor has the right to compensation of ordinary damage and profit loss if the debtor, at the time of conclusion of the contract, had to have predicted them as possible consequences of the contract, bearing in mind the circumstances that were then known or had to be known to him. Telephone costs related to this are not such consequences” PSH Pž-3442/93 from 18.01.1994; “If one contracting party was abroad at the time of conclusion of the contract and had travel expenses related to the concluded contract, which was known to the other party, this party could have predicted these costs as damages from breach of contractual obligations” VSRH Rev-2975/98 from 29.05.2002; “If a certain breach occurred due to gross negligence, the creditor has a right to request from the debtor the compensation of full damages – which included the amount of rent for a rented car for the time when the creditor could not use his car.” PSH Pž-493/91 from 19.03.1991.


3. In which cases does the breach of contract imply the right of interest? How is the amount of the interest rate specified in case of breach (overdue fulfillment) of sales contract? Answer the following questions: Is your legislation in compliance with the Directive on combating late payment (Directive 2000/35/EC of the European Parliament and of Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35-38) and in what manner is it done? Please precisely list the legal solutions of this question.

a) In which cases does the breach of contract imply the right of interest?

The debtor in default with the performance of a monetary obligation shall in addition to the principal owe default interest (Article 29 paragraph 1 LO). This is a general provision related to sales contracts as well (especially to a sales contract with payment of the price in installments or a contract for sales on credit), unless the parties agree otherwise. The interests are the consequence of the debtor default in performing the obligation and they accrue from the moment of maturity of the payment. From this we reach the fundamental question: when is the debtor overdue? That is to say, how do we determine the moment of maturity? The answer depends on the type of relation we have.

3.1. General rule – Law on Obligations

In contractual obligations in which at least one contracting party is not a trader, the debtor is overdue when he fails to fulfill the obligations in the time set for its fulfillment. If a time limit for performance is not stipulated in the contract, the debtor shall perform the obligation within the time
limit stipulated by law. However, if the time limit is not stipulated by contract or law, and the objective of the transaction, the nature of the obligation or other circumstances do not require a specific time limit, the creditor may request immediate performance of the obligation, and the debtor on his part may request from the creditor to receive immediate performance (Article 173 LO). The request by the creditor for fulfillment of obligation when the time limit is not set, can be written or oral, by an extrajudicial demand or initiation of a proceeding aimed at achieving performance of the obligation (Article 183 LO). In the latter case the debtor is obliged to immediately fulfill his obligation, although there is an established practice of eight days from such a request.

Case law:

3.2. Special rule – Law on the Deadlines for Fulfillment of Monetary Obligations

In the time for fulfillment of monetary obligations in trade contracts and contracts between traders and public authorities until 31.12.2011 Article 174 of the LO shall be in power, which is fully harmonized with Directive 2000/35/EC. However, from 01.01.2012 the provisions of this Article shall be made void with the coming into power of the new Law on the Deadline for Fulfillment of Monetary Obligations.

The Croatian Parliament at the meeting on 21.10.2011 adopted the new Law on the Deadline for Fulfillment of Monetary Obligations (OG 125/11, hereinafter: LODFMO), which would come into power on 01.01.2012. The new Law prescribes the deadlines for fulfillment of monetary obligations and the legal consequences of lateness in fulfillment of monetary obligations between undertakings and between undertakings and public authorities. This law comes as consequence of harmonization of the Croatian legal system with Directive 2011/7/EU on combating late payment in commercial transactions (OJ L 48/01). Directive 2011/7/EU was adopted for more efficient combat against fulfillment of monetary obligations in commercial transactions. The deadline for its implementation in the national law of EU member states is 16.03.2013 after which it will completely replace Directive 2000/35/EC. The Republic of Croatia has already fulfilled its obligation by adopting the new Law on the Deadline for Fulfillment of Monetary Obligations. This law makes void the provision thus far from Article 174 of the Law on Obligations (monetary obligation in commercial contracts), which was used to implement the solutions of Directive 2000/35/EC. According to the new law the deadlines for fulfillment of monetary obligations are the following:

Regarding the deadlines for fulfillment of monetary obligations between undertakings, with the said contract a deadline may be agreed upon for fulfillment of the monetary obligation in up to 60 days, and in very exceptional cases a longer deadline can be contracted for fulfillment of monetary obligations. If there is no deadline contracted for fulfillment of monetary obligations in the contract between undertakings, the debtor is obliged, without being requested by the creditor, to fulfill the monetary obligation within 30 days from: 1) the date when the debtor received the bill or other appropriate request for payment, or 2) from the day when the creditor fulfilled his obligation, if it cannot be determined with certainty the day of receiving of the bill or other appropriate request for payment or if the debtor has received the bill or other appropriate request for payment

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4 Undertakings, in the sense of this law, are undertakings regulated by tax regulations, including trade companies that are sectorial orderers as regulated in the public procurement acts.

5 Public authorities, in the sense of this law, are public orderers as regulated in the public procurement acts and sectorial orderers that are not undertakings from the definition of undertakings.
before the creditor fulfilled his obligation, or 3) from the day of expiry of the deadline for verification of the subject of the obligation, if the contract or law provides a certain deadline for such verification, and the debtor has received the bill or other appropriate request for payment before the expiry of that deadline. In this the timeframe for verification of the subject of the obligations may not be longer than 30 days from acceptance of the subject of the obligation, unless a longer deadline has been exclusively agreed for verification of the subject of the obligation (Article 2 LODFMO).

Regarding the **deadlines for fulfillment of monetary obligations between undertakings and public authorities**, in a contract between undertakings and public authorities in which the public authority is the debtor of the monetary obligation a **deadline** can be contracted for **fulfillment of the monetary obligation of up to 30 days**. Exceptionally a longer deadline can be contracted but no longer than a maximum of 60 says. Monetary obligations in contracts between undertakings and public authorities, and in which the debtors of monetary obligations are undertakings or the institute for implementing mandatory healthcare or a medical institution founded by the Republic of Croatia, or a unit of regional self-government or city, are fulfilled in accordance with the provisions for fulfilling obligations among undertakings (i.e. according to Article 2). If the contract between an undertaking and a public authority does not stipulate the deadline for fulfillment of the monetary obligation, the debtor is obliged, without the request of the creditor, to fulfill the monetary obligations within 30 days' time, which are determined in the same way as in contracts between undertakings. The same provision applies to the deadline for verification of the subject of the obligation (Article 3 LODFMO).

The law is very restrictive. **Void** are the contractual obligations that exclude, restrict or condition the right of creditors to default interest in case of the debtor being overdue in fulfillment of the monetary obligation. Equally void are provisions which:

1. contract the date of receiving of the bill or other appropriate request for payment;
2. contract the deadline for fulfillment of monetary obligations longer than 60 days (in contracts between undertakings in Article 2.2 LODFMO);
3. contract the deadline for verification of the object of the obligation longer than 30 days (in contracts between undertakings in Article 2.5 LODFMO);
4. contract the deadline for fulfillment of monetary obligations longer than 30 days (and the public authority is not the debtor in contracts between undertakings and public authorities from Article 3.2. LODFMO);
5. contract the deadline for fulfillment of monetary obligations longer than 60 days (in contracts between undertakings and public authorities from Article 3.3 LODFMO);
6. contract the deadline for verification of the object of the obligation longer than 30 days (in contracts between undertakings and public authorities from Article 3.6 LODFMO),

All of the above shall apply if on the basis of the circumstances in the case, and in particular commercial customs and nature of the subject of obligation, it can be seen that with such a contractual obligation, in opposition to the principles of conscientiousness and honesty, a legal inequality has been cause in the rights and obligations of the contracting parties for the damage of the creditor. When evaluating whether a provision is void it will be taken into consideration if there are any justified reasons for deviation from the deadlines for fulfillment of monetary obligations prescribed by this law (Article 4 LODFMO).

*Case law still does not exist – The law started application on 01.01.2012.*
b) How is the amount of the interest rate specified in case of breach (overdue fulfillment) of sales contract?

**Default interest** come as consequence of the debtor’s lateness in fulfillment of monetary obligations, and in addition to the principal the debtor in case of lateness also owes interest (Article 26 paragraph 1 LO). They accrue from the first day after the day of maturity of the claim. Default interests are not contracted and they belong to the creditor – contracting party, by the law itself (*ex lege*). Thus, in practice they are also called statutory default interest and their rate is regulated by law. The obligation for payment of interest appears as a primary obligation of the contracting party in, for example, credit contracts, loan contracts, contracts on monetary deposits in banks, sales contracts with payment in installments or sales on credit.

The default interest rate on relations arising from commercial contracts and contracts between a trader and a public law person shall be determined on semi-annual basis by increasing the discount rate of the Croatian National Bank applicable on the last day of a six-month period prior to the current six-month period by eight percentage points (discount rate + 8%), or five percentage points in other relations (discount rate + 5%). The parties to commercial contracts and contracts between a trader and a public law person may contract a different default interest rate, but not over the maximum determined amount (Article 29 paragraphs 2-3 LO). The differentiation between the amounts of interest rates depends on the legal business from which the consequence arises is implementation of Directive 2000/35/EC in the Croatian legal system. The provisions on the amount of interest rate are of forced or cogent nature.

The provision of the contract on a different interest rate than the one prescribed by law shall be **void**, if it arises from the circumstances of the case, in particular from commercial custom and the nature of the subject of obligation, that the contracted default interest rate has contrary to the principle of fair conduct caused obvious inequality of rights and obligations of parties to the contract. In deciding whether the provision regarding the rate of default interest is void it shall be taken into account whether there were reasons for departing from the default interest rate prescribed by law (Article 29 paragraphs 4-5 LO).

The default interest rate shall refer to the period of one year. It is determined by the Croatian National Bank, is obliged on 1 January and 1 July of every year to publish its discount rate in the *Official Gazette* of the Republic of Croatia (Article 29 paragraphs 7-8). In legal literature it is considered that the discount rate of the Croatian National Bank is a reference image of the real situation of the money market.

However, in addition to default, the Croatian legal system allows the parties to themselves contract interests, and they are thus called **contractual interests**. The difference to default interests is that they can be contracted to use exchangeable (generic) things. The contractual rate of interest among persons of whom at least one is not a trader may not exceed the statutory default interest rate applicable on the day of entering into the contract or the day the contractual rate of interest changed, where the contracted rate of interest is variable. The contractual rate of interest among traders or a trader and a public law person may not exceed the statutory default interest rate for such persons, increased by one half of that rate (Article 26 paragraphs 1-2 LO).

If interest is contracted **without determining its rate** the interest rate applicable among persons of whom at least one is not a trader shall be equal to one quarter of the statutory default interest rate and among traders to one half of the statutory default interest rate (Article 26 paragraph 3 LO). If the contractual interest exceeds the statutory interest, the highest statutory rate of interest

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6 The discount rate of the Croatian National Bank on 27.06.2011 was 7%.
shall apply. Same as the default interest, the contractual rate of interest shall refer to a period of one year (Article 29 paragraphs 4-5 LO).

**Regarding the relation between contractual and default interests**, if in commercial contracts and contracts between traders and persons of public law the contractual rate of interest exceeds the default interest rate, they shall continue to accrue also when the debtor is in default (Article 29 paragraph 6 LO). If in the given contracts there is a contracted contractual interest, which is up to one half higher than the statutory rate of default interest, then it shall be applied. Thus, if the debtor is overdue, there will not be an obligation on him to pay default interest, but his obligation will remain to pay contractual interests at the rate higher than the rate of default interests.

Case law:
Žs in Koprivnica, Gž-1152/02-2 from 01.04.2003; Žs in Zagreb, Gž-Ovr-228/02 from 10.12.2002.; Decision of the Supreme Court of RC U-III-692/02, U-III-1649/01 from 06.05.2005. (on usury interest), VSRH Rev-23/00 from 23.03.2000; VTS Pž-442/97 from 04.03.1997; VSRH Rev-230/02-2 from 18.02.2004.

4. **Is the damaged party entitled to claim compensation for loss apart from the right of interest, or are both rights excluded? In case of cumulative rights, does the interest payment affect the determination of the compensation amount for loss and in what manner?**

In Croatian law the damaged party is entitled to request both interest and compensation for damage as two cumulative rights. The creditor shall have the right to default interest regardless whether he suffered any damage as a result of the debtor’s default. If the damage suffered by the creditor as a result of the default by the debtor exceeds the amount to be received from default interest, he shall be entitled to full compensation of the difference (Article 30 LO).

The reason for this legal regulation arises from the very nature of these rights. Interest is compensation that somebody pays for using the money of another person in a certain period of time, and compensation for damage, as its name implies, is aimed at compensating material or non-material damage occurring due to breach of contract. The opinion that default interests are not compensation for damage has been clearly stated by the Supreme Court of the Republic of Croatia. In this sense these two rights do not influence one another, especially when determining the amount of compensation for damage. Damage that has really occurred is compensated, in accordance with the rules and criteria for compensation of damage described in the previous answers. In discrepancy to this, interests are paid even if no damage occurred. It is not even allowed to present counter evidence that the creditor has suffered a smaller loss than the one prescribed in the cogent provisions on the amount of default interest rates.

Case law:

“Interests are not compensations for damage, but are compensation for using the money of another person in a certain period of time.” VSRH Rev-1293/89-2 from 05.12.1989 and County Court in Zagreb in decision Gž-1811/97 from 13.10.1998 “If the seller is late delivering the goods, the buyer only has right to compensation of damage and not default interest on the amount of the paid purchase. Default interest, namely, is owed only by a monetary obligation debtor who is overdue in its fulfillment. In this case the debtor has belatedly fulfilled a non-monetary obligation” PS Pž-3049/92 from 18.05.1993.

List of recommended literature:

14. Momčinović H., Important changes made by the new LO regarding sales contracts, lease contracts, contracts on activity, contracts on construction and contracts on transportation, Croatian legal review, 5(2005), pp. 3-8.
15. Momčinović H., Monetary compensation for damage from breach of contractual obligations in legislation and case law, Banking system and financial operations in the Republic of Croatia, Zagreb, 1999., pp. 200-211.


24. Težulat V., Obligation for compensation of material damage – some disputable questions, Croatian legal review, 10(2010), pp. 18-32.


REMEDIES FOR NON-PERFORMANCE IN SALES CONTRACTS - DAMAGE AND INTEREST

Country report for Macedonia

1. In which case of breach of sales contract are the parties entitled to claim compensation for damage? Is the right of compensation for damage the sole right, or is it one of the rights that follow the breach of contract?

The right to compensation for damage due to breach of contract exists in both situations of non-fulfilment of sales contracts, or in situations of lateness, and in situations of improper contract fulfilment. When the contract was terminated due to non-fulfilment, according to the general rules on liability for non-fulfilment of contract, both parties are exempted from the obligations with the exception of the obligation of compensation for potential damage (Article 121(1) LO). This is also according to general rules on lateness, i.e. the general rules on non-fulfilment, Namely, when the debtor fails to fulfil an obligation or is overdue in its fulfilment, the creditor has the right to request compensation for the damage incurred as a consequence thereof (Article 251(2) LO). For damages due to lateness in fulfilling the contract and a debtor that the creditor has provided with an adequate additional time for fulfilment (Article 251(3) LO). Bearing in mind these provisions, the right to compensation for damage exists in the case of contract termination, also when the contract has been fulfilled but belatedly. Regarding the improper fulfilment of a sales contract, the right to compensation of damage is the right of the buyer, and can request proper fulfilment, also in cases when requests for termination of contract or lowering of price were selected (Article 476(2) LO). These rules relate to material defects in fulfilment. Regarding the legal defects of fulfilment, there is also the right of the buyer for compensation of damage, regardless of whether there was full or partial eviction (Article 498(3) LO). Finally, regarding sales there are special rules on compensation for damage in the case of termination of contract due to contract breach. The range of application of these provisions is disputable, bearing in mind that the breach is not limited to cases of defects in fulfilment, but to non-fulfilment as well. At least on a theoretical level, a breach would exist in cases of non-fulfilment and in cases of defect in non-fulfilment. In any case, when the sale has been terminated due to contract breach by one of the contracting parties, the other party shall be entitled to compensation for damage suffered due to that, according to the general rules for compensation of damage incurred due to contract breach (Article 511 LO). Also, there is a special rule on compensation of so-called abstract damage. Namely, when the sales has been terminated due to contract breach of one contracting party and the good has a current price, the other party can request the difference between the price agreed in the contract and the current price on the date of termination of contract in the market where the business was concluded (Article 512(1) LO). Finally, there is a spe-
cial rule for compensation of so-called concrete damage due to settlement, which means that when the object of sales is a certain amount of goods determined by type, and one party does not fulfil its obligation on time, the other party may conduct sales for settlement, or buying for settlement, and request the difference between the price agreed in the contract and the price of sales, or buying, for settlement (Article 513(1) LO).

2. **What is the definition of the concept of damage in your legislation – the tangible and intangible one respectively? In compliance with your laws, are the contractual parties entitled to compensation for tangible and/or intangible damages in case of breach of contract? Are there any particular requirements regarding the liability for damages where a breach of sales contract is made? According to which rules are the extent of liability and the compensation amount for damage (tangible and/or intangible) specified, in case of breach of sales contract?**

Regarding the range and amount of damage compensation, in addition to the aforementioned rules for compensation of abstract damage and concrete damage due to settlement, the general rules shall apply for damage liability due to non-fulfilment or lateness. According to Article 255(1) of the LO, the creditor has a right to compensation for normal damage and gain damage, as well as right to pecuniary compensation of intangible damage, which the debtor had to have predicted at the moment of concluding of the contract as the possible consequences of the breach of contract, bearing in mind the fact that he then knew or must have known. In brief, the creditor has a right to compensation of tangible damage (normal damage and gain damage), and intangible damage. The explicit mentioning of the right for compensation of intangible damage, in case of breach of contracts, was put in the novelties to the LO in 2008, bearing also in mind the general principle of protecting personal rights from Article 9-a of the LO. In any case, this damage is compensated exclusively as predictable. An exception to this rule is the provision from Article 255(2) of the LO, which prescribes that in case of fraud or deliberate non-fulfilment, as well as non-fulfilment due to gross negligence, the creditor has a right to request from the debtor compensation of the total damage occurring due to breach of contract, regardless that the debtor was not aware of the special circumstances that lead to them. When determining the amount of the damage, the contribution of the creditor to the created damage is also taken into account. This contribution, after the novelty to the LO from 2008, is no longer evaluated according to the guilt of the creditor. So, in accordance with Article 256 of the LO, when the creditor, or a person for whom he is liable, has contributed to the occurring of the damage or to its amount or for aggravating the debtor’s condition, then the damage is proportionally reduced. Finally, the debtor can be exempted from damage liability only if he proves that he could not fulfil his obligation, or he was overdue with fulfilling the obligation, due to an extraordinary event occurring after conclusion of the contract, which he could not prevent, avoid or remove (vis major) (Article 252 LO).
3. In which cases does the breach of contract imply the right of interest? How is the amount of the interest rate specified in case of breach (overdue fulfillment) of sales contract? Answer the following questions respectively: Is your legislation in compliance with the Directive on combating late payment (Directive 2000/35/EC of the European Parliament and of Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35-38) and in what manner is it done? In this respect, please stipulate the original legal resolutions.

Generally, only the breach of a monetary obligation gives the creditor the right to payment of so-called default interest, and these general rules also apply to the obligation of the buyer for payment of the sales price. This interest is paid by force of law, when the debtor is overdue with fulfillment of a monetary obligation (Article 266(1) LO). As a rule, the time of when the debtor becomes overdue is determined by applying the regulation of the LO on maturity of receivables (Article 266(2) LO). If maturity cannot be determined by using these rules, than the rules taken from Directive 2000/35/EC shall apply, which are implemented in Article 266(3) of the LO. A characteristic of domestic law is that the LO determines the amount of the default interest rate. In this, in relation to Directive 2000/35/EC, LO makes a difference between the so-called legal default interest and the so-called contractual default interest. The basis for determining each of these rates is the so-called reference rate, which is the interest rate of the basic operations instrument on the open market, published by the National Bank of the Republic of Macedonia every January second and every July first. The National Bank published the reference rate for the current semester, i.e. until the end of the current semester, on its website (Article 266-a(6) LO). When talking of the rate of the legal default interest, it is determined for every current semester that the debtor is overdue, by enlarging the reference interest rate valid for the last day of the previous semester for a certain number of percentage points. In commercial contracts and in contracts between traders and persons of public law, this reference rate is increased by ten percentage points, and in contracts in which at least one person is not a trader the reference rate is increased for eight percentage points (Article 266-a(1) LO). The rate of legal default interest determined thus, is valid for every semester that the debtor is overdue. It must be mentioned that these rules are valid only when the monetary obligation is expressed in domestic currency. The rule is similar when the monetary obligation is expressed or determined in foreign currency, but in such situations the reference rate is the monthly rate of EURIBOR, for Euros, that was valid on the last day of the previous semester (Article 266-a(2) LO). These rules apply to the so-called legal default interest. It is allowed to agree on so-called contractual default interest, but only in commercial contracts and in contracts between traders and persons of public law. Persons of public law are considered to be all persons obliged to act according to the rules for public procurement with the exception of traders (Article 266-a(7) LO). The rate of the contractual default interest, however, may not be higher than the legal default interest increased by fifty percent, which was valid on the date of conclusion of the contract (Article 266-a(3) LO), depending on the currency of the obligation. The court is authorized, at the request of the other party, to fully or partially declare null and void the contractual obligation on the rate of contractual default interest under the conditions of Article 266-a(4) and (5) of the LO. All of these rules relate to the overdue payment of monetary obligations arising from the contract. Regarding other types of obligations, the rate shall apply for legal default interest that is applied to contracts in which at least one person is not a trader, for the respective currency (Article 266-b LO).
4. Is the damaged party entitled to claim compensation for damage apart from the right of interest, or are both rights excluded? In case of cumulative rights, does the interest payment affect the determination of the compensation amount for damage and in what manner?

