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# SAGLASNOST ZA ZAKLJUČENJE UGOVORA[**]

***SAŽETAK***: Predmet rada je saglasnost trećeg lica za zaključenje ugovora. Dosadašnji manjak interesovanja pravne nauke za institut saglasnosti trećeg lica za zaključenje ugovora je posledica njegove normativne razuđenosti. Imajući u vidu da se saglasnost trećeg lica za zaključenje ugovora zahteva često, u raznolikim i brojnim slučajevima, ona je sporadično uređena u delovima propisa koji te ugovore uređuju. Imajući u vidu veliki broj slučajeva u kojima se zahteva saglasnost trećeg lica za zaključenje ugovora, saglasnost koja se za zaključenje ugovora zahteva je sporadično uređena u delovima propisa koji uređuju pojedine ugovore za čije zaključenje se saglasnost zahteva. Stoga, rad se bavi ugovorima za koje je potrebno pribaviti saglasnost trećeg lica i koji se u pravnom prometu najčešće javljaju, a to su ugovori u kojima učestvuju ograničeno poslovno sposobna lica, kao i uređenjem saglasnosti koja se zahteva za zaključenje ugovora o podzakupu i podlicenci. Predmet ovog rada je i analiza dosadašnjeg uređenja saglasnosti u zakonodavstvu Republike Srbije, kao i analiza pitanja vezanih za formu, pravnu prirodu i posledice nepostojanja saglasnosti za zaključenje ugovora. U radu se izlaže i uporednopravna analiza rešenja sadržanih u zakonodavstvu Nemačke, Francuske i Švajcarske.

***Ključne reči***: saglasnost trećeg lica za zaključenje ugovora, punovažnost ugovora, dozvola, odobrenje

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## UVOD

Institut saglasnosti trećeg lica za zaključenje ugovora je institut koji još uvek nije dobio jednu opštu analizu i teorijski osvrt, što se može činiti iznenađujućim imajući u vidu broj situacija u kojima se pojavljuje. Razlog ovakvog manjka interesovanja naučne i stručne javnosti za ovaj institut možda se može pronaći upravo u njegovoj razuđenoj prisutnosti u različitim zakonom uređenim situacijama, koje nisu jednostavne za obradu na apstraktnijem i opštijem nivou. Saglasnost za zaključenje ugovora može se zahtevati iz mnogih razloga, pa je i uloga takve saglasnosti u samom postupku zaključenja ugovora različita. Drugo, saglasnost može biti data prethodno i naknadno, pri čemu se i sudbina ugovora zaključenih u odsustvu saglasnosti može razlikovati. Treće, saglasnost se može zahtevati i od privatnopravnih i od javnopravnih lica, pa se i sama uloga davaoca saglasnosti u postupku zaključenja ugovora može razlikovati. Društveno opravdanje za davanje takve saglasnosti je drugačije, i posledice nedavanja saglasnosti se razlikuju.

Ova raznolikost saglasnosti u pogledu lica koja je daju, vremena naspram zaključenja ugovora kada se daju, i uticaja na pravnu sudbinu ugovora, čine naučnu obradu instituta saglasnosti za zaključenje ugovora otežanom u tolikoj meri da se može i dovesti u pitanje svrsishodnost jedne takve analize. To ne čini manje bitnim potrebu da se jednoj ovakvoj analizi teži, i njome ujedno pokaže i eventualna neophodnost daljeg proučavanja saglasnosti za zaključenje ugovora kao jedinstvenog instituta, uz ukazivanje na pitanja koja se povodom davanja saglasnosti za zaključenje ugovora mogu postaviti.

Stoga će se prvi deo rada baviti analizom pojma saglasnosti za zaključenje ugovora, dok će drugi deo rada biti posvećen pojedinim slučajevima kod kojih Zakon o obligacionim odnosima i Porodični zakon nameću obavezu davanja prethodne ili naknadne saglasnosti za zaključenje ugovora. Prvi deo rada će, u okviru opšte analize, obuhvatiti istoriju uređenja saglasnosti u zakonodavstvu Republike Srbije, pitanje modifikovanog paralelizma forme saglasnosti, posledice odsustva saglasnosti na pravnu sudbinu ugovora, kao i analizu odnosa instituta saglasnosti sa zastupanjem i poslovodstvom bez naloga kao srodnim institutima, a radi jasnijeg sagledavanja pravne prirode saglasnosti. Drugi deo rada, koji će se baviti različitim situacijama u kojima se zahtev za davanje saglasnosti nameće, obuhvata ugovore ograničeno poslovno sposobnih lica, ugovore kojima se raspolaže nepokretnom imovinom deteta i pokretnom imovinom deteta velike vrednosti, i ugovore o podzakupu i podlicenci.

Radi podrobnog ispitivanja zakonskih rešenja koja se odnose na saglasnost za zaključenje ugovora, u radu će pre svega biti korišćen normativno-dogmatski metod, kako bi se došlo do jasnog prikaza jezičke i logičke

sadržine normi koje uređuju saglasnost za zaključenje ugovora. Kroz primenu istorijskog metoda biće izložen tok razvoja instituta saglasnosti kroz relevantne zakonske propise, što doprinosi sagledavanju instituta u celini, njegove evolucije i odnosa sa aktuelnim rešenjima, uz eventualno iznošenje *de lege ferenda* predloga. Celokupan rad će biti prožet i odgovarajućom uporednopravnom analizom zakonskih rešenja Francuske, Švajcarske i Nemačke, te će takvom uporednopravnom analizom rad biti metodološki zaokružen, a u cilju rasvetljavanja koncepta saglasnosti lica za zaključenje ugovora.

## OPŠTA PITANJA O SAGLASNOSTI ZA ZAKLJUČENJE UGOVORA

Analiza instituta saglasnosti za zaključenje ugovora podrazumeva pojmovnu analizu instituta, čiji je cilj da se dođe do jedinstvene definicije ovog pojma, uprkos nejedinstvenom zakonskom uređenju. Pojam saglasnosti za zaključenje ugovora prati i geneza pojma kroz zakonodavstvo Republike Srbije, kao i pitanje forme saglasnosti. Nakon celovite analize pojma kroz navedene dimenzije, postavlja se pitanje pravnih posledica koje po ugovor proizvodi nedostatak saglasnosti kada je ona propisana zakonom. Takođe, radi preciznog određenja pojma saglasnosti neophodno je izvršiti i pojmovno razgraničenje saglasnosti sa srodnim institutima.

### Pojam i razvoj saglasnosti za zaključenje ugovora

Princip autonomije volje na osnovu koga su strane u obligacionom odnosu slobodne da svoje odnose urede po sopstvenoj volji trpi nekoliko ograničenja. Sloboda zaključenja ugovora je nekada ograničena i zahtevom da se neko treće lice saglasi sa zaključenjem ugovora.[1] U skladu sa opštom odredbom čl. 29. Zakona o obligacionim odnosima, ova saglasnost može biti data prethodno ili naknadno,[2] od čega će i zavisiti posledice odsustva saglasnosti. Pošto neispunjenje zahteva zakonodavca u pogledu saglasnosti trećeg za zaključenje ugovora utiče na valjanost zaključenih ugovora kao i sposobnost ugovaranja, saglasnost volja, osnov i predmet, koji se smatraju opštim bitnim uslovima za

[1] Perović, S. (1990). *Obligaciono pravo – knjiga prva*. Beograd: Novinsko-izdavačka ustanova *Službeni list SFRJ*, 176.

[2] Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89. – odluka USJ i 57/89, *Službeni list SRJ,* br. 31/93, *Službeni list SCG*, br. 1/2003. – Ustavna povelja *i Službeni glasnik RS*, br. 18/2020, čl. 29, st. 1.

zaključenje ugovora, može se zaključiti da saglasnost za zaključenje ugovora, uz formu, predstavljaju posebne bitne uslove za zaključenje ugovora, ukoliko je tako zakonom propisano ili je tako predviđeno voljom ugovornih strana. Iz zakonske formulacije nedvosmisleno proizlazi da se ova saglasnost zahteva od trećeg lica, dakle lica koje se nalazi van ugovora, i koje nema, niti će imati svojstvo ugovorne strane. Treće lice čiji se pristanak zahteva u smislu ove odredbe može biti fizičko ili pravno lice, kao i lice privatnog i javnog prava. Saglasnost trećeg lica samostalno proizvodi pravna dejstva, te se može zaključiti da je reč o jednostranom pravnom poslu, kao poslu koji se sastoji od izjave volje jednog lica. Na osnovu izloženih elemenata, saglasnost za zaključenje ugovora se može definisati kao jednostrani pravni posao koji u zakonom propisanim slučajevima predstavlja uslov za zaključenje ugovora i koji preduzima lice koje nije ugovorna strana u tom ugovoru, a koji je usmeren na davanje ili uskraćivanje pristanka da se ugovor zaključi.

Srpski građanski zakonik iz 1844. godine saglasnost za zaključenje pojedinih ugovora spominje sporadično, u pojedinim slučajevima. Srpski građanski zakonik je razlikovao režim pod koji potpada imovina deteta ukoliko je ona nastala pod „roditeljskom vlašću i njihovim upravljanjem" što će predstavljati imovinu roditelja do momenta naslednopravne sukcesije. S druge strane, deca stiču svojinu na stvarima i pravima koja su stekla svojim trudom ili poklonom, iako će do sticanja punoletstva, koje se po Srpskom građanskom zakoniku sticalo sa navršenom 21 godinom, biti pod režimom očinskog upravljanja.[3] Čl. 122. SGZ u režimu imovine pod očinskim upravljanjem opet razlikuje glavnicu, glavnu stvar, i plodove, pri čemu je glavnu stvar dužan sačuvati, osim ako „bi se potrošak toga za osnivanje sreće detinje iziskivao", u kom slučaju se potrošak može učiniti uz dopuštenje suda. Takođe, deca mlađa od 7 godina bila su izjednačena sa licima „lišenim razuma", te im je bilo zabranjeno zaključivanje svih ugovora. Međutim, ukoliko bi nešto „primila na svoju korist", takva pravna radnja bi proizvodila pravna dejstva.[4] Uvažavajući sada već prevaziđenu terminologiju kojom se služio tvorac SGZ-a može se pretpostaviti da je zapravo deci koja nisu navršila 7 godina života bilo dozvoljeno preduzimati one pravne poslove kojima se pribavljaju isključivo prava. Drugi poslovi koje bi preduzeo maloletnik nisu bili apsolutno ništavi, već je mogao da se traži poništaj takvog ugovora. Pravo da se sudski zahteva poništenje ugovora pripadalo je samo maloletniku, i na njemu je bio teret dokazivanja da je zaključenjem ugovora pretrpeo štetu, dok bi saugovarač, radi održanja

[3] Srpski građanski zakonik – SGZ od 11. marta 1844. godine, sa izmenama i dopunama, para. 122.

[4] SGZ, para. 533.

ugovora na snazi, mogao da dokazuje suprotno, da maloletno lice nije pretrpelo štetu zaključenjem predmetnog ugovora.[5]

Međutim, Mihailo Konstantinović je smatrao potrebnim da slučaj, kada se zahteva saglasnost za zaključenje ugovora koju daje treće lice, izdvojeno zakonski uredi, tako da je jedna takva odredba pronašla svoje mesto u Skici za Zakonik o obligacijama i ugovorima. Odredba čl. 4. Skice je preuzeta u ZOO uz sitne terminološke izmene.[6] Ova odredba je dugo bila imuna na bilo kakve izmene ili dopune, pa je tako u integralnoj verziji preuzeta čak i u čl. 172. Prednacrta građanskog zakonika Republike Srbije.[7] Može se zaključiti da potreba za razvojem ili eventualnom promenom ove odredbe nije uočena, niti se razmatrala njena izmena u srpskom zakonodavstvu. Međutim, odredba o poslovnoj sposobnosti poklonoprimca („daroprimca“) iz čl. 512. Skice nije pronašla svoje mesto u Zakonu o obligacionim odnosima. Prema toj odredbi, dar može primiti i poslovno nesposobno lice, ali njegov zakonski zastupnik može svojom izjavom raskinuti dar ukoliko je ovaj prihvaćen bez njegove dozvole. Ova odredba predstavlja svojevrstan „izuzetak od izuzetka“, uspostavljanje kontrole zakonskog zastupnika nad pravnim poslom kojim poslovno nesposobno lice u načelu stiče samo prava. Uprkos dobročinoj prirodi ugovora o poklonu, moguće je da zakonski zastupnik utvrdi da ovakav posao ipak nije u najboljem interesu poklonoprimca, da mu ipak nameće neke obaveze ili terete, pa možda čak i da spreči nametanje poreskih obaveza poslovno nesposobnom licu, kao što je slučaj sa ugovorom o poklonu nepokretnih stvari u nemačkom pravu.[8]

Osnovno pravilo koje postavlja Zakon o obligacionim odnosima po uzoru na Skicu profesora Konstantinovića glasi da se saglasnost koju daje treće lice za zaključenje ugovora može dati i prethodno i naknadno, bez davanja prioriteta bilo kojoj od te dve opcije.[9] Tek ukoliko je zakonom predviđen naročit zahtev da se saglasnost mora dati u obliku odobrenja, odnosno u obliku dozvole, može se govoriti o davanju prednosti nekom od ova dva modaliteta saglasnosti trećeg lica.

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[5] Pavlović, Đ. (2014). *O obveznostima i ugovorima uopšte*. Beograd: Pravni fakultet Univerziteta u Beogradu, 232.

[6] Konstantinović, M. (1996). *Obligacije i ugovori – Skica za zakonik o obligacijama i ugovorima*. Beograd: Novinsko-izdavačka ustanova *Službeni list SFRJ*, čl. 4.

[7] Prednacrt građanskog zakonika Republike Srbije. (2015). Preuzeto 19. 8. 2022. sa: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html čl. 172.

[8] Više o tome u daljem tekstu rada.

[9] Konstantinović, M. (1996) *Op. cit.*

## FORMA SAGLASNOSTI ZA ZAKLJUČENJE UGOVORA

Do marta 2020. godine u pogledu saglasnosti trećeg lica za zaključenje ugovora važio je princip paralelizma formi. Između forme saglasnosti za zaključenje ugovora i forme ugovora za čije se zaključenje saglasnost daje nije smeo postojati disparitet, pa je forma saglasnosti u potpunosti pratila formu ugovora. Nakon izmene i dopune ZOO, odredba čl. 29. ZOO je dopunjena st. 3. prema kojem je za ugovor za čije se zaključenje saglasnost daje propisana forma javnobeležničkog zapisa ili javnobeležnički potvrđene isprave, dovoljno je da saglasnost bude data u formi javnobeležnički overene (legalizovane) isprave.[10] Kada je reč o blažim formama ugovora i funkcijama takvih formi, poput sprečavanja prenagljenog odlučivanja i obezbeđivanja autentičnosti ugovora, princip paralelizma formi je opravdan.[11] Međutim, kada je za ugovor propisano da mora biti zaključen u strožim – javnobeležničkim formama, zakonodavac smatra da se funkcija ovih formi, pre svega dokazna i kontrolna, mogu postići i bez nametanja strogih zahteva forme za saglasnost.

