

UDK 347.439(497.1)''1978''

CERIF: S130, S155

DOI: 10.5937/AnaliPFB2001088Z

Miloš Živković, PhD*

CONTRACTUAL WAIVER OF CLAIM UNDER THE 1978 YUGOSLAV CODE OF OBLIGATIONS

The paper analyses validity of contractual waiver under the Yugoslav Code of Obligations. Generally, the effect of a waiver of claim under the Code would be an obligation to refrain from exercising a certain right that may be invoked as defence against the waived claim. Under the Code of Obligations, a waiver of claim is generally valid. There are cases where validity of the waiver is explicitly excluded. Is a waiver invalid only in cases where it is expressly forbidden? If not, what would be the criteria under which, irrespective of the fact that there is no express prohibition, a waiver would nevertheless fail to produce effects? Are there additional criteria if a future claim is waived? This paper deals with these issues, seeking to set the criteria under which a (generally permitted) waiver of existing and future claims shall not be effective in a concrete case under the Code.

Key words: *Waiver of claim. – ZOO. – Effectiveness of waiver. – Waiver of future claim.*

1. INTRODUCTION

Waiver is normally defined as an act of abandoning or refraining from asserting or exercising a right (*Collins Dictionary of Law* 2001, 403). Even though it originated in English law (on its history in England see Atiyah 1979, 165–167), it is not an entirely clear legal institution even within the common law world (*Black's Law Dictionary* 1999, 1574–1575, defines not less than ten different types of waivers). In English legal texts, it has been said that 'it must be confessed that the topic of waiver is not a clear one and awaits an authoritative modern statement' (Furmston 1991,

* Associate Professor, University of Belgrade Faculty of Law, mdz@ius.bg.ac.rs.

565). In American doctrine it has been labelled a word of ‘indefinite connotation’ which, ‘like a cloak, covers a multitude of sins’, (Farnsworth 1999, 541, quoting Arthur L. Corbin). However, waiver is usually dealt with in textbooks on contract law (for law of England and Wales see Guest 1984, 434–438; Beatson 2002, 523–527; Treitel 1995, 321 and 322; for American law Farnsworth 1999, § 8.5, 540–544). *Waiver of claim* is aimed at refraining from asserting or exercising a claim, i.e. abandoning a right to demand something from an individual adverse party, typically a contractual partner. As an institution of common law, ‘waiver of claim’ has no direct and readily available counterpart in the civil law. Therefore, it needs to be ‘translated’ into the ‘language’ of civil law in order to properly identify the rules of local law applicable thereto.

Civil law systems generally regard claim (Serbian *potraživanje*, German *Forderung*) as a ‘relative’ right (*inter partes* right, *iura in personam*, as opposed to *erga omnes* rights, such as property right, i.e. *iura in rem* – Zweigert, Koetz 1998, 145). It represents a demand aimed at a specific adverse party to effectuate a performance – to give something, or pay a sum of money, or suffer some behaviour of the right-holder, or abstain from undertaking some action it would otherwise be entitled to carry out (claims requesting omission). A claim can either represent a special type of right – right of obligation (Zweigert, Koetz 1998, 145) – or it can be created by violation of some other right, which is itself not a claim (such as ownership and other property rights, intellectual property or personality rights). A waiver may be unilateral, when a right-holder waives a right by its unilateral statement, and may be a part of the contract, in which case the waiver is an integral part of the contract, and is undertaken as an obligation towards a particular person. A waiver may lead to the cessation of the waived right, when such a right ceases to exist altogether, or to the obligation of the person who waived the right to refrain from using it and the possibility for the other party to invoke the waiver in order to prevent the use of the right. Generally, so-called absolute rights, such as property rights (ownership, servitude, pledge, etc.), rights of intellectual property or (some) personality rights, which have an *erga omnes* effect, cease to exist when waived (which is often unilateral). On the other hand, so-called ‘relative’ rights, such as claims, do not cease by waiver, but their exercise may be prevented by invoking the waiver (this waiver is in most cases contractual). The latter also applies to the so-called ‘transformation rights’ (Serbian *preobražajna prava*, German *Gestaltungsrechte*), i.e. a right to alter a certain legal relationship by a unilateral constitutive declaration of will.