In principal, the default interest does not only have an indemnification, but also a preventive and penalty function. In other words, the creditor has a right to default interest even if his real damage is less than the amount of the default interest or if he has not suffered any damage at all (Article 267(1) LO). However, if the creditor proves that his real damage is higher than the amount that belongs to him on the basis of default interest, then he has a right to full compensation of damage. Namely, as provided in Article 267(2) LO, if the damage that the creditor suffered because the debtor was overdue is higher than the amount he has received in the name of default interest, he has a right to request the difference up unto the full compensation for the damage.
1. In which case of breach of sales contract are the parties entitled to claim compensation for damage?

Damage as consequence for breach of duty for fulfillment of an obligation by the debtor can occur either because the debtor did not fulfill his obligation (non-performance of obligation) or because he did not fulfill it in the deadline (overdue fulfillment) (Article 269 paragraph 2 LO).

Is the right of compensation for damage the sole right, or is it one of the rights that follow the breach of contract?

The right to compensation of damage is one of the rights, bearing in mind that in two sided contract, when one of the parties does not fulfill its obligation, the other party may request fulfillment of obligations or terminate the contract, and in any case has the right to compensation of damage (Article 119 LO).

2. What is the definition of the concept of loss – the tangible and intangible one?

Damage is loss of a person's assets (ordinary loss), halting of assets increase (loss of profit), inflicting physical or psychological pain and fear on another person and violation of personality rights and reputation of a legal entity (Article 149 LO).

In accordance with your laws, are the contractual parties entitled to compensation for tangible and/or intangible damages in case of breach of contract?

According to our law the contracting parties have a right to compensation of material damage in case of breach of contract and these are ordinary loss (dammnum emergens) and loss of profit (lucrum cessans).

Are there any particular requirements regarding the liability for damages where a breach of sales contract is made?

In case of termination of sales contracts special rules for compensation of damage have been prescribed:

General rule

When sales have been terminated due to breach of contract of one contracting party, the other party shall be entitled to compensation for damage suffered, according to the general rules for compensation of damage from breach of contract (Article 532 LO).
When the good has a current price (so-called abstract damage)

When the sale has been terminated due to breach of contract by one of the contracting parties, and the good has a current price, the other party may request for the difference between the price set in the contract and the current price on the date of termination of the contract in the market of the place where the business was conducted, as well as compensation for all reasonable expenses incurred due to non-performance. If on the market of the place in which the business is concluded there is no current price, for calculation of the compensation amount we take into account the market price that could replace this market in the given case, and the difference in transportation costs should be added to the price (Article 533 LO).

When purchase or sales has been made for settlement (so-called concrete damage)

Where the object of sale is a certain quantity of things determinate as to their kind, and one party fails to perform its obligation in due time, the other party may effect sale for the purpose of settlement, or purchase for the purpose of settlement and demand payment of the difference stipulate in the agreement and price of sale or purchase effected for the purpose of settlement, as well as compensation for all reasonable expenses incurred due to non-performance. The sale or purchase for the purpose of settlement must be effected within a reasonable period and in a reasonable manner. The creditor shall notify the debtor on the made purchase or sale (Article 534 LO).

Compensation of other damage

In addition to the right for compensation of damage according to the aforementioned rules, the party that did not breach the contract is entitled to compensation of higher damages, if it has suffered it (Article 535 LO).

The buyer has a right to compensation of damage on the basis of seller liability for material defects of goods. The buyer who has timely and adequately informed the seller of the defect can: 1) request the seller to remove the defect or to give him another good without defect (fulfillment of contract); 2) request reduction of price; 3) state that he terminates the contract. The seller shall be held liable for the damage due to defect in the good suffered by the buyer on his other goods, and according to the general rules on liability for damage (Article 496 LO).

The buyer has a right to compensation of damage also on the basis of seller liability for the correct functioning of the sold good. If the seller does not repair or exchange the good in reasonable time, the buyer may terminate the contract, or reduce the price and request compensation of damage (Article 512 LO).

The buyer has a right to compensation of suffered damage also on the basis of seller liability for legal defects (protection from eviction) (Article 518 LO).

According to which rules are the liability extent and the compensation amount for damages (tangible and/or intangible) specified, in case of breach of contract?

The regulations for defining the extent of liability and amount for damages in case of breach of contract are provided in the Law on Obligations (269-276 LO), as special provisions and general provisions on the amount for compensation of material damage (196-199 LO).
3. In which cases does the breach of contract imply the right of interest?

The right to interest is prescribed in case of overdue fulfillment of monetary obligations. The debtor in default with the performance of a monetary obligation shall in addition to the principal owe default interest at a rate prescribed by law. The creditor and debtor may agree to have the default interest rate lower or higher than the default interest rate provided by law. If the contractual interest rate is higher than the default interest rate, it shall also accrue after the debtor becomes overdue (Article 284 LO).

The creditor shall have the right to default interest regardless whether he suffered any damage as a result of the debtor’s lateness. If the damage suffered by the creditor as a result of the default by the debtor exceeds the amount to be received from default interest, he shall be entitled to full compensation of the difference (Article 285 LO).

On due and unpaid contractual or default interest, as well as other due periodical monetary payments, default interest shall not accrue, unless otherwise provided by law. On the amount of unpaid interest default interest can be requested only from the day when a request for its payment was submitted to court, and on due periodical monetary obligations, default interest shall accrue only from the day when a request for their payment was submitted to court (Article 286 LO).

How is the amount of the interest rate specified in case of breach (overdue fulfillment) of sales contract?

The interest rate in case of overdue payment of monetary obligations is regulated in accordance with the Law on the Amount of Default Interest (“Official Gazette of Montenegro”, no. 83/09). This law regulates the amount of the default interest rate paid by the debtor when he is late fulfilling the monetary obligation in cases when the amount of the default interest rate is not regulated in the contract. The debtor who is overdue in payment of a monetary obligation shall owe, in addition to the principal, default interest rate on the amount of the debt until the date of payment, at a rate provided by this law (Article 2). The default interest rate is determined in the amount of the basic default interest rate increased by seven percentage points. The basic default interest rate shall be the interest rate determined by the European Central Bank for main refinancing operation and which is in effect on the first day of the calendar semester it relates to (Article 3). The default interest rate shall be determined every half year and calculated every one year.
1. In which cases of breach of sales contract are the parties entitled to claim compensation for damage?

When one of the parties in a contract fails to fulfill its due obligations, the other party has a right to ask for fulfillment of the contract or terminate the contract due to non-fulfillment. In both cases the party towards which the obligation was not fulfilled has a right to claim compensation for damages generated. In the first case it is damage caused by delays in fulfillment of obligations, while the second case is damage caused by non-fulfillment of obligations. The right to choice is provided in Article 124 of the Law on Obligations (LO). Namely, the creditor has a right for fulfillment of obligations and may realize it without any limitations and additional conditions, since it is an obligations created on the debtor by concluding a contract. On the other hand, in order for the creditor with a simple expression of will, expressed to the other party, to be able to terminate the contract, the Law prescribes the fulfillment of additional conditions, provided in Articles 125 – 131. Thus, for a right of compensation for damage to occur it is necessary for the debtor not to have fulfilled his obligation or that he is late with the fulfillment, that the creditor has suffered damages and that there is a causal link between the damage and non-fulfillment of the obligation, i.e. the delay in its fulfillment. This is said under the assumption that in the particular case there is no basis for exemption of debtor liability. The creditor has the burden of proof for the existence of the damage and causal link.

Maybe it should be pointed out that in Serbian law, the legal regime of termination of contract due to material defects is fully equalized with the legal regime of termination of contract due to non-fulfillment (Article 497 LO), and that this is related both to the procedure for termination and the effect of termination. Namely, in the first case it is liability for qualitative material defects, and in the second liability for partial non-fulfilment - delivery of a lesser quantity than the contracted one and delivery of a different type than the contracted one and complete non-fulfilment of the contract. Lawyers in the Anglo-Saxon system would place all of the aforementioned under "substantial breach of contract", which is the formulation contained in the Civil code.

2. Is the right of compensation for damage the sole right, or is it one of the rights that follow the breach of contract?

Article 132 of the LO regulates the effects of termination. In cases of termination of contract due to non-fulfillment of obligations certain legal consequences arise. When terminating a contract due to non-fulfillment the legal obligations base ceases to exist. Parties are free of all obligations created by concluding the contract (Article 132, paragraph 1 LO). None of them can further request
fulfilment of contractual obligations by the other party, since the contract as a legal basis for obligations has ceased to exist. However, if the both parties have partially fulfilled their contractual obligations or one party has fully completed its obligation and the other one has not (or only partially), there is the issue of restitution– return of what was given, because termination has a retroactive effect. Each party has the right to request return of what was given (Article 132, paragraph 2 and paragraph 3 LO), and the return is made according to the rule in natura, and only if this is impossible in money. Thus, the Supreme Court in Judgment Rev. 268/07 from 29.11.2007 expressed the opinion that restitution is a legally prescribed right of the party that has up to termination of the contract fulfilled the contract partially or fully, irrespective of the culpability for contract termination. In another decision, Rev. 1033/06 from 25.05.2006, the Supreme Court deemed that the circumstance is irrelevant that the defendant has immediately spent the received money on another sale, i.e. it has the opinion that it has no effect on deciding upon the obligation of the defendant regarding the returning of what was given after termination of the contract.

In addition to compensation for damage and restitution, each party owes the other one compensation for gain that it had in the meantime from what they were obliged to return, i.e. compensate (Article 132, paragraph 4 LO).

The question is posed whether termination due to non-fulfilment has effects on third conscientious parties? Based on the sales contract, the seller has given the good to the buyer. A third party has acquired the good from the buyer from the previous contract, who is obliged, according to the terminated contract, to return that same good to the same seller from the terminated contact. However, the third conscientious party could have acquired the property right by way of origin over the disputed good. Firstly, in the sense of the Law on the basis of property legal relations, if it is movable property, on which holding has been acquired in a valid, applicable contract, directed at transfer of ownership (ownership could not, however, be acquired derivatively, because a contract was made with a non-owner), the conscientious acquirer acquires the right to ownership based on the rules of acquisition from a non-owner. Another way of acquisition by origin is maintenance (regulated in the Law on the basis of property legal relations). Conscientious acquirer by way of maintenance acquires the right to ownership based on time elapsed during which he had qualified holding (what is understood under this depends on whether he had regular or extraordinary maintenance). As the third party acquired the right of ownership, the right of ownership of the seller from the terminated contract ceased to exist due to the fact that one good cannot be subject to two ownership rights. Thus, the seller cannot request return of the good with a property complaint, nor raise an obligation complaint against the third party, because he does not have an obligations relation with him, and can only request from the buyer from the terminated contract a monetary compensation for the value of the good.

II

1. What is the definition of the concept of damage in you legislation – tangible and intangible one respectively?

The Law on obligations does not provide a definition of damage. In Article 155 entitled – damage, all types of damage are listed, divided into tangible and intangible. Tangible damages are considered to be reductions of a person’s property – normal (real) damage and prevention of its increase – lost gain. Intangible damage is, according to the Law, inflicting on another person physical or psychological pain or fear.
Tangible or property damage is damage incurred on property goods, whereas property goods we understand things whose value can be measured in money, i.e. as frequently defined in theory – “ones that can be sold and procured for money”. If the property of the damaged party has been impacted directly, there was reduction of property, it is an issue of real damage. In the opposite, if the property of the damaged party has been impacted indirectly, i.e. in the regular course of things there it would have increased, but this did not occur due to the damaging event, we have lost gain as a type of tangible damage.

2. In compliance with your laws, are the contractual parties entitled to compensation for tangible and/or intangible damages in case of breach of contract?

When the debtor (buyer or seller) does not fulfil or incorrectly fulfils his obligation from the sales contract, he becomes debtor for compensation of damage to the creditor (buyer or seller), unless the damage was caused by reasons for which the debtor is not liable. The purpose of the compensation of damage is to put the creditor in the property position he would be in if the contract was properly fulfilled – positive legal interest.

In case of termination of contract the debtor owes the creditor for abstract and concrete damage (Articles 523 - 526). Abstract damage is determined abstractly (as indicated by its title), i.e. regardless whether the creditor has suffered any damage at all – this is presumed damage. Determining the amount of damage suffered in this way is based on the idea of resale. Thus, had the seller fulfilled his contractual obligation and delivered the goods to the buyer, the buyer could have resold the same according to a certain price (and since he did not do that, because the seller did not deliver the goods, he suffers damage). On the other hand, the seller could also have sold the same goods to another buyer at a certain price. Another idea we can base abstract damage on is buying or selling for settlement. If the current price of the goods at the moment of termination of contract is higher than the contracted on, the buyer suffers damages and opposite, if the current price is lower than the contracted one, the seller suffers damage. In both cases, the creditor for compensation of damage must prove the given difference in price. In addition to abstract damage, the buyer or seller, in case of non-fulfilment of obligations by the other party, may be creditors for compensation of real damage – realization of buying or selling for settlement. The damage is calculated according to the difference between the contracted price and the price realized through sales or purchase (it is taken as given that the expenses incurred are also taken into account). In addition to abstract and concrete damage, in case of termination of a sales contract the creditor (buyer or seller) can realize the right to compensation of other proven damage.

When the contract has not been terminated the creditor only realizes the right to compensation of so-called other damage (type of concrete damage), which covers real damage and gain damage.

3. Are there any particular requirements regarding the liability for damages where a breach of sales contract is made?

Chapter VII of the LO is dedicated to sales contracts. Article 488 paragraph 1 LO stipulates that it is the buyer’s right (who has timely and duly informed the seller of the good’s defect) to be able to: request from the seller to remove the defect or to give him another good without defects (fulfilment of the contract); request lowering of price; state that he terminates the contract. Paragraph 2 of the same Article stipulates that the buyer in all of these cases has the right to compensation of damage. In order to precisely answer the question, in cases when the buyer has a right
to compensation of damage, it is necessary to first indicate the cases in which there are material defects, i.e. the liability of the seller for it, in the sense of the LO. In order for it to be a material defect, it is necessary that it exists in the concrete case in the sense of Article 479 of the LO: that the defect was hidden; that it existed at the moment of transfer of risk to the buyer (which in Serbian law is the moment of acquiring the holding of the good by the buyer) and that there is timely notification of the seller by the buyer.

In the frames of the provisions that LO dedicates to sales contracts, there are articles regulating the issue of proper functioning of the sold good, i.e. Article 504 regulates the right of the buyer to terminate an agreement or request a price reduction, with compensation for damage in both cases, if the seller does not fix or replace the good in reasonable time.

In the same chapter of the LO in another place there are also regulations for the buyer’s right to compensation of damage by the seller, in the case of so-called eviction, i.e. the seller liability for legal defects of the good - Article 510 paragraph 3 LO. Regardless whether due to the eviction the contract is terminated by law (total eviction) or the buyer realizes his right to terminate the contract or proportionally reduce the price, the buyer always has a right to compensation for damage suffered.

Regarding the position of the seller, it is indubitable that the seller, when certain conditions are met, has a right to request compensation for damage from the buyer. First, the seller can terminate the sales contract in case that the buyer does not pay the price, which is the basic obligation of the buyer in a sales contract. The seller also has a right to request fulfilment (forced enforcement). In both cases the seller may request from the buyer compensation for damage.

We have the question of whether the seller has any rights and if he has them, what are those rights, in cases when the buyer fails to fulfil some other obligation from the contract (in Anglo-Saxon law this would come under minor breach of contract). What is beyond doubt is that the seller has also in this case the right for compensation for damage (and, of course, the right to ask for fulfilment). Thus, the compensation for damage occurs as a general sanction.

4. According to which rules are the liability extent and the compensation amount for damage (tangible and/or intangible) specified in case of breach of sales contract?

Article 523 of the LO provides that in case of termination of a sales contract because of contract breaches by one of the contracting parties, the other party has the right to compensation for damage suffered, according to the general rules on compensation for damage incurred by breach of contract. Thus, this article refers to general provisions for compensation of damage incurred by breach of contract. What are those provisions? Article 262, paragraph 2 stipulates that the creditor has a right to request compensation for damage he has suffered due to non-fulfilment or delays in fulfilment by the debtor. Further, Article 264 stipulates that the contract can expand the liability of the debtor to cases for which he would not usually be held liable, but that the fulfilment of such contractual provisions cannot be requested if it is in opposition to the principle of conscience and honesty. Opposite to this is the provision from Article 265 which prescribes the possibility for limitation and exemption of liability. Liability cannot be excluded for intent and gross negligence (paragraph 1), nor for normal negligence (paragraph 2), if it is a consequence of the contract arising from the monopoly position of the debtor or generally unequal relationship between the contracting parties. The provision of the contract determining the highest compensation amount is also valid, if the amount determined thus is not in apparent disproportion to the damage and unless otherwise provided by law for the concrete case (paragraph 3). In case of limitation of the amount
of compensation, the creditor has a right to full compensation if the inability to fulfil the obligation has been caused deliberately or with gross negligence by the debtor (paragraph 4). Regarding the compensation amount, Article 266 gives the creditor the right for compensation of normal damage and gain damage, but only the ones that the debtor had to predict at the time of concluding the contract (paragraph 1). In case of fraud, intent or gross negligence compensation for the damage that could not be predicted is owed as well (paragraph 2). Always when the Law does not prescribe differently, on compensation of contractual damage the appropriate provisions of the Law on compensation of non-contractual damage shall apply.

Article 263 of the LO regulates exemption from liability for damages in contractual relationships. Namely, the debtor is exempt from liability for damage if he proves that he was unable to fulfil his obligation, i.e. that he was late fulfilling his obligation due to circumstances occurring after conclusion of the contract that he could not prevent, remove or avoid. So, it is up to the creditor to prove that the damage exists, and the debtor to prove that the exemption circumstances have occurred after conclusion of the contract, that he could not prevent, remove or avoid them, and that due to their existence he could not fulfil his obligation, i.e. that due to that reason he was late in fulfilling the obligation.

III

1. In which cases does the breach of contract imply the right of interest?

In case of breach of contractual obligations from a sales contract (regulated by the Law on Obligations of the Republic of Serbia) the issue of default interest occurs in two cases. In the first case the right to default interest is on due receivables to the buyer due to non-payment (or incomplete payment of the price), as well as on other monetary receivables of the seller to the buyer. Another case is the right of the buyer to default interest in case of return of price due to termination of the sales contract.

The basic obligation of the buyer from the sales contract is payment of the price on time and in the place determined in the contract, assuming that the parties have reached a common agreement (Article 516 LO). As the price must be expressed in money (at least predominantly if not fully), the obligation of the buyer is a monetary obligation. The sales contract is a typical two sided contract, which means that it puts both the seller and the buyer in the position of creditor and debtor. If the buyer does not pay the due price, he is overdue, as a debtor, and since these are monetary obligations we have the case of default interest, the existence of which is conditioned by the existence of money as a good. In Serbian love, being overdue as a debtor is regulated in Article 324 of the LO, prescribing that the debtor is overdue when he does not fulfil the obligation in the time due for its fulfilment, that is, if the time has not been set the debtor is overdue when the creditor calls on him to fulfil his obligation, orally or in writing, with a non-judicial warning or by starting a procedure the purpose of which is to achieve the fulfilment of a certain obligation. We will look at the quoted article in connection to Article 277 of that same law, which prescribes that the debtor (in this case the buyer) who is late fulfilling the monetary obligation owes in addition to the principal also default interest. Thus, when the buyer from a sales contract fails to meet his due obligation, the creditor always has the right to default interest, regardless whether the buyer is responsible for the lateness. The creditor is not obliged to prove that he has suffered damage in the amount of the default interest. On the other hand, the debtor cannot prove that because he is overdue there was no damage incurred on the creditor, just as he cannot prove that the damage has occurred, but to an extent lesser than the amount of the default interest. The logic behind these rules is simple. Had the
buyer paid the price on time, the seller could have deposited the received money. Thus, regardless of why the buyer was overdue and his possible responsibility or irresponsibility for that, the seller suffers damage in the amount of the default interest, and it is all due to the characteristic of money as a good that can be “given under interest”. We will talk about the relationship between default interest and compensation for damage when we answer other questions.

In case of termination of sales contract, we have the question of the buyer’s right to return of the price, if the buyer has fulfilled his contractual obligation. If he has not, termination by both parties relieves them of all contractual obligations. Termination of contract is one of the ways for closing of the contract. Because termination eliminates the legal bases on which the seller has received a certain amount of money in the name of price, the question arises of restitution as the consequence of the contract’s termination. The buyer has a right to ask for return of the price, but also an amount of interest, from the date when the price was paid to the seller. The reason for this is the retroactive effect of the termination, and this is provided in Article 132 paragraph 5 of the LO, which stipulates that the party (in this case the seller) returning the money is obliged to pay default interest from the day they have received the payment. The explanation for this rule is the same in all cases of monetary obligations, that is in the field of the specific characteristics of money, its internal value that can be changed, and in the concrete case the inability of the buyer to use the money during the time it was in possession of the seller.

The Supreme Court in the explanation of verdict Rev. 2860/05 from 13.04.2006 indicated that the defendant is obliged to return the sales price with legal default interest from the date when the plaintiff made payment of individual installments to the defendant, until the final payment, which is in accordance with the provisions of Article 132 of the LO, i.e. since the contract was terminated, the party receiving the money on the basis of that contract is obliged to in addition of repaying them, also pay default interest from the date of receiving of the payment, irrespective of the fault of the parties for termination of the contract.

