THE CASE LAW *of Central and Eastern* EUROPE

Enforcement of Contracts

Volume II

STEFAN MESSMANN
TIBOR TAJTI EDS.

EUROPEAN UNIVERSITY PRESS

THE CASE LAW OF CENTRAL & EASTERN EUROPE

Enforcement of Contracts

Stefan Messmann & Tibor Tajti (eds.)

The Case Law of Central & Eastern Europe ; Enforcement of Contracts / Stefan Messman, Tibor Tajti eds., contributions by Lina Aleknaite, Evgjeni Bashari, Slobodan Doklestić, Florentin Giurgea, Arnisa Gorezi, Leonila Guglya, Yuliya Guseva, Anna Hergottova, Krzysztof Kaźmierczyk, Filip Kijowski, Oleksiy Kononov, Csongor István Nagy, M. Ileana Smeureanu, Alexandr Svetlicinii, Zsófia Oláh, Zoltán Víg, - Berlin et al. : European University Press, 2009

<eng.>

ISBN 978-3-89966-285-6

The photos on the cover page are '*Warsaw at Dawn*' (2008) by Kasia Romanska (contact email: kasia.romanska@gmail.com), '*The Gate*' by Tibor Tajti (2007) (St. Ann's Church in Vilnius: „*Vilniaus Šv. Onos bažnyčia*"), and '*After the Rain*' (2004) (Saint Stephen's Basilica in Budapest, Hungary) by Tibor Tajti.

ISBN 978-3-89966-285-6, 2 vols., this is vol. II

EAN

1st ed. 2009. Printed and published in Germany.

ENFORCEMENT OF CONTRACTS IN SERBIA

by

Slobodan Doklestić[1] and *Zoltán Vig*[2]

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LIST OF ABBREVIATIONS

art. - Article

BELEX - Belgrade Stock Exchange

BRA - Business Registers Agency

CEE - Central and Eastern Europe

CPI - Corruption Perception Index

CRS - "*Centralni registar hartija od vrednosti*" (Central Register of Securities)

EU - European Union

FRY - Federal Republic of Yugoslavia

Gž. - *"drugostepena odluka u građanskoj parnici"* (second instance decision in a civil law suit)

Iž. - *"drugostepena odluka u izvršnom sporu"* (second instance decision in an enforcement procedure)

LD - "*Zakon o menici*" (Law on Drafts)

LEP - "*Zakon o izvršnom postupku*" (Law on Enforcement Procedure)

LFL - "*Zakon o finansijskom lizingu*" (Law on Financial Leasing)

LPIL - Law on Private International Law

NBS - "*Narodna Banka Srbije*" (National Bank of Serbia)

no. - Number

OUN - "*Organizacija Ujedinjenih Nacija*" (United Nations Organization)

Prev. - *"po reviziji"* (on review)

Pzz. - *"postupak za zaštitu zakonitosti"* (procedure for the protection of legality)

Pž.	-	*"drugostepena odluka u privrednom sporu"* (second instance decision in a commercial law suit)
SCG	-	*"Srbija i Crna Gora"* (State Union of Serbia and Montenegro)
SFRY	-	Socialist Federal Republic of Yugoslavia
UN	-	United Nations
UNMIK	-	United Nations Mission in Kosovo
UNO	-	United Nations Organization
ZIP	-	*"Zakon o izvršnom postupku"* (Law on Enforcement Procedure)
ZPP	-	*"Zakon o parničnom postupku"* (Law on Civil Procedure)
WW II	-	World War II

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1. Introduction

1.1. Historical and Political Context

Following the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY"), the Republic of Serbia (hereinafter: "Serbia") remained in federation with the Republic of Montenegro (hereinafter: "Montenegro") by forming the Federal Republic of Yugoslavia ("FRY"). Yet, after a short "honey-moon" period, due to the growing political disagreements between the political elites, the two republics started slowly to move apart from each other. By the year 2000, Montenegro had taken over most of the competences from the federal state, thus leaving FRY existing only on paper. After the political turn-around in Serbia in the year 2000,[3] Montenegro was reluctant to return the seized federal competences to the federal state clearly expressing its intention to step out of the federation with Serbia. Nevertheless, at the insistence of the European Union (hereinafter "EU") and some arm-twisting diplomacy, the breakup of the two republics was temporarily postponed through creation of the State Union of Serbia and Montenegro (hereinafter "SCG"). The State Union was from the very beginning perceived by many as a temporary solution, since the Constitutional Charter ("*Ustavna povelja*") on which it was based provided that any of the republics constituting it may after a three-year period organize a referendum on its stepping out of the Union. As was expected, Montenegro utilized this right as soon as it was possible and in 2006 held a referendum in which its citizens decided to leave the union and form a free-standing independent state. As a result of the Montenegrin vote, Serbia again became an independent and sovereign state.[4]

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[3] After long years of Slobodan Milošević's regime Vojislav Koštunica was elected for the President of the Repulic and the Democratic Opposition of Serbia gained majority in the Serbian parliament. *See* CIA – The World Factbook at < https://www.cia.gov/library/publications/the-world-factbook/geos/rb.html >; last visited on 7 January 2009.

[4] One of the most pressing political challenges Serbia is facing today is the future status of its province Kosovo and Metohija. Since 1999, the province has been under the United Nations protectorate (UNMIK). Under international law, *to wit*, the UN Charter and UN Security Council Resolution 1244, Kosovo is integral part of Serbia. However, *de facto* Kosovo has been for the last nine years outside of Serbian legal and political jurisdiction. At present, the future status of Kosovo is the subject of intense discussion at international level. Thus, it should be noted that the ensuing presentation of Serbian law and judicial practice does not include developments from and related to Kosovo and Metohija.

1.2. Legal and Judicial System

In October 2006 the Serbian Parliament ("*Narodna skupština*") enacted a new Constitution ("*Ustav Republike Srbije*"),[5] which was previously approved in a referendum. The new Constitution provides a legal framework for the organization and functioning of the independent state. It defines the Republic of Serbia as the state of the Serbian nation and all citizens living in it, based on the rule of law and social justice, principles of democracy, and respect of fundamental freedoms, as well as human and minority rights and commitment to European principles and values.[6] The organization of governmental power is based on the principle of separation of powers. The legislative power is conferred to the Parliament, which has 250 representatives. The executive power is divided between the President ("*Predsednik*") and the Government ("*Vlada*"), though most of the executive powers are entrusted to the Government, the President only symbolizing the state unity of Serbia and carrying out certain, mostly protocolar, competencies. The judicial power is conferred to courts that are per the Constitution independent in their work and decide on the basis of the Constitution, laws and other general acts, as well as generally accepted rules of international law and ratified international conventions.[7] Furthermore, as a guarantee of judicial independence it is expressly stipulated that the position of a judge is permanent.[8] However, the Constitution introduced one, seemingly important, novelty in this regard. When a person is first appointed as a judge, the appointment is limited to a period of three years;[9] the effects of this novel solution remain to be seen, yet it appears – as empirical information already shows – that the new tool for ensuring independence of judges carries the risk that this transitory period may be used not only to test the professional and moral values of a judge, but also his or her willingness to follow potential

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5 Official Herald of the Republic of Serbia ("*Službeni glasnik Republike Srbije*") no. 98/2006.

6 Original wording: "*Republika Srbija je država srpskog naroda i svih građana koji u njoj žive, zasnovana na vladavini prava i socijalnoj pravdi, načelima građanske demokratije, ljudskim i manjinskim pravima i slobodama i pripadnosti evropskim principima i vrednostima.*" *See* art. 1 of the Serbian Constitution.

7 Original wording: "*Sudovi su samostalni i nezavisni u svom radu i sude na osnovu Ustava, zakona i drugih opštih akata, kada je to predviđeno zakonom, opšteprihvaćenih pravila međunarodnog prava i potvrđenih međunarodnih ugovora.*" *See* art. 142 of the Serbian Constitution.

8 *Id.* art. 146.

9 *Id.*

political instructions in certain situations and related to politically sensitive cases.

Recently one interesting question was raised in regard to the position of judges and their potential tortious liability for illegal or improper work in rendering of decisions. In 2007 Serbia's judicial system was faced with an until then unprecedented problem: a large number of citizens filed actions for damages against judges for their allegedly illegal and improper work in courts. Although the claims were directed to compensation of non-material damages in relatively small amounts, it became a grave problem because of the enormous number of actions filed (about 9,500 per month), as the sheer number of cases could have paralyzed the already overburdened court system. The problem was eventually addressed by the Serbian Supreme Court, whose Department for Private Law Disputes ("*Građansko odeljenje Vrhovnog suda Srbije*") adopted a legal standing ("*pravno shvatanje*") in this regard in its session of 15 March 2007.[10] On the basis of the analysis of the Serbian Constitution and laws, as well as of relevant international standards, the Court held that judges in Serbia enjoy legal immunity from such claims, which therefore have to be rejected by the courts handling the complaints as non-permitted.[11] The only exception to this is when a judge commits a criminal offense in rendering a decision.[12]

Finally, over the last several years a number of efforts to reorganize the judicial system in Serbia have been undertaken. A set of laws in that regard was adopted, but their implementation has been postponed several times.[13] As a result the current structure of the Serbian judicial system cannot be

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[10] *See* Legal Standing of the Department for Private Law Disputes of the Serbian Supreme Court, no. 07/03-01, of 15 March 2007. For more information about the role of courts, their legal standing and position *see* heading 1.3. entitled "Role of Courts" *infra*.

[11] The court based its findings on the provisions of the Law on Judges ("*Zakon o sudijama*") (Official Herald of the Republic of Serbia nos. 44/2004, 61/2005, 101/2005 and 46/2006) and on the Constitution of the Republic of Serbia. Per article 5 of the Law on Judges, a judge is not liable to anyone for opinion expressed or vote given in carrying out of his function. Per article 6 of the same law, the Republic of Serbia is liable for damages caused by illegal or wrongful work of a judge, with the possibility to seek recourse from a judge if the damage was caused intentionally or with gross negligence. Article 151 of the Serbian Constitution provides that a judge may not be held liable for opinion expressed or vote given in rendering of a court decision, unless he has therewith also committed a criminal offense.

[12] *Id.*

[13] *See* the Law on Organization of Courts ("*Zakon o uređenju sudova*") with all its amendments. Official Herald of the Republic of Serbia nos. 63/2001, 42/2002, 27/2003, 29/2004, 101/2005 and 46/2006.

described other than as a temporary one, which is to remain in place until the new system of organization of courts is introduced, though when that will occur cannot be stated firmly at present. For the time being, courts of general jurisdiction in Serbia are municipal courts (*„opštinski sudovi"*), district courts (*"okružni sudovi"*) and the Supreme Court of Serbia (*"Vrhovni sud Srbije"*), which stands at the top of the judicial pyramid.[14] Courts of special jurisdiction in the sphere of commercial transactions are commercial courts (*"trgovinski sud"*) and the Higher Commercial Court (*"Viši trgovinski sud"*) seated in Belgrade.[15] If the new organization of the judicial system materializes, in addition to already existing courts, four courts of appeal (*"apelacioni sudovi"*)[16] and a specialized Administrative Court (*"Upravni sud"*)[17] will be established. The changes aim to ensure higher quality and more efficient work of courts though it will probably take some time until the results of the reform surface. A final novelty introduced by the new Constitution deserves to be mentioned: this novum provides that the highest court in Serbia is the Supreme Cassation Court (*"Vrhovni kasacioni sud"*) instead of the Supreme Court of Serbia, however, this term is used only by the Constitution; the new Law on Courts still has to be passed that will introduce the this term in practice.[18]

1.3. Role of Courts

Like other civil law systems, Serbian courts do not have lawmaking powers. Thus, the common law notion of *stare decisis* has no true counterpart in Serbian law. As mentioned, in Serbia *"courts are autonomous and*

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[14] However, the Supreme Court of Serbia may not decide on constitutionality of laws and legality of by-laws. These competencies are bestowed to the Constitutional Court (*"Ustavni sud"*), which is, *inter alia*, competent to protect constitutionality and legality, as well as human and minority rights and freedoms. Its decisions are final, binding and enforceable. *See* art. 166 of the Serbian Constitution.

[15] *See* art. 10, 24-25 of the Law on Organization of Courts.

[16] *Id.* art. 13(2).

[17] *Id.* art. 26.

[18] *See* art. 143 of the Serbian Constitution. The *rationale* of this change is not clear. Inevitably, this will cause, at least one more amendment of the Law on Organization of Courts. Since the Constitution does not provide for a list of competencies of the Supreme Cassation Court, this will have to be regulated in the amendments of the Law on Organization of Courts. Until then it remains unclear whether this is only a terminological or rather a structural change. Therefore, at present time it is not possible to foresee what effects, if any (except reducing the workload of courts in general), this change will have on the functioning of the Serbian judicial system.

independent in their work and they decide on the basis of the Constitution, laws and regulations, ... as well as generally accepted rules of international law and ratified international conventions." [19] In addition, judges are independent in their work and subject only to the Constitution and the law.[20] The sources of law in Serbia are the Constitution, ratified international agreements, laws, regulations, and generally accepted rules of international law. Therefore, according to the letter of the Serbian Constitution court practice does not represent a formal (i.e., primary) source of law in Serbia.[21] This does not, however, by any means, mean that court decisions and courts in general should be underestimated in Serbia. On the contrary, courts do play an important role in shaping the contours of law in particular in those cases where courts need to render a decision in a matter which is not expressly regulated by legal norms in force, or where the court is asked to resolve a dispute related to a novel kind of business contract, as will be demonstrated in this paper. In such cases, courts do not only mechanically apply the law but constructively interpret the parties' agreements and apply general rules of contract law to specific individual cases.[22]

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19 *See supra* footnote 6.

20 The Constitution expressly prohibits any kind of influence on judges in carrying out of their competencies. *See* art. 149 of the Serbian Constitution.

21 However, in Serbian legal doctrine, as well as in former Yugoslav legal theory, this view was contested. Some authors argued that judicial practice *in fact* constitutes a source of law, while others suggested that it actually represents only an "*interpretative source of law*". Still, today the prevailing position is that judicial practice, in spite of its importance and relevance, does not represent a formal source of law; or, it is not a primary but only a secondary source of law. *See also Milan Dakić, Piercing the Corporate Veil and Liability for Company Debts in Serbia – Movement to Understand Modern Company Law in:* STEFAN MESSMANN & TIBOR TAJTI (EDS.), THE CASE LAW OF CENTRAL AND EASTERN EUROPE. LEASING, PIERCING THE CORPORATE VEIL AND THE LIABILITY OF MANAGERS & CONTROLLING SHAREHOLDERS, PRIVATIZATION, TAKEOVERS AND THE PROBLEMS WITH COLLATERAL LAWS (European University Press, Europäischer Universitätsverlag, 2007), at 155 (hereinafter: Messmann & Tajti, Case Law).

22 The Serbian Law on Obligations ("*Zakon o obligacionim odnosima*") (Official Gazette of SFRY no. 29/78, 39/85, 45/89, Official Gazette of FRY no. 31/93 and Official Gazette of SCG no. 1/2003) expressly provides rules for interpretation of contracts. According to these rules, contractual provisions in the first place need to be interpreted as they were written ("*odredbe ugovora primenjuju se onako kako glase*"), i.e., in accordance with their [common] meaning.
However, this basic rule of interpretation is supplemented by the provision that in interpretation of disputable provisions courts should not hold to literal meaning of the words used, but should investigate the common intention of the parties and understand the provision in accordance with the principles of the law of obligations as set out under the

It is more of a curiosity than of practical relevance today, but Serbian courts may in some cases apply *principles* of the pre-World War II (hereinafter: WW II) laws to fill legal lacunae. This is so as one of the very first laws passed by the socialist Yugoslavia, the 1946 Law on the Invalidation of Legal Acts Passed before 6 April 1941 and During Occupation,[23] abrogated all pre-WW II laws of Yugoslavia to part with the capitalist past. Yet as it was clear to some of the less zealous lawmakers of those times that huge gaps had been created, the very same law foresaw that until the enactment of new – "socialist"[24] – laws and regulations, courts might apply *principles* extrapolated from pre-WW II laws in rendering decisions, provided that such principles did not contradict the values of the then emerging "socialist" order.[25] Although Serbia has also redirected its

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law (*"pri tumačenju spornih odredbi ne treba se držati doslovnog značenja upotrebljenih izraza, već treba istraživati zajedničku nameru ugovarača i odredbu tako razumeti kako to odgovara načelima obligacionog prava utvrđenim ovim zakonom"*).

Moreover, the law provides for the so-called *'contra proferentem rule'* (*i.e., in dubio contra stipulatorem* principle) by providing that in case of contracts prepared by one party dubious provisions ought to be interpreted in favor of the other party. Finally, when a contract is not followed by consideration (i.e., payment or performance by the other party) doubtful provisions should be interpreted in favor of the debtor. As opposed to that, in cases of contracts backed by consideration such provisions should be interpreted in a manner which ensures fairness as far as the mutual obligations of the parties is concerned (*"pravičan odnos uzajamnih davanja"*).

Parties may also agree that in the case of a dispute a third person will give an interpretation of their contract, in which case they may not initiate court proceedings before such an interpretation has been given or refused. *See* arts. 99-102 of the Serbian Law on Obligations.

[23] *"Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije"* enacted in 1946, published in the Official Gazette of the Federal People's Republic of Yugoslavia no. 86/46.

[24] This system was by many western democratic systems of those times referred to as a 'communist' system. Yet the Yugoslav variant of 'socialism' is to be differentiated both from the 'socialist-market economy' of the post-WW II Western Europe and the soviet-model of the Eastern Block countries because of its many distinguishing features. To mention the most important ones: 1/ in Yugoslavia private ownership of small enterprises was possible; 2/ agricultural land and forests were not completely nationalized; 3/ enterprises (starting from the 1950s) were run by their employees (the so-called self-management system [*"samoupravljanje"*]); and 4/ on a political and international plain – Yugoslavia was not part of the Warsaw Pact but was the leader of the Group of Unallied Nations.

[25] *See Milan Dakić,* chapter on Serbia *in:* Messmann & Tajti, Case Law, at 155. *See also V. Petrić, M. Mirković, Pravno-politička istorija nove Jugoslavije [Legal and Politic History of the New Yugoslavia] in:* G. NIKOLIĆ (ed.), ISTORIJA DRŽAVA I PRAVA JUGOSLOVENSKIH

development once again towards capitalism (essentially from year 2000 on) and this redirection has been followed by a flood of new laws, occasional resort to pre-WW II principles is still a must (e.g., gifts or civil partnerships).[26]

The role and importance of the Supreme Court of Serbia[27] is best illustrated by the following two institutions anticipated by the Law on Organization of Courts. Specifically, departments (*"odeljenja"*) of the Supreme Court may on their meetings adopt a *legal standing* (*"pravno shvatanje"*) on a certain legal issue, which is obligatory for all panels (*"veća"*) of that department.[28] Moreover, the General Meeting of the Supreme Court (*"opšta sednica Vrhovnog suda"*) may adopt a *general legal position* (*"načelni pravni stav"*), which is binding on all panels and departments of the Supreme Court and may be amended only by the General Meeting of the Supreme Court.[29] As said, although Serbia is a civilian legal system not knowing the stare decisis doctrine, these two peculiar institutions may be the only local counterparts of precedents and they may be listed as secondary sources of law.[30] Yet it is very hard to state precisely to what extent the decisions of higher courts and the mentioned positions of the Supreme Court influence lower courts; at any event, it is fair to state that they do have some persuasive force.

Talking of the role of courts, finally, it needs to be mentioned that Serbian courts made a commendable contribution to preserving and properly

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NARODA [History of the States and Laws of Yugoslav Nations] (Naučna knjiga, Beograd, 1972), at 513.

[26] These transactions are not expressly governed by the positive norms (i.e., law in force) of Serbian law. Therefore, they are subject to general rules and principles of contract law, while in respect of transaction-specific issues pre-WW II principles may apply. *See id.*

[27] More information on the Supreme Court of Serbia (also English pages) available at the website of the Court at < http://www.vrhovni.sud.srbija.yu >, last visited on 7 January 2009. The Bulletin of Case Law (*"Bilten sudske prakse"*) issued by the Court is also accessible through the site. The Bulletin comprises the most important decisions of the Supreme Court and other courts in Serbia. However, it should be mentioned that in the opinion of the American Bar Association in Serbia *"access to judicial decisions is limited to the parties to a proceeding. Law students, legal scholars, and others may be granted access by the court president on a case-by-case basis."* See American Bar Association at < http://www.abanet.org/rol/publications/serbia_jri_2005_eng.pdf >, last visited on 7 January 2009.

[28] *See* art. 40 of the Law on Organization of Courts.

[29] *Id.* art. 42.

[30] *See Milan Dakić*, chapter on Serbia *in:* Messmann & Tajti, Case Law, at 155.

balancing the connected interests as far as international contractual relationships were concerned in one difficult part of Serbia's history, namely in the period 1992-1995, when an international economic embargo was imposed on FRY by the United Nations Security Council, which had often detrimental effects on many local businesses, as often decades-long cooperation with foreign partners was brought to an end virtually overnight. Often the partners managed to "freeze" or reduce the level of business activities so that they could relatively easily restart doing business after the lifting of the embargo (which eventually lasted much longer than initially expected by many). In spite of the efforts of some domestic businesses to use the embargo as an excuse for avoiding their obligations from contracts with foreign partners, Serbian courts – instead of unconditionally taking account solely of local interests – tried rather to find a way to balance the conflicting interests. The delicate issue was how to reconcile the need to protect the legitimate expectations of foreign partners for proper fulfillment of contractual obligations and granting of some kind of relief to local businesses on the basis of the obviously changed political, legal and economic circumstances caused by the embargo.

The main reason why Serbian courts have to be praised – in addition to facing and resolving unique legal problems due to the embargo – is that in most cases they managed to find a way to satisfy both ends, which in the years full with animosity towards the international community because of the sanctions was far from being easy. This meant that a simple reliance on the embargo as an excuse for non-performance by Serbian businesses in the litigation phase was not accepted; however, this was distinguished from the possibility to enforce contractual obligations enshrined in final court judgments. In other words, even though foreign partners could have started and completed litigation by obtaining a final court decision ordering the Serbian partner to pay and perform, the final decision might not have been enforceable in courts of law due to the international embargo. As the statute of limitations for enforcement of final court judgments runs out in ten years[31] generally all contractual obligations with foreign partners have had to be fulfilled within that period of time; even such venerable principles of private law as *rebus sic stantibus* or *force majeure* have not been automatically

[31] *See* the Law on Obligations (*"Zakon o obligacionim odnosima"*) (Official Gazette of SFRY nos. 29/1978, 39/1985, 45/1989, 57/1989 and Official Gazette of FRY no. 31/1993), art. 371.

applied to release Serbian parties.[32] However, if due to the embargo it was impossible to carry out the enforcement procedure (*e.g.*, impossibility to make international payments because of the frozen accounts of virtually all Serbian bank-affiliates located abroad) then the courts would have exercised their statutory right to grant postponement of enforcement until such time as the enforcement again became feasible.[33]

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[32] In one case, the Higher Economic Court held that a bank which had issued an irrevocable bank guarantee to a foreign beneficiary had to fulfill its obligation from the guarantee irrespective of the UN economic sanctions (i.e., embargo). The court stated that the fact that the UN embargo limited the possibilities for foreign trade operations must not influence the obligations of the domestic bank, but that it could only be of relevance in the enforcement proceedings as a ground for their postponement. *See* Decision of the Higher Economic Court no. Pž. 3811/93, of 13 August 1993.
The holding of the decision in Serbian language reads as follows: *„Činjenica da su sankcije OUN otežale spoljnotrgovinski promet ne može biti od uticaja na obavezu domaće banke kao izdavaoca neopozive bankarske garancije prema inostranom korisniku garancije, već se te okolnosti mogu isticati samo u izvršnom postupku."*
A similar position was taken in another case, where the Supreme Court held that a defaulting debtor who had failed to fulfill his obligations prior to the introduction of the UN embargo could not invoke the embargo as a reason for non-performance. *See* Decision of the Supreme Court of Serbia no. Prev. 106/94, of 22 June 1994.
The paraphrased holding in Serbian language reads as follows: *„Kada načini nije izvršio svoju obavezu da radove izvede znatno pre uvođenja sankcija OUN onda se on zbog docnje ne može pozivati na nemogućnost izvršenja obaveze zbog više sile usled sankcija."*

[33] Accordingly, the Higher Economic Court held in one case that the UN embargo might be the reason for postponement of the enforcement proceedings if the debtor can appropriately prove that he is not capable to fulfill his obligation exactly because of that. In that case, due to the suspension of international payments with Serbia, the debtor was prevented from disposing with his foreign currency deposits located outside of the country and therefore it was prevented from fulfilling his obligation towards the creditor. *See* Decision of the Higher Economic Court no. Pž. 217/94.
The paraphrased holding of the judgment in Serbian language reads as follows: *"Sankcije OUN mogu biti razlog za odlaganje izvršenja prema dužniku, ako iz tog razloga on nije u mogućnosti da izvrši svoju obavezu. ... Zbog prekida deviznih veza od strane partnera dužniku je onemogućeno raspolaganje devizama u bankama van Jugoslavije, pa samim tim i nije u mogućnosti da realizuje izvršnu ispravu prema poveriocu – ino partneru."*

However, Serbian courts were observant of the principle of reciprocity when deciding on a motion for postponement of enforcement proceedings. In one legal standing the Higher Economic Court stated that there is no justifiable reason for postponement of enforcement proceedings when – at the same time – in the country of the creditor enforcements are carried out in favor of Yugoslav companies. *See* Legal Standing of the Higher Economic Court no. 99/00-041.
The paraphrased legal standing in Serbian language reads as follows: *"Ako se u zemlji*

2. Provisional and Preliminary Measures

2.1. Legislative Overview

2.1.1. Provisional Measures

According to the Law on Enforcement Procedure ("*Zakon o izvršnom postupku*")[34] (hereinafter: "LEP") a provisional measure ("*privremena mera*") may be ordered before or during the course of litigation or administrative proceeding, as well as after the termination of such proceedings until the enforcement (i.e., seizure, sales and payment of so received moneys to the creditor) is in fact accomplished.[35] Issuance of a provisional measure is the last resort, to be granted only if the creditor's rights cannot be sufficiently secured by other means.[36] On motion of a creditor the court[37] may, considering the circumstances of the case and if appropriate, order even more provisional measures in a single case.[38] Serbian law distinguishes between provisional measures for securing pecuniary and non-pecuniary claims.

A provisional measure for securing pecuniary claims ("*privremena mera za obezbeđenje novčanog potraživanja*") may be ordered if the creditor shows (1) the *probability of the existence of the claim* that is to be secured by the provisional measure; and (2) *the risk* that without such a provisional measure the debtor would prevent, delay or considerably hinder satisfaction of the claim by disposing of, hiding or otherwise making unavailable his property. Yet the creditor is not required to prove the risk if he shows the probability that the debtor would sustain only insignificant damage by the imposition of the provisional measure.[39] Per the LEP, in order to ensure that there will be assets upon which enforcement of a pecuniary claim is possible,

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poverioca sprovode izvršenja u korist jugoslovenskih firmi, nema opravdanog razloga za odlaganje izvršenja po predlogu dužnika u Jugoslaviji."

[34] Official Herald of the Republic of Serbia no. 125/2004.

[35] *See* art. 291 of the Law on Enforcement Procedure.

[36] *Id.* art. 292. However, it should be emphasized that here 'secured' means not creation of an *in rem* right (security interest or lien) but only a measure aiming at ensuring that collection on the would-be-judgement will be possible.

[37] The competent court is the one on whose territory the debtor has its seat or residence. *Id.* art. 3.

[38] *Id.* art. 295.

[39] *Id.* art. 299 (1-2). The law provides that the risk exists particularly when the claim would have to be enforced abroad, if the debtor's statutory obligations (*e.g.*, alimony or unpaid taxes) and obligations determined in final decisions of courts or other authorities exceed his regular income, when an earlier attempt of enforcement was unsuccessful due to the debtor's refusal to provide information on his property, or when the debtor had provided false information on his property in earlier enforcement procedures. *Id.* art. 299 (3).

any measure achieving that objective may be ordered.[40] As a general rule, provisional measures do not establish a lien (i.e., an *in rem* right ensuring priority in bankruptcy or as to lien-holders) over the debtor's assets. However, the court may order – especially in the presence of a risk that without the provisional measure the debtor would prevent or considerably hinder satisfaction of the claim – that a provisional measure shall establish a temporary lien over the designated assets of the enforcement debtor.[41]

Similarly, a provisional measure for securing of non-pecuniary claims ("*privremena mera za obezbeđenje nenovčanog potraživanja*") may be ordered if creditor shows (1) probability of the existence of the claim to be secured by the provisional measure and (2) a risk that otherwise satisfaction of the claim would be prevented, delayed or considerably hindered. In addition, a provisional measure may also be ordered when creditor shows the probability that the provisional measure is necessary to prevent use of force or infliction of irreparable damage.[42] In order to secure a non-pecuniary claim, the court may order any measure that it deems appropriate, though logically the content of such measures is in practice normally different from the ones awarded to pecuniary claims.[43]

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[40] Such measures may include in particular: (1) prohibiting the debtor to dispose of certain chattels, as well as seizing such chattels from the debtor and entrusting them to the creditor or a third party for safekeeping, or for safekeeping in a deposit with the court, (2) prohibiting the debtor from disposing of or encumbering his immovable property or property rights to immovable property recorded in his favor in a public book, with recordation of such prohibition in public books, (3) prohibiting debtor's debtor from paying the debtor's claim or from handing over objects to the main debtor, and prohibiting the debtor from receiving such objects, collecting the claim or disposing of what is received or collected, (4) ordering a bank or other financial institution where the debtor has an account to stop payments to the debtor or a third party on order of the debtor from such account up to the amount equal to the monetary claim to be secured by the preliminary measure, and (5) seizure of cash or securities held by the debtor and depositing them for safekeeping. *Id.* art. 300.

[41] The Serbian language of the respective provision reads as follows: "*Privremenom merom ne stiče se založno pravo, ali sud može odrediti, naročito ako postoji opasnost određena u članu 299. stav 3. ovog zakona, da se privremenom merom stiče privremeno založno pravo.*" *Id.* art. 301.

[42] *Id.* art. 302. As in the case of ensuring collection of pecuniary claims, the creditor is not required to prove the risk, if he proves that the debtor would sustain only insignificant damage from the provisional measure, or that the claim would have to be enforced abroad.

[43] These may, *inter alia*, include: (1) a ban on disposing of or encumbering the assets being the object of the claim, seizing of such chattels and entrusting them to the creditor or a third person for safekeeping, or for safekeeping in deposit with the court, (2) a ban on disposing of or encumbering immovable property being the object of the claim and

2.1.2. Preliminary Measures

A preliminary measure ("*prethodna mera*") may be granted on the basis of a judgment[44] of a domestic court on a pecuniary claim (i.e., roughly – money-judgment), which has not become final or enforceable, if the enforcement creditor shows the probability of a risk that without such a measure satisfaction of the claim would be impossible or significantly impaired.[45] Subject to the fulfillment of the said conditions, the court may order one or more of the preliminary measures listed by the law.[46]

2.2. Adequacy of Provisional Measures

When deciding on a motion for a provisional measure, Serbian courts tend to require the existence of a connection between the provisional measure sought and the substance (merits) of the plaintiff's lawsuit, though the law does not define exactly what the connection is supposed to be. Thus, some ingenuity on the side of courts is needed in establishing the existence of a proper connection. In a recent case, the District Court in *Valjevo* (27 January 2006) held that a provisional measure cannot be ordered unless there is a

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recording such ban in public records, (3) a ban on taking actions that may cause damage to the enforcement creditor, (4) a ban to the debtor's debtor to hand over to the debtor the claimed objects, (5) order to the debtor to take specific actions necessary for protection of chattels or immovable property, and to prevent their physical alteration, damage or destruction, (6) authorization to the creditor to take an action, by himself or through a third party, or procure a particular object at the debtor's expense, especially if necessary to attain *status quo ante*, or (7) temporary regulation of a disputed relationship in order to prevent violence or infliction of irreparable damage. *Id.* art. 303.