There is a general scarcity of legal texts or research on waiver in the Yugoslav doctrine based on the 1978 Code of Obligations¹ (*Zakon*

¹ Also translated into English as *Law on Obligation Relations* and *Law on Contracts and Torts*.

obligacionim odnosima, hereinafter: ZOO²). Not surprisingly, there is also not much case law on the issue. This is all due to the fact that waivers were not commonly used in local contractual practice until a decade or so ago. The use of waivers in contracts subject to the ZOO is not a ‘homegrown’ phenomenon, but rather a consequence of the fact that templates created for the use in England or other common law jurisdictions started to be used in the ZOO countries,³ especially in transactions related to company law (privatizations, M&A). This was done by lawyers who, even in cases when they represented the local state, often did not have any real command of local laws (this applies to all former Yugoslav jurisdictions). This novel practice has not undergone academic analysis, therefore the permissibility, effects and types of waiver have not previously been examined in a systematic way in laws of the ZOO countries, and the doctrine of waiver – and how it actually operates – has not been developed.

This paper strives to provide a systematic analysis of what are regarded to be the requirements of validity of contractual waiver in the context of the existing ZOO. In doing so, unilateral waivers will not be examined. Even though unilateral waivers may produce legal effects (e.g. one may unilaterally waive ownership or any other property right, or personality right, or intellectual property right), it is deemed irrelevant for the topic of this paper and therefore the analysis will be restricted solely to the validity of the contractual waiver, i.e. the situation when a party to a contract waives its rights as an obligation undertaken towards the other party. Generally, the effect of waiver of claim under the ZOO would be an obligation to refrain from exercising the waived right, made towards a particular party, which such party may invoke as defence against such claim if it is asserted despite the waiver.

2. GENERAL CONDITIONS FOR VALIDITY OF WAIVER OF CLAIM UNDER THE ZOO

Several undisputed issues serve as the starting point of the analysis. Firstly, waiving a right (Serbian *odricanje od prava*) is by all means generally allowed under the ZOO. The ZOO mentions it explicitly on

² Official Gazette of SFR Yugoslavia Nos. 29/1978, 39/1985, 45/1989 – decision of the Constitutional Court and 57/89, Official Gazette of FR Yugoslavia No. 31/1993.

³ ZOO is the *alma mater* of all codifications of the law of obligations in the countries of the former Yugoslavia (Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and North Macedonia, and it also still applies in Kosovo). The term ‘ZOO countries’ is used to denote these countries. All of those countries have altered and/or passed their respective ‘ZOOs’ after the breakup of Yugoslavia, but since the changes were not systemic, the rules of contract and tort law in all these countries remain essentially (sometimes even verbatim) the same.

more than ten occasions (the same applies to *Skica*⁴). *Waiver of a statute of limitation, waiver of a right to annul the contract for laesio enormis* or because of the changed circumstances (*rebus sic stantibus*, similar to common law concept of hardship), waiver of a right without consideration (which requires a special power of attorney for the agent), are just some of the situations in which the ZOO mentions waiver explicitly, thus making it beyond dispute that waiver of a right is generally possible, allowed and effective under the ZOO. This is without exception in doctrine – there is not a single textbook on civil law or law of obligation that would dispute the general possibility of enforceable waiver of right – some even elevate it to the level of methodological principle of civil law (Vodinečić 2012, 40–41).⁵

The next undisputed issue is that, contrary to the common law doctrine of contract law, waivers are not the subject of specific interest of legal doctrine dealing with contract law in the territory where the ZOO once applied as federal law. There is neither a comprehensive ‘theory of waiver’, nor any remotely systematic literature on waivers: they are mentioned occasionally, mostly when the statute refers to them. Therefore, a range of issues that begs to be answered has not yet been addressed in the doctrine, including the limits to the freedom to waive rights, i.e. the validity of waivers. Case law is of no help in this matter either, since, as already explained, the relative novelty of the use of waivers in contractual practice inevitably resulted in scarcity of case law.

