

UNFAIR CONTRACT TERMS AND SMEs IN BW AND DRAFT CC OF SERBIA

Abstract

This article is inspired by the ever-growing literature on the protection of weaker parties to contractual relations emphasizing that consumers are not the only weaker parties which should be protected. It is submitted that SMEs lack the bargaining power, expertise or suffer from information asymmetry in contractual relations in the same way as consumers do. In this article, the author chose to analyze the position of SMEs when it comes to policing of unfair standard contract terms, as it is repeated that the protection against unfair contract terms is a paradigm of weaker party protection. The article compares the way in which the control of unfair contract terms is regulated in the BW and in the DGZ. The pros and cons regarding the categorical protection of SMEs against unfair terms were explored, and two conclusions were reached. First, the benefits of categorical protection of SMEs outnumber the drawbacks. Second, BW is more in line with the arguments that are given for the protection of SMEs than DGZ, and DGZ could draw some inspiration in this area from BW.

Keywords: SMEs, unfair contract terms, weaker party protection, civil code.

1. Introduction

This article is inspired by the ever-growing literature on the protection of weaker parties to contractual relations emphasizing that consumers are not the only weaker parties which should be protected. In fact, there are more and more voices claiming that certain businesses deserve the same or similar kind of protection as consumers. For example, it is stated that “consumers have no exclusive title to legal protection against market asymmetries that create inequality of bargaining power between

¹ Teaching assistant at the Union University Faculty of Law, e-mail: aleksa.radonjic@pravnofakultet.rs.

a weaker and a stronger party to a business contract...² This is because the typical reasons for the protection of consumers may be used to justify the protection of micro, small and medium-size enterprises (SMEs) too. It is submitted that SMEs lack the bargaining power, expertise or suffer from information asymmetry in contractual relations in the same way as consumers do.³ Therefore, in order to treat like cases alike and different cases according to those differences, it is stated that kind of protection afforded to consumers should be extended to SMEs or at least to the smallest of SMEs.⁴ Hence, the SMEs deserve to be considered the weaker parties to contracts and should be able to rely on the weaker party protection mechanisms. After all “the policing of unfair terms (especially limitation clauses) and doctrines like *Wegfall der Geschäftsgrundlage* (frustration of contract) were first developed in business-to-business (b2b), not in business-to-consumer (b2c) relationships.”⁵

In this article, the author choose to analyze the position of SMEs when it comes to policing of unfair standard contract terms, as it is repeated that the protection against unfair contract terms is a paradigm of weaker party protection⁶ and that it is “one of the most obvious ways to foster contractual justice”.⁷ Furthermore, it was compared the way in which the control of unfair contract terms is regulated in the Civil Code of the Netherlands (*Burgerlijk Wetboek* or BW)⁸ and in the Draft Civil Code of Serbia (DGZ)⁹. The author opted for the BW considering that the Commission which made the DGZ had paid special attention to the

² V. Roppo, “From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?”, *European Review of Contract Law* 3/2009, 311.

³ M. W. Hesselink, “SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis”, *Centre for the Study of European Contract Law Working Paper Series 2007/03 (CSECL Working Paper Series)*, 14.

⁴ M. W. Hesselink, “Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive”, *2009/06 (CSECL Working Paper Series)*, 6.

⁵ M. Hesselink, “Post - Private Law?”, in: *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (eds. Kai Purnhagen, Peter Rott), Springer 2014, 35.

⁶ J. G. Klijnsma, *Contract law as fairness: a Rawlsian perspective on the position of SMEs in European contract law (PhD Thesis)*, Amsterdam Law School University of Amsterdam, Amsterdam 2014, 139, <https://dare.uva.nl/search?identifier=436e5079-6363-4ac3-a207-5b0dd002f33f>, last visited December 11, 2017.

⁷ H. Beal et al., *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford and Portland 2010., 757.

⁸ *Burgerlijk Wetboek*, <http://www.dutchcivillaw.com/civilcodegeneral.htm>, last visited December 11, 2017.

⁹ *Građanski zakonik Republike Srbije*. Radni tekst pripremljen za javnu raspravu sa alternativnim predlozima – DGZ, 2015.