[44] According to LEP arbitral awards are treated as judgments. *See* art. 31 of the LEP.

[45] *See* art. 282(1) of the LEP. The law mandates that the risk shall be deemed to exist if the motion for a preliminary measure is claimed to ensure collection or performance based on one of the following types of decisions: (1) a payment order issued on the basis of a bill of exchange or a check against which timely objection has been made, (2) a judgment issued in such a criminal matter where the criminal court has adjudicated also the connected private claim as legitimate, however, against which retrial is allowed, (3) a decision to be enforced abroad, (4) a judgment on the pleadings which has been appealed, or (5) judicial or administrative settlement, which is contested in a manner prescribed by law. *Id.* art. 283.

[46] The LEP lists four distinctive preliminary measures that can be ordered by a court: (1) listing (i.e., taking inventory) of particular assets, (2) prohibiting debtor's debtor to satisfy the debtor's claim or handing over items, as well as prohibiting the debtor to collect his claims or receive and dispose with certain assets, (3) prohibiting a bank to pay the debtor, or a third party at the order of the debtor, up to the amount which is the object of the preliminary measure, or (4) temporary recordation of a lien on an immovable property of the debtor or on the rights in that property. *See* art. 285 of the LEP.

'*mutual connection*' between the substance of the plaintiff's claim and the content of the provisional measure sought, in the sense that the provisional measure must ensure that the creditor will be in the position to collect in the enforcement phase based on the judgment to be rendered.[47] Thus, whether a provisional measure is adequate – or, more precisely, whether the content of the provisional measure is adequate – in a case depends on the substance of the plaintiff's claim sought to be secured. Therefore, what kind of provisional measure is to be issued should be determined by the court depending on the circumstances of each individual case.[48] Put simply, while in one case a simple prohibition of disposal with a particular asset would be sufficient, in another case only the transfer of a particular asset into the custody of a third person would produce appropriate results.

Although this rule may sound more or less straightforward, in practice parties often request provisional measures that go *ultra vires*. A scholarly example of such attempts of creditor-plaintiffs can be found in a case of the Higher Commercial Court, which – applying the standard that " [...] *the content of the ordered provisional measure may not be such as to in effect amount to the enforcement of the plaintiff's claim before the final court decision has been rendered* [...]"[49] – refused to grant the request of the creditor-plaintiff directed at handing-over of the disputed goods to a third party implying the permission of using them up as raw material immediately upon transfer. Instead, it merely ordered their safekeeping by a third party until the final resolution of the court proceedings.

Interestingly, the first-instance court had no problem with granting the sought measure, which apparently demonstrates a certain level of inconsistency in the positions of Serbian courts. Even in such simple cases, courts may misapply the law – which admittedly is perhaps a bit too generally formulated – and grant a provisional measure that would in fact prejudice the adjudication of the case on the merits. No wonder then that the Higher Commercial Court remanded the decision of the lower court with the

[47] Decision of the District Court in Valjevo, Gž. 231/2006 of 27 January 2006. The paraphrased text in Serbian language reads as follows: "*Nema uslova za određivanje privremene mere ako između sadržine tužbenog zahteva i sadržine privremene mere ne postoji uzajamni odnos koji se sastoji u svrsi privremene mere da obezbedi potraživanje koje je predmet tužbe.*"

[48] *Id.*

[49] *See* Decision of the Higher Commercial Court Pž. 14499/2005 of 5 January 2006. The paraphrased holding in Serbian language reads as follows: "*Sadržina privremene mere ne sme biti takva da se njom u suštini tako menja postojeće stanje stvari da ona po svom dejstvu predstavlja izvršenje tražene sudske odluke pre nego što je ona i doneta.*"

instructions for another hearing stating, *inter alia*, that if such a provisional measure would be granted it would in effect amount to the enforcement of the plaintiff's claim and thus would make adjudication of the case on the merits completely unnecessary.[50]

2.3. Provisional Measure v. Existence of the Plaintiff's Claim

Ordering of a provisional measure may by no means prejudice the final outcome of the court proceedings on the merits of the case. Such a position was reaffirmed by the Higher Commercial Court in its decision of 27 July 2005, in which the court held that when deciding on a motion for a provisional measure the court is expected to limit its analysis solely to the issue whether the petitioner's statements and the submitted evidences make the existence of the plaintiff's claim *probable*, and that it must not deal with such meritorious questions as whether the conditions for the termination of a contract have been satisfied. Yet the existence of such a probability does not mean that the plaintiff's claim is well-founded and that the court will reach the same conclusion in its decision on the merits.[51] Otherwise, the court upheld the decision of the lower court ordering a provisional measure wherewith the defendant was ordered to refrain from encumbering and disposing of the assets of the company pending its privatization. The

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[50] The above summarized holding in Serbian language reads as follows: "*Kako je privremena mera po svojoj pravnoj prirodi samo mera koja proizvodi dejstvo do okončanja odluke o samom pravu, to ista ne može biti istovetna sa tužbenim zahtevom i ne može u suštini predstavljati izvršenje sudske odluke pre nego što je odluka o postavljenom tužbenom zahtevu i doneta. Stoga se sadržinom privremene mere nikada ne može dozvoliti promena postojećeg stanja stvari a kako se to u konkretnom slučaju traži tužbenim zahtevom, te kako je i usvojeno određenom privremenom merom. Naime, iz sadržine navoda samog tužioca proizilazi da on privremenom merom ne želi postići privremeno čuvanje pokretnih stvari na koje je usmeren tužbeni zahtev, nego da je sa istima već raspolagao prodavši ih trećem licu, kao i da je suština tražene mere da se te stvari upotrebe kao sirovina za dalju proizvodnju. Ovako usvojenom privremenom merom dozvoljena je promena postojećeg stanja stvari, a izvršenjem iste u potpunosti bi se obesmislilo odlučivanje o postavljenom tužbenom zahtevu.*" See id.

[51] Decision of the Higher Commercial Court of the Republic of Serbia, Pž. 8161/2005 of 27 July 2005. The above paraphrased holding in Serbian language reads as follows: "*U postupku za odlučivanje o predloženoj privremenoj meri sud ne utvrđuje da li su predložene činjenice tačne, da li su se stekli uslovi za raskid ugovora, već samo činjenicu da li iz navoda tužioca i prvenstveno dokaza proizilazi verovatnost postojanja potraživanja. Činjenica da je sud utvrdio da se radi o verovatnom postojanju potraživanja ne znači da se sud izjasnio i da je to potraživanje osnovano.*"

provisional measure was to remain in force until the final ending of the court proceedings and to be registered with the competent public registers.[52]

2.4. The Cumulative Nature of Conditions for Granting Provisional Measures

As explained above, the LEP sets two basic conditions for ordering of a provisional measure. *First*, the creditor must show the probability of the existence of his claim, and *secondly* he must show the risk that without such a provisional measure the debtor would prevent or considerably hinder satisfaction of the claim.[53] Moreover, the statutory text sets these two conditions in a cumulative manner, *i.e.*, both conditions must be fulfilled for a court to order a provisional measure.[54]

In view of this, in a recent case the Higher Commercial Court unambiguously stressed that in order for a court to order a provisional measure, the creditor – besides demonstrating the probability of his claim – must also demonstrate the probability of the risk that due to the defendant's conduct satisfaction of the creditor's claim will be prevented or considerably hindered.[55] In that case, the parties had concluded an agreement on the lease of special cargo vehicles, which were duly handed over into the possession of the defendant. In the court proceedings the plaintiff alleged breach of the contract by the defendant and sought repossession of the said vehicles, as well as payment of the outstanding lease installments plus compensatory damages. In support of its claim the plaintiff argued, *inter alia*, that the vehicles were incomplete and in poor condition as they had been out of use for a long period of time and had been stored outdoors without any protection from theft, as a result of which, important parts of the vehicle had been stolen.

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[52] *See id.*

[53] *See* sub-section 2.1.1. *supra.*

[54] Yet there are some exceptions to this rule. Thus, in regard to provisional measures securing of pecuniary claims it suffices for the creditor to show the probability that debtor would sustain only insignificant damage by the provisional measure. *See* art. 299 of the LEP. Also, a provisional measure for securing of non-pecuniary claims may be granted if the creditor shows the probability that the provisional measure is necessary to prevent use of force or infliction of irreparable damage. *Id* art. 302.

[55] *See* Decision of the Higher Commercial Court of the Republic of Serbia Pž. 2820/2005 of 4 April 2005. The above paraphrased holding in Serbian language reads as follows: "*Da bi sud usvojio predlog za određivanje privremene mere, pored uslova da predlagač učini verovatnim postojanje ovog potraživanja, potrebno je da učini verovatnim i postojanje opasnosti da će se ostvarivanje potraživanja osujetiti ponašanjem tuženog ili znatno otežati.*"

In addition, the plaintiff sought a provisional measure prohibiting the defendant from encumbering or disposing of certain immovable assets, alleging that such encumbrance or disposal would prevent satisfaction of his claim. The court held that although the plaintiff had demonstrated the probability of his claim, he failed to show the risk that without the provisional measure satisfaction of his claim would be prevented or considerably hindered, since he did not show what conduct of the defendant exactly could prevent or considerably hinder the satisfaction of his claims.[56] Therefore, the fact that the plaintiff was capable of showing the probability of his claim in no way implied that *ipso facto* the satisfaction of his claim was put at risk. Therefore, he had to put forward additional facts and evidences demonstrating the fulfillment of the second cumulative condition. Failure to do so was a ground for the court to reject the request for the preliminary measure.

2.5. Leasing and Provisional Measures

In another case, parties concluded a leasing agreement the subject matter of which was the leasing of a bus, which was handed over into the possession of the defendant (*i.e.*, lessee). The leasing agreement defined the amount of installments and the schedule of their payment, as well as the right of the plaintiff (*i.e.*, lessor) to terminate the contract and to accelerate the payment of all the outstanding installments if the lessee defaulted on the payment of any full or partial installment for more than 30 days. Since the lessee was late with payments of leasing installments for more than 30 days, the lessor terminated the contract and filed a lawsuit requesting the seizure and return of the possession of the bus and compensatory damages. The plaintiff also sought a provisional measure ordering the defendant to refrain from using the object of leasing until the final resolution of the case. The first instance court granted the provisional measure and the defendant appealed the decision.

Deciding on the appeal, the Higher Commercial Court in its decision[57] of 25 October 2004, upheld the decision of the lower court by distinguishing between the so-called '*objective*' and '*subjective risk*'[58] of preventing or

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[56] *Id.*

[57] Decision of the Higher Commercial Court Pž. 6523/2004 of 25 October 2004.

[58] Distinction between the objective and subjective risk of preventing or considerably hindering the satisfaction of a claim was also elaborated in another decision of the Higher Commercial Court, where the court – focusing on the *difference* between the conditions for ordering a provisional measure for securing a pecuniary versus a non-pecuniary claim – found that the nature of the risk endangering satisfaction of a claim is determinative.

considerably hindering the satisfaction of a claim. It held that for the ordering of a provisional measure securing a non-pecuniary claim, the risk of preventing or considerably hindering the satisfaction of the claim should not have been connected to the actions of the debtor.[59] Thus, it would have sufficed for the petitioner to demonstrate solely the probability of his claim and the existence of the risk, not necessarily connected to the actions of the debtor, that satisfaction of his claim would be prevented or considerably hindered.

However, rather unfortunately, the court then went on to explain that the creditor would have suffered irreparable damage, since the bus was in the possession of the debtor, who would have continued to use it and thus cause depreciation of its value. Therewith, the court in fact confused two distinct legal grounds for ordering provisional measures.[60] What is more, this kind of understanding of "irreparable damage" may be gravely criticized, since depreciation of the object of a claim due to the normal "wear and tear" can hardly be regarded as "irreparable damage". The court's opinion was that any further exploitation of the vehicle would have led to significant depreciation of its value.

Hence, a provisional measure securing a pecuniary claim is to be ordered only if there is a so-called '*subjective risk*', meaning the active conduct of the debtor aimed at preventing or considerably hindering the satisfaction of the pecuniary claim by disposing of, hiding or otherwise making unavailable his property.
As opposed to that, in case of ordering provisional measures related to non-pecuniary claims, it is sufficient to satisfy the so-called '*objective risk*' requirement, which may be unrelated to the actions of the debtor. Therefore, a provisional measure for securing a non-pecuniary claim may be ordered in the presence of *any* risk potentially preventing or hindering satisfaction, which may not be linked to the actions of the debtor. *See* Decision of the Higher Commercial Court Pž. 3601/2005 of 19 April 2005.

[59] Decision of the Higher Commercial Court Pž. 6523/2004 of 25 October 2004. The above paraphrased holding of the court in Serbian language reads as follows: "[...] *[Z]a određivanje privremene mere radi obezbeđenja [nenovčanog] potraživanja nije neophodno da tuženi preduzima bilo kakve radnje koje bi za posledicu imale osujećenje ili znatno otežavanje nenovčanog potraživanja, dovoljna je opasnost da bi se inače [bez privremene mere] ostvarenje ovog potraživanja moglo osujetiti ili znatno otežati. Prema tome ovde se radi o objektivnoj a ne subjektivnoj opasnosti.*"

[60] Per article 302(1) of LEP the court may order provisional measure if creditor shows probability of his claim and a risk that its satisfaction will be prevented or considerably hindered. On the other hand, article 302(2) of LEP provides that a provisional measure may *also* be granted when creditor shows probability that provisional measure is needed to prevent occurrence of irreparable damage.

2.6. *Ex Parte* Provisional Measures

In exceptional situations courts may order *ex parte* provisional measures – *i.e.*, measures issued prior to service of the claim[61] and without giving the other party the opportunity to be heard on the claim – such as when the plaintiff would suffer irreparable harm by postponing the issuance of the provisional measure. Such measures may be granted also to avoid direct danger of harm to plaintiff's assets, serious violation of his rights, or to prevent violence.[62]

In the view of the fact that *ex parte* provisional measures leave the defendant without the possibility to argue against a provisional measure and that they are based solely on the allegations of a plaintiff, Serbian courts tend to apply stricter criteria when deciding on a motion for an *ex parte* provisional measure than the ones applicable to non-*ex parte* motions. Thus, the Higher Commercial Court held in its decision of 24 August 2006 that to order an *ex parte* provisional measure, it is not enough merely to state that there is a risk of irreparable damage or of destruction of evidence, but that it is also essential to examine all facts relating thereto, which presupposes for the plaintiff to specify the nature and extent of potential damages and the concrete circumstances making it irreparable.[63] Yet normally damages – including lost

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[61] Unlike in US law, or some other legal systems, in Serbian law service of a claim or other briefs is the responsibility of the court and not of the parties. Parties submit their briefs to the court, which then delivers them to the opponent party and other participants of the proceedings (if any). Thus, when *ex parte* provisional measure is granted, the debtor will receive at the same time both the creditor's motion for a provisional measure and the court's decision granting it. The debtor is, however, not deprived of the right to contest the preliminary measure in the appellate proceedings. He may immediately file an appeal against the *ex parte* measure.

[62] *See* art. 265 (1) of the LEP. The provision in Serbian language reads as follows: "*U postupku obezbeđenja, sud može doneti rešenje o obezbeđenju, pre dostavljanja predloga protivnoj stranci i pre nego što je protivnoj stranci omogućio da se o predlogu izjasni: (1) ako bi predlagač obezbeđenja, zbog odlaganja, mogao pretrpeti nenadoknadivu ili teško nadoknadivu štetu, (2) radi otklanjanja neposredne opasnosti protivpravnog oštećenja stvari ili gubitka odnosno teškog ugrožavanja prava, (3) radi sprečavanja nasilja.*"

Some other laws as well provide for certain cases when the *audiatur et altera pars* principle may be waived. Thus, the Law on Patents (*"Zakon o patentima"*) (Official Gazette of SCG nos. 32/2004 and 35/2004, as well as the Official Herald of Serbia no. 115/2006) in article 94(3) provides that a provisional measure may be ordered without hearing the defendant if (1) there is a risk of irreparable damage, or (2) it is obvious that there is a risk of destruction of evidence.

[63] Decision of the Higher Commercial Court, VIII Iž. 1770/2006(1) of 24 August 2006. The above paraphrased holding in Serbian language reads as follows: "*Za određivanje privremene mere bez saslušanja protivne strane nije dovoljno paušalno navođenje da je*

profits – are reparable and hence only exceptional additional circumstances may make them irreparable, in which case, however, such circumstances have to be proven and scrutinized.[64] Since the lower court did not make such a scrutiny of facts and no peculiar evidence was put forward by the plaintiff, the Higher Commercial Court revoked the provisional measure and remanded the case to the lower court for a *de* novo trial consistent with the said opinion.

2.7. Provisional Measures in the Proceedings for Violation of a Trademark

The condition for ordering a provisional measure in the proceedings for violation of a trademark is rather specific because when deciding on ordering of a provisional measure in the proceedings for violation of trademarks, Serbian courts have to apply the somewhat specific conditions of the Law on Trademarks[65] and not the ones from the LEP. Although the basic precondition is also that the plaintiff demonstrates the probability that his trademark has been or is going to be violated, it is not necessary to satisfy the second cumulative requirement from LEP, *i.e.*, the plaintiff does not have to show that without the provisional measure the defendant would prevent or considerably hinder the satisfaction of his claim or that he would suffer irreparable harm.[66] On the other hand, due to the very nature of trademarks,

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uslov opasnosti od nastanka nenadoknadive štete ili od uništenja dokaza ispunjen, već je nužno raspraviti činjenice vezane za ispunjenje tog uslova, što podrazumeva da predlagač navede u čemu se šteta sastoji i koje su okolnosti iz kojih sledi da se ista ne može nadoknaditi."

64 *Id.*

65 *"Zakon o žigovima"* [Law on Trademarks], Official Gazette of SCG nos. 61/2004 and 7/2005. The protection of IP rights is new in Serbia – during socialism it was just a politically motivated proclamation, window-dressing and thus no wonder that very few cases have reached courts and the protection of IP rights was weak. This is nowadays changing but still very few cases get as far as the courts. A very good overview of this issue is given by Miroslav Vrhošek and Vladimir Kozar, *"ZAŠTITA ŽIGA I FIRME"* [Protection of Trademarks and Company names] (Intermex, Beograd, 2002). *See* also: *Andro Anastasijević, "Intelektualna svojina i tržišna privreda" [Intellectual Property and Market Economy] in:* Jezdimir Mitrović (ed.), *"Informator za intelektualnu svojinu"* [Informator for Intellectual Property] (Intermex, Beograd, 2002), at 85.

66 Decision of the Higher Commercial Court Pž. 10784/2005 of 17 October 2005. The above paraphrased holding of the decision in Serbian language reads as follows: *„Za određivanje privremene mere u sporu za zaštitu žiga nije potrebno da bude ispunjen i uslov da tužilac učini verovatnim da će u slučaju neusvajanja privremene mere tuženi osujetiti ili znatno otežati naplatu njegovog potraživanja odnosno da će tužilac pretrpeti nenadoknadivu štetu."*

the content of these provisional measures is also specific. As per article 61 of the Law on Trademarks a court may, at the request of a trademark holder, order a provisional measure with the following content: seizure or exclusion from trade of products violating the trademark, seizure of the machines and equipment for production of such goods, or prohibition of the continuation of activities that violate the trademark.[67]

In another decision the Higher Commercial Court further clarified the meaning of the above standard and stated that when deciding whether a plaintiff has shown the probability that his trademark has been or is going to be violated (*i.e.*, whether the condition for ordering of a provisional measure is fulfilled), the court may find the standard satisfied, for example, by receiving a confirmation from the customs authorities that they have received counterfeited goods with trademarks the protection of which is being sought before the court.[68] In case of two similar trademarks, courts are expected to decide on this issue on the basis of the so-called 'average consumer standard' ("*pažnja prosečnog potrošača*"), because the precise purpose of protection here is to prevent lay consumers from mixing-up two products due to the similarity of the trademarks employed.[69]

2.8. Damages Caused by Unjustified Provisional Measures

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[67] *Id. See also* article 61 of the Serbian Law on Trademarks. The text of the provision in Serbian language reads as follows: „*Na zahtev lica koje učini verovatnim da je njegov žig ili pravo iz prijave žiga povređeno ili da će biti povređeno, sud može da odredi privremenu meru oduzimanja ili isključenja iz prometa predmeta kojima se vrši povreda, sredstava za proizvodnju tih predmeta, odnosno meru zabrane nastavljanja započetnih radnji kojima bi se mogla izvršiti povreda.*"

[68] Decision of the Higher Commercial Court Pž. 2249/2006 of 10 March 2006. The above paraphrased holding in Serbian language reads as foolws: „*Uslov za određivanje privremene mere u postupku zbog povrede žiga je da je tužilac, nosilac žiga učinio verovatnim da je njegov žig povređen, a za ovaj stepen dokazanosti dovoljno je uverenje suda o verovatnosti povrede zasnovano na obaveštenju nadležnog carinskog organa da je na carinjenje prispela roba čije oznake odgovaraju oznakama i opisu robe iz rešenja Uprave carina kojim je usvojen opšti zahtev tužioca za zaštitu prava intelektualne svojine.*"

[69] *Id.* The above paraphrased text in Serbian language reads as follows: "*Neosnovani su žalbeni navodi da se zaključak o sličnosti navedenih znakova može javiti samo kod laika. Naime, sličnost znaka koji je upotrebljen sa znakom drugog lica koji je nosilac žiga na tom znaku i procenjuje se na osnovu pažnje prosečnog potrošača, pa se može reći i laika, kako ga tuženi u žalbi naziva, jer je suština zaštite da se spreči dovođenje u zabludu potrošača odnosne robe koji postupa sa običnom, uobičajnom pažnjom, a ne sa naročitom pažnjom u prometu.*"

The final question that needs to be formulated with respect to provisional measures is what the consequences of unjustified provisional measures are. In this respect the Serbian Supreme Court held in its decision of 6 December 2006 that when adjudicating on the claim for damages caused by an unjustified provisional measure, the fact that the plaintiff's claim secured by the provisional measure was dismissed is not necessarily the only determinative factor; rather it must also be determined whether the provisional measure was justified at the time it was granted.[70] That is, according to the explicit language of the LEP an enforcement debtor has the right to damages in such cases if the harm was caused either by a provisional measure that was subsequently adjudicated as unfounded, or by a provisional measure that was not justified by the creditor.[71]

In the present case the provisional measure was ordered based on an expert opinion (first expert opinion) stating that the defendant was carrying out construction works contrary to recognized professional standards and thereby put the plaintiff's building in danger of collapse. However, a second expert opinion determined that the circumstances justifying the provisional measure had subsequently ceased to exist and implied that the provisional measure was no longer necessary. On the basis of these facts the Supreme Court concluded that even if the provisional measure was justified on the basis of the circumstances that had existed at the time of the issuance of the first expert opinion, it also had to be determined whether it was necessary to maintain the validity of the provisional measure throughout the entire period of time, or rather whether it should have been withdrawn before the conclusion of the case, as claimed by the second expert opinion.[72] The case was thus remanded to the lower court to decide if the provisional measure was justified in the questionable period as opined by the second expert opinion. Moreover, the court noted that the failure of the debtor to seek the cancellation of the provisional measure does not exclude the potential liability

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[70] Decision of the Supreme Court of the Republic of Serbia Rev. 2387/2006 of 6 December 2006. The above summarized holding in Serbian language reads as follows: "*Na osnovanost zahteva dužnika na naknadu štete nanesene privremenom merom nije samo od uticaja okolnost što je tužbeni zahtev za čije je obezbeđenje određena privremena mera odbijen, već i okolnost da li je privremena mera u trenutku određivanja bila osnovana.*"

[71] *Id.* art. 298 of the LEP which in Serbian language reads as follows: „*Izvršni dužnik ima prema izvršnom poveriocu pravo na naknadu štete koja mu je nanesena privremenom merom za koju je utvrđeno da je bila neosnovana ili koju izvršni poverilac nije opravdao.*"

[72] *Id.*

of the creditor for damages caused by the unjustified provisional measure issued to protect his interests.[73]

3. Means and the Objects of Enforcement

3.1. Legislative Overview

3.1.1. Basic Principles

One of the basic principles of the LEP is the *principle of urgency* in conducting of enforcement procedures. *Inter alia*, the court is obliged to decide on a motion to enforce ("*predlog za izvršenje*") within three days following its filing. Similarly, when the motion is based on a foreign executive title[74] ("*strana izvršna isprava*") that has not yet been recognized by a domestic court, the court must decide thereon within 30 days following its filing with the court.[75] Further, the law provides for a *strict priority order of satisfaction* in enforcement proceedings: as a rule, courts must decide and act upon cases in the order of their submission to the court, unless the nature of the claim or other special circumstances warrant otherwise.[76] The court shall grant enforcement or security by such *means and on such objects of enforcement*[77] that are proposed by the creditor in his motion to enforce or

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[73] *Id.*

[74] Most often this is a foreign court decision or a foreign arbitral award. However, it can also be a settlement reached before an administrative body or a court, or some other enforceable title according to the law. If foreign executive title has been recognized by a domestic court, it is enforced as a domestic enforceable title. Yet it is also possible to seek direct enforcement of a foreign enforceable title that has not been recognized by a Serbian court. In such cases, the court decides on the issue of recognition as on preliminary issue. *See* arts. 25 and 30 of the LEP.

[75] Also, deadlines set by a court in the enforcement proceedings for carrying out specific actions may not exceed three days. If a party fails, without justifiable reasons, to carry out certain action within the time limit set by the law or a court, it shall be precluded from undertaking such action. *See* art. 5 of the LEP.

[76] If more than one creditor is enforcing his monetary claims against the same debtor and against the same object of enforcement, satisfaction is to be conducted in the order of acquiring the right of satisfaction from such an object, unless otherwise provided by the law. *See* art. 6 of the LEP. However, in practice there are usually problems with proving such rights.

[77] LEP distinguishes between the means of enforcement and the objects of enforcement. *Means of enforcement* ("*sredstva izvršenja*") are various enforcement actions used to coercively enforce a claim in accordance with law. Means of enforcement for realizing of a monetary claim are: sale of chattels, sale of immovable property, transfer of a monetary claim, transfer of a claim for handing over chattels or immovable property, sale of other property rights, transfer of funds from bank accounts, and sale of shares in business entities. *Objects of enforcement* ("*predmeti izvršenja*") are items and rights on which

motion for a security. However, the court may, *ex officio* or on the motion of a party, limit enforcement to certain means or objects of enforcement, or designate objects or means of enforcement different from the one initially proposed.[78]

3.1.2. Grounds for Enforcement

Per the LEP, enforcement may be ordered only on the basis of an *executive title*[79] ("*izvršna isprava*") or an *authentic document*[80] ("*verodostojna isprava*").[81] An authentic document is suitable for enforcement only if it designates the creditor, debtor, object of enforcement, and the type, scope and time period for fulfillment of the obligation.[82]

3.2. Enforcement Procedure

3.2.1. Res Judicata Effect

In Serbian law, a final and enforceable court judgment is considered as *res judicata* ("*presuđena stvar*") and may not, save for a limited number of extraordinary legal remedies, be reviewed by courts. This especially applies to enforcement proceedings, which only serve as a means of enforcing final and

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enforcement of the claim may be carried out in accordance with the law. *See* art. 42 of the LEP.

Generally, the court will order enforcement via the means of enforcement chosen by the creditor in his motion for enforcement. *See* Decision of the Higher Commercial Court, Iž. 930/2007 of 25 April 2007. The paraphrased holding of the court in Serbian language reads as follows: "*Na poveriocu je izbor sredstava izvršenja radi ostvarenja novčanog potraživanja od onih sredstava izvršenja koja su predviđena u članu 42. Zakona o izvršnom postupku tako da sud određuje izvršenje onim sredstvom koje je navedeno u izvršnom predlogu.*"

[78] *See* art. 8 of the LEP.

[79] The law, *inter alia*, enumerates the following documents as executive titles: (1) enforceable court decision or enforceable court settlement, and (2) an enforceable decision issued in an administrative or misdemeanor procedure ("*prekršajni postupak*") and administrative settlement determining a monetary obligation. *See* art. 30 of the LEP.

[80] As authentic documents the law, *inter alia*, lists: (1) bills of exchanges or checks, with protest and with a return documentation if necessary for establishment of a claim, (2) bonds and other issued securities entitling their holders to payment in their nominal value, (3) invoices (bills), (4) business book excerpts for the price of utilities, water, heating, garbage collection and similar services; (5) bank guarantees and letters of credits, and (6) judgment debtor's certified statements authorizing the enforcement creditor to transfer of funds. *See* art. 36(1-2) of the LEP.

[81] *Id.* art. 29.

[82] *Id.* art. 36(4).

enforceable court decisions and not as a "final scrutiny" of their validity or correctness. Accordingly, a writ of execution[83] may be appealed in the enforcement proceedings only on the basis of a very limited number of statutorily enumerated legal grounds.[84] It should be mentioned that the new LEP foresees the possibility of 'appeal' ("*žalba*") instead of 'objection' ("*prigovor*"), which is reserved only for decisions on enforcement granted on the basis of an authentic document or in summary procedure. The reason must be that the lawmaker wanted to speed up the enforcement procedure, as its length has in practice often been a serious problem.

In one recent case decided by the Higher Commercial Court, the plaintiff (i.e., the debtor) sought the court to proclaim the defendant's (i.e., the creditor) claim toward him non-existent, although the claim had already been determined as valid by a final and enforceable court decision.[85] The court held that such a claim was unfounded and a final and enforceable court decision may only be challenged on the basis of grounds enumerated in the LEP by an objection against the writ of execution ordered on the basis of an executive title.[86] The court further stated that such an objection could have been raised only: (i) if the decision on the basis of which the writ of execution was issued was remanded or reversed, or (ii) if the claim had ceased to exist because of a

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[83] 'Writ of execution' is used in this chapter, however in Serbian – using literal translation – this act of the court is named 'decision on enforcement'.

[84] Most of these grounds are procedural in nature and relate to the infringement of the rules on the enforcement procedure (*e.g.*, jurisdiction of the court, enforceability of the executive title, or expiry of the deadline for enforcement). Yet some grounds concern the final judgment or the claim itself. Thus, a writ of execution may also be appealed if the decision on the basis of which it was issued was remanded or reversed, or the underlying settlement was annulled, or the claim has not yet become mature or has ceased to exist in the meantime. *See* art. 15 of the LEP.
Although debtors may try to exploit the appeal to delay enforcement, in practice such an attempt would face at least two obstacles. *First*, appeal against the writ of execution does not have suspensive effect, *i.e.*, does not suspend the effectuation of the writ of execution. In other words, enforcement continues irrespective of the appeal. *See* art. 12 (5) of the LEP. *Secondly*, in enforcement proceedings the debtor may not seek the re-examination of the correctness of the final and enforceable court judgment. Apart from procedural objections, his possibility of appeal is limited to asserting setting aside of the executive title, non-maturity of the claim being enforced, or its termination in the meantime.

[85] Decision of the Higher Commercial Court, Pž. 7490/02, of 24 January 2003.

[86] *See id.* The above paraphrased holding in Serbian language reads as follows: "[...] *potraživanje utvrđeno pravosnažnom i izvršnom presudom može se osporavati samo ako za to postoje razlozi iz člana 51. stav 1. tačka 4. i 8. Zakona o izvršnom postupku za prigovor protiv rešenja o izvršenju određenog na osnovu izvršne isprave.*"

fact that came into existence after the decision had become enforceable, or before that time but at a time when the enforcement debtor could not raise this ground in the proceeding from which the executive title derives.[87] Since the plaintiff did not invoke any such ground but merely sought re-examination of the facts and circumstances from the previous proceedings, the court upheld the decision of the lower court and denied the plaintiff's claim.