In case of termination of the contract, the buyer would have a right to return of the advance he possibly gave the buyer. This, of course, includes the right to interest on the amount of the advance, until the moment of payment thereof (Verdict of the Higher Commercial Court of Serbia, Pz. 3034/91 from 15.05.1991). In the last case, the interest is paid as compensation for using of the money by the seller.

2. How is the amount of the interest rate specified in case of breach (overdue fulfilment) of sales contract?

In Serbian law the provisions on default interest are located in the Law on Obligations and the Law on the Rate of Default interest. LO, as stated in the answer to the previous question, prescribes the right of the creditor to default interest in cases when the debtor is overdue with the payment of the monetary amount, and the other determines the amount of the interest rate of the default interest and the manner of its calculation. Namely, according to Article 277 paragraph 1 of the LO, the debtor who is overdue paying a monetary obligation owes in addition to the principal also default interest provided by law. If the rate of the agreed interest is higher than the rate of default interest, it also accrues after the debtor is overdue. Opposite to this, if the rate of agreed interest is lower than the rate of interest of arrears, than after the debtor is overdue only the default interest accrues and never both together (Article 277, paragraph 2 LO). LO does not provide a possibility for contracting the default interest rate, but the contracting parties may predict an interest rate that will apply to the monetary claim from the contract, and if the agreed rate is higher than the rate of default interest, after the debtor is overdue only the contracted interest will accrue. The interest rate
of the contracted interest is limited with the provisions of Article 141 LO related to usury contracts. The debtor obligation when he is overdue in fulfilling the monetary to pay the legal interest, on the amount of the debt until the date of payment, is provided also in Article 1 of the Law on the Rate of the Default interest. Article 2 of the same Law predicts that the rate of default interest is comprised of the monthly rate of growth of consumer prices and a fixed rate of 0.5% per month. Calculation of default interest is performed by multiplying the monthly flat rate of 0.5% with the amount of the principal debt increased by the interest for the monthly rate of growth of consumer prices using the conformity method, which means addition of the monthly calculated interest to the principal debt and calculation of the new interest on the amount of the principal thus set (Article 3 paragraph 1 of the Law). Article 3 paragraph 2 of the same Law provides that if for a certain month the rate of growth of consumer prices is not known, the last published monthly rate of growth of consumer prices, and paragraph 3 prescribes that for a month when the rate of growth of consumer prices is zero or negative, the monthly rate of default interest is equal to the flat rate of 0.5%. The data on monthly rates of growth of consumer prices in the Republic of Serbia is published on the website of the Republic Statistical Institute. Default interest is calculated starting from the first day after expiration of the contracted or legally prescribed time for payment, and stops accruing with expiration of the day when the payment was made. If it was not agreed on how the debtor’s liability becomes due, the default interest starts accruing from the moment of the creditor’s call to the debtor to pay the debt, i.e. the date from submission of a complaint in court since from that moment the debtor is overdue.

The Law on the Rate of the Default interest was adopted in 2001, and the amendments came in 2011. On the day of coming into power of this Law the Law on the Rate of the Default interest from 1993 was annulled. The new Law, unlike the old one, does not prescribe special provisions on the rate of default interest on receivables in foreign currency between domestic and foreign entities, or we could say that there is a legal gap, which case law has not managed to fully fill out. However, the opinion of our arbitration practice is that this legal gap could be filled by analogue application of the provision from Article 3, paragraph 3 of the Law on the Rate of the Default interest.

3. Answer the following questions respectively: Is your legislation in compliance with the Directive on combating late payment (Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35–38) and in what manner is it done?

The legislation of the Republic of Serbia is not harmonized with Directive 2000/35 of the European Communities.

IV

1. Is the damaged party entitled to claim compensation for damage apart from the right of interest, or are the both rights excluded?

We already quoted Article 278 paragraph 1 of the LO, which stipulates that the creditor has a right to default interest regardless of whether he has suffered any damage because the debtor was overdue. Paragraph 2 of the same article stipulates that if the damage suffered by the creditor due to the lateness of the debtor is higher than the amount he would receive from the default interest, he has a right to request the difference to the full compensation of damage. This is the answer to the question whether the right to compensation for damage and the right to interest are rights that can be realized independent of each other or if the realization of one right excludes the realization of the
other. The Serbian legislation has decided on the first option, i.e. the creditor can in the specific case realize the right both to default interest and compensation for damage (the second one only in the amount of the difference up to the full compensation for damage). Thus, the creditor has a right to default interest, from the moment the debtor becomes overdue until the expiration of the day when the payment was made and, as we already pointed out, regardless of whether he is responsible for the lateness in payment. Separately from this we look at the question of possible damage caused to the creditor by the debtor’s lateness. First, we have the question whether the creditor has suffered damage cause by the debtor being overdue? If he has, the debtor will be obliged to compensate the creditor for the damage, but only if he is responsible for being late in paying the debt. Of course, an aggravating circumstance for the debtor is that his liability is presumed and not proven! Only the opposite can be proven, i.e. that the debtor is not responsible for the lateness and then the burden of proof is on the debtor. How is the debtor exempted from liability for damage? First, from Article 278 paragraph 2 comes the obligation of the debtor for compensation of damage caused to the creditor due to lateness. We can relate this article with Article 262 paragraph 2 that also prescribes the obligation of the debtor for compensation of damage to the creditor incurred due to non-fulfilment or lateness in fulfilment of obligations. The next article – Article 263 answers the question, that is the debtor is exempted from liability due to circumstances occurring after the conclusion of the contract that he could not prevent, remove or avoid (namely, the debtor is exempted from liability due to circumstances exempting liability irrespective of guilt). Thus, the following conclusion can be made: if the debtor is not responsible for being overdue in the fulfilling of his obligation, the creditor has a right only to interest in arrears, and in the opposite case has a right both to interest in arrears and the difference to the full amount of the damage if, of course, the amount of damage suffered is higher than the amount of the default interest, which must be proven and the burden of proof of the existence of the damage and its amount falls on the creditor. Thus, the creditor requests default interest and proves that he has suffered damage that the default interest does not cover fully, and if he proves that the court shall award him both with default interest and the difference between the default interest and the proven damage.

The Supreme Court of the Republic of Serbia in decision Rev. 2765/05 from 09.11.2005 has concluded that because the defendant was late in returning unjustly retained payments by the plaintiffs there was total devaluation of the payments made, which lead to damage suffered by the plaintiffs because of the debtors lateness, and that it is higher than the amount that the plaintiffs would receive in the name of default interest, which has also been totally devalued with the owed principal, which further means that the plaintiffs have a right to ask for the difference until the full compensation for the damage.

2. In case of cumulative rights, does the interest payment affect the determination of the compensation amount for damage and in what manner?

There is presumption of liability of the debtor for lateness, but even if the debtor does not prove the existence of circumstance excluding his liability, the position of the creditor is not easy at all. It is exactly the creditor who must prove that there is damage and that it has occurred in consequence to the debtor being overdue with the payment. Regarding the amount of damage suffered, the burden of proof is also on the creditor. The damage occurring as consequence of failing to pay in time may sometimes be gain damage for the creditor, i.e. the profit that the creditor would certainly make had the debtor paid on time (which the creditor must prove). In other cases the damage suffered is real damage. When the creditor proves that he has suffered damage and when its amount
is determined, **the default interest must be deducted from the amount of damage suffered!** In accordance with this is the decision of the Supreme Court of Serbia Rev. 2049/07 from 28.11.2007, according to which the creditor has a right to request the difference until the full compensation for the damage in case the damage suffered is greater than the amount he would receive in the name of default interest. Thus, the creditor has a right to request only the difference between the default interest and damage suffered; i.e. only the difference will be paid until the full compensation for the damage. Another possibility is for the creditor to only request the **full amount for compensation of the proven damage, without calculation and payment of the default interest!**

It can be said that Article 278 paragraph 2 of the LO is a rule in Serbian law – default interest is deducted from the amount of damage suffered. In spite of this, the aforementioned rule should not be applied always and literally, without taking into account the specifics of every concrete case. A situation that brings in the question the adequate application of this article is selling for purposes of settlement. Namely, the buyer did not pay the price on time, he became overdue and default interest started accruing. On the other hand, the seller did not hand over to him the good, waited for the payment of the price, and in the end terminated the contract, sold the good to another person, but at a price lower than the one agreed with the first buyer – thus he suffered damage! Who owes the compensation? The first buyer! As he collected the price from the second buyer, default interest due to overdue payments stopped accruing, which was a burden on the first buyer, but an obligation for compensation for damage was created and now there is **default interest accruing on the amount that is the difference in prices (i.e. damage).** This example indicates the complexity of individual cases and the inability to solve them by simple application of the rule contained in Article 278 – **deduce the default interest from the damage suffered!**

**Bibliography:**

ANNEXES

V

E-CONCLUSION OF CONTRACTS
ELECTRONIC CONCLUSION OF CONTRACTS
Country report for Albania


Since the Stabilization and Association Agreement (referred to as SAA) entered into force our domestic legislation has been aligned with the acquis. The area of information society, under Article 103 of the SAA, focuses on mutual cooperation between parties. To fulfil such obligations several directives related to the area of information society have been transposed into our legislation.

a. Directive 2000/31/EC has been transposed in our national legislation through Law No. 10128, dated 11.05.2009, “On Electronic Commerce,” a law enacted by the Albanian Parliament. This law regulates commercial transactions performed using electronic devices, by means of services provided by the information society. Also, this law aims to protect the confidentiality of consumers’ and other participants’ confidential data. The transposition of this directive into our domestic system has not been realized through direct reference, but has been enacted in the light and spirit of the provisions of the corresponding directive. This law is organized in six parts. The first part contains provisions on the object, the scope of application, the definitions, the general principles and the implementation of the law. The second part regulates the right to provide services and the obligation to provide general information. The third part includes provisions on conditions regarding commercial communications such as conditions on providing information, on unsolicited commercial communication and on regulated professions. The fourth part focuses on electronic contracts. This part contains provisions on necessary conditions relating to the validity of contracts, the exclusion of certain contracts, the information to be provided, and the conclusion of a contract. The fifth part refers to the exclusion of a service provider from liability. The provisions of this part regulate the exclusion of a service provider who acts as a ‘mere conduit’ from liability, the temporary storage of information (caching), hosting (meaning requesting or inviting information), the termination and prevention of infringements and the obligations of the service providers. The last part regulates supervisory authorities, sanctions, the right to appeal against a decision made by the supervisory authority to the court and dispute settlement.

b. Directive 1999/93/EC on a Community Framework for Electronic Signature has been transposed into our legislation through the enactment of Law No. 9880, dated 25.2.2008 “On Electronic Signature.” This law was enacted in order to create the necessary legal framework for the acknowledgement and use of electronic signatures in the Republic of Albania. The law is organized in eleven parts. The first part contains general provisions on the object, the scope of application, and on definitions. The second part regulates the legal validity of electronic signatures and exclusions. The third part focuses on the authority which exercises supervision and the registration. Parts four and five regulate the certification of a service
provider and the procedure for issuing such certificates. The sixth part contains a provision on the liability of the certificate service provider along with his relationship with the authority. The seventh part focuses on the protection of personal data obtained by the certificate-service-provider. The next two parts regulate technical issues such as security, tariffs and costs. The tenth part sets forth administrative measures and the concluding part comprises the final provisions.

c. Directive 97/7/EC on Distance Selling has been transposed into our domestic legislation through a law enacted by the Albanian Parliament, Law No. 9902, dated 17.04.2008 “On Consumer Protection”, as amended by Law No. 10444, dated 14.07.2011 and the Decision of the Council of Ministers, No. 64, dated 21.1.2009 “On Distance Contracts”. These acts aim to introduce a pertinent legal framework into the area of consumer protection and to establish an institutional framework to implement these provisions. The Decision of the Council of Ministers contains provisions on definitions, on information to be provided, on the requirements to be fulfilled by such information, and on excluded contracts etc.

2. Has any reference been made to the 1996 UNCITRAL Model Law on Electronic Commerce?

Law No. 10128, dated 11.05.2009 “On Electronic Commerce” does not make any direct reference to the 1996 UNCITRAL Model Law in any of its provisions. It is obvious that the Directive on Electronic Commerce served as a guideline for drafting the Albanian law.

3. Are there any separate national laws or is there any type of implementing (enabling) legislation that relates to e-contracts that have been enacted in SEE countries?

So far, in the Republic of Albania, the legal framework related to e-contracts consists of:

a) Law No. 10128, dated 11.05.2009 “On Electronic Commerce;”
      a. Decision of Council of Ministers No.837, dated 29.07.2009;

b) Law No. 10273, dated 29.04.2010 “On Electronic Document;”

   i) Decision of Council of Ministers No. 525, dated 13.05.2009 “On the Approval of the Regulation of Electronic Signature”

   ii) Decision of the Council of Ministers No.503, dated 13.05.2009 “On the Approval of the Fees for Services Provided by the National Authority on Electronic Certification”
       a. Guideline of the National Authority of Electronic Certification, No.1 “On the Law on Electronic Signature;”
       b. Guideline of the National Authority of Electronic Certification, No.2 “On the Usage of the Electronic Signature;”
       c. Guideline of the National Authority of Electronic Certification, No.3 “On the Electronic Service Provider;”
4. The definition of an e-contract in national law

The Law on Electronic Commerce gives a plain and a very short definition of an electronic contract. Under Article 11 of the aforementioned law, any contract concluded through electronic means is considered to be an electronic contract. According to the definition provided by this law, the word electronic refers to any electronic equipment for processing (including digital compression) or for the storage of data by means of which a given service is delivered from its point of origin to its final destination by means of electronic equipment. Sending, transmitting and the receiving are all functions that are carried out via cables, radio waves, optical means or other electromagnetic means.

Due to the fact that the electronic conclusion of a contract is simply a way of contracting, the Law on Electronic Commerce has not provided a detailed definition regarding what constitutes an electronic contract. Therefore, when defining a contract (electronic or not) it is necessary to refer to the definition provided by the Civil Code. According to Article 659 of the Albanian Civil Code a contract is defined as a juridical (legal) act through which one or more parties create, change or extinguish a legal relationship. The definition provided by this lex generalis law is also applicable to e-contracts because, as stated above, the electronic conclusion of a contract does not change its nature. It is an innovative method of entering into a contract whilst also exploiting the benefits of an information society.

5. How many steps are needed for an enforceable e-contract to be concluded?

The conclusion of an electronic contract is realized in certain steps which are thoroughly regulated by the Law on Electronic Commerce:

a. The first step in concluding an e-contract consists of the realization of commercial communication between parties. This communication is realized through publishing the required
information as foreseen by the law. In addition to the general information that is provided by a service provider, which should be clear and unambiguous and, in particular, must indicate the price and whether it includes tax and delivery costs, an offeror should provide the following information to an offeree prior to him placing an order:

(i) The different technical steps required to conclude the contract;

(ii) The contractual terms and conditions;

(iii) The technical means for identifying and correcting input errors prior to placing an order;

(iv) The languages offered for the conclusion of the contract.

(v) Whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

b. In the second stage the service provider grants the recipient a resume of the general and particular terms and conditions. After the recipient places an order, the service provider should acknowledge receipt of the recipient’s order without undue delay and by electronic means.

c. The third step concludes a contract. An e-contract is concluded when the offeror receives an electronic message which acknowledges receipt of the confirmation and acceptance of the offer.

6. The moment at which an e-contract is considered to have been concluded

Under Albanian legislation the moment of conclusion of a contract varies upon whether the contract is deemed to be real or consensual. Therefore, the effects of the contract start at a specific moment precisely defined by law. Due to this particular way of entering a contract, the moment of conclusion of an electronic contract is regulated under specific terms in the Law on Electronic Commerce, namely Article 14 of the same law.

As mentioned above, after a recipient has placed an order, the service provider must give a resume of the general and specific terms and conditions of the contract and must also acknowledge the recipient’s order without undue delay by electronic means.

The moment that constitutes the conclusion of an electronic contract, is the moment when the offeror receives an electronic message which acknowledges receipt, confirmation and acceptance of the offer. This electronic message is sent to the offeror/offeree (I think here) by the service provider after he has received an order made by the recipient/offeree. Also, the law provides that a proposal and an acceptance of an offer made by parties are deemed to have been received when the parties, to whom they are addressed, have been able to prove to one another that they are able to access them. The law does not clarify what is meant by ‘able to access’ the acceptance and the offer. It has been not determined whether an e-mail that arrives at a mail server is deemed to have been received.

To summarize, the conclusion process passes through the following process:

a) The recipient of the service indicates that he has accepted the service;

b) The service provider acknowledges receipt of the acceptance;

c) The service provider sends the offeror/offeree an electronic message containing both confirmation and acceptance of the offer.
7. The legal form (formality) required for an e-contract to be deemed valid

The Albanian Law on Electronic Commerce does not require any special form for e-contracts to be deemed valid, but it makes a direct reference to the Civil Code with respect to general conditions and legal form. Therefore, the requirements of the Civil Code regarding validity and form applies to all contracts that are to be concluded electronically. It is obvious that the only contracts that can be concluded electronically are for which the law does not foresee any intervention of public authorities, for example a contract that is to be entered into in notarial form or a contracts for which registration is required. Contracts, which under the Civil Code can be concluded orally or in writing, can make use of electronic means to realize their conclusion.

On the other hand, an electronic contract, being an electronic document should meet the requirements of an electronic document. These requirements are set by the Law on Electronic Document. An electronic contract should be considered valid if it is created, sent, received, stored or saved by using information technology, computer networks, computer systems or other such devices or electronic programs, thus fulfilling the requirements set out in Articles 6, 7, and 8 of this law. Under these articles an electronic document must adhere to the following criteria:

a) The electronic signature must appear under the Law on Electronic Document signature;

b) Data must be present on the creator of the electronic document;

c) There must be no possible ways of violating the electronic document;

d) Access to the content of the electronic document must be available for the whole cycle of its documentation;

e) Its content must be clear to read.

As far as the content is concerned an electronic document should consist of general and special parts which are integrated and inseparable.

a) The general part introduces the content of information of the electronic document. If the electronic document is addressed do a specific receiver, and then this part must also contain his name.

b) The specific part includes one or several electronic signatures along with information related to the date of creation of the electronic document, and other data related to the documentary quality, under the provisions of Article 3 Point 2 of the law.

Concerning the form, an electronic document, consists of internal and external parts. The internal form is the digital form that is derived from processing, sending, receiving and storing electronic documents through a system of software and computer devices. The external part of an electronic document is the visual presentation of its content that is displayed on the computer screen or on another similar devices, hard copy or by other material means, produced by the internal form of its presentation.

Thus an electronic document can be presented as electronic data or as a paper/hard copy document. The certification of a copy of an electronic document that is presented on paper must be made by authorized persons or by the head of an institution. It is worth mentioning that under Article 11, an electronic document and its paper copy have equivalent status with regard to performing legal acts, irrespective of whether the presentation of an electronic document or its certified paper copy is required.

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1 Article 5, Law on Electronic Document No. 10 273, dated 29.4.2010
2 Article 6, ibid.
3 Article 7, ibid.
To conclude, an electronic contract is deemed valid if it meets the relevant requirements of an electronic document; the electronic conclusion of contracts should only be applied to those contracts which can be entered into electronically under the Law on Electronic Commerce.

8. Do contracts concluded by electronic means (‘on-line’) have the same equivalent legal status as paper (‘off-line’) contracts?

The Law on Electronic Commerce does not directly give equivalent status to these contracts, but the second paragraph of Article 11 requires that for an e-contract in order to be considered valid, it should fulfil the requirements of the general part of the Civil Code on contracts, the requirements on the form of the contract foreseen in the Civil Code and the specific requirements provided by the Law on Consumer Protection. Therefore, the law indirectly gives the same status to ‘on-line’ and ‘off-line’ contracts in that it requires the same requirements to be met by both types of contract conclusion. Such a conclusion is reinforced by other pieces of legislation related to e-contracts. The Law on Electronic Signature, in Article 4, gives an electronic document signed by an underwriter the equivalent status to a hard copy document. This equivalent status is given because the electronic means used to enter a contract do not change the nature of the contract. There are several exceptions (please see Question 10) to certain contracts which, due to their special legal requirements, cannot be concluded by electronic means. For example, a contract which transfers the ownership of an immovable property cannot be realized in an electronic form.

Except for the aforementioned contracts, all other types which can be concluded electronically have the same legal status as an ‘off-line’ contract.

9. Are there any differentia specific aspects regarding e-contracts that are affected by the national Law on Contracts in relation to contract formation (offer, acceptance, acknowledgement, whether or not e-marketing (e-advertisement) represents an offer of goods or an invitation to treat, e-contracts and general terms and conditions etc.)?

The law itself, in Article 11, requires that an electronic contract should fulfill the same conditions regarding validity and form as off-line contracts. Therefore, the same rules of the Civil Code on proposal, offer and acknowledgement should also govern e-contracts. It is obvious that there is no differentia specific with regard to e-contracts as long as they are considered to have equivalent status with traditional contracts. Furthermore, Article 14 of the Law on Electronic Commerce, regarding the conclusion of contracts, sets forth that the provisions of the Civil Code on the acceptance or refusal of a proposal provided for in the general conditions of a contract are just as applicable for this purpose.