The last undisputed fact is that the ZOO provides cases where the possibility of waiver is explicitly excluded (and so did *Skica*). For example, a debtor may not waive the statute of limitation prior to lapse of the period required for limitation.⁶ Also, waiving in advance the right to annul a contract for *laesio enormis* is explicitly forbidden,⁷ as well as waiving the right to fulfil a monetary obligation before its due date.⁸

Two questions remain: is a waiver forbidden *only* in cases where such prohibition is expressly provided for in the statute, or not? If not,

⁴ The 1978 ZOO was based on a draft published in 1969 by Prof. Mihailo Konstantinović, called *Skica za Zakonik o obligacijama i ugovorima* [Sketch for the code of obligations and contracts]. This draft is referred to as *Skica*.

⁵ Vodinečić says, when discussing the principle of transferability of civil law rights ‘The norms of civil law, in majority of cases, allow the right holder to ... waive their right’ (Vodinečić 2012, 40, own translation). He also emphasizes that waiver may lead to complete ceasing of the right, but also to temporary impossibility of enforcement. Last but not least, he warns that there are many exceptions to this rule, and for many various reasons – whereas he explicitly mentions that waiver is not possible if it would limit the freedom of the right holder excessively, e.g. waiving a right to annul an invalid agreement (Vodinečić 2012, 41).

⁶ Art. 365 of the ZOO.

⁷ Art 139 para 3 of the ZOO.

⁸ Art. 398 para 2 of the ZOO.

what would be the criteria under which, irrespective of the fact that there is no express prohibition of waiver in the particular matter, a waiver would nevertheless fail to produce effects?

The answer to the first question seems to be clear: waiver may be ineffective and invalid not only where its ineffectiveness is expressly regulated by the statute, but also in other cases. For example, even though it is not expressly provided in the ZOO, waiving a right to seek annulment of a null contract, or waiving in advance the right to avoid a voidable contract is quite certainly not allowed.

The answer to the second question is much more complex, because of the number of criteria that can render a waiver inoperable is significant. Subsuming them under the notion of *ordre public*,⁹ as it is usually done in the doctrine on limitations to the freedom of contract in general, is of little help in the concrete case, as the outer borders of the notion of *ordre public* are not always easy to chart. Instead, when speaking about waivers and their effectiveness, a parallel to the issue of freedom of contract and its (particular) limitations seems to be more useful.

In examining this issue under the ZOO, *Skica* remains a valid starting point, particularly Article 44. This article regulates the possibility of the party that performed an obligation from a formal bilateral contract lacking the required form, to request performance of the other party, rather than just restitution (return of its performance). *Skica* allows such a request for performance only if the required form is established for the protection of the very party requesting performance, ‘and if in the concrete case the waiver of such protection is possible’ (translated by author). The rationale of this provision would be that a precondition for the effective waiver is that the waived right has no significance to the general, common or public interest, but solely for the right-holder (‘waivability’). Statutory rights and requirements may exist in both public and private interest, and only those not impeding the public interest may be waived. Moreover, they may be waived if that is possible in the concrete case, i.e. if the specific criteria that would exclude the possibility of waiver allow it. Thus, a scheme is established where the first level of analysis is ascertaining the general ‘waivability’ of a claim and the second is establishing whether the particular criteria that would exclude the validity of waiver (of a generally waivable right) exist.

Judging from the cases in which waiver is explicitly excluded, one might conclude that the law, in most cases, excludes the possibility of those waivers that would lead to violations of the principles of law of obligations provided in the ZOO – above all, the principle of the equality

⁹ The notion is similar to the notion of public policy used in international private law, but it is not identical. On the notion of *ordre public* in Yugoslav doctrine, see Perović (1975, 99–165).

of parties and the principle of good faith. The ZOO provides for several examples that illustrate the point.

