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CONTRACT LAW AS PART OF LARGER LAW OF OBLIGATIONS AND CIVIL LAW IN BOSNIA AND HERZEGOVINA – A POSITIVIST AND HISTORICAL ANALYSIS

Abstract

The author in this article analyses, explains, compares, weighs in and provides possible outcomes for the future regarding various legal concepts within the law of obligations and contract law, being part of larger civil law in Bosnia and Herzegovina. Inter alia, the author explores the historical background of this important branch of law regulating market economy, from the very beginnings to the modern time, providing relevant, succinct and reliable information. This article analyses the following issues:

- *to what legal family BiH law belongs;*
- *whether the primacy of legislation is a characteristic of the legal system in BiH;*
- *the principle of equity;*
- *the interplay between the Act on Obligations and the usages of trade;*
- *the position of the judiciary in BiH;*
- *the distinction between the public law and private law (administrative contracts);*
- *in addition, last but not least, the distinction between civil law and commercial law (commercial contracts).*

In this paper, the author relied upon a wide range of sources, documents, doctrinal writings as well as extensive case law to substantiate his assertions and conclusions.

Keywords: family of law, contract law, equity, judiciary, contracts, administrative contracts, commercial contracts.

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I Introduction

In Bosnia and Herzegovina (BiH), contract law is an integral part of the broader law of obligations and the civil law system. The law of obligations encompasses legal rules related to various types of obligations, including contracts, torts, unjust enrichment, and other legal relationships. It defines the rights and duties of parties involved in these obligations. Contract law is a significant component of the law of obligations, as it governs agreements between parties. Contract law in BiH regulates the formation, performance, and termination of contracts. It provides legal principles for creating legally effective (valid) contracts, specifying terms, and enforcing contractual obligations. The Constitution of Bosnia and Herzegovina (BiH) recognizes the importance of the rule of law, which includes contract law, as a fundamental principle for the functioning of the state.[1] However, systemic challenges persist due to the complex constitutional architecture established by the Dayton Agreement, which affects the rule of law in Bosnia and Herzegovina.[2] The legal framework ensures that contracts are enforceable and that parties can seek remedies for breaches. BiH faces challenges related to governance, transparency, and the stability of institutions, which influence the implementation of contract law. Contract law plays a crucial role within the broader legal context in BiH, and efforts continue to strengthen the rule of law and enhance legal mechanisms for enforcing contractual rights and obligations.

The term "law of obligations" has its origins in Roman law. The concept of obligations was central to Roman law and influenced the development of legal systems throughout Europe. The term "law of obligations", used in various legal contexts since then, continues to be a fundamental area of law today. In a Romano-Germanic legal system, obligations are understood as legal relationships between individuals, where one party (the debtor) is bound to perform a certain act or service for another party (the creditor).

The main purpose of the law of obligations is to regulate a transaction on a market place between a creditor and a debtor, a so-called obligational (creditor/debtor) relation (e.g., contractual, arising out of tort, or unjust enrichment, etc.). Within an obligation, a creditor has a right to require a specific course of conduct from the debtor:

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[1] Expert Report on Rule of Law issues in Bosnia and Herzegovina, 2019, https://archive.europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaand-Herzegovina.pdf, last visited: 20. 6. 2024.

[2] *Ibid*.

- giving (transferring title to) real or personal property (Latin–hereinafter L "dare, do ut des");
- performing a specific behavior (service; L. "facere, facio ut facias");
- refraining from performance of a specific behavior (L. "non facere"), of which the debtor is otherwise legally entitled to perform;
- suffering creditor's or someone else's behavior, of which the debtor is otherwise legally entitled to put a stop to.

II The Historical Background of the Country

BiH has one of the lushest histories in the region, having been first settled by a branch of south-Slavic tribes gradually inhabiting the area from the sixth to the ninth centuries AD, previously populated by Illyrians (considered ancestors mainly of today's Albanians) and Thracians (ancestors mainly of Vlachs, who disappeared through assimilation into the Slavic, mostly Serbian population). Kulin Ban established the first independent Bosnian medieval state in the region in the late twelfth century,[3] known as the Banate (Duchy) of Bosnia later to evolve into the Kingdom of Bosnia in the fourteenth century.[4] This Kingdom lasted until the Ottoman Empire conquest in 1463. Present-day "Herzegovina" that now includes southern regions of medieval Bosnia fell into Turkish hands in 1482, whereas the Hungarian-backed restored "Bosnian Kingdom" was the last to surrender to Turks in 1527.[5]

The Turks brought Islam, thus changing much of the cultural and social configuration of BiH and the whole region as well. Since then BiH was a holding of the Ottoman Empire until the Treaty of Berlin, signed and ratified in 1878, when the Habsburg (Austro-Hungarian) Empire first occupied, and then annexed this country. The rule of Austro-Hungarian Monarchy lasted up until the First World War. After the defeat and breakdown of the Habsburg Empire, as the result of the peace treaty in Versailles, BiH became part of the Kingdom of Serbs, Croats and Slovenes, that lasted during the interwar period. After the Second World War, BiH gained the full status of a federal republic in the newly established Federative People's Republic of Yugoslavia (FNRJ).

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[3] G. Čremošnik, *Original povelje Kulina bana*, GZM, Nova serija 12, Sarajevo 1957, 192–215.