Concerning a proposal to enter a contract, our legislation considers a proposal which contains the essential elements of a contract that is expected to be concluded to be a valid offer. Therefore, an electronic communication which contains the details of a product/service along with the corresponding price can be considered a valid offer for the conclusion of a contract. Due to the specific nature of electronic commerce, with respect to the protection of e-consumers, the law foresees several obligations regarding information to be provided not only by the offeror but also by the service provider/consumer/recipient. This information is necessary for the recipient to know with whom he will enter a contract. Under Article 7 of the law, the service provider, as an intermediary, shall ensure that the recipient receives the following information:
(a) The name of the service provider, in case there is no registered name for exercising the activity;
(b) The address at which the service provider has his established base or head office;
(c) The service provider’s electronic mail address and any other details which allow the recipient to rapidly and effectively contact him;
(d) The registered data of the service provider in the commercial register, especially his unique identification number;
(e) Where the activity is subject to supervision or should obtain a prior authorization, the pertinent data of the relevant supervisory authority;
(f) The details of any professional regulations/qualifications:
   i) The details of any professional public body or similar institution with which the service provider is registered;
   ii) The professional title of the service provider and the name of the state where granted or gained;
   iii) Reference to any applicable professional rules or jurisdictions in the state of establishment and details of how to access them;
(g) The service provider’s unique identification number or INTP (NIPT) (Identification Number of Taxable Person) (if it is subject to VAT).

All of the above information should be published clearly and unambiguously and must indicate that the price includes tax and delivery costs.

In order to be considered as a valid proposal to conclude a contract, besides this information an offer or should publish, prior to a recipient requesting it, the following information:

a) The different technical steps to be followed in order to conclude the contract;

b) The contractual terms and conditions;

c) The technical means for identifying and correcting input errors prior to the placing of the order;

d) The languages offered for the conclusion of the contract.

e) Whether or not the concluded contract will be filed by the service provider and whether or not it will be accessible;

This information contains the essential elements required to constitute a valid offer because it contains the essential terms and conditions of the contract.

An e-contract should also meet the requirements of the Law on Consumer Protection regarding general information to be provided to consumers, labelling, price, language4 and other additional requirements for certain specific contracts.

In conclusion, the general provisions of the Civil Code are applicable to this new method of conclusion of contracts; in that regard there is no differentia specifica. However, the Law on Electronic Commerce only provides for some additional steps and information such as, for example, a proposal to be considered valid or for additional information to be provided for by the service provider and the offeror/recipient.

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4 Articles 7, 8, 9, 10, 11, 12 of the Law on Consumer Protection No. 9902, dated 17.04.2008
10. Contracts and transactions excluded from the application of e-contract legislation

Some fields and certain contracts are excluded by the Law on Electronic Commerce. According to the first paragraph of Article 2, the law does not apply to the following transactions:

a) The activities of notaries or other similar actions directly related to the exercise of public authority;

b) The representation of persons and the protection of their interests before the court or before any other body, where the representation of a person can be made by a third party through an act of representation.

c) Paid activities for participation in betting, lotteries, gambling, electronic games, racetracks and casinos.

Also, the effects of the law do not extend to:

a) The field of taxation;

b) Personal data protection;

c) Issues related to practices and agreements governed by the Law on Competition.

The reason that these areas are excluded by law is due to the fact that these areas are already thoroughly governed by other enacted laws.

Excluded contracts are determined in Article 12 of the law/Law on Electronic Commerce. The following contracts cannot be entered into as e-contracts:

a) Contracts entered into to create, change or terminate rights on real estate, except for rental contracts on real estate up to a term of 9 years;

b) Contracts which, under the law, require the involvement of courts, public authorities and professions, or that exercise or provide a public service;

c) Contracts to grant collateral securities on suretyship furnished by persons acting for purposes outside their trade, business or profession;

d) Contracts governed by the Family Code and legal actions provided by a third party in a “Testamentary Succession”

e) Financial services or security services, to which distance marketing has been applied.

All of the above mentioned contracts are excluded by the effects of the Law on Electronic Commerce and cannot therefore be concluded in this way. The reasons for these exemptions are mainly related to the intervention of public authorities for the conclusion of certain contracts (for example contracts listed under point b), due to the intuitu personae character of some other contracts (for example contracts listed under point d) or due to specific regulations and specific requirements in the legal form of a contract (for example contracts listed under points a, c and e).

11. The equivalence of electronic documentation in all contractual matters (for example, the notion of durable mediums, electronic records etc.)

The legislative framework does not give any specific regulations concerning the equivalence of electronic documentation with regard to the notion of durable mediums, electronic records etc. This issue has to be solved in practice. But the most relevant issue governed by the law is the security of the electronic document and its reputation in the real world. Concerning this issue the Law on Electronic Commerce does not set out any regulations, but the Law on Electronic Document
No. 10273, dated 29.4.2010 foresees some general provisions regarding the preservation of an electronic document.

The law sets forth rules on the creation of an archive to preserve electronic documents. As per actual regulations, an electronic document is stored in its original form in its respective information system, thus enabling the viability of electronic records over time to determine a system of storage and an electronic document archive.

An electronic archive should ensure that:

a) A document filed in electronic form is created, sent, received and stored, without changing its entirety, including the electronic signature data, and data for its verification;

b) An electronic document, including the signature, is preserved throughout any technological procedures, that security is provided for its integrity and inviolability throughout the time it is stored, and that nothing is erased without proper authorization;

c) An electronic document, during its storage period, should be in readable form, and accessible to persons who have the right to access it;

d) It is easy to reliably determine the origin, creator, time, manner, way of creating and method of storage for each electronic document;

e) The maintenance procedure for the preservation of an electronic document does not harm its integrity.5

The law also establishes general obligations for the protection of electronic documents. Under such obligations, information system operators are required to install equipment and systems for the protection of electronic documents, for the prevention of infringement by external factors, for the protection of systems and documents circulating in their information systems, and to inform users about risks and ways of avoiding them.6


Under our legislation e-contracts can be concluded between businesses, businesses and consumers, and businesses and government. The law does not provide any specific rules for businesses entering into electronic contracts with other parties such as businesses, consumers and government bodies. This conclusion can be reached by referring to the second paragraph of Article 11, according to which an electronic contract (regardless of whether it is a B2B, B2C or B2G contract) has to comply with the requirements of the Civil Code and the Law on Consumer Protection, No. 9902, dated 17.04.2008.

Some deviances, however, are set forth by the law concerning only contracts entered into with non-consumers. For example, under Paragraph 1 of Article 14 the law provides that, except when otherwise agreed by parties who are not consumers, a service provider must make available to the recipient of the service a resume of the general and specific conditions and must notify him, without undue delay, of receipt of the order he has placed via electronic means. This means that it is obligatory for parties who are consumers, and can in some way be derogated through a mutual agreement by parties who are not consumers, to receive a resume of all general and specific conditions. It seems that the law foresees a great level of protection for consumers and sets imperative

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5 Article 18, Law on Electronic Document No. 10273, dated 29.4.2010
6 Article 19/2, ibid.
provisions regulating such contracts; it is more flexible regarding the conclusion of e-contracts with parties who are non-consumers such as B2B or B2G.

Likewise, Article 13, in its second paragraph, provides for parties who are non-consumers not to disclose information as foreseen in the first paragraph of this article (the different technical steps required to conclude a contract; contractual terms and conditions; technical means for identifying and correcting input errors prior to the placing of an order; languages offered for the conclusion of a contract; whether or not a concluded contract will be filed by the service provider and whether or not it will be accessible) and for a service provider to indicate, within the Code of Conduct, where it is prescribed and the way that those code can be consulted electronically.

Unfortunately we cannot provide statistics or official data on contracts entered between these parties because there is currently no such official data.

13. Tax aspects and possible tax obstacles related to cross border e-transactions

The Law on Electronic Commerce does not provide any rule on fiscal obligations nor does it provide any instrument for the fiscal aspects of e-commerce. So far, no national legislation has been put in place to regulate such issues.

Cross border e-transactions are just an extension of existing cross border transactions that exploit information technology; therefore, no different tax regime should be applied to such transactions. Thus, e-transactions are subject to import duties and VAT if they are imported to Albania, excluding those sectors which are exempted from import duties under the Stabilization and Association Agreement or under any other bilateral agreements for the exclusion of import duties.

But due to their specific nature, e-transactions may derive some tax obstacles with regard to: possible double taxation or double non-taxation.

One other uncertainty which may arise in this field is the definition of permanent establishment for taxable business using e-transaction. The Law on Income Tax, Article 2/2/a sets forth the definition of permanent establishment as a place of business, through which business is wholly or partially carried out. This issue is complicated when it comes to e-commerce because several questions may arise; for example do a web site or an Internet service provider constitute a permanent establishment for an enterprise to which they provide services? If the answer is yes, under which circumstances? What about computer equipment such as servers; are such offerors considered to be permanent establishments? Although the questions raised above are given potential solutions at an international level, they are currently not regulated in our legislation. There is no specific regulation regarding taxes applied to electronic commercial transactions with respect to the above questions.

Another issue that is not clearly regulated by our legislation is the definition of a ‘place of effective management’. Under our law ‘a juridical person is considered as resident if:

a) His base (head office) is in the Republic of Albania;

b) His place of effective management is in the Republic of Albania.

The determination of a ‘place of effective management’ is crucial for determining the residence of a tax payer and for subsequently deciding in which country he is liable.

In electronic commerce transactions, these issues are more sensitive because activities are performed in a virtual market. Therefore, the status of a web page should be determined; is it a place of effective management or not?

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14. Other obstacles related to cross-border e-transactions (import duties, customs and the like)

Cross-border e-transactions are subject to any import duties, customs and excise (if applicable) that are applied to cross border transactions. As mentioned above these import duties may be excluded by means of bilateral or multilateral agreements or by the Stabilization and Association Agreement. There exist some opinions in international level that if, a switch to e-commerce will generate potential revenue losses, but so far there have not been any special regulations or studies made public on this issue.

15. E-contracts and the protection of personal data

Electronic transactions are more sensitive with respect to personal data because a recipient of any product or service has to disclose certain information prior to the conclusion of a transaction, especially financial information. Due to this vulnerability of the recipient, the information provided by the latter is subject to protection under different pieces of legislation. As of 10.03.2008 the protection of personal data is governed by the Law on Protection of Personal Data No. 9887 which is aligned with Directive 95/46/EC. Given the specifics of electronic communication, the protection of personal data is also regulated by other laws. Confidentiality and data protection are regulated by Articles 121-131 of the Law on Electronic Communications in the Republic of Albania. According to Article 121 of the Law on Electronic Communications in the Republic of Albania No.9918, dated 19.05.2008, personal data and privacy are granted special protection due to the sensitivity of electronic communication and the disclosure of personal data. Under this law, providers are obliged to take necessary measures to protect the confidentiality of electronic communications and personal data as well as to prevent the unauthorized access in electronic communications systems and data processing in their electronic communications systems.

The obligation to protect personal data and the confidentiality of documents does not only fall on a provider, but also on his authorized persons and employees during the period of performing the activity as well as afterwards. A provider can only access data which is indispensable for providing electronic communications services.

Paragraph 4 of the aforementioned article provides for the prohibition of obtaining, recording, publishing and using data and messages transmitted by non-public electronic communication networks, and giving them to unauthorized persons unless this has otherwise been provided for in the legislation in force.

In order to guarantee the protection of data and confidentiality, providers and public electronic communications services are obliged, individually or if necessary in cooperation with each other, to implement technical and organizational measures to achieve the security of any networks and / or services offered by them. Furthermore, providers’ networks and public electronic communication services are obliged to inform their users of any particular risks, of how those risks can be reduced for users, and the potential costs to be borne by users.

According to this law, the confidentiality of electronic communication includes:

a) The content of any information;

b) The traffic of data and its location in relation to communications;

c) Data on unsuccessful attempts to establish connectivity.

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8 Article 122/1, Law on Electronic Communications in the Republic of Albania No. 9918, dated 19.05.2008
9 Article 123/1, ibid.
To ensure safe routes of communication the law prohibits: “...All forms of surveillance, interception, interruption, recording, storage, transfer and communication deviation, and the data referred to in paragraph 1 of this article unless it is necessary for the transmission of messages, faxes, electronic mail, telephone secretaries, voice mail, short messages or for cases provided for by law.” In a case where a provider of networks or public electronic communications services needs to obtain information about the content of any communication, or to copy or retain any communication traffic data, he is obliged to inform the subscriber at the time of signing the contract or at the start of the delivery of the communication service. The interception of electronic communication is only allowed in compliance with the requirements of the law.

Also, under the Law on Electronic Signature, a recipient using an electronic signature should provide the certification service provider with a variety of data, but the latter should only use the data that is necessary for issuing the certificate. Personal data provided to the certification service provider can only be provided by the actual owner of the underwriter code or by a third person authorized by the owner.\(^{11}\)

The certification service provider is obliged to preserve any such data and is not permitted to disclose it to any unauthorized persons. The certification service provider is only obliged to disclose this data in certain cases provided for by the law, and upon the request of the authorities. The certification service provider is obliged to submit data on the identity of the owner of the code of signature to the authorities only in the following cases:

a) When it is necessary for the prosecution of criminal offences or violations of law and when such a request comes from pertinent bodies engaged by law as a result of investigations;

b) To avoid danger that threatens national security or public order;

c) To perform duties that the law has vested to tax authorities, customs or other authorities in investigating violations of the law;

d) When a court so decides.

The authority, after asking for information, informs the owner of the signature code provided that it does not limit the performance of judicial duties or the interests of the signature code holder.

This protection is even guaranteed by the establishment of the pertinent bodies that have aimed at protecting personal data from being disclosed through electronic communication. The principal objectives of the National Agency on Information Society are as follows:

a) The protection of personal data and intellectual property, the protection of data bases and the privacy of data;

b) Protection from cybercrime in electronic business (electronic commerce, electronic documents, electronic signatures and electronic payments)

c) To create legislation on electronic communication and establish a pertinent regulatory framework.\(^{12}\)

\(^{10}\) Article 123/2, ibid.

\(^{11}\) For further details refer to Article 47 of the Law on Electronic Signature No. 9880, dated 25.2.2008

\(^{12}\) The Inter-Sectorial Strategy on Information Society 2008-2013, page 34.
Furthermore, the Criminal Code reinforces such protection by viewing certain actions such as illegally intercepting computer data; intervening in computer data, and intervening in computer systems as criminal offences.

16. The current situation regarding certification service providers as qualified issuers of certificates related to electronic signatures

A pertinent legal framework has been set in place for concerns regarding this issue. The Law on Electronic Signature foresees interested persons being equipped with electronic signatures by certification service providers and supervised by the National Authority on Electronic Certification. Two decisions have been approved by the Council of Ministers and the National Authority on Electronic Certification regarding the regulation of electronic signatures. The Authority on Electronic Certification is set, but regarding current practice only one certification service provider is registered: ‘Posta Shqiptare Sh.A.’ The authority has enacted several guidelines (as mentioned above) with respect to certification service providers, but despite all of these legislative measures there is no other official data on the current situation regarding the practice of certification service providers.

17. Dispute resolution in connection with e-contracts (any national case law developed so far)

The dispute resolution is regulated by Article 24 of the Law on Electronic Commerce. The law foresees alternative dispute resolution as a way of settling conflicts; only if arbitration fails should the parties proceed to the court. It seems that the law has given priority to arbitration agreements, and that disputes will only be settled by district courts if such agreements do not exist. So far there is no case law on disputes related to e-contracts settled by court or by arbitration. Actually, there is a significant lack of jurisprudence related to the newly introduced laws in the commercial area.

18. Available statistics related to e-contracts (percentage of population using Internet, turnover via e-transactions etc.)

Regarding the percentage of the population using the Internet, the Institute of Statistics is unable to provide any official data, but based on some media publications it appears that Albania has made extraordinary steps forward in this respect. The percentage of the population using the Internet in 2011 was 50% compared with 4.8% of the population six years ago. There are some statistics on Internet usage by businesses resulting from a survey carried by the IDRA (Institute Development Research Area) which showed that of the 300 businesses interviewed, 84% had full Internet access, 68% had high speed Internet and 58% had Intranet connections. Still, however, a lot remains to be done to reach the standards in developed countries.

Unfortunately there is no official data regarding turnover in e-transactions.

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14 Interview of Mr. Genc Pollo, Minister of Innovation, Technology and Information, available at http://www.dw-world.de/dw/article/0,15378136,00.html
15 The Inter-Sectorial Strategy on Information Society 2008-2013, page 17
Legal texts

ELECTRONIC CONCLUSION OF CONTRACTS
Country report for Bosnia and Herzegovina


Legal sources in Bosnia and Herzegovina:

1.1. State level:

- Law on Electronic Signature (Official Gazette of B&H, No. 91/06) – to a great extent takes the regulations and regime of electronic signatures, in a manner similar to the Community documents. According to the report of the European Commission (Report on the Progress of Bosnia and Herzegovina in 2011, annex to the information of the Commission to the European Parliament) from 12.10.2011, the implementation of the Law on Electronic Signature (in the period from October 2010 to September 2011) was weak.
- Law on Electronic Legal and Business Traffic (Official Gazette of B&H, No. 88/07);
- Law on Consumer Protection of Bosnia and Herzegovina (Official Gazette of B&H, No. 25/06);
- Decision on the basis for using of electronic signature and provision of certification services (Official Gazette of B&H, No. 21/09) – not harmonized with the relevant EU regulations, and needs to be amended.

1.2. Entity level:

1.2.1. Federation of Bosnia and Herzegovina

There is no legislation in this area, and the laws adopted at state level are applied.

1.2.2. Republic of Srpska

- Law on Electronic Signature of RS (Official Gazette of RS, No. 59/08)
- Law on Electronic Document of RS (Official Gazette of RS, No. 110/08)
- Law on Electronic Business of RS (Official Gazette of RS, No. 59/09) – it is harmonized with the existing regulations on contractual law of RS. It regulates the provision of information society services, liability of information society service providers, and the rules on concluding electronic contracts, whereas it does not apply to data protection, the area of taxation, public notary activity, representation of parties and protection of their interests in front of courts and games of chance with monetary bets. It contains provisions in line with Directive 2000/31/EC and completely implements certain areas regulated with this Directive (e.g.
contracts in electronic form and liability of information society mediation service providers, court protection, extrajudicial dispute settlement etc., but some solutions from the Directive are left out (e.g. provisions regulating the provision of information society services by service providers located in the EU).

- Regulation on the carrier of electronic certification activities in the republic administrative bodies (Official Gazette of RS, No. 114/08, 73/09);
- Rulebook on the register of certification service providers and electronic signatures of certified bodies (Official Gazette of RS, No. 88/09);
- Rulebook on the content and manner of keeping of registers of certification bodies for issuing qualified electronic certificates (Official Gazette of RS, No. 88/09);
- Rulebook on the measures for protection of electronic signature and qualified electronic signature, lowest amount of mandatory insurance and implementation of organizational and technical measures for protection of certificates (Official Gazette of RS, No. 88/09);
- Rulebook on technical rules for ensuring the connection of records (Official Gazette of RS, No. 88/09).

1.2.3. Brčko District of Bosnia and Herzegovina

- Law on Electronic Signature of Brčko District of B&H (Official Gazette of BD, No. 39/10, 61/10, 14/11) – The Law in already in power, but will be applied from 1 January 2012.
- Law on Electronic Document of Brčko District B&H (Official Gazette of BD, No. 39/10, 61/10, 14/11) – The Law in already in power, but will be applied from 1 January 2012.

Generally speaking this area is regulated in detail and the aforementioned provisions are in line with the EU directives regulating this area. However, there are also certain shortcomings in the implementation of the existing legislation; lack of full mutual harmonization of the aforementioned regulations; restrictiveness and complexity of individual provisions; some issues are not regulated, etc.

2. Is any reference made to the 1996 UNCITRAL Model Law on Electronic Commerce?

Bosnia and Herzegovina is not in the group of counties that have adopted laws directly based on the Model Law on Electronic Commerce. The laws in B&H regulating and developing the electronic business system are based on the relevant EU regulations and, thus, indirectly on the Model Law.

Source:

3. Are there separate national laws and implementing (enabling) legislation related to e-contracts enacted in the Southeastern European countries?

There are, as follows:
3.1. Croatia

- Law on Electronic Signature (Official Gazette, No. 10/02) and the Law on Amending the Law on Electronic Signature (Official Gazette, No. 80/08).
- Law on Electronic Commerce (Official Gazette, No. 173/03) and Law on Amending the Law on Electronic Commerce (Official Gazette, No. 67/08, 67/08, 36/09, 130/11)
- Law on Electronic Document (Official Gazette, No. 150/05).
- Rulebook on the record of certification service providers in the Republic of Croatia (Official Gazette, No. 107/10)
- Rulebook on creation of electronic signature, using of means for creation of electronic signatures, general and special conditions of business for service providers, issuing of time stamps and certificates (Official Gazette, No. 107/10)
- List of regulation acts in the field of implementation of the Law on Electronic Signature and the rulebooks on creation of electronic signature, using of means for creation of electronic signatures, general and special conditions of business for service providers, issuing of time stamps and certificates in the activities of certification service providers in the Republic of Croatia (Official Gazette, No. 107/10)
- Decision on the determination of the Croatian accreditation agency as the national body in charge of performing the accreditation body functions (Official Gazette, No. 88/09)
- Regulation on the work, content and carrier of the activity for certification of electronic signatures for state administrative bodies (Official Gazette, No. 146/04)

3.2. Slovenia

- Law on Electronic Commerce and Electronic Signature (ZEPEP), (Official Gazette of RS, No. 57/00, 30/01, 25/04, 98/04)
- Law on Electronic Commerce on the Market (ZEPT), (Official Gazette of RS, No. 61/06)
- Regulation on the conditions for electronic commerce and electronic signing, (Official Gazette of RS, No. 77/00)
- Regulation on the amendments and additional provisions on the conditions for electronic business and electronic signing (Official Gazette of RS, No. 2/01)
- Rulebook on the registration of certification bodies and keeping of certification body register in the Republic of Slovenia (Official Gazette of RS, No. 99/01)
- Rulebook on the amendment of the Rulebook on the registration of certification bodies and keeping of certification body register in the Republic of Slovenia (Official Gazette of RS, No. 42/07).