3.2.2. The *Audiatur et Altera Pars* Principle

Although the LEP provides that the provisions of the Law on Civil Procedure ("*Zakon o parničnom postupku*")[88] apply supplementarily to the enforcement proceeding unless otherwise expressly envisaged by the law,[89] some of the basic principles of civil proceedings have only a limited and specific application in the context of enforcement procedure. One of the best examples is the *audiatur et altera pars* principle[90] – *i.e.*, the right to be heard, entitling each party to respond to the opposing party's requests, motions and statements – which is subject to certain limitations and exceptions in the enforcement phase.

In view of this, the Higher Commercial Court[91] held in its decision of 27 January 2006 that this principle – which is a basic principle of civil procedure and which mandates the court to allow each party to respond to the opposing party's requests, motions and statements – applies also in enforcement proceedings. However, having in mind the very nature of enforcement proceedings, the said principle suffers certain limitations and

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87 The above shortened holding of the decision in Serbian language reads as follows: "*Prema pravnom stanovištu Višeg trgovinskog suda potraživanje utvrđeno pravnosnažnom i izvršnom presudom, može se osporavati samo ako za to postoje razlozi iz člana 51 stav 1 tač. 4 i 8 Zakona o izvršnom postupku za prigovor protiv rešenja o izvršenju određenog na osnovu izvršne isprave. Ti razlozi su: ako je odluka na osnovu koje je doneseno rešenje o izvršenju ukinuta, poništena ili preinačena, ili ako je potraživanje prestalo na osnovu činjenice koja je nastupila posle izvršnosti odluke ili pre toga, ali u vreme kad dužnik to nije mogao da istakne u postupku iz kog potiče izvršna isprava. Svi ostali razlozi mogli bi predstavljati samo razlog za ponavljanje postupka u smislu člana 421 Zakona o parničnom postupku.*"
Although the Law on Enforcement Procedure was changed after the rendering of this decision, these grounds for objecting (*i.e.*, appealing) against the writ of execution were kept and were enshrined in article 15 paragraph 1 items 4 and 8 of the new LEP.

88 Official Herald of Serbia no. 125/2004.

89 *See* art. 27 of the LEP.

90 This is what is known as 'due process' constitutional guarantee in US and other countries.

91 Decision of the Higher Commercial Court Iž. 118/2006(2) of 27 January 2006.

exceptions in this phase. These limitations and exceptions are present already when the motion for enforcement is lodged with the court, *to wit,* when the court decides on the motion without delivering the motion to the debtor and allowing him to respond, as well as when the motion is delivered to the debtor together with the writ of execution already granting enforcement.[92] Yet when the debtor files an objection against a writ of execution based on an authentic document, the court renders a decision without allowing the creditor to file a response to the objection. In this way the court in fact vacates the writ of execution, annuls the actions that have been carried out up until that point in the proceedings, and the procedure continues as a normal litigation (similarly to the consequences of an objection against a payment order).[93] Irrespective of that, as the court opined, even then the *audiatur et altera pars* principle is preserved, though to a limited extent, since the opposing party has the possibility to respond through two available procedural remedies – appeal or objection.[94]

3.2.3. Pending Proceedings

Similarly to the *audiatur et altera pars* principle, the objection of pending litigation (*lis pendens or* pending suit) is by its very nature inapplicable in the enforcement phase. Litigation and enforcement procedure

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[92] *See id.* The above summarized part of the holding in Serbian language reads as follows: "[...] *u postupku izvršenja shodno se primenjuju odredbe Zakona o parničnom postupku, ako nije drugačije određeno. Saglasno tome u postupku izvršenja primenjuje se i osnovno načelo parničnog postupka o saslušanju stranaka koje obavezuje sud da svakoj stranci omogući da se izjasni o zahtevima, predlozima i navodima protivne stranke. Međutim, imajući u vidu prirodu izvršnog postupka, navedeno načelo u ovom postupku izvršenja trpi određena ograničenja i izuzetke. Ovo ograničenje, odnosno izuzetak predviđen je već u fazi pokretanja postupka izvršenja predlogom poverioca za dozvolu izvršenja o kome izvršni sud odlučuje bez dostave predloga izvršnom dužniku i bez izjašnjenja izvršnog dužnika, već se predlog dostavlja tek uz rešenje o izvršenju kojim je taj predlog već usvojen.*"

[93] *Id.* The above summarized part of the holding in Serbian language reads as follows: "*Kada u navedenoj situaciji izvršni dužnik izjavi prigovor protiv rešenja o izvršenju, ako je ono doneto na osnovu verodostojne isprave, sud i bez izjašnjenja poverioca donosi rešenje kojim konstatuje posledicu tako izjavljenog prigovora i kojim se rešenje stavlja van snage u delu kojim je izvršenje određeno, ukidaju sprovedene radnje, a postupak nastavlja kao povodom prigovora protiv platnog naloga. Poveriocu se i prigovor i rešenje doneto na osnovu tog prigovora dostavljaju istovremeno.*"

[94] *Id.* The above paraphrased part of the holding in Serbian language reads as follows: "*Ipak, i u navedenim situacijama, ovo načelo je očuvano jer je protivnoj stranci mogućnost izjašnjavanja data kroz pravni lek – žalbu, odnosno prigovor.*"

differ from each other not only by their respective subjects and structure, but also in the way they are initiated, progressing and ending. Filing of a motion for enforcement does not amount to litigation. Therefore, in enforcement proceedings it may be possible to have two parallel enforcement proceedings based on the same executive title, since the LEP does not exclude the possibility of having two or more proceedings for enforcement of the same claim.[95] Accordingly, in enforcement proceedings there will be no *lis pendens* (and therefore no such objection can be raised) if two parallel enforcement proceedings are pending based on the same executive title, between the same parties, with the same means of enforcement on the same object of enforcement, because in the case of the satisfaction of the creditor's claim in one proceedings the other would become pointless.[96]

Moreover, the writ of execution does not have *res judicata* effect, since it only creates a procedural relationship aimed at coercive satisfaction of a creditor's claim, but does not at the same time guarantee success in that respect. Hence, upon the ending of the respective enforcement proceedings the writ loses its effect regardless of whether the enforcement was successful or not. If the enforcement proceedings have proved to be unsuccessful, the enforcement creditor may continue to file unlimited number of motions for enforcement.[97] Yet if the creditor's claim is satisfied in enforcement

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[95] Decision of the Higher Commercial Court, Pž. 10966/2005 of 10 October 2005. The above summarized part of the holding in Serbian language reads as follows: "[...] *Pogrešan je pravni stav podnosilaca žalbe da u izvršnom postupku postoji prigovor presuđene stvari i litispendencije, jer po prirodi stvari kao parnična procesna pretpostavka litispendencija u postupku izvršenja u opšte ne dolazi u obzir. Parnični procesni odnos i izvršni procesni odnos se razlikuju ne samo po subjektima i strukturi, već i po tome kako nastaju, razvijaju se i prestaju. Podnošenjem predloga za izvršenje ne pokreće se parnični postupak, već izvršni i ne zasniva se parnični procesni odnos da bi se moglo da se govori o toku parnice. Međutim u toku izvršenja može se dogoditi da paralelno teku dva istovetna postupka izvršenja povodom iste izvršne isprave, pa kako ZIP izričito ne zabranjuje vođenje više postupaka izvršenja radi ostvarivanja istog izvršnog potraživanja, čak istim sredstvima izvršenja na istom predmetu izvršenja, istaknuti prigovor litispendencije izvršnog dužnika je neosnovan.*"

[96] *Id.* The above summarized part of the holding in Serbian language reads as follows: "[...] *Nema litispendencije ukoliko u postupku sprovođenja izvršenja teku dva paralelna postupka izvršenja po istoj izvršnoj ispravi, između istih stranaka, istim sredstvom izvršenja, na istom predmetu izvršenja, jer u slučaju namirenja potraživanja izvršnog poverioca po jednom pokrenutom postupku izvršenja, drugi izvršni postupak postaje bespredmetan.*"

[97] *Id.* The above summarized part of the holding in Serbian language reads as follows: "*Donošenjem rešenja o izvršenju stvara se procesnopravni odnos radi ostvarenja izvršnog potraživanja izvršnog poverioca prinudnim putem odnosno, otvara se mogućnost za*

proceedings, in potential new enforcement proceedings the debtor cannot make a *res judicata* objection, though he can appeal the new writ of execution, stating that the underlying claim has ceased to exist in the meantime.[98]

3.2.4. Postponement of Enforcement

Postponement of enforcement is possible at the request of the debtor provided that the conditions set by the law are met.[99] Although not so frequent, such postponements are from time to time granted by courts. In one case, the District Court of *Novi Sad*, applying the said provision, held that the court may grant postponement of enforcement if two conditions are met cumulatively, *to wit*, the enforcement debtor has to show with high probability that carrying out of enforcement would cause him irreparable harm, the recovery of which would be possible only under extreme hardship, *and* if the claim of the debtor for vacating of the executive title was accepted and a first instance decision of that content has been rendered.[100]

In this case, the debtor filed an action for vacating a settlement concluded between him and the creditor, which served as an executive title in the enforcement proceedings. However, as the litigation was still ongoing at the time of filing the postponement motion and no first-instance decision had

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sprovođenje izvršenja i definitivno namirenje izvršnog poverioca uz upotrebu prinude ali se ne garantuje i uspeh u tome. Čim se okonča postupak izvršenja na koji se rešenje o izvršenju odnosi, ono nema značaj ni dejstvo bez obzira da li je izvršenje bilo uspešno ili ne, pa ukoliko postupak izvršenja nije okončan ostvarivanjem izvršnog potraživanja izvršnog poverioca, jer iz različitih razloga nije sprovedeno rešenje o izvršenju, ne može se govoriti o presuđenoj stvari. Sve dok materijalnopravno ovlašćenje izvršnog poverioca egzistira i ako raniji postupak izvršenja nije dao rezultate ili je obustavljen, dopušteno je podnošenje predloga za izvršenje u neograničenom broju puta."

[98] *See id.* The above paraphrased holding in Serbian language reads as follows: "*U slučaju da je u sprovedenom postupku izvršenja izvršni poverilac namiren, u novom postupku po predlogu za izvršenje izvršni dužnik ne može isticati prigovor presuđene stvari već u žalbi protiv novog rešenja o izvršenju da izvršno potraživanje više ne postoji.*"

[99] Generally, the LEP provides that postponement of enforcement at request of a debtor may be granted when debtor shows the probability that enforcement could cause him irreparable or hardly reparable damage. *See* art. 64 of the LEP.

[100] Decision of the District court in Novi Sad, Gž. 4154/2006 of 6 September 2006. The above paraphrased part of the holding reads as follows: "*Na predlog izvršnog dužnika sud može odložiti izvršenje ako su ispunjeni uslovi za odlaganje izvršenja utvrđeni zakonom, odnosno ako je izvršni dužnik učinio verovatnim da bi sprovođenjem izvršenja pretrpeo nenadoknadivu ili teško nadoknadivu štetu i ako je po zahtevu izvršnog dužnika za stavljanje van snage izvršne isprave donesena prvostepena odluka kojom je zahtev usvojen.*"

by then been rendered, the court denied the request for postponement of enforcement.[101] Note here that the final judgment had already been rendered in the case and that the debtor launched a new trial obviously just to prevent enforcement; the employment of dilatory tactics by the debtor was obviously duly noted and reacted upon by the court. As such the case is an illustration of the fact that Serbian courts do have mechanisms to hand and they are willing to forestall debtors who attempt to fraudulently prevent or delay enforcement.

3.2.5. Summary Enforcement Procedure

The LEP provides that in commercial and commerce-related disputes a special *summary enforcement procedure* may be conducted, primarily to ensure higher efficiency in these domains. As defined by the Higher Commercial Court, "*the summary enforcement procedure is such a sub-type of enforcement procedure that is subject to special rules of enforcement, including stricter application of the formal legality principle, shorter duration of the enforcement procedure, limited grounds for objecting against the writ of execution, as well as a limited number of authentic documents on the basis of which this procedure may be initiated.*"[102] One of the documents on the basis of which the summary enforcement procedure may be initiated is a contract made in writing with the parties' signatures authenticated by the court or other competent organ.[103] Therefore, a contract intended to serve as an authentic document for the purposes of the summary enforcement procedure must fulfill two conditions cumulatively relating to its form: (i) it must be in writing, and (ii) the parties' signatures must be authenticated by a court or by another competent organ, *i.e.*, competent organ of the municipal

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[101] *Id.* The above summarized part of the holding in Serbian language reads as follows: "[...] *Kako je izvršni dužnik samo pokrenuo postupak pred Trgovinskim sudom za poništaj izvršne isprave-poravnanja zaključenog pred Trgovinskim sudom u Novom Sadu dana 13.8.2003. godine, a u tom predmetu nije donesena presuda kojom bi zahtev izvršnog dužnika za poništaj izvršne isprave bio usvojen, neophodan uslov nije ispunjen i odluka prvostepenog suda je u svemu pravilna.*"

[102] Decision of the Higher Commercial Court, V Iž. 1907/2006 of 18 September 2006. The above quoted text in Serbian language reads as follows: "*Skraćeni izvršni postupak je vrsta izvršnog postupka za koju važe posebna pravila izvršenja u trgovinskim i sa trgovinski povezanim stvarima, a u kome je pojačano načelo formalnog legaliteta iz člana 7. ZIP, skraćeno trajanje samog postupka, ograničena mogućnost odnosno razlozi iz kojih izvršni dužnik može izjaviti prigovor na doneto rešenje, ali i ograničen krug verodostojnih isprava na osnovu kojih se ovakav postupak može sprovesti, tako što se radi o određenim kvalifikovanim ispravama.*" *See also* arts. 252-259 of the LEP.

[103] *Id. See also* art. 253(2) of the LEP.

administration.[104] Only a contract fulfilling both of these conditions may serve as a basis for ordering a summary enforcement procedure.[105] This was introduced recently with the aim of speeding up enforcement in commercial cases, and is a clear sign that there are reforms in this field in Serbia.

3.3. Enforcement on Immovable Property

During the period of socialism, enforcement on immovable property in Serbia was rare. This was most likely the product of socialism, a system which looked upon credit as the enemy of the regime and which favored social peace over efficient protection of rights of creditors, as well as the fact that most of the land and other immovable property were under so-called social ("*društvena*") or state ("*državna*") ownership at that time.[106] As the country, like others in the region, opted for introduction of market economy about a decade ago, the situation has changed for the better in the meantime. Although enforcement on immovable property is still far from being a frequent and smooth process, the very idea that one's immovable property

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[104] It should be mentioned that in Serbia the institution of "public notary" does not exist as yet (though one of the plans for the reform of the Serbian judicial system envisages the introduction of a system of public notaries). Thus, authentication can be done either by municipal courts or by clerks of the municipal administration. Attorneys are not authorized to do such authentication in Serbia at the time being.

[105] *See* decision of the Higher Commercial Court, V Iž. 1907/2006 of 18 September 2006. The above paraphrased part of the holding in Serbian language reads as follows: "*Da bi sud odredio izvršenje po skraćenom izvršnom postupku na osnovu ugovora kao verodostojne isprave, taj ugovor mora ispunjavati propisanu formu, a to znači da potpisi na ugovoru moraju biti overeni od strane nadležnog suda, odnosno drugog organa ovlašćenog zakonom.*"

[106] The *sui generis* ownership form – known as 'social ownership' – was one of the distinguishing features of the Yugoslav version of socialism (i.e., it did not exist in the other former socialist systems of CEE) together with its twin brother the concept of workers' self-management ("*samoupravljanje*").
Social ownership was different from state ownership because in its case the owner was not the state (or any of the governmental bodies), though state ownership as a distinct form of ownership had existed. If a business enterprise was in social ownership (as indeed the overwhelming part of the economy was in such an ownership form), it was said that the owners of such enterprise were the workers of that particular company itself and as a result they were elected to the various governing bodies of such companies.
Per the recently adopted Serbian Constitution all property that has remained in social ownership is to be transformed into private ownership through the process of privatization within a very short period of time. At the time of writing, the process is still ongoing. *See* art. 86(2) of the Serbian Constitution.

may be sold in order to cover his debts is no longer so repugnant to the Serbian system.[107]

Enforcement on immovable property in Serbian law is conducted through four stages: (i) recordation of the decision on enforcement in the register of immovables and mortgages, (ii) determination (i.e., appraisal) of the value of the immovable property to be sold, (iii) sale of the immovable property,[108] and (iv) satisfaction of the enforcement creditor from the proceeds of the sale.[109] The real estate that is the object of the enforcement proceedings must be evidenced in the land register[110] as the debtor's property. If ownership on the immovable is recorded in another person's name and not that of the debtor, the creditor must additionally submit a document suitable for recordation of the debtor's ownership with the land register.[111] Only when the debtor has become registered as the owner can the enforcement procedure start in such cases.

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[107] Although it is generally up to the creditor to designate the wanted method of enforcement in the motion for enforcement, it is very unlikely that enforcement on immovable will be undertaken until other methods of enforcement have proved to be unsuccessful. Yet mortgages (i.e., security interests in immovables or in Serbian "*hipoteka*") are today still perceived as the strongest type of security one can get.

[108] In the enforcement proceedings immovable property may be sold, either at a public auction, or through direct agreement with the buyer. Of the two, the former represents the rule and the latter the exception; sale by direct agreement may be resorted to solely if the creditor and the debtor have explicitly agreed upon such a manner of disposal. *See* art. 120 of the LEP.

[109] *See* art. 99 of the LEP.

[110] Until recently the system of land registers in Serbia was based predominantly on land books ("*zemljišne knjige*") and, to a smaller extent, on land deeds ("*tapije*"). Recently, the World Bank funded "Real Estate Cadastre and Registration Project" was launched, with the goal of establishing a real estate cadastre ("*katastar nepokretnosti*") for the entire territory of the country, which would provide a uniform database about the land and other forms of real estates in Serbia and rights thereon. The real estate cadastre is kept by the Republic Geodetic Authority ("*Republički geodetski zavod*"). According to the information from the website of the Republic's Geodetic Authority – also with English language pages – (*see at* < http://www.rgz.sr.gov.yu >; last visited on 7 January 2009) so far 83 percent of Serbia's territory has been recorded in the real estate cadastre. Once this process is completed, the real estate cadastre will be available online; at present it is only partly operational and may be found at the website of the Republic Geodetic Authority. It has to be added that an electronic database of registered mortgages has been established a few years ago, which is now centralized and computerized what makes the data available on the Internet (*see at* < http://www.rgz.sr.gov.yu/ceh >; last visited on 7 January 2009, providing the public with information on the mortgages registered with land registers.

[111] *See* art. 100 of the LEP.

In the case of co-ownership ("*susvojina*")[112] of an immovable, the court shall grant enforcement against immovable property only if all other co-owners of that immovable have agreed to such enforcement. From the proceeds realized from the co-owned property, other co-owners have to be satisfied prior to the creditor and prior to covering the costs of the enforcement procedure.[113] However, it should be noted that this rule requiring consent of all co-owners applies only when the object of sale is the entire immovable property, including the parts of other co-owners. Accordingly, the District court in *Novi Sad* held in its decision of 16 August 2006 that the provision of the law requiring consent of all co-owners does not apply when the object of enforcement is only one part of the immovable, which is in the sole ownership of the debtor (*i.e.*, debtor's share).[114] The court stressed that the creditor is entitled to seek the sale of the entire real estate co-owned by the debtor only with the consent of all other co-owners.[115] However, when the object of enforcement is only the debtor's share in the real estate concerned, this provision will not apply. Otherwise, the creditor would never be able to seek enforcement on the debtor's share of the immovable without the consent of all other co-owners.[116]

Recordation of the decision on enforcement with the land register entitles the creditor to satisfy his claim from the immovable property even if a third party subsequently acquires ownership of the same immovable property. Moreover, with the recordation of the writ of execution, the creditor acquires a statutory lien on the immovable, which provides him priority in the

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[112] Type of ownership where two or more persons together own an undivided asset and where the share of each of them is determined as aliquot (*e.g.*, ½ or ¼ part of the property). Thus, co-ownership does not mean physical division of the owned asset, but division of the right of ownership between two or more persons. *See* the Law on Basics of Property Rights ("*Zakon o osnovama svojinsko-pravnih odnosa*") (Official Gazette of SFRY nos. 6/80 and 36/90, Official Gazette of FRY no. 29/96, Official Herald of Serbia no. 115/2005), arts. 13-17. On this issue *see* also ILIJA BABIĆ, "*OSNOVI IMOVINSKOG PRAVA*" [the Basics of Property Law] (Published by Službeni glasnik, Beograd, 2007), at 265-68.

[113] *See* art. 101 of the LEP.

[114] Decision of the District Court in Novi Sad, Gž. 3944/2006 of 16 August 2006. The above paraphrased part of the holding in Serbian language reads as follows: "*Zakonska odredba o određivanju izvršenja na nepokretnosti na kojoj je izvršni dužnik suvlasnik – [iako] postoji saglasnost drugih suvlasnika – ne može se primeniti ako je određena prodaja samo jedne polovine nepokretnosti na kojoj je vlasnik izvršni dužnik, već samo ako je predmet izvršenja cela nepokretnost.*"

[115] *Id.*

[116] *Id.*

enforcement procedure over a person that has subsequently obtained a lien or other right of satisfaction (*e.g.*, in enforcement procedure) in that immovable property.[117] Accordingly, the Higher Commercial Court held in its decision of 5 May 2001 that an agreement of the creditor and the debtor evidenced in the records made during court hearings – which established a mortgage as security for the creditor's claim – has the value of a judicial settlement ("*sudsko poravnanje*") and as such excludes the possibility of litigation in the same matter irrespective of the subsequent change of the owner of the immovable concerned.[118] Moreover, the court held that following the recordation of the mortgage and enforceability of the claim, enforcement on the immovable property might be carried out against any third person that acquired ownership over it subsequently.[119]

The procedure prescribed by the law for enforcement on immovables must be applied in all cases[120] and a creditor may not circumvent this

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[117] *See* art. 102 of the LEP. The lien is valid also in bankruptcy and provides the creditor with a privileged treatment in the context of bankruptcy. The bankruptcy act differentiates between two types of proprietary right holders: 1/ owners and other similar *in rem* right holders ("*izlučni poverilac*"); having the entitlement to ask for the separation of the asset from the bankruptcy estate; and 2/ security interest holders (i.e., secured creditors; in Serbian "*razlučni poverilac*") who have the right to get paid from the collateral sold. How the secured creditor can do that is regulated by the bankruptcy act in relative detail, though gaps seem to remain. Similarly, the exact list of such privileged proprietary right holders is not provided in the bankruptcy act. *See* arts. 37 and 38 of of the Law on Bankruptcy Proceedings („*Zakon o stečajnom postupku*") (Official Herald of the Republic of Serbia nos. 84/2004 and 85/2005).

[118] Decision of the Higher Economic Court in Belgrade, Pž. 1250/2001 of 5 May 2001.

[119] *Id.* The above paraphrased holding in Serbian language reads as follows: „*Članom 231. Zakona o izvršnom postupku utvrđeno je da upis založenog prava i upis izvršnosti potraživanja imaju dejstvo da se izvršenje na toj nepokretnosti može sprovesti prema trećem licu koje je tu nepokretnost docnije steklo. Iz ovih razloga proizilazi da sporazum stranaka, koji je prethodio upisu založenog prava ima značaj sudskog poravnanja i pravosnažno presuđene stvari, te stoga poverilac ne može ponovo voditi parnicu, o čemu sud po službenoj dužnosti pazi, u smislu člana 322. stav 2. Zakona o parničnom postupku. Ne stoje navodi iz odgovora na žalbu da ne postoji identitet stranaka, pravnog osnova ni iznosa, jer se prema članu 231. Zakona o izvršnom postupku, izvršenje može sprovesti prema trećem licu koje je tu nepokretnost docnije steklo.*"

[120] Once the writ of execution and the decision determining the immovable property's value have become final, the court issues a decision on sale ("*zaključak o prodaji*") of the immovable property, stating the method and conditions of sale, the time and place of the sale, and the time when the asset to be sold may be inspected by interested persons. The sale of immovable property – as a rule – is conducted at a public auction, unless the parties and the lien creditors agree to sell the asset by direct negotiations with the buyer.
For the purpose of enforcement, the market value of the immovable property is determined

procedure through some agreement with the debtor. In one case the Higher Commercial Court – faced with a settlement of the mortgage creditor and the debtor whereby the creditor was foreseen to become the owner of the mortgaged real estate upon debtor's default – held that such an agreement was null and void and that the creditor whose claim is secured by a mortgage must realize his claim in the procedure prescribed by the law.[121] The court disagreed with the lower court's reasoning – which was that the agreement was essentially the effectuation of the mortgage and thus valid – since the realization of a mortgage cannot be made but in the manner prescribed by the law. Moreover, transfer of ownership on the immovable property to the creditor is possible only if the immovable property could not be sold at the second auction hearing or by direct agreement within the period set by the court.[122]

If, in a geographic area which has land registers an immovable is for some reason not recorded therein,[123] the creditor has to submit together with his motion for enforcement documents required for recording of the title on the immovable concerned. However, when a creditor designates as an object of enforcement a building or a part of a building not recorded in the land

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on the date of valuation, either by an expert appraiser, or based on other suitable methods. If after the sale some proprietary right or encumbrance remains on the asset sold, regard must be paid to this in appraising the immovable.

The immovable property may not be sold below the appraised value at the first round of auctions. If the property can not be sold at the first auction, the court shall schedule a second one at which the property may be sold below the appraised value, but not less than two thirds of that value. At least 30 days must pass between the two auctions. If the immovable property cannot not be sold even at the second auction or by direct agreement within the period set by the court, the court shall on motion of the enforcement creditor award the immovable property to the creditor. In that case, the enforcement creditor shall be considered satisfied in an amount equal to two-thirds of the appraised value of the immovable property. *See* art. 112-134 of the LEP.

[121] Decision of the Higher Commercial Court, V Pž. 5819/2006(2) of 7 September 2006. The above paraphrased holding in Serbian language reads as follows: "*Poverilac potraživanja obezbeđenog hipotekom navedeno potraživanje može realizovati samo u zakonom propisanom postupku i na zakonom propisani način i ne može steći svojinu na opterećenoj nepokretnosti ni na osnovu sporazuma sa dužnikom.*"

[122] *Id.*

[123] This might be the case with multi-storey buildings, for example. As during socialism the maintainance of all books on real estates was quite neglected and as the overwhelming part of multi-storey buildings have also been erected in the post-WW II period, often on the books there is still 'agricultural land' recorded although the building has been there for several decades. This is a real problem especially in the capital, Belgrade, and in other bigger cities.

register and declares that recording cannot be effectuated, the court shall allow enforcement against such non-registered immovable only if the creditor submits or designates as proof of ownership of non-registered immovable property, a building permit in the name of the debtor or, if the building permit is not in the name of the debtor, submits documents evidencing a legal transaction leading to the debtor's acquisition of the property. In addition, the court may, on motion of the enforcement creditor, order the enforcement debtor or a third party to submit such documents, omission or refusal to do so being subject to fines prescribed by the law.[124]

The provisions concerning enforcement on immovables not recorded in land registers are rather strictly applied by the courts and their infringement is normally looked upon by higher courts as a substantial violation of the LEP resulting in revocation of the lower courts' decisions. In one case, the District Court in *Novi Sad* held that if an area has land registers yet a particular piece of immovable has not been recorded therein, the creditor must attach to his motion for enforcement documents sufficient for recordation of title on the real estate concerned and that these rules must be observed in the course of proceedings.[125] Since the lower court had permitted enforcement on the unrecorded real estate even though the creditor had not attached to the motion for enforcement documents sufficient for the recordation of debtor's title on the real estate, or the building permit in the name of the debtor, the court revoked the decision of the lower court due to fundamental violation of the provisions of enforcement procedure and voided all actions carried out in the enforcement proceedings.[126]

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[124] *See* art. 153 of the LEP.

[125] Decision of the District Court in Novi Sad, Gž. 3550/2006 of 13 September 2006.

[126] *Id.* The above paraphrased part of the holding in Serbian language reads as follows: "*Odredbom člana 153. stav 1. ZIP propisano je da ako na području na kome su ustanovljene javne knjige, nepokretnost nije upisana, izvršni poverilac uz predlog za izvršenje mora podneti isprave na osnovu kojih se može izvršiti upis. Članom 153. stav 2. ZIP propisano je da će po prijemu predloga za izvršenje i isprava na osnovu kojih se može izvršiti upis, sud bez odlaganja isprave dostaviti sudu., organu ili organizaciji koja vodi registar radi upisa, i zastati sa postupkom dok postupak upisa ne bude okončan, a članom 153. stav 3. ZIP propisano je da ako izvršni poverilac u predlogu za izvršenje kao predmet izvršenja predloži zgradu ili deo zgrade koji nisu upisani u javnu knjigu, uz izjavu da se upis ne može izvršiti u smislu člana 153. st. 1. i 2. ZIP, sud će rešenjem dozvoliti izvršenje na nepokretnosti u vanknjižnoj svojini izvršnog dužnika, ako izvršni poverilac dostavi ili označi, kao dokaz o vanknjižnoj svojini, građevinsku dozvolu koja glasi na ime izvršnog dužnika ili, ako građevinska dozvola ne glasi na ime izvršnog dužnika, isprave o pravnim poslovima koje vode sticanju svojine izvršnog dužnika. U konkretnom slučaju prvostepeni sud je dozvolio izvršenje na nepokretnosti u vanknjižnoj svojini parničnih stranaka, iako*

3.4. Enforcement on Movable Property

Enforcement on chattels is, besides garnishment of bank accounts, the most frequent method of enforcement in Serbia. Enforcement against chattels is conducted through the following three phases: (i) listing and appraisal of the value of chattels in the possession of the debtor or of a third person, (ii) sale of chattels, and (iii) satisfaction of the creditor from the proceeds of the sale.[127] Any third party claiming certain right in a chattel that is in possession of a debtor must inform the court conducting the enforcement and supply evidence in that respect; otherwise the court would consider such rights as non-existent and would regard the debtor as the sole owner of the objects in his possession. Debtor's chattels in possession of a third party may, however, be put on the list only with that person's consent. In the absence of such consent, however, the court may, at the creditor's request, transfer on him the debtor's right to request handing over of the chattels.[128] In the case of unsuccessful listing of chattels, the creditor may file a motion for a new attempt of listing within three months after the receipt of notification on the unsuccessful listing. In one decision, the Higher Economic Court held that if – in the proceedings of enforcement on chattels – an attempt of listing has remained unsuccessful because no chattels suitable for enforcement were found, the enforcement creditor may file a motion for a second listing within three months of the receipt of notification of the unsuccessfulness of the previous one. However, if the creditor fails to file the motion within the said period of time or if no chattels suitable for enforcement are found even after the second attempt of listing, the court will discontinue enforcement.[129] In the

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izvršni poverilac nije uz predlog podneo isprave na osnovu kojih se može izvršiti upis niti je pod uslovima iz citiranog člana 153. stav 3. ZIP dostavio građevinsku dozvolu, ... iz kog razloga je ovaj sud primenom čl. 14. i 27. ZIP i člana 387. tačka 3) ZPP pobijano rešenje ukinuo i shodno članu 19. stav 1. ZIP obustavio izvršenje i ukinuo sve sprovedene radnje."

Immovables built without building permit are serious problem in Serbia. For example, the Development Strategy Plan of the City of Belgrade (the Serbian capital) also mentions this as a serious issue that has to be solved urgently. The text of the Plan can be found at < http://www.beograd.org.yu/documents/nacrtstrategije.pdf >; last visited on 10 August 2008 (could not revisit on 7 January 2009).

[127] *See* art. 71 (1) of the LEP.

[128] *See* art. 73 (1-4) of the LEP.

