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Katarina Jovičić, Slobodan Vukadinović. 2023. *Neizvršenje ugovora, odgovornost i naknada štete (Nonperformance of contracts, liability, and compensation for damages).* **Belgrade: Institut za uporedno pravo, 228.**

1. INTRODUCTION

The academic monograph *Neizvršenje ugovora, odgovornost i naknada štete* (Nonperformance of contracts, liability, and compensation for damages)[1] provides comprehensive insight into legal issues that arise in cases involving breaches of contract, with a particular focus on contractual liability and compensation for damages. The authors approach these topics from both the theoretical and the practical perspectives, offering solutions to problems frequently encountered in business, judicial, and arbitration practices. The focus is on current and significant issues, presenting systematic analyses

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1 The academic monograph *Neizvršenje ugovora, odgovornost i naknada štete* is publicly available at: *http://ricl.iup.rs/1868/*, last visited December 8, 2024.

and proposals for resolving problems. Their review includes characteristic solutions from various national laws, international conventions (such as the United Nations Convention on Contracts for the International Sale of Goods, which has been ratified by Serbia), as well as foreign and Serbian case law. This thorough analysis covers both theoretical considerations and practical aspects of contract law (such as issues related to contract performance and the resulting effects), which is of great importance to legal professionals and academics.

The book further provides a comparative approach, which enables a cross-analysis of the legal concepts and trends at the international level.[2]

2. THE DIVERSITY OF SOURCES OF CONTRACT LAW

The first chapter, which addresses the sources of law, clearly highlights the importance of the principle of autonomy of will in contract law, while also pointing out its limitations through mandatory norms and public policy. A key distinction is made between the influence of contracting parties on their relationships and the restrictions that arise from the application of mandatory regulations. These limitations raise the question of whether the autonomy of the parties will can be viewed as absolute or whether it is essentially relative, dependent on the legal and regulatory frameworks within which it operates. In this way, the space for contractual freedom exists but is always subordinate to the broader legal contexts, which can dictate the outcomes of contractual relations.

Furthermore, the authors discuss the significance and application of the principle of freedom of contract, both in the context of substantive law and in the context of conflict of laws. While the principle of autonomy of the will is historically deeply rooted in liberal economic and political ideas (Vukčević 1983, 59), it still occupies a central place in contemporary contract law, particularly with regard to the ability of contracting parties to independently regulate their legal relations (Jovičić 2019, 440). The concept derived from concepts of economic liberalism assumes that each party will

[2] In examining and researching the topics covered in the monograph, the authors have utilized relevant legal literature, appropriate legal sources, and judicial practice. Their analysis encompasses a broad range of sources, including national legislations, international conventions, and principles of international contract law. The authors employ clear language and a straightforward writing style. This approach allows the reader to effortlessly follow and understand the complex legal issues addressed in the book.

best manage its own interests, but it does not account for asymmetric power of the different contracting parties. Limitations on the principle of autonomy of the will often serve as a protection against abuses and power imbalances, but they raise the question of whether contractual autonomy truly exists in the sense presented in theory. Adhesion contracts (Vukadinović 2020, 5–15) illustrate how economically stronger parties can leverage their position to impose terms, while the weaker party has little or no room for negotiation. In today's world, where large corporations and powerful economic entities often dictate the terms of agreements, does the principle of autonomy of will truly allow for fair and equitable application? In this context, limitations on the principle of autonomy of will are not only a necessity but also a reflection of the growing need for legal protection against inequality in contractual relations (Jovičić 2019, 440).[3]

The reader will understand how contracting parties can choose and apply the applicable rules of foreign law, rules from international conventions, customary rules, codified rules of international organizations, as well as rules contained in the principles of international contract law.

3. BINDING NATURE OF THE CONTRACT AND LEGAL CONSEQUENCES OF NONPERFORMANCE

By examining various concepts of nonperformance of contractual obligations, the book offers a deep insight into the theoretical and practical aspects of contractual liability. The authors point out that although Serbian positive law currently lacks a provision that would explicitly formulate the principle of contractual obligation – which does not diminish its significance in practice – progress has been made with the introduction of such a provision in the Draft Civil Code of the Republic of Serbia (Commission for the Drafting of the Civil Code 2015, 109). Although the principle of the binding nature of contracts is theoretically undisputed and deeply rooted in the tradition of contract law, the lack of an explicit provision in current Serbian positive law raises questions about the clarity and transparency of the legislative framework. Comparative law examples, such as those from France and Italy, demonstrate that it is possible to clearly and precisely formulate this principle (Jovičić, Vukadinović 2023, 62–63), which contributes to legal

