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KEY DISTINCTIONS BETWEEN COMMERCIAL AND CIVIL LAW CONTRACTS IN SERBIAN LEGISLATION

Ključna razgraničenja između privrednih i građansko-pravnih ugovora u srpskom zakonodavstvu

Abstract

Belonging to the sphere of business transactions, commercial contracts are characterised by certain specific features when compared to the classic contracts relative to the civil law – civil, non-commercial contracts. These specific features are reflected in the appropriate rules applicable to commercial contracts, irrespective of whether the given legal system adopted the concept of uniform regulation of obligation relations (a single law provides for all obligation relations regardless of the status of the parties) or the concept of separate regulations (classic obligation relations are governed by one law, while commercial relations and business transactions are governed by another). In this regard, concluding and drafting commercial contracts requires familiarity with the legal rules relevant to this category of contracts, always taking into account their specific features, as well as drawing a distinction between these contracts and the ones that do not belong to the sphere of commercial law relations. The main purpose of this paper is to offer the reader an overview of the key distinguishing features of regulations governing commercial contracts in Serbian law. To this effect, the paper first presents the general legal framework relevant to commercial contracts in the Serbian legal system and then analyses the main specific features of commercial contracts, such as: duty of a higher level of care, assumption of joint and several liability, special rules for the contract of sale, loan contract, limitation periods, as well as certain rules on the right of pledge applicable to commercial contracts.

Keywords: *commercial contracts, Law of Obligations, specific features, contract performance, contracting parties, contractual obligation.*

Sažetak

Privredni ugovori, kao ugovori koji egzistiraju u sferi poslovnog prometa, odlikuju se određenim specifičnostima u odnosu na klasične ugovore građanskog prava – civilne, vanprivredne ugovore. Ove specifičnosti svoj izraz nalaze i u odgovarajućim pravilima koja se primenjuju na privredne ugovore, bez obzira da li je u konkretnom pravnom sistemu usvojena koncepcija jedinstvene regulative obligacionih odnosa (jednim zakonom su obuhvaćeni svi obligacioni odnosi bez obzira na status njihovih učesnika) ili koncepcija posebne regulative (klasični obligacioni odnosi regulisani su jednim zakonom, a privredno-pravni odnosi drugim zakonom). U tom smislu, zaključenje privrednih ugovora i određenje njihove sadržine podrazumeva poznavanje pravnih pravila relevantnih za ovu kategoriju ugovora, uz uzimanje u obzir njihovih posebnih karakteristika, kao i njihovo razgraničenje od ugovora koji ne ulaze u sferu privredno-pravnih odnosa. Osnovni cilj ovog rada ogleda se u pružanju čitaocu opšteg pogleda na ključne specifičnosti uređenja privrednih ugovora u srpskom pravu. U tom smislu, u radu je najpre učinjen pregled opšteg pravnog okvira relevantnog za privredne ugovore u pravnom sistemu Srbije, a zatim su analizirane najznačajnije specifičnosti privrednih ugovora kao što su: dužnost pojačane pažnje, prepostavka solidarnosti, posebna pravila za ugovor o prodaji, ugovor o zajmu, rokovi zastarelosti, kao i određena pravila založnog prava koja se primenjuju na privredne ugovore.

Ključne reči: *privredni ugovori, Zakon o obligacionim odnosima, specifičnosti, ispunjenje ugovora, ugovorne strane, ugovorna obaveza.*

Introduction

In concluding commercial contracts, contracting parties approach the table from different positions, intending to secure different economic interests. It is exactly because of the disparity of these interests that a contract needs to strike a balance between the rights and obligations of contracting parties, in an effort to achieve a fair relationship between them. The principle of autonomy of will, as one of the fundamental principles of the contract law, entitles contracting parties to determine their contractual relationship by mutual consent, of their own volition.[1] This means that contracting parties can define the specific contents of their contracts and establish a set of rules adjusted to their needs and interests in any given case. This freedom, however, is not without limitations; it must always stay within the bounds of public order, mandatory rules, and good faith. These limitations are explicitly specified in the Serbian Law of Obligations (Law of Contracts and Torts), other codes in comparative law and sources of the uniform contract law which proclaim the principle of autonomy of will. It may therefore be inferred that a successful conclusion of commercial contracts lays before the contracting parties two essential requirements: 1. knowledge and proper understanding of the legal framework relevant for conclusion of the contract (the rules of both mandatory and non-mandatory character applicable to the contract unless otherwise agreed by the parties) and 2. defining the contents of the contract with the aim of protecting the best interests of the parties, within the limits of the principle of autonomy of will. These requirements must in particular be taken into consideration by businessmen who are often not familiar enough with the rules and notions of the contract law [2, p. 11].

In the nature of things, commercial contracts which belong to the sphere of business relations are characterised by certain specific features when compared to the classic civil law contracts. These specific features are traditionally manifested in business practice, regardless of whether defining the notion of commercial contract is based on the parties having the status of "merchants" or on the transaction being of commercial character. The above specificities are also reflected in the appropriate rules applicable to commercial contracts, irrespective of whether the given legislation adopted the system of uniform regulation of obligation relations (a single law provides for all obligation relations regardless of the status of the parties) or the system of separate regulations (classic obligation relations are governed by one law, while commercial relations and business transactions are governed by another). In this regard, appropriate drafting of a commercial contract requires familiarity with the legal rules relevant to this category of contracts, always taking into account the commercial implications in each particular transaction, as well as drawing distinction between these contracts and the ones that do not belong to the sphere of business relations, such as primarily consumer contracts, governed by separate regulations.