Nemački građanski zakonik je izričito pri stavu da saglasnost ne mora biti data u formi koja se zahteva za pravni posao za koji se daje. Izjava o davanju pristanka ili odbijanju da se pristanak dâ može se saopštiti bilo kojoj od ugovornih strana.[12] Sličan stav srećemo i u švajcarskom pravu. Zakonski zastupnik lica sposobnog za rasuđivanje koje nema odgovarajuću poslovnu sposobnost može dati saglasnost prethodno ili naknadno, dok se saglasnost može dati izričito ili prećutno,[13] bez potrebe da bude data u nekoj naročitoj formi. Ipak, ne možemo se složiti sa stavom da saglasnost treba da bude lišena bilo kakvih zahteva u pogledu forme. Kada je cilj forme zaštita privatnih interesa, interesa ugovornih strana, zaštita od prenagljenog odlučivanja i nesmotrenog pristupanja zaključenju ugovora, smatramo opravdanim da se za saglasnost propiše obavezna forma. Postavljanjem takvih zahteva i u pogledu forme saglasnosti postiže se potpunije postizanje ciljeva forme kojima se teži propisivanjem forme za ugovor za čije zaključenje se saglasnost daje.[14] Takođe, obaveznim utvrđivanjem identiteta davaoca saglasnosti u postupku legalizacije privatne

[10] ZOO, čl. 29, st. 3.

[11] Predlog zakona o izmenama i dopuni Zakona o obligacionim odnosima. (2019). Preuzeto 19. 8. 2022. sa: http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/2883-19.pdf.

[12] Nemački građanski zakonik iz 1900. godine sa izmenama (*Bürgerliches Gesetzbuch;* dalje u fusnotama: NGZ), para. 182, al. 1.

[13] Švajcarski građanski zakonik iz 1907. godine sa izmenama (*Code Civil Suisse;* dalje u fusnotama: ŠGZ*)*, para. 19a.

[14] Perović, S. (1964). *Formalni ugovori u građanskom pravu.* Beograd: Savez udruženja pravnika Jugoslavije, 32.

isprave se postiže i funkcija preventivne jurisdikcije i obezbeđivanja pravne sigurnosti koja je svojstvena svim javnobeležničkim formama.

Kada je u pitanju forma saglasnosti za zaključenje ugovora, treba razlikovati i saglasnosti koje daju privatnopravni i javnopravni subjekti. Saglasnost koju daju javnopravni subjekti u zakonom propisanom postupku i u granicama ovlašćenja imaju oblik upravnog akta i samim tim svojstvo javne isprave, te je nepotrebno i nezamislivo za takve saglasnosti nametati da budu date u bilo kojoj javnobeležničkoj formi. Zaštita javnog interesa i dokazna funkcija forme se u podjednakoj meri postižu i davanjem saglasnosti u obliku upravnog akta.[15] Pored mogućnosti da je ovakav postupak uređen posebnim propisima, u kom slučaju će se primenjivati posebni zakon,[16] razlozi svrsishodnosti takođe ne ukazuju na potrebu da se saglasnost data od strane upravnog organa sastavlja u formi javnobeležnički potvrđene isprave. Naime, zaštita javnog interesa, kao i dokazna funkcija postižu se u jednakoj meri i sastavljanjem saglasnosti u obliku upravnog akta. Davanje saglasnosti za zaključenje ugovora od strane organa uprave je uređeno pravilima upravnog prava, pri čemu upravnopravno uređenje saglasnosti ne menja obligacionopravnu prirodu ugovora za čije se zaključenje daje.[17]

Dozvola ili odobrenje koje daje državni organ se ne smatraju samostalnim pravnim poslom. S druge strane, saglasnost koju daje fizičko ili pravno lice koje je privatnopravni subjekt ima prirodu jednostranog pravnog posla građanskog prava na koji se primenjuju odredbe ZOO, uključujući i odredbe o formi saglasnosti.[18]

## Pravna priroda saglasnosti za zaključenje ugovora i pravne posledice odsustva saglasnosti za zaključenje ugovora

U doktrini postoje različiti stavovi u pogledu pravne prirode saglasnosti za zaključenje ugovora, pa samim tim i posledica njenog odsustva. Prema

[15] Radomirović, I. (2020). *Forma punomoćja za zaključenje ugovora o prodaji nepokretnosti,* masterski rad odbranjen na Pravnom fakultetu univerziteta u Beogradu, 17.

[16] Antić, O. (2012). *Obligaciono pravo.* Beograd: Pravni fakultet Univerziteta u Beogradu, 342.

[17] Vizner, B. (1978). *Komentar Zakona o obligacionim odnosima*. Zagreb: *Narodne novine*, 166; Perović, S., Stojanović, D. (ur.). (1980). *Komentar Zakona o obligacionim odnosima*. Kragujevac, Gornji Milanovac: Kulturni centar, Pravni fakultet u Kragujevcu, 194; Perović, S. (1964). *Formalni ugovori u građanskom pravu.* Beograd: Savez udruženja pravnika Jugoslavije, 32; Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora dr M. Konstantinovića.* Beograd: Savez studenata Pravnog fakulteta u Beogradu, 51.

[18] Vizner, B. (1978). *Op. cit.*, 166.

jednom stanovištu, reč je o sastavnom delu bitne forme ugovora, te do kompletiranja forme pravnog posla davanjem saglasnosti takav ugovor ne proizvodi pravna dejstva.[19] Drugi stav o prirodi saglasnosti za zaključenje ugovora govori o davanju saglasnosti kao odložnom uslovu,[20] prema kome je ugovor nastao, ali počinje proizvoditi pravna dejstva u momentu ostvarenja uslova, odnosno dobijanja potrebne saglasnosti. Međutim, o saglasnosti trećeg lica kao odložnom uslovu može se govoriti samo kada je reč o naknadnoj saglasnosti za zaključenje ugovora, a imajući u vidu da prilikom prethodnog davanja saglasnosti ne dolazi do zasnivanja uslova jer saglasnost prethodi zaključenju ugovora.[21] Dakle, stav o saglasnosti trećeg lica kao odložnom uslovu može se razmotriti kada je reč o davanju odobrenja.[22] Kada je reč o saglasnosti koju daje zakonski zastupnik ograničeno poslovno sposobnog lica, Konstantinović zauzima stav da je reč o izjavi volje koja predstavlja sastavni deo ugovora koji zaključuje maloletnik, a da samostalno posmatrano, ona predstavlja jednostrani pravni posao na koji se primenjuju pravila o takvim pravnim poslovima.[23]

Uprkos različitim teorijama, čini se najprikladnijim prethodno utvrđivanje prirode saglasnosti putem svrhe radi koje se saglasnost zahteva. Cilj propisivanja zahteva u pogledu saglasnosti može biti sprečavanje pravnih dejstava pravnog posla da uopšte nastupe bez saglasnosti, a može biti i da je cilj ovakvog pravila da se određena fizička ili pravna lica disciplinuju i kontrolišu u pravnom prometu, te da se nepostupanje po zakonskim zahtevima prepozna i sankcioniše na odgovarajući način. Ukoliko je reč o saglasnosti koju daje državni organ u odgovarajućem upravnom postupku,[24] po pravilu će biti reč o težnji zakonodavca da uspostavi kontrolu nad određenom vrstom pravnih poslova ili nad prometom određenih dobara koja mogu biti opasna ili koja zahtevaju pojačanu obazrivost i oprez prilikom stavljanja u promet. Tako lice koje želi da otuđi vatreno oružje ima pravno relevantnu volju potrebnu za

[19] Stanković, O. (ur.). (1996). *Leksikon građanskog prava.* Beograd: Nomos, 389.

[20] Salma, J. (2004). Obligaciono pravo. Novi Sad: Pravni fakultet Novi Sad, 272; Perović, S. (1964). *Formalni ugovori u građanskom pravu.* Beograd: Savez udruženja pravnika Jugoslavije, 32; Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora dr M. Konstantinovića.* Beograd: Savez studenata Pravnog fakulteta u Beogradu, 51.

[21] Perović, S. (1990). *Obligaciono pravo – knjiga prva*. Beograd: Novinsko-izdavačka ustanova *Službeni list SFRJ*, 176.

[22] Krulj, V., Blagojević, B. (1980). *Komentar Zakona o obligacionim odnosima*. Beograd: Savremena administracija, 51.

[23] Konstantinović, M. (1969). *Op. cit.*, 50.

[24] Konstantinović takođe slučajeve kada se za zaključenje ugovora zahteva saglasnost trećeg lica deli na slučajeve kada je potreban pristanak drugog lica, pri tome misleći na privatnopravna lica, i slučajeve kada je potreban pristanak državnog organa. Konstantinović, M. (1969). *Op. cit.*, 50–51.

zaključenje ugovora kojim se vatreno oružje otuđuje, ali pravno relevantna volja nije dovoljna. Potrebno je i da država, kao lice koje ima interes da kontroliše bezbedan promet vatrenog oružja dâ svoju saglasnost, te se takva dozvola državnog organa nalazi van uslova punovažnosti ugovora koji se tiče volje ugovornih strana i predstavlja samostalan uslov za punovažnost ugovora. Ugovor zaključen bez prethodne saglasnosti državnog organa je po pravilu pogođen sankcijom ništavosti.[25] Ukoliko je reč o naknadnoj saglasnosti, oni se smatraju zaključenim pod odložnim uslovom, te ako se uslov ispuni, odnosno odobrenje bude dato, takvi ugovori će proizvoditi pravna dejstva od momenta zaključenja.

Isto se može reći i kada je reč o saglasnosti organa starateljstva koja je potrebna za obavljanje poslova koji prelaze okvir redovnog upravljanja imovinom štićenika,[26] kao i detetovom nepokretnom i pokretnom imovinom velike vrednosti.[27] Lice koje traži saglasnost je potpuno poslovno sposobno, bilo da je reč o licu koje pravni posao preduzima u svoje ime i za svoj račun ili o njegovom zakonskom zastupniku, ali je ipak potrebno da poslednju reč ima državni organ kompetentan da proceni svrsishodnost i opravdanost preduzimanja takvog pravnog posla. Odnos organa koji daje saglasnost prema samom ugovoru za koji saglasnost daje je kontrolne prirode, državni organ nema neposredan interes za ishod konkretnog pravnog posla, za ugovorne strane, niti za njegov predmet, već je reč o njegovoj nadležnosti da kroz davanje odobrenja vrši kontrolu ugovora te vrste. Državni organ je nadležan da u unapred propisanom upravnom postupku utvrdi da li određeno lice treba da zaključi takav ugovor, da li je to u interesu zastupanog lica, i ukoliko su navedeni uslovi ispunjeni, on će odobriti konkretan pravni posao.

S druge strane, kada je reč o saglasnosti koju zakonski zastupnik daje za pravne poslove koje je zaključilo ograničeno poslovno sposobno lice, zakonski zastupnik, kao lice koje je zakonom ovlašćeno da se stara o pravima i interesima tog lica, zapravo kompletira i dopunjuje njegovu volju. Volja ograničeno poslovno sposobnog lica nije dovoljna za zaključivanje određenih ugovora, pa je potrebno i da njegov zakonski zastupnik dâ svoju saglasnost.[28] Ovde se može govoriti o saglasnosti trećeg kao uslovu koji je obuhvaćen uslovom punovažnosti ugovora koji se tiče volje. Ovo i stoga što je odnos trećeg lica prema pravnom poslu koji ograničeno poslovno sposobno lice treba da zaključi

[25] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora dr M. Konstantinovića.* Beograd: Savez studenata Pravnog fakulteta u Beogradu, 51.

[26] Porodični zakon – PZ, *Službeni glasnik RS,* br. 18/2005, 72/2011. – dr. zakon i 6/2015, čl. 139, st. 3.

[27] PZ, čl. 193, st. 3.

[28] Konstantinović, M. (1969). *Op. cit.*, 50.

intimniji, pa je ovo lice više zainteresovano za ishod ovakvog ugovora. Ono se stara o njegovim pravima i interesima, brine se o njegovoj imovini i pravnoj poziciji, te je naročito zainteresovano da konkretan ugovor koristi licu koje zastupa. Zakonski zastupnik, za razliku od državnog organa, svoje ovlašćenje da dâ saglasnost izvodi iz naročitog odnosa koji ima sa konkretnim licem, poput roditelja kao „najvećeg prirodnog garanta deteta“[29]. U ovoj situaciji dolazi do izražaja i težnja da se propisivanjem zahteva saglasnosti zaštite i interesi trećih lica, pri čemu se na ovom mestu pojam trećih lica odnosi na ona lica koja nisu ni na jedan način uključena u proces zaključenja ugovora, a može se drugačije nazvati i funkcijom sigurnosti pravnog prometa.[30] U nemačkoj doktrini se kao cilj davanja saglasnosti zakonskog zastupnika za pravne poslove maloletnika sa navršenom sedmom godinom života navodi zaštita maloletnika, sprečavanjem da maloletnik preduzme pravne poslove kojima bi sebi naneo štetu ili pogoršao svoj pravni položaj,[31] ali i zaštita maloletnika od trećih lica koja mogu zloupotrebiti njegovo neiskustvo. Svakako, svaki pravni sistem ima zadatak da uspostavi ravnotežu između interesa zaštite poslovno nesposobnog lica i lica sa kojima oni stupaju u ugovorne odnose.[32]

Treća vrsta saglasnosti koja se može tražiti za potpunost određenog pravnog posla jeste ona koju je ovlašćeno da dâ tačno određeno lice na osnovu pravne pozicije ili uloge koju ima u nekom pravnom odnosu, a koji prethodi ugovoru koji se želi zaključiti i koji se zapravo na njemu zasniva. U ovu grupu saglasnosti možemo uvrstiti i saglasnost zakupodavca koja se traži za davanje zakupljene stvari u podzakup, kao i saglasnost davaoca licence za davanje podlicence. U ovim slučajevima, lica čija se saglasnost traži su učesnici nekog prethodnog ugovornog odnosa povodom koga se predmetni ugovor želi zaključiti, te otuda njegov interes da utiče na pravnu sudbinu takvog ugovora.[33] Ova lica zastupaju sopstveni interes, a ne javni, niti interes lica o kome se staraju.

Zakon o obligacionim odnosima rešava ovu situaciju u pogledu ugovora ograničeno poslovno sposobnih lica: ako ograničeno poslovno sposobno lice zaključi ugovor sa trećim licem bez odobrenja zakonskog zastupnika, a u

[29] Stanković, O. (1982). Ograničena poslovna sposobnost i zastupanje maloletnika od strane njihovih roditelja u našem pravu. *Anali Pravnog fakulteta,* 1982 (6), 1229.

[30] Vodinelić, V. (1999). Funkcije poslovne sposobnosti maloletnika. *Pravo – teorija i praksa,* (3), 43.

[31] Đurđević, D. (2010). Neutralni pravni poslovi. *Anali Pravnog fakulteta u Beogradu* (2), 81.

[32] Smits, J. M. (2017). *Contract Law: A Comparative Introduction*. Cheltenham, Northhampton: Edward Elgar Pub, 127.