[129] Decision of the Higher Economic Court in Belgrade, Pž. 10101/96 of 15 January 1997. The above paraphrased part of the holding in Serbian language reads as follows: "*Ako u postupku izvršenja na pokretnim stvarima dužnika ostane bezuspešan pokušaj popisa stvari, jer kod dužnika nisu nađene stvari koje mogu biti predmet izvršenja, poverilac*

mentioned case, the Higher Economic Court upheld the decision of the lower court discontinuing enforcement since the creditor had failed to file a motion for re-conducting of listing within the prescribed period of time.[130]

As a rule, listing includes as many chattels as necessary for satisfaction of the creditor's claim and the concomitant costs of enforcement.[131] It is of great important that listing has other legal effects as well, namely that the creditor acquires a judicial lien on the listed chattels.[132] The court then – without delay – delivers a copy of the listing to the Business Registers Agency ("*Agencija za privredne registre*")[133] for registration of the so constituted non-possessory lien, which will have *erga omnes* effect (*i.e.*, will function as a public notice).[134] Hence, from the moment of registration, third

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može u roku od tri meseca od prijema obaveštenja o neuspešnom popisu predložiti da se ponovo sprovede popis. Ako poverilac u označenom roku ne predloži ponovni popis stvari ili ako se ne nađu stvari podobne za izvršenje kod dužnika, sud će obustaviti izvršenje." Although this decision was rendered on the basis of the old Serbian Law on Enforcement Procedure, it is still of relevance, as identical provisions are present in the new LEP. *See also* art. 79 of the LEP. It should be noted that the creditor may initiate a new enforcement proceeding, and every such initiatiation interrupts the running of the statute of limitations (i.e., prescription time).

[130] *See id.*

[131] *See* art. 74 (1) of the LEP.

[132] *Id.* art. 75 (1) that in Serbian language reads as follows: "*Na popisanim stvarima izvršni poverilac stiče sudsko založno pravo u momentu kada sudski izvršitelj potpiše zapisnik o popisu. Sudski izvršitelj dužan je da pored svog potpisa jasno naznači dan i čas kad je zapisnik potpisao.*"
This text in English reads as follows: "*The enforcement creditor acquires a judicial lien on the listed assets at the moment when the court bailiff puts his/her signature on the records. The bailiff has to indicate next to his/her signature also the day and hour when he/she has signed the records.*"

[133] The Business Registers Agency is, *inter alia*, competent for registration of commercial entities (i.e., companies), keeping of public records of registered commercial entities, as well as for keeping of the public register of non-possessory liens. The public registers kept by the Business Registers Agency are available online on the Internet address of the Agency at < http://www.apr.sr.gov.yu >; last visited on 7 January 2009.
Interesting data related to this Agency – showing that Serbia is adapting to modern technology and efficient administration that Internet offers is that during the first half of year 2008 the database of non-possessory liens was visited 36,489 times and the database of financial leasing was visited 30,375 times (source: "*Privredni pregled*," 28 July 2008, at 3).

[134] The law does not provide for a strict period of time within which such delivery must occur. This is rather unfortunate since the moment of the registration of the judgment lien in the public records is of practical importance. Although once registered judgment lien produces effects from the moment of its constitution, the mentioned *erga omnes* effect accrues only

parties are prevented (i.e., estopped) from claiming that they were unaware of this right[135] and every person in possession of or having control over the chattels listed is prohibited from disposing of them without court authorization.[136]

The appraisal of the value of chattels is to be undertaken by a court bailiff – if necessary by involving also a court-appointed expert and concurrently with the listing – on the basis of available market prices at the location of the listed assets.[137] The court may decide to conduct appraisal on the basis of price reports acquired from appropriate organizations and institutions (*e.g.*, enforcement on shares of stocks listed on the Belgrade Stock Exchange).[138] Moreover, the enforcement creditor and the enforcement debtor may agree on the value of assets, which will be then accepted by the court.[139]

It should be noted, however, that the motion for enforcement must correspond to the debtor's obligation determined in the executive title. If this were not be the case, the court would have to deny the motion for enforcement. Thus, the Higher Economic Court held in its decision of 17 April 1998 that if the debtor's obligation as determined in the executive title is to hand over to the creditor certain quantity of substitutable goods (wool in that particular case), then the creditor may not seek enforcement by way of transfer of cash, as such a request would be contrary to the content of the

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after the recordation of the lien. Thus, before the registration third persons may argue that they were unaware of the lien. *See* art. 76 of the LEP.

[135] *Id.* art. 76 (1).

[136] *Id.* art. 78.

[137] The law does not specify in which cases is the appraisal to be carried out by a court-appointed expert. Presumably, this will be the case in those situations when, in the opinion of the bailiff or the court, the court bailiff alone cannot make the appraisal. Generally, this will happen when there is no easily determinable market price for certain goods. Moreover, each party may request for the appraisal to be carried out by the court appointed expert. If the court grants such a request, the party requesting it must provide for the costs of the expertise in advance. Otherwise it will be deemed that it has withdrawn the request. *See* art. 80 of the LEP.

[138] The Belgrade Stock Exchange ("BELEX") was established in 1894, and the first transactions on it were carried out in 1895. However, after WW II and the establishment of the communist regime in Yugoslavia it was closed as an "unneeded institution." In 1989 the stock exchange was reestablished and in 1992 was renamed Belgrade Stock Exchange (abbreviated "BELEX" – as before). It has operated under the name BELEX ever since. More information on BELEX is available on its website at < http://www.belex.co.yu >; last visited 7 January 2009.

[139] *See* art. 80 (1-5) of the LEP.

underlying executive title.[140] Rather, the creditor should have sought enforcement by taking possession of the wool in accordance with the provisions of the law.[141] As a result, the Higher Economic Court reversed the decision of the lower court granting the sought enforcement[142] forcing the creditor to initiate another enforcement proceeding wherein he would have requested enforcement by taking possession of the wool in accordance with the executive title.

In line with this, in another decision the Higher Economic Court held that a motion for enforcement must be fully in compliance with the executive title serving as a basis for enforcement.[143] Accordingly, when enforcing a court decision entitling the creditor to enforce on a specified movable, the court has to reject a motion for enforcement on other assets of the debtor.[144] This, however, does not prevent the creditor from filing a new motion for enforcement on the particular movable specified in the executive title, *i.e.*, to harmonize his motion with the court decision that serves as the executive

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[140] Decision of the Higher Economic Court, Pž. 2723/98 of 17 April 1998. The above summarized part of the decision in Serbian language reads as follows: "*Ako izvršna isprava glasi na obavezu dužnika da preda poveriocu određenu količinu zamenjivih stvari (vuna), tada poverilac ne može zahtevati u izvršnom postupku naplatu novčanog potraživanja, jer je zahtev iz predloga za izvršenje suprotan sadržini isprave u prilogu.*"

[141] *See id.* However, if the particular goods to be enforced upon cannot be found on the premises of the debtor, the creditor can seek the determination of the value of such goods by a court appointed expert and then ask for enforcement on other assets of the debtor in the amount equal to the value determined by the court appointed expert. That was the standing of the District Court in *Novi Sad*, which in one decision held that when the subject-matter goods cannot be found with the debtor, the court might, at the request of the creditor, appoint an expert to determine the value of the goods that should have been enforced upon. In that case, the creditor was given entitlement to collect the appraised amount from the available assets of the debtor together with statutory interest accrued from the moment of the appraisal until collection. *See* Decision of the District Court in Novi Sad, no. Gž. 3193/99 of 22 December 1999.
The paraphrased holding of the decision in Serbian language reads as follows: "*U slučaju kada je izvršni sud obavezao dužnika da isplati poveriocu protivvrednost pokretnih stvari, pošto iste nisu pronađene kod dužnika, poverilac ima pravo i na zakonsku zateznu kamatu na ovaj iznos od dana kada je utvrđena vrednost stvari pa do isplate.*"

[142] *Id.*

[143] Decision of the Higher Economic Court, Pž. 7273/96 of 6 December 1996. The above paraphrased holding in Serbian language reads as follows: "*Predlog za izvršenje mora u svemu biti saglasan sa izvršnom ispravom na osnovu koje se i predlaže izvršenje. [...] Kada se radi o izvršenju sudske odluke u kojoj su poveriocu dosuđene određene pokretne stvari, izvršni sud neće dozvoliti izvršenje koje nije u skladu sa izvršnom ispravom.*"

[144] *Id.*

title.[145] Although this view of the court may seem to formalistic from a business-oriented point of view, it represents a manifestation of the strict formality principle in enforcement proceedings. Put simply, one may not seek enforcement other than that specified in the executive title (*e.g.*, court judgment) and the creditor's options are limited to what he has sought and got in the preceding litigation. Therefore, creditor should be very careful in the litigation phase in respect of what he seeks from the court (*e.g.*, specific performance, damages, or alternative claims), because his position in the enforcement proceedings will be strictly conditioned with the content of the underlying executive title (*i.e.*, court decision). Naturally, going back to the court for another judgment is always an option, but that is time-consuming and costly.[146]

The law mandates that the sale of the seized assets – at a public auction or through direct agreement subject to court's consent – may not be conducted before the expiration of fifteen days following the closure of the listing. Earlier effectuation of the sale may occur if the debtor consents, if the chattels are susceptible to quick deterioration, if there is a risk of significant price-reduction on the relevant market, or if the creditor deposits a sum of money as guarantee for damage the debtor might suffer (if the decision on enforcement is revoked for any reason).[147] Public auction is ordered especially in the case of chattels of higher value and if it can be legitimately expected that the auction will result in a price well above the assessed one.[148]

The listed chattels may not be sold, at the first auction, or within the period set by the court for sale through direct agreement, for a price below their appraised value. However, if the appraised value cannot be obtained – upon motion of the creditor – the court shall order another auction with the opening price set at half of the appraised value.[149] In the absence of explicit statutory language, it is somewhat unclear whether the court may order a third or even further rounds of public auctions if the previous auctions have proved

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[145] *Id.* The above paraphrased holding in Serbian language reads as follows: "*To ne sprečava poverioca da novim predlogom za izvršenje zahteva pokretne stvari navedene u izvršnoj ispravi, odnosno da uskladi predlog za izvršenje sa sudskom odlukom na osnovu koje izvršenje traži.*"

[146] The new LEP is more flexible, for example, it provides in art. 207 that if non-fungible goods cannot be found, the court will on the motion of the creditor appraise their value and order the debtor to pay its value to the creditor.

[147] *See* art. 83(2-3) of the LEP.

[148] *Id.* art. 84(1-2).

[149] *Id.* art. 85(1-2).

to be unsuccessful.[150] It seems that the Higher Commercial Court resolved the doubt when in its decision of 29 December 2006 it held that in the case of enforcement on chattels the law did not limit the number of public auction rounds, and therefore there is no legal ground for the court to deny the request of a creditor for scheduling of a third or a further round of public auctions.[151] In that case – given that the listed chattels could not be sold at two rounds of public auctions – the request of the creditor for a third public auction was denied by the first instance court as something contrary to the law. Deciding on the creditor's appeal the Higher Commercial Court was of the view – analyzing the provisions of article 85 of the LEP – that they merely provide for reduction of the starting price in the case of unsuccessful first public auction or attempt for direct agreement and that they do not in any way limit the number of possible rounds of public auctions of listed chattels.[152] This holding is a good example of the changed and increased role of courts in Serbia in filling gaps in the law.

Similarly to enforcement on immovable property, the law provides for a possibility of awarding the chattels – *i.e.*, transfer of title – to the creditor. If the chattels cannot be sold at a second auction or through direct negotiations with interested parties within the period set by the court, the court will – at the creditor's request – transfer the chattels to him. In this case, the creditor's

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[150] However, the law does not exclude the possibility for the court to switch to sale through the direct agreement with the buyer if, due to the previous unsuccessful attempts to sell chattels through the public auctions, it finds that in such a way the most favorable terms of sale will be achieved. The court would, however, need to render a new decision ordering sale through the direct agreement with the buyer. *See* LEP, art. 84(1).

[151] Decision of the Higher Commercial Court, Iž. 2893/2006 of 29 December 2006. The above paraphrased holding in Serbian language reads as follows: "*Kod izvršenja na pokretnim stvarima Zakon o izvršnom postupku nije limitirao broj ročišta za javnu prodaju popisanih stvari, te stoga nema zakonskog osnova za odbijanje predloga izvršnog poverioca za oglašavanje treće ili neke sledeće prodaje.*"

[152] *See id.* The above paraphrased holding of the decision in Serbian language reads as follows: "*Prema članu 85. Zakona o izvršnom postupku, popisane stvari ne mogu se prodati za iznos ispod procenjene vrednosti, na prvom nadmetanju, a ukoliko na prvom nadmetanju nije postignuta cena u visini procenjene vrednosti, sud će na predlog stranke odrediti novo nadmetanje na kome će početna cena biti jednaka jednoj polovini procenjene vrednosti, te se u članu 85. stav 3. pomenutog zakona propisuje da će se stav 2. primeniti i kada se popisane stvari nisu mogle prodati u visini procenjene vrednosti putem neposredne pogodbe u roku koji je odredio sud niti na nekom docnijem ročištu za prodaju, iz čega bi proizilazilo da zakonodavac nije limitirao broj ročišta za javnu prodaju.*"

claim will be deemed satisfied by the receipt of one half of the chattel's appraised value.[153]

3.5. Enforcement on Bank Accounts

Enforcement of a monetary claim against a legal entity ("*pravno lice*") or entrepreneur ("*preduzetnik*")[154] may be conducted against all financial assets in their accounts with banks (*i.e.*, garnishment) and other financial institutions, as well as against the *dinar* (*i.e.*, the designation of the Serbian national currency) equivalent of foreign currencies they keep on foreign currency accounts with banks or other financial institutions.[155] The writ of execution in such cases is directed against banks or other financial institutions, which are ordered to transfer the amount designated for enforcement from the account of the debtor to the account of the creditor.[156]

Thereafter the court delivers the writ of execution to the department in charge for compulsory collections of the National Bank of Serbia ("*Narodna Banka Srbije*;" hereinafter: 'NBS'),[157] which immediately orders banks and other financial institutions that keep debtor's accounts to stop all payments from all its accounts until final satisfaction of the claims, not to open new accounts for the debtor, as well as to promptly deliver information on balances in the accounts of the debtor. After the receipt of information on the balances in debtor's accounts, the NBS orders banks and other financial institutions to transfer the assets from debtor's accounts to the account of the creditor until the full satisfaction of the claim.[158] Banks and other financial

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[153] *See* art. 90 of the LEP.

[154] Self-employed persons registered for carrying out certain economic activity (*e.g.*, trade or craftsmen). The business of an entrepreneur does not have the status of a legal entity and hence they are liable for their obligations with all their assets, *i.e.*, those related with carrying out their economic activities, as well as with all other privately held assets.

[155] *See* art. 197 of the LEP.

[156] *Id.* art. 198.

[157] The website of the National Bank of Serbia provides an online system of verification whether bank account(s) of certain legal entity or entrepreneur has been blocked in the previous year due to some form of compulsory collection (*see* the 'Databases, Searches, Code List' page and then 'Search of Debtors in Enforced Collection' – also with English language pages – at < http://www.nbs.yu >; last visited on 7 January 2009). In this way a creditor can ascertain whether his decision on enforcement is effectuated and in what phase of enforcement his claim is.

[158] *See* art. 199 of the LEP.

institutions are obliged to carry out such transfers on the same day as they receive the NBS's order.[159]

Enforcement against the funds on debtor's bank account may be conducted against all financial assets in its accounts with banks and other financial institutions. In one decision the District Court in Belgrade held that as long as there is an account of an enforcement debtor with funds that can be object of enforcement there are no legal obstacles to conducting the enforcement.[160] Hence, the court concluded that the fact that enforcement cannot be carried out from the debtor's account specified in the decision on enforcement does not prevent enforcement on another account of the enforcement debtor.[161]

Enforcement on debtor's foreign currency accounts is anticipated only as a subsidiary means of enforcement, reserved for situations when there are no financial assets in the debtor's dinar (i.e., local currency) accounts. In such cases, the NBS shall order banks keeping the debtor's foreign currency accounts to transfer assets from those accounts to the debtor's dinar account and then the enforcement will proceed on the dinar account as described earlier. Banks shall act on the order on the same day they receive the NBS order. However, if there are no assets in the debtor's foreign currency accounts, banks keeping such accounts shall act at the time when assets are credited to the debtor's foreign currency accounts, unless notified otherwise by the NBS in the meantime. During enforcement, banks may not act on debtor's instructions on disposal of assets on foreign currency accounts unless otherwise instructed by the NBS.[162]

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[159] *Id.* art. 200 (2).

[160] Decision of the District court in Belgrade, Gž. 6335/2005 of 8 June 2005. The above paraphrased part of the holding in Serbian language reads as follows: "*Sve dok postoji bilo koji račun izvršnog dužnika sa kog se prinudno izvršenje može sprovesti ne postoje smetnje za sprovođenje izvršenja sa računa izvršnog dužnika.*"

[161] *See id.* The above paraphrased part of the holding in Serbian language reads as follows: "*Okolnost da se izvršenje ne može sprovesti sa računa dužnika navedenog u rešenju o izvršenju ne sprečava da se izvršenje istim sredstvom kojim je određeno sprovede sa drugog njegovog računa.*"

[162] *See* art. 204 of the LEP.

3.6. Enforcement on Shares and Bonds[163]

In regard to enforcement on stocks, bonds and other securities, it should be noted that the LEP provides rather simple and easily understandable rules governing the process. These rules are briefly presented immediately below. However, the number of reported judicial decisions explaining the process, potential focal points and application of the general rules to various individual situations is scarce, virtually none. Reason for this could be perceived as two-fold. *First*, the practice of using stocks, bonds or other securities as a collateral or object of enforcement has only started to develop in Serbia in the last few years and it is mainly banks that tend to exploit this possibility. *Secondly*, since most of these transactions are of relatively recent vintage, it will undoubtedly take some time before courts are asked to decide related disputes. Additionally, some particular types of transaction in certain securities have not even been started yet. For example, the very idea that companies or municipalities may raise capital by issuing bonds (or debt-securities) is brand new. All in all, until transactions in securities become more frequent, the issue of enforcement on stocks, bonds and other securities will remain a gray area of Serbian enforcement law. Thus, the ways in which these relatively simple rules will be applied to concrete situations business life remains to be seen.

Hence, we have no other option but to restrict ourselves to what the written law states on this matter, starting with the enforcement on stocks and then moving on to enforcement on shares and bonds. The phases of enforcement on stocks are: (i) attachment, (ii) valuation, (iii) sale, and (iv) satisfaction of the creditor.[164] The writ of execution against stocks is to be served to the creditor, debtor, and the Central Register of Securities ("CRS").[165] The attachment on stocks is effected through serving the writ of

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[163] The term "stocks" ("*akcije*") as used in this paper refers to shares of stock of joint-stock companies ("*akcionarska društva*"), while the term "share" ("*udeo*") refers to quota in the capital of a limited liability company ("*društvo sa ograničenom odgovornošću*"). It should be noted that in Serbian law there is one particularly important difference between these two terms, namely, "*akcija*" represents a security ("*hartija od vrednosti*") and is registered with the Central Register of Securities ("*Centralni registar hartija od vrednosti*") ("CRS"), while "*udeo*" does not represent a security.

[164] *See* art. 246 of the LEP.

[165] Per the Law on the Securities and other Financial Instruments Market ("*Zakon o tržištu hartija od vrednosti i drugih finansijskih instrumenata*") (Official Herald of Serbia no. 47/2006) securities are issued, transferred and recorded in electronic form in the information system of the CRS. Thus, the law introduced a system based on dematerialized securities. Accordingly, the CRS, *inter alia*, provides the following services: (i) keeping securities registers, (ii) keeping evidences of securities on issuers'

execution to the CRS. From the moment of receipt of the writ by the CRS the creditor acquires a lien on the attached stocks and the debtor may no longer freely dispose of them.[166] As far as their valuation is concerned, if the stocks to be enforced upon are quoted on the stock exchange (i.e., BELEX), their value is determined on the basis of their average price on the stock exchange over the past thirty days (i.e., thirty days preceding the evaluation). If the value cannot be determined in this manner, the court orders an expert appraisal on motion of one of the parties. In respect of the manner of sale, the law provides that if stocks are traded on the stock exchange, they have to be cashed in through the stock exchange. If they are not traded on the stock exchange they may be sold in other ways allowed by the law regulating trade in securities.[167] Notably, procedure of enforcement on bonds essentially follows the procedure for enforcement on stocks. Moreover, the law expressly provides that in respect of valuation and sale of bonds the rules regulating valuation and sale of stocks apply by analogy.[168]

The writ of execution against *shares* is served to the Business Registers Agency ("BRA")[169] – which, *inter alia,* keeps the register of limited liability companies – instead of the CRS. Accordingly, the attachment of shares occurs when the writ of execution is delivered to the BRA. Through attachment the creditor acquires a lien on the shares, which is recorded in the registry of

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accounts, (iii) registration of third persons' rights on securities, (iv) safe-keeping of certificated securities and services related to their dematerialization, (v) clearing and balancing of claims and obligations arising out of the transactions between the CRS members, and (vi) transfer of securities to accounts of CRS members and accounts of lawful owners of securities. More information on the CRS is available on its website – also with English language pages – at < http://www.crhov.co.yu >; last visited 7 January 2009.

[166] *See* art. 247 of the LEP. The CRS is obliged to register creditors' liens in the securities records without delay. Following such registration third persons cannot claim that they were unaware of the creditor's lien on the stocks. Even thought the law requires immediate recordation, in reality that cannot occur but in a day or two. The authors were not capable to determine with accuracy exactly how many.

[167] *See* art. 248 of the LEP.

[168] *Id.* art. 192. The valuation of stocks is done by the court. If the stock is quoted on the Belgrade Stock Exchange, its value is determined based on the average price of the stock during the last 30 days. If the value cannot be determined this way, the court will order, on the motion of one of the parties, appraisal by an expert. Art. 248 of the LEP.

[169] Serbian Business Registers Agency has a unique centralized database on registered businesses as well as on financial leasing and pledge agreements in electronic form that can be accessed through the Internet at < http://www2.apr.sr.gov.yu/Default.aspx?alias=www2.apr.sr.gov.yu/eng >; last visited on 12 August 2008 (unable to revisit on 7 January 2009).

limited liability companies kept by the BRA, as well as in the book of shareholders maintained by the limited liability company. From the moment of creation of the creditor's lien the debtor may no longer freely dispose of the shares.[170] In case of sale of a share in a limited liability company other members of the company have preemptive rights in that regard and these preemption rights apply also in the context of sales as part of enforcement.[171] A member of a limited liability company thus has priority over the most favorable buyer if he immediately after the end of the sale declares that he is willing to buy the share under the same conditions.[172] Moreover, the LEP mandates that in respect to the valuation and sale of the shares rules regulating the valuation and sale of stocks apply by analogy.[173]

4. Dilemmas Surrounding the Newcomer Fixed and Floating Charges

In accordance with the civil law tradition to which it belongs, until recently, in Serbia movables could have been exploited as collateral only in the form of possessory pledge.[174] The pledge was perfected only when

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[170] *Id.* art. 249.

[171] *Id.* art. 251(1).

[172] *Id.* art. 251(2).

[173] *Id.* art. 250. This solution seems to be inadequate, due to the aforementioned distinction between the stocks ("*akcije*") and shares ("*udeli*") in Serbian law. As mentioned, stocks are securities and must be traded in accordance with the law that regulates trading in securities. On the other hand, shares are not securities and are therefore not subject to the rules and limitations applicable to trade in stocks (as securities).
Moreover, since shares are not quoted on the stock exchange (or any other organized market), their value cannot be inferred from the average quoted price, as is the case with stocks. Thus, it is questionable to what extent rules applicable to stocks may be adequate for valuation and sale of shares of limited liability companies. The most suitable solution is appraisal by a court appointed expert, which is also an option for appraisal of non-quoted stocks.
However, as far as sale of shares is concerned it is difficult to conceive how shares could be sold in the process of sale anticipated for stocks (i.e. securities). It seems more appropriate for shares to be sold either at a public auction or through direct negotiations and agreement with the buyer, similarly to the process of sale of movable assets. Rules concerning the preemptive rights of other company's members should also be perceived in light of this.

[174] An agreement whereunder a debtor or other person (pledgor) would oblige to the creditor (pledgee) to hand him over certain movable item in his ownership, so that the creditor may, in the case his claim is not satisfied upon maturity or in case of debtor's default, satisfy his claim from the value of the pledged item before all other creditors, while the creditor would oblige to preserve the pledged item and return it undamaged to the pledgor after the satisfaction of the claim. *See* the Law on Obligations ("*Zakon o obligacionim odnosima*")

possession of the pledged item was transferred to the creditor (or, a third person – bailor – designated by the creditor for holding and safekeeping the collateral).[175] Consequently, non-possessory security devices, like the chattel mortgage – or the most complex ones, the fixed and floating charges – were not available under Serbian law, since they were inconsistent with the principle that pledged items must be transferred into the possession of the pledgee.[176]

However, the idea that keeping a pledged item in the possession of the debtor could be beneficial for both debtor and the creditor – as it enables the debtor to exploit the pledged item in order to generate profits out of which he can eventually satisfy [even] the creditor's claim – has become acknowledged by Serbian businessmen and legislators only in the last few years. In view of this, the Serbian Parliament enacted in 2003 the Law on Registered Security Interests in Movables[177] (hereinafter: Law on Pledge of Movables), which introduced into the Serbian legal system – besides chattel mortgage (or "registered pledge") – the notion of fixed charge and rather bashfully the idea of the floating charge. The Pledge Register ("*Registar zaloge*") is today operational, and the information recorded therein electronically accessible by the public.[178] However, as in the case of other laws transplanting new legal concepts to Serbian soil, judicial practice has not yet been developed and it may take some time before some of the focal issues relating to these newly introduced concepts are clarified. Therefore, the ensuing analysis presents only the most important aspects of the Law on Pledge of Movables, supplemented – where available – with the relevant judicial practice.

(Official Gazette of SFRY nos. 29/1978, 39/1985, 45/1989, 57/1989 and Official Gazette of FRY no. 31/1993), art. 966.

[175] *Id.* art. 968.

[176] These security devices are a measure of development of businesses because they allow use of the entire assets of a company, or of an identifiable branch or plant of a company, as collateral. As in case of the floating charge the security interest does not attach and does not affect the running of the business until crystallization (events that may lead to crystallization are normally defined in the agreement creating the floating charge) and as they allow for extension of the largest possible credit (often a revolving credit), they are business-friendly methods of raising money by businesses. The American version – considerably different from its English counterpart – is known as the '*floating lien*' and is governed by Article 9 of the Uniform Commercial Code. *See* also *Oxford Dictionary of Law*, Oxford University Press, 2003, at 74.

[177] „*Zakon o založnom pravu na pokretnim stvarima upisanim u registar*" (Official Herald of the Republic of Serbia nos. 57/2003, 61/2005, 64/2006).

[178] The Pledge Register is kept by the Business Registers Agency and is available online on its website at < http://www.apr.gov.rs/ >; last visited on 7 January 2009.

The most important novelty introduced by the Law on Pledge of Movables is the counter part of the common law concept of chattel mortgage. Namely, the law permits agreement whereunder the security interest is established on a certain movable as a security for the creditor's claim, with the pledged item remaining in the possession of the pledgor and the security interest being recorded in the Pledge Register.[179] Such an agreement must be made in writing, otherwise it is invalid.[180] The security interest is perfected through recordation in the Pledge Register.[181] A creditor whose security interest has been properly recorded in the Pledge Register may – if his claim is not satisfied upon maturity or debtor's default – satisfy his claim from the value of the pledged item before any and all other creditors of the debtor.[182] Moreover, his security interest on the pledged item shall be effective against any third persons who may have subsequently acquired the pledged item, thus having *erga omnes* effect following the recordation.[183] Importantly, the subject matter of securing may be not only existing monetary claims, but also *future* and *conditional* claims. In such cases, the highest secured amount is recorded in the Pledge Register up to which the future or conditional claim is being secured.[184] The object of pledge may be (i) a specific movable asset, (ii) generic items identified by quantity, quality, number or other manner distinguishing it from other generic items of the same sort, or (iii) a collection of movable assets (*universitas rerum – "zbir pokretnih stvari"*) such as goods in a certain warehouse or store, inventory for carrying out of certain economic activity.[185] The debtor's claims towards third parties may also be used as

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[179] *See* Law on Pledge of Movables, art. 2(1).

[180] *Id.* art. 3(2).

[181] *Id.* art. 4(1). However, it should be noted that Serbian law does not make a distinction between the 'attachment' and 'perfection' of the security interest, as do common law systems. Therefore, the term 'perfection' as used herein means that the creditor acquires the security interest (*"založno pravo"*) on certain movable in the moment of registration with the Pledge Register.

[182] However, the law provides that the statutory security interest of the carrier, the commission agent, the forwarding agent and the warehouseman that originate from carriage or forwarding of the goods that are the subject of the security interest according to the Law on Obligations have priority over registered security interests. The same rule applies for the contractor's claims regarding the invested work and material. *Id.* art. 33. Regarding the statutory security interest of the state for tax and other duties, their priority is determined based on the time of their entry into the Pledge Register. *Id.* art. 34.

[183] *Id.* art. 6.

[184] *Id.* art. 7 (3-4).

[185] *Id.* art. 9.

collateral just as other kinds of property rights (*e.g.*, intellectual property rights). Finally, the object of pledge may be items or rights to be acquired by the pledgor in the future (*i.e.*, after-acquired property), in which case the security interest is perfected in the moment the pledgor acquires title on such items or rights. Naturally, the pledgee may seek recordation of the security interest on the items or rights to be acquired by the pledgor in future.[186]

As mentioned above, the Law on Pledge of Movables has in a rather cautious manner introduced a concept quite similar to the English floating charge (or floating lien known to U.S. law). The law anticipates that the object of pledge may also be *collection of movables* (*universitas rerum – "zbir pokretnih stvari"*), such as goods/inventory in certain warehouse or store, equipment for carrying out of certain economic activity, and other collection of movables in accordance with the pledge agreement.[187] Unfortunately, this is where the law stops and does not provide any further details in this respect, apparently leaving a number of very important questions to be answered by courts in the application of its provisions. The first fundamental question arising here is whether this provision has introduced in Serbia the concept of the floating charge at all. The answer to this question seems to be yes. Why did the legislators otherwise add after the first two paragraphs of article 9 of the Law of Pledge of Movables – which provides that object of pledge may be specified movable items and generic movable items – a third category of '*collection of movables*'? Probably, any other reading of the wording '*collection of movables*' would make little sense, since such items would already fall within the scope of specified or generic movables. Moreover, the examples stated in the law for collection of movables (*i.e.*, goods in a certain warehouse or store, or equipment for conducting economic activity) further support this view, as the very nature of

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[186] *Id.* arts. 10-14.

[187] *Id.* art. 9(3). The above paraphrased provision in Serbian language reads as follows: "*Predmet založnog prava može biti i zbir pokretnih stvari, kao što je roba u određenom skladištu ili prodavnici, inventar koji služi za obavljanje privredne delatnosti i drugo, u skladu sa ugovorom o zalozi.*"
Although the law does not expressly provide that the object of pledge may be entire property of a company, it also does not exclude this possibility. Moreover, a proper reading of the said provision would undoubtedly allow pledging of all movables in the possession of the pledgor. Yet at this early stage of development of these newcomer institutions it is difficult to guess what will be the interpretation of this provision by Serbian courts. The legislator has opened the door for "innovative reading" of the law, but the reading itself remains to be done by courts. This also shows the increased importance of courts.

these movables is that they are all stock-in-trade; *i.e.*, they are constantly circulating as part of the ordinary business of the debtor. The law also mandates that when the object of pledge is sold in the ordinary course of business of the pledgor, the good faith purchaser acquires the ownership thereon free of any liens, which is also one of the characteristics of the floating charge.[188] Finally, let us recall that the law provides that object of pledge may be items to be acquired by the pledgor in the future (after-acquired property), in which case the security interest is perfected in the moment the pledgor acquires such items.