The main purpose of this paper is to offer the reader an overview of the key distinguishing features of the regulations governing commercial contracts in Serbian law, so that they may make the most appropriate decisions in concluding contracts in each given case. To this effect, the paper will first present the general legal framework for commercial contracts in Serbian legislation. After that it will analyse the main specific features of commercial contracts, such as: duty of a higher level of care, assumption of joint and several liability, special regulations for the contract of sale, loan contract, limitation periods, as well as certain rules on the right of pledge, applicable to commercial contracts.

General legal framework for commercial contracts

In the legal system of Serbia, the primary source of contract law is the Law of Obligations, which governs obligations in full. The Law stipulates the rules about the sources of obligations – contract, causing damage, acquisition without proper grounds, unauthorised conduct of business, unilateral expression of will (public promise of award and securities), effects and termination of obligations, as well as the rules pertaining to different kinds of obligations and substitution of creditor or debtor. The fundamental principles of the Law of Obligations

1 For more details on the autonomy of will principle, see [15, pp. 156-182].

include the autonomy of will, equality of parties to obligation relation, principle of good faith and fair dealing, prohibition of abuse of rights, prohibition of creation and misuse of a monopoly position, principle of equal consideration in bilateral contracts, prohibition of causing damage, duty to perform obligations, non-mandatory nature of the provisions of the Law, application of fair business practices, etc. A special section of the Law governs contracts for the sale of goods and services, including sale, exchange, loan, lease, service contract, deposit, order, pledge, suretyship, contract of construction, warehousing, commission agency, commercial agency, forwarding, transport of persons and things, license, insurance, travel contracts, assignment, settlement of claims, as well as banking business – money deposit, lodging of securities, savings deposit, current account, safe deposit box, credit contract, letter of credit and bank guarantee. Certain contracts that are provided for in general terms of the Law of Obligations are also governed by special laws which regulate such contracts in detail, acting as *lex specialis* to the Law of Obligations (for example, insurance or transport contracts). On the other hand, there are contracts which are not covered by the Law of Obligations, but by other relevant laws, either because they are of a recent date (such as financial leasing contracts) or because by their very nature they do not regulate obligation relations (such as contracts granting concessions or memorandums of association). As regards international commercial contracts, the Law of Obligations is applied when parties have agreed to apply the Serbian substantive law or when the rules of private international law lead to the application of the Serbian substantive law, in cases when the contract does not provide for applicable law.

With regard to the rules on commercial contracts, the Law of Obligations adopts the principle of uniform regulation of obligation relations[2] according to which its rules are equally applicable to all transactions that take place in the sphere of trade of goods and services, regardless of the status of the parties to such transactions.[3] However, assuming that commercial contracts are concluded by businessmen with relevant knowledge and experience in the sphere of business, and taking into consideration some specific features of commercial contracts, in certain cases the Law of Obligations lays down special rules for commercial contracts. Thus, the Law stipulates that its provisions relating to contracts shall apply to all kinds of contracts, unless otherwise explicitly provided in respect of commercial contracts (Art 25, Para 1).

The Law of Obligations defines commercial contracts as contracts concluded by companies and other legal persons engaging in an economic activity, as well as natural persons performing an economic activity as their registered profession, in the course of performing such activity or in relation to such activity (Art 25, Para 2).[4] In contrast to commercial contracts, there are civil law (non-commercial) contracts concluded by persons who do not have the status of an economic operator – natural persons who do not engage in an economic activity as their registered profession and legal persons who do not perform economic activities.[5]

Compared to the classic civil law contracts, the rules of the Law of Obligations relevant to commercial contracts have certain distinguishing features [7, pp. 53-61]. In general terms, some of the above-mentioned fundamental principles of the Law, such as prohibition of creation and abuse of a

2 For the principle of uniform regulation of obligation relations, see [16, pp. 19-22], [15, pp. 50-53].

3 With regard to regulating commercial contracts, two different concepts prevail in comparative law. Based on one concept, the obligation relations of commercial nature and those within the sphere of classic civil law contracts are governed by different laws and subject to different legal regimes. This is the case with French law where commercial relations are governed by the Commercial Code (Code de commerce), and civil law relations by the Civil Code (Code civil), the same as in German law (German Commercial Code and German Civil Code). The other concept involves uniform regulation of both kinds of contractual relations, regardless of the status of parties. This legislative system, which happens to prevail in comparative law (for example, in the Swiss Code of Obligations, Italian Civil Code and many other national laws), is considered to be modern and better suited to regulating obligation relations. For more details, see [22, pp. 43-49].

4 For determining the notion of commercial contracts, see [22, pp. 44-47]. For commercial character of contracts from the international standpoint, see [21, p. 2], [23, pp. 4-5], [4, pp. 8-9].

5 General classification of contracts has lately come to include "consumer" contracts which, in broadest terms, may be defined as contracts concluded by a professional in the course of performing their professional activities, on the one hand, and by an individual entering into the contract not for professional reasons, but for personal, family or household use, on the other. For consumer contracts in comparative law, see [1, pp. 21-28]. For the point of view of the European Private Law, see directives relevant to this area, classified and published in [17].

monopoly position (Art 14) and the principle of application of fair business practices (Art 21), by their very nature have a bearing only on commercial contracts, while the principle of informality (consensualism) achieves its full expression and effect exactly in the domain of commercial contracts (Art 67). Furthermore, the very fact that commercial contracts are concluded in the sphere of trade and business relations in general gives rise to the assumption that these contracts are concluded as onerous contracts (gratuitous contracts as a rule do not belong to commercial contracts). Commercial contracts, depending on the manner of their conclusion, often fall into the category of contracts of adhesion, typical of companies which regularly and continuously engage in the activities involving contracts concluded en masse.

