

JESU LI KAUKA UGOVORNE OBAVEZE I SVRHA UGOVORA ISTO?

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Apstrakt

U radu se ispituje odnos kauze ugovorne obaveze i svrhe ugovora. Naime, pokušava se dati odgovor na pitanje, da li se radi o dva različita pravna instituta, ili među njima, osim terminološke, druge razlike ne postoje. Problem se analizira na temelju ugovora o sponzorstvu. Izabran je upravo ovaj ugovor usled jedne njegove osobenosti. Ekonomski cilj sponzora je toliko očigledan i vidljiv, tako da se, bez imalo ustručavanja, može razmišljati o primeni ekonomske koncepcije kauze ugovorne obaveze na ovaj ugovor. Ako uzmemo u obzir da za tako nešto imamo oslonac u sudskoj praksi (naime, ima odluka u kojima je primenjena ekonomska koncepcija kauze ugovorne obaveze), kao i to, da u domaćoj pravnoj doktrini pojedini autori svrhu ugovora definišu kao ekonomski cilj, problematika postaje više nego očigledna.

Ključne reči: kauza ugovorne obaveze, svrha ugovora, ekonomski cilj, ugovor o sponzorstvu, transfer imidža.

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Uvod

U ovom članku, autor analizira odnos između kauze ugovorne obaveze, sa jedne strane, i svrhe ugovora koja se pominje u članu 133 Zakona o obligacionim odnosima (u daljem tekstu ZOO) sa druge strane. Cilj je, ustanoviti da li se radi o jednom te istom institutu, ili među njima ipak ima razlike. Što se kauze ugovorne obaveze tiče, na raspolaganju su nam mešovita, objektivna (ekonomska) i subjektivna koncepcija. Mešovita koncepcija kauze ugovorne obaveze prihvaćena je u ZOO, većem delu domaće pravne teorije, kao i u sudskoj praksi. Objektivna (ekonomska) koncepcija kauze ugovorne

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obaveze prihvaćena je u jednom delu domaće pravne teorije, a u praksi naših sudova, nalazi se odluka u kojoj je kauza ugovorne obaveze tumačena na način, da se radi o ekonomskom cilju ugovarača. Subjektivna koncepcija kauze ugovorne obaveze niti ima pristalice u našoj pravnoj doktrini, niti u našoj sudskoj praksi. Sa druge strane, u našoj pravnoj doktrini, ima stavova koji poistovećuju svrhu ugovora sa kauzom ugovorne obaveze. Ipak, s obzirom na specifično poimanje kauze ugovorne obaveze koje zauzimaju zastupnici takvog stava, autori u pogledu shvatanja o tome, šta se konkretno podrazumeva pod svrhom ugovora mogu se grupisati na one koji pod svrhom ugovora vide motive ugovarača i one koji pod svrhom ugovora vide ekonomski cilj ugovarača.

Razmatraćemo postavljeno pitanje na primeru ugovora o sponzorstvu usled jedne specifičnosti ovog ugovora. Naime, za sponzora, kao jedne ugovorne strane ugovora o sponzorstvu, je toliko očigledno i jasno izražen ekonomski cilj obavezivanja, terminologijom ekonomske literature označen kao „transfer imidža“. Usled toga, čini se posve lako i primamljivo, u slučaju ugovora o sponzorstvu, posegnuti za objektivnom (ekonomskom) koncepcijom kauze ugovorne obaveze, naročito, usled toga, što se uporište za tako nešto, kako smo naveli, osim u domaćoj pravnoj teoriji, može naći i u domaćoj sudskoj praksi. Da li je to opravdano, videćemo u nastavku. Prikazaćemo kako domaći sudovi u praksi primenjuju objektivnu (ekonomsku) koncepciju kauze ugovorne obaveze, kao i kako bi to izgledalo na primeru ugovora o sponzorstvu. Kako se u slučaju ugovora o sponzorstvu radi o dvostranoobaveznom i teretnom ugovoru, to će se sve ono što u nastavku budemo napisali odnositi upravo na dvostranoobavezne i teretne ugovore.

Ukratko o ugovoru o sponzorstvu

Ugovorom o sponzorstvu, obavezuje se sponzor da u cilju podrške aktivnostima sponzorisanog, sponzorisanom isplati ugovorenu sumu novca, ili preda ugovorom predviđene stvari (u svojinu, ili na korišćenje), ili pruži ugovorene usluge (s tim da se ove obaveze mogu i kombinovati), a sponzorisani prepušta sponzoru pravo upotrebe njegovog imidža u marketinške svrhe i preuzima obavezu promocije sponzora i učešća u njegovim marketinškim aktivnostima (Ječmenić 2018, 190). Po pravilu, sponzori su uspešne kompanije, a sponzorisani uspešni pojedinci u sportu, umetnosti, kulturi, ili pak sportske organizacije i savezi, olimpijski komiteti, sportski, ili kulturno-umetnički događaji... Suštinske odlike ugovora o sponzorstvu predstavljaju činidba podrške sponzora, komunikacijska kontračinidba sponzorisanog, kao i karakteristični ekonomski cilj koji ovim ugovorom želi da postigne sponzor, i koji se u knjigama o ekonomiji naziva

transferom imidža. Radi se naime o objektivnom ekonomskom cilju svakog sponzorskog ugovora za sponzora, bez obzira ko bio sponzor, ko je spozorisani, ili u kojoj se oblasti sponzorstvo javlja. Ovaj specifični ekonomski cilj sponzora je toliko imanentan ovom ugovoru, da se u njegovom odsustvu, prema našem mišljenju, uopšte ne bi moglo govoriti o ugovoru o sponzorstvu.