[4] Cf.: H. Camo, Srednjovjekovna bosanska drzava 1180.-1463, http://www.camo.ch/povijest-bih03.htm, last visited: 28. 11. 2013.

[5] M. Imamović, *Historija države i prava BiH*, Magistrat, Sarajevo 2003, 117–123.

After the breakdown of former Yugoslavia, the country declared independence in 1992, followed by the bloody war raging until 1995. BiH became a thoroughly decentralized country, as the result of the peace accords signed first in Washington in 1994,[6] and then in Dayton (Ohio) in 1995.[7] BiH became divided into the Federation of Bosnia and Herzegovina (FBiH), the Republic of Srpska (RS) and the Brčko District (BD), each enjoying a wide range of autonomy that inter alia includes legislative regulation of civil law matters (i.e., encompassing obligations and contract law).

Prior to its independence, BiH was part of the Socialist Federal Republic of Yugoslavia (SFRY). In the early 1990s, as Yugoslavia disintegrated, BiH declared sovereignty in October 1991 and independence from the SFRY on March 3, 1992, following a referendum (boycotted by ethnic Serbs). The dissolution of Yugoslavia led to a devastating conflict in BiH known as the Bosnian War (1992–1995).

BiH's legal history has unravelled in a complex political context, post-war reconstruction, and efforts toward EU integration. Its legal culture, very similar to that of Croatia and Serbia, continues to evolve navigating through its difficult political landscape, aspiring to a European future. During the socialist era, BiH implemented a distinct Marxist-socialist legal system. Having emerged as an independent state after the dissolution of the SFRY, BiH belongs to the European-continental legal family. During the post-socialism period, BiH transitioned towards a pluralistic democracy, the rule of law, and market economy, introducing Western legal transplants into the domestic legal systems. Some intellectual elements, such as legal reasoning, and common sources of law (such as the Act of Obligations) remain similar to former Yugoslav republics, despite sharing no common institutions anymore. Yet BiH now develops and maintains a distinct regional legal culture.[8]

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[6] See: http://www.ucdp.uu.se/gpdatabase/peace/BoH%2019940301.pdf, last visited: 29. 11. 2013.

[7] This Agreement consists of the Dayton Agreement, Dayton Accords, Paris Protocol or Dayton-Paris Agreement. These treaties (accords) ended a bloody war raging for almost four years, resulting in wide decentralization of this country. Bosnia and Herzegovina is now composed of, or more accurately put, divided between three entities: Federation of Bosnia and Herzegovina (itself divided into ten cantons enjoying wide autonomy) and Republic of Srpska (with the unitary constitutional structure); and one BD. See about this in more length: D. Petrović, Bosnia and Herzegovina, A Single Country or an Apple of Discord, 2006, http://www.bosnia.org.uk/news/news_body.cfm?newsid=2202, last visited: 16. 4. 2013.

[8] Compare: L. Bubalo, "An Introduction to the Legal Cultures of Bosnia and Herzegovina, Croatia, and Serbia (Western Balkan)", in: *Handbook on Legal Cultures: A Selection of the World's Legal Cultures* (eds. S. Koch, M. M. Kjølstad), Springer, Cham 2023, 145–196.

Having achieved independence, BiH has followed a path of state building under international supervision,[9] all the while facing significant challenges in the domain of building and improving its legal system. The Dayton Agreement (1995) ended the Bosnian War, establishing a decentralized constitutional framework for BiH, while incorporating a complex power-sharing arrangement among its three main ethnic groups: Bosniaks, Croats, and Serbs. The High Representative for BiH oversees the implementation of the Dayton Agreement and ensures stability.

In its path towards its EU Integration and Harmonization, BiH became a part of the Stabilization and Association Process (SAP) in 2016, later acquiring the status of an EU candidate country in December 2022, despite facing challenges in its integration process. SAP commits South-Eastern-European (SEE) countries (including BiH) to harmonize domestic legislation with the EU *acquis communautaire*.

III To What Legal Family Does Law in BiH Belong?

BiH belongs to the family of Romano-Germanic (continental or civil) laws, being the common name for legal systems that root their tradition in the institutions of the former Roman law mostly, and whose main characteristic is in that they have their origin in the written law and codifications prevailing over case law and precedent. Its main concepts originate from the Justinian's *Corpus Juris Civilis*, a Byzantine Emperor's codification of civil law from 1,500 years ago,[10] supplemented with legal concepts of Church (canonical) law, Germanic local customs refined later by institutionalized legal doctrines of Western Europe. During the Ottoman rule in BiH, the Islamic law (Sharia) and church law of Catholic and Orthodox Christian denomination as well as Jewish Halakha law were traditionally implemented in marital matters.[11]

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[9] https://www.ustavnisud.ba/en/constitution-of-bosnia-and-hercegovina, last visited: 2. 8. 2024.

[10] See: Corpus iuris civilis, http://www.rechtslexikon.net/d/corpus-iuris-civilis/corpus-iuris-civilis.htm, last visited: 29. 9. 2017.

