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Ugovori u privredi i prekomerno oštećenje – specifičnosti ugovora o osiguranju s obzirom na njegov aleatorni karakter

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Apstrakt

U većini država Evrope ugovori o privredi izuzeti su od primene instituta *laesio enormis* jer se od privrednika očekuje poseban nivo pažnje i stručnosti prilikom zaključivanja ugovora i procene vrednosti prestacija. U Zakonu o obligacionim odnosima je propisano da se lezija primenjuje i na ugovore u privredi, ali Prednacrt Građanskog Zakonika Republike Srbije predviđa da se zbog nesrazmere uzajamnih davanja ne može tražiti poništenje privrednih ugovora. Zakonodavac je takođe eksplicitno isključio primenu pravila o prekomernom oštećenju i kada je reč o aleatornim ugovorima. Istovremeno, pravila o leziji se primenjuju na potrošačke ugovore kao jedan vid zaštite slabije ugovorne strane. S obzirom na specifičnu prirodu ugovora o osiguranju koji predstavlja jedan vid potrošačkih ugovora, ali i sporna shvatanja o tome da li je pravna priroda ovog ugovora suštinski aleratorna, u ovom radu najpre vršimo pregled i detaljnu analizu argumenata za oprečne stavove o opravdanosti primene instituta lezije na ugovor o osiguranju. Kao zaključak potom dajemo i naš odgovor na to pitanje, potkrepljen adekvatnom pravnom argumentacijom.

Ključne reči: ugovor o osiguranju, prekomerno oštećenje, ugovori u privredi, potrošački ugovori, aleatornost

1. OPREČNA SHVATANJA O OPRAVDANOSTI PRIMENE INSTITUTA *LAESIO ENORMIS* NA UGOVORE U PRIVREDI

Prekomerno oštećenje je jedan od najznačajnijih instituta zaštite načela ekvivalentnosti uzajamnih prestacija. U literaturi ne postoji jedinstven stav o opravdanosti njegove primene na ugovore u privredi.[1] U tekstu koji sledi navešćemo argumente za i protiv primene instituta prekomernog oštećenja na ugovore o privredi, analiziraćemo ih, iskazati stav o njihovoj osnovanosti i naposletku utvrditi i objasniti naše stanovište o ovom pitanju. Potom ćemo se posvetiti analizi specijalnog položaja ugovora o osiguranju, ispitati da li je on po svojoj prirodi aleatoran ugovor, te utvrditi na koji način je regulisana primena pravila o leziji kad je reč o ovoj vrsti ugovora.

1.1. Argumenti protiv primene instituta prekomernog oštećenja kada je reč o privrednim ugovorima

U većini građanskih zakonika evropskih zemalja institut prekomernog oštećenja primenjuje se na građanskopravne, ali ne i na ugovore u privredi (Salma, 2010, 40). Stoga Salma navodi da bi domaći zakonodavac trebalo da se ugleda na brojna rešenja iz strane legislature, po kojim se ovaj institut ne primenjuje na privredne ugovore (Salma, 1977, 282). Obrazloženje ovakvog stava jeste da se od privrednika očekuje poseban nivo pažnje i stručnosti prilikom zaključivanja ugovora i procene vrednosti prestacija (Bikić, 2011, 89). Takav stav je zauzimao i Konstantinović (Dabić Nikiće-

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[1] Termin „privredni ugovori" u domaćem pravu se koristi paralelno sa terminom „trgovinski ugovori". U uporednoj legislaturi nailazi se i na termin „preduzetnički ugovori". U domaćoj teoriji se povremeno nailazi na stav po kome naziv „trgovinski ugovori" više odgovara njihovoj suštini. Obrazlaže se da je reč o ugovorima izvan javnog prava jer se u sistemu tržišne privrede, kakva je danas i srpska, posluje privatnim kapitalom, a ne društvenim kako je to bio slučaj u bivšoj Jugoslaviji u kojoj je termin „privredni ugovori" i skovan. (videti: Salma, 2010). Kako je naziv „privredni ugovori" prilično odomaćen kako u našoj teoriji, tako i u praksi, smatramo da je njegova upotreba i dalje sasvim opravdana. Takav naš stav je dodatno potkrepljen time što je i u Nacrtu novog Zakona o obligacionim odnosima zadržan termin „privredni ugovori", što je jasan znak da će isti još izvesno vreme ostati u upotrebi u domaćem pravu.

vić, 2022, 540), te se u Skici za zakonik o obligacijama i ugovorima (1996, čl. 107, stav 5) navodi da kad je reč o primeni oštećenja preko polovine (objektivno shvaćen institut prekomernog oštećenja) „zbog ove nesrazmere ne može se tražiti poništenje ugovora u privredi, aleatornih ugovora kao ni javnih prodaja."

U članu 18, stav 1 Zakona o obligacionim odnosima iz 1978. godine (dalje: ZOO) je načinjena razlika između strane u klasičnom građanskom ugovoru od koje se zahteva da u izvršavanju svoje ugovorne obaveze postupa sa pažnjom „dobrog domaćina" i ugovarača u privrednom ugovoru koji je u izvršavanju svoje obaveze dužan da postupa sa pažnjom „dobrog privrednika." Stavom 2 istog člana je propisano da je strana u obligacionom odnosu dužna da „u izvršavanju obaveze iz svoje profesionalne delatnosti" postupa sa pažnjom dobrog stručnjaka (ZOO, čl. 18). Iz navedenih odredbi, jasno je da se od ugovorne strane u privrednom ugovoru zahteva da postupa sa većom obazrivošću, stručnošću i uopšte sa višim standardom pažnje.

Drugim rečima, očekuje se da privrednopravne ugovore zaključuju lica kojima je poznata kako vrednost činidbe, tako i vrednost protivčinidbe, te se smatra da su dužni da vode računa o ekvivalentnosti istih (Loza, 1970, 52). Pored toga, s obzirom na masovnost privredno – pravnog prometa velika odstupanja u vrednosti između prestacija ne mogu proći nezapaženo i mogu biti samo rezultat volje ugovornih strana. Tako, nije retka pojava da poslovne organizacije prodaju određenu količinu robe ispod tržišne cene sa ciljem da privuku kupce, povećaju svoju konkurentnost na tržištu ili prosto da se oslobode robe od koje mogu imati štetu (primera radi, jer joj uskoro ističe rok trajanja ili je reč o prodaji tehnologije koja postaje zastarela i ukoliko se ne proda u kratkom roku ispod cene velike su šanse da uopšte neće moći da se unovči).

U tom kontekstu je interesantna presuda Privrednog apelacionog suda, (Pž 2243/2015) doneta 22. 10. 2015. godine u kojoj se navodi da se na prekomerno oštećenje, kao razlog rušljivosti ugovora, oštećena strana „može pozivati samo ako u vreme zaključenja ugovora za pravu vrednost nije znala niti je morala znati, što je uslov koji je ovde nije ostvaren imajući u vidu proceduru zaključenja ugovora, kao i činjenicu da se radi o ugovoru u privredi, te da su ugovorne strane privredni subjekti koji kao dobri privrednici, odnosno dobri stručnjaci svakodnevno zaključuju ugovore, pa se ne može smatrati da su prilikom zaključenja ugovora bile u zabludi u pogledu vrednosti uzajamnih davanja". Ovaj primer iz sudske prakse ilustruje upravo uverenje sudova da ugovorne strane prilikom zaključivanja ugovora u privredi postupaju sa posebnim stepenom pažnje i da kako je reč o ugovorima koje sklapaju svakodnevno u okviru svoje poslovne delatnosti vrlo retko može doći do uslova za primenu instituta prekomernog oštećenja koji se ogleda u nepoznavanju prave vrednosti prestacija, odnosno zablude o istoj.

Takođe, ponekad između privrednih subjekata postoji sporazum o dugoročnoj međusobnoj saradnji. U skladu sa tim, iako u pojedinačnim ugovorima u prometu vrednost prestacija nije usklađena, ekvivalentnost prestacija je evidentna u ukupnom zbiru ostvarenih razmena i kada se „podvuče crta" svih zaključenih ugovora (Salma, 1977, 280).

Stav da institut lezije ne treba primenjivati na ugovore u privredi pravda se i činjenicom da je u privredno – pravnom prometu snažno izražena aleatornost, kao i principi pravne sigurnosti, te savesnosti i poštenja. Ističe se da bi primena pravila o prekomernom oštećenju u privrednoj sferi usporila i otežala promet, koji po prirodi stvari mora biti brz, efikasan, dinamičan i raznovrstan. Naglašava se da je načelo *pacta sunt servanda* jedno od najvažnijih načela obligacionog prava (Radivojević, 1983, 349) kojim je prožet čitav ZOO, a da je u skladu sa tim načelom da se ugovori održe na snazi onda kad je to moguće, što naročit značaj može da ima za ugovore u privredi (Loza, 1970, 46–50; Salma, 1976, 1–25).

1.2. Argumenti u prilog primene instituta prekomernog oštećenja kada je reč o privrednim ugovorima

Nasuprot napred navedenom, u delu pravne teorije nailazi se na decidan stav da izuzeće privrednih ugovora od primene pravila o prekomernom oštećenju ne bi trebalo prihvatiti. Obrazloženje ovakvog stava jeste u tome da suština instituta *laesio enormis* leži upravo u zaštiti oštećene strane. Stoga, ne bi trebalo biti od značaja u kojoj sferi je ugovor zaključen, već treba postupati u skladu sa načelom pravičnosti koje je jedno od osnovnih i sveprožimajućih načela ugovornog prava.

Salma (2010, 41) kao zastupnik navedenog shvatanja navodi kao argument i činjenicu da se kako u domaćoj, tako i u uporednoj legislaturi, svi ostali instrumenti zaštite načela ekvivalencije u ugovornom pravu jednako primenjuju i na građanskopravne i na privredne ugovore, te da ni pravila o leziji ne bi trebala da budu izuzetak.