BW¹⁰ and because of the Dutch courts in the past and the legislator in the present provided (to a certain extent) the protection of SMEs when it comes to standard contract terms.¹¹ DGZ is chosen because we wished to see where it stands against the background described in this introduction and compared to the BW which recognizes SMEs to an extent as weaker contracting parties. Of course it would have been even better to include other codes but that would exceed the scope of this article by far.

Considering the above said first the article will show how the matter of standard contract terms is regulated under BW (2) and DGZ (3). Afterwards the solutions offered in the codes will be compared (4). Then the pros and cons for the protection of SMEs will be addressed (5) and finally, some conclusions will be drawn (6).

2. The Civil Code of the Netherlands

The Dutch legislator dedicated seventeen articles of BW to standard contract terms.¹² Such a big number is owed, in part, to the fact that the Netherlands decided to integrate the whole of contract law into BW, thus to include the consumer contract law as well. However, this is not the only reason. A great number of articles dealing with standard contract terms is also owed to the fact that the Dutch legislator paid the attention to certain details some of which shall be mentioned here.

Article 6:231 (a) BW defines standard terms and conditions as “one or more contractual provisions or stipulations, drafted to be included in a number of contracts”, not including the “provisions and stipulations that indicate the essence of the performance under the obligation” unless the latter is defined ambiguously or unclearly, which should imply that in such cases they too are susceptible to the judicial review.

Article 6:233 BW declares voidable standard terms if:

- a) they are “unreasonably burdensome for the counterparty, having regard to the nature and content of the contract, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case”;
- b) “if the user has not given his counterparty a reasonable opportunity to take knowledge of the content of the applicable standard terms and conditions.”

In addition to the aforementioned unfairness test, BW gives clarifications as to what “a reasonable opportunity to take knowledge”

¹⁰ Komisija za izradu Građanskog Zakonika, *Rad na izradi Građanskog Zakonika Republike Srbije. Izveštaj o otvorenim pitanjima*, 2007, 18.

¹¹ M. W. Hesselink (2009), 156.

¹² Art. 6:231-6:247 BW.

actually means in different situations.¹³ Finally, BW prescribes that once a particular standard term is nullified by the court, that particular term is voidable should the user use this term in his standard terms and conditions again in any other contract he concludes.¹⁴

What is interesting about BW regarding the policing of standard terms and conditions is a personal scope of these provisions. Namely, the drafters of the BW decided for the nuanced approach by which only small businesses with less than 50 employees and consumers may rely on the articles 6:233 and 6:234.¹⁵ Consumers additionally benefit from the black and grey lists of unfair terms and conditions, one containing the terms and conditions which are “always unreasonably burdensome for consumers”¹⁶ and the other containing those which are “presumed to be unreasonably burdensome for consumers”¹⁷. Businesses with 50 or more employees may rely solely on the general requirement of good faith.¹⁸ However, there is one very important provision of BW regarding standard terms and conditions which is applicable to businesses regardless their size. It is the norm which protects the contracting parties which find themselves in the middle of a distribution chain. Namely, article 6:244 BW provides protection to a business who has used standard terms which have been nullified in relation to his customer but is bound by the same or similar terms in relation to his supplier, by preventing that supplier to invoke those terms and conditions in relation to the said business. As I already stated, this article protects all the business parties in the chain regardless their status and size.¹⁹

Last but not the least, the black and grey lists provided for in articles 6:237 and 6:238 BW respectively although directly applicable to consumer contracts only have *Indizwirkung*, meaning they may serve as “indicative of what is to be considered unfair under the more general open norm, which... applies also to B2B situations.”²⁰ This can be read out of the explanatory commentaries to the draft BW which imply that the fact that a contract term is listed in the black or the grey list may indicate that it is unreasonably onerous to the other party.²¹

¹³ See art. 6:234 BW.

¹⁴ See art. 6:243 BW.

¹⁵ M. W. Hesselink, (2009), 33 fn. 156.

¹⁶ See art. 6:237 BW.

¹⁷ See art. 2:238 BW.

¹⁸ M. W. Hesselink, (2009), 33 fn. 156.

¹⁹ see comment to the art. 6:244 BW

²⁰ J. G. Klijnsma, 2014., 135.

²¹ H. Beal *et al.* (2010), 796.