[3] Jovičić (2019) provides arguments justifying the need for greater limitation of the freedom of contract for traders in consumer contracts, aimed at ensuring a fairer relationship in agreements between consumers, who are less experienced in negotiations, and traders, who are more knowledgeable and financially stable.

certainty. The lack of such a provision in Serbian law opens the door to legal uncertainty and varying interpretations, especially in situations involving disputes. This issue becomes even more relevant considering that legal systems around the world already have explicit norms that articulate this principle, which further encourages reflection on the need for additional steps to formalize the principle of contractual obligation, thereby achieving greater clarity and predictability.

It also explores the issue of why contracts are binding and why legal systems protect contractual obligations as legally binding, while other promises remain in the realm of moral obligation. Although the principle of autonomy of the will is key to contractual autonomy, the question arises as to why legal systems feel the need to protect contracts as legally binding. Is it justified to legally sanction every deviation from contractual obligations, or should legal theory recognize greater freedom for the parties to revise their obligations? Additionally, it examines various perspectives that are significant for the development of contract law theory, from Roman law, which forms the foundation of our contract law, to modern theories of contract law. Thus, the book also analyzes promise theory, reliance theory, transfer theory, as well as the prevailing principle of *pacta sunt servanda*.[4]

The book examines when a contract is considered unperformed in a legal sense and analyzes various concepts of nonperformance in comparative law, which is important for determining contractual liability and compensation for damages. The question arises whether legal systems clearly define the concept of nonperformance or leave room for subjective interpretation and different interpretations depending on the specific case. Comparative

[4] A contract would not be a contract if it did not bind the parties who entered into it. The principle that contracts bind is ancient, having been upheld by the earliest civilizations (Confucianism, Buddhism, Hinduism, and later Islam pay particular attention to the duty of contract performance; in Sharia law, the principle of *pacta sunt servanda* has a divine origin). The essence of the rule is clear and straightforward: contracts must be honored and performed, whether they concern contracts between private individuals or those concluded by a state or sovereign. *Pacta sunt servanda* also means that contractual obligations should be fulfilled in good faith and that the contracting parties express mutual understanding and respect. Contract performance is carried out in accordance with the interpretation of the contract, which consolidates what is required by the contract and how those requirements must be met. The principle of good faith applies equally to both the parties to the contract and to the judge or arbitrator resolving the dispute. Interpretation of the contract in good faith includes, among other things, the assumption that the contracting parties acted fairly, that they made real rather than illusory promises, that nothing unreasonable, contradictory, or impossible was intended, and that terms were used in their usual meaning (Kotuby, Sobota 2017, 90–92).

legal analysis shows that there is no uniform approach to this issue, which can lead to legal uncertainty. A universal definition could contribute to predictability, but the specificities of each contract often require flexibility and tailored analysis. Specifically, the authors of this book examine the unitary concept of nonperformance, which implies that any deviation from contractual obligations constitutes a breach of contract, regardless of the cause or nature of that deviation (Jovičić, Vukadinović 2023, 80–82). They then discuss the application of the unitary concept of nonperformance in the context of international legal sources such as the Vienna Convention, the UNIDROIT Principles, and the Principles of European Contract Law. These sources do not differentiate between complete and partial nonperformance, but they include mechanisms that mitigate the debtor's liability, primarily through remedies available to the creditor. Although this concept provides clarity, there is a risk that a formalistic approach could lead to stricter liability for the debtor, even in cases of unforeseeable circumstances. The book highlights the need to consider more flexible models, which would better balance the interests of the contracting parties and enable fairer dispute resolution.

The value of the book also lies in pointing out the differences between the unitary concept of nonperformance and the approach characteristic of continental legal systems. While the unitary concept emphasizes the legal remedies available to the creditor, continental legal systems focus more on the causes of nonperformance and on determining appropriate legal remedies for each type of breach of contract (Jovičić, Vukadinović 2023, 94–99).