For instance, Article 597 paragraphs 3 and 4 of the ZOO, envisages a situation whereby in a lease contract concluded for indefinite period, the leased chattels present a health hazard. In that case, the lessee may terminate the agreement without notice, even if they knew of the hazard at the time of contract formation, and this right to terminate without notice cannot be waived. This illustrates that when a particular right is established, not only in the interest of the right-holder (here the lessee) but also in the public interest, such a right cannot be waived. A similar logic governs the exclusion of waiver of the statutory limitation period prior to its lapse.¹⁰

Furthermore, Article 92 of the ZOO provides in its first paragraph that the principal may restrict or revoke the power of attorney to an agent, even if they had contractually waived that right. In addition to being a consequence of the independence of the power of attorney from the contract on which it was based, this rule stems from the notion of the protection of personal freedom of the principal, who simply cannot be in the position to be bound by the will of the agent if they no longer wish so.¹¹ That would subject the principal, against their own will, to the will of the agent, and would result in a violation of the principle of equality of parties. Many other cases of explicitly excluding the possibility of a waiver have the same rationale.

Moreover, Article 136 of the ZOO allows the parties to waive the possibility to terminate or revise the contract for a specific changed circumstance, *provided it is not contrary to the principle of good faith*. Hence, the law is fairly explicit about the ground for excluding the possibility of waiver in this case.

Finally, Article 486 of the ZOO provides for a possibility to limit or exclude liability of the seller for material defects. According to the third paragraph of this article, if the buyer waived his right to terminate the sales contract for material defects, they would not be regarded as having waived other rights that are provided to them by the law in that situation (they ‘retain’ these rights). The rationale behind this provision is that the scope of the waiver should be interpreted narrowly. The same idea is contained in the rule that the waiver of the security right should not be interpreted as the waiver of the secured claim.¹²

In conclusion, it could be said that waivers are generally possible and recognized in civil law systems based on the ZOO. The effect of

¹⁰ Art. 375 of the ZOO.

¹¹ The question is whether the time limited waiver would produce legal effects in this case or not; Serbian case law would most probably allow it.

¹² Article 345 of the ZOO.

a waiver of claim would be the obligation of the person who waived the claim to refrain from exercising that claim/right against the person towards whom the claim was waived. However, in order for a waiver to produce the desired effect, several conditions need to be met: firstly, the right waived must exist solely in the interest of the right-holder, i.e. not even partially in the public interest, otherwise the right cannot be waived (one can label this as the 'waivability' of a right); secondly, the waiver of a generally 'waivable' right will not produce the effect if, in a particular case, it were to violate the *ordre public*, particularly the basic principles of the law of obligations as defined by the ZOO, primarily the principle of equality of the parties (requiring that one party is not subjected to the other against its will, or excessively, to the extent that limits the freedom of one party more than allowed) and the principle of good faith (requiring also a minimum level of fairness and equity in the relation between the parties); thirdly, the waivers are to be interpreted strictly (narrowly).

3. WAIVER OF A FUTURE CLAIM

The deliberations set out in respect of the rules generally applicable to waiver of an existing claim also apply to the waiver of a future claim. However, there are two more issues that need to be addressed: the first relates to waiving a particular, *specified* future claim and its particularities, and the second to waiving an *unspecified* future claim.

As for waiving a particular future claim, apart from what was said about the general rules of waiver, two more points should be stressed.

The first is the fact that waiving a future claim is more susceptible to being in violation of the principle of equality and good faith. This is more or less self-explanatory: waiving a claim even before it came to existence has an inherent danger of abuse by the other contractual party, and always results in subjecting the waiving party to the party who benefits from the waiver. If such subjection is excessive, so as that it violates the freedom of the waiving party and thus the principle of equality of the parties, or if it is contrary to the good faith principle, the waiver will be ineffective. Therefore, the ZOO forbids in several places the waiving of a claim in advance, i.e. before it is established. Sometimes it is done explicitly, like in Article 139 para 3 of the ZOO, in regard to *laesio enormis*, which prohibits waiving the right to seek annulment of a contract on the grounds of excessive loss in advance, before the party actually learned that there is an obvious disproportion of mutual commitments. However, the prohibition is sometimes also contained implicitly, e.g. in case of voidable contracts: a party may not waive