3. The Draft Civil Code of Serbia

At present in Serbia, like in e.g. Austria, Greece or France²², the consumer contract law is separated from the rest of the contract law and it is regulated in a special statute. The rest of contract law in Serbia is governed by the Law on Obligations (ZOO)²³. Consequently, there are two sets of rules governing standard contract terms, and needless to say that these sets of rules treat this topic differently. The way in which the rules governing the standard terms and conditions are formulated in the DGZ is almost word-for-word taken from the current ZOO²⁴, with the addition of one new article in the DGZ which is not crucial for the topic at hand. In addition, the drafters decided to keep the consumer contract law out of the Code. Therefore, once the Code is adopted there will be no significant change in this area of law compared to the present state.

And what is the present state (and quite likely the future too)? ZOO like DGZ defines standard terms and conditions as predetermined by the user of those terms regardless of whether they are only referred to in the contract or are made part of the contract.²⁵ Furthermore, the user of the terms is bound to “make them public in a usual way”.²⁶ Finally, if there is discord between the negotiated and standard terms, the former will prevail.²⁷

The unfairness test prescribed by ZOO (and DGZ) is twofold. Namely, in art.143(1) ZOO (284(1) DGZ) it is stated that standard terms which are contrary to the goal of the contract or to good business practices are null and void even when approved by the public authority. Therefore, the goal of the contract and good business practices are the points of reference when testing the fairness of standard contract terms, and the nullity is the sanction should there be any discord between the terms and the goal of the contract or the good business practices. On the other hand, article 143(2) ZOO (284(2) DGZ) states that courts MAY (emphasis added) refuse to apply standard terms and conditions should they prevent the contracting party to rely on certain remedies, rights etc., or are generally unfair or particularly onerous for that party. The wording of article 143 (2) ZOO, same as of the article 284 (2) DGZ, suggests that the court has a choice, a freedom to decide whether to apply or not to apply a term which

²² B. Lurger, “The ‘Social’ Side of Contract Law and the New Principle of Regard and Fairness”, in: *Towards a European Civil Code* (eds. Arthur Hartkamp et. al.), Nijmegen 2004³, 276.

²³ Zakon o obligacionim odnosima – ZOO, “Sl. list SFRJ”, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, “Sl. list SRJ”, br. 31/93 i “Sl. list SCG”, br. 1/2003 – Ustavna povelja.

²⁴ Compare ars. 142-143 ZOO and ars. 283-284 DGZ.

²⁵ Art. 142 (1) ZOO.

²⁶ Art. 142 (2) ZOO.

²⁷ Art. 142 (4) ZOO.

is onerous or unfair to the other party, or prevents her to use certain rights and remedies. It suggests that even an unfair term could be upheld by the court which is rather strange and unfortunate phrasing. Finally, these provisions do not discriminate between the types of businesses and are thus applicable both to contracts between large companies, and contracts between large companies and SMEs.

Unlike ZOO or DGZ, Consumer Protection Act (ZOZP)²⁸ provides a much clearer standard of unfairness stating that any contract term which contrary to good faith and fair dealing as a consequence has a significant disproportion in rights and duties between the contracting parties to the detriment of the consumer is null and void.²⁹ The Act also states the criteria which are relevant for the assessment of the unfairness of a term.³⁰ It also provides for a *contra proferentem* rule and declares black and grey lists of contract terms.³¹ The former means that any ambiguity of a contract term will be interpreted to the benefit of a consumer, and the later lists provide for terms that are irrefutably and refutably respectively deemed unfair. This is the obvious influence of Unfair Terms Directive, which is no surprise since Serbia transposed consumer *acquis* into its ZOZP.

4. Comparative conclusions

A number of provisions BW dedicates to standard contract terms, seventeen articles, compared to only three articles in DGZ was the first and staggering difference between the two texts I noticed. Like I already said, BW unlike the draft of his counterpart in Serbia regulates the consumer law too. Although only two articles (black and gray lists) are reserved for consumers only, the more detailed regulation of the unfairness test compared to the rather laconic style of DGZ, the clarifications of certain standards like what it means to give reasonable opportunity to the other party to take knowledge of the content of standard terms and conditions etc. corresponds to the way in which standard contract terms are regulated in ZOZP. Therefore one might say that the quantity of articles regulating unfair contract terms in BW is owed to the integration of consumer law into the code after all. I would rather say that it is a consequence of the understanding that policing of unfair contract terms is meant for the protection of weaker parties to contracts, and that consumers are not the only weaker parties on the market. Thus BW extended part of the protection to some SMEs, while the rest of the businesses may rely on the general

²⁸ Zakon o zaštiti potrošača – ZOZP, *Sl. glasnik RS*, br. 62/2014 i 6/2016 – dr. zakon.