When it comes to the rules on specific contractual relations, some of the most important distinguishing features of commercial contracts include: duty of a higher level of care in commercial contracts; the assumption of joint and several liability in an obligation with multiple debtors arising from a commercial contract and the assumption of joint and several liability of a surety for an obligation under a commercial contract; certain differences in the regulations governing contracts of sale; the assumption of interest in commercial loans, as well as shorter limitation periods for the claims arising from commercial contracts. Special rules for commercial contracts are also noticeable with regard to the right of pledge, both in the Law of Obligations and other laws governing pledge. Each of the above-mentioned differences will be addressed separately.

Duty of a higher level of care

Using appropriate standards, the Law of Obligations has defined duties relative to the conduct of parties in performance of their obligations and exercise of their rights in obligation relations. These standards imply a lesser or higher level of care as a criterion for the liability of an obligor who failed to exercise appropriate care in the performance of their obligations.

Thus, the Law provides that in performing their obligations the parties to obligation relations are bound to act with the care required in legal transactions in a given type of the obligation relations – the care of a good businessman, the care of a good master of the house and the care of a good expert (Art 18). In each case, the care is evaluated based on the type of person who acts in accordance with his/her abilities, knowledge and profession, whilst also taking into account what is typically expected from such person in a specific type of contractual relation and, more generally, obligation relation. The Law has established objective care as the standard, meaning that the individual traits of parties are not deemed to be of significance. In civil law contracts, the parties are required to perform their obligations acting with the care of a good master of the house (*bonus pater familias*), which implies a person who acts reasonably and with due care in performing their tasks, managing property and fulfilling their obligations towards other persons. On the other hand, when it comes to commercial contracts, the Law requires the care of a good businessman in performing contractual obligations (Art 18, Para 1). However, in performance of the tasks which fall within the domain of their professional activity, a party is required to act with a higher level of care, in accordance with the rules and practices of profession – the care of a good expert (Art 18, Para 2). This is a special level of care required of professionals performing obligations while pursuing their business endeavours in accordance with the rules of profession. The evaluation of the standard of a good expert is primarily based on the rules of a given profession and particular fair business practices applicable to professional performance of the given activity. It may be inferred in that regard that each party to a commercial contract is required to act with the care of a good businessman in discharging their contractual obligations. However, when it comes to the performance of an obligation stemming from the professional activity, a party must exercise a higher level of care; they must abide by the rules of profession and practices applicable to the given profession, in other words – act with the care of a good expert [22, p. 50].

The general principle of the Law concerning the duty to apply appropriate level of care is specifically reflected in a series of regulations governing particular contracts. Thus, for example, in sales contracts the Law stipulates that the seller is obliged to take care of the goods with the care of a good businessman or a good master of the house

and take necessary steps to that effect in cases when, due to the buyer's delay, the risk passes to the buyer prior to delivery of goods. The same applies to the buyer after the goods have been delivered to them, if they wish to return them to the seller either because they have cancelled the contract or demand other goods instead of those delivered (Art 520, Paras 1 and 2). By the same token, leaseholder is bound to use the goods as a good businessman or a good master of the house, depending on whether the lease contract was concluded as a commercial or civil law contract (Art 581, Para 1); a depositary is bound to store goods as their own, and if they receive a fee for the deposit, the goods should be kept with the care of a good businessman or a good master of the house (Art 714, Para 1); the person accepting an order is obliged to perform the order as instructed, with the care of a good businessman or a good master of the house, and if the orderer has not provided specific instructions concerning the transaction to be performed, the person accepting the order, while being guided by the interests of the orderer, must act as a good businessman or a good master of the house (Art 751), etc.

Since recourse to commercial agents is the easiest and the least expensive means of entering a market, particularly in international trade transactions, commercial agency contracts are frequently used in commercial transactions [2, p. 184]. Contracts with commercial agents explicitly call for the care of a good businessman.

With respect to intermediary contracts, under the Law of Obligations an intermediary is required to look for an opportunity to conclude a particular contract and to communicate such opportunity to the principal with the care of a good businessman. The intermediary cannot be held liable if, in spite of the necessary care, they fail in their endeavours (Art 818). It should be noted here that the Law provides that the intermediary is obliged to endeavour to find a person with whom a contract can be arranged and to act as a link between the principal and such person, which means that it is not intermediary's obligation, unless otherwise agreed, to actually find an appropriate person, but only to make endeavours to that effect. Therefore, if in the performance of their obligations the intermediary acts in good faith, with the care typically required in their profession, it is deemed that they have met their obligations regardless of whether or not a contract is concluded between their principal and a third party. In contrast, if, when looking for a potential business partner for the principal, the intermediary fails to exercise due care (for example, they find an insolvent person or a person of whose incapacity to perform they were otherwise aware or should have been aware), they are deemed not to have met their contractual obligations and are liable for damages. Thus, for example, the position held in court practice is that the intermediary is to be held liable if they have directed their principal to a company which has been experiencing financial difficulties for a long time and whose giro account was blocked, of which the intermediary should have been aware (Judgement of the Supreme Court of Serbia, Gž. 4632/76 of 12 October 1977).[6]