Iako u inostranom pravu preovladava rešenje po kom su ugovori u privredi izuzeti od primene pravila o leziji (jedan od primera jeste i hrvatski Zakon o obveznim odnosima, 2022, čl. 375, st. 5), ima i drugačijih primera i to u zemljama koje su poznate po izuzetno razvijenoj trgovini i razmeni.Tako se u Holandiji, koja je već vekovima trgovinska velesila i čija ekonomija znatnim delom počiva upravo na uspešnom posredovanju i

brzom i sigurnom prometu roba i usluga, institut prekomernog oštećenja primenjuje i na ugovore u privredi, doduše sa izvesnim ograničenjima koja za cilj imaju neutralisanje ili bar ublažavanje eventualnih negativnih efekata u vidu usporavanja prometa ili njegove destabilizacije. *Laesio enormis* se stoga u Holandiji ne primenjuje na one ugovore o kupoprodaji kod kojih vrednost stvari nije izvesna, a sama kupovina je spekulativne prirode (tzv. „kupovina nade" – *emptio spei*). Primer bi bilo zaključivanje ugovora o kupoprodaji budućeg prinosa sa neke njive ili pak kupovina nekog zemljišta jer se veruje da je ono bogato mineralima (Van den Bergh, 2012, 47).

Najvažniji uslov za primenu pravnog instituta lezije jeste da ugovorna strana koja se na nju poziva u privrednim ugovorima nije znala za disproporciju između vrednosti robe i za nju plaćene cene (Van den Bergh, 2012, 47). Prema tome, zahteva se postojanje subjektivnog elementa na strani oštećenog ugovarača.

Zanimljiv stav, vrlo sličan onom koji prevladava u Holandiji, nailazimo i u domaćoj sudskoj praksi. Naime, sud je i u vreme kad je na snazi bilo čisto objektivno shvatanje instituta *laesio enormis* smatrao da kod ugovora u privredi mora biti dokazano i postojanje subjektivnog elementa ovog instituta. Tako je Vrhovni privredni sud u svojoj odluci Sl. 491/58 od 6. novembra 1959. godine obrazložio: „Događa se da neka privredna organizacija iz posebnih svojih razloga plati za neku stvar dvostruko više nego što ona vredi, odnosno da je proda ispod polovine svoje vrednosti. U takvom slučaju ne može ona taj posao pobijati zbog oštećenja preko polovine, pozivajući se jedino na objektivnu činjenicu da je oštećena za toliko.To nije dovoljno. Da bi uspela sa zahtevom za pobijanje, stranka mora dokazati povrh te činjenice još i subjektivni momenat na strani saugovarača, i to činjenice koje se protive dobrim običajima u privredi."

Takav stav suda je, očekivano, naišao na kritike. Tako, Carić ističe da je pravno stanovište po kom je objektivna okolnost oštećenja preko polovine uz druge pravno relevantna činjenica za privredno-pravni promet suprotno osnovnim principima privrednog prometa. Isti autor smatra da je stav Vrhovnog suda o subjektivnom elementu lezije u privredno-pravnom prometu „proizvoljan", te zaključuje da „specifičnosti privrednog poslovanja derogiraju institut oštećenja preko polovine u svim njenim oblicima" (Carić, 1979, 51). Ovakvo shvatanje je u skladu sa njegovim načelnim stavom o izuzeću primene instituta prekomernog oštećenja na ugovore u privredi, ali sama sudska odluka koju smo citirali dokaz je toga da je suprotan stav bio i te kako zastupljen, kako u teoriji, tako i u praksi tog doba.

Na osnovu navedenog, jasno je da postoje vrlo validni argumenti za primenu pravila o prekomernom oštećenju na ugovore u privredi, koji se odnose na ravnopravnost ugovornih strana, pravnu sigurnost ali i pravičnost. Naš stav o tome da li smatramo da su dovoljno ubedljivi iskazaćemo u daljem izlaganju.

2. PRIMENA PRAVILA O PREKOMERNOM OŠTEĆENJU NA UGOVORE U PRIVREDI U ZOO I PREDNACRTU GRAĐANSKOG ZAKONIKA REPUBLIKE SRBIJE

U ZOO prihvaćeno je stanovište po kom se pravila o prekomernom oštećenju primenjuju bez razlike na ugovore u privredi. U pitanju je rešenje (Kapor, 1979, 17) kojim je, kako se u teoriji navodi, „načelo jednake vrednosti davanja dobilo novu sadržinu i širi domašaj primene" (Milošević, 1978, 36). Sudska praksa je taj stav dosledno primenjivala, uključujući tu i pravila o nemogućnosti poništenja sudskog poravnanja (ZOO, čl. 1094).

Međutim, u novijoj literaturi se ističe da bi privredne ugovore trebalo izuzeti od primene instituta lezije (Dabić Nikčević, 2022, 558), osim ukoliko je reč o onim privrednim ugovorima koje fizička ili pravna lica koja obavljaju privrednu delatnost zaključe van svoje registrovane delatnosti. Razlozi koji se navode se uglavnom svode na stručnost privrednih subjekata i njihovu obazrivost prilikom zaključivanja predmetnih ugovora, što oni čine svakodnevno i u velikom broju u okviru svoje delatnosti i u vezi sa prometom roba i usluga (Bikić, 2011, 89).

Čini se da je srpski zakonodavac saglasan sa navedenim stavom moderne pravne teorije. Tako se u Prednacrtu Građanskog Zakonika Republike Srbije (2019, čl. 273, st. 5) eksplicitno navodi da se zbog nesrazmere uzajamnih davanja ne može tražiti poništenje privrednih ugovora. Interesantno je da Prednacrt prihvata objektivnu koncepciju instituta prekomernog oštećenja, te predviđa mogućnost da se zahteva poništaj ugovora zbog oštećenja preko polovine u roku od godine dana od dana njegovog zaključenja ako između obaveza strana ugovornica u dvostrano-obaveznom ugovoru postoji u vreme zaključenja ugovora tolika nesrazmera, da ono što je jedna strana primila ili treba da primi od druge strane ne predstavlja ni polovinu vrednosti onoga što je ona dala drugoj strani, ili se obavezala dati ili učiniti (Prednacrt Građanskog Zakonika Republike Srbije, 2019, čl. 273, st. 1). Drugim rečima, ne zahteva se više postojanje subjektivnog elementa instituta prekomernog oštećenja. Ukoliko ovakvo rešenje bude usvojeno, primena instituta u praksi će biti pojednostavljena,

ali ostaje otvoreno pitanje elastičnosti i prilagodljivosti navedenog instituta (Slijepčević, 2013, 119). Upravo je objektivno postavljanje kriterijuma za primenu instituta lezije dodatan argument za izuzimanje ugovora u privredi od primene pravila o prekomernom oštećenju. Naime, kako ističe Krulj, ukoliko zakonodavac ne bi postavio ograničenje primene lezije u vidu toga da oštećena strana za pravu vrednost prestacije nije znala niti morala znati, primena instituta prekomernog oštećenja na ugovore u privredi ne bi se mogla zamisliti (Krulj, 1980, 361).

Izuzimanje ugovora u privredi od primene instituta prekomernog oštećenja nam se čini opravdanim i celishodnim rešenjem. Pre svega, na taj način se postupa u skladu sa osnovnim načelima obligacionog prava, poput pravne sigurnosti, pravičnosti, načela savesnosti i poštenja i ravnopravnosti stranaka. Takođe, insistiranjem da su privredni subjekti dužni da prilikom zaključivanja ugovora postupaju sa posebnim stepenom pažnje i da poseduju posebna znanja koja se u ovakvim slučajevima primenjuju radi utvrđivanja vredmosti prestacije, podiže se stepen pravne sigurnosti i efikasnosti pravnog prometa. Izuzetak bi, prema našem mišljenju, trebalo da predstavljaju ugovori koje je privredni subjekt zaključio van svoje redovne delatnosti jer se u tim slučajevima ne radi o ugovorima čije zaključivanje predstavlja deo svakodnevnog profesionalnog postupanja privrednih subjekata, niti o materiji u kojoj oni imaju specijalno, stručno znanje.

3. POSEBNA PRAVILA U VEZI SA PRIMENOM INSTITUTA PREKOMERNOG OŠTEĆENJA NA UGOVOR O OSIGURANJU

3.1. Argumenti protiv primene pravila o prekomernom oštećenju na ugovor o osiguranju

Već u prva dva člana Glave XXIX – O ugovorima odvažnim ili na sreću Srpskog građanskog zakonika iz 1844. godine bili su definisani navedeni ugovori i istaknuto zajedničko pravilo po kojem je zabranjeno poništenje ugovora na sreću zbog prekomernog oštećenja („oštećenje preko polovine") (Jovanović, 2022, 14). Slično tome, Zakon o obligacionim odnosima izričito propisuje da se zbog očigledne nesrazmere uzajamnih davanja ne može tražiti poništenje ugovora na sreću, javne prodaje, kao ni onda kad je za stvar data viša cena iz osobite naklonosti (ZOO, čl. 139, st. 5). Ovakvo rešenje nije usamljeno – primena instituta prekomernog oštećenja kod istih vrsta ugovora, isključena je, primera radi, i u Austrijskom građanskom zakoniku (Carić, 1962, 10), a takvo rešenje, kako smo pomenuli, sadrži i Skica za zakonik o obligacijama i ugovorima (1996, čl. 107, st. 5).

Kada je reč o aleatornim ugovorima, ovakvo postupanje zakonodavca je razumljivo ako se ima u vidu da u momentu njihovog sklapanja nije poznato za koju od ugovornih strana će nastati pravo a za koju obaveza i u kojoj visini odnosno ko je poverilac, a ko dužnik. Takođe nije poznato kakav će biti odnos tih obaveza, kao ni vrsta, količina ili kvalitet činidbe (Mijačić, 1990, 174). Sve to zavisi od nastupanja nekog neizvesnog događaja. Stoga se u teoriji ističe da je u aleatornim ugovorima „apsolutno nemoguće" odrediti vrednost prestacije, odnosno da li će postojati nesrazmera između uzajamnih davanja. Stoga sama priroda ugovora na sreću podrazumeva svestan pristanak ugovornih strana da ugovor za rezultat ima upravo takvu nesrazmeru (Mijačić, 1990, 174), pri čemu ishod ne zavisi od volje ugovornih strana već od nekog budućeg nepredvidivog događaja. Drugim rečima, rizik je ravnomerno raspoređen među ugovornim stranama (Menyhard, 2003, 308). Usled neizvesnosti koja im je inherentna, na takve ugovore se ne primenjuje načelo jednakih davanja (Cvetković, 2008, 196; Vizner, 1978, 89).