[33] Naravno, taj interes je manje izražen kod davaoca licence i zakupodavca nego kod poverioca, a imajući u vidu da se njihove dozvole ne traže uvek, već samo u naročito propisanim slučajevima, i pošto se dozvola može odbiti samo iz naročito ozbiljnih razloga.

pitanju je ugovor koji se nalazi van kruga ugovora čije samostalno zaključivanje mu je dozvoljeno zakonom, po slovu zakona, takav ugovor će biti rušljiv, ali može biti osnažen naknadnim odobrenjem zakonskog zastupnika.[34] Isto rešenje ima i nemačko pravo. Ako saugovornik poslovno nesposobnog lica pozove zakonskog zastupnika da se izjasni da li posao odobrava, izjašnjenje može biti dato samo njemu, dok bi izjašnjenje dato maloletniku pre poziva da se izjasni bilo nepunovažno.[35] Za razliku od našeg prava u kome se nakon proteka roka od 30 dana od poziva da se izjasni smatra da je odobrenje odbijeno, u nemačkom pravu taj rok iznosi dve nedelje od prijema zahteva za izjašnjenje. U švajcarskom pravu rok je formulisan kao razuman period koji je odredio saugovornik ili sud.[36]

U pogledu pravne prirode i sudbine takvog ugovora, zaključenog od strane ograničeno poslovno sposobnog lica, a bez saglasnosti zakonskog zastupnika, uprkos postojanju različitih stavova, te zakonskom uređenju ovih pravnih poslova kao rušljivih, najzastupljeniji je stav koji ovakve ugovore smatra tzv. hramajućim pravnim poslovima (*negotium claudicans).* Hramajući pravni posao se definiše kao pravni posao za čiju je punovažnost potrebna saglasnost, odnosno odobrenje nekog trećeg, pri čemu takav pravni posao ne proizvodi nikakva pravna dejstva do dobijanja saglasnosti.[37] Postoji stav u teoriji prema kome su hramajući poslovi i svi drugi poslovi za čiju valjanost je potrebno dobiti saglasnost trećeg.[38] Dakle, sve do dobijanja odobrenja zakonskog zastupnika ne može se reći da je ugovor nastao, već se može govoriti samo o određenoj „pravnoj situaciji" u kojoj se davanje saglasnosti očekuje,[39] tj. radi se o ugovoru *in statu nascendi.* Međutim, postoji i stav prema kome će ovaj hramajući pravni posao biti osnažen i bez naknadne saglasnosti zakonskog zastupnika. Naime, osnaženje ovakvog ugovora će nastupiti protekom roka tokom koga ovlašćeni subjekt može zahtevati da se ugovor poništi zbog poslovne nesposobnosti saugovornika ili odsustva saglasnosti.[40] Ali, saugovornik ograničeno poslovno sposobnog lica

[34] ZOO, čl. 56, st. 3. Kao što se ukazuje u različitim delovima rada, zakonodavčeva terminološka nedoslednost ponovo dolazi do izražaja. Iako se čl. 29, st. 1. ZOO odobrenje definiše kao saglasnost data posle zaključenja ugovora, čl. 56. govori o „naknadnom odobrenju" što u kontekstu zakonske definicije odobrenja predstavlja svojevrsni pleonazam te je određenje odobrenja kao naknadnog trebalo bi da izostane.

[35] NGZ, para. 108, al. 2.

[36] ŠGZ, para. 19a.

[37] Stanković, O. (ur.). (1996). *Leksikon građanskog prava.* Beograd: Nomos, 388.

[38] *Ibid*.

[39] Dolović Bojić, K. (2021). Pravno nepostojeći ugovori, Beograd: Pravni fakultet Univerziteta u Beogradu, 113.

[40] Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad: Pravni fakultet u Novom Sadu, 220.

ne može zahtevati poništaj ugovora pozivajući se na odsustvo dozvole ili ograničenu poslovnu sposobnost saugovornika.[41] Saugovornik ograničeno poslovno sposobnog lica ima pravo da od ugovora odustane, što je pravna moć koja se daje savesnom saugovorniku bez obzira na pravo da zahteva poništaj u sudskom postupku. Prekluzija nastupa u roku od 30 dana od saznanja za poslovnu nesposobnost ili odsustvo saglasnosti zakonskog zastupnika, osim ukoliko zakonski zastupnik ne da odobrenje pre isteka tog roka. Reč je o preobražajnom pravu saugovornika koji nije znao za ograničenu poslovnu sposobnost saugovornika ili za odsustvo dozvole zakonskog zastupnika.[42]

## Odnos saglasnosti za zaključenje ugovora sa srodnim institutima

### a) Zastupanje

Zastupništvo se definiše kao vršenje pravnih poslova u tuđe ime, a na osnovu ovlašćenja za zastupanje, tako da prava i obaveze iz preduzetog pravnog posla nastupaju neposredno za zastupano lice.[43] Ovlašćenje za zastupanje može se zasnivati na zakonu, opštem aktu pravnog lica, aktu državnog organa i izjavi volje zastupanog.[44] Najčešći slučaj zakonskog zastupanja jeste zastupanje ograničeno poslovno sposobnih lica.[45] Što se tiče maloletnika koji imaju jednog ili oba roditelja, oni vrše roditeljsko pravo koje podrazumeva i ovlašćenje za zastupanje sve do sticanja punoletstva deteta i sticanja potpune poslovne sposobnosti, osim ukoliko i posle punoletstva roditeljsko pravo bude produženo sudskom odlukom. Zakonski zastupnici preduzimaju sve pravne poslove u ime i za račun deteta koje nije navršilo 14 godina života, osim korisnih, neutralnih i bagatelnih.[46] Poslovi koje bi mlađi maloletnik preduzeo samostalno ne bi proizvodili pravna dejstva, niti bi mogli biti osnaženi odobrenjem zakonskog zastupnika. U tom slučaju je reč o vršenju zastupničkih ovlašćenja, pošto roditelji preduzimaju pravne poslove u ime svog deteta, tako da prava

[41] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora dr M. Konstantinovića.* Beograd: Savez studenata Pravnog fakulteta u Beogradu, 50.

[42] Isto rešenje postoji i u nemačkom pravu, s tim što NGZ ne predviđa da se nakon isteka roka pravo na odustanak gubi, već saugovornik može odustati od ugovora dok god ga zakonski zastupnik ne odobri.

[43] Stanković, O., Vodinelić, V. (2007). *Uvod u građansko pravo*. Beograd: Nomos, 193.

[44] ZOO, čl. 84, st. 2.

[45] Pored zastupanja ograničeno poslovno sposobnih lica, podjednako je bitno istaći i učestalost zastupanja pravnih lica, u čije ime pravne poslove preduzimaju ovlašćeni organi tog pravnog lica. V.: Stanković, O., Vodinelić, V. (2007). *Op. cit.*, 208.

[46] PZ, čl. 64, st. 1.

i obaveze nastupaju neposredno za njega, a sve u skladu sa standardom najboljeg interesa deteta. Dete nema pravno relevantnu volju za preduzimanje određenih pravnih poslova, pa se u tom smislu ne može ni govoriti o zastupanju volje, već o zastupanju interesa deteta.[47]

Maloletnici koji su navršili 14. godinu života mogu preduzimati pravne poslove koje mlađi maloletnici ne mogu samostalno nikako preduzimati, ako imaju prethodnu ili naknadnu saglasnost zakonskog zastupnika. Davanjem saglasnosti on samo kompletira pravnu volju maloletnika, koji sam preduzima obaveze u svoje ime i za svoj račun.

Zakonsko zastupanje deteta od strane roditelja proizlazi iz sadržine roditeljskog prava i predstavlja i pravo i dužnost roditelja, u cilju zaštite ličnih i imovinskih interesa deteta.[48] Davanje saglasnosti predstavlja saglašavanje trećeg lica sa ugovorom koji saugovornik sam zaključuje, dok zastupništvo podrazumeva zaključivanje ugovora od strane samog zastupnika i neposredno proizvođenje pravnih dejstava takvog ugovora za zastupanog. Iako u oba slučaja lice izjavljuje svoju volju, prilikom davanja saglasnosti volja je usmerena na pristanak da se zaključi ugovor u čijem zaključenju on nije učestvovao, dok se kod zastupanja radi o pravnom poslu koji je zastupnik preuzeo, opet izjavljujući svoju volju, ali u tuđe ime. Iako će saglasnost zakonskog zastupnika biti potrebna za punovažnost nekih ugovora koje zaključuje zastupani, zakonski zastupnik će prilikom davanja saglasnosti ili odbijanja izjavljivati sopstvenu volju i u svoje ime, a ne u ime zastupanog. U pitanju je izjava volje koja samostalno posmatrano ima prirodu jednostranog pravnog posla.[49]

**b) Poslovodstvo bez naloga**

Prema Zakonu o obligacionim odnosima, smatraće se da je nezvani vršilac od početka delovao kao zastupnik u dva slučaja: ukoliko obavljeni posao ne trpi odlaganje te predstoji šteta, ili ukoliko bi se neobavljanjem posla propustila očigledna korist za gospodara.[50] Reč je o nužnom i korisnom poslovodstvu kod koga je gospodar posla dužan da tako obavljen posao odobri, čime se smatra da je poslovođa delao u svojstvu zastupnika od samog početka. U slučaju nužnog i korisnog poslovodstva ne može biti reči o odluci gospodara posla da određeni posao odobri, već je nezavisno od svoje volje on dužan da

[47] Vizner, B. (1978). *Komentar Zakona o obligacionim odnosima.* Zagreb: Narodne novine, 381.

[48] Draškić, M. (2020). Porodično pravo i prava deteta. Beograd: Pravni fakultet Univerziteta u Beogradu, 277.

[49] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora dr M. Konstantinovića.* Beograd: Savez studenata Pravnog fakulteta u Beogradu, 50.

[50] ZOO, čl. 220, st. 2.

tako učini, a imajući u vidu da nezvani vršilac zapravo preduzima pravni ili materijalni posao na osnovu ovlašćenja sadržanog u zakonu.[51] Odobrenje se kod nužnog i korisnog poslovodstva ne može smatrati ratihabicijom iz čl. 228. Zakona o obligacionim odnosima, već se radi o jednostranom prihvatu obavljenih poslova, preuzimanju na sebe svih obaveza koje je poslovođa preuzeo u ime gospodara posla, kao i preuzimanju obaveze da se poslovođi naknade nužni i korisni izdaci i eventualno pretrpljena šteta.[52]

O davanju odobrenja u pravom smislu reči, koje zavisi od volje onog čiji je posao, može se govoriti samo ukoliko poslovođa dela bez zakonskog ovlašćenja, te isključivo od volje onog čiji je posao zavisi da li će takav posao biti naknadno odobren ili ne.[53] Iz zakonske formulacije se može jasno zaključiti da može biti reč i o pravnim i o materijalnim poslovima, dok se saglasnost iz čl. 29. Zakona o obligacionim odnosima daje samo kada je reč o pravnim poslovima. Drugo, gospodar posla odobrava posao koji je obavljen za njegov račun i u njegovom interesu. Kada treće lice daje saglasnost za zaključenje ugovora ta saglasnost je usmerena na osnaživanje posla koji ne pripada onome čija se saglasnost zahteva, već je cilj takve saglasnosti da dopuni nepotpunu volju lica čiji je ugovor u pitanju, ili da svojom saglasnošću potvrdi da je dati ugovor u interesu tog lica te da ga zastupnik takvog lica može preduzimati. U svakom slučaju, u pitanju je treće lice na koje se posledice preduzimanja pravnog posla ne projektuju, koje nema neposredni pravni interes za posao u pitanju. Stoga, iako se i u ovom slučaju zahteva davanje odobrenja, a radi ustanovljavanja fikcije da je ugovor o nalogu na osnovu koga je nezvani vršilac radio od početka, ne može se ova situacija poistovetiti niti se na nju primenjuje odredba čl. 29. Zakona o obligacionim odnosima, a imajući u vidu različitost okolnosti pod kojima se ugovor zaključuje, svojstvo u kojem se odobrenje daje i njegovu ulogu. Ako onaj čiji je posao odobri (naknadno odobri, po rečima zakonodavca) ono što je izvršeno, on postaje nalogodavac iz ugovora o nalogu. Njegova pravna pozicija je saugovaračka, te on svojim odobrenjem zapravo zasniva ugovor iz koga za njega neposredno proističu odgovarajuća prava i obaveze. Kada je reč o saglasnosti trećeg lica, ono davanjem saglasnosti ne stupa u ugovorni odnos, već njegova saglasnost predstavlja neophodan uslov za punovažnost tog ugovora, ono je u tom odnosu treće lice i davanjem takve saglasnosti se stiču prava i obaveze za ugovornike, a ne za njega, čak i ako saglasnost daje u svojstvu zakonskog zastupnika.

[51] Stanković, O., Vodinelić, V. (2007). *Uvod u građansko pravo*. Beograd: Nomos, 196.

[52] Vizner, B. (1978). *Komentar Zakona o obligacionim odnosima.* Zagreb: Narodne novine, 1003.

[53] ZOO, čl. 228.

## POJEDINI SLUČAJEVI ZA KOJE JE PROPISANA SAGLASNOST TREĆEG LICA KAO USLOV VALJANOSTI UGOVORA

### Ugovori ograničeno poslovno sposobnih lica

Ograničeno poslovno sposobno lice može samostalno preduzimati samo one pravne poslove na čije zaključenje je zakonom ovlašćeno, a za sve ostale mu je potrebno odobrenje zakonskog zastupnika, a ugovori zaključeni bez odobrenja mogu biti osnaženi naknadnim odobrenjem.[54] Očigledno je da čl. 56. ZOO nije uvažena podela saglasnosti trećeg lica na prethodnu i naknadnu, jer se na oba mesta govori o odobrenju. Smatramo da je u pitanju još jedna jezička nepreciznost zakonodavca, te da zakonodavac nije imao nameru da saglasnost u ovom slučaju ograniči samo na naknadnu. Porodični zakon, sa druge strane, kada govori o saglasnosti roditelja za poslove koje preduzima stariji maloletnik, kaže da se ona može dati i prethodno i naknadno.[55] Stariji maloletnik je inače ovlašćen da preduzima pravne poslove kojima pribavlja isključivo prava, pravne poslove kojima ne stiče ni prava ni obaveze i pravne poslove malog značaja bez saglasnosti zakonskog zastupnika, kao i mlađi maloletnik, dok mu je za sve ostale potrebna saglasnost.[56]

U francuskom pravu, kao i u srpskom, sposobnost (*capacité)* ili pravni kapacitet je pravilo.[57] Pretpostavka je i da poslovna sposobnost pokazana prilikom preduzimanja drugih pravnih poslova ili zaključenja drugog ugovora i dalje postoji, a teret dokazivanja će biti na licu koje tvrdi suprotno.[58] Ona u sebi obuhvata i pravnu (*capacité de juissance)* i poslovnu sposobnost (*capacité d'excercer)*, što nije slučaj u srpskom pravu.[59] Pravna sposobnost u francuskom pravu zapravo predstavlja pravo lica da „uživa" svoja prava, ali i da postane

[54] ZOO, čl. 56.

[55] PZ, čl. 64, st. 2.

[56] O pojmu pravnih poslova kojima se ne stiču ni prava ni obaveze: Đurđević, D. (2010). Neutralni pravni poslovi. *Anali Pravnog fakulteta u Beogradu* (2), 81 i dalje.

[57] Reformom francuskog obligacionog prava koja je stupila na snagu 1. 10. 2016. godine, pretpostavka opšte pravne sposobnosti ugovaranja se odnosi samo na fizička lica, dok je kod pravnih lica naglašena vezanost pravne sposobnosti za cilj njihovog delovanja. Francuski građanski zakonik iz 1804. godine sa izmenama (*Code Civil;* dalje u fusnotama: FGZ), para. 1145.

[58] De Leon, H. S., De Leon, H. M. Jr. (2014). *The Law on Obligations and Contracts*. Manila: Rex Book Store, 544.