3.3. Serbia

- Law on Electronic Signature of the Republic of Serbia (Official Gazette of RS, No. 135/04)
- Law on Electronic Document of the Republic of Serbia (Official Gazette of RS, No. 51/09)
- Law on Electronic Commerce of the Republic of Serbia (Official Gazette of RS, No. 41/09)
4. **The definition of the e-contract in the national law**

The Law on Electronic Legal and Business Traffic of B&H (Article 3) defines the electronic message as a “series of data, sent or received electronically, which foremost includes electronic exchange of data and electronic mail”, and the data in electronic form as data “created, stored, sent, received or editable electronically”. The Law does not contain a definition of e-contract.

The Law on Electronic Business of the Republic of Srpska (Article 3) contains a definition of e-contract: “Contracts in electronic form shall be contracts that physical or legal entities in full or partly conclude, send, receive, terminate, cancel, access or show in electronically, by using electronic, optic or similar means, including, but not limited to, Internet transfers.”

5. **How many steps are needed an enforceable e-contract to be concluded?**

According to the Law on Electronic Legal and Business Traffic of B&H (Article 19), the following steps are needed:

1. The service provider is obliged to inform the user, before his declaration of will for concluding the contract (offer or acceptance of offer), on the important data related to the technique of conclusion of contracts and the languages in which the contract may be concluded, and point out the voluntary codes of business he applies, with information on the electronic access to these codes.

2. The service provider is obliged to provide the user with suitable technical means, with the help of which he can see and correct inputted errors, before declaring his will for conclusion of the contract.

3. The service provider is obliged electronically, without delays to confirm to the user that he has received the declaration of his will. The aforementioned steps are not related to contracts concluded exclusively via electronic mail or individual communication equal to it.

4. The service provider is obliged to put at the user’s disposal the contractual provisions and general terms of business, so that he can keep and reproduce them.

These steps for conclusion of e-contracts are also regulated in the Law on Electronic Business of RS (Articles 11, 12 and 13).

6. **The moment at which an e-contract is considered to be concluded**

According to Article 22 of the Law on Electronic and Legal Traffic of B&H, the declaration of will for conclusion of an e-contract is considered received when the party to whom it is addressed to can receive it under normal conditions.

The Law on Electronic Business of (Article 13) regulates that the e-contract is considered concluded at the moment when the offeree received an e-message from the offeree containing a statement of the offeree that he accepts the offer. The offer and acceptance are considered received when the person to whom they are addressed can access them.
7. The legal form (formality) required for e-contract to be deemed valid

In the law of Bosnia and Herzegovina the electronic form is equal to the traditional written form, when it is a condition for the validity of a contract, even when a handwritten signature is required.

According to Article 12 of the Law on Electronic Legal and Business Traffic in B&H, the legal effect of data in electronic form and their use as evidence cannot be excluded due to the fact that they are in electronic form.

According to Article 4 paragraph 2 of the Law on Electronic Signature of B&H, the legal effect of electronic signatures and their use as evidence cannot be excluded due to the fact that the electronic signature is only available in electronic form or because it is not based on a qualified certificate, or a qualified certificate of an accredited certificate issuer, or because it was not created using technical means and procedures.

Article 7 paragraph 3 of the Law on Electronic Business of RS and Article 6 paragraph 1 of the Law on Electronic Signature of RS established the equality of the written form and the electronic form of business. The exceptions to the given provisions are provided in the answer to question number 10.

8. Are the contracts concluded by electronic means ("on-line") given equivalent legal status as ‘paper’ ("off-line") contracts?

Yes. These contracts are just as valid as off-line contracts, in accordance with the principle of consensus contained in the entity versions of the Law of Obligations that are in power.

9. Are there any differentia specifica aspects with the e-contracts as to the general national law on contracts related to contract formation (offer, acceptance, acknowledgement, does e-marketing (e-advertisement) represent offering of goods or invitation to treat, e-contracts and the general terms and conditions, and alike)?

The preconditions for the validity of an e-contract do not have any important differences from the preconditions for valid conclusion of classical contracts.

10. Contracts and transactions excluded from the application of the e-contract legislation

Exempt from the possibility for contracting in e-form are all legal businesses that are concluded in the form of a notary document, legal business related to representation of parties in front of courts and games with awards and games of chance, for which a deposit with monetary value is made, including lotteries and betting (Article 2 of the Law on Electronic and Business Traffic of B&H).

According to Article 5 of the Law on Electronic Signature of B&H, a secure electronic signature does not have the legal effect of the written form in legal business concerning family and inheritance law, which require written form or fulfillment of stricter requirements for form; other statements of will or legal business for the validity of which an official verification is required, or a court or notary checking of authenticity or notary document; statement of will, legal business or submissions that require official verification or a court or notary checking of authenticity or notary document, for entry into land registers, or other official register, and statements of guarantees furnished by persons acting for purposes outside their trade, business or profession.
Article 7 of the Law on Electronic Business of RS prescribes that one cannot make contracts in e-form in the fields of family law and inheritance law, contracts on presents, contracts on burdening or selling of property for which an approval is needed by competent bodies working on social protection, contracts on the transfer of the right to ownership over real-estate or other legal business provisioning the real rights on real-estate, with the exception of contracts for lease of real-estate, other contracts for which it is prescribed in a special law that they are made in the form of a notary act or document and contracts for expression of will of guarantors, if the guarantor is a person acting for purposes outside his trade, business or profession.

A provision with similar content is also contained in the Law on Electronic Signature of RS (Article 6).

11. Equivalence for electronic documentation in all contractual matters (for example, the notion of durable medium, electronic record, etc.)

According to Article 12 of the Law on Electronic Legal and Business Traffic in B&H, the legal effect of data in electronic form and their use as evidence cannot be excluded due to the fact that they are in electronic form.

According to Article 2 of the Law on Electronic Signature of the Republic of Srpska, the electronic signature is a comprehensive set of data that is electronically generated, sent, received or stored on an electronic, magnetic, optic or other media. The content of the electronic record includes all forms of written and other text, data, pictures and drawings, cards, sound, music, speech and computer data bases. Article 6(1) of the same law prescribes that a document may not be refused only because it was made and issued in electronic form with electronic signature or qualified electronic signature.

According to Article 3 a) of the Law on Electronic Document of RS, an electronic document is a uniformly connected set of data that is electronically formed (made with computers and other electronic devices), sent, received or stored in electronic, magnetic, optic or other media, and that contains characteristics used to determine the author, determine the authenticity of the content and prove the time when the document was made. The content of the electronic record includes all forms of written and other text, data, pictures and drawings, cards, sound, music and speech. The law prescribes that the electronic document has equal legal validity as a document on paper if it is made, sent, received, stored and archived using the available information technologies (Article 7).


In Bosnia and Herzegovina at the moment there is no PKI infrastructure for legal and physical entities on the state level. However, there are several independent PKI infrastructures, foremost electronic banking and partially in the sector of electronic government, which operates in closed systems and currently covers over 10,000 companies and almost 10,000 civil servants.


The possible negative consequences are most visible in the business sector and the B2B and G2B transactions, where the insufficiently safe and efficient regulatory environment prevents business through increasing competition by reducing costs and time needed for business transac-
tions and business with the government. It will also prevent companies from participating in foreign tenders and contracts that require electronic contracts or electronic invoices.


13. Tax aspects and possible tax obstacles related to cross-border e-transactions

The complex tax environment is a possible tax obstacle related to cross-border e-transactions. Also, in the field of customs and taxes, the existing information system is not fully harmonized with the EU requirements.


14. Other obstacles related to cross-border e-transactions (import duties, customs and alike)

The Customs Law is not harmonized with the Customs Code of the EU, and the legal provisions on free zones and intelectual property rights with the acquis. Further harmnization is needed with the acquis in the field of VAT and EU regulations on excise. In the field of taxation of companies, some measures are not in accordance with the EU Code of Conduct (e.g. regulations on free zones).


15. E-contracts and personal data protection

Personal data protection is regulated related to the conclusion of e-contracts.

According to Article 18 of the Law on Electronic Signature of B&H, the creditor may use only the personal data needed for providing the service. This data may be gathered only directly from the person in question or with its consent, from a third party. If a pseudonym was used, the creditor will submit data on the user’s identity if for determining of their identity there is a major legal interest in the sense of the regulations providing for data protection. The creditor is obliged to record the submission.

The Law on Consumer Protection of B&H (Article 46), regarding distance contracts provides an obligation of the trader not to give data on the buyer to third parties, or to a party which acts as legal or individual entity in the same group of companies (concern) that the trader belongs to, unless the buyer approves this to the trader in writing.
16. The current situation in practice with the certification-service-providers as issuers of (qualified) certificates related to electronic signatures

The Law on Electronic Signature of B&H (Article 3 j) prescribes that the certifier is a legal or physical entity that issues certificates or time stamps or performs other services related to electronic signatures and certification.

Article 20 of this law prescribes that the supervisory body is the Office for Supervision and Accreditation of Certifiers in the ministry competent for the information society. This Office maintains the electronic register of certifiers with head office in Bosnia and Herzegovina, accredited certifiers and certifiers with head office in third countries, the certificates of which are guaranteed by a certifiers with head office in Bosnia and Herzegovina. Also, the Office maintains a register of certificates by certifiers that contains qualified certificates by certifiers for provision of services related to electronic signature and certification. These certificates may be issued by the supervisory body as well. These registers, in general, must always be available by using means from information and communication technology. The supervisory body places its secure electronic signature on the registers it maintains. The confirmation by the supervisory body is published in the Official Gazette of B&H.

The Law on Electronic Signature of RS (Article 2 k) defines the certification body as a legal or physical entity that issues certificates or performs other services related to electronic signatures. According to this Law, the certification body for issuing qualified electronic certificates performs services based on a permit issued by the Ministry of Science and Technology, at the request of the service provider. According to Article 3 of the Act on the carrier of electronic certification operations in the republic administrative bodies (Official Gazette of RS, No. 114/08, 73/09) the Agency for Information Society of the Republic of Srpska is the carrier of electronic certification operations for state administration bodies and performs the activities that the carrier of certification activities should perform under the Law on Electronic Signature of RS.

It is estimated that in Bosnia and Herzegovina currently there are approximately 12,000 issued ordinary certificates (10,000 for companies and 2,000 for civil servants) and approximately 100 qualified certificates.

One of the biggest problems that exists currently in practice is that there is still no established Office for Accreditation and Supervision of CA in the frames of the Ministry of Traffic and Communications of B&H, i.e. on the state level, regulated in Article 20 of the Law on Electronic Signature of B&H.


17. Dispute resolution in connection with the e-contracts (any national case law developed so far)

At this moment there are no available data from case law on disputes related to e-contracts.

18. Available statistics related to e-contracts (percentage of population using Internet, turn-over made via e-transactions, etc.)

According to the data of the Regulatory Agency for Communication (RAK) of B&H, in 2010 in Bosnia and Herzegovina there were a total of 522,364 Internet subscribers. The Agency estimates
that in the same period there were 2,000,000 Internet users, or that the rate of Internet usage in Bosnia and Herzegovina in 2010 is 52%. When talking about Internet access, statistics show that in 2010 the dominant type of Internet access was xDSL, the number of subscribers to which is 42.8% of the total number of Internet subscribers in B&H. On the second position are the subscribers to dial-up access, the number of subscribers to which is 25.2% of the total number of Internet subscribers.

Source: Annual survey of RAK permits users for provision of internet services in Bosnia and Herzegovina in 2010.

According to the research of the Agency for Information Society of the Republic of Srpska in 2010 in RS 63.16% of households owns a computer; 48.34% of the surveyed have an internet connection (out of which 58.20% ADSL, wireless 12.70%, cable 18.03%, dial up – 6.97%); 49.51% of the surveyed uses a computer at home every day, whereas 80% of the surveyed uses a computer at work every day; 24.95% of the surveyed uses a computer for business needs, and 1.56% for internet banking, 39.96% for sending and receiving of mails.
ELECTRONIC CONCLUSION OF CONTRACTS
Country report for Croatia

Answers 1-11 prepared by: M. Sc. Ana Keglević


By signing the Stabilization and Association Agreement with the European Community and member states on 20.10.2001 (Official Gazette (OG) MU 14/01) the Republic of Croatia is obliged, amongst other issues, to harmonize its legislation with the then European Community and the European Union today. This obligation of course entails the harmonization of the Croatian legislation with the European in the field of electronic commerce rights. The Directive on certain aspects of electronic commerce in the internal market 2000/31/EC (Directive on Electronic Commerce) has been implemented in Croatian law with the Law on Electronic Commerce (OG 173/03, 67/08, 36/09 and 130/11, hereinafter: LEC). The Directive on a Community framework for electronic signatures 1999/93/EC (Directive on Electronic Signature) was implemented in Croatian law with the Law on Electronic Signature (OG 10/02, 80/08, hereinafter: LES). Regarding the implementation technique, it is obvious that the Republic of Croatia has determined to implement each of these techniques in a separate act, while maintaining the harmonization with the act on general contractual law, using the method of minimal approximation (harmonization). Additionally in 2005 in the Republic of Croatia the Law on Electronic Document (OG 150/05, hereinafter: LED), which is not based on the European acquis, but complements the package of regulations in the field of electronic commerce, and it is important that we mention it here.

Finally Directive 97/7/EC on consumer protection regarding distance contracts (Directive on Distance Selling) has been implemented in Croatian law together with the other guidelines in the field of consumer protection with the Consumer protection law (OG 79/07, 125/07, 79/09, 89/09, hereinafter: CPL, Article 36-55), replacing the old Consumer protection law from 2003 (OG 96/03). It is the main act for consumer protection in the Republic of Croatia.

Regarding the hierarchy of application of the regulations we can state the following. All the listed laws are special regulations (lex specialis) for electronic trade and distance contracts and are a primary source of legal provisioning of the electronic conclusion of contracts. On all other issues that are not regulated with subject special regulations we apply the Law on Obligations (OG 35/05, 41/08, hereinafter: LO) as a general regulation (lex generalis).
2. Is any reference made to the 1999 UNCITRAL Model Law on Electronic Commerce?

In adopting the regulations from the previous point the legislator did not make a direct reference to the UNCITRAL Model Law on Electronic Commerce from 1999. This is logical. Namely, all regulations were not made according to any specific model law (thus neither according to the UNCITRAL model) and their content is the consequence of the implementation of the relevant EU Directive(s) in the domestic legal system with the aim of adapting the Croatian legal system to the European and with the aim of fulfilling the obligations arising from the Stabilization and Association Agreement. This is clearly visible in all of the rationales of draft laws available at the webpage of the Parliament of the Republic of Croatia: www.sabor.hr – access to information, catalogue of information, and e-doc database.

However, the content-comparative analysis of the regulations indicates that individual solutions of subject provisions follow to a great extent and display similarities with the UNCITRAL Model Law on Electronic Commerce from 1999.

3. Are there separate national laws and implementing (enabling) legislation related to e-contracts enacted in the Republic of Croatia?

The most important bylaws for the implementation of the Law on Electronic Signature are:
- Regulation on the range, content and carrier of activities for certification of electronic signatures for state bodies, OG 146/04
- Rulebook on records of service providers for certifying electronic signatures OG 54/02, 112/07
- Rulebook on the register of service providers for certification of electronic signatures, which issue qualified certificates OG 54/02, 112/07
- Rulebook on measures and procedures for use and protection of the electronic signature and advanced electronic signature, means for creation of electronic signatures, advanced electronic signatures and the system for certifying and mandatory insurance for service providers for issuing of qualified certificates, OG 54/02
- Rulebook on the technical rules and conditions for connecting the system for certification of electronic signatures, OG 89/02

Without their existence the functioning of the electronic signature would not be possible.

4. The definition of the e-contract in the national law.

A definition of e-contracts does exist in Croatian law and it has been prescribed with the Law on electronic commerce. E-contracts are defined as contracts that physical or legal entities in full or partly conclude, send, receive, terminate, cancel, access or show in electronically, by using electronic, optic or similar means, including, but not limited to, internet transfers (Article 2 paragraph 1 point 6 LEC).

5. How many steps are needed an enforceable e-contract to be concluded?

There is no single answer to this question, nor does the law exclusively prescribe how many steps are needed for an e-contract to be validly concluded. This depends on the manner and type
of conclusion of agreement, i.e. depends on whether it is direct or indirect negotiations between the contracting parties, or general offers/calls for submitting bids or whether it is concluding contracts at the webpage itself etc. According to the general rules of obligation law the contract starts generating its legal effect and becomes binding for the contracting parties from the moment of concluding the contract. When the contract is concluded in electronic form, then both the offer and the acceptance of the offer can be made in electronic form (Article 9 paragraphs 1-2 LEC). Thus, the answer to the question how many steps are needed for a contract to be concluded depends on the number of steps that are needed to be taken in order to conclude an agreement. The answer to the next question can help us with this.

6. **The moment at which an e-contract is considered to be concluded?**

The contract in an electronic form is concluded at the moment when the offeror accepts an electronic message containing a statement of the offeree that he is accepting the offer (Article 15 LEC). The offer and acceptance, and other declarations of will undertaken electronically, are accepted when the person they have been sent to can access them. These are cogent legal provisions the application of which the parties may not exclude, but only with consumer contracts. Thus, from this arises that this possibility would be allowed when concluding contracts between other persons who are not traders. It is a provision that was introduced in the law in 2003 because it was shown that the solution thus far, which referred to a general provision of the CPL on concluding contracts, was not suitable, and it was necessary to clearly and explicitly prescribe in a regulation the moment of concluding a contract electronically.

The contract is concluded – perfect at the moment when the offeror receives a message (declaration of will) by the offeree that he accepts the offer. With this the LEC has taken over the concept of concluding contracts as was regulated with the general rules from LO, according to which the contract is concluded at the moment of agreement of wills of the contracting parties on the important components of the contract (Article 247 LO), or more precisely at the moment when the offeror receives a statement of the offeree that he accepts the offer (Article 252 paragraph 1 LO).

However, due to the characteristics and different forms of electronic communication this moment is not always identical, but reflects the characteristics of the different possibilities for electronic declaration of will. The offer and acceptance of that offer and other declarations of will undertaken electronically are considered as having been taken at the moment when the person they are directed at can access. At which moment an individual person can access the in this way made declaration of will depends on the type and means for electronic communications. If the contract is concluded with an individual direct manner of communication (chat, e-conference, telephone, Skype etc.) then it is considered that the contract is concluded between the parties present and that acceptance of the offer can be declared directly (direct declaration of will). Here the general rules from the LO are applied on the creation of a contract between the parties present, with which the contract between the parties present has been concluded immediately when the contracting parties have positively agreed on the important components of the contract, unless the parties have agreed on something else or have determined an additional deadline for acceptance of the offer. In this case, if the acceptance has been done in the deadline, the contract is created at the moment of acceptance of the offer (Article 263 LO). In other cases it is considered that the contract is concluded between parties absent, and it is necessary to precisely determine the moment of acceptance of the offer. If the contract is concluded via e-mail then the contract is considered concluded when the positive declaration of will of the offeree (offer acceptance) has reached the server of the ISP provider (server), since from that moment the offeror can access the acceptance of the offer by the offeree,
take it (download) and save/store it on his computer or mobile device, after which he can reproduce
it. Finally, if it is a case of an electronic from contract by electronic declaration of will via internet on
the website, then we are talking of a narrower sense of concluding Click-wrap and Browse-wrap con-
tracts. As a rule, the contract is considered concluded with the click of a mouse on the internet site
itself (with certain exemptions) with which the concluding of the contract is accepted or initiated.
After this, the information technology service provider is obliged without delays to electronically, in
a separate electronic message, confirm the receiving of the electronic message containing the offer
or acceptance of the offer for concluding a contract (Article 14 paragraph 1 LEC). These are cogent
provisions the application of which may not be excluded in consumer contracts. Since here the con-
tracting parties do not individually negotiate, the goal of this provision is to create a higher level of
security when concluding contracts in electronic legal traffic.

7. **The legal form (formality) required for e-contract to be deemed valid?**

The Law on obligations has accepted the concept according to which contracts can gener-
ally be concluded with oral declaration of will of the contracting parties, and that the written form
is not a precondition for their validity (informal contracts), then which can be concluded in classical
written form, in which the written form is a precondition of their validity, and the data carrier is paper
or some similar medium (formal contracts) and finally contracts can be concluded in electronic form.
Generally, in the Republic of Croatia, regarding the form of the contract valid is the principle of infor-
mality as a rule, unless otherwise provided by law or agreed, which makes the principle of formality
an exception (Article 286 paragraph 1 and Article 289 paragraph 1 LO). The provision on electronic
contract form has been introduced in the Croatian legal system with the provision from Article 293
of the Law on obligations from 2005, and is further confirmed in the Law on electronic commerce.
The mentioned law prescribes that concluding of contracts is possible electronically, i.e. in electronic
form (Article 9 paragraph 1 LEC). It is a joint term for all instances of concluding contracts electroni-
cally, and not a term for a special type of contract.

When the electronic message, i.e. the electronic form is used as a form for concluding a
contract, this contract shall not have its legal validity disputed solely based on the fact that it is com-
posed in the form of an electronic message, i.e. in electronic form (Article 9 paragraph 3 LEC). We can
conclude that the contract concluded in electronic form will not be void due to its form, but valid,
unless it has been differently prescribed or agreed for that type of contract.

8. **Are the contracts concluded by electronic means („on-line“) given equivalent legal
status as ‘paper’ („off-line“) contracts?**

A contract concluded in electronic form as a rule has equal legal significance and produces
equal legal effects like “traditional” written contracts regulated with the general provisions of obli-
gation law. The difference between them in the data carrier – whereas with the traditional written
form this medium is paper or a similar medium, with electronic conclusion of contracts those are
electronic media, which de facto, at any moment, allows for its reproduction in the sense of printing
of documents with a printer.