Although the above line of reasoning may seem logical and practical to someone coming from a system with a working collateral laws, the few thoughts put down here are nothing more than theoretical constructs based on innovative reading of the new law and the final say in this regard is yet to be given by courts interpreting and applying its provisions. For the time being these issues remain unanswered in Serbia, which is especially a problem given that from a practical point of view the very notion of floating charge is a hardly comprehensible concept to lawyers trained solely in domestic law. Thus, proper drafting of the underlying agreements – in the light of the insufficiently detailed language of the law – may turn out to be a discouraging problem in practice.[189] Another solution would be to reform the existing laws, which would certainly lead to higher legal certainty in this field; this would not be unprecedented as in many CEE countries there have been several waves of reforms – i.e., amendments of the civil code or special laws introducing novel elements from secured transactions (or personal property security) law.

Another important characteristic of the Law on Pledge of Movables is that it provides for a rather efficient procedure for repossession of the pledged movable by the pledgee. Specifically, if the creditor's claim has remained

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[188] *Id.* art. 23(6).

[189] The law does not provide for any special rule for enforcement on *collection of movables* as collateral or on the moment of crystallization. Thus, it is legitimate to conclude that in such cases – if the creditor's claim is not satisfied upon maturity or upon the debtor's default – the generally applicable enforcement rules are to be applied, i.e., the creditor has to inform the pledgor by registered mail that he intends to satisfy his claim from the value of the pledged movables, as well as to seek recordation of the start of enforcement in the Pledge Register. *Id.* arts. 36-37.
As this area of law is brand new, caution is recommended and thus the drafters of pledge agreements anticipating this kind of security interests are well advised to provide clear and precise provisions in respect of the moment of crystallization, i.e., when the creditor may seek utilization of his security interest.

unsatisfied upon maturity or debtor's default, the creditor needs to inform the pledgor via registered mail that he intends to satisfy his claim from the pledged item and is entitled to seek repossession (in Serbian: "*tražiti povraćaj poseda, tražiti da mu se da u državinu*") of the pledged movables. The crucial thing is that the creditor may do so directly and does not have to go through the court.[190] If the pledgor refuses to hand over the pledged item to the creditor, the creditor may file with the court a motion for repossession ("*zahtev za donošenje rešenja o oduzimanju predmeta založnog prava*").[191] The court is obliged to decide on the motion within three days of its receipt. Furthermore, the court's decision granting the creditor's motion for repossession is to be enforced within three days of its rendering.[192] Potential objection of the pledgee against the decision on repossession does not have a suspensive effect, *i.e.*, it does not postpone the enforcement of the decision on repossession.[193] Here, one has to underline that setting exact deadlines within which a court or court officials has to act, as well as the non-suspensive effects of objections in the enforcement phase – obviously meant to speed up the process – are novelties in Serbia and are part of a positive trend and the expression of a mind shift, though the positive effects of all this may not be visible in real life for a few years.

In line with what just has been said, the Higher Commercial Court held in its decision of 11 December 2006 that the conditions for rendering the decision on repossession of the pledged item are fulfilled when the creditor submits to the court (i) a motion for repossession accompanied by authenticated excerpt from the Pledge Register, and (ii) [an authentic copy of] the pledge agreement.[194] The court went on to state that when the secured

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[190] *Id.* arts. 36-40.

[191] *Id.* art. 41.

[192] The provision of the law in Serbian: „*Postupak oduzimanja predmeta založnog prava sprovodi se u roku od tri dana od dana donošenja rešenja kojim se usvaja zahtev iz stava 1. ovog člana.*" *Id.*
The English translation of this provision reads as follows: "*The repossession of the collateral is to be effectuated within three days from the day of the making of the decision whereby the motion from subsection 1 is accepted.*"

[193] *Id.*

[194] Decision of the Higher Commercial Court, Iž. 2651/2006 of 11 December 2006. The above paraphrased holding of the court in Serbian language reads as follows: "*Pravilan je zaključak prvostepenog suda da su ispunjeni uslovi za donošenje rešenja za sticanje državine na predmetu založnog prava od strane izvršnog poverioca, koji su regulisani članom 41. Zakona o založnom pravu na pokretnim stvarima upisanim u registar, jer je*

claim has not become satisfied upon maturity (or upon the debtor's default),[195] the pledgee is by the law entitled to repossess the collateral upon informing the pledgor of his intention to satisfy his claim from the collateral. Since the pledgor has failed to voluntarily fulfill his obligation of handing over the collateral to the pledgee, the pledgee is entitled to request the court to issue a decision of repossession of the pledged movable by submitting to the court a motion for repossession accompanied by authenticated excerpt from the Pledge Register and the pledge agreement. Finally, the court emphasized that the authenticated excerpt from the Pledge Register of the Business Registers Agency represents an executive title in the enforcement procedure initiated by the pledgee for repossession of the pledged movable item.[196]

Another fundamental novelty aiming at speeding up enforcement of claims based on secured transactions is that the new law expressly provides that when the pledgor is a commercial entity (*i.e.*, is professionally engaged in economic activities), the pledge agreement may provide the pledgee with the right to sell the pledged item at an out-of-court auction if his claim is not satisfied upon maturity. What is more, if the collateral has a market or stock-exchange price, the agreement may anticipate that the pledgee is entitled to sell the pledged item or even to keep it for himself under that price. However, when the pledged item does not have a market or stock exchange price, the

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izvršni poverilac podneo prvostepenom sudu zahtev – predlog za izvršenje, uz koji je priložio overeni izvod iz registra zaloge i ugovor o zalozi."

[195] Although the court used the term "maturity" ("*dospelost*"), it seems reasonable to assume that the same consequences would follow also from the debtor's default where the creditor's claim has not become mature (*e.g.*, when pledge agreement anticipates that creditor may utilize security interest when certain event occurs, for instance debtor's bankruptcy).

[196] *See* Decision of the Higher Commercial Court, Iž. 2651/2006 of 11 December 2006. The above paraphrased text of the court's holding in Serbian language reads as follows: „*Kako zalogodavac – izvršni dužnik nije dobrovoljno izvršio svoju obavezu predaje predmeta založnog prava založnom poveriocu, izvršni poverilac je kao založni poverilac ovlašćen da od suda traži donošenje rešenja o oduzimanju predmeta založnog prava od zalogodavca ili lica u čijoj se državini predmet založnog prava nalazi i predaji tog predmeta založnom poveriocu u državinu, s tim što je uz zahtev sudu izvršni poverilac dužan da podnese overeni izvod iz registra zaloge i Ugovor o zalozi. Izvršni poverilac je u skladu sa navedenim pravom na podnošenje zahteva sudu i obavezom prilaganja navedenih pismena, regulisanim članom 41. stav 1. i 2. citiranog Zakona, podneo prvostepenom sudu zahtev – predlog za izvršenje, uz koji je priložio overeni izvod iz registra zaloga i Ugovor o zalozi. Ovim članom Zakona i to stavom 3. je regulisano da se izvod iz registra zaloge izjednačava, u smislu tog Zakona, sa izvršnom ispravom, u slučaju podnošenja zahteva izvršnog poverioca kao založnog poverioca sudu za sticanje državine na predmetu založnog prava.*"

pledgee may sell it only in a commercially reasonable manner ("*na način na koji bi to učinio razuman i pažljiv čovek*"), which requirement is imposed to protect the interests of the pledgor.[197]

Finally, an interesting issue was raised at the session of the Department for Commercial Disputes ("*Odeljenje za trgovinske sporove*") of the Higher Commercial Court of 19-20 September 2005. The issue was how to conduct enforcement proceedings and how to divide funds obtained through sale of collateral when, on one hand, immovable assets (concretely a piece of land and a building on it) are encumbered by two mortgages, and on the other hand, the equipment located in the building is encumbered by a security interest established and recorded in accordance with the Law on Pledge of Movables. The scenario itself is very interesting and revealing given that it displays that Serbian businessmen are innovative and are keen to exploit new business-friendly mechanisms: neither the use of the registered charge nor the encumbering of the same immovable with more than a single mortgage were common earlier (to say the least). In a sense it is a happy development that such disputes have reached the High Court relatively quickly after the introduction of the new law and the beginning of the spread of the idea on the role of collateral among businessmen.

Needless to say, exactly because of this the position of the High Court is not just of heightened practical importance but also theoretically interesting; in brief terms the court took the following legal position. The first mortgagee has a first-ranking senior mortgage and therefore is entitled to satisfy his claim from the value of the encumbered real estate – *i.e.*, the encumbered immovable with all assets affixed (i.e., with all the fixtures) to it and with all the proceeds and potential improvements – prior to the other creditors. Following the full satisfaction of the first mortgagee, the second-ranking mortgagee is entitled to full satisfaction of his claim from the remaining value of the mortgaged real estate. If there is a deficiency, he may seek satisfaction by enforcing on other assets of the debtor. However, satisfaction of the third creditor – whose claim was secured by the recorded security interest on the debtor's movable assets (*i.e.*, equipment located in the building) – is independent from the satisfaction of the two mortgage creditors. This creditor is entitled to the satisfaction of his claim from the funds obtained through the sale of the pledged equipment, and if there are several such creditors, the

[197] *See* Law on Pledge of Movables, art. 27.

order of their priority is to be determined according to the time of the recordation of their security interests in the Pledge Register.[198]

5. Leasing in Serbia

5.1. The Basic Dilemma: the Legal Nature of the Newcomer Financial Leasing

Financial leasing transactions in Serbia are regulated by the Law on Financial Leasing[199] (hereinafter: "LFL"), which was enacted in 2003 and which represents the first ever act regulating the newcomer transaction 'leasing' in Serbia. Per this Law financial leasing is a transaction whereunder the lessor ("*davalac lizinga*") – in accordance with the lessee's specification – acquires from the seller ("*isporučilac predmeta lizinga*") ownership of the subject matter of leasing, and on the basis of the financial leasing agreement with lessee ("*primalac lizinga*") transfers to him possession of the subject matter of the leasing, while the lessee pays in consideration a leasing fee in installments as agreed upon.[200] Interestingly, before the enactment of the LFL,

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[198] Legal standing of the Higher Commercial Court in regard to Questions of Commercial Courts Determined at the Sessions of its Department for Commercial Disputes of 19-20 September 2005 and the Department for Economic Offenses and Administrative-Accounting Disputes ("*Odeljenje za privredne prestupe i upravno-računske sporove*") of 26 September 2005.

The above paraphrased text of the position in Serbian language reads as follows: *„Prilikom namirenja prvo će se namiriti hipotekarni poverilac koji ima hipoteku prvog ranga bez obzira što su na nepokretnosti učinjene poboljšice, a po njegovom namirenju namiriće se hipotekarni poverilac koji ima hipoteku drugog ranga, ukoliko ostane sredstava po namirenju prvog poverioca. Nije od značaja činjenica da li ima dovoljno sredstava za namirenje svih hipotekarnih poverilaca. ... Ukoliko nema dovoljno sredstava da se naplati iz sredstava dobijenih realizacijom hipoteke za preostali iznos se može namiriti iz imovinske mase ličnog dužnika, kao običan, hirograferni poverilac. ... Što se tiče treće banke koja ima ručnu zalogu na opremi naplata njenog potraživanja se vrši nezavisno od hipotekarnih poverilaca bez obzira da li se radi o bezdržavinskoj zalozi prema Zakonu o založnom pravu na pokretnim stvarima upisanim u registar koji se primenjuje od 1.1.2004. godine ili ugovoru o zalozi prema odredbama Zakona o obligacionim odnosima. ... Redosled namirenja kod ugovora o zalozi na pokretnim stvarima upisanim u registar predviđen je članom 29. i 31. Zakona. Založni poverilac ima pravo da se iz postignute cene naplati pre ostalih poverilaca zalogodavca a ako je založena stvar upisom u registar založena nekolicini poverilaca red po kome se one isplaćuju određuje se prema trenutku upisa njihovih založnih prava u registar."*

[199] "*Zakon o finansijskom lizingu*" (Official Herald of Serbia nos. 55/2003 and 61/2005).

[200] *See* art. 2 of the LFL. On the issue of leasing in Serbia *see also* Lucija Spirović-Jovanović and Ljubiša Dabić, „*Trgovinsko pravo*" [Commercial Law] (Međunarodni naučni forum, Beograd, 2008), at 729-736.

the issue of what constitutes the subject matter of a financial leasing transaction was scrutinized by the Supreme Court of Serbia in its decision of 15 April 1997. In that case the plaintiff asked for the termination of the underlying leasing agreement and the return of the subject matter of the leasing agreement (two machines) because the defendant did not pay the leasing fee in due time.[201] This right of the plaintiff was derived from the clause of the leasing agreement that provided for the right of the lessor to terminate the leasing agreement and to repossess the subject matter of the leasing (the two machines) if the lessee defaulted on the payment even of only one installment of the leasing fee. The same agreement also contained an option clause for the sale of the subject matter of the leasing following the fulfillment of the agreement. The defendant-lessee claimed that it had the right to keep one of the machines and to acquire ownership on it because the total amount of installments paid by him prior to default was equal to the price of one of the machines. The defendant invoked art. 412 (1) of the Law on Obligations that provides for the division of obligations.[202] The Court was of the opinion that in the case of leasing agreement the essential element is the transfer of the subject matter of the agreement to the lessee for exploitation (utilization) and not the transfer of ownership of it.[203] The clause applies from the moment of the lessee's default and the sale-option clause can be invoked only after the leasing agreement is fulfilled. In the opinion of the Court these are specific clauses typical for leasing agreements that cannot be considered in isolation from the rest of the contract.[204]

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[201] Decision of the Supreme Court of the Republic of Serbia Rev. 116/1997 of 15 April 1997.

[202] According to this provision, the obligation is divisible if the obligation can be fulfilled in parts, in which case those parts have the same nature as the whole, and if it does not lose anything of its value by the division. Otherwise, the obligation is not divisible. The original text of the law in Serbian: *„Obaveza je deljiva ako se ono što se duguje može podeliti i ispuniti u delovima koji imaju ista svojstva kao i ceo predmet, i ako ono tom podelom ne gubi ništa od svoje vrednosti, inače obaveza je nedeljiva."*

[203] The above paraphrased part of the holding in Serbian language reads as follows: *"Suština ugovora o lizingu je ekonomsko korišćenje objekta lizinga. Kod ugovora o lizingu bitno je ustupanje stvari na korišćenje, a ne prenos svojine."*

[204] The above paraphrased part of the holding in Serbian language reads as follows: *"[P]ored ugovorene klauzule o opciji kupoprodaje koja podrazumeva potpuno izvršenje obaveza korisnika lizinga, tačkom 5. člana 9. ugovora dogovorena je i kaznena klauzula po kojoj u slučaju docnje korisnika sa plaćanjem makar jedne rate lizing naknade davalac lizinga stiče pravo na raskid ugovora i povraćaj predmeta lizinga. U pitanju su specifične ugovorne klauzule kod ugovora o lizingu koji se ne mogu posmatrati odvojeno."*

5.2. Other Characteristics of Financial Leasing

Another peculiar rule applicable to financial leasing agreements[205] is that they cannot be concluded for a period shorter than two years[206] and the lessor and the seller cannot be one and the same person.[207] The latter distinction is also supported by judicial practice. The Higher Commercial Court in Belgrade criticized the decision of a lower court for not making a distinction between direct and indirect leasing.[208] The Higher Court held that indirect (or financial) leasing is a legal transaction involving three parties in the context of which two contracts are being concluded. The concrete sequence of acts, in a nutshell, is that first the lessee specifies the equipment and chooses the supplier, based on which the lessor concludes a purchase contract with the seller, and the lessor concludes a leasing contract with the lessee based on the agreed terms. The seller delivers the equipment directly to the lessee, who uses the equipment; however, it is the lessor who obtains ownership of it.[209] This finding of the court made in 1997 actually does not differ from the definition given by the Law on Financial Leasing a few years later in 2003. The Higher Court also noted that it is typical for financial leasing that the parties agree on a basic interval during which it is not possible to terminate the leasing contract.

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[205] This agreement must be concluded in written form and must regulate the subject matter of leasing, amount of leasing fee, the number and amount of installments, as well as the period of time for which the agreement is concluded. Naturally, financial leasing agreements may provide also for other elements, such as time and place of delivery of the object of leasing, terms and conditions for the acquisition of ownership thereon. *See id.* art. 6 of the LFL.

[206] *See* art. 3 of the LFL.

[207] Such agreements are regulated by the Law on Obligations depending on their distinctive characteristics and may qualify normally either as sales or traditional lease/rent. *See id.* art. 13.

[208] Decision of the Higher Commercial Court in Belgrade, Pž. 7167/04 of 6 December 2004.

[209] The above paraphrased holding in Serbian language reads as follows: *"[Lizing] je trostrani pravni posao u kojem učestvuju tri lica i zaključuju se dva ugovora. Centralnu poziciji kod ovog posla ima davalac lizinga koji je subjekt oba ugovora. Pravna konstrukcija ovog posla je sledeća: Primalac lizinga daje davaocu lizinga specifikaciju opreme i bira isporučioca ne oslanjajući se, po pravilu, na sigurnost davaoca lizinga, davalac lizinga na osnovu ove specifikacije i ovog izbora zaključuje ugovor o kupovini (isporuci) sa trećim licem (izabranim isporučiocem) u skladu sa lizing ugovorom koji je zaključio sa primaocem lizinga ili koji će da zaključi sa primaocem lizinga uz znanje prodavca (isporučioca). Pravo svojine na opremi koja je predmet ugovora o lizingu stiče davalac lizinga."*

The other type of leasing is "direct" ("quasi" or "operational") leasing, which is designated as such because there are only two parties to the transaction; here the seller and the lessor of the object of leasing is the same person and thus the same person delivers the object of leasing by retaining ownership on the same, though the lessee uses the equipment the same way as in the case of financial leasing. In the opinion of the court, the distinguishing feature of this type of leasing is that the parties may terminate the agreement anytime.[210] The court noted as well that from a legal point of view such agreement is not a leasing agreement, but a simple (i.e., traditional) lease agreement or perhaps another type of nominated contract[211] yet with specific clauses.[212] Thus, courts have to apply the Law on Obligations – i.e., the provisions related to that nominated kind of contract, the features of which are closest to those of the direct leasing contract before the court – whenever they have concluded that the agreement under scrutiny is a direct leasing.[213] The same issue is regulated by the new LFL that provides that a financial leasing agreement can be concluded for a minimal duration of two years.[214]

5.3. The Prudential Regulation of Financial Leasing Companies

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[210] The above paraphrased part of the decision in Serbian language reads as follows: "*Za razliku od finansijskog lizinga postoji i direktni (nepravi, kvazi) lizing. Ovo je takav lizing kod kog se javljaju samo dve strane u lizing konstrukciji i lizing ugovoru: davalac lizinga koji je istovremeno i prodavac (isporučilac) i korisnik lizinga. Prodavac (isporučilac) i nakon zaključenja ugovora o lizingu ostaje vlasnik stvari koja je predmet korišćenja iz ugovora o lizingu, budući da je on istovremeno i davalac lizinga. ... Karakteristika ovog lizinga je i nepostojanje tvz. bazičnog roka unutar kojeg se ne može otkazati ugovor, te obe stranke, pod uslovima predviđenim ugovorom, mogu otkazati ugovor i to u svakom trenutku.*"

[211] In the Serbian legal system most of the commercial contracts are regulated by the Law on Obligations ("*Zakon o obligacionim odnosima*"). However, this act has a non-closed list of nominated contracts and thus novel or hybrid kinds of contracts can and indeed do arise and are used in commercial life; they may be regulated by separate laws (e.g., the new Law on Mortgage, pulished in the Official Herald of the Republic of Serbia no. 115/2005)

[212] The above paraphrased part of the holding in Serbian language reads as follows: "*Pravno posmatrano, ovde nije reč o ugovoru o lizingu koji ima svoja specifična pravila, već je u osnovi reč o ugovoru o zakupu ili nekom drugom imenovanom ugovoru, sa određenim specifičnim klauzulama.*"

[213] The above paraphrased part of the holding in Serbian language reads as follows: "*[Z]avisno od prirode konkretnog ugovora, ukoliko nije u pitanju finansijski lizing, primenjuju se odredbe Zakona o obligacionim odnosima.*"

[214] Art. 3 of the LFL.

As financial leasing is a financial service, leasing companies have been subjected to a number of prudential rules to protect not just the customers of such companies but also the stability of the financial system. Thus, the law mandates that the lessor (in financial leasing transactions) may only be a commercial entity ("*privredno društvo*");[215] moreover, the cash part of its registered capital may not be less than EUR 100,000 and the lessor must be in the possession of a duly obtained license from the NBS[216] for carrying out financial leasing operations.[217] What is more, the lessor has to obtain consent of the NBS for appointment of its management organs, as well as of other persons with special authorizations and responsibilities (*e.g., procurists*).

An important issue regulated by the law is ownership of the subject matter of the leasing. As a general rule, the LFL provides that the ownership of the subject matter of leasing does not pass the lessee with the expiry of the term for which the leasing agreement was concluded. However, the parties may foresee in the leasing agreement the right of the lessee to buy the object of the leasing following the expiry of the term stipulated in the agreement.[218] The Supreme Court of Serbia faced this issue already in 2003[219] in a case involving a defendant-lessee who had leased five semi-trailers from the plaintiff-lessor for the period of five years. The agreement of the parties provided that the defendant had the right to purchase the object of leasing at a reasonable price following the expiry of the five-year term, provided he informed the plaintiff about this intention in writing 30 days before the expiry of the leasing agreement. Yet the

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[215] Art. 2 of the new Company Law ("*Zakon o privrednim društvima*"), published in the Official Herald of the Republic of Serbia no. 125/2004, enumerates the forms of commercial entities: *to wit*, general partnership ("*ortačko društvo*"), limited partnership ("*komanditno društvo*"), limited liability company ("*društvo s ograničenom odgovornošću*") and joint-stock corporation ("*akcionarsko društvo*"). These entities have legal personality in the Serbian legal system.
The original text of art. 2 reads as follows: *"(1) Privredno društvo je pravno lice koje osnivaju osnivačkim aktom pravna i/ili fizička lica radi obavljanja delatnosti u cilju sticanja dobiti. (2) Pravne forme privrednih društava u smislu ovog zakona su ortačko društvo, komanditno društvo, društvo s ograničenom odgovornošću i akcionarsko društvo (otvoreno i zatvoreno)."*

[216] NBS is obliged by the law to decide on the request for granting a license to carry out f financial leasing operations within 30 days of its filing. Its decision is final and may be challenged only in administrative procedure ("*upravni spor*") before the Supreme Court of Serbia. *See id.* art. 13a-13v of the LFL.

[217] Moreover, lessor may not engage in any other type of business operations except financial leasing operations. *See id.* art. 10 of the LFL.

[218] *See* art. 42(1-2) of the LFL.

[219] Decision of the Supreme Court of Serbia, Prev. 110/03 of 2 April 2003.

defendant failed to fulfill this condition. The court ruled that as a result of the debtor's failure the leasing agreement did not transform to a sales contract after the expiry of the five years term, rather the plaintiff remained the owner of the objects of leasing and the defendant was obliged to return them to the plaintiff.[220]

The LFL also contains provisions for the case of bankruptcy of the lessee. In such cases, lessor is entitled to seek separation ("*pravo na izdavanje*"), *i.e.*, the bankruptcy trustee must hand over to him the object of leasing even prior to the conclusion of the bankruptcy proceedings and before distribution to creditors ("*izlučno pravo*") in accordance with the Law on Bankruptcy Proceedings.[221] In order to facilitate the realization of that right of

[220] The above paraphrased part of the decision in Serbian language reads as follows: „*Tuženi je stekao pravo poseda na spornim vozilima po osnovu ugovora o lizingu zaključenog sa tužiocem 25. januara 1989. godine. Tim ugovorom (odredba člana 2) tuženi je stekao samo pravo zakupa, uz obavezu da za to plaća tužiocu ugovorenu cenu zakupnine. Istina, tuženi je saglasno odredbi člana 10. ugovora imao ovlašćenje i da po isteku ugovorenog roka zakupa preuzeta vozila otkupi od tužioca po ceni od 500 nemačkih maraka po jednom vozilu. Međutim, ostvarenje tog prava uslovljeno je dostavljanjem preporučene izjave tužiocu 30 dana pre isteka ugovorenog roka zakupa. To upućuje da je tuženi mogao steći svojinu na predmetnim vozilima pod odložnim uslovom – protek ugovorenog roka zakupa i dostavljanje preporučene izjave o kupovini vozila 30 dana pre isteka zakupa. Međutim, do ostvarenja tog uslova nije došlo, jer tuženi nije u ugovorom propisanom roku izjavio da vrši otkup spornih vozila. Zato saglasno odredbi člana 74. stav 1. Zakona o obligacionim odnosima nije izvršeno pretvaranje zakupnog u kupoprodajni odnos parničnih stranaka. Iz tih razloga tužilac je po isteku ugovorenog roka zakupa ostao vlasnik spornih vozila. Sledom rečenog, a shodno odredbi člana 585. stav 1. Zakona o obligacionim odnosima tuženi je dužan da po proteku zakupa vrati tužiocu sve stvari primljene po tom osnovu.*"

[221] *See* art. 75 of the Law on Bankruptcy Proceedings. This is actually so because leasing agreements contain retention of title (hereinafter: ROT) and as per the Serbian Bankruptcy Act the beneficiary of a ROT is treated as an unrestricted owner. *See* art. 15(1) of the LFL. It is another merit of the LFL that it has tried to address and clarify the legal nature and effects of ROT in the context of financial leasing transactions, which is of importance because in the pre-LFL era courts had been virtually struggling with these issues because of the lack of explicit provisions.

To illustrate this, it is worth taking a look at one such decision from 1996. In the decision of the Higher Commercial Court in Belgrade (Pž. 6136/96 of 15 November 1996), the Court held that the opening of bankruptcy proceedings against the lessee does not affect the lessor's right of separation of the object of leasing from the bankruptcy estate as it is the lessor who has ownership on it and not the lessee. Here, the problem arose because the bankruptcy court issued and granted two separation requests; one for the benefit of the lessor and one for the benefit of a foreign company which had sold the object of leasing to the lessor. Thus, the issue was whether the ownership on the object to be separated could have been acquired based on the decision on granting separation of the bankruptcy court. In other words, the court held that in case of conflicting claims for separation of a single object (one of them based on leasing), the lessor can have priority only if it can prove that it has legally acquired ownership over the object of leasing and that there was an

the lessor, the law obliges the lessee and the bankruptcy court to inform the lessor of the initiation of bankruptcy procedure without delay.[222] In regard to the lessor's liability for defects of the subject matter of leasing, the law differentiates between liability for material (*i.e.*, physical) and liability for legal defects. Unless otherwise agreed upon, the lessor is not liable for the former (*i.e.*, this is liability of the seller),[223] but is liable for the latter.[224] On

uninterrupted chain of ownership transfers.

The paraphrased decision in Serbian language reads as follows: "*U smislu čl. 117. Zakona o prinudnom poravnanju, stečaju i likvidaciji otvaranje stečajnog postupka ne utiče na prava izdavanja stvari koja ne pripadaju dužniku – izlučna prava. Kod situacije da je stečajni sud doneo dva rešenja o izlučenju to je prvostepeni sud bio dužan da do kraja utvrdi ko je vlasnik predmetnih vozila od tužilaca, jer je očito da tuženi nije vlasnik predmetnih vozila. Tačno je da tužioci vlasništvo nisu mogli steći rešenjem o izlučenju koje je doneo stečajni sud nego na osnovu nekog ranije izvršenog pravnog posla između vlasnika strane firme i tužilaca, međutim, prvostepeni sud je propustio da utvrdi da li je vlasnik robe iz ugovora o lizingu preneo svoje vlasništvo na tužioca prvog reda, te da li postoji kontinuitet – neprekinuti niz vlasništva iz koga bi se utvrdilo da je neki od tužilaca vlasnik predmetnih vozila. Prvostepeni sud je propustio da ceni sve dokaze, naročito ugovore koji se nalaze u predmetu iz kojih proizlazi da je tuženi kao zakupodavce, odnosno vlasnike predmetnih vozila prihvatio tužioce.*" *See also supra* under heading 2.5. Decision of the Higher Commercial Court in Belgrade, Pž. 6523/04 of 25 October 2004.

[222] *Id.* art. 15 of the LFL. However, the law does not provide for any penalty or fine which would apply to the lessee failing to fulfill this obligation; nor is there any sanction for or remedy against the court disregarding this provision. Theoretically, the lessor could always seek damages from the lessee, yet it is highly questionable whether that would be of any use against a lessee in bankruptcy.The lessor can also always file a proprietary claim ("*svojinska tužba*") against any third person that would acquire the subject matter of leasing in the course of bankruptcy proceedings, but this would inevitably lead to a lengthy and costly litigation. Thus, it seems that in practice it is up to the lessor to police the operations, or at least solvency of the lessee (as mentioned this is possible through NBS website), in order to secure effective realization of the said right in case of the lessee's bankruptcy.

[223] However, if the choice of the seller was done by the lessor, he will be jointly and severally liable with the seller for non-delivery, late delivery, as well as for potential material defects of the subject matter of the leasing. *See* art. 39 of the LFL.

[224] Thus, lessor is liable to the lessee if the object of leasing is subject to some right of a third person, which excludes, diminishes or limits lessee's possession, and if the lessee was, neither informed of, nor has agreed to accept the object of leasing burdened with such a right. This liability of the lessor may not be contractually limited or waived. If the object of leasing is taken from the lessee due to the existence of some right of a third person, the lease agreement is deemed terminated and the lessee is entitled to damages. If, however, existence of a third person's right does not result in dispossession of the lessee, but merely in limitation of his rights, he may either choose to terminate the agreement or to seek adequate mitigation of the leasing fee. Naturally, in any case he may claim damages. *See* arts. 16-21 of the LFL.

the other hand, the lessor is generally not liable for damage caused by the object of leasing. An exception to this is when (i) lessee sustains damage due to reliance on lessor's expertise, and (ii) lessor participated in the choice of the seller or in specifications of the subject matter of the leasing.[225] Finally, it is noteworthy that the lessor may dispose with the ownership over the subject matter of the leasing and transfer it to a third party. In this case, the acquirer becomes the new lessor and the rights and obligations from the leasing agreement are transferred to him.[226]

The lessee is obliged to use the object of leasing with the standard of a diligent businessperson in accordance with its purpose and the leasing agreement. He is liable for damage caused through use of the subject matter of leasing contrary to its purpose and the leasing agreement, even when this was done by a third person authorized by the lessee.[227] Moreover, the lessee has the duty to maintain the subject matter of leasing in a proper state, to make the needed repairs thereon, as well as to insure it during the duration of the leasing in accordance with the terms of leasing agreement.[228] Importantly, the risk of accidental destruction or damage of the subject matter of leasing is on the lessee from the moment of taking its possession.[229] The lessee is also obliged to pay the leasing fee. Breach of this obligation may serve as a ground to the lessor for termination of the leasing agreement, in accordance with the provisions of the law and the leasing agreement.[230] In one case, the Higher

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[225] This type of lessor's liability is of non-mandatory nature. Thus, parties are free to agree otherwise in regard to the scope of lessor's liability for damage caused by the object of leasing. *See* art. 17 of the LFL.

[226] However, the acquirer may not request the lessee to hand over the object of leasing prior to the expiration of the agreed upon period of leasing. On the other hand, the lessor's right to dispose of the object of leasing may be contractually limited (*e.g.*, with lessee's consent) or waived. *See* art. 22 of the LFL.

[227] *See* art. 25 of the LFL.

[228] *Id.* arts. 26 and 34.

[229] *Id.* art. 32.