[59] Pravna nesposobnost se javlja kod pravnih lica. Youngs, R. (2014). *English, French & German Comparative Law.* London and New York: Routledge, 581. Ipak, smatra se da opšta pravna nesposobnost ne postoji, zato što bi ona predstavljala negaciju ličnosti u pravu. Renault-Brahinsky, C. (2019). *Droit des obligations*. Paris: LGDJ, 49.

njihov nosilac, bez obzira na to da li je osnov sticanja zakon ili pravni posao.[60] Poslovna sposobnost se određuje kao sposobnost titulara prava da svoje pravo vrši, da ga „ostvaruje", naročito ugovorom.[61] Poslovna „nesposobnost ne sprečava lice da postane titular prava niti da pravo stiče, ali ga onemogućava da njime slobodno raspolaže".[62] Pretpostavka je i da poslovna sposobnost pokazana prilikom preduzimanja drugih pravnih poslova ili zaključenja drugog ugovora i dalje postoji, a teret dokazivanja će biti na licu koje tvrdi suprotno.[63]

Za razliku od pravne sposobnosti, poslovna sposobnost može biti opšta i specijalna.[64] Svojim pravima lice može raspolagati posredstvom trećeg lica koje će zastupati njega i njegove interese. Nesposobnost za vršenje prava je svojstvena maloletnicima koji nisu prošli postupak emancipacije,[65] kao i punoletnim licima koja se nalaze pod starateljstvom.[66] Maloletnici se smatraju poslovno nesposobnim licima u pogledu velikog broja poslova, sa pojedinim izuzecima. Radi preduzimanja poslova za koje nemaju potrebnu poslovnu sposobnost, maloletnici moraju biti uredno zastupani, a režim zastupništva zavisi od toga da li se o maloletniku staraju roditelji (ili jedan od njih), ili maloletnik nema roditelje. Ukoliko maloletnika ne zastupaju roditelji ili roditelj, ustanovljava se režim tutele (zaštitništva), koji podrazumeva postavljanje tutora (*tuteur)* i ustanovljavanje porodičnog saveta (*conseil de famille),* kojim predsedava posebni sudija za starateljstvo (*juge de toutelle).* Kao što je prethodno pomenuto, poslovna nesposobnost ne sprečava poslovno nesposobna lica da preduzimaju sve pravne poslove koje pravni poredak poznaje. Kada su u pitanju svakodnevni pravni poslovi *(les actes de la vie courante)* za koje zakon ili običaji daju ovlašćenje*,* poput kupovine namirnica i sličnih stvari manje vrednosti, njih poslovno nesposobno lice može preduzimati samostalno, pod uslovom da su preduzeti pod „normalnim uslovima".[67] Reč je o pravnim poslovima za koje je uobičajeno da ih i maloletno lice može preduzimati sâmo, a što se odnosi na one svakod-

[60] Terré, F., Fenouillet, D. (2012). *Droit Civil: Les personnes: Perconalité. Incapacité. Protection.* Paris: Dalloz, 280.

[61] *Ibid*.

[62] Za francusko pravo je karakteristično i zabranjivanje pojedinim licima da zaključuju neke pravne poslove, a zbog postojanja nekog odnosa između njih. Primer za to je zabrana zaključenja ugovora o prodaji nepokretnosti između supružnika, osim u situacijama propisanim zakonom. FGZ, para. 1595.

[63] De Leon, H. S., De Leon, H. M. Jr. (2014). *Op. cit.*, 544.

[64] Renault-Brahinsky, C. (2019). *Op. cit.*, 50.

[65] U francuskom pravu se maloletnim licima smatraju sva lica koja nisu navršila 18 godina života. Sva ta lica svrstana su u istu kategoriju maloletnika, pošto francusko pravo ne grupiše maloletnike na osnovu uzrasta kao što to čini naše pravo. FGZ, para. 388.

[66] FGZ, para. 1147.

[67] FGZ, para. 1148.

nevne, redovne pravne poslove koji ne mogu finansijski ugroziti maloletnika i koji su u skladu sa njegovim načinom života, ali i ovakvi pravni poslovi mogu biti poništeni ukoliko su ekonomski nepogodni za maloletnika.[68] Takvi ugovori su pogođeni sankcijom relativne ništavosti, zato što je uslov punovažnosti u konkretnom slučaju ustanovljen radi zaštite interesa jedne ugovorne strane, maloletnog lica.[69] Drugu kategoriju pravnih poslova čine poslovi redovnog upravljanja, koje može preduzimati i jedan roditelj samostalno, kao i tutor bez saglasnosti porodičnog saveta. Ugovor koji zaključi lice koje nema potrebnu poslovnu sposobnost za njegovo zaključenje je rušljiv, te proizvodi pravna dejstva i obavezuje ugovorne strane dok ne bude poništen u sudskom postupku. Na kraju, treća kategorija pravnih poslova jesu poslovi pravnog raspolaganja i pravnog upravljanja, za čije preduzimanje je potrebna saglasnost oba roditelja (ili, u slučaju njihovog neslaganja, odluka sudije za starateljstvo).

Kako je poslovna sposobnost pravilo, a nesposobnost izuzetak, francusko pravo formira takozvana „ostrva sposobnosti" unutar poslovne nesposobnosti lica. Ova „ostrva" poslovne sposobnosti se zakonski predviđaju kako bi se napravila ravnoteža između zaštite maloletnika kao cilja pravila o njihovoj poslovnoj nesposobnosti, i uvažavanja stepena njihove zrelosti i sposobnosti za rasuđivanje.[70] Zato maloletnom licu koje je navršilo 16 godina života roditelji mogu odobriti da preduzima one poslove upravljanja koji su neophodni za osnivanje i vođenje jednočlanog društva sa ograničenom odgovornošću ili jednočlanog akcionarskog društva. Ovo odobrenje mora imati oblik privatne, svojeručno potpisane isprave (*sous seing privé*) ili javnobeležničke isprave (*acte notarié*).[71]

Slično je u švajcarskom pravu: lice je poslovno sposobno ukoliko je punoletno i sposobno za rasuđivanje, a punoletstvo se stiče sa navršenih 18 godina života.[72] Prema čl. 19. Švajcarskog građanskog zakonika svaki maloletnik koji je sposoban za rasuđivanje može preduzimati sve pravne poslove uz saglasnost zakonskog zastupnika, dok samostalno može preduzimati samo one pravne poslove koji mu donose besplatnu korist. Sposobnim za rasuđivanje smatra se lice kome ne nedostaje sposobnost da razborito i racionalno deluje zbog maloletstva, mentalne zaostalosti, mentalnog poremećaja, intoksiniranosti ili sličnih okolnosti. Iako se sposobnost za rasuđivanje

[68] Smits, J. M. (2017). *Contract Law – A Comparative Introduction.* Cheltenham, Northhampton: Edward Elgar Pub, 127.

[69] Porchy-Simon, S. (2016). Droit civil 2e année: Les obligations. Paris: Dalloz, 172.

[70] Ghestin, J., Loiseau, G., Serinet, Y-M. (2013). *La formation du contrat – Tome 1: Le contrat – Le consentement.* Paris: LGDJ, 795.

[71] FGZ, para. 388–1–2.

[72] ŠGZ, para. 13.

ne utvrđuje apstrakno, već u svetlu svakog pojedinačnog slučaja ili pravnog posla, zakonski je ustanovljena pretpostavka sposobnosti za rasuđivanje u odnosu na sva lica.[73]

Dok francusko pravo najviše naglašava značaj ekonomske korisnosti pravnog posla za maloletnika, nemačko pravo, kao i druga prava pod njegovim uticajem, daleko veći akcenat stavljaju na saglasnost roditelja kao preduslov za punovažnost ugovora.[74] Nemačko pravo, kao i naše, a za razliku od francuskog prava, vrši stepenovanje poslovne sposobnosti maloletnika shodno njihovom uzrastu. Maloletnici koji nisu navršili sedam godina života su potpuno poslovno nesposobni i u tome izjednačeni sa licima koja nisu sposobna za rasuđivanje.[75] Maloletnik sa navršenih sedam godina može preduzimati sve pravne poslove uz saglasnost svog zakonskog zastupnika, dok mu za poslove kojima stiče isključivo pravnu korist nije potrebna saglasnost zakonskog zastupnika.[76] Pod saglasnošću se u ovom slučaju podrazumeva prethodna saglasnost.[77] U skladu sa značajem koji nemačko pravo pridaje saglasnosti zakonskog zastupnika kao uslova za punovažnost ugovora, pojam isključive pravne koristi se izuzetno usko tumači. Uz sticanje isključive pravne koristi, potrebno je da se maloletniku takvim sticanjem ne nameće nikakva obaveza, dužnost ili teret. Tako maloletnik bez saglasnosti zakonskog zastupnika ne bi mogao ni da primi poklon koji ima za predmet nepokretnu stvar, jer bi mu takav pravni posao nametnuo poresku obavezu.[78]

## Ugovori kojima se raspolaže nepokretnom imovinom i pokretnom imovinom veće vrednosti od strane roditelja

Kada je reč o pravnim poslovima kojima se raspolaže nepokretnom imovinom ili pokretnom imovinom velike vrednosti, roditeljima je potrebna saglasnost organa starateljstva, koja u skladu sa zakonskom formulacijom može biti data i prethodno i naknadno. Saglasnost se dakle traži samo za akte raspolaganja stvarima i pravima koja već čine imovinu deteta. Pored toga, u teoriji postoji i mišljenje prema kome bi saglasnost trebalo tražiti i kada je reč

[73] Thommen, M. (2018). *Introduction to Swiss Law*. Zurich: Carl Grossmann Publishers, 293.

[74] Smits, J. M. (2017). *Contract Law – A Comparative Introduction.* Cheltenham, Northhampton: Edward Elgar Pub, 128.

[75] NGZ, para. 104.

[76] NGZ, para. 107.

[77] Youngs, R. (2014). *English, French & German Comparative Law.* London and New York: Routledge, 583.

[78] Smits, J. M. (2017). *Op. cit.*, 131.

o aktima propuštanja da se imovina besteretno uveća, poput davanja izjave o odricanju od nasleđa i odbijanju poklona.[79] Iako bi nametanje zahteva saglasnosti i u ovim situacijama bilo u skladu sa interesima zastupanog lica, postavlja se pitanje i učestalosti ovakvih slučajeva u praksi, te mogućnosti efikasnog nadzora nad odbijanjem poklona, koje se po prirodi stvari sprovodi neformalno, odbijanjem ponude za zaključenje ugovora o poklonu, koja ne podleže bilo kakvoj kontroli pomoću koje bi se moglo obezbediti da saglasnost organa starateljstva bude pribavljena. Raspolaganje se u ovom slučaju odnosi kako na pravne poslove kojima se raspolaže pravom svojine, tako i na pravne poslove kojima se raspolaže drugim stvarnim pravima, tako da se saglasnost zahteva, pored akata otuđenja, i za akte opterećenja nepokretne imovine i pokretne imovine velike vrednosti. Reč je o zaključivanju ugovora kojima se zasniva založno pravo, ustanovljava hipoteka, ili zaključuje ugovor o jemstvu.[80]

Kako se ugovori kojima se vrši raspolaganje nepokretnostima poslovno nesposobnih lica sačinjavaju u formi javnobeležničkog zapisa,[81] dok se svi ugovori kojima se vrši prenos prava svojine na nepokretnosti moraju zaključiti u formi javnobeležnički potvrđene (solemnizovane) isprave, na ove ugovore se primenjuju propisi kojima je uređena javnobeležnička delatnost i postupak sastavljanja i potvrđivanja javnobeležničkih isprava. Javnobeležničkim poslovnikom je detaljnije uređen postupak sačinjavanja javnobeležničkih isprava, koji se primenjuje na obe pomenute forme ugovora. Kada je za preduzimanje pravnog posla ili druge pravne radnje potrebna saglasnost organa starateljstva, javni beležnik upućuje učesnika, odnosno njegovog zastupnika da nadležnom centru za socijalni rad podnese zahtev za davanje saglasnosti.[82] Dalje, Javnobeležničkim poslovnikom je predviđena i sadržina javnobeležničke isprave, te se posle teksta pravnog posla u javnobeležničku ispravu unosi i napomena javnog beležnika da je ovlašćeno lice organa starateljstva dalo saglasnost za preduzimanje konkretnog pravnog posla, čak i ovlašćeno lice organa starateljstva stavlja svoj potpis na ispravu, pored drugih učesnika

[79] Stanković, O. (1982). Ograničena poslovna sposobnost i zastupanje maloletnika od strane njihovih roditelja u našem pravu. *Anali Pravnog fakulteta,* 1982 (6), 1230; Draškić, M. (2020). *Porodično pravo i prava deteta*. Beograd: Pravni fakultet Univerziteta u Beogradu, 405.

[80] Draškić, M. (2020). *Op. cit.*, 405.

[81] Zakon o javnom beležništvu – ZJB, *Službeni glasnik RS,* br. 31/2011, 85/2012, 19/2013, 55/2014 – dr. zakon, 93/2014 – dr. zakon, 121/2014, 6/2015. i 106/2015, čl. 82, st. 1, t. 1. Prema jezičkom tumačenju odredbe, u obliku javnobeležničkog zapisa moraju se sačiniti samo oni ugovori u kojima se poslovno nesposobno lice nalazi u svojstvu prenosioca prava na napokretnosti, a ne i kada se poslovno nesposobno lice nalazi u poziciji kupca na primer.

[82] Javnobeležnički poslovnik – JP, *Službeni glasnik RS,* br. 62/2016, 66/2017, 48/2018, 54/2018, 151/2020. i 59/2022, čl. 57, st. 1.

u postupku sačinjavanja isprave.[83] Takođe, javni beležnik je dužan da odbije sačinjavanje isprave ukoliko ne može da utvrdi identitet i ovlašćenje lica koje dolazi ispred organa starateljstva. Iz svih navedenih odredbi se može zaključiti da propisi koji uređuju javnobeležničku delatnost zapravo derogiraju odredbu Porodičnog zakona prema kojoj ova saglasnost može biti data i prethodno i naknadno. Kako javni beležnik prilikom postupka sastavljanja ili potvrđivanja ugovora upućuje učesnike na nadležni centar za socijalni rad, utvrđuje identitet ovlašćenog lica organa starateljstva i odbija sastavljanje i potvrđivanje isprave kada ne može da utvrdi identitet ovlašćenog lica, jasno je da ova saglasnost može biti data isključivo pre zaključenja ugovora kojim se vrši promet nepokretne imovine i pokretne imovine veće vrednosti deteta.

U francuskom pravu bi se u ovu kategoriju mogli uvrstiti oni poslovi za koje je i pored saglasnosti oba roditelja neophodno pribaviti prethodnu saglasnost sudije za starateljstvo, ali i pojedini poslovi koji nose preveliki rizik po imovinu maloletnika, koji su potpuno zabranjeni njegovim zakonskim zastupnicima.[84] Kada je reč o režimu starateljstva, staratelj za poslove pravnog raspolaganja mora pribaviti saglasnost sudije za starateljstvo, ukoliko nije reč o pravnom poslu koji je zbog svoje ozbiljnosti u potpunosti zabranjeno preduzimati od strane staratelja. Saglasnost koja se zahteva od sudije za starateljstvo prema slovu zakona mora biti data prethodno.[85] Prilikom vršenja kontrole nad sprovođenjem tih pravnih poslova, sudija za starateljstvo može, ako smatra da je neophodno da se zaštite interesi maloletnika, a s obzirom na sastav ili vrednost imovine, starost maloletnog lica ili njegove porodične okolnosti, odlučiti da će određeni pravni poslovi raspolaganja biti predmet njegovog prethodnog odobrenja.[86] Ugovori zaključeni protivno ovim pravilima pogođeni su sankcijom ništavosti. Međutim, druga ugovorna strana se može protiviti ništavosti ovako zaključenog ugovora, dokazujući da je predmetni ugovor koristan za poslovno nesposobno lice, da će od njega imati neposredne koristi ili da nije u pitanju ugovor kojim nije postignuta ugovorna ravnoteža, u kojem postoji nesrazmera ugovornih davanja (*lésionnaire)*.