From the aforementioned it is clear that if the law prescribes or if a written form has been
agreed, then the contract can also be concluded in electronic form. However, there are two impor-
tant reservations here. First, the form of electronic contract does not replace the written form of con-
tracts in the case of contracts that are listed in the provision of Article 19 paragraph 4 of LEC (which
are listed in answer No. 10 of this questionnaire). Second, when it is requested that a written contract
be signed, then the electronic contract should also be signed with a so-called electronic signature. For the electronic contract requiring a signature to be valid it must also additionally fulfill all other conditions for utilization and use of electronic signature prescribed in the Law on electronic signature (Article 11 LES). This comes from the situation where in the Croatian legal doctrine the electronic signature serves for identification both of the signer and the authenticity of the signed electronic document. Finally, if it is an electronic document, then its validity requires that the fulfillment of all requirements prescribed in the Law on electronic document (more details on this in answer 12).

9. Are there any *differentia specifica* aspects with the e-contracts as to the general national law on contracts related to contract formation (offer, acceptance, acknowledgement, does e-marketing (e-advertisement) represent offering of goods or invitation to treat, e-contracts and the general terms and conditions, and alike)

The Law on electronic signatures regulates some further special obligations by service providers. The information society carrier is obliged before concluding a contract for provision of services to **inform the user** of certain information pertinent to the concluding of the contract. The information society service provider is obliged in front of the potential information society service user, before the concluding of the agreement on provision of information society services, to provide him in a clear, understandable and unambiguous way with data and inform him of: the different levels that follow in the procedure for concluding a contract, on individual provisions of the contract, on general business conditions if they are a component part of the contract, on the languages offered for concluding the contract, on codices of behavior according to which service providers act and information on how can these codices be reviewed electronically. Additionally, the information society service provider is obliged to ensure for the potential service user technical means for recognition and correction of wrong inputs of data in the message before its submission or sending (Article 12 paragraph 1-2 LEC). For consumers the listed provisions are of cogent (forced) legal nature, whereas contracting parties that are not consumers may agree on exemptions from these provisions in their mutual contractual relations. These provisions are also not applicable to contracts concluded via e-mail or forms of individual communication equivalent to it, which is understandable, since the contracting parties are directly negotiating on the contract terms and other contract elements.

Regarding **the availability of contracts and general business conditions** the Law on electronic commerce has prescribed that contractual provisions and general business conditions provisions of a contract concluded in electronic form, which are concluded by information society service providers must be available to the service user in a manner that they are enabled to store, reuse and reproduce them (Article 13 LEC). This is especially important if the contracts are concluded by clicking a mouse on the internet site in self in the sense of *Click-wrap* and *Browse-wrap* contracts, in which the service recipient does not come in direct contact with the information society carrier. As a rule it is a special type of adhesion or form contract.

Regarding the **liability of information society service providers**, the Law on electronic trade contains a large number of provisions with which this liability is **exempted or limited**. First, the information society service provider that **transfers** electronic messages submitted to him by a service user is not held liable for the content of the sent message and its forwarding, under the condition that he has not initiated the transfer, did not select the data and documents subject to transfer, did not exclude or change the data in the content of the messages or documents, did not select the user of the transfer (Article 16 paragraph 1 LEC). Second, the information society service provider is also not liable regarding the so-called **temporary saving** (*caching*) of data inputted by the user via a communication network. He is not liable for their automatic, intermediary and tempo-
rary saving, which is only aimed at more effective shaping of the transfer of data requested by other users if: he does not change the data, accepts the conditions for access to data, acts according to the rules for updating data, acts in accordance with the allowed application of technologies for gathering data, immediately removes or immediately disables access to data he has stored at the moment he finds out that the data has been removed from transfer at their origin or that access to them has been disabled or if a court or another competent body has ordered their removal or disabling of access (Article 17 LEC). Third, when saving data (hosting) he is not liable for the content of stored data provided by the users at their request: if he has no knowledge, or he could not know of the illicit actions of the users or the content of data, as well as in court proceedings related to compensation of damages arising from illicit actions of the users or the content of stored data and if he could not be acquainted with the facts or circumstances from which the illicit activity of the user would be obvious, and immediately after finding out or becoming aware that the action or data is illicit he removes or disables access to the data (Article 18 LEC). Fourth, the liability of service providers for links is provisioned in such a way that the service provider, which through electronic directing opens access to third party data, is not liable for that information: if he has no knowledge, nor could he have found out of the illicit actions of the users or the content of data in this information, and immediately after finding out or becoming aware that the action or data is illicit he removes or disables access to the data (Article 19 LEC). Finally, the insurance service provider when providing the service is not obliged to check the data he has stored, transferred or made available, i.e. check the circumstances indicative of illicit user activity, but if he determines the existence of reasonable doubt that by using his services the user is undertaking illicit activities, and if he determines the existence of reasonable doubt that a user of his service has provided illicit data, the service provider is obliged to inform thereof the competent state body and on the basis of a relevant court act, or administrative act, must present all data on the basis of which perpetrators of criminal acts can be detected or persecuted, i.e. the rights of third parties can be protected (Article 21 LEC).

Regarding e-advertising and the use of e-mail with the aim of sending unwanted electronic communications (unsolicited commercial information) we can say that it is allowed but only with prior consent of the person for which this type of communication has been intended, and in accordance with the law regulating the field of telecommunications (electronic communications) (Article 8 LEC). Regarding the legal effect of e-advertising the general rule of the LO is applied, according to which the sending of catalogues, price lists of tariffs and other information, and advertisements presented in print, leaflets, radio, television, electronically or in any other way are not considered an offer for concluding a contract, but only a call to make an offer under the offered conditions, if not otherwise arising from such declarations of will (Article 256 paragraph 1 LO).

The Law on electronic commerce provides for court resolution of disputes, but it is very interesting that in Article 22.c. it also proposed extra-judicial dispute resolution in the sense of conducting procedures for arbitration, i.e. mediation.

10. Contracts and transactions excluded from the application of the e-contract legislation.

The provisions of the Law on electronic commerce shall not be applies to the following contracts:

- property, prenuptial, i.e. nuptial contracts, and contracts regulated by the Family law,
- contracts on burdening or sale of property that require the approval of the social care center,
- contracts on cession and division of property during life, contracts on life insurance, contracts on alimony till death and contracts regarding inheritance, contracts for waiver of in-
heritance, contracts for transfer of inheritance part before division, issues regard wills and other contracts regulated by the Law on succession,
- contracts for presents,
- contracts on transfer of ownership rights on real-estate or other legal business regulating real rights over real-estate, with the exception of lease and rent contracts for real-estate,
- other contract for which a special law prescribes that they are created in the form of a public notary act, i.e. document,
- contracts and declarations of will of guarantors, if the guarantor is a person acting outside of his trade, business or professional activity (Article 9 paragraph 4 LEC).

11. Equivalence for electronic documentation in all contractual matters (for example, the notion of durable medium, electronic record, etc.)

Croatian general obligation law (LO) does not have a single general term or definition of durable medium, electronic record, means for distance communication etc. However these terms are defined in the provisions of the special regulations. Thus, the terms of durable medium and means for distance communication have been defined in the Consumer protection law as a consequence of implementation of Directive 97/7/EC on consumer protection regarding contracts concluded at a distance in the Croatian legal system. The term of "durable medium" is defined as any instrument enabling the consumer to store data intended for him personally, in a manner that the data remains available for future use with a duration adequate for the purpose of the information, and that enable unaltered reproduction of the stored data (Article 3 paragraph 1 point 7 CPL). "Means for distance communication" are those means that are adequate for concluding contracts between traders and consumers without the simultaneous physical presence of the trader and consumer in a single location. Some examples of means for distance communication can be: printed materials with and without addresses, standard letters and postcards, printed advertising messages with order forms, catalogues, telephone with human operators and without them, videophone, video text, telefax, device, television, internet and e-mail (Article 37 CPL).

At the same time, the term "contract in an electronic form" has been defined in the Law on electronic commerce as a contract that physical or legal entities in full or partly conclude, send, receive, terminate, cancel, access or show in electronically, by using electronic, optic or similar means, including, but not limited to, internet transfers. The Law does not define what is understood under electronic, optic or similar means obviously believing that the interpretation of said terms is not a problem in practice.

As assistance in determining these terms we can use the Law on electronic communications (OG 73/08, 90/11), which for the needs of that Law defines in Article 2 the term electronic mail as: every text, voice, sound or picture message sent via public communication network, which can be stored in the network or terminal equipment of the message recipient, until the recipient takes it (point 11), then it defines the term electronic communications as: providing for usage electronic communication networks and/or providing electronic communication services (point 12), in which an electronic communication network comprises: portable systems and, when needed, equipment for connecting (commutation) or routing and other means, including parts of the network that are not active, which enable the transfer of signals via wires, radio, light or other electromagnetic system, which includes satellite networks, immovable landline networks (with connecting of channels and connecting of packages, including internet), landline networks for mobile communications, electrical-energy cables system to the extent in which they are used for transfer of signals, radio
broadcasting networks and cable television networks, regardless of the type of data being transferred (point 7), and electronic communication service is: a service which, as a rule, is provided for a fee, and is comprised fully or for the most part of transfer of signals in electronic communication networks, including telecommunication services and transfer services u radio broadcasting networks, which does not include services for provision of content and performing editing supervision over the content being transferred using electronic communication networks and services. This service does not include information society services that are fully or for the most part not consisted of signal transfers in electronic communication networks (point 10).

Answers 12-18 prepared by: Ivana Kanceljak, LL.B.


Our legislators, in the Law on electronic commerce (OG 173/03, 67/08, 36/09 and 130/11) has defined contracts in electronic form as contracts that physical or legal entities in full or partly conclude, send, receive, terminate, cancel, access or show in electronically, by using electronic, optic or similar means, including, but not limited to, internet transfers (Article 2 paragraph 1 point 6). From this definition we can conclude that we have a legal basis for e-contracts in the B2B and B2C context.

The Consumer protection law (OG 79/07, 125/07 - amended, 75/09 – Law on consumer crediting, 79/09, 89/09 – amended and 133/09 – Law on payment operations) provisions contracts concluded electronically under the title: Contracts concluded at a distance. Article 34 lists the Internet as one of the means for distance communication.

Regarding B2G we can see that in Croatia in the field of e-operations there are certain services that are functioning such as e-health, e-pension, e-customs, e-tax etc. Their primary purpose is mutual exchange of information, so it is just e-operations not e-commerce, so we cannot speak about electronic conclusion of contracts.

A particularity in our legal order is the Law on electronic document (OG 150/05) that equalizes a public document with a properly made document in electronic form, which is signed with an electronic signature containing a stamp and signature (advanced electronic signature). This document is necessary for the functioning of e-operations.

Important changes can be noticed regarding public procurements regarding the new Law on public procurement (OG 90/2011) that came into power on 1 January 2012. This Law has been adopted in accordance with the EU Directives. In the public procurement procedure the public orders (these are for example state bodies of the Republic of Croatia, units of local, area or regional self-government) are enabled to send offers through electronic auctions in which the oferees, i.e. economic subjects send their offers via internet. The Law contains special provisions regulating the conclusion of contracts. The procurement procedure starts by announcing the call of the public order for bids through the Electronic advertiser for public procurements of the Republic of Croatia (available at the web-site: http://oglasnik-jn.nn.hr/). The data published in this manner are only available to registered subjects. Only a part of the procedure for concluding contracts is currently conducted electronically, and that is the sending of bids and their revision via internet.

13. Tax aspects and possible tax obstacles related to cross-border e-transactions

The general tax in the Republic of Croatia is the Value Added Tax regulated with the Law on value added tax (OG 47/95, 106/96, 164/98, 105/99, 54/00, 73/00, 127/00, 86/01, 48/04, 82/04, 90/05, 76/07, 87/09, 94/09) and the Rulebook on value added tax (OG 149/09 and 89/11). The value added
tax rate is 23%, and there are special provisions on when the purchaser is exempt from payment of the VAT. Any seller (exporter) who sells goods via internet or provides services in another country is exempt from paying value added tax (Law on value added tax: Article 13 and 14, and Rulebook on value added tax Article 71 to 73). The tax obligation will is on the buyer in accordance with the rules of the state where he receives the goods or the service.

Regarding importers ordering the goods via internet, if the preconditions according to the Law and Rulebook on value added tax have been fulfilled, must pay the value added tax as part of the customs process. A buyer may be in a situation, when buying via internet, to pay value added tax both in the country of residence of the selling legal entity and in the country where the delivery was made. The reason for this is that buyers are not aware of the information that they have a right to ask the seller (if it is a legal entity) for a tax return (tax free) that would, as a rule, conducted through Global refund systems or other systems. This is a situation when there is double taxation; it can also happen that there is no taxation.

14. Other obstacles related to cross-border e-transactions (import duties, customs and alike)

Customs law (OG 78/99, 117/99, 73/00, 92/01, 47/03, 140/05, 138/06, 60/08, 45/09 and 56/10) together with Act for implementation of the Customs law (OG 161/03, 69/06, 5/07, 70/08, 76/09 and 29/11) determine the preconditions for payment of customs. Regarding goods coming to the Republic of Croatia via mail, and which are received by physical entities, it must be noted that according to Article 187 paragraph 1 point 3 of the Customs law and Article 12 point 4 of the Law on VAT, consignments sent for free by a foreign physical entity to a physical entity in the Republic of Croatia with a value of up to 300.00 kuna are exempt from paying customs duties and VAT, under the condition that consignments are not of a commercial nature (subject of sales and purchase or intended for further selling).

Thus, the given exemption does not relate to consignments subject of sales and purchase (e.g. ordering via internet). Goods with value in excess of 300.00 kuna, subject of free of charge legal business, is subjected to calculation of customs debt. Goods with negligible value (goods whose value does not exceed 160.00 kuna) contained in consignments from abroad sent directly to recipients in the Republic of Croatia is exempt from paying customs duties and VAT. These goods are not submitted to the customs office. The given exemption is not valid for alcohol and alcoholic beverages, tobacco and tobacco products, perfumes and eau de cologne. Customs are paid if the value is in excess of 160 kuna, which frequently puts the consumers in a situation where they give up internet purchases. However, bearing in mind what was said previously, if the basis is giving a gift, it is possible to bring in a bit higher value.

When the consignment by post is received by a legal entity in the Republic of Croatia, in order to receive the customs duty exemption a statement is submitted on a prescribed form in the import of books, samples of goods and advertising material. Additionally, this cannot be goods the total value of which are in excess of 3,000.00 kuna, to have continuous consignments and the goods may not be subject to limitation, prohibitions or specially prescribed formalities.

The regulation only relates to duty free books according to the Agreement on the Importation of Educational, Scientific and Cultural Materials and the Protocol to that Agreement and the exemption from payment of value added tax in accordance with Article 10a point c of the Law on value added tax and Article 57 paragraph 1 point c of the Rulebook on value added tax. In order for this to be applicable to goods samples and advertising material, they must comply with the condi-
tions from Article 32 and 33 of the Act on conditions and procedures for realization of exemptions from customs duties, and Article 12 paragraph 1 point 5 of the Law on value added tax.

**Single administrative document – in all other cases.** Together with customs obstacles, importers are having the problem of not knowing that for the import of certain products that they bought via internet they need a special permit. For example, for importing technical goods intended for telecommunications it is necessary to acquire a permit from the Croatian agency for post and electronic communications (http://www.hakom.hr/). Two things may happen for a consumer: paying the procedure in the agency in order to receive the device or its confiscation with very little chance of reimbursement from the seller (due to exemption from liability in such situations).

In the end, an obstacle may also be the different legal regulation of the electronic signature.

### 15. E-contracts and personal data protection

For the protection of personal data most important laws are the Law on personal data protection (OG 103/03, 118/06, 41/08 and 130/11) that generally regulates personal data protection and the Law on electronic communications (OG 73/08 and 90/11) that specifically regulates the violation of personal data. According to Article 2 paragraph 1 point 45, violation of personal data is violation of security that causes accidental or illegal destruction, loss, changing, unauthorized disclosure or access to personal data, which are transmitted, stored or processed in another way regarding the performing of publicly available electronic communications services. In order to void violations it is necessary to undertake certain measures from Article 99: ensure that personal data can only be accessed by authorized persons for legally authorized purposes, protect the transferred or stored personal data from accidental or illegal destruction, accidental loss or changing, and unauthorized or illegal storing, access or disclosure, and ensure the application of a security policy regarding the processing of personal data.

The Consumer protection law (OG 79/07, 125/07 – amended, 75/09 – Law on consumer crediting, 79/09, 89/09 – amended and 133/09 – Law on payment operations) also contains a provision aimed at protecting personal data. According to Article 7 paragraph 3 the trader is prohibited to give out consumers' personal data to any third party without prior explicit and written approval by the consumer, unless obliged to this by law or decision from a competent government body.

When concluding contracts electronically, each buyer should read the general terms of business of the seller, because by concluding the contract these provisions become directly relevant to their relationship. The general terms of business may also contain provisions regarding the protection of personal data.

Further I am providing an example of general terms of business taken from the web store http://www.technomarket.hr. Article nine of the general terms of business covers data protection in three points:

1. The Seller shall gather the Buyer's personal data only to the extent necessary for fulfilling his obligation, for informing of new and action products, and submission of advertising materials, improving the relationship with the Buyer and for checking of other data necessary for online shopping;

2. The Seller is obliged to protect the Buyer's personal data in accordance with the Law on personal data protection and is obliged not to in any way give this personal data to third parties without consent of the Buyer (except for the data that are needed by business partners for delivery of purchased products). From this the cases are exempt when the Seller is obliged,
by valid order of competent state bodies, in accordance with the law, to submit or allow insight into the Buyer’s personal data;

3. The Buyer may ask for amending, correcting or changing of incorrect personal data”.

16. The current situation in practice with the certification-service-providers as issuers of (qualified) certificates related to electronic signatures

According to the Law on electronic signature, in order for someone to issue a certificate they must have special authorization. This can be a legal entity meeting the conditions prescribed by law. The certificate issuer then issues the physical entity with a certificate confirming the electronic signature of that person. The register of certificate providers is kept by the Ministry of economy, labour and entrepreneurship. Currently in Croatia there is only one certificate provider: Financial agency (FINA, www.fina.hr), which enables business subjects to acquire an electronic signature. It is necessary to previously have a Fina e-card or Cobranding card/token of the bank that Fina has a contract with for business cooperation. The using of this signature is possible by using the application “web e-signature”. The electronic signature is not only intended for legal entitles, but to physical entitles as well and bodies of the state administration. The electronic signature is necessary in the field of e-business of different e-services (for example it enables the electronic submission and takeover of financial and statistical reports).

17. Dispute resolution in connection with the e-contracts (any national case law developed so far)

The Law on electronic commerce contains provisions regarding dispute resolution. Disputes can be resolved in court. A person believing that the service provider is violating one of their rights may submit a complaint to the competent court in accordance with the law (Article 22a/1 LEC). At the request of the complainant the court may decide on public announcement of the decision at the expense of the defendant (Article 22a/2 LEC). The court submits judgments with final force and effect to the competent state body (Article 22a/3 LEC). Interim measures may also be issued. A person believing that the service provider is violating one of their rights may submit a request to the competent court for issuing an interim measure. Unless provided differently by this Law, in the procedure for determining an interim measure the provisions of the law regulating the issues of enforcement and insurance shall be applied (Article 22/1 LEC). With an interim measure the court can: prohibit the actions or procedures that may lead to violation of rights or continuation of violations in progress, and limit the provision of information society services by ordering the service provider to remove or disable access to the data (Article 22/2 LEC). The court may issue an interim measure even without hearing the other party if the person submitting the request proves that postponing the determination of the interim measure would disable the fulfilling of its goal or would result in damages to the person submitting that would be difficult to compensate (Article 22b/3 LEC). The procedure for determining the interim measure from paragraph 1 of this Article is urgent (Article 22b/4 LEC). Also, there are special rules for dispute resolution out of courts. The service provider and user, for resolution of disputes, may agree on a procedure of arbitration, that is mediation (Article 22c/LEC). For a procedure in front of arbitration, i.e. mediator the provisions of the law regulating these procedures shall be applied (Article 22c/2 LEC). At the request of the complainant the arbitration may determine public announcement of the decision at the expense of the defendant (Article 22c/3 LEC). Arbitration submits decisions to the competent body, in accordance with the law regulating...
arbitration procedures, and informs it of the practice, customs and habits related to electronic busi-
ness (Article 22c/4 LEC).

Currently in the Republic of Croatia there is no court practice regarding the concluding of contracts electronically. Our legal literature frequently quotes the decision of the Supreme Court of the Republic of Croatia (Rev. 1227/93 from 18.10.1994), which states that the condition for written form of the contract is fulfilled if the parties exchange letter or communicate with teleprinter or some other means that enable to determine with certainty the content and issuer of the document. The expression “some other means” relates to modern communication technologies, that is communication via internet. This decision points out two conditions for recognition of the written form: possibility for determining with certainty the content and possibility for determining with certainty the identity of the issuer of the document.

18. Statistical data

The total number of internet users in the Republic of Croatia in 2010 is 60% (Source: State Statistical Institute, http://www.dzs.hr).

In 2010 e-commerce is 14% of the total turnover. Internet users in Croatia most frequently buy on foreign web-pages (44.4% of them), whereas the services of Croatian on-line stores are used by 32.29% of the persons questioned (Sources: http://www.jatrgovac.com/2010/01/eurostat-u-hrvatskoj-14-posto-prometa-kroz-e-trgovinu/, http://www.jatrgovac.com/tag/e-trgovina/).