[11] Contrary to stereotypical perceptions prevailing in the West, in accordance with Quranic teachings, Ottomans were tolerant toward people of the Book, namely: Christians and Jews. They established a so-called Millet system, a notion referring to the confessional communities in the Ottoman Empire. The term refers to the separate legal courts pertaining to "personal law" under which communities (Muslim Sharia law, Christian Canonical law and Jewish Halakha law abiding) were allowed to rule themselves under their own system. The word Millet comes from the Arabic word millah (ةلم) and literally means "nation." The Millet system of Sharia (Islamic law) has been called an early example of pre-modern religious pluralism. It is known that in Ottoman Empire non-Muslims could

This approach continued during the Habsburg rule and that of the Kingdom of Yugoslavia, to be abolished in 1946 by ruling communist authorities in the newly created socialist Yugoslavia. Today, the complete positive legal system in BiH is founded on the secular sources of law.

IV The Primacy of Legislation in BiH

The primacy of legislation is a characteristic of the legal system in Bosnia and Herzegovina (BiH). This means that the written law, primarily the Constitution and statutory laws, is the supreme source of law in the country. The courts are bound to apply the law as it is written, and they have limited discretion to interpret or modify it. However, while the primacy of legislation is a fundamental principle, there are some nuances to consider:

- **International Law:** BiH is a signatory to various international treaties and conventions. In cases of conflict between domestic law and international law, international law generally takes precedence.
- **Constitutional Court:** The Constitutional Court of BiH has the power to review the constitutionality of laws and interpret the Constitution. If a law is found to be unconstitutional, it can be declared void.
- **Customary Law:** While not as prominent as statutory law, customary law can also play a role in the legal system. However, customary law must be consistent with statutory law and cannot contradict it.

While the primacy of legislation is a central feature of the BiH legal system, article II of the BiH's Constitution provides for direct implementation of internationally recognized standards of human rights provided for in international law and customary law.

1. The Principle of Equity

Besides prescriptions of positive law that govern relations between creditors and debtors in BiH, there is also a body of meta-legal tenets and standards

rise up to the highest ranks within government and military to become pashas, vezirs (even grand vezirs—prime ministers) and generals (A. Sachedina, *The Islamic Roots of Democratic Pluralism*, Oxford University Press, Oxford 2001), the showcase being the appointment of Mehmed Pasha Sokolović, the brother of the Patriarch of the Serbian Orthodox Church, Makarije Sokolović in the late sixteenth century. See R. Popović, "Srpski episkopi i patrijarsi", u: *Kratak pregled srpske crkve kroz istoriju*, http://www.svetosavlje.org/biblioteka/Istorija/SPCIstorijaPopovic/Lat_SPC04.htm, last visited: 29. 11. 2013.

of behavior, very often universal by nature. These standards frequently vary among societies and milieus, depending on historical circumstances conditioning their emergence, inasmuch as both may significantly be at variance in real life. Equity functions as a sort of moral corrective requiring that positive law be in harmony with justice, as 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.

While the Romano-Germanic legal systems are primarily known for its reliance on codified law and legal formalism, the principle of equity has also played a significant role in its development and application. Equity, in this context, refers to the concept of fairness and justice that courts apply in order to modify or supplement the strict application of positive law. Courts apply carefully the principle of equity to avoid undermining the rule of law and the predictability of legal outcomes. Equity, thus, often counterbalances the rigidity of codified law.

In BiH (and all former Yugoslav republics), the Act on Obligations so explicitly foresees various circumstances where courts may apply equity:

- In case of liability grounded on equity in case of damages resulting from accidents caused by motor vehicles in motion.[12]
- In the domain of contract interpretation.[13]
- The clause of *rebus sic stantibus* (frustration of purpose, commercial impracticality).
- Unfair contracts (ripping-off contracts, loan sharking, usury).[14]
- In addition, in an array of other modes of contractual liability.

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[12] 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).

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

[14] The Art. 140, para. (3) and (4) the Act on Obligations.

2. The Relation between the Act on Obligations and the Usages of Trade

Trade usages play a significant role in both domestic (that of BiH) and international markets, as they are an essential part of a dynamic market economy. Usages of trade facilitate smooth business interactions, contribute to economic growth, and ensure consistency across markets. This is due to the following reasons:

- Trade usages refer to consistent and uniform business practices that are regularly followed within a particular trade or industry. These practices emerge organically over time and become customary ways of conducting business.
- Trade usages serve a normative function in contracts and commercial transactions. Even in the absence of explicit knowledge, contractual parties may be bound by trade usages.
- They help interpret and supplement contract terms.
- Trade usages provide for benefits and ensure efficiency in market economy as they streamline transactions, reduce uncertainty, and enhance efficiency. They support innovation by promoting best practices and adaptation. They assure access to quality goods, as trade allows access to goods and services of higher quality and lower cost than domestic alternatives.

The concept of trade usages has deep historical roots, including the law merchant (*lex mercatoria*) —an international commercial system of law that flourished during medieval times. While the influence of the law merchant declined after the rise of nation-states, trade usages persisted. Traditionally, trade usages acquired binding force operating as implied terms of contracts. However, recent trends suggest that they can produce binding force even without explicit party agreement. International and regional uniform law projects increasingly recognize widely followed trade usages.