Zbog svega navedenog važi pravilo da „alea isključuje leziju" (Kovač, 1980, 14), odnosno da se kod ove vrste ugovora ne može pozivati na prekomerno oštećenje (Perović, 1995, 280).

Pitanje koje se nameće jeste da li se institut prekomernog oštećenja može primeniti na ugovor o osiguranju, kao specifičan ugovor u privredi? U tom smislu je važno najpre ustanoviti da li je ugovor o osiguranju aleatoran. O tome postoje oprečna mišljenja.

Jedan deo pravne teorije smatra da je ugovor o osiguranju po svojoj prirodi aleatoran (Uzelac, 2011, 98). Naime, ugovor o osiguranju je ugovor kod kojeg se jedna ugovorna strana zvana ugovarač osiguranja ili osiguravač obavezuje da plati određenu premiju osiguranja, prema uslovima utvrđenim ugovorom, dok druga ugovorna strana, osiguranik – preuzima obavezu da ako nastupi dogadaj koji predstavlja osigurani slučaj isplati ugovaraču osiguranja ili nekom trećem licu ugovorenu svotu, ili da učini nešto drugo (Šalaj, 2006, 32).

U skladu sa navedenom definicijom, jedan od konstitutivnih elemenata ugovora o osiguranju je upravo rizik, odnosno budući neizvestan štetan (npr. propast osigurane stvari) ili koristan događaj (npr. dobitak na lutriji) koji može nastati bilo usled prirodnih događaja ili zbog postupanja ljudi (Bikić, Grgić, 2018, 157). Kad se rizik ostvari, govorimo o nastupanju osiguranog slučaja (Bikić, Grgić, 2018, 168). Aleatornost ugovora o osiguranju se ogleda u tome što se on zaključuje s obzirom na budući događaj, koji nije nastupio, a koji mora biti neizvestan, nezavisan od volje ugovarača i čije

je osiguranje dopušteno zakonom, javnim poretkom i moralom (Šalaj, 2006, 38). U tom smislu razlikujemo situacije kad nije izvesno da li će događaj uopšte nastupiti (mogućnost njegovog nastupanja postoji, ali ne i izvesnost) i kad je izvesno da će događaj nastupiti, ali ne i kada (npr. u slučajevima osiguranja života određene osobe).

Zaključak o aleatornoj prirodi ugovora o osiguranju proističe iz toga što u momentu zaključivanja ovog ugovora osiguranik ne zna da li će izgubiti plaćenu premiju ili pak dobiti naknadu iz osiguranja koja je znatno viša po vrednosti od uplaćene premije. Osiguravač, sa druge strane, ne zna da li će naplatiti premiju bez obaveze da za nju plati bilo kakvu protivvrednost, ili će pak morati osiguraniku platiti naknadu iz osiguranja čime bi bio u finansijskom gubitku (Šalaj, 2006, 36).

Ukoliko prihvatimo stav po kome je ugovor o osiguranju suštinski aleatoran ugovor, čini se nepobitnim da zakon eksplicitno isključuje primenu pravila o prekomernom oštećenju na isti.

3.2. Argumenti za primenu pravila o prekomernom oštećenju na ugovor o osiguranju

Oprečno je shvatanje po kojem se negira aleatorna priroda ugovora o osiguranju i ističe njegova komutativnost. Zastupnici ovakvog shvatanja negiraju postojanje bilo kakvih elemenata neizvesnosti na strani kako osiguranika, tako i osigurača. Osiguranik je svestan da ako ne nastupi osigurani slučaj gubi premiju, ali mu je ta činjenica bila unapred poznata i na to je i pristao. Nasuprot njemu, osiguravač je zahvaljujući zakonu velikih brojeva uvek na dobitku, čime je efektivno isključena alea (Šalaj, 2006, 36). Aleatornost ugovora o osiguranju bi se, prema ovim autorima, eventualno mogla priznati samo ako se posmatra pojedinačni posao osiguranja u kom je pozicija osigurača nesigurna i nije izvesno da li će dobiti ili izgubiti novac (Šalaj, 2006, 36).

Dodatni argument u korist primene prekomernog oštećenja kao jednog vida ograničenja slobode ugovaranja kod ugovora o osiguranju nalazimo u tome što se u novijoj literaturi ističe da je sloboda ugovaranja kod ovog tipa ugovora višestruko ograničena, pa i usmerena (Petrović Tomić, 2020, 101). Naime, zbog prirode ugovora o osiguranju i tipične potrošačke pozicije strane koja pribavlja uslugu osiguranja intervencija zakonodavca u ugovorni odnos osiguranja je znatno veća nego kod drugih ugovora (Petrović Tomić, 2020, 103). U ovom kontekstu je značajno naglasiti da ugovori o osiguranju spadaju u potrošačke ugovore kod kojih se uzima u obzir neukost osiguranika i u skladu sa pravilima o zaštiti slabije ugovorne strane oni uživaju posebnnu sudsku zaštitu (Petrović Tomić, 2020, 105).

U ZOO nema odredbi o pojmu potrošača, niti o pojmu potrošačkog ugovora, iako postoje određene odredbe kojim se pruža pravna zaštita slabijoj ugovornoj strani (Mihajlović, 2015, 488). Najčešća definicija potrošačkih ugovora jeste da je da je reč o ugovoru između trgovca i potrošača (Mihajlović, 2015, 489), koji se zaključuje na osnovu opšteg uslova trgovca o kojim potrošač nema mogućnost da pregovara (Đurđević, 2007, 671).

Eksplicitnim, zasebnim regulisanjem potrošačkih ugovora potrošačima se kao posebnoj kategoriji pruža dodatna zaštita i uvažavaju specifičnosti njihovog položaja u pravnom prometu. U Srbiji je prvi korak u tom pravcu načinjen donošenjem Zakona o zaštiti potrošača 2021. godine, koji predstavlja *lex specialis* u odnosu na opšta rešenja ZOO kada je o ovoj materiji reč (Zakon o zaštiti potrošača, čl. 3, st. 7, dalje: ZZP). Pored toga, u ovom kontekstu je značajan i Zakon o zaštiti korisnika finansijskih usluga (2021). Donošenje ovih zakona predstavlja pokušaj srpskog zakonodavca da uskladi naše pravo sa pravom Evropske unije, a naročito sa Poveljom o osnovnim ljudskim pravima u Evropskoj uniji (Božović, 2016, 10).

U skladu sa izričitom odredbom ZZP (2021, čl. 5, st. 1), definicija „potrošača" jeste da je u pitanju fizičko lice koje na tržištu pribavlja robu ili usluge koje nisu namenjene njegovoj poslovnoj ili drugoj komercijalnoj delatnosti. Kao „trgovac" je okarakterisano pravno ili fizičko lice koje nastupa na tržištu u okviru svoje poslovne delatnosti ili u druge komercijalne svrhe, uključujući i druga lica koja posluju u njegovo ime i za njegov račun (ZZP, čl. 5, st. 2). Ono što je na osnovu navedenih odredbi evidentno jeste da su u ovom zakonu uvažene sugestije predstavnika naše novije teorije, te da je načinjeno razlikovanje između one ugovorne strane za koju je predmetni ugovor jedan od mnogobrojnih ugovora koji zaključuje u okviru svog redovnog poslovanja i obavljanja svoje redovne komercijalne delatnosti (odnosno trgovca) i one ugovorne strane koja nema specijalizovano znanje u toj oblasti i sasvim moguće da iz tog razloga pristaje na ugovor kojim se ugrožavaju njena prava, a između ostalog i vreda načelo ekvivalentnosti uzajamnih prestacija (odnosno potrošača). Stoga je jasno da je kod ugovora o osiguranju „trgovac" osiguravač koji u okviru svoje redovne delatnosti zaključuje veliki broj ugovora o osiguranju, dok je „potrošač" osiguranik koji je slabija ugovorna strana (Petrović Tomić, 2020, 111).

Između ostalog, ZZP u čl. 2 propisuje da je jedno od osnovnih prava potrošača pravo na pravnu zaštitu, pod čime se podrazumeva zaštita njegovih prava u slučaju njihove povrede, i to u zakonom predviđenom postupku, kao naknada materijalne i nematerijalne

štete koju mu pričini trgovac. Potrošač ne može da se odrekne ovih prava i ništave su odredbe ugovora kojim se uskraćuju ili ograničavaju njegova prava koja proizlaze iz ovog zakona.

Pored toga, istim zakonom (ZZP, čl. 43, st. 2) predviđeno je da je nepravična ugovorna odredba svaka odredba koja, protivno načelu savesnosti i poštenja, ima za posledicu značajnu nesrazmeru u pravima i obavezama ugovornih strana na štetu potrošača. Pravna posledica nepravičnih odredbi je ništavost (ZZP, čl. 43, st. 1). Termin „značajna nesrazmera u pravima i obavezama ugovornih strana na štetu potrošača" odgovara pravnom standardu „očigledna nesrazmera uzajamnih davanja ugovornih strana", čiji je cilj takođe zaštita interesa slabijeg ugovarača. Pri tome postupanje protivno načelu savesnosti i poštenja treba shvatiti kao takvo postupanje koje je protivno moralu, obavezi lojalnosti i informisanja druge ugovorne strane o činjenicama od važnosti za ugovor, te običajima poštenog prometa. Istim članom u stavu 3 nabrojani su i kriterijumi na osnovu kojih će se utvrđivati da li je konkretna odredba nepravična ili ne. U skladu sa ovim zakonskim odredbama, u te kriterijume spadaju priroda robe ili usluge na koje se ugovor odnosi, okolnosti pod kojima je zaključen, način na koji je postignuta saglasnost u vezi sa njegovom sadržinom i način na koji je potrošač obavešten o sadržini ugovora, te ostale odredbe istog ugovora ili pak ugovora sa kojim je on u vezi.