[83] JP, čl. 60.

[84] Reč je o pravnim poslovima kojima se otuđuju prava ili dobra maloletnika bez naknade; kojima se stiče pravo ili potraživanje od trećeg lica prema maloletniku; vršenje delatnosti ili profesije u ime maloletnika i prenos imovine i vlasništva u fiducijarno vlasništvo.

[85] Staratelj ne može, bez prethodnog ovlašćenja sudije za starateljstvo: prodati zgradu ili preduzeće koje pripada maloletniku, uneti u privredno društvo zgradu ili preduzeće koje pripada maloletniku, podići kredit u ime maloletnika, odreći se prava koje pripada maloletniku u njegovo ime, prihvatiti nasledstvo zbog naslednika, kupiti imovinu maloletnika ili je izdati u zakup, pružiti besplatno obezbeđenje u ime maloletnika radi obezbeđenja duga trećeg lica, niti izvršiti radnju koja se odnosi na prenosive hartije od vrednosti ili finansijske instrumente. FGZ, para. 387–1.

[86] FGZ, para. 387–3, al. 1.

### Ugovor o podlicenci i ugovor o podzakupu

Ugovor o podlicenci jeste ugovor kojim sticalac isključive licence pravo iskorišćavanja predmeta licence ustupa drugom licu. Pretpostavka je da sticalac isključive licence može ovo pravo ustupiti bez ikakvih uslova, ali je moguće i ugovoriti da je za zaključenje ugovora o podlicenci potrebna saglasnost davaoca licence.[87] Ovakvo ograničenje slobode da se ugovor o podlicenci zaključi je ipak delimično, a imajući u vidu da davalac licence može odbiti dozvolu samo iz ozbiljnih razloga. Postojanje ozbiljnih razloga će zavisiti od pojedinosti konkretnog slučaja, ali se može pretpostaviti da će u većini slučajeva biti dužan da podlicencu odobri. Iako je ugovor o podlicenci samostalan pravni posao, on ipak umnogome zavisi od ugovora o licenci. Lice koje se kod ugovora o licenci javlja u svojstvu sticaoca licence, kod ugovora o podlicenci ima ulogu prenosioca, pri čemu je predmet ugovora o podlicenci identičan predmetu ugovora o licenci, osim ukoliko je reč o delimičnom prenosu predmeta ugovora o licenci.[88] Takođe, trajanje ugovora o podlicenci zavisi od ugovora o licenci, čijim raskidom se automatski raskida i ugovor o podlicenci.

Slično rešenje je predviđeno i za ugovor o podzakupu. Po pravilu, zakupac može dati predmet zakupa u podzakup, osim kada je dozvola zakupodavca potrebna prema ugovoru ili zakonu.[89] Zakupodavac može odbiti zasnivanje ugovora o podzakupu samo iz opravdanih razloga, što, kao i kod ugovora o podlicenci, bitno ograničava slobodu donošenja odluke zakupodavca. Ako bi zakupodavac odbio da dâ dozvolu za zaključenje ugovora o podzakupu u odsustvu opravdanih razloga, pravo koje je dato zakupodavcu bi se pretvorilo u zloupotrebu prava koja bi bila protivna cilju radi koga je to pravo propisano.[90]

Saglasnost koja se daje prilikom zaključenja ugovora o podzakupu i podlicenci ipak ima svoje karakteristike koje ih čine drugačijim od prethodnih slučajeva kod kojih se saglasnost trećeg lica za zaključenje ugovora zahteva. Prvo, položaj davaoca licence i zakupodavca je drugačiji. Iako se oni ne nalaze u poziciji ugovorne strane,[91] oni imaju naročit interes da učestvuju u postupku zaključenja ugovora, zato što je posredan predmet ovih ugovora i dalje u njihovoj svojini, te im je od značaja način korišćenja utvrđen ugovorom o podzakupu odnosno podlicenci. Kako ZOO ovlašćuje i zakupodavca

[87] ZOO, čl. 704.

[88] Vlajković, Z. (1986). Pojam i vrste ugovora o licenci. *Zbornik radova Pravnog fakulteta u Novom Sadu,* (20), 127.

[89] ZOO, čl. 588.

[90] Orlić, M. (1995). Čl. 587: Kad zakupodavac može odbiti dozvolu. *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović). Beograd: Savremena administracija, 1061.

[91] Vlajković, Z. (1986). *Op. cit.*, 127.

i davaoca licence da zahtevaju neposredno od sticaoca podlicence i podzakupca isplatu iznosa koji duguju davaocu podlicence odnosno zakupcu, oni imaju interes i da znaju od koga će moći potraživati iznos koji im njihovi saugovornici duguju, što predstavlja odstupanje od principa relativnog dejstva obligacionih prava.[92] Stoga, iako oni nisu ugovorne strane, ipak se ne mogu smatrati ni trećim licima u čistom obliku, zato što njihov interes da učestvuju u zaključenju ugovora prevazilazi interese koje mogu imati druga treća lica čija se saglasnost za zaključenje ugovora zahteva. Takođe, zaključenjem ugovora o podlicenci i podzakupu i oni stiču samostalna prava, te je samim tim i njihov interes naglašeniji. Još jedan pokazatelj različitosti ovog slučaja davanja saglasnosti u odnosu na prethodno navedene se može videti i u ograničenju njihove slobode da donesu odluku da li će saglasnost dati ili ne. Prema dispozitivnim zakonskim odredbama, njihova saglasnost nije ni potrebna, a ukoliko je ipak potrebno da se o zaključenju ugovora izjasne, oni to mogu učiniti u vrlo ograničenom vidu, jer će u većini slučajeva biti u obavezi da dozvole zaključenje ugovora o podlicenci i podzakupu[93] Na kraju, davalac licence može otkazati ugovor o licenci ukoliko je ugovor o podlicenci zaključen bez njegove dozvole, kao što i zakupodavac može otkazati ugovor o zakupu ako je podzakup zaključen bez njegovog pristanka. U slučaju otkaza, ugovor o podlicenci i podzakupu će automatski biti raskinuti. Ugovor o podlicenci i ugovor o podzakupu direktno zavise od sudbine licence i zakupa, i to ne samo u navedenom slučaju već i u svakom drugom slučaju raskida ugovora, što objašnjava relevantnost volje zakupodavca odnosno davaoca licence.

## ZAKLJUČAK

Saglasnost trećeg lica za zaključenje ugovora u pozitivnom pravu Republike Srbije je na jedinstven način uređena samo čl. 29. ZOO, dok su konkretni slučajevi u kojima se saglasnost za zaključenje ugovora zahteva uređeni drugim odredbama. Opšte je pravilo da saglasnost može biti data prethodno ili naknadno, ali je to pravilo najčešće izmenjeno drugim odredbama. Ako saglasnost mora biti data pre zaključenja ugovora, onda odustvo takve saglasnosti vodi njegovoj ništavosti. Sa druge strane, ukoliko nije neophodno da dozvola bude data pre zaključenja ugovora, ili ako se za određeni pravni posao zahteva

[92] Orlić, M. (1995). Čl. 589: Neposredni zahtev zakupodavca. *Komentar Zakona o obligacionim odnosima* (ur. Slobodan Perović). Beograd: Savremena administracija, 1062.

[93] Suprotno rešenje je usvojeno u nemačkom pravu, u kome se zakupcu izričito zabranjuje da predmet zakupa daje trećim licima na korišćenje, a naročito u podzakup, bez dozvole zakupca. NGZ, para. 540.

odobrenje, onda takav ugovor biva osnažen odobrenjem, koje po preovlađujućem stavu u teoriji ima pravnu prirodu odložnog uslova.

Pravni režim saglasnosti se takođe razlikuje i u zavisnosti od toga da li saglasnost daje privatnopravni ili javnopravni subjekt. Ukoliko je reč o privatnopravnom subjektu, saglasnost se daje u skladu sa principom modifikovanog paralelizma formi. Takva saglasnost se daje u formi koja je propisana i za ugovor za koji se saglasnost daje, osim ako je reč o formi javnobeležnički potvrđene isprave ili javnobeležničkog zapisa, kada je dovoljno da saglasnost bude data u formi javno overene isprave. Ako saglasnost daje javnopravni subjekt, saglasnost se daje u skladu sa upravnopravnim propisima, i tako data saglasnost je u formi upravnog akta te samim tim ima svojstvo javne isprave. S druge strane, saglasnost koju daje fizičko ili pravno lice koje je privatnopravni subjekt ima prirodu jednostranog pravnog posla građanskog prava na koji se primenjuju relevantne odredbe ZOO.

Najčešći ugovori za koje se zahteva saglasnost trećeg lica su ugovori ograničeno poslovno sposobnih lica za koje saglasnost daje zakonski zastupnik i ugovori koje preduzima zakonski zastupnik u ime ograničeno poslovno sposobnog lica, za koje se zahteva saglasnost organa starateljstva. Ti ugovori su bili predmet najvećeg broja doktrinarnih analiza, a njima je posvećen i najveći broj odredbi kod nas i u uporednom zakonodavstvu. Odredbe o poslovnoj sposobnosti maloletnika sadržane u srpskom pravu su najpribližnije rešenju sadržanom u nemačkom pravu, a prema kome uzrast i zrelost maloletnika utiče i na obim njegove poslovne sposobnosti. Manje tipičan slučaj ugovora za koje se zahteva saglasnost trećeg lica jesu ugovori o podlicenci i podzakupu, kod kojih se saglasnost po pravilu ne zahteva, a kada se zahteva onda je sloboda u donošenju odluke o saglasnosti znatno ograničena.

Uprkos različitosti pravnih poslova koji su uređeni čl. 29. ZOO saglasnost za zaključenje ugovora treba razlikovati od saglasnosti koja se daje kod poslovodstva bez naloga, i od zastupništva. Dok davanje saglasnosti predstavlja saglašavanje trećeg lica sa ugovorom koji zastupani sam zaključuje, zastupništvo podrazumeva zaključivanje ugovora od strane samog zastupnika u ime zastupanog i neposredno proizvođenje pravnih dejstava takvog ugovora za zastupanog. S druge strane, kada treće lice daje saglasnost za zaključenje ugovora ono osnažuje posao koji mu ne pripada i u kome nema svojstvo ugovornika, za razliku od gospodara posla kod poslovodstva bez naloga, već je cilj takve saglasnosti da dopuni nepotpunu volju lica čiji je ugovor u pitanju, ili da svojom saglasnošću potvrdi da je dati ugovor u interesu tog lica te da ga zastupnik takvog lica može preduzimati.

Saglasnost za zaključenje ugovora se zahteva u nizu različitih situacija koje se među sobom razlikuju u pogledu svojstva davaoca saglasnosti, prirode i forme saglasnosti, vremenskog momenta davanja saglasnosti i posledica

njenog odsustva. Raznovrsnost ugovora za koje se zahteva saglasnost trećeg lica opravdava nejedinstveno uređenje ovog instituta u pogledu pojedinih pitanja, što je stav i drugih pravnih sistema koji su predmet analize. Ipak, to ne sprečava sagledavanje svih tih situacija kao pojava koje su obuhvaćene istim institutom i za koje ipak važe i opšta pravila sadržana u čl. 29. Zakona o obligacionim odnosima.

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# CONSENT TO CONTRACT[**]

***ABSTRACT***: The topic of this paper is the consent of a third party to the conclusion of a contract. The current lack of interest of legal science in the institution of third-party consent to contract is a consequence of its scattered normative regulation. Considering third-party consent is required often, in numerous and diverse cases, it is sporadically regulated in parts of regulations governing these contracts. Given the large number of cases where third-party consent to contract is required, this institution is sporadically regulated in parts of regulations governing individual contracts for which consent is required. Therefore, this paper examines contracts for which it is necessary to obtain third-party consent and which most often appear in legal transactions, such as contracts involving persons with limited business capacity, as well as consent required for the conclusion of sublease and sublicense contracts. This paper also includes an analysis of the current regulation of consent in the legislation of the Republic of Serbia, as well as an analysis of issues related to the form, legal nature, and consequences of the absence of third-party consent. The paper also presents a comparative legal analysis of solutions contained in the legislation of Germany, France, and Switzerland.

***Keywords***: third-party consent to contract, contract validity, permit, approval

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## INTRODUCTION

The institution of third-party consent to contract is an institution that has not yet received a general analysis and theoretical overview, which may seem surprising considering the number of situations in which it appears. The reason for such a lack of interest from the scientific and expert community in this institution may be found precisely in its scattered presence in various legally regulated situations, which are not easy to process on a more abstract and general level. Third-party consent can be required for many reasons, so the role of such consent in the contract conclusion process itself varies. Secondly, consent can be given beforehand and subsequently, in which case the fate of contracts concluded without consent can also differ. Thirdly, consent can be required from both private and public law entities, so the role of the consent provider in the contract conclusion process can differ, the social justification for giving such consent is different, and the consequences of refusing consent differ.

This variety of consent in terms of the entities that give it, its timing relative to the conclusion of a contract, and its impact on the legal fate of the contract, make the scientific processing of the institution of third-party consent difficult to such an extent that the usefulness of such an analysis could even be questioned. This does not make the need to strive for such an analysis any less important, and at the same time, it demonstrates the possible necessity of further studying third-party consent as a unique institution, while pointing out questions that can be raised regarding third-party consent.

Therefore, the first part of the paper will analyze the concept of third-party consent, while the second part of the paper will be dedicated to individual cases where the Law of Contract and Torts and the Family Law impose the obligation to give prior or subsequent consent to contract. Within the framework of the general analysis, the first part of the paper will include the history of consent regulation in the legislation of the Republic of Serbia, the issue of modified form parallelism, the effect of the absence of consent on the legal fate of a contract, as well as an analysis of the relationship between the institution of consent and representation and management without mandate as related institutions, in order to gain a clearer understanding of the legal nature of consent. The second part of the paper, which will deal with various situations where the request for consent is imposed, includes contracts with persons with limited business capacity, contracts that dispose of a child's immovable property and movable property of great value, and sublease and sublicense contracts.

For a detailed examination of legal solutions related to third-party consent, the normative-dogmatic method will primarily be used in order to provide

a clear presentation of the linguistic and logical content of the norms governing third-party consent. Through the application of the historical method, the course of the development of this institution will be presented through relevant legal regulations, contributing to the view of the institution as a whole, its evolution and relationship with current solutions, with the possible presentation of *de lege ferenda* proposals. The entire paper will be permeated with a corresponding comparative legal analysis of the legal solutions of France, Switzerland, and Germany, and such a comparative legal analysis will methodologically round off the paper, with the aim of elucidating the concept of third-party consent.

## GENERAL QUESTIONS ABOUT THIRD-PARTY CONSENT TO CONTRACT

This analysis of the institution of third-party consent encompasses a conceptual analysis of this institution, with the aim of reaching an integrated definition of this term, despite its scattered legal regulation. The concept of third-party consent is followed by the genesis of the term through the legislation of the Republic of Serbia, as well as the question of the form of consent. After a comprehensive analysis of the term through these perspectives, the question arises about the legal consequences of the absence of consent when it is required by law. Also, for a precise definition of this term, it is necessary to conceptually distinguish consent from related institutions.