In Bosnia and Herzegovina there is a special relation between two different sources of the law: the Act on Obligations and usages of trade, particularly the General Usages for Traffic of Goods, adopted by the Plenum of the General State Arbitration in 1954[15] (a body within the Chamber of Commerce of former Yugoslavia at the time). The Act on Obligations is unambiguous

[15] At http://www.overa.rs/opste-uzanse-za-promet-robom.html, last visited: 1. 10. 2017.

about this relation: the parties to obligation are required to adhere to good usages of trade (*boni mores*).[16] However, if the General Usages of Trade or a special usage of trade is contrary to a supplementary-dispositive norm (default rule)[17] of the Act on Obligations, the latter shall prevail, unless parties explicitly stipulated the implementation of a respective usage, or any other commercial custom.[18]

This is, however, a clear departure from tendency shown in modern commercial codifications in Europe and the USA[19] that in contrast give way to commercial customs (trade usages) over written rules, of course, unless parties chose the opposite.

V The Position of the Judiciary in BiH

BiH has a unique political system resulting from the Dayton Peace Agreement (DPA) that ended the Bosnian War (1992–1995). As already said, the country is composed of two entities: the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS), along with the Brčko District (BD). Each entity has its own legal system, including courts and judicial institutions. As such, the position of the judiciary in BiH is multifaceted, influenced by a complex historical context, difficult constitutional arrangements, and ongoing challenges. Within a decentralized multi-level governance system, the BiH's judiciary is established and regulated at the level of central government (so-called "state level"), although being financed by cantons within the FBiH, and the

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[16] 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 visited: 28. 7. 2013.

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

[18] 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: Legal Theory Lexicon: Default Rules and Completeness, 2012, http://lsolum.typepad.com/legaltheory/2012/09/legal-theory-lexicon-default-rules-and-completeness.html, last visited: 28. 7. 2013.

[19] At: A-K. Drettmann, Would English law on trade usages benefit from adopting a more formal approach such as seen in other jurisdictions as well as in international conventions?, 2009, http://www.cisg.law.pace.edu/cisg/biblio/drettmann.html#c, last visited: 28. 7. 2013.

RS, along with the BD. The position of judges is incompatible with membership in political parties or legislative bodies.

The judicial system in BiH is decentralized and consists of multiple layers:

- Municipal courts (basic courts in the RS) that handle local matters within municipalities.
- Cantonal courts (circuit courts in the RS), operating within the FBiH, which deal with civil, administrative, and criminal cases.
- The Supreme Court of the Federation: the highest court in the FBiH (i.e., in the RS).
- The Constitutional Court of BiH is responsible for protection of basic human rights, resolving constitutional matters and ensuring compliance with the BiH Constitution. The Constitutional Court plays a crucial role in interpreting the Constitution and resolving disputes between different levels of government.[20]

The complexity of BiH's political system influences judicial decision-making. In other words, the judiciary in BiH operates within a challenging context, balancing multi-level governance, ethnic diversity, and the need for independence. Efforts continue to strengthen the rule of law, aligning BiH's legal system with European integration goals. Ensuring judicial independence of the BiH judiciary remains a challenge, as the judiciary faces obstacles related to past conflicts and ethnic divisions. There is the need for harmonization in civil, administrative, and criminal matters. International actors (such as the EU Commission, OSCE, and UN) monitor and support efforts to enhance judicial independence.[21]

Contrary to common law jurisdictions, BiH's law has no equivalent of a *stare decisis* doctrine within contemporary adjudication processes. A landmark decision in BiH reached by the highest judicial authority in deciding any given legal issue produces just the *inter partes* legal effect. As such, it is only an indirect source of law as *having a persuasive role*, even if it is issued by the Constitutional Court of BiH (the highest judicial authority in BiH when it comes to violations of human rights). The most important landmark cases in BiH are:

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[20] www.ustavnisud.ba, last visited: 20. 8. 2024.

[21] *Ibid*.

- The "Constituent Peoples case" decision by the Constitutional Court promoted multi-ethnic integration.[22]
- The European Court of Human Rights' "Sejdić-Finci case" decision, aimed at integrating ethnic minorities into political life (which remains unimplemented).[23]

VI Distinction Between the Public Law and Private Law (Administrative Contracts)

In BiH, whose legal tradition is rooted in Romano-Germanic legal concepts and classifications, there is a distinction between the public and private law (*ius publicum versus ius privatum*), developed around the theory of interest that distinguishes between *general or public interests versus private or individual interests*. This doctrine is best formulated by the famous Roman law scholar Ulpianus (170-228 BC):

> Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.[24]

This division remerged in the nineteenth century. It came along with the arrival of the theory of subordination that deems essential relations of subordination governed by the public law (*government versus citizen* – or, in other words, government acting *ex iure imperii* – from the position of power–toward citizens and other legal entities). This is in contrast to relations of coordination or equality, governed by the private law (*citizen/entity versus citizen/entity*; government acting – *ex iure domini* – as private entity, equal to citizens and other entities).[25] The purpose of private law is thus to regulate relations

[22] Constitutional Court of Bosnia and Herzegovina, Decision U-5/98 from 29 January 2000, http://www.ustavnisud.ba/dokumenti/_bs/u-5-98-12209.pdf, last visited: 20. 8. 2024.

[23] European Parliamentary Research Service, Bosnia and Herzegovina: The 'Sejdić-Finci' case, 2015, https://www.europarl.europa.eu/RegData/etudes/ATAG/2015/559501/EPRS_ATA(2015)559501_EN.pdf, last visited: 20. 8. 2024.