²⁹ Art. 43 (1)(2)ZOZP.

³⁰ Art. 43(3) ZOZP.

³¹ Ars 44 and 45 ZOZP.

duty of good faith. This corresponds to the argumentation that “large and most medium sized businesses may be expected to structure their organisation to ensure that their decisions are economically rational.”³² Whereas small businesses and individual entrepreneurs cannot afford such structuring of their organization or their “cognitive limitations” do not disappear just because they act not as consumers but as business subjects in a particular situation, they are the same person regardless the capacity in which they act.³³ In contrast, DGZ offers protection to all the subjects, be they big businesses, medium size or small enterprises. This may be questionable since big companies typically do not need the same level of protection as some SMEs do.

Another difference is that BW recognizes the specific situation in which the businesses in the middle of the supply chain may find themselves when a standard term they use is annulled by their customer, but they themselves are a party to a contract against whom the same term is used, and provides protection to such businesses in a way described above. The drafters of the DGZ did not dedicate a single norm to such situations.

Furthermore, under BW the unfair terms are voidable which means that the court does not sanction these terms on its own motion and that according to article 3:51 BW the right of a counterparty to nullify unfair terms and conditions is prescribed after the lapse of time determined by the Code. On the other hand, according to DGZ terms and conditions contrary to the goal of the contract or the good business practices are null and void³⁴ which means that the court should nullify these terms on its own motion³⁵ which is a stricter sanction than the voidability is. However, the formulation of article 284 (2) leaves it unclear whether the terms which prevent the other party to rely on particular rights and remedies or are unjust or overly onerous to that party are null and void or just voidable because it states that court may refuse to apply such terms. If the sanction is nullity the court would not have the choice as to the application of the term if the term would be qualified as unfair according to article 284 (2). If the sanction is voidability the court again should not have a choice whether to apply it or not if it would be determined, on the motion of a contracting party, that the term is unfair according to article 284 (2).

From the comparison conducted here, not many normative conclusions can be made, except for those of more technical nature such as that the phrasing of article 284 (2) DGZ should be clearer. Everything else may be assessed only against particular viewpoint. The viewpoint

³² M. W. Hesselink (2009), 34.

³³ *Ibid.*, 34-35.

³⁴ Art. 284 (1) DGZ.

³⁵ Art. 247(1) DGZ.

whether there should be the protection of SMEs against unfair terms, and whether that protection should be wider for small businesses than for the big ones. I have briefly mentioned some of the reasons for the protection in the introduction, but I feel I should discuss these in more detail before I reach any conclusions about the regulation of unfair terms under the codes at hand.

5. To protect or not to protect?

The type of protection I am discussing here is categorical protection, meaning the protection of certain category of subjects against (in this case) unfair contract terms. As was seen above such protection is afforded to the category of consumers. Consumers are defined as natural persons acting outside their business or professional capacity.³⁶ Therefore any natural person falling within the definition of consumer is granted the protection regardless of his or her personal skills and characteristics. There are several reasons to afford such protection to consumers. First, it is said that consumers lack the bargaining power and thus are in a take-it-or-leave-it situation when contracting with businesses.³⁷ Second, consumers suffer from the information asymmetry, which means that they have insufficient information about the product or service they acquire and insufficient knowledge and experience about contract terms and negotiation compared to businesses who engage in such transactions regularly.³⁸ Therefore, they are less likely to make an informed decision and are susceptible to error.³⁹ Furthermore, consumers are single natural persons not having a team behind them able to assess the decisions and to correct the influence of limited rationality, exhaustion, lack of knowledge, emotion etc.⁴⁰ Third, and different type of argument says that businesses are on the market competing for profit and that bad decisions lead to the 'natural' selection making only good enterprises to survive and resulting in capital being invested in the right businesses.⁴¹ Such argument does not stand for the individuals acquiring goods and services not for profit but for their needs and pleasure in their lives.⁴²

The question is: are there any similarities between consumers and SMEs that would give way to extending the protection afforded to the consumer

³⁶ See art. 6:238 BW or art. 5 ZOZP.

³⁷ J. G. Klijnsma, 102.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* 103.