### The Concept and Development of Third-Party Consent

The principle of the autonomy of will, which allows parties in an obligation relationship to arrange their relationship as they wish, has several limitations. The freedom to conclude a contract is sometimes restricted by the requirement of third-party consent.[1] In accordance with the general provision of Article 29 of the Law of Contract and Torts, this consent can be given beforehand or subsequently,[2] which affects the consequences of the absence of consent. As non-compliance with legal requirements regarding third-party

[1] Perović, S. (1990). *Obligaciono pravo – knjiga prva*. Belgrade: Newspaper and Publishing Institution Official Gazette of the SFRY, 176.

[2] Law of Contract and Torts, *Official Gazette of the SFRY*, no. 29/78, 39/85, 45/89. - decision of the CCY and 57/89, *Official Gazette of the FRY,* no. 31/93, *Official Gazette of SCG*, no. 1/2003. *and Official Gazette of the RS*, no. 18/2020., Article 29, paragraph 1.

consent affects the validity of a contract in the same way as contractual capacity, mutual agreement, its grounds and subject, which are considered general essential conditions for the conclusion of a contract, it is evident that third-party consent, as well as contract form, constitute special essential conditions for the conclusion of a contract if prescribed by law or provided for by the will of the contracting parties. It clearly follows from the legal wording that this consent is required from a third party, i.e. a person outside of the contract who does not have, nor will have, the status of a contracting party. The third party whose consent is required, in terms of this provision, may be a natural or legal person, as well as a private or public law entity. Third-party consent independently produces legal effects, suggesting that it is a unilateral legal transaction, i.e. a transaction consisting of a declaration of will by one person. Based on the elements presented, third-party consent can be defined as a unilateral legal transaction that, in cases prescribed by law, is a condition for the conclusion of a contract and is conducted by a person who is not a party to that contract, and which is aimed at giving or refusing consent to contract.

The Serbian Civil Code from 1844 sporadically mentions third-party consent for certain contracts, in certain cases. This Civil Code distinguished the regime under which a child's property falls if it was created under "parental authority and their management", which would then become the parents' property until succession. On the other hand, children obtain ownership of things and rights that they have acquired through their efforts or gifts, although they remain under paternal management until they reach the age of majority - 21, as per the Serbian Civil Code.[3] Article 122 of the Civil Code, discussing property under paternal management, distinguishes between the principal thing and its fruits, where the father is obligated to preserve the principal thing, unless "its consumption would be necessary for the child's happiness", in which case consumption can occur with court permission. In addition, children under the age of 7 were equated with persons "deprived of reason" and were prohibited from concluding all contracts. However, if they "received something for their benefit", such a legal transaction would produce legal effects.[4] Respecting the now outdated terminology used by the creator of the Civil Code, it can be inferred that in fact children who have not reached the age of 7 were allowed to conduct those legal transactions through which only rights are acquired. Other actions undertaken by a minor were not entirely void, but the annulment of such a contract could be requested. The right to judicially demand the annulment of a contract belonged only to the minor, who also had the burden of proving that he sustained a loss by concluding the contract. In order to keep

[3] Serbian Civil Code – SCC of March 11, 1844, as amended, para. 122.

[4] SCC, para. 533.

the contract in effect, the other contracting party could prove the opposite - that the minor did not sustain a loss by concluding the contract.[5]

However, Mihailo Konstantinović deemed it necessary to legally regulate cases where a contract's conclusion requires third-party consent, so one such provision found its place in the draft for the Code of Obligations and Contracts. Article 4 of the draft was included in the Law of Contract and Torts with minor terminological changes.[6] For a long time, this provision was immune to any changes or additions and was adopted in its entirety in Article 172 of the Draft Civil Code of the Republic of Serbia.[7] It can be concluded that the need for the development or possible change of this provision was not recognized, nor was its change considered in Serbian legislation. However, the provision on the business capacity of the recipient ("donee") from Article 512 of the Draft did not find its place in the Law of Contract and Torts. According to this provision, a gift can be received by a person without business capacity, but their legal representative can terminate the gift with their statement if it was accepted without their permission. This provision represents a sort of "exception to the exception", the establishment of control of the legal representative over the legal transaction through which a person without business capacity, in principle, acquires only rights. Despite the gratuitous nature of the gift contract, it is possible for the legal representative to determine that such a deal is not in the best interest of the gift recipient, that it imposes some obligations or burdens on them, and perhaps they can even prevent the imposition of tax obligations on a person without business capacity, as is the case with the gift contract of immovable property in German law.[8]

The fundamental rule laid down by the Law of Contract and Torts, based on Professor Konstantinović's draft, is that third-party consent can be given both beforehand and subsequently, without prioritizing either of these options.[9] Only if the law stipulates a specific requirement that the consent must be given in the form of approval or in the form of a permit, does it become a question of giving preference to one of these two modes of third-party consent.

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[5] Pavlović, Đ. (2014). *O obveznostima i ugovorima uopšte*. Belgrade: Faculty of Law, University of Belgrade, 232.

[6] Konstantinović, M. (1996). *Obligacije i ugovori – Skica za zakonik o obligacijama i ugovorima*. Belgrade: Newspaper and Publishing Institution Official Gazette of the SFRY, art. 4.

[7] Draft Civil Code of the Republic of Serbia. (2015). Accessed on August 19, 2022, from: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html Art. 172.

[8] More on this later in the paper.

[9] Konstantinović, M. (1996). *Obligacije i ugovori – Skica za zakonik o obligacijama i ugovorima*. Belgrade: Newspaper and Publishing Institution Official Gazette of the SFRY, art. 4.

## FORM OF THIRD-PARTY CONSENT TO CONTRACT

Until March 2020, the principle of form parallelism applied to third-party consent. There should not be a disparity between the form of consent and the form of the contract for which consent is required; hence the form of consent would fully follow the form of the contract. However, following amendments and supplements to the Law of Contract and Torts, Article 29 was supplemented with Paragraph 3, stating that if the form of a contract for which consent is required is prescribed as a notarial deed or a notary-certified document, it is sufficient for the consent to be given in the form of a notarized (legalized) document.[10] In the context of less stringent contract forms and their functions, such as preventing hasty decisions and ensuring the authenticity of contracts, the principle of form parallelism is justified.[11] However, when a contract must be concluded in more stringent, notary forms, the legislator believes that the function of these forms, primarily their evidential and control functions, can be achieved without imposing stringent form requirements for consent.

The German Civil Code explicitly states that consent does not have to be given in the form required for the legal transaction for which it is given. The statement of giving or refusing consent can be communicated to any of the contracting parties.[12] There is a similar approach in Swiss law. The legal representative of a person capable of reasoning who does not have the appropriate business capacity can give consent either beforehand or subsequently, and consent can be given explicitly or implicitly,[13] without the need to be given in a particular form. However, we cannot agree with the position that consent should be devoid of any form requirements. When the aim of a required form is to protect private interests, that is the interests of contracting parties, and to protect against hasty decision-making and reckless contracting, we believe it is justified to prescribe a mandatory form for consent. By setting such requirements in terms of consent form, a more complete achievement of the form goals pursued by prescribing a form for a contract requiring consent

[10] Law of Contract and Torts, Art. 29, paragraph 3.

[11] Proposal for the Law on Amendments to the Law of Contract and Torts. (2019). Accessed on 19 August 2022 from: http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/2883-19.pdf.

[12] German Civil Code of 1900 as amended (*Bürgerliches Gesetzbuch;* hereinafter: GCC), para. 182, point 1.

[13] Swiss Civil Code of 1907 as amended (*Code Civil Suisse;* hereinafter in the footnotes: SWCC), para. 19a.

is achieved.[14] Also, by mandatory determination of the identity of the consent giver in the legalization process of a private document, the function of preventive jurisdiction and legal security, inherent in all notary forms, is achieved.

When it comes to the form of third-party consent, it is important to distinguish between consent given by private law entities and public law entities. Consent given by public law entities in an administrative procedure and within the limits of authority has the form of an administrative act and thus the property of a public document, so it is unnecessary and unthinkable for such consent to be given in any notarial form. The protection of public interest and the evidential function of the form of consent are equally achieved by giving consent in the form of an administrative act.[15] Besides the possibility that such a procedure is regulated by special regulations, in which case the special law will apply,[16] reasons of expediency also do not indicate the need for consent given by an administrative body to be in the form of a notary-certified document. Namely, the protection of public interest as well as the evidential function are achieved equally by giving consent in the form of an administrative act. Third-party consent by administrative bodies is regulated by administrative law, whereby the administrative regulation of consent does not change the contractual nature of the contract for which it is given.[17]

A permit or approval given by a state body is not considered an independent legal transaction. On the other hand, consent given by a natural or legal person who is a private law entity has the nature of a unilateral civil law transaction subject to the provisions of the Law of Contract and Torts, including provisions on the form of consent.[18]

Legal Nature of Third-Party Consent and Legal Consequences of Absence of Consent to Contract

In legal doctrine, there are different views on the legal nature of third-party consent, and therefore, the consequences of its absence. According to

[14] Perović, S. (1964). *Formalni ugovori u građanskom pravu.* Belgrade: Association of Lawyers of Yugoslavia, 32.

[15] Radomirović, I. (2020). *Forma punomoćja za zaključenje ugovora o prodaji nepokretnosti,* master's thesis defended at the Faculty of Law of the University of Belgrade, 17.

[16] Antić, O. (2012). *Obligaciono pravo.* Belgrade: Faculty of Law, University of Belgrade, 342.

[17] Vizner, B. (1978). *Komentar Zakona o obligacionim odnosima*. Zagreb: *Narodne novine*, 166; Perović, S., Stojanović, D. (ed.). (1980). *Komentar Zakona o obligacionim odnosima*. Kragujevac, Gornji Milanovac: Cultural Center, Faculty of Law in Kragujevac, 194; Perović, S. (1964). *Formalni ugovori u građanskom pravu.* Belgrade: Association of Lawyers of Yugoslavia, 32; Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 51.

[18] Vizner, B. (1978). *Op. cit.*, 166.

one viewpoint, it is an integral part of the essential form of a contract, hence, until the form of the legal transaction is completed by giving consent, such a contract does not produce legal effects.[19] Another opinion on the nature of third-party consent describes giving consent as a condition precedent,[20] under which a contract has been created but begins to produce legal effects at the moment the condition is met, that is, the necessary consent is obtained. However, third-party consent can be viewed as a condition precedent only when it comes to subsequent consent, bearing in mind that when giving prior consent, there is no condition as the consent precedes the conclusion of the contract.[21] Therefore, third-party consent can be viewed as a condition precedent only when it comes to giving approval.[22] Regarding the consent given by the legal representative of a person with limited business capacity, Konstantinović holds the view that it is a declaration of will that is an integral part of a contract concluded by a minor, and when viewed independently, it represents a unilateral legal transaction subject to the rules on such legal transactions.[23]

Despite various theories, it seems most appropriate to determine the nature of consent, as previously stated, through the purpose for which consent is required. The aim of prescribing the requirement for consent may be to prevent the legal effects of a legal transaction from occurring without consent, or it may also be that the aim of such a rule is to discipline and control certain natural or legal persons in legal transactions and to identify and sanction non-compliance with legal requirements in an appropriate manner. If it is a matter of consent given by a state body in the appropriate administrative procedure,[24] it will generally be the legislator's aim to establish control over certain types of legal transactions or over the trade of certain goods that may be danger-

[19] Stanković, O. (ed.). (1996). *Leksikon građanskog prava.* Belgrade: Nomos, 389.

[20] Salma, J. (2004). *Obligaciono pravo*. Novi Sad: Faculty of Law, Novi Sad, 272; Perović, S. (1964). *Formalni ugovori u građanskom pravu.* Belgrade: Association of Lawyers of Yugoslavia,, 32; Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 51.

[21] Perović, S. (1990). *Obligaciono pravo – knjiga prva*. Belgrade: Newspaper and Publishing Institution Official Gazette of the SFRY, 176.

[22] Krulj, V., Blagojević, B. (1980). *Komentar Zakona o obligacionim odnosima*. Belgrade: Savremena administracija, 51.

[23] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 50.

[24] Konstantinović also divides instances when third-party consent is required into cases where the consent of another individual is needed, referring to private law entities, and cases where the consent of a state body is required. Konstantinović, M. (1969). *Op. cit.*, 50–51.

ous or require increased caution and care when placed on the market. Thus, a person who wants to alienate a firearm has a legally relevant will necessary for concluding a contract by which the firearm is alienated, but a legally relevant will is not enough. It is also necessary for the state, as a party with an interest in controlling the safe trade of firearms, to give its consent, and such a permit of a state body is outside the conditions of the validity of the contract concerning the will of the contracting parties and represents an independent condition for the validity of the contract. A contract concluded without the prior consent of a state body is typically null and void.[25] If it is a matter of subsequent consent, it is considered concluded under a condition precedent, and if the condition is met, that is, approval is given, such a contract will produce legal effects from the moment of conclusion.

The same can be said when it comes to the consent of the guardianship authority, which is required for conducting transactions that go beyond the scope of regular management of a ward's property,[26] as well as a ward's immovable property and movable property of great value.[27] The person seeking consent has complete business capacity, whether it is a person who conducts the legal transaction on their own account or a legal representative, but it is still necessary for the state body that is competent to assess the expediency and justification of conducting such a legal transaction, to have the last say. The relationship of the state body that is giving consent to the contract for which consent is required is of a controlling nature. The state body does not have a direct interest in the outcome of this specific legal transaction, in its subject, or in the contracting parties. Rather, it is a matter of its jurisdiction to exercise control over such contracts by giving approval. The state body is competent to discern in a predetermined administrative procedure whether a certain person should conclude such a contract, whether it is in the interest of the represented person, and if these conditions are met, it will approve the specific legal transaction.

On the other hand, when it comes to the consent given by the legal representative for legal transactions conducted by a person with limited business capacity, the legal representative, as a person authorized by law to protect the rights and interests of that person, essentially completes and supplements their will. The will of a person with limited business capacity is not sufficient for

[25] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 51.

[26] Family Law, *Official Gazette of the RS,* no. 18/2005, 72/2011. and 6/2015, art. 139, para. 3.

[27] Family Law, art. 193, para. 3.

concluding certain contracts, so the consent of their legal representative is also required.[28] This consent can be considered an essential condition regarding will necessary for the validity of the contract. This is because the relationship of the third party to the legal transaction that the person with limited business capacity needs to conduct is more intimate, and this person is more interested in the outcome of such a contract. The third party protects their rights and interests, takes care of their property and legal position, and is particularly interested in this contract benefiting the person they represent. Unlike a state body, a legal representative derives their authority to give consent from a special relationship they have with this specific person, such as a parent as the "greatest natural guarantor of the child"[29]. In this situation, the desire to protect the interests of third parties by requiring consent is also highlighted, with the term third parties here referring to those who are not involved in the contract conclusion process in any way, and this can also be called the function of the security of legal transactions.[30] In German doctrine, the purpose of a legal representative giving consent for legal transactions of minors who are over seven years old is the protection of minors, by preventing them from conducting legal transactions that could be harmful or weaken their legal position,[31] as well as the protection of minors from third parties who can exploit their inexperience. Certainly, every legal system has the task of establishing a balance between the interests of protecting a person with limited business capacity and those with whom they enter into contractual relationships.[32]

The third type of consent that may be required for the completion of a certain legal transaction is consent that a specific person is authorized to give based on the legal position or role they have in a legal relationship that precedes the contract that is intended to be concluded and is actually based on it. This group of consents can include the consent of the lessor required for subletting, as well as the consent of the licensor to grant sublicenses. In these cases, the persons whose consent is required are participants in some previous contractual relationship based on which this contract is supposed to be

[28] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 50.

[29] Stanković, O. (1982). Ograničena poslovna sposobnost i zastupanje maloletnika od strane njihovih roditelja u našem pravu. *Anali Pravnog fakulteta,* 1982 (6), 1229.