[24] Cf. H. Temporini, *Aufstieg und Niedergang der römischen Welt: Geschichte und Kultur Roms im Spiegel der neueren Forschung* (ed. H. Temporini, W. Haase), Walter de Gruyter, Berlin-Boston 1982, 23; E. DePalma Digeser, "Hellenes, Barbarians, and Christians: Religion and Identity Politics in Diocletian's Rome", in: *Romans, Barbarians, and the Transformation of the Roman World: Cultural Interaction and the Creation of Identity in Late Antiquity* (eds. R. W. Mathisen, D. Shanzer), Ashgate Publishing, Ltd. 2011, 125.

[25] I. Krbek, *Odgovornost države za štetu*, JAZU, Zagreb 1954, 156, according to: I. Borković, *Upravno pravo*, Zagreb 2002, 132; J.Vukadinović Marković, "Is there a place for arbitration in

between citizens and other private legal entities, based on freedom and autonomy of private individual will.

In contrast to this, the public law relies on the monopoly of physical coercion. It hence serves a twofold mission: on the one hand, it creates conditions for the effective exercise of state power, establishing state institutions, and determining their powers and jurisdiction as well as the way those are exercised, and, on the other, to secure and protect the rights and freedoms of the citizens.[26] This delineation is not an easy one, given there is some overlapping among institutions and norms from the commercial law, the environmental law, the European Union (EU) law (e.g., the Stabilization and Association Agreement between BiH and the European Communities (EC) and their Member States)[27] as well as that of the public international law (e.g., international standards of human rights).[28]

As such, the private law in BiH is traditionally composed of the following elements: civil law, the law of obligations, property law, commercial law, law of inheritance, family law, private international law and intellectual property law. Public law encompasses constitutional law, administrative law, criminal law, public international law, etc.

1. Administrative Contracts

Administrative contracts are a specific type of legally binding agreement where one of the parties involved is a public entity. These contracts are subject to examination by administrative courts and are characterized by certain key features:

- Involvement of a public authority: in an administrative contract, one of the parties must be a public authority, such as a government agency, municipality, or other public institution.

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disputes arising from administrative contracts", in: *Law on General Administrative Procedure: Contemporary Tendencies and Challenges* : *Thematic Collection*, Eurosfera & Partners, Institute of Comparative Law, Faculty of Management and Law, Belgrade-Ljubljana 2024, 165–179.

[26] Cf. http://www.fcjp.ba/index.php/19-uncategorised/81-blank-97780871, last visited: 11. 8. 2015. After the Second World War an interesting doctrinal development took place in Germany dubbed the inclusion theory (*Zuordnungstheorie*) or a modified subject theory (*modifizierte Subjektstheorie*). See about this in: N. Foster, S. Sule, *German Legal System and Laws*, Oxford University Press, Oxford 2010, 285.

[27] At http://www.dei.gov.ba/bih_i_eu/ssp/default.aspx?id=1172&langTag=en-US, last visited: 8. 12. 2013.

[28] See the Art. II of the Constitution of Bosnia and Herzegovina.

- The other party may be a natural person (an individual) or an artificial person (such as a company).
- Jurisdiction of administrative courts: administrative contracts fall under the jurisdiction of administrative judicial authorities. These courts handle disputes related to administrative matters, including the interpretation and enforcement of administrative contracts.
- Administrative contracts often include clauses or conditions derived from public law (*ius cogens* – such as regulatory requirements or obligations).

Concisely, administrative contracts play a crucial role in public administration, governance, and the provision of public services. They are subject to specific legal rules and oversight by administrative courts.

Administrative contracts in BiH are a peculiar legal category lying on the borderline between the private law and the public law. Usually, state agencies at various levels of government enter into these contracts with other legal entities in BiH, with the main purpose of *achieving a goal of the broader public interest*. The intrinsic characteristic of these kinds of contracts is that they are usually concluded after a *lengthy and public (ought-to-be transparent) administrative procedure*. This procedure usually starts with a public invitation to bid. Having exhausted all phases of the procedure (including available legal remedies), this procedure ends up with signing up to a straightforward obligational agreement (contract) with all rights and duties pertaining to it.

In this context, the public law element within such an agreement is the administrative procedure itself. This manifests in the way an administrative contract forms, governed by a respective act on administrative procedure[29] supplemented with procedural rules from a special enactment (*lex specialis*) relative to a kind of the administrative contract at hand. From the perspective of contract law, this public element ought to be considered a *special, solemn form* (*forma ad solemnitatem*) in which this administrative contract is concluded. The private law element is the result of an administrative procedure–the very (obligational) agreement itself and rights and duties it contains, governed by the contract law of BiH in general as well as substantive rules from special enactments and regulations laid down by respective administrative agencies in particular.

[29] There are three administrative procedures in Bosnia and Herzegovina implemented on the territories of the FBiH, the RS and the BD.

In BiH there are several kinds of administrative contracts, each regulated by a special enactment (*lex specialis*) coupled by rules and regulations from an administrative agency at a different level of government. Those are the public procurement contract,[30] the concession contract,[31] the public-private partnership,[32] the contract on granting real estate on a construction zone,[33] etc. Similarly, leasing public property, granting concessions, or allowing private entities to use public resources (e.g., natural resources, infrastructure) fall under administrative contracts. Contracts related to public works, sale of state-owned immovable property, or occupancy of public property fall also under the category of administrative contracts. Some contracts are explicitly defined as administrative by law. For example, contracts allowing a private entity to occupy public space (e.g., a café using part of a sidewalk) fall into this classification.