The Law requires the care of a good businessman to be exercised by the commission agent under the commission agency contract, as well as by the commercial agent under the commercial agency contract. The commission agent is obliged to meet their contractual obligations with due care. Thus, when the commission agent receives merchandise for sale from the client or takes over the merchandise purchased on behalf of the client from a third party, they are obliged to keep it with the care of a good businessman (Act 776, Para 1). Likewise, the agent is liable to the client for losses if they sell the merchandise to a person heavily in debt, provided that they are aware or should have been aware of such a fact (Art 774). The issue of care, that the commission agent is required to exercise when performing the commission contract, has often been the subject of court rulings. For example, in one case the court held that the importer, a specialised agency, in order to protect its client's interests, was obliged to take all necessary steps to establish the state of health of the imported animals and to ensure a guarantee for material defects, without waiting for further instructions from the client (Decision of the Supreme Court of B-H, Pž. 614/88 of 30 December 1989).[7] In the same context, the court took the position that the commission agent was liable for damages to the client if they had failed to arrange for or exercise the right to a penalty under the contract concluded on

6 Pravo i privreda, No. 6-78, p. 62, quoted from [8, p. 176].

7 Informator, No. 3783, 9 June 1990, p. 5, quoted from [8, p. 175].

client's behalf (Decision of the Supreme Court of B-H, Pž. 296/87 of 24 March 1988; Decision of the Supreme Court of B-H, Pž. 564/89 of 14 June 1990)[8], and that the commission agent, as a specialised agency and an expert in the profession, must not act in strict compliance with the client's instructions, but instead should have warned the client if they had known that the collection from the buyer was uncertain (Decision of the Supreme Court of B-H, Pž. 65/86 dated 18 March 1987).[9]

In the same way as the intermediary and the commission agent, in all transactions undertaken by the commercial agent with regard to the interests of their principal, the commercial agent is also obliged to act with the care of a good businessman (Art 797, Para 1) and is liable for damages to their principal if they should fail to act in the described manner.

In addition to contracts with commercial agents, the Law calls for the care of a good businessman in other contracts of trade services, such as the forwarding contract where the forwarding agent is required to act in line with the interest of the principal and with the care of a good businessman at all times (Art 832), whilst being liable for the choice of the carrier (Art 834), and the contract of control of goods and services where the controller is obliged to perform the agreed control in a professional and impartial manner (Art 847, Para 1).

There are instances where the Law explicitly provides for the care of a good expert in contract performance. This is the case with transportation contracts where the carrier is liable for the losses sustained by the passenger due to delay, unless the cause of delay was impossible to eliminate by exercising the care of a good expert (Art 683, Para 2); contracts of organisation of travel where the travel organiser, even though the services are performed in accordance with the contract and applicable regulations, is liable for loss sustained by the traveller in relation to performance of such services, unless they may prove that they acted as a careful travel organiser in making their choice of persons performing such services (Art 868, Para 2); contracts of lodging securities where the bank is obliged to ensure safekeeping of securities with the care required from the depositary against a fee and to take all actions on behalf of the depositor necessary for preserving and exercising their rights under the securities (Art 1049, Para 1), etc.

Establishing the level of care under the above standards is important for determining the obligor's liability for a breach of contract and, above all, liability for loss [13, pp. 468-479]. The party that failed to act with the required level of care may be released from liability only under the general conditions provided by the Law for obligor's release from liability. Under those provisions, the obligor is released from the liability for loss if they can prove that their non-performance, or delay in performance, was the result of the circumstances they were unable to prevent, eliminate or avoid, arising after the conclusion of the contract (Art 263). Assessment of the exercise of the required level of care in a given case is also important for a possible rescission of the contract due to a material mistake, permissible by the Law, which provides that the party entering into contract on the basis of material mistake may request rescission, unless in entering the contract it failed to act with the level of care required in the sphere of trade (Art 61, Para 2). The level of required care is also relevant for determining the degree of guilt in subjective liability for loss and other cases raising the issue of the conduct of parties to an obligation relation.

Joint and several liability

Specificities of the rules relevant to commercial contracts are particularly conspicuous in the domain of joint and several liability where the Law provides for the assumption of joint and several liability in an obligation with multiple debtors created by a commercial contract and in case of surety's liability for an obligation under a commercial contract.

The assumption of joint and several liability in an obligation with multiple debtors arising out of a commercial contract. Before the subject of the assumption of joint and several liability is dealt with, the notion of divisible obligation with multiple debtors and creditors will be outlined in general terms. The Law of Obligations defines divisible

8 Informator, No. 3660, 5 April 1989, p. 7, Privredno pravni priručnik, No. 12/90, p. 53, quoted from [8, p. 175].

9 Privredno pravni priručnik, No. 11/97, p. 65, quoted from [8, p. 175].

obligations as follows: "an obligation shall be divisible if that which is owed can be divided into and fulfilled in parts having the same properties as the whole object and if that which is divided should lose nothing in value by virtue of such division; otherwise, the obligation shall be indivisible. When multiple debtors exist in a divisible obligation, such obligation shall be divided between them in equal shares, unless a different kind of division is agreed, and each shall be liable for their share of the obligation" (Art 412, Paras 1 and 2). In contrast, indivisible obligations with multiple debtors are governed by the provisions on joint and several obligations (Art 435). This definition points to several important elements which need to exist cumulatively for an obligation to be divisible: firstly, debt can be divided (divisible obligation) or cannot be divided (indivisible obligation); secondly, parts must hold the same properties as the whole; thirdly, division does not diminish the value of the object. Such and similar definitions of divisible and indivisible obligations [11, pp. 465-481] may also be found in comparative law [14, pp. 75-87]. In other words, general rule of the law of obligations stipulates that in obligations involving multiple debtors or creditors the claims or debts between them are divided, so that each creditor can demand payment of only their part of the claim and each debtor owes only their part of the debt [5, p. 20ff]. In this kind of obligation, the entire claim or entire debt is divided into as many separate obligations as there are creditors or debtors.