The chapter concludes with an analysis of nonperformance in Serbian positive law, with an emphasis on the theoretical and practical aspects. Although Serbian law clearly distinguishes three general forms of nonperformance – delay, impossibility of performance, and liability for material and legal defects – the challenges that arise in practice can lead to inefficiency. In particular, the distinction between complete and partial nonperformance often results in different legal consequences, which can lead to unfairness in complex cases. Perhaps, instead of insisting on formal distinctions, the focus should be more on the essence of breaching and the fair protection of the contracting parties' interests.

4. CONTRACTUAL LIABILITY: BASIS, LIMITATION, AND EXCLUSION

In the third part of the book, the authors examine proper performance of obligations as the primary goal of any contractual relationship[5] and as the regular way in which an obligation between contracting parties is completed. It is particularly emphasized that deviations from contractual obligations do not always lead to a legally relevant breach of contract, as the circumstances of each case must be carefully considered. Accordingly, the authors discuss contractual liability and analyze it in the context of the Serbian Law on Obligations. They point out that the damages resulting from nonperformance of a contract is considered a consequence of a breach of the primary obligation, and that contractual liability is essentially liability for compensation of damages. However, they emphasize that there are situations in which the debtor may be exempt from liability if they can prove that the nonperformance occurred due to circumstances beyond their control. When it comes to the theoretical aspects of contractual liability, the authors note that in Serbian law there is a dilemma as to whether contractual liability is based on the debtor's fault (subjective liability) or whether the debtor is liable regardless of fault (objective liability). They note that the majority of older local authors, including experts from the former SFRY, believed that the Law on Obligations establishes the basis of contractual liability as subjective liability, which has also been confirmed in national court decisions. Additionally, they point out that in more recent literature, Marija Karanikić Mirić and Nebojša Jovanović also highlight this dilemma (Jovičić, Vukadinović 2023, 117).

The issue of objective and subjective liability of the debtor is examined through the lens of comparative law, with particular focus on the differences between continental and Anglo-Saxon law (Jovičić, Vukadinović 2018, 647–660).

Limitation or exclusion of contractual liability is a topic thoroughly addressed through an analysis of the legal norms governing these legal institutes, as well as exoneration clauses. Therefore, this section also focuses on the issue of impossibility of performance, as it allows the debtor to be released from fulfilling obligations established by the contract. The issue of contractual limitation or exclusion of liability presents a challenge in modern law, which faces the need to allow flexibility in contractual relationships,

[5] The primary obligation of the debtor under a legally valid contract is to perform the obligations undertaken by the contract diligently and in accordance with its provisions.

while also ensuring the protection of the weaker party. Although contracting parties have the right to regulate their own relations, national legislation often limits this freedom to prevent abuses, particularly in cases of power imbalance. This is especially significant in consumer law, where exclusion clauses are frequently considered unfair and may be annulled. Conversely, in contracts between professionals, these clauses can serve as a legitimate means to allocate risks between the parties, though their validity depends on compliance with applicable law. By analyzing the legal basis for the limitation and exclusion of contractual liability through exoneration clauses, the authors highlight their importance and varied application in modern contract law. It is emphasized that, although theoretically these clauses provide greater predictability in contractual relationships, there is a risk of their abuse in practice, especially when the economically stronger party imposes its terms on the economically weaker party.[6] Regarding legal systems that allow for the contractual limitation of liability, the authors point out that although there is theoretical space for the application of such clauses, their practical application is limited, particularly in consumer law where they may be declared void due to an imbalance in the relationship between contracting parties. In commercial contracts, these clauses are used more frequently, but experts exercise caution when negotiating them (Jovičić, Vukadinović 2023, 135).

Although exoneration clauses can be beneficial to contracting parties in terms of reducing legal uncertainty and improving contract predictability, the question arises whether such contractual solutions always reflect true autonomy of will or are also used as tools to protect the interests of economically stronger actors. The increasing use of these clauses in consumer contracts raises concerns about whether it is truly possible to achieve a fair balance between contracting parties, or if they essentially serve as a means to secure the interests of the stronger negotiators at the expense of the weaker ones. The need for transparency and equality in negotiations has never been greater, especially in light of the increasingly complex contractual relationships in the global economy. In this context, the question is whether legislators should provide additional mechanisms to protect weaker parties or if this remains a matter for judicial practice and legal interpretation.

[6] This occurrence is common in cases where contracts are concluded through standard-form agreements or pre-prepared contract models, where the weaker party is effectively in a situation where they must accept the imposed terms.