There is a somewhat wider survey available made in Croatia (Zagreb, 18 July 2011). According to the data of GemiusAudience increasingly more internet users decide purchasing via internet. In 2009 the share of persons making purchases in Croatian on-line stores was 32%, whereas today via internet in Croatian internet stores buy 37% of all internet users older than 12 years of age. According to GemiusAudience data, in the month of June on 142 measured pages the amount is 1,955,877 Croatian internet users aged 12+. The greatest number in June among the pages measure were on: net.hr, index.hr, tportal.hr, 24sata.hr and njuskalo.hr. The data of GemiusAudience for June 2011 are publicly available on the web-page http://www.audience.com.hr/. GemiusAudience data show how domestic offerers of on-line stores still receive greater confidence between Croatian users as opposed to their foreign competition. However, there is also an increase of channels for foreign on-line stores. Whereas in 2009 22% of all Croatian internet users aged 12+ performed on-line shopping in foreign internet stores, today there are 29% of them.
Data from the GemiusAudience research show that on-line shopping is still preferred by men (59%), more than women (41%). As expected, most of the internet shopping is realized by individuals who are intense internet users and who use it several times a day (in 2011 they are 62% of all consumers buying on-line). When speaking of age groups, youths are most prominent between online buyers: there are most in the age group of 15 to 24 years of age (31%), and are followed with 28% by the group at the age of 25 to 34. An interesting segment of internet consumers are buyers older than 45 years of age, because for them it is true that they more and more frequently decide to buy via internet. The reason for this is the increase over the years of internet users among older persons.

(Source: http://www.valicon.net/uploads/Sve_vise_korisnika_kupuje_putem_Interneta.pdf)
List of recommended literature

Books and articles:


6) Ćesić Z., Measures and procedures for usage and protection in the electronic signature system, Law and taxes (Ćesić Z., Mjere i postupci uporabe i zaštite u sustavu elektroničkog potpisa, Pravo i porezi), 11(2002), pp. 47-52, 146-147.


18) Matic T., Electronic communication according to Article 75 of the Law on general administrative procedure, Croatian legal review (Matić T., Elektronička komunikacija prema članku 75. Zakona o općem upravnom postupku, Hrvatska pravna revija), 10(2010), pp.84-91.


21) Matic Tin, Contracts in electronic commerce, Croatian legal review (Matić Tin, Ugovori u elektroničkoj trgovini, Hrvatska pravna revija, 10(2010)), pp.1-17.


Internet sources:

http://www.carina.hr
http://www.dzs.hr
http://www.e-hrvatska.hr/
http://www.fina.hr
http://www.jatrgovac.com/tag/e-trgovina/
http://www.nn.hr
http://www.teb.hr/include/pdf/zakoni/Zakon_o_elektronickom_potpisu.pdf.
ELECTRONIC FORMATION OF A CONTRACT
Country report for Macedonia


In order to establish a consistent legal framework for the development of electronic commerce aimed at the promotion of competition and to establish sustainable economic development in the country, in accordance with its obligation to harmonize national law with EU legislation, the Republic of Macedonia has enacted a few national legal acts to regulate e-commerce material.

The enactment of the Law on Electronic Commerce\(^1\) that came into force on 11.11.2007 introduced legal security in electronic transactions on the Internet in Macedonian legislation for the first time, and respectively dealt with concluding electronic contracts. This revolution in the legal system was made to stimulate traders to use electronic devices when concluding business transactions by following globally developed processes in the field of e-commerce, thus saving them both time and money. The Law on Electronic Commerce in 2007 was partially harmonized with Directive 2000/31/EC of the European Parliament and of the Council regarding certain legal aspects about information society services, in particular electronic commerce, in the internal market (Directive on Electronic Commerce); however, some weaknesses were also seen in the application despite its accordance with recommendations made by the European Commission. At the beginning of 2011 amendments were made on the effective Law on E-Commerce.\(^2\) This was to reconcile it further with Directive 2000/31/EC, especially in the section defining notions, and in the section encouraging cooperation and data exchange with EU Member States through given contact points (national authorities). A few provisions, however, still need to be harmonized after entering the European Union, but these are only relevant only for Member States.

In order to provide security and legal validity of data in electronic form and electronic signatures in legal and trade turnover, the Law on Electronic Data and Electronic Signature\(^3\) was adopted in 2001. The law consists of 53 articles and regulates electronic work in the field of informatics and telecommunication technology and the usage of electronic data and electronic signatures in judicial and administrative procedures. This law, in the same way as the Law on E-Commerce, transposes EU acts, in particular, the provisions of Directive 1999/93/EC into the Community Framework for Electronic Signatures.

The Law on Consumer Protection\(^4\) from 2004, among other EU regulations, harmonizes Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts, predicting precise provisions on contract conclusion from a distance,

\(^1\) Official Gazette of the Republic of Macedonia No.133/07;
\(^2\) Ibid, No 17/11;
\(^3\) Ibid, No 34/01, 6/02 and 98/08;
\(^4\) Ibid, No 38/04, 77/07, 103/08 and 24/11;
whereupon its use is strictly a device for distance communication, thus meaning a B2C contract. This directive has almost completely been transposed excluding the provisions that are only relevant for the Member States of the European Union. However, the amendments of Directive 97/7/EC made by the adoption of Directive 2002/65/EC for providing financial services from a distance, Directive 2005/29/EC regarding unfair trade practices towards consumers in internal markets and Directive 2007/64/EC for payment services in the internal market have still not been transposed into the Law on Consumer Protection. Thus, this law offers better consumer protection, considering consumers to be an inferior part of the contract; for this purpose the law increases the liability of the trader in the aforementioned areas concerning the consumer, in particular before the conclusion of a contract, the right to break a contract within a term of eight working days without providing any explanation for the reason, the possibility to terminate a contract if the trader does not submit information to the consumer in advance and there are also favourable spillovers for the consumer in the event that he breaks a contract.

2. Are there any references made to the 1996 UNCITRAL Model Law on Electronic Commerce?

The enactment of Directive 2000/31/EC on Electronic Commerce was intended to create a legal infrastructure to enable the smooth functioning of internal markets and to enable business entities and consumers to use the benefits of EU fundamental principles to give them freedom of movement, establishment and services. Although the directive functions within the global dimensions of e-commerce, it provides rules for the community in accordance with international sources that regulate this area. Therefore, Directive 2000/31/EC on E-Commerce accepted the results that were obtained through discussions with various international organizations (WTO, OECD and UNCITRAL). This presupposes that the directive indirectly refers to the application of the UNCITRAL Model Law on Electronic Commerce. Hence, we may find that in Macedonian legislation, in particular in the area of E-Commerce, there are no direct references that relate to the UNCITRAL Model on E-Commerce 1996, but that the provisions of the Law on E-Commerce in Macedonia have been made in the spirit of this model.

3. Are different national regulations and methods of implementing legislation related to e-contracts being enacted in the SEE countries?

The Macedonian legal system has enacted special legal regulations (Law on E-Commerce) that regulate the services of an information society connected with e-commerce; a special chapter is aimed at the establishment of rules to conclude contracts in electronic form. However, the law does not provide provisions that can be used as a legal base for the promulgation of by-laws to implement legislation related to e-contracts. Conversely, the Law on Consumer Protection does lay down clear rules regarding intercourse between the consumer and the trader and defines an electronic contract as a contract made from a distance, realized by using devices for distance communication. Due to the enforcement of this law, the Government of the Republic of Macedonia has started annual programs to inform consumers about their protection in concluding contracts, especially regarding contracts made from a distance.

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5 Ibid No. 38/04, Article 84;
4. The definition of an e-contract in national law

The electronic contract presents a novelty in legal regulations regarding the binding of relations. For the first time, the national Law on E-Commerce, in a general way, defines the notion of contracts in electronic form, thus meaning contracts made by natural or legal persons who partly or entirely, conclude, accept, receive, break, cancel, accede contracts and present them in electronic way by using electronic, optical or similar devices, including but not restricted only to the Internet.6

5. How many steps are necessary for the validation of an e-contract?

Electronic contracts as well as traditional one are made in accordance with the principles of contract law. Whilst using e-contracts we see different types of procedures, according to people’s involvement (B2B or B2C). Usually, in B2B contracts there are four steps required to conclude an e-contract. The first one is informative, where the parties (business partners) inform themselves about prices of the goods and services, and the subject of the offer on the on-line market. The second step is when, on the basis of gained information, an offer is made regarding the goods or services, prices, conditions for payment and delivery terms. The third step consists of composing the contract; in this step in particular there can often be negotiation regarding the details of the featured contract. Finally, the fourth step is the moment when the contract is concluded (the purchase order) and an obligation for the purpose of realization results.

In B2C contracts pursuant to the Law on Consumer Protection, we can precisely identify three necessary steps: the first is when a consumer is informed about the products and the services on a seller’s site, the second is when the consumer fills in a standard application including personal data and credit card data and the third step is when the consumer sends the data to the seller, thus creating a contract. In this situation, the main subject is contracts with access or adhesive contracts that are prepared by the trader; there is no possibility for negotiation.7

6. The moment when an e-contract is considered to be made

Apart from the many theories about the moment when a contract is deemed as concluded, Macedonian legislation has decided to consider an e-contract as concluded at the moment when the bidder accepts a message from the recipient containing a statement that confirms his acceptance of the content of the contract. The offer and the acceptance are considered as received from the moment the content of the message is available to the contracting parties.8

7. The legal form necessary for an e-contract to be deemed valid

This topic is one of the most important for providing legal security to the involved parties in an electronic transaction. In addition to that, it is generally accepted that e-contracts are valid and that they cannot be contested due to the fact that they are in electronic form. Such a contract is, however, only acceptable if it fulfils the same basic requirements as a hard copy: identification of the contracting parties and authentication of the e-document. In accordance with the provisions of the Law on E-Commerce, a contract concluded in electronic form will not have its validity contested

6 Ibid No. 133/07 Article 3 (8);
7 The Law on Consumer Protection, Articles 84, 89, 91, 92, 93 and 95;
8 The Law on Electronic Commerce, Official Gazette of the Republic of Macedonia No. 133/07, Article 14;
purely because it is in electronic form, but rather if its validity requires the signatures of the contracting parties; this condition is, however, considered to have been completed if the electronic message is signed with an electronic signature.\(^9\)

8. **Do contracts made by electronic means (‘on –line’) have the same legal status as paper (‘off –line’) contracts?**

During the time of digital expansion and due to our busy lifestyles, companies and consumers have started more and more to see the advantages and results of e-commerce. However, without having confidence in concluded e-contracts, contracting parties will not use them as an option despite the fact that they have been put forward by the information society. E-contracts are still a novelty in the legal system as was mentioned previously, but they create rights and obligations for parties in the same way as does the classic form of contract; therefore the legal status of an e-contract is equivalent to that of the classic contract. For the purpose of the legal validity of an e-contract it is necessary to fulfil conditions in the same way as in a traditional contract as follows: to provide security in the identity of the party reporting the information and to provide the original content of the e-contract. As confirmation that e-contracts and paper based contracts are equivalent in Macedonian legislation, it is important to restate the provision that provides that the validity of a contract concluded in electronic form will not be contested purely on the basis that is has been concluded in electronic form.\(^{10}\)

9. **Are there any different or special aspects concerning e-contracts within national legislation regarding contracts and contract formation (offer, acceptance, confirmation, whether the e-marketing (e-advertisements) means an offer of goods or an invitation to offer, e-contracts and general terms and conditions etc.)?**

In contrast to the traditional way of concluding a contract pursuant to contract law, including several phases - informing the interested party about the products and services, negotiation, concluding the contract and its completion - there is particular aberration in e-contracting. The important characteristic in e-contracts is that e-advertising is considered as being a phase in concluding a contract, so by advertising a buyer realizes his first contact with the product and trader in a way that may not be evident in a traditional contract. Advertising is an initial phase that encourages a consumer to contact a trader via the Internet and to make contract, thus presenting an invitation for making an offer. Pursuant to the Law on E-Commerce and the Law on Consumer Protection, the commercial aim of the service provider, that is the trader, should be clearly stated so that it may be easily identified at the moment of acceptance by the user.

Before the conclusion of an e-contract the buyer (trader or consumer) looks for a product or service on the traders’ web page where traders offer products and services. This phase corresponds to the phase in traditional contracts which includes invitations for offer through the submission of catalogues, tariffs, pricelists etc. Furthermore, if the buyer accepts a contract made earlier by the trader, then a contract is already in the process of being made. Hence, we can see that the negotiation phase does not usually exist, having looked at formed contracts (typical and adhesion) where the general conditions of a contract have previously been formed by traders making a number of individual contracts. General conditions regulate the contract in a complex manner, and individual contracts are based on a restricted set of key elements: price, time of delivery, quantity of goods etc.

\(^9\) Ibid, Article 10 (3) and (4);
\(^{10}\) Ibid, Article 10 (3);
Pursuant to the Law on Obligations, the special agreements between the parties are complemented by general conditions of a contract by which are generally adhered to; however, in cases of incompliance of any general or special provisions, the latter shall prevail. General provisions are obligatory for a contracting party if he is known or might have been known by the contracting authorities. The provisions from general conditions are null and void if they oppose the aim of the conclusion of a contract or if they obstruct business, even if the general conditions have been approved by a competent body. The court may deny certain provisions of a contract as well as an application if the general conditions are unfair, too strict or unfavourable for the other party. Unclear provisions in formed contracts pursuant to the Law on Obligations are interpreted as damaging to parties who have previously suggested or prepared such contracts.\textsuperscript{11}

Furthermore, if we order products via the Internet, in contrast to traditional contracts it is necessary for the recipient of the service to ask for confirmation of his electronic order without delay.\textsuperscript{12} However, after concluding a contract, it is still necessary to fulfil (the subject of the contract is the goods that are to be delivered to the buyer) the contractual obligations. Therefore, the conditions of e-contracting are very specific regarding the preliminary term and also regarding the conditions for supplying goods. The buyer expects the product to arrive in a short period, but if the trader does not deliver the goods in time, the buyer may review his decision and cancel the order.

10. \textbf{Contracts and transactions that are excluded from the application of e-contract legislation}

Particular contracts and transactions, by reason of their specific legal nature, are used in same way as is justification for the elimination of e-contracting. The Law on E-Commerce prescribes that the services in an information society provided by service providers that have established themselves in EU Member States shall not be restricted for the reason of coordinated areas, excluding the following areas: authors and other rights from industrial property, the emission of e-money, insurance company activities, the freedom of parties, the ability to elect rights from the country that will apply the contract: contracting obligations regarding consumer contracts, the validity of contracts by which rights of reality have been created or transferred, and the allowance of commercial communication through e-mail. Furthermore, Article 10 of this law states that the following contracts may not be completed via the Internet: contracts establishing the acts of family and heredity rights, contracts establishing or conveying rights on real estate with the exclusion of the tenancy rights, contracts for a given guarantee and additional provision by persons who are trading, working or carrying out professional engagements and contracts that require the services of courts, notaries and other similar professions.

11. \textbf{Equivalence of electronic documentation in all contractual matters (for example, the notion of durable mediums, electronic records, etc.)}

Certain particular information that is provided by electronic technology is often only used for a transitional period whilst a durable medium is established. The Law on Providing Financial Services in Distance\textsuperscript{13} enacted 2010, for the first time precisely defined the notion of a durable medium meaning any instrument which would enable a consumer to store information addressed to him in such a way that the information was accessible and could be used during a certain time period

\textsuperscript{11} Law on Obligation, Official Gazette of the Republic of Macedonia No.84/08 Articles 130, 131;  
\textsuperscript{12} The Law on Electronic Commerce, Article 13;  
\textsuperscript{13} Official Gazette of the Republic of Macedonia No 158/10;
appropriate to the aim of information as well as storing the information in such a way as to allow its unchanged reproduction.

The law prescribes that before a consumer is obliged to enter into any contract or offer from a distance, the provider of the service (lender) is obliged to submit all the conditions of the contract and pre-contract information to the consumer on paper or in any other durable medium (floppy disk, CD-ROM, DVD) that is available to the consumer. This is to inform the consumer about conditions and to make comparisons between different offers before a final decision is made regarding the conclusion of a consumer loan from a distance.

The Law on Consumer Protection also prescribes that a trader must provide the consumer with the full details of any previous information (for the conditions before conclusion of the contract from a distance) in paper or any other disposable medium during the fulfilment of the contract, but not later than the moment of product delivery, and respectively not later than the day of providing the services. Therefore, in conclusion, in the Republic of Macedonia electronic documentation, in the form of e-contracting, exists as an equivalent form to documentation in classic form.


Depending on the parties involved in transactions in electronic contracting, concluded e-contracts can be classified as: business entities (B2B), trader and consumer (B2B), trader and government (B2G) and consumer to consumer (C2C). Therefore, depending on the type of contract different rules apply in the national legislation.\(^\text{14}\)

Firstly, regardless of the type of contract that is to be concluded, the principles of an autonomous statement of will should not be forgotten. Autonomy of will in the context of e-contracting can sometimes suffer great restraints and can also lead to differences between parties due to being referred to as inferior or superior. In contracts that are concluded as B2C contracts the consumer appears as the inferior party because of the fact that he enters a pre-existing contract; he has no possible way to bargain about the essential elements of the contract. The trader, however, appears to be the stronger party due to his long practice in trading and the fact that he always prepares contracts with the aim of providing himself with good economic opportunity. Therefore, the consumer does not have a choice other than accepting to join the contract; this is usually concluded at great speed and the content of the contract with all its protecting clauses is compiled by legal and economic experts who aim to protect the trader at all stages. In usual practice the consumer is not aware of his situation as long as there is no fraud or manipulation. In order to protect the consumer and to encourage the conclusion of this type of contract, the national legislator has prescribed provisions to cover this in the Law on Consumer Protection. In this way, protection has been given to the consumer regarding the eventual misuse or infringement of his rights, and it has been provided for that the consumer can break a contract in a period of up to 8 working days without stating the reason,

or in case when the trader does not submit written information to the consumer according to article 91 of the Law on Consumer Protection, the consumer can break the contract within three months.

The contracts B2B are represented in the business intercourse of traders and offer advantages when traders make transactions through an electronic medium; there is a reduction in cost. In such contracts there are no particular provisions for protection because both parties are equally protected in the same way and are both legally informed before making the decision about a trade transaction. In contrast to B2C contracts, B2B contracts allow parties to bargain, bid and deal over elements of the contracts and transactions.

B2G contracts, or contracts between companies and public authorities. This type of contract is enabled through established electronic systems for public procurement, where a contracting authority announces an advertisement for issuing public procurement. After companies submit offers, the contracting authority reviews the offers and elects the most suitable, thus concluding the contract for e-public procurement with the best bidder. E-procurement in public administration efficiently facilitates trade between government and business. Other transactions in B2G intercourse include procedures in giving licenses, paying taxes, customs, and other services. These electronic transactions are aimed at stimulating economic prosperity whilst simultaneously reducing administrative burdens for establishments and doing business. According to regulatory reforms for businesses operating in the Republic of Macedonia since 2010, there has been consistent work to improve the business climate in Macedonia, with the aim of harmonizing the EU directives and recommendations on electronic registration. A variety of projects have been carried out as follows: the implementation of a one stop shop system for the licensing of export, import, the transit of goods and services and for tariff quotas; introduction of electronic registration services in the Trade Register and in the Register of Other Legal Persons thus enabling the submission of company registration requests, the alteration and deletion of legal entities via the Internet if supported by electronic documentation and electronic certificates; the registration of direct investments of non-residents in the Republic of Macedonia and of residents abroad; the electronic management of insolvency etc.

C2C contracts (consumer sells to other consumer) are made between consumers with the assistance of Internet market providers such as: party for e-auctions on E-bay or advertisement parties such as Pazar 3 in Macedonia. During C2C contracts, the consumer sets out his products for an auction or sale and relies on the market provider to provide catalogues, a browser, the capacity for the settlement of transactions; in this way products are displayed and paid for and the market provider gains certain provisions. Consumers sell books, films, games, computer equipment and similar items. In the Republic of Macedonia this type of e-trade is increasing due to the fact that already there are websites for advertising.

13. Tax aspects and possible tax obstacles related to cross-border e- transactions

Information-communication technology has changed the world on a huge scale. These revolutionary steps taken by new technology have enabled new ways of buying and selling goods and services. Today, a physical presence is not so important in the conclusion of a contract and therefore the key question is whether the yield resulting from these transactions should be taxed. Many governments are alarmed by the huge expansion of the Internet and the problem for taxing such intangible transactions is a global problem. Therefore we ask the question, how can we harmonize national fiscal borders with the limitless world of the Internet?

In the Republic of Macedonia, transactions concluded on the Internet are subject to traditional tax principles because there is no special legal regulation. Pursuant to the national Law on
Income Tax\textsuperscript{15}, a legal entity who is a resident of Macedonia and who realizes an income in the country and abroad is obliged to pay income tax. A legal entity (trader) should be taxed in the Republic of Macedonia on the basis of realized electronic transactions in the Republic of Macedonia. Also, for the sake of business consistency, a person obliged to pay income tax could just as easily be a foreign entity if he has obtained income as a result of activities realized by his branch office in the territory of the Republic of Macedonia. A more important question is the question of the avoidance of double taxation. Thus, because of the avoidance of double taxation, a resident in the Republic who earned income in a foreign country pays tax in the other country; therefore the tax payable should be reduced by the income tax already paid in the foreign country. In order to avoid double taxation of citizens and legal entities who have earned profit abroad, and to concurrently avoid tax evasion, the Republic of Macedonia has concluded a number of bilateral international agreements with foreign countries (35 in total) that prescribed very clearly the way that income should be taxed, and also the yield from intangible goods (royalties).