[230] Thus, the law provides that lessor may terminate the leasing agreement if the lessee delays payment of the first leasing installment. Thereafter, conditions for termination of the agreement are more stringent and the lessor may terminate the agreement only if the amount of late payments reaches one quarter of the total leasing fee to be paid by the lessee. Exceptionally, lessor may terminate the leasing agreement if the lessee delays payment of one installment, if it is obvious from the surrounding circumstances that future installments will not be fulfilled. In any case lessor must leave to the lessee adequate period of time to fulfill his obligation. Following the expiry of such period the agreement is deemed terminated by the law. Alternatively, the lessee may preserve the agreement if he provides adequate means of security. Unfortunately, the law does not say what is the

Commercial Court in Belgrade decided that the lessor has the right to terminate the leasing agreement when the lessee defaults with the payment of due installments.[231] In this particular case, the defendant (lessee) leased a machine from the plaintiff (lessor), however, it defaulted with the payment of a single installment. Moreover, the leasing agreement explicitly provided for the right of the lessor to terminate the agreement if the lessee defaulted with the payment of an installment. The Court held that the plaintiff has the right to terminate the leasing agreement under the circumstances.[232] Unfortunately, in the reproduced text of the decision there is nothing about whether notice was required prior to termination or whether the contract could have been terminated because of a default with a single installment; however, these are issues that are left to be agreed upon by the parties and thus could have proved to be valuable empirical evidence.

The LFL provides for a special procedure of repossession of the subject matter of leasing, essentially allowing the lessor to skip the entire litigation phase. The basis for this expedient procedure is a judicial settlement ("*sudsko poravnanje*") that may be concluded between the lessor and lessee authorizing the lessor to repossess in case of non-payment of the leasing fee by the lessee. This settlement is concluded before a court, which has to include it into the records of the special court hearing scheduled at the request of the parties, usually at the time of execution of the leasing agreement. Once the settlement is concluded, the lessor may seek repossession of the subject matter of leasing in court whenever the lessee defaults on payment of the leasing fee. The request for repossession is filed with the competent court and must be accompanied by the duly signed judicial settlement.[233] The law mandates that the court must decide on the request within three days and that the repossession of the subject matter of leasing must be carried out within the next three days following the rendering of the court decision.[234] The lessee may object the decision on repossession stating that he has paid the disputed

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adequate mean of security and whether lessor's consent is required in that regard. *See id.*, art. 28.

[231] Decision of the Higher Commercial Court in Belgrade, Pž. 59/05 of 13 January 2005.

[232] The above paraphrased holding in Serbian language reads as follows: *"[T]uženi [je] preuzeo od tužioca u zakup – lizing mašinu koji je predmet ovog ugovora, da tuženi nije isplatio tužiocu dospele rate, a da je po ugovoru predviđena mogućnost raskida ugovora u slučaju neisplate lizing naknade, to je prvostepeni sud pravilno zaključio da tužilac ima pravo na raskid spornog ugovora."*

[233] *See* art. 30(1-4) of the LFL.

[234] *Id.* art. 30(5-6).

leasing fees, but the objection does not have suspensive effect, *i.e.*, does not postpone enforcement of the decision on repossession.[235]

Finally, it should be noted that based on the LFL, a Register of Financial Leasing ("*Registar finansijskog lizinga*") was erected a few years ago in Serbia, as a uniform electronic database which records information on matters such as concluded financial leasing agreements, objects of leasing agreements, disputes concerning financial leasing agreements, and termination of leasing agreements. The register is public and available online at the website of the Business Registers Agency.[236] The law provides that it is presumed that third parties are made aware of the existence of registered leasing agreements and related data and they may not claim that they were unaware of the information recorded therein.[237]

Although Serbia started on the path of market economy with a decade of lag, it has done everything to catch up with the rest of the CEE countries in the domain of commerce and finance. As a result, it now also has a booming leasing market (especially passenger cars) and a modern leasing law; however, the problems, dilemmas and idiosyncratic solutions will appear only in the years to come. The real test of the leasing laws thus awaits those days.

6. Bills of Exchange and Promissory Notes

6.1. Overview

In Serbian law, bills of exchange and promissory notes are regulated by the Law on Drafts ("*Zakon o menici*"), related to which a terminology caveat should be made immediately.[238] In Serbian law the term "draft" ("*menica*") is used as a generic expression that includes both bills of exchange ("*trasirane menice*") and promissory notes ("*sopstvene menice*"), and therefore the term 'draft' will be used throughout this chapter to include both. It is also of relevance that at the international level Serbia is signatory to the Convention on Uniform Law on Bills of Exchange and Promissory Notes, concluded within the auspices of the League of Nations on 7 June 1930.[239] Accordingly,

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[235] *Id.* art. 30(7-8).

[236] Available at < http://www.apr.sr.gov.yu >. The website's address changed to < http://www.apr.gov.rs >; last visited on 7 January 2009.

[237] *See* art. 48 of the LFL.

[238] Official Gazette of FPRY no. 104/46, Official Gazette of SFRY nos. 16/65, 54/70, 57/89, Official Gazette of FRY no. 46/96, and Official Gazette of SCG no. 1/2003.

[239] However, Serbia has not signed the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes adopted in 1988. *See* website of the United Nations Commission on International Trade Law ("UNCITRAL") at < http://www.

the provisions of the Serbian Law on Drafts (hereinafter: "LD") are harmonized with the provisions of the said Convention. The issue to be explored here is whether and to what extent drafts-related business practices have changed in the meantime (especially in the post-1990 period) and how courts have handled the thus arising challenges. That there is some discrepancy between the law – largely based on standards and perceptions from the 1930s – and novel business practices, and that some dilemmas have consequently arisen, is best visible from the fact that court cases on very basic, drafts-related issues, have been passed in Serbia in the last few years. As drafts per se represent specific kinds of contracts, the enforceability of connected claims and the courts' reaction to those issues is – exactly because of that – of relevance to this book concerned with enforcement of contracts in the transitory (to some: post-transitory) systems of CEE.

That the previous contention does have legitimacy may be best seen from the position of one of the highest Serbian commercial courts on the very first issue: the legal nature of drafts. This issue, as well as the courts' understanding of drafts, may be best perceived from a legal standing adopted at the session of the Department for Commercial Disputes ("*Odeljenje za trgovinske sporove*") of the Serbian Higher Commercial Court held on 10 December 2004.[240] The position will be cited in greater length than the other court cases referred to in this paper because it is very instructive and thus useful for our purposes in that it demonstrates that activist courts do exist in Serbia as well. Moreover, courts do realize that modern commerce requires less formalism and more flexibility even in such highly formalism-based field of law as drafts. In its relevant parts the opinion reads as follows:[241]

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uncitral.org/uncitral/en/uncitral_texts/payments/1988Convention_bills_status.html >; last visited on 7 January 2009.

[240] Legal standing adopted at the session of the Department for Commercial Litigation of the Higher Commercial Court held on 10 December 2004.

[241] *Id.* The above quoted text in Serbian language reads as follows:
„Menica je hartija od vrednosti. Ona je naredba jednog lica izdata drugom licu da iz njegovog pokrića isplati određenu sumu novca ili obećanje jednog lica da će isplatiti određenu sumu novca. Prva je trasirana, vučena menica, a druga je sopstvena, solo menica.
Menica je strogo formalna hartija od vrednosti, jer menično pismeno mora da sadrži zakonom propisane elemente osim preipostavljenih. Nedostatak bitnog elementa čini je nevažećom. Izuzetak je blanko menica. Blanko menica sadrži samo minimum bitnih elemenata sa ovlašćenjem kasnijem imaocu menice da popuni ostale bitne elemente saglasno sporazumu sa izdavaocem.
Prema odredbama Zakona o menici i čeku bitni menični elementi kod trasirane menice su:
- označenje da je menica, napisano u samom slogu isprave na jeziku na kome je ona

sastavljena;
- bezuslovni uput da se plati određena svota novca;
- ime onoga koji treba da plati (trasat);
- označenje dospelosti;
- mesto gde plaćanje treba da se izvrši;
- ime onoga kome se ili po čijoj naredbi mora platiti (remitent);
- označenje dana i mesta izdavanja menice;
- potpis onoga koji je izdao menicu (trasant).
Kod sopstvene menice bitni elementi su:
- označenje da je menica, napisano u samom slogu isprave na jeziku na kome je ona sastavljena;
- bezuslovno obećanje da će se određena svota platiti;
- označenje dospelosti;
- mesto gde plaćanje treba da se izvrši;
- ime onoga kome ili po čijoj se naredbi mora platiti;
- označenje dana i mesta gde je menica izdata;
- potpis onoga koji menicu izdaje;
- rok dospelosti;
- mesto izdavanja;
- mesto plaćanja.
Ako u menici nije označen rok dospelosti menica je punovažna i smatra se da dospeva po viđenju. Ako nije označeno mesto plaćanja, menica je punovažna i kao mesto plaćanja smatra se mesto koje je označeno pored trasatovog potpisa. Ako nije naznačeno mesto izdavanja menice, ona je punovažna i smatra da je mesto izdavanja mesto koje je označeno pored trasantovog potpisa.
Blanko menica je menica koja u momentu izdavanja voljom samog izdavaoca, ne sadrži sve bitne menične elemente, a predata je meničnom poveriocu sa ovlašćenjem da je kasnije popuni saglasno sporazumu sa izdavaocem. Specifični prigovori za ovu menicu su: odsustvo volje za stvaranje menične obaveze, popuna blanko menice suprotno sporazumu sa izdvaocem, a u nedostatku ovog sporazuma saglasno uslovima i rokovima iz osnovnog posla, prigovor ništavosti osnovnog posla po osnovu kog je izdata blanko menica, prigovor da je menica data na ime kaucije, depozita ili garancije i prigovor preinačenja i falsifikovanja blanko menice. Ovi prigovori se ističu samo prema licu kome je blanko menica predata od strane izdavaoca i prema trećem nesavesnom licu na koga je menica preneta.

...

Odlukom o jedinstvenom meničnom blanketu objavljenom u "Sl. listu SRJ", br. 29/94 predviđeno je da se menični blanket sastoji od meničnog i poreskog dela. U poreskom delu štampan je iznos po kome se blanket prodaje korisniku. To znači da se porez plaća prilikom kupovine blanketa. U meničnom delu štampani su neki bitni elementi menice, s tim što su ostavljena mesta za popunjavanje ostalih bitnih elemenata.
Jedinstvenim meničnim blanketom smanjuje se mogućnost ništavosti menice usled propuštanja označavanja bitnih meničnih elemenata prilikom izdavanja menice i na taj način se omogućava i izdavanje blanko menice.

...

Stav Narodne banke Jugoslavije je da punovažnost menice zavisi od plaćenog poreza.

"Draft is a security. It is an order of one person to another to pay out of his funds a certain sum of money or a promise of one person to pay a certain sum of money. The former is a bill of exchange, and the latter is a promissory note.

Draft is a strictly formal security, since it has to contain elements prescribed by the law, except for the presumed ones. Lack of any of the essential elements shall render a draft null and void. The exception is a blank draft ("blanko menica"). A blank draft contains only minimum of the essential elements with the authorization given to the [subsequent] holder of the draft to fill in the remaining essential elements, in accordance with the agreement with the issuer of the draft.

...

Na sednici Odeljenja za privredne sporove Višeg privrednog suda održanoj 18.11.1998. godine zauzet je pravni stav da se blanko menica može popuniti po osnovu ovlašćenja na iznos duga koji nije veći od limitiranog na blanketu menice. To je limit označen na poreskom delu blanketa. Na ovaj način punovažnost menice je uslovljena plaćanjem poreza.
Međutim, Zakon o menici i čeku ne sadrži odredbu iz koje bi proizlazilo da pravna valjanost menice zavisi od plaćanja poreza. Da bi se menično pismeno smatralo menicom, mora da sadrži sve bitne elemente propisane zakonom osim pretpostavljenih. Menica može biti napisana i na običnoj hartiji.

...

U presudi Saveznog suda Jugoslavije Gprs. 41/89 od 12.4.1990. godine zauzet je stav da menica kao strogo formalni papir mora sadržavati propisane bitne sastojke. Po Zakonu o menici, valjanost menice nije uslovljena ispisivanjem na određenom materijalu niti nekim posebnim načinom formulisanja teksta. Menični blanketi, formulari, služe da se reduciraju slučajevi ništavosti menice zbog propusta da se naznače svi bitni menični elementi. ... Savezni sud je stanovišta da se upotrebom meničnih blanketa pruža olakšica u prometu, jer se kupovinom određenog meničnog blanketa automatski uplaćuje i porez na promet menice, obzirom da je sadržan u kupovnoj ceni blanketa. Međutim, valjanost menice ne može zavisiti od toga da li je propisani porez plaćen. Upotreba određenog meničnog blanketa nije uslov valjanosti menice.

...

Menice su kod nas najčešće korišćene kao sredstvo obezbeđenja izvršenja ugovora i to uglavnom ugovora o kreditu.

...

Iz svih rečenih razloga smatram da je potrebno izmeniti dosadašnji stav sudske prakse ovog suda da se blanko menica ne može popuniti po osnovu ovlašćenja na iznos duga koji nije veći od limitiranog na blanketu menice u poreskom delu. Na ovaj način bi se postigla efikasnost uloge menice u savremenom pravnom prometu u kojem ona dobija sve veći značaj.
Predlažem da novi stav ovako glasi:
Pravna valjanost menice, pa i blanko menice ne zavisi od iznosa označenog na jedinstvenom meničnom blanketu u poreskom delu."

According to the provisions of the Law on Drafts, the essential elements of a bill of exchange are:

- the term "draft" inserted into the body of the instrument and expressed in the language employed in drawing up the instrument,[242]

- an unconditional order to pay a determinate sum of money,

- the name of the person who is to pay (payor),

- a statement of the time when payment is to be made,

- a statement of the place where payment is to be made,

- the name of the person to whom or to whose order payment is to be made,

- a statement of the date and of the place where the bill is issued, and

- the signature of the person who issues the bill (drawer).

In the case of a promissory note the essential elements are:

- the term "draft" inserted into the body of the instrument and expressed in the language employed in drawing up the instrument,

- an unconditional promise to pay a determinate sum of money,

- a statement of the time when the payment is to be made,

- a statement of the place where payment is to be made,

- the name of the person to whom or to whose order payment is to be made,

- a statement of the date and of the place where the bill is issued, and

- the signature of the person who issues the bill (maker).

If a draft does not specify the time of payment, it shall nonetheless be valid and it shall be deemed to mature at sight. If the place of payment is not specified, a draft shall also be valid and payable in the place stated beside the drawee's signature. If the place of issuance is not specified, a draft shall be valid and deemed to be issued in the place stated beside the drawer's signature.

A blank draft is a draft which in the moment of issuance, by the will of the issuer does not contain all essential elements, and is handed over to the creditor with the authorization to fill it in according to the agreement with the issuer. Specific objections [that may be raised by the issuer] for this kind of draft are absence of the will to establish the draft obligation, filling of the blank draft contrary to the agreement with the issuer or terms and conditions of the underlying transaction, nullity of the underlying transaction on the basis of which the draft was issued, objection that the draft was issued as

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[242] As explained hereinbelow, Serbian courts have interpreted this provision in such a way that this does not mean that a draft can solely be made on a pre-printed document (*i.e.*, form), but any writing containing the prescribed elements may suffice.

deposit or guarantee, and objections of alteration or forging of the instrument.[243]

[...]

[243] In Serbian law and judicial practice it is presumed that a draft document truly represents the genuine will of the issuer of a draft. Accordingly, when a blank draft is handed over to the creditor, there is a legal presumption that the holder of the draft is authorized to fill in all the remaining essential elements of the draft. To prevent collection on such a draft, the issuer thereof must prove *mala fides* (bad faith) of the draft holder, *i.e.*, those elements of the draft inserted by the holder do not correspond to the true will of its issuer.

In one case the Higher Commercial Court was faced with a dispute involving realization of blank promissory notes which were allegedly inadequately filled out by their holder. On this ground the issuer of the promissory notes sought a court decision prohibiting collection on the disputed promissory notes. The court held that it is presumed that the will of the issuer of a draft is adequately stated in the draft document when it is submitted to the organ for compulsory collection and that the burden of proving the contrary is on the draft debtor and not on the draft holder. Since the draft debtor sought a court decision prohibiting realization of the promissory notes based on the allegation that he had issued blank promissory notes leaving some of the essential draft elements open and that the holder of the promissory notes had abused that fact by trying to use the notes for collection of another claim and not of the claim for whose security the notes were issued, the court held that it was on the draft-debtor to prove abuse of the draft and all the elements in order to prevent enforced collection. *See* Decision of the Higher Commercial Court, Iž. 2795/2006(2) of 20 December 2006.

The paraphrased part of the decision in Serbian language reads as follows: „*Kako se kod menice uvek pretpostavlja da je volja izdavaoca ona koja je napisana u meničnom pismenu u momentu kada se menica upotrebljava kod organa prinudne naplate, to je teret dokazivanja činjenica o tome da volja izdavaoca menice nije onakva kako u meničnom pismenu stoji uvek na meničnom dužniku, a ne na imaocu menice.*"

The same line of reasoning was also accepted in a judgment of the Higher Commercial Court of 22 March 2007, in a dispute concerning the validity of blank drafts that had been allegedly filled contrary to the true intention of their issuer. In the judgment the court stated that blank drafts are very commonly used in commercial practice. Such drafts are valid even if at the moment of their issuance they are lacking one or more of the prescribed essential elements, since it is presumed that the person who issues such a draft authorizes the good faith holder to fill in the missing elements.

On the other hand, blank drafts are subject to the legal presumption that, following their filling, they adequately represent the true intention of their issuer. However, in order to facilitate trading with blank drafts it was necessary to supply the above-mentioned legal presumption with the element of good faith, whereunder the said presumption applies only to good faith holders of blank drafts. Consequently, a blank draft filled by its holder with an essential draft element that by its content does not correspond to the true will of its issuer is null and void. *See* Judgment of the Higher Commercial Court Pž. 10873/2006 of 22 March 2007.

The paraphrased holding in Serbian language reads as follows: "*Ništava je menica u kojoj je njen imalac uneo neki od bitnih meničnih elemenata, koji po svojoj sadržini ne odgovara stvarnoj volji njenog izdavaoca.*"

The decision on uniform draft form[244] *provides that the draft blanket consists of the draft and the tax part. In the tax part of the draft blanket is imprinted the amount under which the blanket is handed over to the beneficiary. That means that the tax is paid when purchasing the blanket. In the draft part of the blanket are imprinted certain essential elements of the draft, with the space left for filling in of other essential elements.*

The uniform draft blanket reduces the possibility of nullity of a draft due to the omission of certain essential elements of a draft on its issuing, and thus facilitates issuance of blank drafts.

[...]

The position of the National Bank of Serbia is that the validity of a draft is contingent on the payment of tax.

[...]

At the session of the Department for Commercial Litigation of the Higher Commercial Court held on 18 November 1998, the legal position accepted was that a blank draft may be filled in only on the basis of an authorization up to the amount not exceeding that specified on the draft blanket. That is the limit imprinted on the tax part of the blanket. In this way, the validity of a draft was conditioned with payment of the tax.

However, the Law on Drafts does not contain any provision stating that the validity of a draft depends on payment of tax. In order for a writing to constitute a draft, it has to contain all essential elements prescribed by the law, except for the presumed ones. Thus, a draft may be written on a plain piece of paper.

[...]

[Accordingly] in the judgment of the Yugoslav Federal Court Gprs. 41/89 of 12 April 1990 the position accepted was that a draft as a strictly formal instrument must contain all prescribed essential elements. Per the Law on Drafts, the validity of a draft is not contingent upon writing on certain material or upon use of some particular wording. Draft blankets [and] forms serve only to reduce cases of drafts' nullity due to the omission of certain essential elements. [...]. The court held that use of draft blankets serves [only]

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[244] "*Odluka o jedinstvenom menično blanketu*" (Official Gazette of FRY no. 29/94, Official Herald of Serbia no. 39/04). This regulatory decision sets out the outlook and form of the pre-printed draft blanket ("*menični blanket*"), which is printed by the National Bank of Serbia. The blanket may be bought in the branch offices of the National Bank of Serbia, as well as in most of commercial banks and even in some bookshops. However, use of the blanket is not a precondition for the validity of a draft, provided that the conditions set out by the law are satisfied. *See infra* text about the judgment of the Yugoslav Federal Court, Gprs. 41/89 of 12 April 1990.

as an aid to trade, since by purchasing a certain draft blanket the purchaser automatically pays the tax which is included in the blanket's price. However, the validity of a draft may not depend on payment of tax. [Thus,] the use of draft blankets is not a condition for the validity of drafts.

[...]

Drafts are in Serbia mostly used as a means of securing the performance of contractual obligations, most often linked to credit agreements.

[...]

For the above reasons, I believe that the earlier position of [...] this Court that a blank draft may not be filled in so that the sum of the draft would exceed the amount imprinted onto the tax part of the blanket should be modified. This is the token of enhancing the more efficient exploitation of drafts in contemporary legal transactions, in the context of which the importance of drafts is increasing.

I propose the new legal position to read as follows:

Validity of a draft, including blank drafts, does not depend on the amount imprinted on the tax part of the uniform draft blanket."

This case clearly displays that modern commerce requires that a draft could be made even on a simple piece of paper; thus the courts legitimately felt that the law should be interpreted in that way – which gave a green light to the enforcement of minimally formal drafts. At the same time, this decision is also a superb proof of the increased role of court decisions in shaping the contours of law; obviously, the law on drafts became radically different after this position was publicized. As far as drafts – *as sui generis* transactions – are concerned, it is obvious that the rights based on drafts can easily and swiftly be enforced in Serbia and perhaps they represent that particular type of rights the enforcement of which faces the fewest obstacles in real life.

6.2. The Principle of Strict Formality

The principle of strict formality means that in dealing with drafts deadlines and draft actions must be strictly observed or carried out in order to preserve draft-related rights. Thus, a draft-creditor is obliged to present the draft for payment within the time of payment, and in the case of non-payment to lodge a protest against the draft. If these requirements are not observed, the draft becomes inoperative towards recourse debtors.[245] In one of its decisions the Serbian Supreme Court proclaimed exactly this, obviously to stress the

[245] Recourse debtors ("*regresni dužnici*") are endorsers, drawers and other parties liable for payment but the issuer. *See* art. 42 Law on Drafts.

importance of this venerable principle of draft law.[246] In that case, plaintiff and defendant had concluded a credit agreement, on the basis of which the plaintiff extended a credit to the defendant who, in turn, endorsed four drafts to the plaintiff as security. However, upon their maturity the drafts were not paid and the plaintiff failed to protest them in time. On the basis of these facts the court held that the plaintiff had no right to seek payment of the drafts from the defendant. The defendant was a recourse debtor (*"regresni dužnik"*) since he had endorsed drafts to the plaintiff, and therefore he could have been held liable to the holder of drafts solely if the conditions for liability of recourse debtors had existed. However, the plaintiff, as the draft-creditor – by failing to protest the drafts in time – lost the draft-related rights towards the defendant.[247]

6.3. The Principle of Incorporation

In its procedural sense, the principle of incorporation means that undertaking of any draft-related action presumes the existence and the presentation of the draft document (*i.e.*, writing incorporating the draft). In the practice of Serbian courts this principle has been likewise rather strictly applied, thus leading to the result that plaintiffs who were not in the possession of the draft document were prevented from successfully exercising their draft-related rights, including filing of the draft action.

This position was also expressed in one decision of the Serbian Supreme Court concerning a dispute relating to the realization of sixteen bills of exchange.[248] Following the creditor's presentation of the drafts to the Service for Payment Operations (*"Služba za platni promet"*) for collection, they were seized by the police officials on the basis of the interim measure ordered by the Commercial Court of *Novi Sad*. However, thereafter the disputed bills of exchanges – although held by the police – disappeared and the creditor had no other choice but to lodge a claim with a court to recover on the basis of photocopies of the bills. Lower courts held that such claims were

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[246] Decision of the Supreme Court of the Republic of Serbia, Prev. 403/96 of 17 September 1996.

[247] *Id.* The above paraphrased holding in Serbian language reads as follows: *"Tuženi je regresni menični dužnik jer je on indosirao menicu na tužioca, pa za njegovu odgovornost moraju postojati uslovi pod kojima imalac menice može potraživati obavezu od regresnih menničnih dužnika. Propuštanjem da u roku dospelosti izvrši protest menice tužilac je kao menični poverilac to pravo izgubio prema tuženom."*

[248] Judgment of the Supreme Court of Serbia, Prev. broj. 451/98 and Pzz. 33/98 of 13 January 1999.

well-founded, finding that the plaintiff's *locus standi* was based on the fact that the originals of the bills were presented to the Service for Payment Operations, that the plaintiff had established himself as the lawful holder of the bills, that he had neither lost or destroyed the bills, nor were they stolen from him, and that he could not present the originals since they were lost after their seizure by the police. Hence, the lower courts held that in such a case presentation of the photocopies of the bills of exchange was sufficient for realization of the draft-related rights. The Supreme Court, however, was of the opinion that the lower courts had wrongfully applied the pertaining substantive law.

The court stated that one of the basic principles of the Law on Drafts is the principle of incorporation, which contains two important elements. *First*, it means that draft-related statements made outside of the draft document have no legal effect. *Secondly*, the holder of a draft may not exercise his draft-related rights without the presentation of the draft document to the draft debtor.[249] Accordingly, the court stressed that the existence of a draft cannot be proven by any other means but by the draft document itself. Each draft-related action presupposes the existence and the presentation of the draft document. Since the recourse claim constitutes a draft-related action, it presupposes the existence of the draft document as well. Therefore, – as the court concluded – since the plaintiff did not possess the draft documents he could not exercise his drafts-related rights either, i.e., he could not successfully file the drafts-related claim.[250] Thus, filing of the draft claim on

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[249] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: *„Jedno od osnovnih načela na kojima se zasniva menično pravo je načelo inkorporacije. Ono je i osnov našeg meničnog prava. Sam naziv ovog načela objašnjava da ova osobenost sadrži u sebi dva značajna momenta. Jedan koji ukazuje da menično-pravne izjave date van meničnog-pravnog pismena ne proizvode pravni učinak i drugo, da menični poverilac – zakoniti imalac menice ne može ostvariti prava iz menice ako istu ne podnese dužniku."*

[250] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: *"Polazeći od ovog meničnog načela iz citiranih odredaba Zakona o menici mora se zaključiti da načelo inkorporacije da se postojanje pravnog osnova i njegovo dokazivanje zasnivaju i da se pravni posao menice ne može dokazivati drugim pravnim sredstvima do samim meničnim pismenom, važi u svakoj fazi realizacije meničnih prava. Svaka menična radnja podrazumeva postojanje i prezentaciju meničnog pismena. Podneta tužba, u ovom slučaju regresna, predstavlja menično-pravnu radnju, a postupanje po njoj moguće je samo u slučaju meničnog pismena. Iz činjenice da tužilac ne poseduje meničnu ispravu proizilazi da on ne može sa uspehom ostvariti prava iz menično-pravnog posla, odnosno ne može sa uspehom podnositi meničnu tužbu. Podnošenje menične tužbe na osnovu fotokopija menice u direktnoj je suprotnosti sa navedenim meničnim načelom (i.e., načelom inkorporacije) kako se osnovano i u reviziji tuženog i u zahtevu za zaštitu*

the basis of the photocopies of the bills of exchange was characterized as being directly contrary to the principle of incorporation.[251] *Finally*, the court explained that the plaintiff ought to have initiated proceedings for substitution of the lost bills of exchanges, wherein he would have obtained a court decision that would have served that purpose. However, since he had failed to initiate such proceedings and was not in the possession of the bills of exchange, he could not be considered the lawful holder of the bills in the sense of the Law on Drafts.[252]

The Yugoslav Federal Court in its judgment of 28 December 2000 reversed this seemingly harsh and probably unjust judgment of the Serbian Supreme Court.[253] In its judgment the court held that the principle of incorporation is not violated when, at the time of filing of the draft claim, the holder of the drafts does not possess the originals but only their photocopies, if the loss of the originals occurred due to the gross negligence of state organs.[254] In the words of the court:

"*The standing of the Supreme court that in this case the principle of incorporation, as one of the basic principles of draft law, was violated because the plaintiff did not have the possibility to enforce his rights in court without the draft document, is unfounded in the present proceedings. In the*

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zakonitosti ukazuje. Fotokopija, u ovom slučaju, može da predstavlja samo dokazno sredstvo, ali njom se ne dokazuje postojanje menično-pravnog posla."

[251] *See id.*

[252] *See id. The above paraphrased part of the decision in Serbian language reads as follows: „Dejstva načela inkorporacije zakonodavac je ublažio institutom amortizacije menice. Ovaj postupak (član 90 Zakona o menici), vodi se u slučaju nestanka menice, i to na zahtev imaoca menice ili nekog drugog lica kome "na osnovu ove menice pripada neko pravo" i javlja se kao izuzetak od načela inkorporacije. Kroz ovaj postupak štiti se menični poverilac. Istina, ovlašćenja su mu na osnovu amortizacione isprave umanjena, jer isplatu može tražiti samo od akceptanta (član 92), odnosno trasanta pod uslovima iz člana 91 stav 2 Zakona o menici. Znači, u slučaju nestanka menice, bez obzira kada je i kome je ona nestala pretpostavljeni menični poverilac svoja menična prava može ostvarivati na osnovu amortizacione isprave koju je ishodovao u vanparničnom postupku amortizacije menice u smislu člana 90 Zakona o menici. Kako je tužilac propustio da koristi prava koja mu po ovom osnovu pripadaju, kako dakle ne poseduje ni meničnu ispravu, ni odluku o amortizaciji, to se isti ne može smatrati zakonitim imaocem menice u smislu člana 15 Zakona o menici, na koju činjenicu osnovano ukazuju tuženi u reviziji i javni tužilac u zahtevu za zaštitu zakonosti. To dalje znači da tužilac nema formalnu legitimaciju u ovoj parnici."*

[253] Judgment of the Federal Court of the Federal Republic of Yugoslavia Gzs. 44/2000 of 28 December 2000.

[254] *See id.*

proceedings it was determined that the plaintiff had possession as the lawful holder of the drafts, that he had presented the originals for collection to the Service for Payment Operations, that the drafts had been accepted for payment without objection, and that receipt in that regard had been issued to the plaintiff by the Service.[255]

[...]

Since the drafts had not been taken from the plaintiff, nor had they been stolen from or lost by him, and since he had presented the originals of the drafts to the competent state service, the plaintiff could not bear the risk of their potential loss due to the obvious gross negligence of state organs after the moment of the presentation of the drafts for collection and their acceptance by the competent state service for payment operations.[256]

[...]

Accordingly, the court is obliged to provide the plaintiff with the protection of his draft-related rights. [This is especially so] since the indication of receipt supplied by the Service for Payment Operations on the face of the presented drafts beyond any doubt evidences that the plaintiff had been in the possession of the drafts and that he had initiated, in accordance with the principle of incorporation, a collection procedure, i.e., a procedure for realization of his draft-related rights on the basis of the draft document."[257]

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[255] *See id.* The above quoted text in Serbian language reads as follows: *„Stanovište revizijskog suda da je u konkretnom slučaju povređeno načelo inkorporacije, kao osnovno načelo menično prava, jer tužilac nema mogućnost da bez menično pismena sudskim putem ostvari svoje pravo, nema uporišta u utvrđenom činjeničnom stanju u sprovedenom postupku. Ovo sa razloga što je u postupku nesumnjivo utvrđeno da je tužilac kao zakoniti imalac predmetnih menica bio u posedu menica, da je originale menica prezentirao na naplatu po njihovom dospeću nadležnoj Službi za platni promet, da su menice primljene bez prigovora na naplatu o čemu je tužiocu izdata uredna potvrda od strane Službe za platni promet."*

[256] *Id.* The above quoted text in Serbian language reads as follows: *„Kako menice nisu oduzete od tužioca, niti su mu ukradene ili ih je on izgubio, već je originalne menice predao nadležnoj službi, to tužilac od momenta uredne predaje menica na naplatu i prihvatanja tih menica od strane ovlašćenog lica nadležne Službe za platni promet ne može snositi rizik eventualnog daljeg nastanka menica usled, u ovom slučaju, očigledne krajnje nemarnosti državnih organa."*

[257] *Id.* The above quoted text of the decision in Serbian language reads as follows: *„Prema tome, sud je dužan da tužiocu u konkretnom slučaju pruži zaštitu njegovog meničnog prava, jer potvrda Službe za platni promet o predatim originalima menica na nesumnjiv način dokazuje da je tužilac bio u posedu menica i da je prema načelu inkorporacije i pokrenuo postupak naplate menica, odnosno realizacije svog meničnog prava na osnovu meničnog pismena."*

This case is a good illustration of the needed flexibility of Serbian courts, as well as the increased importance of courts.