[30] Vodinelić, V. (1999). Funkcije poslobne sposobnosti maloletnika. *Pravo – teorija i praksa,* (3), 43.

[31] Đurđević, D. (2010). Neutralni pravni poslovi. *Anali Pravnog fakulteta u Beogradu* 2010 (2), 81.

[32] Smits, J. M. (2017). Contract Law – A Comparative Introduction. Cheltenham, Northhampton: Edward Elgar Pub, 127.

concluded, hence their interest in influencing the legal fate of such a contract.[33] These people represent their own interest, not the public interest, nor the interest of the person they care for.

The Law of Contract and Torts resolves this situation regarding contracts of persons with limited business capacity: if a person with limited business capacity concludes a contract with a third party without the approval of their legal representative, and it is not a type of contract whose independent conclusion is permitted by law, according to the letter of the law, such a contract will be voidable but can be validated by subsequent approval of the legal representative.[34] German law has the same solution. If the person entering into a contractual relationship with a person with limited business capacity contacts the legal representative to ask for approval, approval can only be given to them, while approval given to the minor before the call would be invalid.[35] Unlike our law, where 30 days after requesting approval, it is considered that approval is not given, in German law this period is two weeks from the receipt of the request for approval. In Swiss law, the deadline is formulated as a reasonable period set by the contracting party or court.[36]

Regarding the legal nature and fate of a contract concluded by a person with limited business capacity but without the consent of their legal representative, despite the existence of different views, and the legal regulation of these legal transactions as voidable, the most prevalent view is that such contracts are considered to be so-called limping legal transactions (*negotium claudicans*). A limping legal transaction is defined as a legal transaction whose validity requires the consent or approval of a third party, whereby such a legal transaction does not produce any legal effects until such consent is obtained.[37] There is a view that all other transactions for whose validity it is necessary to obtain the consent of a third party are limping transactions.[38] Therefore, until the approval of the legal representative is obtained, it cannot be said that a

[33] Of course, this interest is less pronounced in licensors and lessors than in creditors, given that their permission is not always required, rather only in specifically prescribed cases, and since permission can be denied only for particularly compelling reasons.

[34] Law of Contract and Torts, Art. 56, paragraph 3. As indicated in different parts of the paper, the legislator's terminological inconsistency is highlighted again. Although Art. 29, paragraph 1. defines approval as consent given after the conclusion of a contract, Art. 56. mentions about "subsequent approval", which in the context of the legal definition of approval represents a kind of pleonasm, and the designation of approval as subsequent should have been omitted.

[35] GCC, para. 108, al. 2.

[36] SWCC, para. 19a.

[37] Stanković, O. (ed.) (1996). *Leksikon građanskog prava.* Belgrade: Nomos, 388.

[38] *Ibid*.

contract has been created, rather it is only a certain "legal situation" in which consent is expected,[39] i.e. it is a contract *in statu nascendi.* However, there is also a view according to which this limping legal transaction will be validated even without the subsequent consent of the legal representative. Namely, such a contract will be validated after the period during which the authorized subject can request the contract to be annulled due to the business incapacity of the contracting party or the absence of consent.[40] But, the person entering into a contractual relationship with a person with limited business capacity cannot request the annulment of the contract citing the absence of permission or the limited business capacity of the contracting party.[41] The person entering into a contractual relationship with a person with limited business capacity has the right to withdraw from the contract, which is a legal power given to a conscientious contracting party regardless of the right to request annulment in court proceedings. The statute of repose period lasts 30 days from the day the contracting party was made aware of the other party's business incapacity or the absence of the consent of the legal representative, unless the legal representative gives approval before the end of this period. This is a legal power of the person entering into a contractual relationship with a person with limited business capacity who was unaware of the contracting party's limited business capacity or the absence of permission from their legal representative.[42]

## The Relationship of Third-Party Consent with Related Institutions

### a) Representation

Representation is defined as conducting legal transactions on behalf of someone else, based on authorization for representation, such that the rights and obligations from the undertaken legal transaction directly apply to the represented party.[43] The authorization for representation can be based on law, a

[39] Dolović Bojić, K. (2021). *Pravno nepostojeći ugovori*, Belgrade: Faculty of Law, University of Belgrade, 113.

[40] Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad: Faculty of Law in Novi Sad, 220.

[41] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 50.

[42] The same solution exists in German law, except that the GCC does not stipulate that the right to withdraw is lost after the deadline passes, rather, the contracting party can withdraw from the contract as long as the legal representative does not approve it.

[43] Stanković, O., Vodinelić, V. (2007). *Uvod u građansko pravo*. Belgrade: Nomos, 193.

general act of a legal entity, an act of a state body, and the represented party's statement of will.[44] The most common case of legal representation is the representation of persons with limited business capacity.[45] In the case of minors who have one or both parents, they exercise parental rights, which include the authority to represent a child until they reach adulthood and obtain full business capacity, unless parental rights are extended by a court decision even after the child has reached adulthood. Legal representatives conduct all legal transactions on account of the child who has not reached the age of 14, except for beneficial, neutral, and trivial transactions.[46] Activities undertaken independently by a younger minor would not produce legal effects, nor could they be validated by the approval of their legal representative. In this case, it is a matter of exercising representative powers, as parents conduct legal transactions on behalf of their child so that the rights and obligations directly apply to their child, all in accordance with the best interests of the child. A child does not have a legally relevant will for conducting certain legal transactions, so in this sense, it is not a representation of will but a representation of a child's interests.[47]

Minors who have reached the age of 14 can conduct legal transactions that younger minors cannot conduct independently if they have prior or subsequent consent from their legal representative. By giving consent, the representative only completes the legal will of the minor, who independently assumes obligations on their own account.

The legal representation of the child by the parents stems from their parental rights and represents both the right and duty of the parents, with the aim of protecting the personal and property interests of the child.[48] Giving consent represents a third party's agreement with a contract concluded by a contracting party, while representation implies the conclusion of a contract by the representative himself and the direct creation of the legal effects of such a contract for the represented party. Although in both cases the person declares their will, when giving consent, the will is directed towards agreeing to conclude a contract in which they did not participate, while in the case of

[44] Law of Contract and Torts, Art. 84, paragraph 2.

[45] In addition to the representation of persons with limited business capacity, it is equally important to highlight the frequency of representation of legal entities, on whose account legal transactions are conducted by the authorized persons of that legal entity. V.: Stanković, O., Vodinelić, V. (2007). *Op. cit.*, 208.

[46] Family Law, art. 64, paragraph 1.

[47] Vizner, B. (1978). *Komentar Zakona o obligacionim odnosima.* Zagreb: *Narodne novine*, 381.

[48] Draškić, M. (2020). Porodično pravo i prava deteta: Faculty of Law, University of Belgrade, 277.

representation, it is a legal transaction that the representative has conducted, again declaring their will, but in someone else's name. Although the consent of a legal representative will be required for the validity of some contracts concluded by the represented party, the legal representative will declare their own will in their own name, not in the name of the represented party, when giving or refusing consent. It is a declaration of will that, when viewed independently, has the nature of a unilateral legal transaction.[49]

**b) Management without a mandate**

According to the Law of Contract and Torts, it will be considered that a manager of another's affairs without a mandate has acted as an actual representative from the beginning in two cases: if the conducted transaction does not tolerate postponement and there is a risk of impending damage, or if by not conducting the transaction an obvious benefit for the principal would have been missed.[50] This refers to necessary and useful management where the principal is required to approve such a conducted transaction, whereby it is considered that the manager acted as an actual representative from the very beginning. In the case of necessary and useful management, it is not the principal's decision to approve a certain transaction. Rather, regardless of his will, he is required to do so, bearing in mind that the manager actually conducted a legal or material transaction with authorization based on law.[51] Approval in the case of necessary and useful management cannot be considered ratihabition from Article 228 of the Law of Contract and Torts, rather it is the unilateral acceptance of completed transactions, taking over all obligations that the unauthorized representative has taken on in the name of the principal, as well as taking over the obligation to compensate the manager for necessary and useful expenses and possibly suffered damage.[52]

Giving approval in the true sense of the word, which depends on the will of the principal, can only exist if the manager acts without legal authorization, and whether such a transaction will be subsequently approved or not depends solely on the will of the principal.[53] From the legal formulation, it is evident

[49] Konstantinović, M. (1969). *Obligaciono pravo – prema beleškama sa predavanja profesora Dr. M. Konstantinovića.* Belgrade: Student Union of the Faculty of Law in Belgrade, 50.

[50] Law of Contract and Torts, Art. 220, para. 2.

[51] Stanković, O., Vodinelić, V. (2007). *Uvod u građansko pravo*. Belgrade: Nomos, 196.

[52] Vizner, B. (1978). *Komentar Zakona o obligacionim odnosima.* Zagreb: *Narodne novine*, 1003.

[53] Law of Contract and Torts, Art. 228.

that this refers to both legal and material transactions, while consent from Article 29 of the Law of Contract and Torts is required only when it comes to legal transactions. Secondly, the principal approves the transaction done on his account. In the case of third-party consent, that consent is directed towards validating the transaction that does not belong to the one whose consent is requested, but the aim of such consent is to supplement the incomplete will of the person whose contract is in question or to confirm with their consent that the contract in question is in the interest of that person and that the representative of such a person can conduct it. In any case, it is a third party, to whom the consequences of conducting a legal transaction do not apply, and who does not have a direct legal interest in the transaction in question. Therefore, although approval is required in this case, for establishing the fiction that the contract of mandate on the basis of which the unauthorized representative acted from the beginning, this situation cannot be equated or subject to the provision of Article 29 of the Law of Contract and Torts, taking into account the different circumstances under which the contract is concluded, the capacity in which the approval is given, and its role. If the principal approves (subsequently approves, according to the legislator) what has been conducted, he assumes the role of mandator from a contract of mandate. His legal position is contractual, and by his approval, he actually enters into a contract, directly acquiring the corresponding rights and obligations. When it comes to the consent of a third party, by giving consent, they do not enter into a contractual relationship, rather their consent represents a necessary condition for the validity of that contract, they are a third party in that relationship and when they give such consent, the contracting parties acquire rights and obligations, not the third party, even if they give consent in the capacity of a legal representative.

## CERTAIN CASES REQUIRING THIRD-PARTY CONSENT AS A CONDITION FOR THE VALIDITY OF A CONTRACT

### Contracts with Persons with Limited Business Capacity

A person with limited business capacity can independently conduct only those legal transactions that they are authorized by law to conduct, while for all other transactions, they require the approval of their legal representative, and contracts concluded without such approval can be validated by subsequent approval.[54] Article 56 of the Law of Contract and Torts does not take

[54] Law of Contract and Torts, Art. 56.

into account the distinction between prior and subsequent third-party consent, as it refers to "approval" in both cases. We believe this is another instance of legislative imprecision, implying that the law did not intend to limit consent in this case solely to subsequent consent. On the other hand, when discussing parental consent for transactions conducted by older minors, the Family Law states that it can be given both beforehand and subsequently.[55] An older minor is authorized to conduct legal transactions through which they exclusively acquire rights, legal transactions through which they neither gain rights nor obligations, and legal transactions of minor significance, without the consent of a legal representative, as is the case with younger minors, while for all other transactions, consent is required.[56]

In French law, as well as in Serbian law, capacity (*capacité*) or legal capacity is assumed.[57] It is assumed that the business capacity demonstrated when conducting other legal transactions or concluding another contract continues to exist, and the burden of proof is on the person who claims otherwise.[58] It encompasses both legal (*capacité de juissance*) and business capacity (*capacité d'excercer*), which is not the case in Serbian law.[59] Legal capacity in French law essentially represents a person's right to "enjoy" their rights and to become their holder, regardless of whether they were acquired based on law or a legal transaction.[60] Business capacity is determined as the ability of the right holder to exercise their right, particularly through a contract.[61] Business "incapacity does not prevent a person from becoming a rights holder or from acquiring rights, but it prevents them from freely disposing of them".[62] It is

[55] Family Law, art. 64, paragraph 2.

[56] On the concept of legal transactions that do not acquire either rights or obligations see: Đurđević, D., 81 and further.

[57] With the reform of French contract law that came into effect on October 1, 2016, the presumption of general legal capacity to contract applies only to individuals, while for legal entities, the link between legal capacity and the purpose of their actions is emphasized. French Civil Code of 1804 with amendments (*Code Civil, hereinafther*: FCC), par. 1145.

[58] De Leon, HS, De Leon, HM Jr. (2014). *The Law on Obligations and Contracts*. Manila: Rex Book Store, 544.

[59] Legal incapacity occurs in legal entities. Youngs, R. (2014). *English, French & German Comparative Law.* London and New York: Routledge, 581. Nevertheless, it is considered that general legal incapacity does not exist because it would represent the negation of personality in law. Renault-Brahinsky, C. (2019). *Droit des obligations*. Paris: LGDJ, 49.

[60] Terre, F., Fenouillet, D. (2012). *Droit Civil: Les personnes: Perconalité. Incapacity. Protection.* Paris: Dalloz, 280.

[61] *Ibid*.

[62] A characteristic of French law is also the prohibition of certain individuals from conducting some legal transactions due to the existence of a relationship between them. An

assumed that the business capacity demonstrated when conducting other legal transactions or concluding another contract continues to exist, and the burden of proof is on the person who claims otherwise.[63]

Unlike legal capacity, business capacity can be general and special.[64] A person can dispose of their rights through a third party who will represent them and their interests. The inability to exercise rights is inherent in minors who have not undergone an emancipation procedure,[65] as well as in adults under guardianship.[66] Minors are considered not to have business capacity for a large number of transactions, with certain exceptions. In order to conduct transactions for which they lack the necessary business capacity, minors must be duly represented, and the regime of representation depends on whether the minor is cared for by their parents (or one of them), or if the minor has no parents. If a minor is not represented by their parents or a parent, a tutelage regime (guardianship) is established, which involves appointing a guardian (*tuteur*) and establishing a family council (*conseil de famille*), chaired by a special guardianship judge (*juge de toutelle*). As previously mentioned, business incapacity does not prevent individuals from undertaking all legal transactions recognized by the legal system. When it comes to everyday legal transactions (*les actes de la vie courante*) for which the law or customs grant authorization, such as purchasing groceries and similar things of minor value, a person without business capacity can conduct them by themselves, provided they are conducted under "normal conditions".[67] This refers to legal transactions that are typically conducted by a minor on their own, meaning everyday, regular legal transactions that cannot financially endanger the minor and that are consistent with their lifestyle, but even such legal transactions can be annulled if they are economically unsuitable for the minor.[68] Such contracts are voidable because, in this case, the condition of validity was established to protect the interests of one contracting party, the minor.[69] The second category of legal transactions consists of regular management, which can be conducted by one parent independently, as well as by a guardian without the consent of the family council.

example of this is the prohibition of concluding real estate sale contracts between spouses, except in situations prescribed by law. FCC, para. 1595

[63] De Leon, HS, De Leon, HM Jr. (2014). *Op. cit.*, 544.

[64] Renault-Brahinsky, C. (2019). *Op. cit.*, 50.

[65] In French law, all individuals who have not reached the age of 18 are considered minors. All these individuals are grouped into the same category of minors, as French law does not categorize minors based on age as our law does. FCC, para. 388.

[66] FCC, para. 1147

[67] FCC, para. 1148.

[68] Smits, J.M., 127.

[69] Porchy-Simon, S. (2016). *Droit civil 2e année: Les obligations*. Paris: Dalloz, 172.