Through an elaborate series of tax questions connected with cross border transactions we cannot forget the importance of value added tax (VAT); a general consumption tax that is counted and paid in all phases of trade and production.\textsuperscript{16} Tax is applicable to the turnover of goods and services, as well as the import of goods through customs in the Republic of Macedonia, including free zones, custom zones and custom reserves in country. The place of turnover of services refers to the place where the entity has a real seat or subsidiary, the place the real service is made, but the place of turnover of goods is the place where the goods are located at the start of the transportation process. In compliance with the Law on Value Added Tax, a return is prescribed on value added tax. This means that a buyer who is a physical person and is not resident in Macedonia on a permanent basis, has a right to a VAT refund on goods bought in the Republic of Macedonia up to a value of 5,000 MKD.

It is impossible to comment on refunded value added tax for goods bought abroad as this is regulated by the pursuant legislation of the foreign country in which the goods were purchased.

According to Macedonian legislation, any company can sell goods via the Internet if it opens an account and accepts the conditions for sale via the Internet in any certificated commerce bank in the country (without any special registration for trading on the Internet). Paying on the Internet with credit cards is considered as non-cash payment which is in accordance with the national legal rules and is a payment for which there is no obligation to issue a fiscal receipt. Electronic invoices in the Republic of Macedonia are not legally regulated which is very limiting. From the question of e-invoices arises the question about taxation on the Internet (what proof would the trader submit for taxation). At the moment it is compulsory for Macedonian Internet merchants to issue a paper invoice to the buyer; however, in order to record personal turnover this is also very problematic as very often the internet merchant and the consumer are physically far apart and are thus unable to submit a printed invoice.

Amending the Law on Value Added Tax and the enactment of bylaws that have been set up to regulate electronic invoices are considered to be the most suitable ways of overcoming the problem. However, we will wait and see if any technical or human capacity is allocated to accept and control electronic invoices in the tax authority.

\textsuperscript{15} The Law on Income Tax Official Gazette of the Republic of Macedonia No. 80/93, 33/95, 43/95, 71/96, 28/98, 11/01, 2/02, 44/02, 51/03, 120/05, 139/06, 160/07, 159/08, 85/10, 47/116 и 135/11, Articles 4 and 5;

\textsuperscript{16} The Law on Value Added Tax, Official Gazette of the Republic of Macedonia No. 44/99, 59/99, 86/99, 11/00, 8/01, 21/03, 19/04, 33/06, 45/06, 101/06, 114/07, 103/08, 114/09, 133/09, 95/10, 102/10, 24/11 и 135/11, Articles 1 and 2;
14. Other obstacles related to cross-border e-transactions (import duties, customs and the like)

A few years ago export customs declarations in the Republic of Macedonia had to be filled in and customs duties paid for posting parcels, including products that had been ordered from Macedonian Internet merchants by people abroad.

Today, this type of customs duty has been abolished, but an export customs declaration is necessary for any product being exported. According to the rules prescribed by the National Bank of the Republic of Macedonia (Central Bank) it is necessary to fill in and submit an individual notice of the transaction for each foreign exchange that is generated by selling and exporting goods or services abroad. This increases costs and administrative procedures for the Internet merchant. The problem is that transactions in e-commerce can be numerous and the amount of each of them is often quite low. For this reason the obligation of reporting all transaction realized by online merchants who have already exported or want to export abroad is an unnecessary burden. Therefore, the National Bank of the Republic of Macedonia is currently reviewing the possibility of cumulatively processing foreign exchange earnings made through electronic commerce.

Regarding products ordered on the Internet that are imported into the country in accordance with customs regulations, these are categorized into the group of products that is imported in the form of small consignments or postal parcels. According to the Regulation on criteria for excluding from paying import duties and the value, quantity and type or purpose of goods that can be excluded from paying import duties\textsuperscript{17}, mail (postal) items up to a specific value are exempt from customs duties, while items above a determined value are subject to import duties. Currently the threshold is 45 EUR, which includes the price of the product and the postal service fee. This threshold for exemption from duties on goods imported as postal parcels is set too low which discourages consumers from ordering products via the Internet.

Another paradox is the difference between the order made for products in material and digital forms. To download music in a digital format from the Internet through some online stores (eMusic) one does not need to pay any import duty, although this type of downloading can cost over €300. However, if the price of the same musical content in a material form (CD or vinyl) exceeds €45, including delivery costs, it will be subject to import duties.

15. Electronic contracts and personal data protection

Personal data protection and privacy during the bargaining and realization stages of a contract also require attention in e-contracting. Personal data protection between parties is guaranteed through the encryption of data. This is especially important when the data is being exchanged or stored by a third party involved in the process of contract realization.

The term personal data is defined as any data by which a particular person can be identified: address, name, surname, age, telephone number, e-mail etc. It is very important for a company to receive, hold and elaborate on such data in order to complete obligations arising from the contract. The company is obliged during the contract process and after its fulfilment, particularly after delivery of goods, to guarantee discretion and is not allowed to misuse personal data in any way. For example it is explicitly forbidden by law for a company to use personal data for survey and research unless consent has been given. A company is obliged to provide technical and organizational measures to protect personal data by not allowing any unauthorized access to it through the use of encryption.
when collecting data and also when transmitting sensitive data, especially credit card data. In this way a company can limit access to personal data, especially to clients' accounts, for the purpose of not disclosing information. Developed trade practice is very important in preventing misuse by third persons, usually by stealing data from credit cards; it is also very important for a merchant when obtaining confidence from consumers to conclude e-contracts.

To achieve a higher level of security in e-contracting in the Republic of Macedonia, the Law on Personal Data Protection was enacted and harmonized in 2005 in Directive 95/46/EC of the European Parliament and the European Council on 24 October 1995 for data protection and free movement of the data. Additionally the Law on Electronic Communications from 2005 which both protects and monitors European provisions fully transposes Directive 2002/58/EC regarding the processing of personal data and the protection of privacy in the electronic and communication sectors. It is planned that the amendment of Directive 2009/136/EC for Universal Services in Electronic Communication will be transposed in the Republic of Macedonia in 2012 by amending the Law on Electronic Communications. From the time that the law was applied up to now, there have been no serious registered infringements of personal data as a result of electronic commerce.

16. The current situation in practice regarding the certification of service providers as issuers of (qualified) certificates related to electronic signatures

The electronic certificate presents a device that affirms an electronic signature and enables a person participating in an electronic transaction to prove his identity to other participants of the same transaction; it is equivalent to an identity card. There are only two registered companies in Macedonia that presently issue electronic signatures that are accepted by the Ministry of Finance: Clearing House, Clearing Interbank System KIBS Co. Skopje and Macedonian Telecom Co. Skopje. It is possible that the increase in the number of transactions made via the internet by the business sector and consumers will continue to increase, and that consequently other companies for issuing electronic certificates will be set up.

17. Dispute resolution in connection with e-contracts (national case law developed so far)

Disputes arising as a result of contracting on on-line networks are manifold, but they usually arise due to the non-delivery of an order, the late delivery, or false information about the price or the product etc. The national courts in the countries where electronic contracting has been developed are dealing with such disputes for various reasons; in the main they are disputes of low value with insignificant values in terms of purchases (buying books, food, clothes), but on the other side the administrative costs for the judicial processes to resolve these cases are very high. Moreover, there are questions regarding applicable law in the context of e-commerce and consumer protection, as well as questions regarding foreign judicial decisions. In the Republic of Macedonia there are no statistics regarding disputes arising from electronic contracts, even though Article 23 of the Law on E-Commerce provides for contracting parties to resolve mutual disputes through arbitration.

18 Law on Personal Data Protection, Official Gazette of the Republic of Macedonia No. 7/05, 103/08, 124/10 and 135/11;
18. Available statistics related to e-contracts (percentage of population using the Internet, realized turnover through e-transactions)

Pursuant to the statistical data in the Republic of Macedonia in January 2011, 93% of business entities with 10 or more employees were equipped with computers, and 88.6% had Internet access. Regarding electronic invoices suitable for automatic processing, business entities received more (9.3%) than they sent (6%), 58.9% had their own website and of these, 10.4% of the websites provided an on-line ordering facility.

The e-government services most frequently used during 2011 by business entities with Internet access were forms (78.2%) and obtaining information (76.8%) from the public government website; the administrative area that was most represented for electronic use (by the e-return of filled in forms) was social contributions of employees (28.1%). Furthermore, 24% of business entities with Internet access in 2010 offered goods or services for sale via the Internet for public procurement in the country. In January 2011 half of the business entities with at least 10 employees had in place a policy of telephone usage, web usage; video conferencing instead of physical travel, and 31.4% had provided remote access for their employees to access the resources of the business (e-mail, documents, and applications), thus enabling them to work away from the business premises.

Regarding Internet use by citizens, students and pupils were the highest users, 96.6%. 82.9% of Internet users had used the Internet during the last three years for participating in social networks (for example to create user profiles, send messages or other content on Facebook, Twitter etc.). During the first half of 2011 only 4.1% of Internet users made orders on the Internet to purchase goods for personal purposes, while 6.7% had made purchases during the last 12 months, mostly for the purpose of buying clothes or sports equipment (20.4%).

During the last 12 months 22.2% of Internet users had used the services of e-governments for the purpose of obtaining information (18.2%), downloading official forms from public administration websites (11.2%), and for sending completed forms to public administration websites (7.4%).

Available statistics show that in the Republic of Macedonia there is a tendency towards an increase in the number of Internet users, despite the fact that e-ordering goods and services is very unsatisfactory compared with western European countries. The reason for this may be due to citizens having insufficient information regarding the benefits, the fear of fraud regarding the fact that ordered products are sent after payment, the small number of internet traders and the modest choice of goods and services available for purchase via the Internet, fear of guaranteeing and protecting personal data etc. To increase confidence in e-payments and shopping in the Republic of Macedonia, the Ministry of Information Society and Administration has advertised a competition to select the 50 best entrepreneurs who present business plans for e-shops; they will be able to start selling their products in the country and abroad.

In Montenegro in power are the Law on Electronic Commerce (“Official Gazette of Montenegro 80/2004 and 41/2010”) and the Law on Electronic Signature (“Official Gazette of Montenegro”, No. 55/03, 31/05 and 41/2010), which implement to a certain extent the listed directives on electronic signature and electronic commerce.

The Consumer Protection Law is in power in Montenegro (“Official Gazette of Montenegro”, No. 26/07), which contains a section regulating the rights of consumers in distance contracts (“distance contracts” is also the term used in the Law), which transposes the key provisions of the Directive on Distance Selling. However, during 2012 we are expecting the adoption of a new Consumer Protection Law with which the rights of consumers in these types of contracts will also be improved and harmonized with the acquis communautaire.

2. Is any reference made to the 1999 UNCITRAL Model Law on Electronic Commerce?

There is no reference in the positive regulations of Montenegro to this international instrument for harmonization of electronic commerce law. Furthermore, there is also no reference to the United Nations Convention on the Use of Electronic Communications in International Contracts from 2005, with which this Model Law referred to in question no. 2 has to a large extent lost in significance in the overall efforts to achieve an adequate degree of harmonization and unification of the international electronic commerce law.

Montenegro has signed the aforementioned UN Convention in 2007, however it has still not been ratified and, thus, it could not become an integral part of national law, and bearing in mind the current situation (only two instruments for ratification have been established), it should not be expected that the Convention will come into power in the signatory countries in the near future.

3. Are there separate national laws and implementing (enabling) legislation related to e-contracts enacted in the SEE countries?

Such provisions do not exist in the legal system of Montenegro.
4. The definition of the e-contract in the national law?

“Contract that physical or legal entities conclude, send, receive, terminate, cancel, access or show electronically, by using electronic, optic or similar means, including, internet transfers.” (Article 3 paragraph 1 point 5 of the Law on Electronic Commerce of Montenegro)

5. How many steps are needed an enforceable e-contract to be concluded?

For example, for a standard B2C contract it is necessary to accept the general offer published on the internet presentation of the offeror, by selecting the product you want to order, i.e. buy, enter the requested data regarding the payment card used for payment of the service, as well as personal data (including personal and/or address where the product will be sent), and then click the icon signifying the final agreement for performing the transaction in that form, i.e. conclusion of the purchase and sales agreement.

On the confirmation of receiving of the acceptance of the offer as a “step” that can be de facto a new stage in the procedure for conclusion of contract we shall talk in more detail in answer to question 7.

6. The moment at which an e-contract is considered to be concluded?

“The e-commerce contract shall be considered concluded at the moment when the offeror receives an electronic message containing the statement of the offeree that he accepts the offer. The offer and its acceptance, as well as other statements of will made electronically, are considered received when the person they are sent to can access them. In consumer contracts it is not allowed to exclude the application of the provision from paragraph 2 of this Article.”

The legislator, with this provision from Article 17 of the Law on Electronic Commerce, on a dispositive basis, with the exception of consumer contracts, and in line with the Directive on electronic commerce, has applied the theory of acceptance of offer when determining the moment of conclusion of contract in electronic form.

7. The legal form (formality) required for e-contract to be deemed valid.

The electronic form of contracting, regarding legal validity of contracts concluded in that form, with smaller exceptions, in the Montenegrin legal system is equalized with the paper form, i.e. both can be treated as written form of contract and can fall under this term.

If the question refers to a concrete and specific formality, as a particular act prior to the beginning of application, i.e. de facto is a basis for creating conditions for enforcement of the contract, such an act might be the confirmation of receiving the acceptance of the offer provided in Article 16 of the Law on Electronic Commerce, which is imperative in consumer e-contracts and dispositive in other e-contracts. This opens a dilemma in the electronic contractual form on whether this actually introduces an additional step in the procedure for conclusion of a contract, bearing in mind the unknowns regarding the civil law sanctions for non-fulfilment of this obligation.
8. Are the contracts concluded by electronic means ("on-line") given equivalent legal status as paper contracts?

With the exception of cases where the law explicitly prescribes, as mandatory, paper form of the contract (Article 11 of the Law on Electronic Commerce), the electronic and paper form of the contract are in principal equalized regarding their legal validity. The condition under which a contract is considered concluded in electronic form are regulated in detail in the Law on Electronic Commerce and indirectly with the Law on Electronic Signature, and in this sense it needs to be pointed out that not every communication realized through open computer networks can automatically, without checking for the application of appropriate safety criteria, be considered as sufficient in the sense of recognition of the legal validity and legal effect of the agreement of wills achieved in that way.

On the other hand, with the Law on Electronic Document ("Official Gazette of Montenegro", No. 5/08) declares absolute equality of electronic and paper form, under the condition that the first meets certain technological criteria aimed at protecting the authenticity and achieving permanence of the electronic document (in which this Law especially is supported by the Law on Electronic Signature), which brings us to the dilemma on the legal effect of the norms in the Law on Electronic Commerce, which explicitly sets exceptions that we will work with in the answers to questions 10 and 11.

9. Are there any differentia specifica aspects with the e-contracts as to the general national law on contracts related to contract formation (offer, acceptance, acknowledgement, does e-marketing (e-advertisement) represent offering of goods or invitation to treat, e-contracts and the general terms and conditions, and alike)?

In answer to question number 7, the specifics and dilemma were pointed out regarding the legal effect of fulfilment, i.e. the civil law sanctions for non-fulfilment of the obligation for confirmation of receiving the acceptance of the offer by the offeror.

Other specific issues in B2C e-contracts are the mandatory elements for protecting the legal interests of the buyer – consumer, related to the obligation that they are previously, in a clear, understandable and unambiguous way be informed on the procedures that exist when concluding contracts, contractual provisions, languages for concluding contracts etc...

Other specific aspects present are related to the nature itself of the electronic means of communications, but in essence they are elaboration on the general principles and rules of contractual law in specific cases of communications through open computer networks, and internet foremost.

E-marketing can be both a general offer or call for offer, depending on the circumstances.

10. Contracts and transactions excluded from the application of the e-contract legislation

In Article 10 paragraph 3 of the Law on Electronic Commerce it is stipulated: 

“When electronic message or electronic form is used during conclusion of a contract, the validity of this contract cannot be disputed solely because it is in electronic form.”

Thus, the Law on Electronic Commerce, in accordance with the solutions from the Directive on Electronic Commerce, though in indirect stylization of the norm, sets as a rule and establishes the equality of the electronic and other contractual forms. However, in Article 11 of the Law there are deviations from the principle of "prohibition of electronic discrimination", and it is prescribed that...
the Law on Electronic Commerce will not apply to contracts regulating family relations, contracts for disposition of property that requires the approval of the social care center, contracts prescribed by law regulating inheritance, contracts on presents, contracts on the transfer of rights of property over real-estate, contracts which have been regulated in a special law as being made in the form of a public notary act, that is document, contracts for which it is explicitly prescribed that they require the use of own handwritten signature on paper documents or verification of own handwritten signature, or contracts of suretyship if the person granting them acts outside of his trade, business or professional activity.

However, guided by the principle *lex posterior derogat legi priori*, then the provisions of Articles 4 and 5 of the Law on Electronic Document (“Official Gazette of Montenegro”, No. 5/08) could be interpreted as derogation of the exceptions from the Law on Electronic Commerce listed here.

*More details in the answer to the next question.*

11. Equivalence for electronic documentation in all contractual matters

Article 4 of the Law on Electronic Document stipulates:

“The use and circulation of electronic documents for the needs of a legal or individual entity can be performed only based on explicitly and freely expressed will on acceptance of the use of an electronic document for personal or business needs and other relations.

The legal or physical entity from paragraph 1 of this Article may not refuse an electronic document only because it has been made, used and put into circulation in electronic form.”

Article 5 confirms the intent of the legislators from paragraph 2 of Article 4 that the electronic form of the document, without any exceptions, is equalized in the further text of the law with the paper form of the documents:

“The electronic document shall have the same legal validity as the document made on paper if:

1) it is made, sent, received, kept and stored with the application of available information technology;

2) fully meets the requirements from Article 6 of this law;

3) contains the basic structure provided in Article 7 of this law;

4) can be shown in a form that is in compliance with the form provided in Article 8 of this law.”

Thus, if the electronic document meets certain conditions regarding the protection of authenticity and permanence of the document, and safety of communications, i.e. its transmission, it is equal in its legal validity to the paper document, without exceptions according to this Law.

In addition to the dilemma from the previous question, does the Law on Electronic Document, as made later in time, derogate the provisions of the Law on Electronic Commerce, we can here add another dilemma.

Can we treat in contractual matter the Law on Electronic Commerce as lex specialis in relation to the Law on Electronic Document?

We consider the logical answer to be affirmative, which means that the exceptions prescribed the Law on Electronic Commerce today are also a part of the positive law of Montenegro,
further supported by the fact that case law also has this opinion. Still, the absence of synchronization of regulations in such important issues is a problem that the legislators in Montenegro must work on as soon as possible.


In Montenegro most numerous are B2C contracts, which is a rule also in comparative experiences. What is characteristic for Montenegro in this regard is that, due to the underdeveloped information technology community in Montenegro (in spite of the undisputable infrastructure and human resources), the vast majority of these contracts are cross-border and contain a foreign element on the part of the subjects in the contractual relationship. This, of course, creates a whole series of, as yet, unopened problems in domestic legislation regarding the application of the rules of international private law.

B2B contracts are present to a more significant extent only in financial operations and on the capital market, where they are a rule in operations, just as they are more or less the exception in other areas of the economy.

B2G contracts have still not started in Montenegro, but there are significant efforts made in this direction (e.g. project “Electronic Government”).

13. Tax aspects and possible tax obstacles related to cross-border e-transactions

There is no special tax legal treatment of these contracts, not, related to this, any special tax obstacles for cross-border e-transactions.

14. Other obstacles related to cross-border e-transactions (import duties, customs and alike)

The author of these answers is not acquainted with the existence of such obstacles.

15. E-contracts and personal data protection.

In Montenegro and based on the standards of European Union law there is a Law on Personal Data Protection (“Official Gazette of Montenegro No. 79/2008”) related also to the data that are reached and collected using electronic means of communication. In addition to this Law, foremost is the Law on Electronic Document, but also the Law on Electronic Signature (and the by-laws adopted for implementation of this Law) contain a whole series of criteria for making of electronic documents the application of which achieves the legal validity of the document itself, and which, among other things, are related to the inviolability of the content of the electronic document, i.e. its authenticity on one hand, and the protection of its confidentiality on the other hand.

16. The current situation in practice with the certification-service-providers as issuers of (qualified) certificatess related to electronic signatures.

The only certification service provider for advanced electronic signatures in Montenegro is the Post of Montenegro. At this moment, advanced – digital electronic signatures are held by a small
number of physical and legal entities (under 1,000), and they use them almost exclusively in mutual communication, i.e. they mostly use them in communication with the state bodies (Public Revenue Office, Customs Administration, Public Procurement Commission etc.).

Competent for issuing permits for performing of certification services for advanced electronic signature is the Secretariat for Development of Montenegro.

17. Dispute resolution in connection with the e-contracts (any national case law developed so far)

In comparison to developed market economies, there is a very small number, i.e. percentage of the total number of contracts, of ones that have been concluded in electronic form. Namely, both citizens and economy subjects are not confident in the electronic form of contracting. The exception here is the trade on the securities market, which can only be performed electronically. Still, the existing and not so extensive case law in disputes arising from the conclusion and application of these agreements rarely concerns particular legal problems arising from the application of electronic-information technologies in the conclusion of contracts. Just the opposite, experience shows that even when this can be done, exactly due to lack of knowledge and understanding of the regulatory framework regarding the special provisions applied to contracts concluded in electronic form, the disputes most frequently go towards diverting the flow of these procedures away from the specific legal aspects of the procedure for electronic conclusion of contracts.

18. Available statistics related to e-contracts (percentage of population using Internet, turn-over made via e-transactions, etc.)

According to the results of the census from 2011, slightly above 40% percent of the population is “computer literate”, i.e. they know or partially know how to work on a computer.

When talking about the volume of turnover realized through e-transactions, there are no relevant data on the level of Montenegro, however, quite certainly, the percentage is still very small.