its right to avoid a voidable contract in advance, before it learns that the contract is voidable. This stems from the very nature and notion of voidable contracts, and therefore, even if the party waives in advance the possibility to avoid a contract, for example, for error, in case an error by that party that provides grounds for avoidance to take place, such waiver will be ineffective. On the other hand, once the party knows it could avoid a contract on the grounds of error, it can effectively waive such a right. The reason for excluding the effectiveness of waiver in advance in these cases is the violation of the equality of parties and guaranteed inalienable level of freedom each party enjoys. This ground for rendering a waiver ineffective is more emphasized in the case of a future claim, and the leeway for effective waivers is thus narrower when a future claim is waived. There is a body of case law on forbidden waivers of future claims, and it mostly relates to statutory interest on the sum in arrears, salaries and other employment-related claims, as well as to some claims related to family law. As for the statutory interest, given its imperative nature, the courts decided that the claim to such interest cannot be validly waived in advance,¹³ but only after it matures.¹⁴ As for the claim related to salary and other employment related claims the courts said that, for example, minimum wages cannot be waived in advance ‘*not only because such waiver would contravene the principle of good faith from the provisions of the ZOO, but also because it contravenes the constitutional provisions of the Constitution of the Republic of Serbia*’ (translated and italicized by author).¹⁵ Similarly, the claim for severance payment cannot be waived in advance,¹⁶ but can be waived by contract after it matures.¹⁷ As for cases

¹³ This was established at the 26th Joint Session of the Federal Court, the Supreme Courts of Republics and Autonomous Provinces and the Supreme Military Court, held on 30 October 1984, and subsequent case law has upheld such position – see Decision of Higher Commercial Court Pž. 7502/96, dated 20 February 1997, published in *Sudska praksa privrednih sudova* [Case law of commercial courts], Bulletin No. 2/1997, 58; Decision of Higher Commercial Court Pž. 3177/2000(1), dated 18 May 2000, published in *Sudska praksa privrednih sudova* [Case law of commercial courts], Bulletin No. 4/2000, 26; Decision of the Commercial Court of Appeals, Pž. 1228/2010(1), dated 25 March 2010, published in *Paragraf Lex*;

¹⁴ Decision of the Commercial Court of Appeals Pž. 1228/2010(2), dated 25 March 2010, while acknowledging the fact that matured amount of statutory interest can be waived by contract, requires explicit expression in that sense.

¹⁵ Decision of the Higher Commercial Court Pž. 1285/2008(2), dated 5 June 2008, published in *Paragraf Lex*.

¹⁶ Decision of the Supreme Court of Cassation Rev. 2. 1494/2010, dated 27 May 2010, published in *Paragraf Lex* and on the website of the Supreme Court of Cassation.

¹⁷ Decision of the Supreme Court of Serbia, Rev. II 1226/2001, dated 27 December 2001, published in *Bilten sudske prakse Vrhovnog suda Srbije* [Bulletin of the Case Law of the Supreme Court of Serbia], No. 1/2003, 90; also Decision of the Supreme Court of Serbia, Rev. 1266/2001 dated 20 June 2002, published in *Paragraf Lex*;

in family law, the courts decided that spouses cannot waive the right to request the division of their joint estate in advance.¹⁸

The second point that should be emphasised is that, when examining the waiver of future claims, one must keep in mind the rules of the ZOO on exclusion and limitation of contractual liability. Namely, similar purposes of the two institutions (waiving a specified future claim and exclusion/limitation of liability) provide grounds for analogous (*mutatis mutandis*) application of the rules on exclusion/limitation of liability (contained explicitly in the ZOO) to waiver of a future claim. Article 265 of the ZOO reads:

Limitation and Preclusion of Liability

(1) A debtor's liability for intention or gross negligence may not be precluded in advance by contract.

(2) At the request by an interested contracting party, the court may, however, also annul the contractual provision on the exemption of liability for simple negligence, should such agreement be the result of the monopoly position of the debtor or, otherwise, of unequal mutual positions of the contracting parties.

(3) A provision of a contract shall be valid by which the highest amount of compensation is determined, unless such amount is in obvious disproportion to the damage and unless the law provides otherwise for the specific case.