Pored ove odredbe opšteg karaktera, u ZZP postoje i druge, pojedinačne odredbe u kojima se nesrazmera međusobnih davanja ugovornih strana javlja kao činjenica od pravnog značaja (videti čl. 52, st. 3 i 4, čl. 81, st. 2, čl. 22, st. 3 i čl. 5, st. 1). Na osnovu ovih odredbi postaje jasno da se kroz ZZP ne štite isključivo interesi potrošača, već se vodi računa o jednakosti uzajamnih davanja i izbegava se nametanje nepravednog i prevelikog tereta bilo kojoj ugovornoj strani.

Jasno je da je poseban tretman potrošača inspirisan njihovom manjom stručnošću i obaveštenošću u odnosu na trgovce koji zaključuju ugovore tog tipa svakodnevno. Teži se zaštiti načela ekvivalentnosti i na više mesta eksplicitno sankcioniše postojanje značajne nesrazmere u pravima i obavezama ugovorne strane. Ne treba zanemariti činjenicu da se pojedinim odredbama ovog zakona eksplicitno štiti i prodavac (u našem slučaju osiguravač), te je primena pojedinih zakonskih odredbi uslovljena time da to ne predstavlja „nesrazmerno opterećenje za prodavca."

Ono što je naročito važno jeste da je donošenjem ovog zakona srpski zakonodavac pokazao spremnost da nastavi svoju zakonodavnu aktivnost u pravcu pravnog sankcionisanja postojanja očigledne nesrazmere ugovornih prestacija i u ugovorima koji spadaju u privredno-pravne. Međutim, ne treba zanemariti činjenicu da je u konkretnim slučajevima reč o ugovorima čije zaključenje spada u poslovnu delatnost samo jedne od ugovornih strana. Drugim rečima, ima se u vidu postojanje neravnopravnog ugovornog položaja ugovarača i to da postoji evidentna potreba zaštite ekonomski i iskustveno slabije ugovorne strane.

Kod ugovora o osiguranju, položaj osiguranika kao slabije ugovorne strane je potvrđen time što, kako se u novijoj literaturi navodi, autonomija volje za osiguranika gotovo i da ne postoji, već se svodi na slobodu da se ugovor zaključi ili ne zaključi, osim kod obaveznih osiguranja, kao i na slobodu izbora osiguravača sa kojim će se zaključiti (Petrović Tomić, 2020, 116). Posebna zaštita osiguranika se, u skladu sa navedenim, ostvaruje i primenom pravila o prekomernom oštećenju koja jesu ustanovljena kako bi se zaštitila slabija, ili neuka ugovorna strana i kako bi se održala ekonomska ravnoteža ugovora.

3.3. Naš stav o opravdanosti primene instituta lezije na ugovor o osiguranju

Pitanje opravdanosti primene lezije kad je reč o ugovoru o osiguranju nije jednostavno kao što se na prvi pogled čini. Sa jedne strane, zakonodavac eksplicitno isključuje primenu prekomernog oštećenja kod aleatornih ugovora. Sa druge strane, aleatorna priroda ugovora o osiguranju se sve više osporava, s obzirom na brojna ograničenja rizika i ekspertne procene koje se vrše pre zaključenja istih. Ukoliko tome dodamo da su ugovori o osiguranju posebna vrsta potrošačkih ugovora, koje karakteriše niz pravila o zaštiti slabije ugovorne strane, među koje spada i institut lezije, argumenti u korist primene pravila o prekomernom oštećenju i na ugovor o osiguranju postaju sve brojniji i validniji.

Uprkos tome, smatramo da je opravdano izuzeće ugovora o osiguranju od primene instituta lezije. Naime, suštinski priroda ugovora o osiguranju jeste aleatorna, jer ove ugovore karakteriše inherentna nejednakost uzajamnih prestacija ugovornih strana i neizvesnost visine i odnosa vrednosti istih. Uprkos procenama rizika i brojnim ograničenjima zakonske i ugovorne vrste, elementarna odlika ovih ugovora jeste taj momenat nesigurnosti, gotovo nasumičnosti i neizvesnosti ko će za svoju prestaciju dobiti manje, a ko više, i koliko. Prekomerno oštećenje je institut koji negira pristajanje na tu neizvesnost i svesno prihvatanje nesrazmere vrednosti uzajamnih davanja ugovornih strana koja je sasvim izvesno da će nastupiti, premda se zna njena visina i koja ugovorna strana će njome biti pogođena. U prilog navedenom je i odredba čl. 898, st. 1 ZOO po kojoj je osigurani slučaj događaj s obzirom

na koji se zaključuje osiguranje i koji mora biti budući, neizvestan i nezavisan od isključive volje ugovarača.

Na osnovu svega navedenog, smatramo da je institut lezije nespojiv sa aleatornim ugovorima, te da je stoga neopravdana i njegova primena kad je reč o ugovoru o osiguranju.

4. ZAKLJUČAK

Iz razloga očuvanja pravne sigurnosti, pravičnosti, načela savesnosti i poštenja i ravnopravnosti stranaka, te u svrhu ubrzanja i povećavanja efikasnosti pravnog prometa, smatramo da bi bilo korisno prihvatiti većinski trend i izuzeti ugovore u privredi od primene pravila o prekomernom oštećenju, sem ukoliko je reč o ugovorima koje je privredni subjekt zaključio van svoje redovne delatnosti. Naime, od privrednika se očekuje da prilikom sklapanja ugovora iz svoje delatnosti postupaju sa posebnim stepenom pažnje i stručnošću. Oni treba da imaju pouzdane informacije o vrednosti svoje i prestacije druge ugovorne strane. Pored toga, često postoje izvesni poslovni razlozi zbog kojih je jedna ugovorna strana pristala na očigledno nesrazmerno davanje druge ugovorne strane, poput benefita koje očekuje uspostavljanjem trajnije poslovne saradnje ili proširenjem obima poslovanja. Sve to govori u prilog izuzeća ugovora u privredi od primene instituta prekomernog oštećenja, što je rešenje za koje se srpski zakonodavac opredelio i u Prednacrtu Građanskog Zakonika Republike Srbije.

Kad je reč o primeni instituta lezije na ugovore u privredi, saglasni smo sa tim da je opravdano da važe posebna pravila za tzv. potrošačke ugovore, koje zbog svojih osobenosti treba regulisati kao posebnu kategoriju ugovora u našem pravu. Potrošački ugovori su, naime, ugovori između potrošača i trgovca, koji se zaključuje na osnovu opšteg uslova trgovca o kojim potrošač nema mogućnost da pregovara. Drugim rečima, postoji velika neravnopravnost ugovornih strana od kojih jedna nema jednak nivo stručnosti i profesionalnog iskustva, te informisanosti, dok druga ugovorna strana zaključuju ugovore tog tipa u velikom broju i vrlo često. U ZZP se nedvosmisleno štiti načelo ekvivalentnosti i sankcioniše postojanje značajne nesrazmere u pravima i obavezama potrošača sa jedne i trgovca sa druge strane. U skladu sa tim, primena instituta *laesio enormis* u ovom kontekstu ima smisla i u skladu je sa pravnom prirodom ali i svrhom i ciljem ovog pravnog instituta – očuvanje jednakosti uzajamnih davanja i ekonomske ravnoteže samog ugovora, a u skladu sa načelima ekvivalentnosti, ravnopravnosti ugovornih strana, pravičnosti ali i savesnosti i poštenja. Srpski zakonodavac je u tom pogledu, prema našem mišljenju, načinio značajne korake u pravom smeru, s tim što ima prostora za dalji napredak i dodatno i potpunije, nedvosmislenije regulisanje ove materije u pogledu primene instituta prekomernog oštećenja i očuvanja jednakosti međusobnih prestacija ugovornih strana.

U ZOO od primene pravila o leziji eksplicitno su, između ostalih, isključeni i ugovori na sreću, odnosno aleatorni ugovori. U skladu sa tim, iako je ugovor o osiguranju vrsta potrošačkog ugovora, smatramo da je opravdano da bude izuzet od primene pravila o prekomernom oštećenju. Naime, ugovor o osiguranju je po svojoj pravnoj prirodi aleatoran ugovor, čija su suštinske odlike upravo nejednakost prestacija ugovornih strana, kao i neizvesnost visine i odnosa istih, te njihova uslovljenost nekim neizvesnim događajem van uticaja ugovornih strana. Sprski zakonodavac je u tom smislu opravdano predvideo da se institut lezije neće primenjivati na aleatorne ugovore.

LITERATURA

Bikić, E., Grgić, D. (2018). Ugovor o osiguranju, *Anali Pravnog fakulteta u Zenici*, 155–193.

Božović, B. (2016). *Zaštita potrošača u evropskom pravu i u praksi međunarodnih i nacionalnih sudova*. Podgorica: Centar za monitoring i istraživanje.

Carić, S. (1979). Zakon o obligacionim odnosima i kodifikacija pravila o ugovorima u privredi, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 14 (2), 48-59.

Carić, S. (1962). Oštećenje preko polovine, *Glasnik Advokatske Komore Vojvodine*, 34 (1), 5–13.

Cvetković, M. (2008). Načelo jednake vrednosti uzajamnih davanja u ugovornom pravu, *Zbornik radova Pravnog fakulteta u Nišu*, 52 (1), 189–210.

Dabić Nikićević, S. (2022). O načinu uređenja prekomernog oštećenja u našem pravu i odnosu sa srodnim ustanovama, *Anali Pravnog fakulteta u Beogradu*, 70 (1), 535–561.