However, the Law of Obligations recognises an important exception to this rule in providing for the assumption of joint and several liability in cases involving multiple debtors in a divisible obligation arising from a commercial contract. Under the Law, if multiple debtors exist in a divisible obligation arising from a commercial contract, they are jointly and severally liable to the creditor, unless the contracting parties have explicitly eliminated joint and several liability (Art 413). This is passive solidarity, with each debtor being liable to the creditor for the entire obligation (all for one, one for all) [20, pp. 920-933], [3, pp. 234-236]. Creditor may, at their option, claim full or partial payment from any debtor or all debtors together until the creditor's claim is fully settled. When one of joint and several debtors meets the obligation in full, the obligation ceases to exist and all debtors are released. A new debtor-creditor relation is created between the debtor who has paid off the debt in full and other joint and several debtors, where former is entitled to claim recovery of their respective shares of debt from co-debtors based on the rules of their mutual relationship. If certain shares of the joint and several debt are not agreed, nor can be determined based on the legal relations existing between debtors, the obligation is divided into equal shares. However, if the joint and several obligation of debtors was stipulated solely in the interest of one debtor, such debtor is bound to redeem the entire amount of the obligation in favour of the debtor who paid off the creditor. A share being in the charge of the debtor unable to provide recovery is distributed commensurately to the remaining debtors.[10] In contrast to the solution accepted in commercial contracts, the legal assumption of joint and several liability does not exist in classic civil law contracts.

Consequently, joint and several obligations are based on the derogation of the general rule on divisibility of claims or debts. Such derogation is often achieved by the agreement of contracting parties which can provide, in each given case, that the creditors may demand collection of the claim jointly and severally (active solidarity) and that the debtors may be jointly and severally liable (passive solidarity). However, where parties to an obligation relation with multiple creditors or debtors have made no provisions as to the way the liability is discharged, the answer to the question whether creditors demand performance or whether debtors render performance of a divisible or a solidary obligation is determined by appropriate rules contained in the law or another source of law applicable to the given legal relation, and hinges primarily on the assumption of joint and several liability. It may therefore be inferred that one of the main reasons for drawing a distinction in the law between divisible and solidary obligations with multiple debtors and creditors is a response to the need to determine the way in which multiple debtors in one and the same obligation relation are liable for the fulfilment of the obligation, when parties to the obligation relation have not provided for it, i.e. when it may not be established how the debtor's liability is to be discharged based on the nature of the transaction,

10 See Arts 413-424 of the Law of Obligations.

customs and other circumstances relevant to the case at hand. This is determined by the existence or absence of the legal assumption of joint and several liability in a passive obligation involving a plurality of debtors [14, pp. 118-119].

With regard to the assumption of joint and several liability in contractual obligations from the aspect of comparative law, national legal systems may be divided into three categories. The first category comprises those which adopted the general assumption of joint and several liability, applicable unless otherwise envisaged by the contract or law. This solution is adopted, for example, in the German Civil Code which stipulates that when more than one person jointly bind themselves by contract to render divisible performance, then, in case of doubt, they are liable as joint and several debtors.[11] A similar solution was adopted in the Italian law where the Civil Code stipulates that co-debtors are jointly and severally liable unless otherwise provided in the law or contract,[12] as well as in the laws of the Scandinavian countries [10, p. 65]. The second group of legal systems includes those which do not accept the assumption of joint and several liability in contractual obligations, thus, there is no joint and several liability of debtors, unless otherwise provided for. A typical example of this solution is the Spanish Civil Code, stipulating that joint and several liability is not assumed in obligations involving multiple creditors or debtors and that such liability will exist only if expressly provided for (Arts 1.137 and 1.138). Furthermore, the assumption of joint and several liability is not accepted in the Dutch Civil Code, which lays down that when performance is owed by two or more debtors jointly, each of them is liable for an equal part, unless it may be inferred from law, common practice or a judicial decision that they are liable for unequal parts and that they are jointly and severally liable (Art 6:6.1). The assumption of joint and several liability is likewise not accepted in the Swiss Code of Obligations, which explicitly sets forth that debtors become jointly and severally liable for a debt by declaring that each of them wishes to be individually liable for performance of the entire obligation; without such declaration, debtors are jointly and severally liable only in the cases specified by the law (Art 143).[13] Finally, the legal systems comprising the third group draw a distinction, with respect to passive solidarity, between civil law contracts and commercial contracts, acknowledging this assumption for the latter, but not for the former. Such solution, as already explained, is accepted in the Serbian Law of Obligations [14, pp. 119-121].

The above differences in solutions with regard to the existence of assumption of passive solidarity in comparative law are particularly important in legal relations of international character. When it comes to contractual liability, the way in which multiple debtors discharge liability in the same obligation relation depends primarily on what is foreseen by the contract. Only if the contract does not foresee anything to that effect or if circumstances of the case in hand or the nature of the transactions do not help to determine it will the appropriate rules of applicable law be invoked, depending on whether (and under what conditions) the assumption of passive solidarity is accepted. It is therefore necessary that the contracting parties, in concluding contracts of international character, should become carefully acquainted with the rules of the applicable law and, in case of a plurality of debtors in the same contract, devote special attention to the solutions relating to the assumption of passive solidarity; if the relevant rule of applicable law does not suit their interests in the given case, contracting parties should provide for this issue in the contract using clear, precise and unambiguous wording, leaving no room for any doubts as to the manner of discharging debtor's liability [14, pp. 124-125].