A contract concluded by a person lacking the necessary business capacity for its conclusion is voidable, it produces legal effects and binds the contracting parties until it is annulled in court proceedings. Finally, the third category of legal transactions consists of transactions of legal disposition and legal management, for which the consent of both parents is required (or, in the case of their disagreement, a decision by the guardianship judge).

As business capacity is the rule, and incapacity the exception, French law forms so-called "islands of capacity" within a person's business incapacity. These "islands" of business capacity are established to achieve a balance between protecting minors as the objective of the rules on their business incapacity and acknowledging their level of maturity and capacity for judgment.[70] Therefore, a minor who has turned 16 can be authorized by their parents to conduct those management transactions necessary to establish and run a single-member limited liability company or a single-shareholder company. This approval must be in the form of a private, handwritten document (*sous seing privé*) or a notarial document (*acte notarié)* [71]

Similarly, in Swiss law, a person has business capacity if they are of age and capable of discernment, and majority is attained at the age of 18.[72] According to Article 19 of the Swiss Civil Code, every minor who is capable of discernment may conduct all legal transactions with the consent of their legal representative, while they may independently conduct only those legal transactions that only bring them benefit. A person is considered capable of discernment if they do not lack the ability to act lucidly and rationally due to their minority, mental retardation, mental disorder, intoxication, or similar circumstances. Although the capacity for discernment is not determined abstractly but in light of each individual case or legal transaction, a presumption of capacity for discernment is legally established for all persons.[73]

While French law primarily emphasizes the economic utility of legal transactions for a minor, German law, as well as other laws under its influence, places far greater emphasis on the consent of parents as a prerequisite for the validity of a contract.[74] German law, like our own and unlike French law, grades the business capacity of minors according to their age. Minors who

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[70] Ghestin, J., Loiseau, G., Serinet, YM. (2013). *La formation du contrat – Tome 1: Le contrat – Le consentement.* Paris: LGDJ, 795.

[71] FCC, para. 388–1–2.

[72] SWCC*,* para. 13.

[73] Thommen, M. (2018). *Introduction to Swiss Law*. Zurich: Carl Grossmann Publishers, 293.

[74] Smits, J.M. (2017). *Contract Law – A Comparative Introduction.* Cheltenham, Northhampton: Edward Elgar Pub, 128.

have not reached seven years of age have no business capacity and are equated to persons who are incapable of discernment.[75] A minor who has reached seven years of age may conduct all legal transactions with the consent of their legal representative, but they do not need the consent of their legal representative for transactions that bring them exclusive legal benefit.[76] Consent in this case means prior consent.[77] In line with the importance German law places on the consent of a legal representative as a condition for the validity of a contract, there is an extremely narrow interpretation of the concept of exclusive legal benefit. When acquiring exclusive legal benefit, it is necessary that no obligation, duty, or burden is imposed on the minor. Thus, a minor could not even accept a gift that involves real estate without the consent of a legal representative because such a legal transaction would impose a tax obligation on them.[78]

### Contracts for the Disposition of Immovable Property and Movable Property of Great Value by Parents

When it comes to legal transactions involving the disposition of immovable property or movable property of great value, parents need the consent of the guardianship authority, which can be given either beforehand or subsequently in accordance with the relevant legal formulation. Consent is required only for the disposition of property and rights that already constitute the child's property. Additionally, there is a view suggesting that consent should also be required when it comes to acts of failing to increase the property gratuitously, such as renouncing inheritance and rejecting gifts.[79] Although imposing a requirement for consent in these situations would be in line with the interests of the represented party, the question arises regarding the frequency of such cases in practice and the possibility of efficient supervision over gift rejections, which are informally implemented by rejecting an offer to conclude a gift contract, which is not subject to any control that could ensure that the consent of the guardianship authority is obtained. Disposition in this case refers to both legal transactions involving property rights and those involving other

[75] GCC, para. 104.

[76] GCC, para. 107.

[77] Youngs, R. (2014). *English, French & German Comparative Law.* London and New York: Routledge, 583.

[78] Smits, J.M. (2017). *Op. cit.*, 131.

[79] Stanković, O. (1982). Ograničena poslovna sposobnost i zastupanje maloletnika od strane njihovih roditelja u našem pravu. *Anali Pravnog fakulteta,* 1982 (6), 1230; Draškić, M. (2020). Porodično pravo i prava deteta: Faculty of Law, University of Belgrade, 405.

real rights, so besides acts of alienation, consent is also required for acts of burdening immovable property and movable property of great value. These are contracts establishing a right of pledge, establishing a mortgage, or concluding a contract of guarantee.[80]

As contracts disposing of immovable property of persons without business capacity are created in the form of a notarial deed,[81] while all contracts transferring property rights to immovables must be concluded in the form of a notary-certified (solemnized) document, these contracts are subject to regulations governing the notarial profession and the process of drafting and confirming notarial documents. The procedure for drawing up notarial documents is regulated in more detail by the Public Notary Rules of Procedure, which apply to both forms of contract mentioned. When the consent of the guardianship authority is required for conducting a legal transaction or other legal action, the notary public instructs the party, or their representative, to submit a request for consent to the competent social work center.[82] Furthermore, the Public Notary Rules of Procedure also govern the content of the notarial document, so after the text of the legal transaction, the notarial document also includes a note by the notary that the authorized person of the guardianship authority has given consent for conducting a specific legal transaction, and even the authorized person of the guardianship authority signs the document, alongside other participants in the procedure of drafting the document.[83] In addition, the notary is obligated to refuse to draft a document if he cannot determine the identity and authorization of the authorized person from the guardianship authority. From all the mentioned provisions, it is evident that the regulations governing notarial activity actually derogate from the provision of the Family Law according to which this consent can be given either beforehand or subsequently. As the notary instructs the participants to contact the competent social work center during the process of drafting or confirming the contract, verifies the identity of the authorized person of the guardianship authority, and refuses to draft and confirm the document when he cannot determine the identity of the authorized person, it is clear that this consent can be

[80] Draškić, M. (2020). *Op. cit.*, 405.

[81] Law on Public Notaries, *Official Gazette of the RS,* no. 31/2011, 85/2012, 19/2013, 55/2014, 93/2014, 121/2014, 6/2015. and 106/2015, Art. 82, paragraph 1, point. 1. According to the linguistic interpretation of the provision, only those contracts in which a person without business capacity is in the role of the transferor of immovable property rights must be formulated in the form of a notarial record, but not when the person without business capacity is in the position of the buyer, for example.

[82] Public Notary Rules of Procedure, *Official Gazette of the RS,* no. 62/2016, 66/2017, 48/2018, 54/2018, 151/2020. and 59/2022, Art. 57, paragraph 1.

[83] Public Notary Rules of Procedure, Art. 60.

given exclusively before concluding a contract dealing with trading immovable property and valuable movable property of a child.

In French law, this category could include those transactions for which, in addition to the consent of both parents, it is necessary to obtain the prior consent of the guardianship judge, as well as certain transactions that pose too high a risk to the minor's property, which their legal representatives are completely forbidden from conducting.[84] When it comes to the guardianship regime, for transactions of legal disposition, the guardian must obtain the consent of the guardianship judge, unless it is a legal transaction that the guardian is completely forbidden from conducting due to its significance. The consent required from the guardianship judge, according to the letter of the law, must be given beforehand.[85] When exercising control over the implementation of these legal transactions, the guardianship judge may decide that certain transactions of legal disposition will be subject to his prior approval if he considers it necessary to protect the interests of the minor, and considering the composition or value of the property, the minor's age, or his family circumstances.[86] Contracts concluded contrary to these rules are null and void. However, the other contracting party may oppose the nullity of such a contract, proving that the contract in question is beneficial for the person without business capacity, that he will obtain direct benefits from it, or that it is not a contract in which contractual balance was not achieved, in which there is a disproportion of mutual consideration (*lésionnaire*).

### Sublicense Contracts and Sublease Contracts

A sublicense contract is a contract by which the licensee of an exclusive license transfers the right to use the subject of the license to another person. The assumption is that the licensee of an exclusive license can transfer this right without any conditions, but it is also possible to make an agreement that

[84] This refers to legal transactions that alienate the rights or goods of a minor without compensation; where a right or claim is acquired from a third party on behalf of the minor; the conduct of an activity or profession in the name of the minor; and the transfer of property and ownership into a trust.

[85] The guardian may not, without prior authorization from the guardianship judge: sell a building or company belonging to the minor, enter a building or company that belongs to the minor into another company, take out a loan in the name of the minor, renounce the rights that belong to the minor on their behalf, accept an inheritance on behalf of the heir, purchase the minor's property or lease it out, provide free security in the name of the minor to secure a third party's debt, or take an action related to transferable securities or financial instruments. FCC para. 387–1.

[86] FCC, para. 387–3, para. 1.

the consent of the licensor is needed to conclude the sublicense contract.[87] Such a restriction on the freedom to conclude a sublicense contract is, however, partial, considering that the licensor can refuse permission only for compelling reasons. The existence of compelling reasons will depend on the specifics of each particular case, but it can be assumed that in most cases, he will be obligated to approve the sublicense. Although the sublicense contract is an independent legal transaction, it largely depends on the license contract. The party appearing as the licensee in the license contract has the role of the licensor in the sublicense contract, with the subject of the sublicense contract being identical to the subject of the license contract, unless it's a partial transfer of the subject of the license contract.[88] Also, the duration of the sublicense contract depends on the license contract, whose termination automatically leads to the termination of the sublicense contract.

A similar solution is provided for sublease contracts. As a rule, the lessee can sublease the subject of the lease, unless the lessor's permission is required according to a contract or the law.[89] The lessor can refuse the conclusion of a sublease contract only for compelling reasons, which, as with the sublicense contract, significantly limits the lessor's decision-making freedom. If the lessor refused to grant permission for the conclusion of a sublease contract in the absence of compelling reasons, the right given to the lessor would turn into an abuse of rights contrary to the purpose for which the right was prescribed.[90]

The consent that is required when concluding sublease and sublicense contracts, however, has characteristics that make it different from previous cases where third-party consent is required. First, the position of the licensor and the lessor is different. Although they are not contracting parties,[91] they have a special interest in participating in the contract conclusion process because the indirect subject of these contracts is still their property, and the manner of use determined by the sublease or sublicense contract is of importance to them. As the Law of Contract and Torts authorizes both the lessor and the licensor to directly demand from the sublicensee and the sublessee the payment of the amount they owe to the licensee or the lessee, they have

[87] Law of Contract and Torts, Art. 704.

[88] Vlajković, Z. (1986). Pojam i vrste ugovora o licenci. *Zbornik radova Pravnog fakulteta u Novom Sadu,* (20), 127.

[89] Law of Contract and Torts, Art. 588.

[90] Orlić, M. (1995). Čl. 587: Kad zakupodavac može odbiti dozvolu. *Komentar Zakona o obligacionim odnosima* (ed. Slobodan Perović). Belgrade: Savremena administracija, 1061.

[91] Vlajković, Z. (1986). Pojam i vrste ugovora o licenci. *Zbornik radova Pravnog fakulteta u Novom Sadu,* (20), 127.

an interest in knowing from whom they will be able to claim the amount they are owed, which represents a deviation from the principle of the relative effect of obligations.[92] Therefore, even though they are not contracting parties, they cannot truly be considered third parties either because their interest to participate in the conclusion of the contract exceeds the interests that other third parties, whose consent is required, may have. Also, by concluding sublicense or sublease contracts, they acquire independent rights, so they have an even greater interest. Another indication of the distinctiveness of this example of giving consent compared to the previously mentioned ones can be seen in their limited freedom to decide whether to give consent or not. According to dispositive legal provisions, their consent is not even required, and if it ends up being necessary, they can give it in a very limited form, as in most cases they will be obligated to allow the conclusion of a sublicense or sublease contract.[93] The licensor can terminate the license contract if the sublicense contract was concluded without his permission, just as the lessor can terminate the lease contract if the sublease was concluded without his consent. In the case of cancellation, the sublicense and sublease contracts will be automatically terminated. The sublicense contract and the sublease contract directly depend on the fate of the license and lease, not only in the aforementioned case but also in any other case of contract termination, which explains the relevance of the will of the lessor or licensor.

## CONCLUSION

Third-party consent to contract in the positive law of the Republic of Serbia is uniquely regulated only by Article 29 of the Law of Contract and Torts, while the specific cases where third-party consent is required are regulated by other provisions. The general rule is that consent can be given beforehand or subsequently, but this rule is most often amended by other provisions. If consent must be given before the conclusion of a contract, then the absence of such consent leads to its nullity. On the other hand, if it is not necessary for permission to be given before the conclusion of a contract, or if a certain legal transaction requires approval, then such a contract is validated

[92] Orlić, M. (1995). Čl. 589: Neposredni zahtev zakupodavca. *Komentar Zakona o obligacionim odnosima* (ed. Slobodan Perović). Belgrade: Savremena administracija, 1062.

[93] The opposite solution has been adopted in German law, in which the lessee is expressly forbidden from allowing third parties to use the leased property, especially for subleasing, without the lessor's permission. GCC, para. 540.

when approval is given, which according to the prevailing view in theory has the legal nature of a condition precedent.

The legal regime of consent also differs depending on whether consent is given by a private or public law entity. If it is a private law entity, consent is given in accordance with the principle of modified form parallelism. Such consent is given in the form that is prescribed for the contract for which consent is required, except in the case of the form of a notary-certified document or a notarial deed, when it is sufficient for consent to be given in the form of a publicly certified document. If the consent is given by a public law entity, it is given in accordance with administrative law regulations, and such consent is in the form of an administrative act and therefore has the status of a public document. On the other hand, consent given by a natural or legal person who is a private law entity has the nature of a unilateral legal transaction of civil law which is subject to the relevant provisions of the Law of Contract and Torts.

The most common contracts for which the consent of a third party is required are contracts with persons with limited business capacity for whom consent is given by their legal representative and contracts concluded by the legal representative on account of a person with limited business capacity, for which the consent of the guardianship authority is required. These contracts have been the subject of the largest number of doctrinal analyses, and the largest number of provisions in our legislation and comparative legislation are dedicated to them. The provisions on the business capacity of minors contained in Serbian law are closest to the solutions contained in German law, according to which the age and maturity of a minor affect the scope of his business capacity. A less common case of contracts for which third-party consent is required are contracts for sublicensing and subleasing, where consent is generally not required, and when it is required, the freedom to decide whether to give consent is significantly limited.

Despite the diversity of legal transactions that are regulated by Article 29 of the Law of Contract and Torts, third-party consent should be distinguished from consent given in management without a mandate and consent given in representation. While giving consent represents a third party's agreement with a contract that the represented party concludes themselves, representation involves concluding a contract by the representative on account of the represented party and directly producing the legal effects of such a contract for the represented. On the other hand, when a third party gives consent to contract, it validates a transaction that does not belong to them and in which it does not have the status of a contracting party, unlike the principal in the case of management without a mandate. Rather the purpose of such consent is to supplement the incomplete will of the person whose contract is in question or to

confirm with their consent that the contract in question is in the interest of that person and that the representative of such a person can conclude it.

Third-party consent is required in a series of different situations that differ from each other in terms of the status of the consent giver, the nature and form of consent, the timing of consent relative to the conclusion of a contract, and the consequences of its absence. The diversity of contracts for which third-party consent is required justifies the scattered regulation of this institution in terms of certain issues, which is also the view of other legal systems that are the subject of this analysis. However, this does not prevent all these situations from being viewed as phenomena covered by the same institute, and for which the general rules contained in Article 29 of the Law of Contract and Torts still apply.

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