Đurđević, M. (2007). Ugovori o potrošnji, *Pravo i privreda*, 45 (5-8), 669–679.

Jovanović, S. (2022). Osiguranje u Srpskom građanskom zakoniku iz 1844. godine – Prilog istoriji pravnog regulisanja ugovora o osiguranju u Srbiji, *Tokovi osiguranja*, *časopis za teoriju i praksu osiguranja*, XXXVIII(3), 9–26.

Kapor, V. (1979). Pitanja u vezi sa stupanjem na snagu Zakona o obligacionim odnosima, *Zbornik radova*, 15–22.

Konstantinović, M. (1996). *Skica za zakonik o obligacijama i ugovorim*a, Beograd: Službeni list SRJ.

Kovač, K. (1980). Ekvivalentnost, aleatornost i poslovni moral u našem pravnom sistemu, *Glasnik Advokatske Komore Vojvodine*, 52 (3), 1–15.

Krulj, V. (1980). *Komentar Zakona o obligacionim odnosima*, Beograd: Savremena administracija.

Loza, B. (1970). Prekomerno oštećenje – oštećenje preko polovine vrednosti kod teretnih ugovora(laesio enormis), *Godišnjak Pravnog fakulteta Univerziteta u Sarajevu*. 14 (1), 40–56.

Menyhard, A. (2003). Excessive benefit and unfair advantage in contracts, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 37 (1-2), 297–311.

Mihajlović, B. (2015). Ima li mesta potrošačkim ugovorima u novom Građanskom zakoniku Srbije?, *Pravo i privreda*, 53 (4-6), 486–502.

Mijačić, M. (1990). *Obligacioni ugovori*. Beograd: Savremena administracija.

Milošević, Lj. (1978). Osnovna načela našeg obligacionog prava prema Saveznom zakonu o obligacionim odnosima, *Zbornik radova*, 31–44.

Odluka Vrhovnog privrednog suda, Sl. 491/58 od 6. novembra 1959. godine.

Petrović Tomić, N. (2020). O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja – fenomen „pokoravanja" ugovora o osiguranju, *Anali Pravnog fakulteta u Beogradu*, 68 (1), 100–125.

Radivojević, Z. (1983). Kodifikcija načela pacta sunt servanda i Bečka konvencija o ugovornom pravu, *Zbornik radova Pravnog fakulteta u Nišu*, 23 (1), 349–363.

Salma, J. (2010). Građanskopravni i trgovinski ugovori – osnovna teorijska i metodološka pitanja njihove kodifikacije, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 44(2), 37–64.

Salma, J. (1977). Načelo ekvivalentnosti i prekomerno oštećenje u obligacionopravnim ugovorima: osvrt na projektovana zakonodavna rešenja, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 11 (1), 273–282.

Salma, J. (1976). *Prekomerno oštećenje u obligacionim ugovorima*. Magistarski rad. Novi Sad: Pravni fakultet u Novom Sadu.

Slijepčević, R. (2013). Izrada Građanskog zakonika Republike Srbije – koncepcija, sadrzina i najvaznije novine prednacrta, *Revija za evropsko pravo*, 15 (1), 99–152.

Šalaj, T. (2006). Pojam, pravna priroda i dejstva ugovora o osiguranju, *Pravo – teorija i praksa*, 23 (7-8), 32–50.

Perović, S. (1995). *Komentar Zakona o obligacionim odnosima*. Beograd: Savremena administracija.

Perović, S., Stojanović, D. (1980). *Komentar Zakona o obligacionim odnosima*. Pravni fakultet Univerziteta u Kragujevcu.

Petrović Tomić, N. (2020). O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja_ fenomen pokoravanja ugovora o osiguranju, *Anali Pravnog fakulteta u Beogradu*, 67(1), 100–125, DOI: 10.5937/AnaliPFB2001100P

Povelja Evropske Unije o osnovnim pravima – Charter of fundamental rights of the European Union – Official journal of the European Union 2012/C 326/02. Dostupno na: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT 11. 2. 2023.

Prednacrt Građanskog Zakonika Republike Srbije (tekst od 28. 5. 2019. godine). Dostupno na: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html 21. 6. 2023.

Presuda Privrednog apelacionog suda, posl. broj Pž 2243/2015 doneta 22. 10. 2015. godine.

Uzelac, O. (2011). Pravni aspekti ugovora o osiguranju života posmatrani u odnosu na druge slične ugovore, *Pravo – teorija i praksa*, 28 (7-9), 97–106.

Van den Bergh, R. (2012). The long life of laesio enormis. *Studia Universitatis Babes Bolyai-Iurisprudentia*. 4(1), 35–52.

Vizner, B. (1978). *Komentar Zakona o obveznim (obligacionim) odnosima*. Zagreb: Riječka tiskara.

Zakon o obligacionim odnosima, *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 - *odluka USJ* i 57/89, *Sl. List SRJ*, br. 31/93, *Sl. list SCG*, br. 1/2003 - *Ustavna povelja* i *Sl. glasnik RS*, br. 18/2020.

Zakon o obveznim odnosima, br. NN 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22.

Zakon o zaštiti korisnika finansijskih usluga, *Sl. glasnik RS*, br. 36/2011 i 139/2014.

Zakon o zaštiti potrošača, *Sl. glasnik RS*, br. 88/2021.

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Commercial contracts and excessive damage – specificities of insurance contracts due to their aleatory character

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Abstract

In most European countries, commercial contracts are exempted from application of the doctrine of laesio enormis. The main reason for that is that a special level of care and expertise is expected from businessmen when concluding commercial contracts and assessing the value of mutual benefits. According to the Serbian Law of Obligations, laesio enormis is to also be applied to commercial contracts. However, the Preliminary Draft of the Civil Code of the Republic of Serbia encisages that the cancellation of commercial contracts cannot be requested due to the disproportion of mutual benefits. The legislator also explicitly excludes the application of rules on excessive damage in the case of aleatory contracts. At the same time, the rules on lesion are applied to consumer contracts as a form of protection for the weaker party to the contract. Considering the specific nature of insurance contracts, which represent a form of consumer contracts, as well as the disputed understanding of whether the legal nature of this contract is essentially aleatory, this paper first provides an overview and detailed analysis of arguments for opposing views on the justification of applying the doctrine of lesion to insurance contracts. As a conclusion, we then provide our answer to this question, supported by adequate legal reasoning.

Keywords: insurance contract, excessive damage, commercial contracts, consumer contracts, aleatoriness.

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1. CONFLICTING VIEWS ON THE JUSTIFICATION OF THE APPLICATION OF THE *LAESIO ENORMIS* INSTITUTE TO CONTRACTS IN THE ECONOMY

Excessive damage is one of the most important institutions for the principle of equivalence of mutual benefits protection. In the literature, there is no unique attitude on the justification of its appliance to commercial contracts.[1] In the following text, we will present the arguments pro and contra the application of the institute of excessive damage to business contracts, we will do the analysis of them, present our attitudes on their merits, and finally determine and explain our standpoint on this issue. After that we will focus to the analysis of the insurance contract special position, to examine whether it is by its nature an aleatory contract, and to determine how the application of the lesion rule is regulated when it comes to this type of contract.

1.1. Arguments against the application of the institute of excessive damage in commercial contracts

In most European countries civil codes, the institute of excessive damage is applied to civil law, but not to

[1] The term "commercial contracts" in domestic law is used parallel with the term "trade contracts". There is also the term "enterprise contracts" in comparative legislation. In domestic theory, there is occasionally presented the view that the name "trade agreements" more precisely matches the essence. It is reasoned that these are contracts out of public law since in the market economy system, such as the Serbian one is today, business is done with private capital, and not with social capital, as it was situation in the former Yugoslavia, where the term "commercial contracts" was coined. (see: Salma, 2010). As the name "commercial contracts" is quite familiar both the theory and in practice, we believe that its use is still fully justified. Our attitude additionally supports the fact that the term "commercial contracts" has been kept in the Draft of the new Law on Obligations, and that is a certain sign that it will remain in domestic law usage for some time in the future.

commercial contracts. (Salma, 2010, 40). Hence, Salma argues that the domestic legislator should look to numerous solutions from foreign legislation, according to which this institute is not applied to commercial contracts (Salma, 1977, 282). The explanation for this attitude is that businessmen are expected to have a special attention and expertise level when concluding contracts and assessing the benefit values. (Bikić, 2011, 89). Konstantinović (Dabić Nikićević, 2022, 540), has also taken that attitude and in the Outline for the Code of Obligations and Contracts (1996, Article 107(5)) it is noted that when it comes to the application of damages, more than a half (objectively comprehended excessive damage institute) "due to this disproportion, the annulment of contracts in the economy, aleatory contracts and public sales cannot be required".

The article 18, paragraph 1 of the Law on Contracts and Torts from 1978 (hereinafter LCT), makes a distinction between a classic civil contract party, who is required to act with "a good host" care in performing one's contractual obligations, and a commercial contract contractorwho, while fulfilling his obligations, is obliged to act with "a good businessman".

The same article's Paragraph 2 stipulates that the party in the obligation relationship is obliged to act with the a good expert care "in fulfilling the obligations of one's professional activity" (LCT, Article 18). Aforementioned provisions clearly show that the contracting party in a commercial contract is demanded to act with greater caution, expertise and, generally, with a higher standard of care.

In other words, it is expected that commercial contracts is concluded by persons who know both the value of both action and counteraction, and it is regarded that they have an obligation to take care of their equivalence (Loza, 1970, 52). Besides that, having in mind the mass of commercial and legal transactions, significant deviations in value between prestations cannot go undetected and may only be the result of contracting parties wills. So, it is not rare for business organizations to sell some amount of goods below the market price with an aim to attract customers, increase their market competitiveness, or just to get rid of goods that may cause harm (for example, because they are close to expiring date, or it is sale of technology that is becoming obsolete and if it is not sold in the below the price in short term, there is high probability that it will not be sold at all).