Joint and several liability of the surety. In the legislation and doctrine of comparative law, suretyship is classified as subsidiary (common) suretyship and joint and several suretyship. In subsidiary suretyship, the creditor may pursue their claim against the surety only upon default of the debtor. In this kind of suretyship, the creditor must observe the mandatory order (*beneficium ordinis*) of claim recovery, attempting first to collect from the principal debtor, and only if recourse against the debtor is ineffective, seeking to recover against the surety. Otherwise, if the creditor would attempt to seek recourse against the surety without pursuing the principal debtor

11 German Civil Code, Art 427.

12 Italian Civil Code, Art 1294.

13 For comment on this rule, see [19, pp. 331-332].

first, the surety could invoke *beneficium excussionis sive ordinis* and thus thwart the creditor's claim [6, pp. 359-364]. On the other hand, in joint and several suretyship, the creditor may demand satisfaction for their claim from the principal debtor or the surety or both at the same time.

The traditional view recognises subsidiary suretyship as a rule and joint and several suretyship as an exception; thus, subsidiary suretyship is assumed, as a rule, while joint and several suretyship, being an exception, must be explicitly agreed, except in commercial contracts. Accordingly, the viewpoint adopted in the greatest number of countries with civil law tradition is that suretyship is subsidiary, unless otherwise agreed. This solution has been accepted in the Austrian Civil Code,[14] French Civil Code,[15] German Civil Code,[16] Dutch Civil Code,[17] Portuguese Civil Code,[18] Spanish Civil Code[19], etc. Some of these legal systems draw a distinction between the cases where surety is a civil law entity, with suretyship being subsidiary, and the cases where surety is a commercial entity, with the assumption of joint and several liability.[20] On the other hand, the Italian Civil Code adopts the general assumption of surety's joint and several liability.[21]

The Law of Obligations belongs to the laws which recognise subsidiary suretyship as a rule. Under the Law, surety may be requested to fulfil the obligation only after the principal debtor fails to perform within the time limit specified in a written notice, unless it is obvious that fulfilment cannot be effected against the principal debtor's assets or if the principal debtor has gone bankrupt (Art 1004, Paras 1 and 2).

Still, in addition to subsidiary, the Law also recognises joint and several suretyship. Thus, the Law provides for the assumption of joint and several liability for the obligations created by commercial contracts and lays down that the surety shall be liable as a surety and payer for an obligation arising out of a commercial contract, unless otherwise agreed (Art 1004, Paras 3 and 4). Furthermore, if the surety is bound as a surety and payer, they shall be liable to the creditor as the principal debtor for the entire obligation, and the creditor may demand performance thereof from the principal debtor or the surety or from both at once (joint and several suretyship). Joint and several liability also exists in case of co-suretyship, under the rule that several sureties to a specific debt are jointly and severally liable, irrespective of whether they undertook to stand surety jointly or each of them made an undertaking to the creditor separately, unless their liability is otherwise provided for in the contract (Art 1005). In that regard, joint and several liability of co-sureties may be created either by one joint contract of suretyship, based on which all co-sureties undertake jointly and severally to fulfil principal debtor's obligations, or by each of the sureties making an undertaking to the creditor separately. Finally, it is worth noting that the Law explicitly provides that the surety to one of multiple joint and several debtors may demand that any of them reimburse the surety for that which they had paid to the creditor, as well as the expenses (Art 1014).[22]

Contract of sale, loan contract, limitation periods

Differences between commercial and civil law contracts are particularly conspicuous in the rules relevant to the contracts of sale. In this context, it is first of all necessary to draw attention to the fact that in the Serbian legal system the contracts for international sale of goods are governed by the UN Convention on Contracts for the International Sale of Goods (CISG) of 1980,[23] when conditions for application

14 Arts 1355, 1351, Para 1.

15 Art 2288 (following reforms of 2006).

16 Art 771.

17 Art 7:855.

18 Art 638.

19 Art 1822.

20 For example, in Austrian, German, French and Portuguese laws.

21 Art 1944, Para 1.

22 For details, see [14, pp. 125-138].

23 The former Yugoslavia signed and ratified the CISG on 11 April 1980 and 27 March 1985, respectively. On 12 March 2001, the former Federal Republic of Yugoslavia declared the following: "The Government of the Federal Republic of Yugoslavia, having considered the Convention, succeeds to the same and undertakes faithfully to perform and carry out the stipulations therein contained as from April 27, 1992, the date upon which the Federal Republic of Yugoslavia assumed responsibility for its international relations". The Constitutional Charter of the State Union of Serbia and Montenegro (4 February 2003) provided for the transmission of all the rights and obligations of former Federal Republic of Yugoslavia to the State Union of Serbia and Montenegro (Art 63). Furthermore, the Charter stated that, in case of separation of Montenegro from the Union, all international documents shall be automatically taken over by the Republic of Serbia as the successor (Art 60.4). On the basis of these rules, the CISG has been in force in the Republic of Serbia since 27 April 1992. See [12, p. 415].

as defined in the Convention are met.[24] Although Art 1(3) of the Convention provides that neither the nationality nor the civil or commercial character of the parties or of the contract are to be taken into consideration in determining the application of the Convention, the Convention as a rule applies to commercial contracts since the rules of the CISG are largely tailored to this type of contracts. It is highlighted in the Commentary on the Convention that, because the scope of special rules for merchants is not uniformly defined on an international level and such distinction between commercial and private contracts and special rules for merchants is unknown in a number of legal systems, it was not possible to focus on merchants [18, p. 45]. In any case, the sphere of application of the CISG is restricted by Art 2 (a) which excludes purchases for personal, family or household use (consumer sales). Because of considerable differences between the Serbian Law of Obligations and the CISG (above all in the concepts of the fundamental breach of contract and non-conformity of goods, as defined in the CISG), the understanding of the rules of the CISG is of great importance for Serbian parties in international commercial contracts and for Serbian courts in resolution of international business disputes [12, p. 416].