6.4. Exceptions to Strict Formality Rules in Enforcement of Drafts

6.4.1. Realization of Non-Protested Drafts

Although in Serbia drafts are treated as strictly formal instruments, both practice of Serbian courts and texts of relevant laws tend to relieve realization (*i.e.*, enforcement) of drafts of unnecessary burdening formalities. Thus, protesting of a draft is not a pre-condition for realization of draft-related rights toward the main draft debtor and his guarantor by aval (hereinafter: "avaliser").[258] The protest of a draft is needed only for preservation of recourse rights, *i.e.*, for filing of the draft claim against recourse debtors.[259] In other words, protest of a draft is not prerequisite for realization of a draft against the main draft debtor and avaliser. However, it is possible that court

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[258] In England terms *"aval"* and *"avaliser"* are used to designate a person who backs up the bill of exchange. In the United States Article 3 of the Uniform Commercial Code, which regulates negotiable instruments, a party signing a negotiable instrument as surety is named as 'accommodation party' (*s.* 3-419).
In Serbian law, payment of a draft may be secured by aval for the entire draft amount or a part thereof. Thus, aval represents a type of draft surety, whereby the guarantor by aval (i.e., avaliser) guarantees to the draft creditor that he will pay the draft if the drawer, or other potential draft debtors, does not pay the draft upon its maturity. The avaliser's liability is equal to that of the person for whom it made the guarantee by aval. *See* art. 29-31 of the Law on Drafts. Moreover, in the opinion of courts in Serbia the avaliser is also liable for the damage a draft creditor may sustain due to the delay in payment of the draft.

Thus, in one case the Supreme Court of Serbia held that the liability of the defendant as avaliser is based on article 31 of the Law on Drafts, according to which the avaliser is liable in the same manner as the person for whom it gave the aval, with his obligation being independent and valid even when the obligation guaranteed for is null and void for any reason, except for some formal ones. Accordingly, the court held that the defendant as avaliser is liable equally as the main draft debtor, his obligation is independent, and therefore he is liable for all consequences of the delay in payment of the draft amount, including the possible damage plaintiff had suffered due to the delayed payment. Decision of the Supreme Court of Serbia P.Rev. 316/96 of 10 July 1996.
The paraphrased holding in Serbian language reads as follows: "*Tuženi kao avalista odgovara kao i glavni dužnik, njegova obaveza je nezavisna, te on snosi sve posledice zbog docnje u plaćanju novčane obaveze, što znači da tužilac od tuženog kao avaliste može potraživati i štetu zbog docnje u plaćanju novčane obaveze.*"

[259] However, when a draft contains "*no protest clause*" it relinquishes its holder from the obligation to protest it in case of non-acceptance or non-payment in order to preserve the recourse rights towards the recourse debtors. *See* below under heading 5.4.2 "*No protest Clauses.*"

decisions contradict each other as they are not authoritative precedents and since there is a gap in the law on this point. Thus, higher courts should have the right – and they do – fill these gaps.

The Supreme Court was faced in one case with a dispute concerning realization of non-protested drafts toward the main draft debtor and his avaliser (*i.e.*, the defendants).[260] Upon their maturity the drafts remained uncollected since no funds were available on the accounts of the defendants. Thereafter, however, the draft-creditor (plaintiff) failed to protest the drafts. After some time, when sufficient funds became available on the accounts of the main debtor and the avaliser, the draft-creditor lodged a draft claim against them seeking realization of the drafts. The defendants, however, objected that the plaintiff's claim was precluded since the drafts had not been protested. Lower courts rejected the argument of the defendants and ordered them to pay on the drafts; their position was upheld by the Serbian Supreme Court, which reasoned that the protesting of a draft is not a pre-condition for realization of draft-related rights toward the main draft-debtor and his avaliser, since the protest of a draft is needed only for preservation of recourse rights, i.e., for filing of the draft claim against recourse debtors.[261]

6.4.2. "No protest" Clauses

When a draft contains a clause "*no protest*", "*without protest*" or another clause with similar meaning, it relinquishes its holder from the obligation to protest it in case of non-acceptance or non-payment in order to preserve the recourse rights towards the recourse debtors. Moreover, no notification in that regard is required for exercising of recourse rights.

This standing was supported in a judgment of the Higher Commercial Court of 14 March 1995.[262] The case concerned realization of ten bills of exchange containing "*no protest*" clauses. Upon the maturity of the bills, the creditor had duly presented them for payment. However, since there were no funds on the accounts of the debtors, the collection remained unsuccessful. After some time, the creditor attempted new collection against the recourse debtors, this time by lodging the drafts claim. Defendants objected that the plaintiff should not be allowed to seek payment from the recourse debtors

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[260] Decision of the Supreme Court of the Republic of Serbia, Prev. 478/96 of 23 October 1996.

[261] *See id.* The above paraphrased part of the decision in Serbian language reads as follows: "*Uslov za ostvarivanje menićnih prava prema glavnom dužniku i njegovom avalisti nije prethodno protestvovanje menice, jer se protest menice vrši samo radi očuvanja regresnih prava, odnosno radi podnošenja menične tužbe protiv regresnih dužnika.*"

[262] Judgment of the Higher Commercial Court Pž. 1252/95 of 14 March 1995.

since he had failed to protest the bills of exchange. However, the Higher Commercial Court upheld the reasoning of the lower court, stating that according to article 45 paragraph 3 of the Law on Drafts a "no protest" clause inserted by the drawer into a draft is effective towards all draft debtors, and per paragraph 1 of the same article, it relinquishes the holder of such a draft from the obligation to raise a protest due to the non-acceptance or non-payment of the draft in order to preserve the recourse rights toward the recourse debtors. Moreover, the court stated that no notification in that regard is needed for exercising of the recourse rights and lack thereof cannot lead to the loss of any draft-related rights.[263]

6.5. Signing of Drafts by Unauthorized Persons

In its Decision of 6 May 2005 the Higher Commercial Court held that a draft is null and void if it was signed on behalf of the drawer by a person who is not inscribed into the court register as a person authorized to represent the drawer.[264] The dispute concerned, *inter alia*, plaintiff's request for annulment of fourteen promissory notes in the possession of the defendant. The lower court found the promissory notes to be null and void since they were signed by a person who was not authorized for such signing and who authenticated the signatures by canceled seals of the drawer. The Higher Commercial Court upheld the view of the lower court, stating that since the information on the change of the person authorized for representation of the drawer was recorded in the Register of Companies – which is a public database – the defendant

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263 *See id.* The above paraphrased holding of the court in Serbian language reads as follows: "*Prema odredbi člana 45. stav 3. Zakona o menici, odredba „bez protesta" koju je trasant napisao dejstvuje prema svim potpisnicima menice, a prema stavu 1. istog člana imaoci takve menice oslobađa obaveze da radi očuvanja regresa podiže protest zbog neakceptiranja ili neisplate. ... Notifikacija nije važna za očuvanje regresa, pa izgleda ovaj nedostatak ne znači ni gubljenje menicnih prava kao ni pogrešno saključje podnosilac žalbe.*"

264 Decision of the Higher Commercial Court Pž. 1298/2005 of 6 May 2005. The above paraphrased part of the holding in Serbian language reads as follows: "*U pogledu žalbenih navoda o delimičnoj realizovanih menica i delimično realizovanih, pravilno je prvostepeni sud nalazo da su ove nevaljane, jer su potpisane od lica koje nije bilo ovlašćeno za potpisivanje istih i overene pečatima pečatima, a lako se podaci o promeni ovlašćenog lica bili upisani u sudski registar, nalazi da je tuženi morao biti upoznat sa činjenicom da lice koje mu predaje i potpisuje menice nije više ovlašćeno za zastupanje tužioca te je tuženi prihvatanjem menica postupio nesavesno, da tužioče zahtev za tužioca te je tuženi prihvatanjem menica postupio nesavesno, da tužioče zahtev za poništaj istih čini osnovanim. Kako su nevažeće menice punilene te pravilno nalazi prvostepeni sud da je osnovan tužioče zahtev da se vrate ove evidene isplatene po delimičnoj realizaciji nevaljanih menica.*"

could not have been unaware of the fact that the person signing and handing him over the promissory notes was no longer authorized to represent the plaintiff.[265] Therefore, by accepting the promissory notes the defendant acted without due diligence and thus the plaintiff's request for annulment of the promissory notes was declared well founded.[266]

7. Assignment of Claims

7.1. Legislative Overview

The legal framework for assignment of claims [267] ("*ustupanje potraživanja*") is provided for in articles 436-445 of the Serbian Law on Obligations.[268] According to these provisions, the assignor may by contract assign his claim to the assignee, unless (i) the law bans assignment of such a claim, (ii) the claim is associated with the assignor's personal capacities, or (iii) the claim is by its nature non-transferable. Moreover, the claim may not be assigned when assignor and the debtor agreed that a claim is non-transferable without the debtor's prior consent.[269] Together with the assigned claim accessory rights – such as priority in collection, mortgage, pledge, surety, interest, or contractual penalty – are also transferred to the assignee. However, a pledged item may be handed over to the assignee only if the pledgor consents thereto.[270] Although the debtor's consent is not required for the assignment of a claim, the assignor is obliged to notify the debtor of the assignment.[271] The debtor's fulfillment of a claim to the assignor prior to the

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[265] *Id.*

[266] *Id.* The plaintiff was also entitled to reimbursement of the funds transferred to the defendant on the basis of the annulled promissory notes.

[267] Assignment of claims most often relates to the assignment of monetary claims, but may also relate to the assignment of non-monetary claims (*e.g.*, delivery of certain movable or immovable, or carrying out of certain work).

[268] *„Zakon o obligacionim odnosima"* (*Službeni list SFRJ br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Službeni list SRJ br. 31/93 i Službeni. list SCG br. 1/2003 – Ustavna povelja*).

[269] *Id.* art. 436. *See also* OLIVER B. ANTIĆ, ILIJA BABIĆ, ĐORĐE NIKOLIĆ, SLOBODAN PAUNOV, MILAN SUBIĆ, *„GRAĐANSKO PRAVO"* [Civil Law] (Projuris and Privredni savetnik, Beograd, 2003), at 286 (hereinafter: Antić et al., Građansko pravo) and LJUBIŠA MILOŠEVIĆ, *„OBLIGACIONO PRAVO"* [Law on Obligations] (Savremena administracija, Beograd, 1982), at 276-77 (hereinafter: Milošević, Obligaciono pravo).

[270] *Id.* art. 437(1-2).

[271] The Law on Obligations does not specify the form of notification, however, legal literature says that it can be done in any form. *See* Milošević, Obligaciono pravo, at 276.

notification of assignment is valid and relinquishes the debtor from his obligation, provided that he was unaware of the assignment.[272]

When assignment is made against consideration, the assignor is liable for the existence of the assigned claim at the moment of the assignment. Such outdated solutions hardly fit modern commerce. On the other hand, the assignor is liable for the collectability of the assigned claim, interest and possible expenses, when this was agreed upon, but only up to the amount he received from the assignee. The law mandates that the parties may not contract a higher level of liability.[273]

The Law on Obligations provides for three special types of assignment. In case of *assignment for satisfaction* ("*ustupanje umesto ispunjenja*") assignor assigns his claim, or a part thereof, to his creditor as satisfaction of his debt toward the creditor. At the moment of the assignment, the assignor's obligation toward his creditor is reduced by the amount of the assigned claim.[274] With the *assignment for collection* ("*ustupanje radi naplaćivanja*"), the assignor's obligation toward his creditor (i.e., assignee) is reduced only after the assignee has collected on the assigned claim. In both cases, the assignee is obliged to hand over to the assignor all collected amounts exceeding the amount of his claim toward the assignor.[275] Finally, through the *assignment as security* ("*ustupanje radi obezbeđenja*") the assignor assigns to the assignee his claim as a security for the assignee's claim toward him. In such a case, an assignee is obliged to care for collection of the assigned (i.e., pledged) claim with the care of the diligent (business) person, and following

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[272] *Id.* art. 438.

[273] *Id.* art. 442-443.

[274] Thus, an assignment agreement whereby the parties agree that at the moment of its formation the assignor is freed from certain obligation towards the assignee is treated as assignment for satisfaction. This view was supported in a judgment of the Higher Commercial Court of 5 September 2005. The court held that the lower court had been mistaken when it found the disputed assignment agreement to be assignment for collection, whereunder the assignor's obligation toward the assignee becomes terminated only after the assignee has collected the assigned claim. Since the agreement provided in its article two that by its formation obligations of the assignor toward the assignee were extinguished, the court concluded that it actually constituted assignment for satisfaction. Accordingly, the assignor was freed from his obligation toward the assignee in the moment of the conclusion of the agreement. *Vice versa*, the assignee's claim toward the assignor was terminated in the same moment. *See* Judgment of the Higher Commercial Court Pž. 6065/2005(1) of 5 September 2005. Original wording: *„Ako je ugovorom o cesiji predviđeno da se zaključenjem istog ugovora gase obaveze ustupioca prema primaocu potraživanja radi se o cesiji umesto ispunjenja."*

[275] *Id.* art. 444 (1-3).

the collection of the assigned claim to hand over to the assignor any collected amounts that exceed the amount of the secured claim.[276] Admittedly, such legal solutions are pretty rigid and ill-suited to modern business.

Although the referred to provisions of the Law on Obligations may seem quite rigid and not always suitable for modern times, its provisions on assignment as security are supplemented by the recently enacted Law on Pledge of Movables. This law provides, *inter alia*, that a security interest may also be established on a claim – except when its transfer is (i) prohibited by the law, or (ii) when it is associated with the personal capacities of the debtor – by a written contract of the pledgor (debtor) and the pledgee (creditor) subject to recordation in the Pledge Register.[277] Moreover, the law provides that after-acquired property of the pledgor may also serve as collateral, thus opening the door for pledging of future claims. In such a case, the security interest shall be established at the moment when the pledgor acquires such a claim, or other proprietary right. The pledgee is naturally entitled to seek recordation of the security interest on "future" property in the Pledge Register.[278] Following the notification of the debtor's debtor (obligor) on pledging of a claim, the obligor may fulfill the claim only to the pledgee, unless otherwise instructed by him.[279]

In spite of the above-described and recently introduced relatively business friendly legal environment, at present time it seems that claims as instruments of financing are far from being widely accepted in Serbia. Yet, with the entrance of foreign investments, the first specialized companies have also emerged providing services in this area. Thus, for instance, a number of commercial banks, or specialized companies, engage in various factoring transactions.[280] In this respect it should be noted that factoring transactions are not expressly regulated in Serbian law at the present time. A factoring contract is therefore considered as an innominate contract ("*neimenovani ugovor*"), meaning that the rights and obligations of the parties are not

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[276] *Id.* art. 445.

[277] *See* Law on Pledge of Movables, art. 10(1-2).

[278] *Id.* art. 13.

[279] *Id.* art. 11(3).

[280] For example *see* the web page of the company '*Prvi faktor Beograd*' – also with English language pages – at < hhtp://www.prvifaktor.co.yu >; last visited on 7 January 2009. However, a number of banks offer factoring services as well, *e.g.*, Raiffeisen banka a.d. (< http://www.raiffeisenbank.co.yu >), Hypo Alpe-Adria-Bank a.d. (< http://www.hypo-alpe-adria.co.yu >), and Meridian Bank-Credit Agricole Group a.d. (< http://www.bankmeridian.com >). Each last visited on 7 January 2009.

expressly settled by any law.[281] Hence, when drafting a factoring agreement this fact should be taken into consideration and such contracts should be rather detailed, providing for clear and, to the extent possible, unambiguous rights and obligations of all parties involved. Naturally, such an agreement would have to pay due regard to all limitations of the party autonomy (i.e., freedom of contract) principle in Serbian law, *to wit,* mandatory norms, public order and good faith.

Adoption of a special law regulating factoring transactions should be welcome in Serbia and would probably increase the level of legal certainty in this area of law. Such a law should provide business actors with enough information about what they can reasonably expect in case of a dispute concerning factoring transactions; at the same time it would provide courts with precise guidelines for adjudication as well, which – in the light of the novelty of factoring in Serbia – is desperately needed.

For the time being, however, it is clear that in Serbia factoring and receivables financing are far from being widely utilized techniques for doing business and in particular, raising of money by enterprises. Why is this so is not easy to say. Presumably two factors have been of relevance here. *First*, the Serbian economy has relatively recently started to transform effectively into a modern market economy. As a result, it will probably take some time before banks, companies and other business actors will learn about, become sufficiently acquainted with, and start utilize such advanced methods of financing as factoring. *Secondly*, from the viewpoint of business actors, receivables financing presupposes a high level of the rule of law, including embeddedness of law in people and trust in the legal and economic system. As Serbia continues to economically develop and strengthen the rule of law, the level at which law will be embedded in people and at which people will trust the system can be expected to increase, and this will allow for more ready exploitation both of factoring and other advanced financing methods.

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[281] This is not to say that factoring transactions in Serbia are unregulated by the law. In the absence of specific provisions dealing with this type of transaction (*i.e.*, sale of account receivables of a firm to a factor), the above mentioned general rules regulating assignment of claims from the Law on Obligations would apply. Yet it should be noted that these rules were not drafted bearing in mind factoring-like transactions. Although they provide for a general legal framework for assignment of claims (including factoring), it should be recalled that in some factoring-specific situations the existing legal provisions may not provide for explicit solution. In this case, courts would probably have to interpret one of the existing legal norms in order to find an appropriate solution, or to infer a solution from the general principles of the Law on Obligations.

With the above in mind, the ensuing elaboration will present the judicial practice of Serbian courts relating to the assignment of claims, which should shed some light on the present understanding and application of the above described rules.

7.2. Notification of the Debtor

As mentioned earlier, assignment of a claim is not conditioned by the debtor's consent. However, it is the obligation of the assignor to notify the debtor of the assignment of a claim. In one case, the Higher Commercial Court was faced with a dispute where the plaintiff had assigned a claim to an assignee and informed the defendant (*i.e.*, debtor) about this but had nonetheless sued the debtor for the claim. In its appeal against the judgment of the first instance court – which ordered the defendant to pay the claim to the plaintiff – the defendant, *inter alia*, argued that the plaintiff did not have *locus standi* in the proceedings since it had assigned the claim and informed the defendant (*i.e.*, debtor) thereof. The Higher Commercial Court accepted this argument of the defendant and held that the debtor's consent is not required for the assignment of a claim, but the assignor is obliged to inform the debtor of the assignment.[282] The court went on to explain that through assignment of a claim and notification of a debtor, a creditor-debtor relationship is established between the assignee and the debtor. Since in the present case the plaintiff had informed the defendant of the assignment of the claim, the court reversed the judgment of the lower court and remanded the case to the lower court with instruction to determine whether the claim was validly assigned and accordingly whether the plaintiff had valid *locus standi* in those proceedings.[283]

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[282] Decision of the Higher Commercial Court Pž. 6780/2003 of 6 January 2004. The above paraphrased part of the decision in Serbian language reads as follows: "*Za prenos potraživanja nije potreban pristanak dužnika, ali je ustupilac dužan da obavesti dužnika o izvršenom ustupanju.*"

[283] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: „*Međutim, za prenos potraživanja nije potreban pristanak dužnika, ali je ustupilac dužan obavestiti dužnika o izvršenom ustupanju, saglasno članu 438 stav 1 Zakon o obligacionim odnosima (dalje: ZOO). Ustupanjem potraživanja i obaveštenjem dužnika o ustupanju uspostavlja se dužničko-poverilački odnos između prijemnika i dužnika, pa je u ovom slučaju sporno da li je tužilac aktivno legitimisan, da navedeni iznos potražuje od tuženog ukoliko je sa TD "I", L 30.4.1997. godine potpisao ugovor kojim je svoje potraživanje prema tuženom ustupio navedenom licu i ukoliko je taj ugovor još uvek na snazi. Navedenu činjenicu prvostepeni sud nije razjasnio mada u obrazloženju svoje odluke citira dopis tužioca od 28.10.1997. godine kojim je obavestio tuženog o ustupanju svog potraživanja, a ipak obavezuje tuženog da tužiocu sporni iznos isplati.*"

7.3. The Relationship of the Assignee and the Debtor

Assignment of a claim is nothing more than a change in the identity of creditors, *i.e.*, the assignee becomes a new creditor stepping into the shoes of the assignor, though the legal basis of the obligation and its subject matter remain the same. In one recent case the Supreme Court was faced with a dispute where the parties had executed an assignment agreement involving a claim without a date of maturity.[284] When the assignee initiated litigation against the debtor for the collection of the claim, the debtor raised the objection that the claim was time-barred, arguing that the running of the statute of limitation (i.e., prescription time) should be counted not from the moment of the assignment but from the moment when the creditor could have sought the payment of the claim. The lower courts rejected this argument of the defendant and ordered him to pay the debt to the plaintiff. However, the Supreme Court reversed the decisions of the lower courts on the ground of erroneous application of substantive law.[285]

The court explained that article 436 paragraph 1 of the Law on Obligations provides that an assignor may by contract assign his claim to an assignee, unless assignment of such a claim is banned by the law, the claim is associated with the assignor's personal capacities, or the claim is by its nature non-transferable. Moreover, the court invoked article 440 paragraph 1 of the Law on Obligations, which provides that the assignee has the same rights towards the debtor as his assignor in the moment of the assignment, while paragraph 2 of the same article states that debtor may raise towards the assignee objections he has directly against him, as well as those he could have raised against the assignor until he was informed of the assignment.[286] Accordingly, the court held that in the case of an assignment of a claim, the legal basis of the obligation and its subject matter remain unchanged and only the identity of creditors changes. Therefore, the assignee as a new creditor has

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[284] Decision of the Supreme Court of Serbia Pzz. 14/2003 of 25 December 2003.

[285] *Id.*

[286] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: *„Odredbom člana 436 stav 1 ZOO propisano je da poverilac može ugovorom zaključenim sa trećim preneti na ovoga svoje potraživanje, izuzev onog čiji je prenos zabranjen zakonom ili koje je vezano za ličnost poverioca, ili koje se po svojoj pravnoj prirodi protivi prenošenju na drugoga. Odredbom člana 440 stav 1 ZOO propisano je da prijemnik ima prema dužniku ista prava koja je ustupilac imao prema dužniku do ustupanja, a u stavu 2 ove zakonske odredbe propisano je da dužnik može istaći prijemniku pored prigovora koje ima prema njemu i one prigovore koje je mogao istaći ustupiocu do časa kada je saznao za ustupanje."*

the same rights toward the debtor as the assignor had prior to the assignment toward the same debtor. Otherwise, if the legal basis or the subject matter of the claim were to change, this would constitute a novation of the obligation rather than an assignment.[287] Coming back to the issue of statute of limitations (*i.e.*, prescription), the court held that it starts to run from the first day following the day when the creditor was entitled to seek satisfaction of his claim and not from the day of the assignment. Accordingly, the case was remanded to the lower court with an instruction to determine the date when the statute of limitation started to run.[288]

7.4. Form of the Assignment Agreement

Written form is not a condition of the validity of assignment agreements. Thus, an assignment agreement may be concluded without observing any special form even when the assigned claim derives from some formal agreement. This view was taken by the Supreme Court of Serbia in its judgment of 20 June 2001.[289] The dispute concerned assignment of a claim deriving from a bank guarantee, which is in Serbian law a formal agreement. Irrespective of that, the court held that the written form of such an assignment agreement is not a condition for its validity, as assignment is an informal agreement – pursuant to article 436 paragraph 1 of the Law on Obligations – concluded by the mere meeting of minds of the assignor and assignee.[290] The court went on to explain that, according to article 438 of the same law, the assignment agreement does not require consent of the debtor for its validity, unless otherwise agreed upon by the assignor and debtor.[291] Accordingly, the

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[287] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: "*Kod ugovora o cesiji dolazi samo do promene poverioca u obligaciono-pravnom odnosu, ali se pravni osnov i predmet ustupljenog potraživanja ne menja. Stoga, prijemnik, kao novi poverilac, ima prema dužniku ista prava koja je imao ustupilac kao raniji poverilac prema istom dužniku. U protivnom, promenom osnova ili predmeta potraživanja došlo bi do prenova obaveze.*"

[288] *Id.*

[289] Judgment of the Supreme Court of Serbia Prev. 166/2001 of 20 June 2001.

[290] *Id.*

[291] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: „*Pismena forma ugovora o cesiji nije uslov njegove pravne valjanosti. To je neformalan pravni posao koji saglasno odredbi člana 436 stav 1 Zakona o obligacionim odnosima (dalje: ZOO) nastaje saglasnošću volja ustupioca i prijemnika potraživanja. Ovaj ugovor je saglasno odredbi člana 438 ZOO punovažan i bez saglasnosti dužnika ustupljenog*

court concluded that the appellant's (i.e., assignor's) statement – that assignment of a claim deriving from a bank guarantee may only be made by a written assignment agreement – was wrong. The assignment agreement is an independent agreement whose validity is not conditioned by the law with fulfillment of written or other special form. Therefore, pursuant to article 67 paragraph 1 of the Law on Obligations, such an agreement may be concluded by a simple consent of the parties, even when the assigned claim derives from a formal agreement, such as a bank guarantee.[292] This kind of solution is commendable for its business friendliness and flexibility. It tends to deprive assignment of claims of unnecessary formalities unrelated with the assignment itself, as well as to protect legitimate expectations of the parties concerned.

7.5. The Scope of Assignment

In Serbian law there is a presumption that in the case of an assignment, due yet uncollected interest is assigned together with the assigned claim. However, parties may derogate from this rule and agree otherwise. This was acknowledged in the judgment of the Higher Commercial Court of 5 September 2005.[293] The case involved an assignment agreement wherein the parties had stipulated the exact amount of the assigned claim, which was equal to the amount of the principal debt. However, since the creditor (i.e., assignor) was also entitled to the accrued interest, a dispute arose as to whether the interest was to be assigned together with the principal claim. The court held that article 437 of the Law on Obligations creates a presumption that due yet uncollected interest is assigned together with the principal claim, though the parties are allowed to agree that such due yet uncollected interest is not to be assigned together with the principal claim.[294] Since in the assignment agreement the parties had stipulated the exact amount being assigned – which was equal to the amount of the principal claim – the court held that they had contracted only the assignment of the principal debt and not

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[292] *Id.* Original wording: *„Sledom rečenog, pogrešna je i revizijska tvrdnja da se ustupanje prava iz bankarske garancije može izvršiti samo putem pismenog ugovora. Jer, ugovor o ustupanju potraživanja je samostalan pravni posao za čiju se pravnu valjanost zakonom ne propisuje obaveznost pismene forme. Zato se saglasno članu 67 stav 1 ZOO takav ugovor može zaključiti prostom saglasnošću volja ugovornih strana i u slučaju kada je njegov predmet potraživanje konstituisano formalnim pravnim poslom, kao što je bankarska garancija."*

[293] Judgment of the Higher Commercial Court Pž. 6065/2005(2) of 5 September 2005.

[294] *Id.*

of the due yet uncollected interest. Therefore, by such stipulation the legal presumption from article 437 of the Law on Obligations was derogated from, given that it only applies in the absence of an agreement of the parties to the contrary.[295]

7.6. Assignment of Claims Determined in Final Court Judgments

One of the questions arising in judicial practice relating to the assignment of claims is whether it is legally possible under Serbian law to assign a claim determined in a final court judgment. It seems that the issue has been resolved, for the time being, only by the legal standing of the Higher Commercial Court adopted on 27 September 2004,[296] which in light of the non-authoritative nature of court decisions and positions is obviously insufficient and works to the detriment of predictability in law. The issue came before the Higher Commercial Court as a practical problem faced by one of the commercial courts. The Higher Commercial Court opined that assignment of claims determined in final court judgments is legally possible based on articles 436-445 of the Law on Obligations. Thus, the general principle of the law is that all claims are transferable, with the exception of those listed by the law as non-transferable.[297] The court added that the subject matter of assignment, within the limits set by the law, may be all claims, due and yet to become due, regardless of the source of their origin. Furthermore, conditional and future claims may be also assigned, provided that they are sufficiently determinate.[298]

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[295] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: *"Označenjem navedenog iznosa glavnog duga kao potraživanja koje se cesijom prenosi, stranke su zapravo izričito ugovorile ustupanje samo glavnog duga bez dospelih zateznih kamata za period docnje dužnika. Takvim ugovaranjem prenosa samo iznosa glavnog duga bez zateznih kamata isključena je i zakonska pretpostavka iz člana 437. Zakona o obligacionim odnosima, jer će ona nastati samo u slučaju da stranke nisu drugačije izričito ugovorile ugovorom o cesiji."*

[296] Legal standing of the Higher Commercial Court adopted at the session of the Department for Commercial Disputes held on 27 September 2004.

[297] *Id.*

[298] *Id.* The above paraphrased part of the decision in Serbian language reads as follows: *„Prema iznetom, predmet ustupanja mogu biti sva potraživanja, kako dospela tako i nedospela, bez obzira na izvor iz koga potiču. Predmet ustupanja mogu biti i uslovna i buduća potraživanja ukoliko su dovoljno određena i postoji izvesnost u pogledu dužnika. Predmet ustupanja mogu biti i potraživanja iz prirodnih obligacija, a u slučaju deljivih moguće je i delimično ustupanje. Ustupanje nije dozvoljeno samo kada je izričito zakonom zabranjen prenos određenog potraživanja ili ako je ono vezano za ličnost odnosno ako je po prirodi takvo da se protivi prenošenju na drugog. Činjenica da je potraživanje*

In other words, the fact that a claim has been determined in a final court judgment is not *per se* a reason for non-transferability. On the contrary, such claims fulfill all conditions for assignment, unless they fall within one of the exceptions enumerated by the law as cases where assignment is not permitted. Accordingly, the fact that a claim is determined in a final court judgment is not a reason for it to be treated as non-transferable, in the absence of exceptions anticipated by the law.[299]

8. Recognition and Enforcement of Foreign Court Decision and Foreign Arbitral Awards

8.1. Recognition and Enforcement of Foreign Court Decisions

There is not much immediate benefit for the prevailing party in a lawsuit if the debtor has no assets in the country where the court decision is delivered. In such a case, the best a creditor can do is to find out where the debtor does have assets, and try to enforce the decision in that country. Foreign court decisions[300] can be enforced in Serbia only if they are

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utvrđeno pravnosnažnom presudom nije prema iznetom razlog da isto bude isključeno prema izričitim zakonskim odredbama od mogućnosti prenosa cesijom sa poverioca na treće lice. Naprotiv, takvo potraživanje ispunjava sve uslove za dozvoljenost cesije, čak je i neizvesnost postojanja potraživanja svedena na minimum, ukoliko ne postoji neko drugo od navedenih ograničenja u pogledu pravnosnažnom presudom utvrđenog potraživanja koje bi shodno iznetom isključilo mogućnost njegovog prenošenja."

[299] *Id.* The above paraphrased holding in Serbian language reads as follows: "*Činjenica da je određeno potraživanje utvrđeno pravosnažnom presudom nije razlog za zabranu prenosa istog putem cesije na treće lice, ukoliko nema drugih zakonom predviđenih razloga.*"

[300] The LPIL states that court settlements and decisions of other organs that are equated with court decisions in the state where they were made are also considered foreign court decisions (art. 86 (3) of the LPIL). *See* also MILAN PAK, *„MEĐUNARODNO PRIVATNO PRAVO"* [Private International Law], Službeni list SRJ, Beograd, 2000, at 121 (hereinafter: Pak, Međunarodno privatno pravo); TIBOR VARADI, BERNADET BORDAŠ, GAŠO KNEŽEVIĆ, *"MEĐUNARODNO PRIVATNO PRAVO"* [Private International Law], Forum, Novi Sad, 2005, at 522-23 (hereinafter: Varadi, Bordaš, Knežević, Međunarodno privatno pravo).

