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SOURCES OF THE CONTRACT LAW AND THE ROLE OF JUDICIARY IN BOSNIA AND HERZEGOVINA AND THE COUNTRIES EMERGING FROM THE DISSOLUTION OF THE FORMER YUGOSLAVIA

Abstract

This article explores the intricate relations among sources of law and the role of judiciary in Bosnia and Herzegovina according to the Act on Obligations, being a sort of ascuis communituire for all countries emerging from the dissolution of the former Yugoslavia.

Key words: written laws, regulations, equity, morality, usages of trade, stare decisis, principal legal understanding, dissenting opinion.

1 Introduction

Written laws in BiH and other countries emerging from the dissolution of the former Yugoslavia prevail over unwritten customs and usages. As such, law in BiH is based on abstract, straightforward and seemingly perfect legal concepts and general principles of law, from which derive less abstract general rules mostly issued by governmental agencies as well as individual administrative or judicial decisions producing *inter partes* legal effect. This is best understood if one explains the relation between written sources of law on the one hand and equity and usages of trade on the other.

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2 The Principle of Equity

The law of obligations in these countries is governed not only by prescriptions of positive law, but also by a body of meta-legal tenets and standards of behavior, very often universal by nature. Yet, depending on historical circumstances conditioning their emergence, these standards frequently vary among some societies and milieus. The notion of positive law differs from equity inasmuch as both may significantly be at variance in real life. Equity is thus, in some societies, instituted as a sort of moral imperative requiring that positive law be in harmony with justice. However, it is evident that positive law may come into conflict with equity, i.e., the perception of whether it is just and fair in a particular society, or even with some universal perceptions of whether it is right or wrong (i.e., justice), common to all civilized nations.

Therefore, there is an ever-reoccurring question: in case of collision between positive law and equity, which ought to prevail? Depending on the legal tradition and adopted legal doctrines, this issue is resolved differently in various comparative legal systems.[1] The legal system in general and the Act on Obligations of the former Yugoslavia, in particular, which is a sort of *ascuis communituire* in these countries, resolve this issue resolutely: it holds untenable favoring equity over positive legal norms due to concern related to the risk of undermining the constitutional order in the country owing to inherent risk of possible legal voluntarism[2] and abuse of power in the name of equity, all of which is epitomized in the sentence of Roman law: *summum ius, summa iniuria*.[3]

Yet, equity is not completely relegated from the realm of obligations in BiH. It is indeed possible to permit equity to govern obligations insofar and insomuch as positive law, in this case the Act on Obligations so explicitly provides for–*and it does so very often*. It is, therefore, considered in BiH (and all former Yugoslav republics) that this is the only way that implementing equity shall uphold legal certainty (legal predictability) rather than put it into jeopardy. This is how the Act on Obligations explicitly empowers courts to resort to equity in case of several important issues. Namely, this enactment provides for liability grounded

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[1] About comparison of equity traditions in common law countries *see* in: T. Cockburn & M. Shirley, *Equity in a Nutshell* (Law book Co, Sydney, 2005); Rene David, John E. Brierly, *Major Legal Systems in the World Today* (2d ed., Stevens & Sons, London, 1978) 53, 283, 293 et. seq.

[2] On the definition of voluntarism, *see*: http://www.thefreedictionary.com/voluntarism (last visit on Aug. 9, 2013).

[3] Roughly translated: "the *greater the right, the greater the wrong*" (http://www.canonlaw.info/2009/07/recife-excommunications-summum-ius.html, last visit on Aug. 9, 2013).

on equity in case of: damages resulting from accidents caused by motor vehicles in motion,[4] in the domain of contract interpretation,[5] the clause of *rebus sic stantibus* (frustration of purpose, commercial impracticality), unfair contracts (ripping-off contracts, loan sharking, usury)[6] and in an array of other modes of contractual liability.

3 The Relation between the Act on Obligations and the Usages of Trade

There is a special relation between two different sources of the law: the Act on Obligations and usages of trade, particularly General Usages for Traffic of Goods, adopted by the Plenum of the General State Arbitration in 1954[7] (a body within the Chamber of Commerce of former Yugoslavia at the time). The Act on Obligations is unambiguous about this relation: the parties to obligation are required to adhere to good usages of trade (*boni mores*[8]). However, if the General Usages of Trade or a special usage of trade is contrary to a supplementary-dispositive norm (default rule[9]) of the Act on Obligations, the latter shall prevail, unless parties explicitly stipulated the implementation of a respective usage, or any other commercial custom.[10]

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[4] The Art. 178 of the Act on Obligations. From the holding of judgment: "Owners of motor vehicles are equally liable where none is guilty (and the injured did not in any way contribute to the damages, and there were no improper or incorrect driving from an unknown vehicle), nor reasons of equity in the case at hand do not require something else." (The decision of the Supreme Court of Croatia, Rev. 2199/91, of Jan. 23, 1992 – The Selected Decisions 1993-124).

[5] The Art. 101 of the Act on Obligations.

[6] http://download.aktivasistem.co.rs/uploadpropisi/Opste_uzanse_za_promet_robom_iz_1954._godine.htm (last visit on Jul. 26, 2013).

[7] http://download.aktivasistem.co.rs/uploadpropisi/Opste_uzanse_za_promet_robom_iz_1954._godine.htm (last visit on Jul. 26, 2013).

[8] The notion of *boni mores* is sometimes interchangeably used with morality or morals (*see* about this in: http://translex.uni-koeln.de/937000#toc-1, last visit on Jul. 28, 2013).

[9] About the nature of default rules in common law *see* in more depth in: Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Virginia Law Review (VALR) 821 (May, 1992).