With respect to the contracts of sale in the sphere of domestic law, the Law of Obligations provides for special rules pertaining to commercial sale in several places.

Thus, under the Law, if a contract of commercial sale does not stipulate the price, and there is not sufficient information therein based on which it could be stipulated, the buyer must pay the price otherwise regularly charged by the seller at the time of entering into contract or a reasonable price if there is no regular charge (Art 462, Para 2). Conversely, in case of non-commercial sale, the price must be stipulated in the contract of sale or the contract must contain sufficient information based on which it could be determined. A contract of non-commercial sale which lacks these elements has no legal effect (Art 462, Para 1). The CISG, which governs commercial sale, as noted above, stipulates a rule similar to that of Art, 462, Para 2 of the Law of Obligations. Under this rule, where a contract has been validly concluded, but does not expressly or implicitly determine or make provision for determining the price, in the absence of any indication to the contrary the parties are considered to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned (Art 55).

There is another significant difference between commercial and non-commercial sale relating to the time limits allowed to the buyer to notify the seller of any material defects. The Law provides that the buyer is obliged to inspect the thing received or have it inspected in the customary manner as soon as this is possible in the usual course of things. In commercial sale, the buyer is obliged, under pain of losing their rights, to notify the seller of any patent defects without delay, while in non-commercial sale the buyer may give such notice to the seller within eight days of discovering such defect (Art 481, Para 1). Identical difference in time limits is stipulated for notices given to the seller about latent defects (Art 482, Para 1). It is worth noting that in contracts for commercial sale, the notice of defects in goods is deemed to have been given to the seller without delay only if given the same day when the defect was established or the following day. It is held in the domestic court practice that the notice of defects is not given without delay if communicated to the seller on the third day from the day of establishing the defect [15, pp. 399-404]. It may therefore be inferred that the above short time limits in the Serbian law are strictly required and interpreted in cases of commercial sale.

The Law provides for other special rules for the contracts for commercial sale. Thus, if the seller of goods of a specific type delivers to the buyer a larger quantity than the one agreed, and the buyer fails to declare their refusal of the surplus within a reasonable time limit, the buyer is deemed to have accepted the surplus and must pay the same price for it. If the buyer refuses to accept the surplus, the seller must reimburse the buyer for the damage (Art 493); in case of a sale by sample or model under a commercial contract, if the goods delivered by the seller to the buyer do not conform to the sample or model, the seller will be liable under the regulations governing

24 For the CISG in general and for the sphere of its application, see [18, pp. 17-223], [9, pp. 21-207].

the seller's liability for material defects (Art 538); if the seller has concluded a contract of sale in the course of carrying out their regular economic activity, under the Law the place of delivery will be the seller's head office, unless otherwise agreed (Art 471).

In addition to contracts of sale, the Law also recognises specific rules for loan contracts and limitation periods in cases of commercial contracts. Thus, the Law provides that in commercial loan contracts the borrower owes interest even if this has not been stipulated (Art 558, Para 2). Be it noted that the domestic court practice holds that the administered default interest rate is mandatory in character and may not be changed by the contract [22, p. 67]. On the other hand, concerning the limitation periods, while the general statute-barring period is set at ten years, the Law provides for a special, shorter limitation period for claims under commercial contracts. Under the Law, mutual claims of legal persons arising out of contracts for sale of goods and services and the claims for reimbursement of expenses incurred in connection with such contracts become statute-barred after three years (Art 374, Para 1).

Pledge

Specific features of commercial contracts have a special place in the domain of pledge.[25] Depending on whether the security charge is a movable or immovable asset, we distinguish between the pledge on movable assets – possessory pledge, the pledge on movable assets in pledge registry – registered, non-possessory pledge and the mortgage which involves immovable assets. The right of pledge or mortgage may arise out of a legal transaction (contract or some unilateral legal transaction), court decision and the law. Thus, the legal theory differentiates between contractual, judicial and statutory pledge and mortgage. While contractual pledge and mortgage may be created only with debtor's agreement, the judicial and statutory pledge or mortgage occur independently of the debtor's will.

Statutory pledge arises directly out of operation of law. Unlike contractual pledge, whose creation requires a valid contract, as well as an appropriate manner of acquisition (delivery of the pledged object or registering with appropriate register), statutory pledge is created automatically once the requirements envisaged by the law are met. Statutory pledge on movable assets is entirely typical of commercial transactions. Thus, for example, the Law of Obligations lays down that the carrier has the right of pledge over the things delivered to them for transport or in relation to transport, effective as long as such things are in the carrier's possession or as long as the carrier holds documentation that allows the disposal thereof, in order to secure payment for the transport and the refund of the necessary costs incurred by the transport (Art 679). Along the same lines, the Law provides for the warehouser's right of pledge on goods for the claims deriving from the contract of warehousing and other claims arising from the storage of goods (Art 736, Para 2), statutory right of pledge of the commission agent on merchandise covered by the commission contract while in their possession or in the possession of someone holding it on their behalf or while holding the documentation that allows the disposal thereof (Art 786, Para 1), agent's right of pledge (Art 809), right of pledge of the person accepting the order (Art 763), etc.