This is also supported by court practice, i.e., the Higher Commercial Court has restated this in one of its decisions. The paraphrased holding in Serbian language reads as follows: *„Pod pojmom „odluke" koja je podobna za priznanje u Srbiji i Crnoj Gori, podrazumeva se odluka stranog suda i odluke drugih, nesudskih stranih organa (npr. upravnih), koje su odluke po svom statusu i dejstvima izjednačene sa sudskim, i to po pravu države kojoj pripadaju."* (Decision of the Higher Commercial Court, Pž. 4039/2004 of 15 September 2004.)

The same court decision stated that the law of the country of origin has to be taken into consideration when qualifying a decision as a court decision or decision equated with it. The paraphrased holding in Serbian language reads as follows: *„pravo zemlje porekla*

recognized by Serbian courts. The recognition is regulated by the Law on Private International Law.[301]

The party that requests the recognition and enforcement of a foreign court decision has to present the decision itself, a certificate on the legally binding (final) character of the decision and a certificate on the enforceability of the decision issued by the foreign court or official organ authorized to issue such certificate.[302]

The LPIL also enumerates obstacles for the recognition and enforcement of foreign court decisions. Such a decision cannot be recognized,

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odluke merodavno je za kvalifikaciju jedne odluke kao sudske, odnosno s njom izjednačene."

However, the same court has decided in another case that invoice (in Serbian: „*faktura*") of foreign subjects cannot be equited with court decisions. Thus, based on such invoices, as authentic documents (*see supra* 3.1.2.) enforcement procedure in Serbia cannot be initiated. The paraphrased holding in Serbian language reads as follows: „*Faktura stranog lica kao privatna isprava ne može biti osnov za pokretanje postupka izvršenja. [...] Prema stanju u spisima tužilaca – strano pravno lice tražilo je redovnom tužbom da se tuženi obaveže na plaćanje iznosa koji mu duguje po osnovu međusobnog poslovnog odnosa, prilažući ugovor i fakturu kao dokaz svog potraživanja. [...] Međutim, iako član 22 ZIP fakturu izričito predviđa kao verodostojnu ispravu, to se ne odnosi na fakturu stranog pravnog lica. Čak ni strane sudske odluke bez odgovarajuće procedure priznanja ne mogu biti osnov za izvršenje u domaćem zakonodavstvu, shodno članu 86 Zakona o rešavanju sukoba zakona sa propisima drugih zemalja. Naime, članom 86 Zakona o rešavanju sukoba zakona sa propisima drugih zemalja predviđeno je da se strana sudska odluka izjednačuje sa odlukom suda Savezne Republike Jugoslavije i proizvodi pravno dejstvo u Saveznoj Republici Jugoslaviji samo ako je prizna sud Savezne Republike Jugoslavije, pa stoga, analognom primenom navedenih propisa, ni faktura stranog lica kao privatna isprava ne može biti osnov za pokretanje postupka izvršenja na osnovu verodostojne isprave.*" (Decision of the Higher Commercial Court, Pž. 1041/2003 of 26 February 2003.)

[301] „*Zakon o rešavanju sukoba zakona sa propisima drugih zemalja*" [Act on the Resolution of Conflicts with Laws of Other States; i.e., essentially the conflicts of law act of Serbia] Official Gazette of the SFRY, nos. 43/82 and 72/82, Official Gazette of the SRY, no. 46/96 and Official Herald of the Republic of Serbia no. 46/2006.

[302] Art. 87 and 96(2) of the LPIL. This is supported by the Decision of the Higher Commercial Court, Pž. 4039/2004 of 15 September 2004. The same decision also states that the finality and enforcability of the foreign decision is assessed on the base of the law where it was delivered. The paraphrased holding in Serbian language reads as follows: „*Pravnosnažnost i izvršnost se dokazuje potvrdom nadležnog stranog suda, koju je dužno da podnese lice koje traži priznanje odnosno izvršenje (proglašenje izvršnom) strane odluke. Da li je jedna inostrana odluka pravnosnažna i izvršna, ceni se prema normama zemlje u kojoj je odluka doneta.*" It has to be added that the above mentioned certificate might be a simple stamp or seal on the decision. *See* DIJANA MARKOVIĆ-BAJALOVIĆ, "*MEĐUNARODNO PRIVATNO PRAVO*" [Private International Law], (Projuris, Beograd, 2007), at 141 (hereinafter: Marković, Međunarodno privatno pravo).

and thus enforced, if (a) the party against whom it was rendered could not take part in the procedure because his procedural rights were violated,[303] or (b) Serbian courts have exclusive jurisdiction,[304] or (c) if in the same subject matter a Serbian court or other Serbian organ has already rendered a legally binding (final) decision or the foreign court decision has already been recognized,[305] or (d) if the recognition is against the Serbian public order,[306] or (e) no reciprocity exists with the foreign state where the decision was rendered.[307] However, if these obstacles do not exist, the decision can be

[303] This is not done *ex officio* by the court, but the party has to invoke this objection. *See* art. 88 LPIL. The court practice emphasises that in cases where the other party invokes such objections, the court will examine whether the summoning was orderly done. However, this is not the only aspect. The paraphrased holding in Serbian language reads as follows: „*Da li je poštovano pravo odbrane ceni se, pre svega, kroz ocenu ispravnosti dostavljanja.*" *See* Decision of the Higher Commercial Court, Pž. 4039/2004 of 15 September 2004.

[304] The court examines this *ex officio*; except in lawsuits related to marital issues. Art. 89 of the LPIL.

[305] The court shall halt the recognition of the foreign court decision if there is an earlier started process going on in front of a Serbian court in the same subject matter among the same parties until rendering a final decision. The court should take this into account *ex officio*, however, in practice this rarely happens. Art. 90 of the LPIL.

[306] The court examines this *ex officio*. *See* art. 91 of the LPIL. *See also* Pak, Međunarodno privatno pravo, at 130-131.

[307] The presumption is that reciprocity exists until the contrary is proven. It has to be mentioned that this condition does not apply if a Serbian citizen requests recognition and enforcement. *See* art. 92 of the LPIL. In its Decesion Pž. 7183/2004 of 29 October 2004, the Higher Commercial Court held that material reciprocity is required, that is to say, foreign citizens has the same rights as Serbian citizens have in their country „in fact". Thus, the existence of relevant international agreement is not decisive, as reciprocity does not have to be diplomatic, but factual. However, if the court cannot obtain information on the existance of reciprocity, it will deem that reciprocity exists between the two countries.

The paraphrased holding in Serbian language reads as follows: „*Za priznanje i izvršenje stranih sudskih odluka traži se materijalni reciprocitet po sadržini što znači da se stranom državljaninu pružaju ona prava koja naš državljanin ima u strančevoj državi odnosno da će se sa stranim sudskim odlukama postupati na način na koji se u zemlji porekla postupa sa sudskim odlukama iz Srbije i Crne Gore. Pri tome, potreban je kvalifikovani reciprocitet što znači da se strancu pružaju ona prava u količini i na način koji važi u toj stranoj državi. [...] Ukoliko sud ni po načelu oficijelnosti ni po osnovu dokaza koje podnesu stranke ne može saznati ništa o postojanju reciprociteta ima se smatrati da on postoji s obzirom da je prema članu 92 stav 3 Zakona predviđeno da se postojanje uzajamnosti u pogledu priznanja strane sudske odluke pretpostavlja dok se suprotno ne dokaže a u slučaju sumnje u postojanje te uzajamnosti objašnjenje daje savezni organ uprave nadležan za poslove pravosuđa. [...]. Pri tome će sud imati u vidu da za uslov*

recognized. Recognized foreign court decisions have the same legal effect as Serbian court decisions, i.e., the subject matter is considered *res judicata*, legal bindingness (finality) applies only to the holding of the decision but not to the opinion part of the decision, and the decision constitutes a legal ground for entering rights into public registers and launching enforcement procedure on the property of the debtor.[308]

The procedure of recognition and enforcement of foreign court decisions is a form of civil procedure, yet in which the court examines only the existence of the conditions listed in the LPIL.[309] The claim can be launched at any district court (jurisdiction) on whose territory (competency) the decision could be enforced.[310] The court delivers a "decision" ("*rešenje*") on the recognition and enforcement, and such a decision can be appealed within 15 days of delivery.[311]

8.2. Recognition and Enforcement of Foreign Arbitral Awards

The issue of recognition and enforcement of foreign arbitral awards in Serbia is basically regulated by three main sources: the New York Convention,[312] bilateral international treaties,[313] and the new Law on

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reciprociteta činjenica da li ili ne postoji relevantan međunarodni ugovor nije odlučujuća jer uzajamnost ne treba da bude diplomatska već je dovoljan faktički reciprocitet [...]."

[308] *See* Marković, Međunarodno privatno pravo,at 141.

[309] Art. 101(2) of the LPIL. However, every court can bring decision on the recognition as on a preliminary issue, that has effect only in that specific procedure. On this issue *see also* Varadi, Bordaš, Knežević, Međunarodno privatno pravo, at 548-51.

[310] Marković, Međunarodno privatno pravo at 141. Decision of the Higher Commercial Court in Belgrade, Pž. 8908/98 of 30 December 1998 states that the competent court for recognition and enforcement of foreign court decisions is the one on whose territory the enforcement has to be done. The paraphrased holding in Serbian language reads as follows: *„Za priznanje i izvršenje stranih sudskih odluka i stranih arbitražnih odluka mesno je nadležan sud na čijem području treba sprovesti postupak priznanja, odnosno izvršenja.*"

At the same time the Court held in the same decision that the enforcing court decides on the enforcement of foreign court decision as of preliminary issue, and not the district court. The paraphrased holding in Serbian language reads as follows: "*Prinudno izvršenje odluke stranog suda može se odrediti i sprovesti ako odluka ispunjava zakonom propisane uslove za priznanje o čemu, kao prethodnom pitanju, u postupku za njeno prinudno izvršenje odlučuje izvršni, a ne okružni sud.*" (Decision of the Supreme Court of Serbia, Gž. 9/2004 of 18 March 2004.)

[311] *See* art. 101(3) of the LPIL.

[312] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the original text can be found at: < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html >; last visited on 7 January 2009. The

Arbitration (earlier it was regulated by the LPIL).[314] The Serbian Constitution determines the priority among these legal acts: first the New York Convention should be applied, then bilateral treaties (if they exist), and finally the Law on Arbitration.[315]

In a recent decision the Higher Commercial Court held that the New York Convention applies to cases where the party is from a member state of the same Convention, as Serbia – being the legal successor of Yugoslavia – has ratified this Convention. The new Law on Arbitration does not, however, require the existence of reciprocity in cases of recognition and enforcement of foreign arbitral awards. In other words, when the party requesting recognition and enforcement is from a New York Convention member state, the Convention should be applied, even if the Convention requires the existence of reciprocity for the recognition and enforcement of foreign arbitral awards.[316]

The Law states that a recognized foreign arbitral award[317] has the same effects as a court decision in Serbia.[318] The jurisdictional and competency rules related to the recognition and enforcement of such awards are the same as those related to the recognition and enforcement of foreign court decisions (*see supra* 8.1.). The party who requests the recognition and enforcement has to enclose the following to his claim: the original arbitral award or its certified

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Serbian law on ratification: „Zakon o ratifikaciji Konvencije o priznanju i izvršenju inostranih arbitražnih odluka", published in the Official Gazette of the SFRY – International Agreements no. 11/81.

313 A bilateral treaty was concluded, e.g., with Austria.

314 Law on Arbitration („*Zakon o arbitraži*"), Official Herald of the Republic of Serbia no. 46/2006.

315 *See* art. 194 of the Serbian Constitution.

316 The paraphrased holding in Serbian language reads as follows: „*Kako je Jugoslavija, čiji je sledbenik Republika Srbija ratifikovala Konvenciju o priznanju i izvršenju stranih arbitražnih odluka (Njujorška konvencija iz 1958. godine) uz rezervu reciprociteta, to se i posle stupanja na snagu novog Zakona o arbitraži koji odsustvo reciprociteta ne predviđa kao smetnju za priznanje stranih arbitražnih odluka, za priznanje odluka zemalja potpisnica Njujorške konvencije, reciprocitet postavlja kao uslov priznanja.*" (Decision of the Higher Commercial Court, Pvž. 293/2007 of 9 May 2007)

317 The Law on Arbitration defines foreign arbitral awards as an award rendered by an arbitral tribunal whose place is outside Serbia, as well as awards rendered by tribunals in Serbia if foreign law was applied for the arbitral procedure. *See* art. 64(3) of the LA.

318 Art. 64(2) of the LA.

copy, the original arbitration agreement or its certified copy, and the certified translation of the foreign arbitral award and of the arbitration agreement.[319]

The recognition and enforcement of a foreign arbitral award can be rejected only if the party against whom it was rendered requests it and provides a proof that (a) the arbitral agreement is not valid according to the law chosen by the parties or according to the law of the country where the award was rendered; or (b) the party against whom the award was rendered was not duly informed; or (c) the award concerns a dispute not covered by the arbitration agreement or was not within the confines of the agreement; or (d) the arbitral tribunal or procedure was not in accordance to the arbitral agreement (or to the law of the place of arbitration); or (e) the award is not yet binding or was set aside by the court of the country in which it was delivered.[320]

The competent court will *ex officio* reject the recognition and enforcement of the award if it finds that (a) the subject matter of the arbitration is not arbitrable or (b) if the effects of the arbitral award are against the Serbian public order.[321] It should be also mentioned that the court decision on the recognition and enforcement can be appealed within 30 days from its receipt.[322] Once the arbitral award is recognized, it can be enforced the same way as any other Serbian court decision, thus, LEP is applicable for this procedure.

9. Conclusions

On the basis of the presented review of Serbian law and selection from the jurisprudence of courts relating to enforcement of contracts, it seems that Serbia has a fairly reasonable legal framework in place. Legal norms and judicial practice concerning provisional measures and enforcement procedure in general, as well as drafts are relatively clear and consistent. However, there are still gaps and thus, there is still need for reforms, as present legal norms often fail to enable legal subjects to reasonably foresee how Serbian courts will decide the cases that come before them. It has to be admitted, moreover, that there is still some vagueness regarding assignment of claims. In addition, a number of issues relating to the possible application of the new registered pledge systems, as well as use of claims as source of financing (*e.g.* factoring

[319] *Id.* art. 65(4).

[320] *Id.* art. 66(1).

[321] *Id.* art. 66(2).

[322] *Id.* art. 68(2).

decertification), remain open, waiting primarily for the procedure and courts to answer them. It therefore seems well-advised for any agreement regarding lease or similar transactions to be drafted in a thorough manner with detailed description of rights and obligations of all parties concerned, as well as remedies and consequences of possible breach thereof. Those "open issues" related to the application of the new registered pledge system certainly have a negative effect on business. A court practice that perhaps could take consideration even foreign practice, thus avoiding mistakes that are inevitable when forging rules for disputes connected to novel transactions, would certainly facilitate business in Serbia. However, courts are very reluctant to learn from others and this is as yet highly unusual in Serbia, quite aside from the problems of availability of foreign sources of law in Serbian language.[55]

Speaking purely from the point of view of procedural law, it seems that the biggest down-side of Serbian judicial system as will be inadequate efficiency of Serbian courts and the impotency of the bailiff system. If faced with litigation, it may take two or even more years before obtaining a final court decision. According to the "*Doing Business*" organization's statistics, in Serbia dispute resolution (related to enforcement of contracts) in courts on average takes 625 days; out of which on average filing and servicing of the complaint takes 30 days, the trial itself and passing of the judgment 695 days and the enforcement of a final judgment 110 days.[56] Moreover, enforcement proceedings, although formally urgent, may in practice quite often be little or delayed. Application of some kind of a security (e.g., *Jamtlv*, pledge, registered lien) may therefore be beneficial in this regard, since it may provide a creditor with heightened certainty in respect of the object of enforcement or it provides priority as to other creditors and faster satisfaction.

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[55] However, there are some noteworthy initiatives, like the publication "Corporate Legislation" ("*Korporativno zakonodavstvo*") of the Ministry of Justice of the Republic of Serbia and the Institute of International Politics and Economics that contains analytical articles on European legislation and gives summaries of European legal texts in Serbian language. More information at <http://www.diplomacy.bg.ac.yu>, last visited on 7 January 2009.

[56] Compared to some other countries of the region, in Albania it takes 390 days, in Bosnia and Herzegovina 395 days, in Bulgaria 564 days, in Croatia 331 days, in Macedonia 421 days, in Montenegro 345 days, and in Romania 335 days. It is also interesting that in Serbia the costs of litigation are relatively high: it is on average 28.6 percent of the claim value (debt) value (i.e., on average attorney fees are 4.0 percent of the claim value, court costs 12.4 percent of the claim value and enforcement costs 7.1 percent of the claim value). See 12.4 percent of the claim value and enforcement costs 7.1 percent of the claim value). See data compiled by the "*Doing Business*" organization at <http://www.doingbusiness.org/data/exploreeconomies/serbia>, last visited on 7 January 2009.

Serbian courts are also rather hesitant in ordering provisional and preliminary measures and will do so only when the petitioner is able to convince the court of the fulfillment of the statutory conditions, which is normally quite burdensome. As explained earlier, Serbian law sets two cumulative conditions for ordering a provisional measure. *First*, the enforcement creditor must show the *probability of the existence of a claim*, and *secondly* he must show a *risk* that without such provisional measure an enforcement debtor would prevent or considerably hinder satisfaction of the claim. When deciding on a motion for a provisional measure the courts in Serbia tend to act in an urgent manner. The first instance decision may be rendered in a matter of several weeks.[325] Potential appellate proceedings, however, may take a couple of months.

A provisional measure may not be granted unless there is a connection between the substance of plaintiff's claim and the provisional measure sought, whereby the provisional measure's purpose is to secure the claim being the subject-matter of plaintiff's lawsuit. Moreover, substance of the ordered provisional measure may not be such as to essentially alter the existent state of the matter, *i.e.*, it can *by no means predetermine the final outcome of the court proceedings* and the existence of the plaintiff's claim. Serbian judicial practice interprets in a different manner the *notion of a risk* in relation to the pecuniary and non-pecuniary claims. In the case of a pecuniary claim, the existence of *subjective risk* is necessary, meaning the active conduct of a debtor aimed to prevent or to considerably hinder the satisfaction of a pecuniary claim, by disposing of, hiding or otherwise making unavailable his property or means. However, with non-pecuniary claims the *objective risk* that the satisfaction of a claim will be prevented or considerably hindered suffices, which may be unrelated to the actions of a debtor. In practice, such differentiation should not matter, as business people are usually inventive enough. In case of not obeying provisional measures, there are two kinds of sanctions: fine prescribed by the LEP and claim for damages under general rules of civil law. However, it is not clear whether such sanctions have sufficiently deterrent effects.

Ex parte provisional measures are extremely rare. Apparently, they are awarded more often in proceedings for protection of intellectual property rights than in other civil or commercial law matters. For ordering an *ex parte*

[325] In Serbia there are no special courts for ordering provisional measures; such measures are ... the litigation. There are no statistics on how long does it ... court clerks it can be said that it can

provisional measure, it is not enough to frivolously state that there is a risk of irreparable damage or of destroying the evidence, but it is essential to prove this and the court is expected to examine all the facts relating thereto. This might have historical reasons in a country whose economy was not so long ago based on the principle of socialist market economy and which favored the protection of debtors over efficient enforcement of the rights of creditors – so important for capitalist societies heavily based on credit.

It is a positive result of recent years' developments that the enforcement of a writ of execution based on a final and enforceable court judgment can only very exceptionally be challenged. In practice nowadays it is very difficult for the debtor to procrastinate the seizure and sale of property once the writ of execution has been issued.[326] Thus, it is extremely difficult to revert the enforcement proceedings back to litigation. The due process principle (i.e., the right to be heard), which is one of the basic principles of the litigation phase – obliging the court to allow to each party to respond to the opposing party's requests, motions and statements – applies in the enforcement proceedings only to a very limited extent (*e.g.*, the court decides on a creditor's motion for enforcement without delivery of the writ of execution to the debtor and without waiting for the debtor's response thereto and the motion is delivered to the debtor together with the writ of execution accepting the creditor's motion). Moreover, in the enforcement proceedings the *lis pendens* and *res judicata* principles do not apply in the way they are accepted in the litigation proceedings.

With regard to the *means of enforcement*, it is up to an enforcement creditor to designate in his motion for enforcement what is the desired means of enforcement from among those specified by the law. Let us remind ourselves that the means of enforcement of a monetary claim are sale of chattels, sale of immovable property, transfer of monetary claim, transfer of claim for handing over chattels or immovable property, cashing of other property rights, transfer of funds from bank accounts, and sale of shares in business entities. In commercial matters a *summary enforcement procedure* may be conducted (*e.g.*, claims related to drafts and checks). Summary enforcement is a type of enforcement procedure subject to special rules of enforcement, including more strict application of the formal legality principle, shorter duration of the enforcement procedure, limited grounds for objection against the decision on enforcement, as well as limited number of authentic documents on the basis of which this procedure may be initiated.

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[326] *See supra* heading 3.2.1.

Related matters are the issue of self-help and collection agencies; i.e., means of getting paid without resort to court or other governmental agencies. In Serbia, similarly to other countries belonging to the Central European civil law tradition, self-help is prohibited, save the very limited instances of protecting one's property from imminent harm. Self-help repossession as known and widely practiced in most common law systems is thus unknown; at least, that is what can be deducted from the reading of the law. Thus, the only possibility that may qualify as a form of self-help is the agreement of the debtor and creditor that the creditor may under some conditions acquire ownership over the collateral without any involvement of a court.

On the other hand, collection agencies have also appeared in Serbia in the post-1990 period (especially the last few years); and as a result now if the creditor does not have the necessary means to contact the debtor, or to locate the assets of the debtor, he may resort to collection agencies, though, at present in Serbia there are only a few agencies dealing with collection.[327] They basically offer two kinds of services, one is purchase of uncollected claims and the other is help in the collection process, be it through the court or by peaceful out of court collection. The latter could be looked upon as a peculiar form of self-help, however, as the law generally prohibits self-help for collection of debts, this is restricted only to services like collecting information on the debtor, informing the debtor about the existence of debt (through mails, phone calls), organizing peaceful negotiations, and informing the debtor about legal consequences of non-payment.[328] Naturally, whether in reality these activities are truly limited to what is foreseen by the law and whether and what kinds of inappropriate means of forcing the debtor pay are being utilized, is another matter. For sure, it is a problem that the activities of these new-fangled agencies are not regulated and are not subject to any suitable monitoring.

The introduction of the institution of fixed and floating charges into the Serbian legal system has enormous economic importance, though the exact effects remain to be seen. The law seems to have struck the right balance in trying to ensure efficient enforcement of creditor's right, by allowing the debtor to exploit economically the pledged item (until crystallization) without interruption from the side of the creditor. However, the judicial practice in this

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[327] Such agencies are, for example, "*Credit express Serbija*" (its website is at < http://www.creditexpress.co.yu/individualnaizradatroska.htm >; last visited on 6 August 2008 – unable to revisit on 7 January 2009), or "*B and T Incasso*" (website at < http://www.incasso.co.yu >; last visited on 7 January 2009).

[328] *Id.*

regard has not yet been developed and it may take some time before some of the focal issues relating to these newly introduced concepts are clarified. In the meantime it is up to businesspeople and their lawyers to be creative and discover all the advantages offered by this unique newcomer institution and to provide for adequate creditor-protective mechanisms through contracting.

Yet it is not just the floating charge that deserves mention from among all the newcomer *in rem* security devices. Of equal importance was the introduction of the 'registered pledge' by the Law on Pledge, whereby non-possessory security interests have become part of Serbian legal system virtually overnight. This was a sensible move because Serbia not only lacked developed collateral law but also lagged behind most of the CEE countries, which had already reformed their respective laws in the 1990s. In brief terms, the law has striven to introduce all those concomitant advanced institutes of secured transactions law which are needed in developed market economies; *to wit*, the possibility that the collateral may consist of a *collection of movables*, like goods in certain warehouse or store, or inventory for conducting of an economic activity. Regrettably, the law lacks sufficient details as far as these hitherto unknown possibilities are concerned, thus leaving a number of very important questions to be answered by courts.

Additionally, it should be noted that the Law on Pledge has introduced a rather efficient and expedient procedure for repossession of the pledged item by the pledgee (creditor), though self-help repossession in the form known in many states of the United States is still prohibited in Serbia.[329] The court is obliged to decide on the creditor's request within three days of its receipt. Furthermore, if the creditor's request for repossession of the collateral is accepted, the enforcement procedure must be conducted within the next three days. Possible objection of the pledgee to the court decision does not suspend enforcement of the decision on repossession.

Although in Serbia – similarly to other continental European systems and unlike the United States, the common law provinces of Canada and New Zealand – leasing has not been brought under the new registered pledge system, and thus leasing contracts are looked upon as species different from

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[329] Art. 330 of the Criminal Code provides that a person who himself enforces some of his rights shall be fined or punished with imprisonment up to six months. The same applies for persons who do so for the benefit of somebody else.

The paraphrased text of the provision in Serbian language reads as follows: "*Ko samovlasno pribavlja neko svoje pravo ili pravo za koje smatra da mu pripada, kazniće se novčanom kaznom ili zatvorom do šest meseci. Ko delo iz stava 1. ovog člana učini za drugog, kazniće se kaznom propisanom za to delo.*"

registered pledges, irrespective that they always contain a retention of title clause. Moreover, until 2004 leasing was treated as a *sui generis* innominate contract for which the provisions of the Law on Obligations were applicable, normally the provisions on sales or traditional lease/rent contracts. In accordance with international trends,[330] financial leasing is now regulated by a relatively modern Law on Financial Leasing in Serbia. One of the shortcomings of this law might be that it does not take into consideration the transitional character of society, providing ill-proportioned protection for the lessor.[331] A good example of this is the above mentioned settlement that can be concluded between the lessor and the lessee entitling the lessor to repossess the subject matter of the leasing within six days. At the same time, such protection might stimulate leasing companies to come to Serbia and to conclude leasing agreements, which generally has as an effect the modernization of the infrastructure, and fostering of the economy. The introduction of the Register of Financial Leasing should have the same effect, as it increases legal certainty and publicity.[332]

Drafts deserved mention in this paper not just as security devices but because they do not represent newcomer institutions but rather devices that have been known and exploited in Serbia since at least the 1930s. They were of interest to see whether courts were in the position to reconcile the overly formalistic rules of draft law with the required flexibility of our times. Based on the case law we can say that courts are becoming more flexible, and have a

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[330] Among others, taking into consideration the recommendations of the UNIDROIT Convention on International Financial Leasing. *See* < http://www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm >; last visited on 7 January 2009.
However, it has to be mentioned that this Convention is not a real success story, it has been ratified only by few countries (Belarus, France, Hungary, Italy, Latvia, Nigeria, Panama, Russia, Ukraine, and Uzbekistan). *See* Philip R. Wood, Comparative Law of Security Interests and Title FInance (Sweet and Maxwell, London, 2007), at 793.
Many other countries in Europe have rather introduced special laws on leasing. For example, Hungary is planning to add a section on leasing to its Civil Code. *See* the pertaining documents of the Hungarian Leasing Association at < http://www.lizingszovetseg.hu/index.php?pageid=-1&mywbContentType_id=1&mywbContentTypeCtrlAction=item&module=38&Type1_mywbContentRecord_id=25&Type1_recordAction1=Item >; last visited on 7 January 2009.

[331] At the same time, sometimes in practice circumstances like relatively lengthy court proceedings or the custom of a sizeable percentage of the population to possess firearms (though not in all parts of the country and with quite radical differences depending also on various segments of the population) does affect the position of lessors.

[332] However, investors always have to have in mind that Serbia is a society in transition and in practice things do not function always as they should and as foreseen by the law.

better understanding of the needs of a market economy. This may also be because proceedings for enforcement of drafts-based rights are urgent proceedings in Serbia, as drafts are considered to qualify as authentic documents.[333] This means that the creditor can collect the claim in a summary enforcement procedure in a relatively short time.[334] Irrespective of this, admittedly the Law on Drafts definitely needs comprehensive reform and improvement to be better adapted to the latest expectations of international commerce.

Finally, a word needs to be devoted to assignment in Serbia, or more precisely the fundamental changes assignments law has undergone and will undergo because of the arrival of new financing methods exploiting receivables (claims). The unfortunately neglect of this set of topics at all levels may prove a problem because it is a serious challenge for courts to comprehend such novel sophisticated transactions as receivables financing and factoring. Yet it is far from irrelevant whether and how the courts will channel the development of the related law, though there are already more and more cases of sold claims in Serbia; in other words, business is much ahead of the law and the courts.[335]

Regarding recognition and enforcement of foreign court decisions and arbitral awards, we can say that it can be done without serious difficulties. However, general problems mentioned in this paper, like lengthy procedures and corruption, have to be taken into consideration.

It also has to be mentioned that corruption is a burning issue in contemporary Serbia. International statistics place Serbia 79th out of 179 countries, with a CPI score of 3.4 (out of 10) and confidence range 3.0–4.0 (out of 10) on Transparency International's Corruption Perception Index 2007.[336] The "*Nations in Transit Rating*" of the Freedom House international organization gave a score of 4.50 for corruption in the country and 3.79 for democracy generally in the year 2008 (the ratings are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 the

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[333] *See supra* under heading 3.1.2.

[334] The debtor can protest within three days.

[335] One of contradictory cases was the "*Centrotextil*" case where the company sold its claims well below their [alleged] value, which caused significant public outrage and criticism. The story was reported by the magazine "*Glas javnosti.*" The text of the related article is available electronically at < http://arhiva.glas-javnosti.co.yu/arhiva/2006/03/10/srpski/D06030910.shtml >; last visited on 7 January 2009.

[336] Source: Tranparency International, < http://www.transparency.org/policy_research/surveys_indices/cpi/2007 >; last visited on 7 January 2009.

lowest.).[337] The EBRD-World Bank "Business Environment and Enterprise Performance Survey" also mentions corruption as a serious problem in Serbia. Closely related to this is the issue of judiciary reform. The Serbian Parliament has adopted the „*National Strategy on the Reform of Judiciary*" in 2006.[338] This reform is supported by the Council of Europe as one of the aims of this reform is to harmonize Serbian legislation with European standards.[339]

Legal education and its reforms can also play a crucial role in the reforms of the judiciary and the fight against corruption. The introduction of the three-cycle system (bachelor, masters, and doctoral level) and other novelties of the Bologna accords are under way at Serbian universities, and it is expected – at least, on the level of official rhetoric – that these reforms will make the educational system more efficient, shorten the time of studies and reduce corruption in higher education institutions. However, changes in the structure of the studies rarely affect the substance of the system and may not result in the increased quality of education; such concerns are more than justified at the moment in Serbia. Without more radical changes in legal education, however, the new and forward-looking laws may to a great extent remain dead letters on paper and the system may continue to function as before. In addition, the heavily loaded court dockets and sometimes the unpreparedness of judges and courts are matters of fact. All this raises serious doubts as to whether courts can adequately deal with the challenges of myriad novel kinds of contracts, as hinted at in this paper. This is in particular a key issue as the increased role of courts as – if not lawmakers – but only gap-fillers and those agents in the system that channel the development of law, is given and well-proven even by the very few cases discussed above. There is certainly a need for the reconsideration of the role of courts fulfill in the legal system, and irrespective that gaps should still be filled primarily by the legislation and the regulatory agencies as per conventional wisdom, the new role of courts should be also recognized.

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[338] More information can be found on the web page of the Ministry of Justice at < http://www.mpravde.sr.gov.yu/lt/articles/pravosudje/nacionalna-strategija-reforme-pravosudja >; last visited on 7 January 2009.

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