5. COMPENSATION FOR CONTRACTUAL DAMAGES: PURPOSE, ASSESSMENT OF DAMAGES, AND LIMITATION OF DEBTOR'S LIABILITY

In the final and most extensive chapter, dedicated to compensation for contractual damages, the authors analyze the compensation for contractual damages through four main thematic areas.[7] The distinction between actual damages and lost profit is highlighted especially, along with the dilemmas regarding the recognition of nonmaterial damages in contractual relationships. The book also addresses whether compensation for damages should always be limited to damages that could have been foreseen at the time the contract was concluded, or if there are cases where fairness would require broader compensation. The authors carefully examine the issue of creditor contribution to the occurrence or increase of damages, suggesting that such behavior may influence the reduction or even the elimination of damages compensation. They emphasize that, although the principle of full compensation prevails in tort law, in practice, certain limitations regarding this principle are applied to all rights. These limitations include, among other things, considering only the damages that the debtor could have foreseen at the time of the contract's conclusion, as well as the impact of creditor behavior on the occurrence or increase of the damages. They emphasize the importance of fair assessment of damages compensation, taking into account specific circumstances, and caution against the need for the careful drafting of contractual clauses to avoid potential disputes. They note the challenges in proving the extent of damages and the possibility for the creditors claiming compensation only for costs incurred under the belief that the contract would be fulfilled. The authors stress that damages compensation is not a punitive measure but should reflect the actual incurred damages. In the context of determining the amount of damages, they examine various methods, including specific calculations and preferential assessment methods in situations where the contract is terminated. The principle of

[7] The first section explores the purpose of damages compensation and focuses on protecting the interests of creditors, including compensation for lost profits, compensation for reliance on contract performance, restitution of funds, as well as protection through contract performance and the preventive role of damages compensation. The second section discusses issues related to proving and assessing the amount of damages, with particular emphasis on the mechanisms used in various legal systems. The third section considers the relationship between causation and foreseeability within contractual liability, while the fourth section analyzes the behavior of creditors and their impact on the calculation of damages.

full compensation is predominant, but there are limitations related to the foreseeability of damages and the role of creditor behavior in the occurrence and increase of damages.

The authors reflect on the relationship between causation and foreseeability, emphasizing that evidence of damages is not always straightforward, and that limiting damages to foreseeable losses helps to constrain the debtor's liability to a fair level. They also highlight the importance of the creditor's behavior and its impact on the calculation of damages, noting that the failure to take reasonable measures to prevent or mitigate damages can affect the amount of compensation.[8]

6. CONCLUSION

The academic monograph *Neizvršenje ugovora, odgovornost i naknada štete* (*Nonperformance of contracts, liability, and compensation for damages*) is an essential work for anyone interested in Serbian contract law. The latest analyses and viewpoints of the authors, combined with rich historical and practical examples, make this book a valuable source of information and a stimulating work for further research and practical application. The analysis raises important questions regarding the fair balance between the rights of creditors and the obligations of debtors.

The book provides a comprehensive overview of significant aspects of contract law, focusing on fundamental principles and challenges in regulating contractual relationships. It highlights the importance of the legal framework in ensuring fair relations between contracting parties and the need for further improvement of legal norms with the aim of providing greater protection for weaker parties and fairer application of contractual obligations. Additionally, it examines how different legal systems approach

[8] In the case of contractual damages compensation, it is not necessary to prove damages to the level of certainty. Instead, the injured party is responsible for damages that can be established with reasonable certainty. A lower degree of proof should provide a middle ground by protecting the defendant from liability for damages that are highly speculative, on the one hand, and not requiring proof that a specific damage would certainly occur, on the other, as it is unlikely that any dispute could determine with certainty what would have happened had the contract been properly performed. Considering that this uncertainty was created by a breach of contract for which the defendant is liable, they should not be allowed to avoid all responsibility for damages simply because of this uncertainty (Bix 2012, 93).

issues related to contractual liability and compensation for damages, emphasizing the importance of the flexibility and adaptability of legal solutions in the present conditions.

The conclusions of the book emphasize the need to strike a balance between the strict application of contract law principles and the realities of the dynamic and often unpredictable contractual relationships. This book not only provides an in-depth analysis of contract law but also lays the groundwork for further discussion on how existing legal frameworks and practices can be improved, particularly in the context of protecting the interests of contractual parties. It offers a comprehensive insight into the current challenges and potential directions for the development of contract law, thereby contributing to both theory and practice.

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