In this context, the interesting is the judgment of the Commercial Court of Appeal, (Pž 2243/2015) that was handed down on October 22, 2015. There is stated that excessive damage, as a reason for voidability of the contract, *"can only be invoked by the injured party if at the time of the conclusion of the contract, one did not know or should have known the true value, and that condition was not fulfilled here, having in mind the conclusion procedure of the contract, as also the fact that it is a commercial contract, and that the contracting parties are business entities that, as good businessmen, namely - good experts, conclude contracts every day, so it cannot be considered that in concluding the contract they were mistaken regarding the value of mutual benefits"*. This judicial practice example illustrates exactly the conviction of the courts that when concluding commercial contracts, contracting parties are dealing with a particular degree of care and since it is a issue of contracts they conclude daily as part of their usual business activities, the conditions for the application of the institute of excessive damages which are reflected in not knowing the true value of prestations - delusions about it, occure quite rarely.

Also, sometimes there is an arrangement between business entities on long-term mutual cooperation. Consequenly, although in individual contracts in circulation the value of prestations is not synchronized, the equivalence of prestations is obvious in the realized exchanges total sum and when "the line is drawn" under all signed contracts (Salma, 1977, 280).

The standpoint that the statute of lesion should not be applied to commercial contracts is justified additionaly by the fact that commercial and legal transactions are strongly aleatory, as well as the principles of legal certainty, conscientiousness and honesty. It is stressed out that the application of excessive damage rules on in the economic sphere would slow down and aggavate traffic, which by its nature has to be fast, efficient, dynamic and various. It is emphasized that the principle of pacta sunt servanda is one of the most significant principles of the law of obligations (Radivojević, 1983, 349) which pervades the entire LCT, and that in accordance with that principle it is of special importance to keep contracts in force when possible can be used for commercial contracts (Loza, 1970, 46–50; Salma, 1976, 1–25).

1.2. Arguments in favour of the application of the institute of excessive damage in commercial contracts

As opposed to the above, in the part of legal theory, there is decisive attitude that the exemption of from the application of the rule on excessive damage for commercial contracts should not be adopted. The explanation for this attitude is that the essence of the *laesio enormis* institute lies exactly in the injured party protection. Hence, it should not matter in which sphere the contract was concluded, but one should act in

course of the principle of fairness, which is one of the fundamental and all-pervading contract law principles.

Salma (2010, 41) as an advocate of the aforementioned attitude cites as an argument the fact that both in the domestic and in the comparative legislature, all other instruments protecting the principle of equivalence in contract law are equally applied to both civil and commercial contracts, and that the rules on lesions should be no exception.

Even though the prevailing solution in foreign law is that commercial contracts are exempted from the rule on the lesion application (one example is the Croatian Civil Obligations Act, 2022, Article 375(5)), there are also different examples in countries known for exeptionally developed trade and exchange. So, in the Netherlands, which has been a trading superpower for centuries with economy is largely based on successful mediation and fast and safe circulation of goods and services, the institute of excessive damage is also applied to commercial contracts, though with some restrictions aimed at neutralising or at least mitigation of possible negative effects in the form of slowdown or destabilisation of traffic. Therefore, in the Netherlands *laesio enormis* does not apply to sales contracts with uncertain value of the item, and where the purchase itself is of a speculative nature (the so-called "purchase of hope" – *emptio spei*). An example for this would be the conclusion of a contract on the purchase and salling the future yield from a some field or the purchase of certain land because it is believed to be rich in minerals (Van den Bergh, 2012, 47).

The most important condition for the legal institute of lesion application is that the contracting party who refers to it in commercial contracts was not aware of disproportion between the goods value and the price paid for them (Van den Bergh, 2012, 47). So, the presence of a subjective element on the damaged contractor side is necessary.

An interesting attitude, very similar to the one prevailing Netherlands, may also be found in domestic judicial practice. Namely, even at the time when the clearly objective understanding of the institution of *laesio enormis* was in force, the court considered that the presence of a subjective element of this institution has also to be proven in commercial contracts. The Supreme Commercial Court explained in its decision SL 491/58 of November 6, 1959: "It happens that some business organisation, for its own reasons, pays twice as much for something as it is worth, that is, sells it for less than a half of its values. In such situation, it cannot refute the deal due to damage which exceeds half the value, referring only to the objective fact that she was damaged for that ammount. That is not sufficient. In order to succeed with the request for rebuttal, the party has to prove, above that fact, that there is a subjective moment on the co-contractor side, namely facts that opposed to good customs in the economy".

As expected, that attitude of the court was criticised. Thus, Carić emphasises that the legal standpoint according to which the objective damage is more than a half of value, along with others, a legally relevant fact for commercial-legal transactions, is opposition to the basic principles of commercial transactions. The same author thinks that the Supreme Court's attitudeconcerning the subjective element of damage in commercial and legal transactions is "arbitrary", and makes conclusion that "the peculiarities of economic operations derogate the institute of damage in all its forms" (Carić, 1979, 51). Such an attitude is in harmony with his principled attitude on the exemption from the institute of excessive damage application to commercial contracts, but the court decision we listed is proof that the opposite position was also represented, both in theory and in practice of that times.

Based on stated above, it is clear that there are very valid arguments for the excessive damage rules application to commercial contracts, which refer to the contracting parties equality, legal certainty and fairness. Our attitude on whether this reasons are convincing enough will be manifested in the further exposure.

2. APPLICATION OF THE RULE ON EXCESSIVE DAMAGE TO CONTRACTS IN ECONOMY IN LCT AND THE DRAFT CIVIL CODE OF THE REPUBLIC OF SERBIA

In the LCT, the point of view is accepted according to which the rules on excessive damage are applied without distinction to contracts in the economy. It is a solution (Kapor, 1979, 17) by which, as stated in the theory, "the principle of equal value of giving received a new content and a wider scope of application" (Milošević, 1978, 36). Jurisprudence consistently applied that position, including the rules on the impossibility of canceling a court settlement (LCT, Art. 1094).

However, in recent literature it is pointed out that commercial contracts should be exempted from the application of the institution of the lesion (Dabić Nikčević, 2022, 558), except in the case of those commercial contracts concluded by natural or legal persons performing economic activity outside of their registered activity. The reasons stated are mainly related to the expertise of business entities and their prudence when concluding the contracts in question, which they do daily and in large numbers within their activities

and in connection with the sale of goods and services (Bikić, 2011, 89).

It seems that the Serbian legislator agrees with the stated position of modern legal theory. Thus, the Draft Civil Code of the Republic of Serbia (2019, Art. 273(5)) explicitly states that the annulment of commercial contracts cannot be requested due to the disproportion of mutual benefits. It is interesting that the draft accepts the objective conception of the institute of excessive damage, and foresees the possibility of requesting the annulment of the contract due to more than half of the damage within a year from the date of its conclusion, if there is such a disparity between the obligations of the contracting parties in a bilaterally binding contract at the time of the conclusion of the contract, that what one party received or should receive from the other party does not represent even half of the value of what it gave to the other party, or undertook to give or do (Draft of the Civil Code of the Republic of Serbia, 2019, Article 273(1)). In other words, the existence of the subjective element of the institute of excessive damage is no longer required. If this solution is adopted, the implementation of the institute in practice will be simplified, but the question of elasticity and adaptability of the said institute remains open (Slijepčević, 2013, 119). It is precisely the objective setting of criteria for the application of the institute of injury that is an additional argument for exempting contracts in the economy from the application of the rule on excessive damage. Namely, as Krulj points out, if the legislator did not limit the application of the lesion in the form of the fact that the injured party did not know or had to know the true value of the prestation, the application of the institute of excessive damage to contracts in the economy would not be conceivable (1980, 361).

The exclusion of contracts in the economy from the application of the institute of excessive damage seems to us to be a justified and expedient solution. First of all, in this way one acts in accordance with the basic principles of obligation law, such as legal certainty, fairness, principles of conscientiousness and honesty and equality of parties. Also, by insisting that business entities are obliged to act with a special degree of care when concluding contracts and to possess special knowledge that are applied in such cases to determine the value of the performance, the level of legal security and efficiency of legal transactions is increased. The exception, in our opinion, should be contracts concluded by the business entity outside of its regular activity, because in those cases, it is not about contracts whose conclusion is part of the daily professional conduct of business entities, nor about a matter in which they have special, professional knowledge.

3. SPECIAL RULES REGARDING THE APPLICATION OF THE INSTITUTE OF EXCESSIVE DAMAGES TO THE INSURANCE CONTRACT

3.1. Arguments against the excessive damage application rule to the insurance contract

Already in the first two articles of the Title XXIX of the Serbian Civil Code from 1844 – On Bold Contracts or Contracts by Luck, the these contracts were defined and a universal rule prohibiting cancellation of a contract by luck due to excessive damage ("damage over half") was highlighted (Jovanović, 2022, 14). Similarly, the LCT expressly stipulates that due to an obvious disproportion of mutual benefits, one cannot ask for the annulment of an aleatory contract, public sale, as well as when a higher price was given for the thing due to special favour (LCT, Article 139(5)). This kind of solution is not unique - the application of the institute of excessive damage in the same types of contracts is excluded, for example, in the Austrian Civil Code (Carić, 1962, 10), and such a solution, as we mentioned, is also contained in the Sketch of the Law of Obligations and Contracts (1996, Article 107(5)).

When it comes to aleatory contracts, this behaviour of the legislator is understandable if it is taken into account that at the moment of their conclusion it is not known for which of the contractual parties the right and for which obligation will arise and in what amount, i.e. who is the creditor and who is the debtor. It is also not known what the ratio of those obligations will be, as well as the type, quantity or quality of the action (Mijačić, 1990, 174). It all depends on the occurrence of some uncertain event. Therefore, the theory points out that in aleatory contracts it is "absolutely impossible" to determine the value of the performance, that is, whether there will be a disparity between mutual benefits. Therefore, the very nature of the contract fortunately implies the conscious consent of the contracting parties that the contract results in just such a disparity (Mijačić, 1990, 174), where the outcome does not depend on the will of the contracting parties but on some future unpredictable event. In other words, the risk is evenly distributed among the contracting parties (Menyhard, 2003, 308). Due to the uncertainty inherent in them, the principle of equal benefits does not apply to such contracts (Cvetković, 2008, 196; Vizner, 1978, 89).