VII Distinction Between Civil Law and Commercial Law (Commercial Contracts)

As a scientific discipline and a branch of law – part of the law of obligations – contract law in BiH has developed under the strong influence of Roman law throughout centuries. Traditionally, the law of obligations is part of the wider concept of the *civil law* (*ius civile)* and the *private law* (*ius privatum*) together with property law, law of inheritance, family law, and to some degree *commercial law* (*lex mercatoria*). The importance of the law of obligations has been immense for the legal regulation of market economy and transactions taking place within it. This subbranch of law has, therefore, been subject to a thorough analysis and theoretical research. Over time, it has gained a high level of technical elaboration and perfection of its abstract legal notions, all along being created and worked out in the process, which is absent in the common law tradition. The commercial law in BiH, as more closely related to legal regulation of market economy, is entrenched in the basic tenets of the law of obligations. In comparison to all other subbranches of law, the law of obligations is more stable, especially in respect of its basic principles, which more or less are almost identical since the era of Roman law.

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[30] At http://www.javnenabavke.ba/index.php?id=10a&jezik=en, last visited: 10. 12. 2013.

[31] At http://skupstinausk.ba/Sluzbeni/Sl_gl_br_3.pdf, last visited: 10. 12. 2013.

[32] At http://skupstinausk.ba/Sluzbeni/Sl_gl_br_19.pdf, last visited: 10. 12. 2013.

[33] The Art. 46 of the Act on Real estate for Construction of the FBiH http://www.fbihvlada.gov.ba/bosanski/zakoni/2005/zakoni/34bos.htm, last visited: 10. 12. 2013.

Commercial law specifically deals with legal matters related to business and commerce as it mediates professional activities of a commercial nature. Commercial law regulates commercial transactions, contract disputes, corporate governance, intellectual property, trade, and other business-related matters. Unlike civil law, commercial law may be less rigidly codified, allowing for more flexibility in adapting to changing business practices. While statutes play a significant role, commercial law also draws from case law and legal precedents, especially in areas like contract interpretation and commercial disputes.[34]

As argued earlier, a vast number of rules, definitions, and notions of the law of obligations date back to Roman law. The explanation for this can be found in the fact that institutions of the law of obligations primarily are designed to legally regulate transfer of goods and services (and, since the modern era, of negotiable instruments, intellectual property rights and other rights, or said in economic parlance – capital as well) in a market economy. These socio-economic relations, pertaining to market economy, also existed in ancient Rome, particularly during the period of formation of the classical Roman law. The same conditions were recreated and further developed in the era of liberal-market economies of the late eighteenth and nineteenth centuries, to achieve a sort of climax in the modern era of globalization characterized by the rise of interdependence, mass use of information technology and advanced communications, that is still ongoing.[35] The argument that the law of obligations and its principles are stable, and that these obligational relations are ubiquitous, is further corroborated by the fact that the same legal phenomena could be found even in the past and present socialist (Marxist) economies.[36] As a result, most of the notions and conceptions of the law of obligations in BiH are quite abstract, therefore, can be used in many legal systems with rather different legal traditions. Yet, the content and context of these legal conceptions, while not entirely identical, in practice, can produce a variety of legal outcomes.

Nonetheless, this does not mean that the law of obligations in BiH, and that of other laws belonging to the family of civil law legal systems, have not

[34] https://jurisnewshub.com/blog/differences-between-civil-and-commercial-law/, last visited: 20. 8. 2024..

[35] On the effects of globalization on international trade *see* in more depth in: G. Trnavci, *Sloboda međunarodne trgovine i Svetska trgovinska organizacija*, Ph.D. thesis, School of Law, University of Belgrade, 1999.

[36] See about this in more depth in: Y-C. Chen, Civil Law Development: China and Taiwan, *Stanford Journal of East Asian Affairs* 2(2002), 8–14.

changed at all over time, and that its conceptions and notions do not reflect, more or less, the development and dynamics of ever-changing socio-economic relations that are purported to regulate. New classifications of contracts emerged parallel to the creation of new societal relations and phenomena, while, at the same time, existing contracts and conceptions modified gradually or completely disappeared, reflecting the change or even extinction of societal relations that determined their existence. The best examples for this are the following occurrences:

- Emergence of new forms of liability (e.g., strict liability).
- Abandoning strict formalism, implemented since the era of Roman law.
- The utter triumph of consensualism.
- Sanctioning liability of employers over acts perpetrated by employees (liability for someone else).[37]
- Insurance contracts.
- Emergence of different sorts of so-called innominate commercial contracts.[38]
- Lately, electronic commerce.[39]
- New sources of obligations appeared, such as negotiable instruments and securities, while another important contractual feature – formalism – reemerged coupled with increase in a number of formal commercial agreements and their boilerplate clauses in the second half of the twentieth century, which in turn put limits on the freedom to contract.[40]

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[37] See the s. 3 of the Act on Obligations.

[38] "*INNOMINATE CONTRACTS, civil law. Contracts which have no particular names, as permutation and transaction, are so called. Inst. 2, 10, 13. There are many innominate contracts, but the Roman lawyers reduced them to four classes, namely, do ut des, do ut facias, facio ut des, and facio ut facias. (q. v.) Dig. 2, 14, 7, 2.*" Innominate contracts, http://legal-dictionary.thefreedictionary.com/Innominate+contracts, last visited: 14. 3. 2013.