[10] The Art. 21 of the Act on Obligations. From the holding of judgment: "It shall be considered that the parties wanted application of the General Usages for Trade in Goods, wherever they inserted terms in their agreement utilized by these Usages." (The decision of the Supreme Court of FBiH, Pž. 236/97, of Nov. 18, 1997 – the Bulletin of Supreme Court of the FBiH 1/98 - 27). Also *see*: http://lsolum.typepad.com/legaltheory/2012/09/legal-theory-lexicon-default-rules-and-completeness.html, (last visit on Jul. 28, 2013).

This is, however, a clear departure from tendency shown in modern commercial codifications in Europe and the USA[11] that in contrast give way to commercial customs (trade usages) over written rules, of course, unless parties chose the opposite.

4 The position of the judiciary

In contrast to common law jurisdictions, the BiH's law, as well as that of all the other all former Yugoslav republics, has no equivalent of a *stare decisis* doctrine within existing adjudication processes. A landmark decision in BiH reached by the highest judicial authority in deciding any given legal issue (that would usually be considered a precedent under the common law jurisdictions) might be considered an indirect source of law as *having a persuasive role*. Given it settles only a dispute between particular parties, such a judgment produces just the *inter partes* legal effect, even if it is issued from the Constitutional Court of BiH (the highest judicial authority in BiH when it comes to violations of human rights).

Yet, Bosnian judges are legally bound by so-called *principal legal understandings* (*opinions–načelna pravna mišljenja*) reached by respective courts' departments (e.g., a court's department of civil law).[12] As such, a legal understanding is not a judgment between litigation parties, but, having been detected as an issue as put forward by judges encountering practical problems in implementing particular provisions of law in a number of litigations at hand, it is more an interpretation of a contentious legal controversy discussed and resolved by a plenum of judges ascribed to a court's department.[13]

Apart from binding principal legal understandings, judges usually take past decisions reached by higher judicial authorities into account if there is a sufficient level of consistency in case law, though even then only refereeing to particular provisions of legislation, (and/or) regulations from administrative agencies, and/or those of bylaws. However, the principle is that *stricto sensu no single judgment binds a court*. Once uniform case law crystallizes around ambiguous, imprecise or nonexistent provisions of written law (legal gaps), courts treat precedents as an indirect (soft) source of law, de facto taking them into account when reaching a judgment, formally referring only to the written provisions of law altogether. There is an established pattern in this process: *the higher the*

[11] http://www.cisg.law.pace.edu/cisg/biblio/drettmann.html#c (last visit on Jul. 28, 2013).

[12] *See*: http://sudovi.me/podaci/vrhs/dokumenta/679.pdf (last visit on December 2013).

[13] http://pravosudje.ba/vstv/faces/kategorije.jsp;jsessionid=ebca52192c211056dd2613b60f6fc1c271382038bd7cc0083f28b62e475024bb.e34TbxyRbNiRb40Lb38TbheNax8Me0?ins=142&modul=765&kat=766&kolona=7513 (last visit on Dec. 5, 2013).

judicial authority providing uniformity in past precedents, the greater the persuasive (de facto) *force of case law*.

As in other Romano-Germanic jurisdictions, in BiH, *no relevance is given to the common law concept of dissenting opinion* (split judgment). Yet, it is possible that cases departing from the mainstream tendency serve as an omen for dissent within the judiciary. Dissenting cases thus might exert influence over future decisions, or might even backfire their authors relative to their perspective carrier advancement–given one of the main factors determining a judge's promotion ought to be the ratio between decisions confirmed and those remanded by the higher court. This is how recent jurisprudential trends and whims influence courts in deciding particular cases.

In civil procedure the adversarial principle is firmly established through the principle of parties' free disposition of the case,[14] though some elements of inquisitorial procedure are maintained in terms of allowing judges to question witnesses and, in case public interest is involved, to order gathering of particular evidence, or even refuse demands affecting public interest or those affecting vulnerable parties (e.g., minors). The decision-making in the procedure is in the hands of a professional judge who is given little or no leeway in interpreting the legal text in his own way. The civil procedures in BiH are not cognizant of the institution of the grand jury, and since 2002 have completely abandoned the role of judicial jurors (*sudije porotnici*) as redundant.

5 Conclusion

Written laws in BiH and other countries emerging from the dissolution of the former Yugoslavia prevail over unwritten customs and usages. Judicial decisions produce *inter partes* legal effect implementing abstract, straightforward and seemingly perfect legal concepts and general principles of law, from which derive less abstract general rules enshrined within legislators' enactments, and regulations mostly issued by governmental agencies and individual administrative authorities. The law of obligations in these countries is governed not only by prescriptions of positive law, but also by a body of meta-legal tenets and standards of behavior, very often universal by nature. However, in case of collision between positive law and equity, the Act on Obligations of the former Yugoslavia, in particular, which is a sort of *ascuis communituire* in these countries, resolve this issue resolutely: it holds untenable favoring equity over positive legal

[14] *See* the Art. 3 of the Civil Procedure Act of the FBiH (http://vstv.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=2703, last visit on Aug. 11, 2015). df (last visit on Dec. 5, 2013).

norms due to concern related to the risk of undermining the constitutional order in the country owing to inherent risk of possible legal voluntarism and abuse of power in the name of equity, all of which is epitomized in the sentence of Roman law: *summum ius, summa iniuria*. Yet, it is possible to permit equity to govern obligations insofar and insomuch as positive law, in this case the Act on Obligations so explicitly provides for–*and it does so very often*, in case of: damages resulting from accidents caused by motor vehicles in motion, in the domain of contract interpretation, the clause of *rebus sic stantibus* (frustration of purpose, commercial impracticality), unfair contracts (ripping-off contracts, loan sharking, usury) and in an array of other modes of contractual liability.

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