Due to all of the above, the rule that *"alea excludes lesion*" applies (Kovač, 1980, 14), that is, excessive damage cannot be invoked in this type of contract (Perović, 1995, 280).

The question that arises is whether the institute of excessive damage can be applied to the insurance contract, as a specific contract in the economy? In this sense, it is important to first establish whether the insurance contract is aleatory. There are conflicting opinions about this.

One part of the legal theory considers that the insurance contract is aleatory in nature (Uzelac, 2011, 98). Namely, an insurance contract is a contract in which one contractual party, called the policyholder or the insurer, undertakes to pay a certain insurance premium, according to the conditions established by the contract, while the other contractual party, the insured, undertakes to pay the policyholder if an event that represents the insured event occurs or to a third party the contracted sum, or to do something else (Šalaj, 2006, 32).

In accordance with the aforementioned definition, one of the constitutive elements of an insurance contract is precisely risk, i.e. a future uncertain harmful (e.g. destruction of the insured object) or beneficial event (e.g. lottery winnings) that may arise either as a result of natural events or as a result of human actions (Bikić, Grgić, 2018, 157). When the risk is realised, we are talking about the occurrence of the insured event (Bikić, Grgić, 2018, 168). The aleatory nature of the insurance contract is reflected in the fact that it is concluded with regard to a future event, which has not occurred, and which must be uncertain, independent of the will of the contracting party and whose insurance is permitted by law, public order and morality (Šalaj, 2006, 38). In this sense, we distinguish between situations when it is not certain whether the event will occur at all (the possibility of its occurrence exists, but not certainty) and when it is certain that the event will occur, but not when (e. g. in cases of life insurance of a certain person).

The conclusion about the aleatory nature of the insurance contract stems from the fact that at the time of concluding this contract, the insured does not know whether he will lose the paid premium or receive compensation from the insurance which is known to be higher in value than the paid premium. The insurer, on the other hand, does not know whether it will collect the premium without the obligation to pay any equivalent value for it, or whether it will have to pay the insured compensation from the insurance, which would result in a financial loss (Šalaj, 2006, 36).

If we accept the position according to which the insurance contract is essentially an aleatory contract, it seems undeniable that the law explicitly excludes the application of the rule on excessive damage to it.

3.2. Arguments in favour of excessive damage application rule to the insurance contract

The understanding, according to which the aleatory nature of the insurance contract is negated and its commutability is accentuated is a contradictory one. The proponents of this understanding deny the existence of any element of uncertainty on both parties – the insured and the insurer. The insured is aware he loses the premium unless insured event happens, but he was aware of this fact in advance and he agreed to it. On the contrary, thanks to the law of large numbers, the insurer is always on the winning side, which effectively eliminates the risk (Šalaj, 2006, 36). According to these authors, the aleatory nature of the insurance contract could be recognised eventually, if a possible insurance business in which the position of the insurer is uncertain and it is not certain that he will win or lose money is observed (Šalaj, 2006, 36).

Additionally, one more argument in favor of the application of excessive damage as a type of limitation of the freedom of contract in insurance contracts is found in the fact that recent literature it stresses that the freedom of contract in this type of contract is limited manifoldly, and even directed (Petrović Tomić, 2020, 101). Actually, due to the nature of the insurance contract and the position of typical consumer as a party obtaining the insurance service, the intervention of the legislator in contractual insurance relations is remarkably greater than in other contracts (Petrović Tomić, 2020, 103). It is signifficant to point out, in this context, that insurance contracts belong to consumer contracts where the ignorance of the insured is taken into account and accordingly to the rules of the weaker contracting party the protection, they enjoy special court protection (Petrović Tomić, 2020, 105).

There are no provisions in Law on Contracts and Torts concerning the concept of consumer in, nor the concept of consumer contract, while there are certain provisions that provide legal protection to the weaker contracting party (Mihajlović, 2015, 488). The most usual consumer contracts definition is that it is a contract between a trader and a consumer (Ibidem, 489), which is concluded on the basis of the trader's general conditions, and consumer has no opportunity to negotiate (Đurđević, 2007, 671).

Explicit and separate regulation of consumer contracts gives additional protection to consumers as a special category and respects the peculiarities of their position in legal transactions. In Serbia, the first step towards that direction was made with the Law on Consumer Protection adoption in 2021, which represents the *lex specialis* in relation to the general decisions of the Law On Obligations when it comes to

this matter (Law on Consumer Protection, Article 3(7), hereinafter LCP).

Besides that, the Law on the Protection of Users of Financial Services (2021) is also important in this context. The adoption of these laws is Serbian legislator attent to harmonise Serbian law with the law of the European Union, particularily with the Charter of Fundamental Human Rights in the European Union (Božović, 2016, 10). In accordance with the express provision of LCP (2021, article 5, paragraph 1), the definition of "consumer" is that it is an individual that on the market acquires goods or services that are not intended for his business or other commercial activity. As "merchant" is characterised as a firm or individual that enters the market as part of his business activity or for other commercial purposes, including other persons operating in his name and on his behalf (LCP, Art. 5(2)). Evidently, on the basis of the aforementioned provisions is that the suggestions of the representatives of our new theory have been taken into account in this law, and that a distinction is made between the contractual party for whom the contract in question is one of the many contracts concluded within the framework of his regular business and the performance of regular commercial activity (that is, the merchant) and the contracting party that does not have specialised knowledge in that area. It is quite possible that that is the reason why they agree to a contract that violates their rights, and among other things, brakes the equivalence of mutual benefits principle (that is, the consumer). Hence, in an insurance contract it is clear that, the "merchant" is the insurer who concludes a significant number of insurance contracts as part of his regular activity, and the "consumer" is the insured who is the weaker contracting party (Petrović Tomić, 2020, 111).

Among other things, LCP in Article 2 determines that one of the consumers basic rights is the right to legal protection, and this means the protection of his rights in the case of their violation, and in the procedure provided for by law, as compensation for material and non-material damage that trader caused him. It is not possible for consumer to waive these rights and the contract provisions of the denying or limiting his rights arising from this law are null and void.

Besides, the same law (LCP, Art. 43(2)) stipulates that an unfair contractual provision is any provision that, opposite to the principle of conscientiousness and honesty, results in a significant disparity contracting parties rights and obligations to the consumers detriment. The legal consequence of unfair provisions is nullity (LCP, Art. 43(1)). The term *"significant disproportion in the rights and obligations of the contracting parties to the detriment of the consumer"* corresponds to the legal standard *"evident disproportion of the contracting parties' mutual benefits"*, and its aim is also protecting interests of the weaker contractor.

Thereby, acting contrary to the conscientiousness and honesty principles should be understood as such acting that is against morality, the obligation of loyalty and informing the other contracting party about the facts of importance for the contract, and the fair trade customs. The Paragraph 3 of the same article lists the criteria on what basis it will be evalueted if a specific provision is unfair or not.

In accordance with these legal provisions, those criteria include the nature of the goods or services to what the contract relates, the circumstances under which it was concluded, the manner in which agreement was reached regarding its content and the manner of informing costumer of the content of the contract, and also other provisions of the same contract or the contract with which it is related.

Besides this general provision, there are other, separate provisions in the LCP in which the disproportion of contracting parties mutual benefits occurs as a fact of legal importance (see Article 52, paragraphs 3 and 4, Article 81, paragraph 2, 22, paragraph 3 and Article 5, paragraph 1). Based on these provisions, it is clear that through LCP, are not protected interests of consumers only, but the equality of mutual benefits is taken into account with the aim to avoid the imposition of an unfair and excessive burden on any contractual party.

Clearly, the special treatment of consumers is inspired by their poor expertise and awareness in comparison to traders who this type of contracts conclude daily. The aspiration is to protect the principle of equivalence and in a few places sanctions explicitly the presence of a significant disparity in the rights and obligations of the contracting party. The fact that certain provisions of this law explicitly protect the seller (in our case, the insurer) should not be ignored, and the certain legal provisions application is conditioned by the fact that it does not represent a "disproportionate burden on the seller".

The particularly important is that by adopting this law, the Serbian legislator has manifested his willingness to continue legislative activity in the direction of legal sanctioning the existence of an apparent disproportion of contractual benefits in contracts that fall under commercial law. Nevertheless, we should not neglect the fact that in specific cases we are speaking of contracts, which conclusion falls under the business activity of only one of the contracting parties. In other words, it is taken into account the existence of an unequal

contractual position of the contractors and the fact that there is an evident need for protection of economically and experientially weaker contracting party.

In the case of insurance contracts, the position of the insured as a weaker contractual party is confirmed by the fact that, as stated in recent literature, the autonomy of will for the insured almost does not exist, as it is reduced to the freedom to conclude or not conclude the contract, with the exception of compulsory insurance, and also the freedom to choose the insurer with whom to conclude contract (Petrović Tomić, 2020, 116). Accordingly to the above, the special protection of the insured is achieved by use of the rules on excessive damage, which were established due to the protection of the weaker or ignorant contracting party and for the economic balance of the contract maintaining.

3.3. Our attitude on the justification of the institute of lesion application to the insurance contract

The question of the justification of the application of the lesion to the insurance contract is not as simple as it may seem at first glance. On the one hand, the application of excessive damage in aleatory contracts is explicitly excluded by legislature. On the other hand, the aleatory nature of insurance contracts is more and more disputed, taking into account the numerous risk limitations and assessments of experts that are needed to be performed prior to concluding them. If we add the fact that insurance contracts present a peculiar kind of consumer contrast, characterised by great number of rules made for weaker contracting party protection, and institute of lesion is among them, there are more and more valuable arguments in favour of applying the rule on excessive damage to the insurance contract.