⁴² *Ibid.*

to SMEs? When it comes to bargaining power and the ability to negotiate contractual terms, small businesses, especially individual entrepreneurs, are in the same position as consumers.⁴³ Let's imagine a small family enterprise producing hand-made chocolate. Would they really be able to negotiate the terms of a contract with a big retailer company owning a chain of supermarkets? Or imagine a professional freelancer journalist buying a laptop for work – is there any difference between him and a consumer, and does it really matter that the former is acting within his profession when neither of them cannot influence the contract for a laptop?⁴⁴ The second reason, the information asymmetry and limited rationality of individuals, is also applicable to SMEs. They are also, typically unable to organize their business process so that they mitigate these asymmetries and influence of the bound rationality.⁴⁵ This is true of sole entrepreneurs and small businesses while most of the medium-size businesses are able to deal with information asymmetries just as big companies are.⁴⁶ The third argument would be applicable to SMEs if they were in an equal position as large companies which are able to hire lawyers or employ persons with special skills in order to make sure that decisions made are correct.⁴⁷ However, most of the SMEs are not able to do that hence it is not that they are bad businesses not worthy of participating on the market. The problem is that they lack skill, time and economic power to influence the content of the contract terms when dealing with large companies. Like for consumers, it is irrational for SMEs to try to inspect and change contracting terms when they have no power to change them.⁴⁸ Which is more, since the terms will not be challenged, at least not effectively, by the counterparties, there is no incentive for large companies to compete by offering better terms and conditions than their competitors, which means that the invisible hand of the market will not mend this market failure, so it is up to the contract law mechanism of policing the unfair contract terms to mend it.⁴⁹ Considering everything said here, it seems that all the justifications for the protection of consumers against unfair contract terms are applicable to SMEs as well.

Now, it would be useful to check the downsides of categorical protection of SMEs against unfair terms. The first problem is the definition of SMEs. This problem seems to be overstated since there are useful definitions. For instance, one could rely on the Recommendation

⁴³ M. W. Hesselink, (2009), 33.

⁴⁴ J. G. Klijnsma.

⁴⁵ M. W. Hesselink (2009), 34-35.

⁴⁶ *Ibid.*

⁴⁷ J. G. Klijnsma, 139.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* 138 – 139.

of the European Commission as to the definition of SMEs.⁵⁰ Article 2 of this Recommendation reads as follows:

Staff headcount and financial ceilings determining enterprise categories

1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.
2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.
3. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

The Dutch legislator relied on the number of employees as criteria too. So there is a way to make a distinction between SMEs and large businesses and to divide SMEs into subcategories too. The drawback of this manner of definition is that it is a bit arbitrary because one employee can make all the difference when in reality a business with 49 employees and the one with 50 employees may not be in a different position after all.⁵¹ The second danger of this approach is to get stuck with purely formal disputes about the number of employees instead of the questions pertaining to the content of the contract and whether the need for protection really exists or not.⁵²

However, these two shortcomings are inherent to any categorical protection.⁵³ When a category covers a great number of subjects a level of arbitrariness is expected. Just like in case of SMEs, there are consumers who are not in need of any protection in particular contracts. Imagine the owner of Coca-Cola Company buying a soda on a food stand. I doubt that a person who has built such a big company lacks the knowledge in negotiation, and lacks the bargaining power. The same is when Rupert Murdoch, owner of one of the largest news companies in the world,

⁵⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC.

⁵¹ M. W. Hesselink (2007), 17.

⁵² *Ibid.*

⁵³ *Ibid.*

buys a copy of newspapers.⁵⁴ There is no information asymmetry when a computer specialist buys a lap-top even outside his professional capacity, at least not regarding the quality of the product. Nevertheless, in these situations these persons are consumers. It is also possible that a particular minor is mature as if he is of age, still, he will be a minor in the eyes of the law. The point is that a category is designed to protect the typical member of the category, not the exceptional one. This is necessary for the sake of legal certainty and because it would be impossible to write a law that would cover all the possible situations one by one. Although it is true that criteria proposed to determine whether a business falls within the category of SMEs may seem a bit more arbitrary than the criteria to determine who is minor or who is a consumer.⁵⁵ This could lead to situations where subjects not in need of protection are protected.⁵⁶ However, the example of DGZ shows that businesses not in need of protection get protection precisely because there is no category of SMEs defined. Furthermore, as was noted above this kind of protection removes a market failure and gives better chances to SMEs. This has an economic importance as well since 2/3 of all employees in 2015 in Serbia worked in SMEs, and SMEs generated 32% of Serbia's GDP in the same year.⁵⁷ Finally, considering the comparison between consumers and some SMEs it becomes a matter of coherence to protect against unfair terms those SMEs which are in the same position as consumers.⁵⁸