[39] G. Trnavci, Zaključenje, punovažnost i dokazivanje elektronskih ugovora: komparativna analiza, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 30(2009)1, 449–472.

[40] In the field of labor law, a strong development took place in respect of labor (employment) contracts since the nineteenth century – from the time when this contract was hardly regulated, leaving everything to "freedom to contract" belonging to parties. Hence, French *Code civil* at the time put on equal footing the labor contract with the service contract, while the contract on wage (to hire) labor was regulated by only three articles (A. T. J. M.

Commercial contracts fall within the domain of commercial law. These contracts involve business transactions, such as sales agreements, leases, distribution agreements, joint ventures, and employment contracts. Commercial contracts often address specific commercial practices, industry standards, and business relationships. They may include clauses related to warranties, payment terms, delivery schedules, intellectual property rights, and dispute resolution mechanisms.

Before promulgation of the Act on Obligations, its drafters had been in a dilemma regarding which approach to take in structuring, configuring, and defining the scope of this codification. The debate was over whether:

- To take a so-called dualistic approach by adopting a unified, yet separate version of the Commercial Act or even a Commercial Code, aimed at regulating commercial transactions separately from those taking place among non-merchants or
- To take a monistic approach by promulgating a unified version of the Act on Obligations (Act on Obligational Relationships), the scope and purpose of which would be to evenly regulate obligations taking place both among merchants and non-merchants (consumers), with some notable variations and exceptions from general principles regarding the former.

Drafters took the latter track. The Act on Obligations is structured in such a way as to relinquish the dualist approach in regulating obligations theretofore implemented on the basis of legal rules according to the Act on Invalidity of the Legal Regulations Issued Before April 6, 1941 and During Enemy Occupation. An alternative, the monistic concept of a unified enactment covering both civil and commercial obligations was introduced,[41] stipulating and

Jacobs, *Labour law in the Netherlands*, Kluwer Law International 2004)), one of which stipulated that, in case of a dispute on wages and advance payments, the court is to believe an employer.However, this provision was, eventually, derogated in 1868. Yet, later, as a result of political actions organized by labor unions in Europe, regulation of labor contracts by means of peremptory norms became particularly prolific. This, *inter alia*, encompassed the following terms of employment contract: mandating the duration of working hours, number and minimum duration of paid breaks and vacations, minimum wages, etc. This development / gradually gave rise to a new sub-branch (or body) of law – labor law, clearly separated from the law of obligations and contract law. See: *Pravna enciklopedija*, Savremena administracija, Beograd 1989, 964–965).

[41] Cf.: V. Krulj, Uvodne napomene, u: *Zakon o obligacionim odnosima sa registrom pojmova*, Savremena administracija, Beograd 1978, V–XVIII.

sanctioning unified rules enforced evenly both on obligations among non-merchants and those among merchants. Where justified, this piece of legislation promoted unified tenets as often and far-reaching as possible, applicable irrespective of the role parties to the obligation play in the marketplace.[42] This approach might be explained as a result of the commercialization of civil law, as well as rise of living standards and purchasing power of the population living in the former Yugoslavia at the time. Thus, in Bosnia and Herzegovina civil law and commercial law serve distinct purposes: civil law regulates private relations broadly, while commercial law focuses specifically on business and commercial matters.

VIII Conclusion

The law on obligations in BiH is a significant source of legislation that inter alia regulates various aspects of contracts governing transactions in a market economy. In other words, the law of obligations encompasses legal rules related to various types of obligations, including contracts, torts, unjust enrichment, and other legal relationships. The importance of the law of obligations has been immense for the legal regulation of market economy and transactions taking place within it. Therefore, this branch of law has been subject to a thorough analysis and theoretical research. The contract law is an integral part of the broader law of obligations in BiH. It governs voluntary agreements between parties, while other legal principles address obligations imposed by law or equity. The contract law defines the rights and duties of parties who voluntarily enter into agreements. It covers the formation, performance, and termination of contracts. BiH's legal system also accommodates equitable principles, although the focus has historically been on Roman and Continental legal concepts. BiH belongs to the family of Romano-Germanic (continental or civil) laws, being the common name for legal systems that root their tradition in the institutions of the former Roman law mostly, and whose main characteristic is in that they have their origin in the written law and codifications prevailing over case law and precedent. A vast number of rules, definitions, and notions of the law of obligations date back to Roman law. The explanation for this can be found in the fact that institutions of the law of obligations

[42] The drafters are said to be inspired by the same approach taken in the Swiss Code on Obligations of March 30, 1911. See: R. Kovačević Kuštrimović, M. Lazić (eds.), *Aktuelna pitanja građanske kodifikacije : zbornik radova*, Pravni fakultet u Nišu, Niš 2008. http://www.prafak.ni.ac.rs/files/centar_pub/GRADJANSKA_KODIFIKACIJA_2008.pdf, last visited: 16. 7. 2013.

primarily are designed to legally regulate transfer of goods and services (and, since the modern era, of negotiable instruments, intellectual property rights and other rights, or said in economic parlance – capital as well) in a market economy. BiH faces unique challenges due to its constitutional architecture established by the Dayton Agreement.