On the other hand, contractual pledge – possessory pledge, registered pledge and contractual mortgage are governed by different laws in the legal system of Serbia.

Possessory pledge is governed by the Law of Obligations (Arts 966-996), which adopts some special rules for this type of pledge when it is created by a commercial contract. Under the general rules of the Law, the pledge creditor in the possessory pledge must go to court in order to recover their claim secured under the pledge. The pledge creditor may also be settled out of court, in cases as provided by the Law. This means that, as a rule, the pledge creditor needs to file an action against the debtor in civil court and demand claim settlement, and the final and enforceable judgement of the court enjoining the debtor to pay the debt is the enforcement order based on which the pledge creditor may enforce their claim through court. As a rule, the assets are sold in a public sale in the enforcement procedure. If, however, the asset has a stock-exchange or market price, the court will not order a public sale, but

25 For details of pledge and mortgage in the Serbian legal system and the comparative law, see [6, pp. 21-272].

issue an order that the asset be sold at its current price. On the other hand, if the assets were given in security against a claim arising from a commercial contract, the pledge creditor need not go to court and may sell the pledged asset in a public sale instead upon expiry of eight days' notice given to the debtor and the pledgor (when the debtor and the pledgor are not the same person). The pledge creditor must give timely notice of the date and place of sale to both persons. If pledged assets have a market or stock-exchange price, the pledge creditor may sell them at such price after eight days from sending notice to the debtor and the pledgor to that effect (Art 981).

The Law on Pledge of Movable Assets in the Pledge Registry[26] also adopts special rules for the pledge created by commercial contracts. In this type of pledge, the pledged asset remains in the possession of the pledgor, and the right of pledge is acquired by registering creditor's right in the Pledge Registry. In the first place, with regard to what may be stipulated in the contract, the Law provides different solutions depending on whether the pledgor is a commercial entity or a natural person. If the pledgor has capacity of a commercial entity, the pledge contract may provide that the pledgee is entitled to sell the object of pledge in an extrajudicial public sale when their claim is not settled upon maturity. If the object of pledge has a market or stock-exchange price, the pledge contract may stipulate that the pledgee is entitled to sell it or retain it at such price (Art 27). Conversely, if the pledgor is a natural person, the Law does not allow for the pledge contract to provide for a transfer of title of the pledged asset to the pledgee when their claim is not settled upon maturity or, indeed, for retention or sale of the object of pledge by the pledgee at a predetermined price - *lex commissoria* (Art 28). Furthermore, in the settlement procedure, when the pledgor is a commercial entity, the pledgee may undertake extrajudicial sale by public option, if so provided under the pledge contract. However, when the pledgor is a natural person, entering into pledge contract outside the course of carrying out their economic activity, this manner of extrajudicial sale may be agreed by the pledgee and the pledgor only at the moment of maturity of the pledgee's claim (Art 46). By the same token, the pledgee may sell the object of pledge in extrajudicial sale at market or stock-exchange price if so provided in the pledge contract, but when the pledgor is a natural person, entering into pledge contract outside the course of carrying out their economic activity, this manner of extrajudicial sale may be agreed only at the moment of maturity of the pledgee's claim (Art 47).

26 "Official Gazette of the Republic of Serbia", Nos. 57/2003, 61/2005, 64/2006 and 99/2011.

Conclusion

The foregoing analysis leads to the conclusion that the key distinctions between commercial and civil law contracts in Serbian legislation are reflected in the Law of Obligations which, although embracing the principle of uniform regulation of obligation relations, recognises certain specific rules pertaining to commercial contracts. These specific features are manifested first and foremost in the context of certain fundamental principles of the Law; some of these principles, such as the prohibition of creation and abuse of a monopoly position and the principle of application of fair business practices, by their very nature have a bearing only on commercial contracts, while the principle of informality achieves its full expression and effect in the very domain of commercial contracts. Furthermore, the very fact that commercial contracts are concluded in the sphere of trade and business relations in general gives rise to the assumption that these contracts are concluded as onerous contracts. Speaking of the rules pertaining to specific contractual relations, some of the most important features of commercial contracts include: duty of a higher level of care in commercial contracts, the assumption of joint and several liability in an obligation involving multiple debtors arising from a commercial contract and the assumption of joint and several liability of a surety for an obligation under a commercial contract, certain differences in regulations governing contracts of sale, the assumption of interest in commercial loans, as well as shorter limitation periods for the claims arising from commercial contracts. Special rules for commercial contracts are also noticeable with regard to the right of pledge, both in the Law of Obligations and in other laws governing pledge.

Although the principle of autonomy of will, as one of the fundamental principles of the contract law, entitles the contracting parties to provide for their contractual relationship by mutual consent, it is worth noting that this freedom is not without limitations; it must always stay within the bounds of public order, mandatory rules and good faith. Consequently, the conclusion of commercial contracts and their successful performance require knowledge and proper understanding of the legal framework relevant for conclusion of contracts and of both mandatory and non-mandatory rules which are applicable to the contract unless otherwise agreed by the parties. It is in this light that the specific features of commercial contracts analysed in this paper should be viewed.

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