Nevertheless, we believe that the exemption of insurance contracts from the application of the institute of lesions is justified. In fact, the nature of the insurance contract is aleatory, since these contracts are distinguished by the inherent inequality of the contracting parties mutual benefits and the uncertainty of the amount and ratio of their values. In spite of risk estimations and numerous legal and contractual limitations, the basic feature of these contracts is the moment of uncertainty, almost randomness and uncertainty as to who will receive less and who will receive more for their prestation, and how much. Excessive damage is an institute that denies consent to such uncertainty and the sensible acceptance of the disproportion in the value of mutual benefits of the contracting parties that is quite certain to happen, though the amount and contracting party that will be affected by it are known. In addition to the above, Art. 898(1) of the LCT provides the insured event is the event with regard to which the insurance is concluded and which must be future, uncertain and independent of the exclusive will of the contracting party.

Based on all we have mentioned above, our oppinion is that the institute of lesion is not compatible with aleatory contracts, so, its application hence unjustified for insurance contracts.

4. CONCLUSION

In order to preserve legal certainty, fairness, principles of conscientiousness and honesty and equality of parties, and for the purpose of accelerating and increasing the legal transactions efficiency of, we are of the opinion that it would be appropriate to accept the majority trend and exclude commercial contracts from the application of the rule on excessive damage, except it is a contracts concluded by the business entity that is outside of its regular activities. In fact, businessmen are expected to act with a particular attention and expertise level when concluding contracts from their business area. They should have credibe information about the value of their and the other party's prestations. Besides that, there are frequently some business reasons why one contracting party agreed to an obviously disproportionate contribution to the other contracting party, such as the benefits it expects by establishing a more continuous business cooperation or expanding the volume of business. All this works in favour of exempting commercial contracts from the excessive damage institute applicance, and that is the solution for which the Serbian legislator opted in the Preliminary Draft of the Civil Code of the Republic of Serbia.

When applying the Institute of Lesion to commercial contracts, we agree appliance of special rules for the so-called consumer contracts that is justified, because their peculiarities ought to be regulated as a special category of contracts in our domestic law. Consumer contracts are, in fact, contracts between the consumer and the trader, concluded on the basis of the trader's general conditions, without possibility for consumer to negotiate. In other words, there is a great inequality between the contracting parties, one of them does not have the same level of expertise and professional experience, and also information, while the other contracting party concludes this type of contracts in great number and freaquently. Consumer Protection Law unambiguously protects the equivalence principle and sanctions the significant disparity presence in the rights and obligations of consumers on the one hand and traders on the other. In accordance to that,

the application of the institute *laesio enormis* in this context is meaningful in harmony with the legal nature, and also with the purpose and aim of this legal institute – preserving the mutual benefits equality and the economic equilibrium of the contract itself, and accordant with the principles of equivalence, equality of the contracting parties, fairness and also conscientiousness and honesty. The Serbian legislator, in our oppinion, in this respect has made significant steps in the right direction, but there is an area for further progress and additional, more complete regulation of this matter with regard to the institute of excessive damage application and the preservation of the equality of mutual prestations of the contracting parties.

In the LCT, contracts of chance, i.e. aleatory contracts, are explicitly excluded from the application of the rule on the lesion. Consequently, even though an insurance contract is a type of consumer contract, we believe it is justified to exempt it from the application of the excess damage rule. Namely, insurance contract is aleatory contract by its nature, and its essential attibutes are exactly inequality of contracting parties prestations and uncertainty of their values and relations and their conditioning by some uncertain event ouf of cotracting parties influence. The insurance contract is an aleatory contract by its legal nature and its essential attributes are precisely the inequality of the contractual parties' payments, the uncertainty of their amount and ratio, and their conditioning by some uncertain event beyond contractual parties control. In this sense, the Serbian legislator justifiably predicted that the institution of lesion will not be applied to aleatory contracts.

REFERENCES

Bikić, E., Grgić, D. (2018). Ugovor o osiguranju, *Anali Pravnog fakulteta u Zenici*, 155–193.

Božović, B. (2016). *Zaštita potrošača u evropskom pravu i u praksi međunarodnih i nacionalnih sudova*. Podgorica: Centar za monitoring i istraživanje.

Carić, S. (1979). Zakon o obligacionim odnosima i kodifikacija pravila o ugovorima u privredi, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 14 (2), 48–59.

Carić, S. (1962). Oštećenje preko polovine, *Glasnik Advokatske Komore Vojvodine*, 34 (1), 5–13.

Cvetković, M. (2008). Načelo jednake vrednosti uzajamnih davanja u ugovornom pravu, *Zbornik radova Pravnog fakulteta u Nišu*, 52 (1), 189–210.

Dabić Nikićević, S. (2022). O načinu uređenja prekomernog oštećenja u našem pravu i odnosu sa srodnim ustanovama, *Anali Pravnog fakulteta u Beogradu*, 70 (1), 535–561.

Đurđević, M. (2007). Ugovori o potrošnji, *Pravo i privreda*, 45 (5-8), 669–679.

Jovanović, S. (2022). Osiguranje u Srpskom građanskom zakoniku iz 1844. godine – Prilog istoriji pravnog regulisanja ugovora o osiguranju u Srbiji, *Tokovi osiguranja, časopis za teoriju i praksu osiguranja*, XXXVIII(3), 9–26.

Kapor, V. (1979). Pitanja u vezi sa stupanjem na snagu Zakona o obligacionim odnosima, *Zbornik radova*, 15–22.

Konstantinović, M. (1996). *Skica za zakonik o obligacijama i ugovorim*a, Beograd: Službeni list SRJ.

Kovač, K. (1980). Ekvivalentnost, aleatornost i poslovni moral u našem pravnom sistemu, *Glasnik Advokatske Komore Vojvodine*, 52 (3), 1–15.

Krulj, V. (1980). *Komentar Zakona o obligacionim odnosima*, Beograd: Savremena administracija.

Loza, B. (1970). Prekomerno oštećenje – oštećenje preko polovine vrednosti kod teretnih ugovora (laesio enormis), *Godišnjak Pravnog fakulteta Univerziteta u Sarajevu*, 14(1), 40–56.

Menyhard, A. (2003). Excessive benefit and unfair advantage in contracts, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 37 (1-2), 297–311.

Mihajlović, B. (2015). Ima li mesta potrošačkim ugovorima u novom Građanskom zakoniku Srbije?, *Pravo i privreda*, 53 (4-6), 486–502.

Mijačić, M. (1990). *Obligacioni ugovori*. Beograd: Savremena administracija.

Milošević, Lj., (1978). Osnovna načela našeg obligacionog prava prema Saveznom zakonu o obligacionim odnosima, *Zbornik radova*, 31–44.

Odluka Vrhovnog privrednog suda, Sl. 491/58 od 6. novembra 1959. godine.

Petrović Tomić, N. (2020). O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja – fenomen „pokoravanja" ugovora o osiguranju, *Anali Pravnog fakulteta u Beogradu*, 68 (1), 100–125.

Radivojević, Z. (1983). Kodifikcija načela pacta sunt servanda i Bečka konvencija o ugovornom pravu, *Zbornik radova Pravnog fakulteta u Nišu*, 23 (1), 349–363.

Salma, J. (2010). Građanskopravni i trgovinski ugovori – osnovna teorijska i metodološka pitanja njihove kodifikacije, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 44(2), 37–64.

Salma, J. (1977). Načelo ekvivalentnosti i prekomerno oštećenje u obligacionopravnim ugovorima: osvrt na projektovana zakonodavna rešenja, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 11 (1), 273–282.

Salma, J. (1976). *Prekomerno oštećenje u obligacionim ugovorima*. Magistarski rad. Novi Sad: Pravni fakultet u Novom Sadu.

Slijepčević, R. (2013). Izrada Građanskog zakonika Republike Srbije – koncepcija, sadrzina i najvaznije novine prednacrta, *Revija za evropsko pravo*, 15 (1), 99–152.

Šalaj, T. (2006). Pojam, pravna priroda i dejstva ugovora o osiguranju, *Pravo – teorija i praksa*, 23 (7-8), 32–50.

Perović, S. (1995). *Komentar Zakona o obligacionim odnosima*. Beograd: Savremena administracija.

Perović, S. Stojanović, D. (1980). *Komentar Zakona o obligacionim odnosima*. Pravni fakultet Univerziteta u Kragujevcu.

Petrović Tomić, N. (2020). O ograničenoj i usmerenoj slobodi ugovaranja u ugovornom pravu osiguranja – fenomen poko-

ravanja ugovora o osiguranju, *Anali Pravnog fakulteta u Beogradu*, 67 (1), 100–125, DOI: 10.5937/AnaliPFB2001100P.

Charter of fundamental rights of the European Union, *Official journal of the European Union* 2012/C 326/02. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, 11. 2. 2023.

Prednacrt Građanskog Zakonika Republike Srbije, 28. 5. 2019. Available at: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html, 21. 6. 2023.

Presuda Privrednog apelacionog suda, posl. broj Pž 2243/2015 doneta 22. 10. 2015. godine.

Uzelac, O. (2011). Pravni aspekti ugovora o osiguranju života posmatrani u odnosu na druge slične ugovore, *Pravo – teorija i praksa*, 28 (7-9), 97–106.

Van den Bergh, R. (2012). The long life of laesio enormis. *Studia Universitatis Babes Bolyai-Iurisprudentia*. 4(1), 35–52.

Vizner, B. (1978). *Komentar Zakona o obveznim (obligacionim) odnosima*. Zagreb: Riječka tiskara.

Zakon o obligacionim odnosima, *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 - *odluka USJ* i 57/89, *Sl. List SRJ*, br. 31/93, *Sl. list SCG*, br. 1/2003 - *Ustavna povelja* i *Sl. glasnik RS*, br. 18/2020.

Zakon o obveznim odnosima, br. NN 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22.

Zakon o zaštiti korisnika finansijskih usluga, *Sl. glasnik RS*, br. 36/2011 i 139/2014.

Zakon o zaštiti potrošača, *Sl. glasnik RS*, br. 88/2021.

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