(4) In case of limiting the amount of compensation, the creditor shall be entitled to full redress should the impossibility of performance of obligation be caused by wilful misconduct or gross negligence of the debtor.¹⁹

The first two paragraphs clearly demonstrate the limits of the possibility of exclusion of liability, inspired by the principle of good faith; even if all liability is excluded, this will not be effective (by operation of law) if the liability is caused intentionally or in gross negligence, and even if it is caused by simple negligence, if the unequal position of the parties enables the one that has the upper hand to force the exclusion in the agreement (if the court finds so).²⁰ The same rationale for the limitation

¹⁸ Decision of County Court in Valjevo, Gž. 704/2007, dated 13 June 2007, published in *Paragraf Lex*. The Court explicitly states that "the case is about a statement by which its issuer has waived her future right, ... so on that ground also the legal validity of the said statement may be questioned" (translated by author). This also indicates that waiver of future claims is more susceptible to being declared invalid than the waiver of an existing claim.

¹⁹ Translation by Đurica Krstić, *The Law on Contracts and Torts*, Jugoslovenski pregled (Yugoslav Survey), Belgrade 1997, at https://www.mpravde.gov.rs/files/The%20Law%20of%20Contract%20and%20Torts_180411.pdf (last visited 21 February 2020).

²⁰ For more details see Jankovec (1993, 363ff). Jankovec sees the roots of the limits of the possibility of exclusion/limitation in *ordre public* and the equity (1993, 366).

of liability is also present in the third and the fourth paragraph: gross disproportion between the limited amount and the actual damages, which violates the equivalence principle, precludes the limitation of liability; intentional non-performance or non-performance due to gross negligence, as violation of the good faith principle, also prevents the operability of the limitations. These rules were in application even before the ZOO was enacted,²¹ and clear wording of the ZOO leaves little if any room for different interpretations. This is the most likely reason why there is no published case law on Art. 265 of the ZOO; the published cases deal with definitions of gross negligence and intent (wherein the doctrinal views are restated),²² but not particularly the inapplicability of exclusion and/or limitation of liability if the damage was caused by gross negligence or intentionally.

By analogy, in the author's opinion the waiver of a right in advance is not effective if it is abused so as to exonerate the intentional or grossly negligent conduct of the adverse party. The rationale is that if a claim is waived in advance, the waiver should cover the situation in which the claim would arise out of the ordinary course of affairs, or out of simple negligence, and not out of bad faith conduct by the adverse party, i.e. intention or gross negligence. Also, if waiving a future claim would lead to gross disproportion between the performances of the parties in a bilateral contract, the waiver may not be effective because of the violation of the equivalence principle.

On the other hand, waiver of any future claim that may arise in a dispute between the parties, without any specification whatsoever, is in the vast majority of cases ineffective, in the author's opinion, because

²¹ In one case, the exclusion of liability for damages caused by a lorry given to the plaintiff to use free of charge did not apply because the lorry was technically not in order, so after it crashed and thus caused damage to plaintiff's goods, the court found the damage to be caused by gross negligence of the defendant, thus the exclusion of liability did not apply (Decision of the Federal Court Gzs. 50/74, dated 24 December 1974, published in *Zbirka sudskih odluka* [Collection of Court Decisions], Book I (1976), Vol. 3, decision No. 317 at p. 137). In another case it was decided that the forwarder, which caused damage by simple negligence, is liable up to the limits set forth in his general terms and conditions, but for the damage caused by gross negligence or intent, the limits do not apply (Decision of the Supreme Court of Slovenia Sl. 213/76, dated 3 June 1976, published in *Zbirka sudskih odluka* [Collection of Court Decisions], Book II (1977), Vol. 3, decision No. 415 at p. 422). However, before the ZOO was enacted in 1978, there was also some case law excluding the very possibility to exclude or limit liability (for details see Mitrović (1983, 929), and case law quoted therein).

²² 'A person acts grossly negligent if it doesn't use even the diligence that every average person would use' – Supreme Court of Croatia Gž 1956/78, dated 20 March 1979, published in *Pregled sudske prakse, Prilog Naše zakonitosti* [Review of Court Practice], No. 15, decision No. 141; In the decision of the Supreme Court of Serbia Rev. 2 1665/02 dated 9 August 2003, available at <http://www.sirius.rs/praksa/3886> (last visited 21 February 2020), gross negligence is defined as 'behaviour that does not satisfy the standard of reasonable, even sub-par diligent person' (translated by author).