Therefore, being aware of the shortcomings of the definition of the SMEs, I am convinced that at least the smallest of SMEs deserve the protection against unfair contract terms when dealing with businesses larger than themselves. I believe that the benefits of this approach outnumber the drawbacks. It is against this stance that I conclude that the regulation of unfair contract terms in DGZ needs amendment. The ambiguity of article 284 (2) DGZ needs to be removed. The drafters should consider referring to black and grey lists from ZOZP at least as indicators of the unfairness of the terms in b2B contracts too. They should define SMEs and afford them a greater level of protection against unfair terms than to big businesses. They should look up to BW and regulate the position of the businesses in the middle of the supply chain regarding the unfair contract terms. The question is should they copy the Dutch approach? The BW is not completely coherent since it does not afford exactly the same level of

⁵⁴ *Ibid.*, 15.

⁵⁵ *Ibid.*, 17.

⁵⁶ *Ibid.*

⁵⁷ Privredna komora Srbije, Mala i srednja privredna društva, <http://www.pks.rs/PrivredaSrbije.aspx?id=20&idjezik=1>, last visited December 20, 2017.

⁵⁸ M. W. Hesselink (2007), 19.

protection to SMEs as it does to consumers. However, this might be the answer to the bigger arbitrariness of the criteria used to determine which business are SMEs. What is certain is that, considering all the arguments for the protection of SMEs and all the arguments referring to the similarity of the position of consumers and SMEs, BW is more in line with these arguments and that DGZ has a lot to learn from it.

6. Conclusion

There more and more voices claiming that protection of weaker parties to contracts must not stop at the protection of consumers. It is submitted that they are not the only weaker parties. There are other categories of subjects in similar or same position as consumers, notably the SMEs. It argued that the same reasons employed to justify consumer protection can be used to justify the protection of SMEs when dealing with large businesses. One, and paradigmatic instrument of protection is policing of unfair contract terms.

Having in mind this background, I analyzed the way in which BW and DGZ regulate the matter of unfair contract terms. I explored the pros and cons regarding the categorical protection of SMEs against unfair terms, and I reached the two conclusions. First, that the benefits of categorical protection of SMEs outnumber the drawbacks. Second, that BW is more in line with the arguments given for the protection of SMEs than DGZ, and that DGZ could draw some inspiration in this area from BW.

Aleksa Radonjić, LL.M

Asistent, Pravni fakultet Univerziteta Union u Beogradu

NEPOŠTENE UGOVORNE ODREDBE I MSP U BW-u I NACRTU GZ-a SRBIJE

Rezime

Ovaj članak je inspirisan argumentima iznetim u literaturi da se zaštita slabije strane u ugovornim odnosima ne sme svesti na zaštitu potrošača. Naročito je interesantna tvrdnja da i određeni poslovni subjekti, tačnije mala i srednja preduzeća i preduzetnici (MSP) predstavljaju slabiju stranu u ugovornim odnosima. Šta više, iznosi se ubedljiva

argumentacija da razlozi kojima se opravdava zaštita potrošača važe i za MSP. Autor je odlučio da proveriti na koji način su MSP zaštićeni u Građanskom zakoniku Holandije i Nacrtu Građanskog zakonika Srbije kada su u pitanju nepoštene ugovorne odredbe budući da se zaštita od takvih odredbi smatra paradigmatičnom kada se govori o zaštiti slabije ugovorne strane. Dalje, razmatrane su prednosti i mane takve kategoričke zaštite MSP i na osnovu svega toga je izveden zaključak da prednosti takve zaštite prevladavaju, da postoje dobri razlozi da se takva zaštita pruža MSP i da bi mnogo toga u tom smislu moglo da se popravi u Nacrtu GZ-a, a da dobar uzor može da bude Građanski zakonik Holandije.

Ključne reči: MSP, nepravilne odredbe ugovora, zaštita slabije strane, građanski zakonik.