Written laws in BiH prevail over unwritten customs and usages. Not only do prescriptions of positive law govern the law of obligations in BiH, but also by a body of meta-legal tenets and standards of behavior, very often universal by nature, known as the principle of equity under the common law. The BiH's legal system holds untenable favoring equity over positive legal norms due to concern related to the risk of undermining the constitutional order in the country. This is due to the 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* ("the greater the right, the greater the wrong"). Sometimes, 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*. This is 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. When it comes to the relation between the Act on Obligations and the usages of trade, the BiH's Act on Obligations is unambiguous about this relation: the parties to obligation are required to adhere to good usages of trade (*boni mores*). However, if the General Usages of Trade or a special usage of trade is contrary to a supplementary-dispositive norm (default rule) of the Act on Obligations, the latter shall prevail, unless parties explicitly stipulated the implementation of a respective usage, or any other commercial custom.

The complexity of BiH's political system influences judicial decision-making that operates within a challenging context, balancing multi-level governance, ethnic diversity, and the need for independence. Efforts continue to strengthen the rule of law, aligning BiH's legal system with European integration goals. Ensuring judicial independence of the BiH judiciary remains a challenge, as it faces obstacles related to past conflicts and ethnic divisions.

BiH's law 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*.

State agencies at various levels of government with other legal entities in BiH frequently conclude administrative contracts in BiH that are usually entered into with the main purpose of *achieving a goal of the broader public interest*. They are usually concluded after a *lengthy and public (ought-to-be transparent) administrative procedure*, which usually starts with a public invitation to bid and, having exhausted all phases of the procedure (including available legal remedies), ends up with signing up to a straightforward obligational agreement (contract) with all rights and duties pertaining to it. In BiH there are several kinds of administrative contracts, each regulated by a special enactment (*lex specialis*) coupled by rules and regulations from an administrative agency at a different level of government. Those are the public procurement contract, the concession contract, the public-private partnership, the contract on granting real estate on a construction zone, etc.

The BiH's Act of Obligations is a unified enactment covering both civil and commercial obligations, stipulating and sanctioning unified rules enforced evenly both on obligations among non-merchants and those among merchants. Where justified, this piece of legislation promoted unified tenets as often and far-reaching as possible, applicable irrespective of the role parties to the obligation play in the market place.

Systemic challenges persist due to the complex constitutional architecture established by the Dayton Agreement, which affects the rule of law situation in Bosnia and Herzegovina. The division of powers among different entities (the Federation of BiH, the Republika Srpska, and the Brčko District) affects legal harmonization and implementation. Efforts continue to strengthen the rule of law and enhance mechanisms for enforcing contractual rights and obligations in BiH. As BiH navigates its complex legal landscape, the need for adaptation and alignment with contemporary values remains essential.

In short, the article is an analysis of contract law within the broader law of obligations and civil law in Bosnia and Herzegovina (BiH). It explores the historical background, legal family, primacy of legislation, principle of equity, interplay between the Act on Obligations and trade usages, judiciary position, and distinctions between public and private law, as well as civil and commercial law.

Key findings of this research include:

- BiH's legal system belongs to the Romano-Germanic (continental) legal family, emphasizing written law and codifications.
- The primacy of legislation is a characteristic of BiH's legal system, with international law taking precedence in conflicts.
- Equity plays a role in modifying or supplementing the strict application of positive law.
- Trade usages are significant in commercial transactions, but statutory law prevails unless parties explicitly agree otherwise.
- The judiciary in BiH operates within a complex, decentralized system influenced by the Dayton Agreement, with efforts ongoing to strengthen judicial independence and align with European integration goals.
- Administrative contracts involve public entities and are subject to specific legal rules and administrative procedures.
- The Act on Obligations in BiH is a unified enactment covering both civil and commercial obligations, promoting unified legal principles.

The article highlights the challenges BiH faces due to its complex constitutional architecture and the need for legal harmonization and adaptation to contemporary values.

Genc Trnavci*

Ugovorno pravo kao deo šireg okvira obligacionog i građanskog prava u Bosni i Hercegovini — pozitivnopravna i istorijska analiza

Sažetak

Autor u ovom članku analizira, objašnjava, upoređuje, razmatra i daje moguće buduće pravce razvoja u vezi sa različitim pravnim konceptima unutar obligacionog prava, koje predstavlja deo šireg okvira građanskog prava u Bosni i Hercegovini. Između ostalog, autor istražuje istorijsku pozadinu ove važne grane prava koja reguliše tržišnu ekonomiju, od samih početaka pa do savremenog doba, pružajući relevantne, sažete i pouzdane informacije.

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Ovaj članak analizira sledeća pitanja:

- kojoj pravnoj porodici pripada pravo Bosne i Hercegovine,
- da li je primat zakonodavstva karakteristika pravnog sistema u BiH,
- načelo pravičnosti,
- odnos između Zakona o obligacionim odnosima i trgovačkih običaja,
- položaj pravosuđa u BiH,
- razlika između javnog i privatnog prava (upravni ugovori),
- i na kraju, ali ne manje važno, razlika između građanskog i trgovačkog prava (trgovinski ugovori).

U radu se autor oslanja na izvore, dokumente, doktrinarne radove, kao i bogatu sudsku praksu kako bi potkrepio svoje tvrdnje i zaključke.

Ključne reči: pravna porodica, ugovorno pravo, pravičnost, pravosuđe, ugovori, upravni ugovori, trgovinski ugovori.

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