it would most certainly lead to subsequent inequality of the parties and excessive limitation of freedom of the waiving party. Namely, such waiver would put a waiving party in a position of latent subordination to the other party, which (subordination) would materialize upon occurrence of the breach. It is highly likely that the courts under the ZOO would not allow it. It is quite seldom to have waivers formulated so broadly even in jurisdictions where waivers are much more ordinary than in the countries of the former Yugoslavia. Every factor that circumscribes and defines future claims waived (i.e. their grounds, value, or similar) potentially increases the effectiveness of the waiver. Consequently, *the more the waiver of future claim is specified, the better the chances it will produce effects*. Naturally, in every particular case one should take account of the general rules on waivers, and of the rules for waiving a specific future claim, in addition to the fact that waiving a bundle of future claims is additionally susceptible to being ineffective on grounds of excessive limitation of party freedom and violation of equality of the parties. It should be pointed out that this does not relate only to the equality at the time of formation of contract, but also to creating inequality subsequent to formation, in the contract fulfilment phase.

In conclusion, it could be said that in the case of waiving a future claim additional rules should be taken into consideration besides the rules applicable to waiving existing claims. Firstly, waiving a future claim is more susceptible to violations of the general principles of the ZOO than waiving an existing claim, since it inherently poses a danger to the principle of equality and borders the good faith requirement. Thus, the leeway for effective waivers is narrower when a future claim is waived. Secondly, in the case when a future claim is waived, one must bear in mind that such a waiver must not exonerate the adverse party from its intentional or grossly negligent behaviour, and may not result in excessive disproportion in the performances of the parties, all this through analogous application of rules related to contractual limitation and exclusion of liability. Lastly, given the fact that waiving a bundle of future claims (say, all claims that could arise from a given contract) would most probably be without effect, it can be concluded that the more the waiver of future claim is specified, the better the chances are that it will produce effects.

REFERENCES

- Atiyah, Patrick Selim. 1979. *The Rise and Fall of Freedom of Contract*, Oxford: Clarendon Press.
- Beatson, Jack. 2002. *Anson's Law of Contract*, 28th ed., Oxford: Oxford University Press. *Collins Dictionary of Law*, 2nd ed. 2001. Glasgow: Harper Collins.

- Farnsworth, Edward Allan. 1999. *Contracts*, 3rd ed. New York: Aspen Law & Business.
- Furmston, Michael P. 1991. *Cheshire, Fifoot and Furmston's Law of Contract*, 12th ed. London, Dublin Edinburgh: Butterworth.
- Garner, B.A. 1999. *Black's Law Dictionary*, 7th ed., St. Paul: West Group.
- Guest, Anthony Gordon. 1984. *Anson's Law of Contract*, 26th ed. Oxford: Oxford University Press.
- Jankovec, Ivica. 1993. *Ugovorna odgovornost* [Contractual liability], Beograd: Poslovna politika.
- Konstantinović, Mihailo. 1969. *Obligacije i ugovori – Skica za zakonik o obligacijama i ugovorima* [Obligations and contracts: a sketch for the code on obligations], Belgrade: Faculty of Law.
- Mitrović, Dobrosav. 1983. *Komentar uz član 265* [Commentary to Article 265] in, *Komentar Zakona o obligacionim odnosima, I tom* [Commentary of Law on Obligations, Vol. I] edited by Borislav Blagojević and Vrleta Krulj, Belgrade: Savremena administracija.
- Perović, Slobodan. 1975. *Zabranjeni ugovori* [Prohibited contracts], Belgrade: Official Gazette of the SFRY;
- Treitel, Guenter Heinz. 1995. *An Outline of The Law of Contract*, 5th ed., London, Dublin, Edinburgh: Butterworth.
- Vodinelić, Vladimir V. 2012. *Građansko pravo – Uvod u građansko pravo i Opšti deo građanskog prava* [Civil law – Introduction and General Part], Belgrade: Union University Faculty of Law.
- Zweigert, Konrad, Hein Koetz. 1998. *An Introduction to Comparative Law* (translated by Toni Weir), 3rd ed., Oxford: Clarendon Press.

Article history:

Received: 6. 1. 2020.

Accepted: 11. 2. 2020.