Dva se pitanja sama po sebi odmah mogu postaviti. Prvo, šta transfer imidža zapravo predstavlja? Drugo, kako transfer imidža može biti ekonomski cilj? Krajnje pojednostavljeno, moglo bi se reći da transfer imidža predstavlja pokušaj da se sponzorstvom u javnosti stvori utisak o povezanosti sponzora i sponzorisanog, kako bi se na osnovu te veze pozitivni imidž koji sponzorisani uživa u javnosti prelio (transferisao) na sponzora, njegove proizvode, ili usluge, pri čemu sponzor može ojačati, ili poboljšati postojeći, ili dobiti potpuno novi imidž. Što se tiče pitanja kako transfer imidža može biti ekonomski cilj, nešto drugačije rečeno, trebalo bi ustanoviti kakav pozitivan ekonomski efekat u imovini sponzora može imati transfer imidža. U presudi nemačkog Saveznog vrhovnog suda u slučaju Marlen Ditrih, navodi se da slika, ime, kao i drugi elementi ličnosti mogu imati znatnu ekonomsku vrednost, koja je zasnovana na poznatosti i ugledu ličnosti u javnosti, a stečena kroz posebna dostignuća, uglavnom na sportskom, ili umetničkom planu. Ovu popularnost, kao i sa njom povezan imidž, mogu poznate ličnosti ekonomski eksploatisati, na taj način, da drugima uz naknadu dozvole korišćenje njihove slike, imena, ili drugih elemenata ličnosti (na osnovu kojih se oni naravno mogu prepoznati u javnosti) u reklamiranju robe, ili usluga. U reklamiranju, značajnu ulogu igra tzv. transfer imidža, pri čemu se zapravo radi o tome, da se pozitivne asocijacije koje potrošači povezuju sa nekom poznatom ličnošću, na reklamirane produkte prenose. Na taj način, poznate ličnosti, u značajnoj meri doprinose stvaranju dodate vrednosti.²

Sponzor ne stupa u ugovorni odnos samo radi sticanja prava iskorišćavanja imidža sponzorisanog u skladu sa svojim marketing ciljevima, nego upravo radi transfera imidža, pri čemu se sticanje prava upotrebe imidža sponzorisanog u marketinške svrhe, posmatra samo i isključivo kao sredstvo koje treba da omogući ostvarenje transfera imidža. Koliko je transfer imidža važan sponzoru, vidi se iz toga, da su sve obaveze koje ovim ugovorom preuzima sponzorisani, oblikovane tako da se što lakše realizuje transfer imidža. Ipak, kako se ne radi o obavezi rezultata, to on ne garantuje sponzoru

² BGH, Urt. v. 1. Dezember 1999 - I ZR 49/97 - Kammergericht, LG Berlin, dostupno na: http://lorenz.userweb.mwn.de/urteile/njw00_2195.htm. Predmet spora bila je postmortalna zaštita prava ličnosti Marlen Ditrih od neovlašćene komercijalne upotrebe.

ostvarenje željenog transfera imidža. Ipak, obavezan je na uzdržavanje od svih postupaka koji bi mogli osujetiti transfer imidža. Tako se u inostranoj sudskoj praksi mogu pronaći brojni sporovi nastali povodom zahteva sponzora za raskid ugovora o sponzorstvu usled toga što je sponzorisani svojim postupcima osujetio ostvarenje željenog transfera imidža.³

Obaveze koje ugovorom o sponzorstvu preuzima sponzor, u svojoj ukupnosti, mogu se podvesti pod opšti pojam činidbe podrške, iz jednostavnog razloga, što sponzor isplatom novca, predajom stvari, ili pružanjem ugovorenih usluga, daje podršku aktivnostima sponzorisanog. Već smo napomenuli da su sve ugovorne obaveze sponzorisanog koncipirane tako da se željeni transfer imidža ostvari, te da bi to dokazali, ukratko ćemo ih skicirati. Generalno se ugovorne obaveze sponzorisanog jedinstveno mogu nazvati komunikacijskom kontračinidbom, budući da on obavlja komunikativne zadatke za sponzora, te tako javnom mnjenju saopštava njegovu poruku. Sponzorisani ugovorom o sponzorstvu ustupa sponzoru pravo upotrebe njegovog imidža u marketinške svrhe. Konkretnije, sponzorisani dozvoljava sponzoru upotrebu njegovog imena i lika (ukoliko se sponzoriše fizičko lice), ili znakova razlikovanja (ukoliko se sponzoriše pravno lice, ili događaj) u marketinške svrhe. Nadalje, preuzima obavezu promocije sponzora i učešća u njegovim marketinškim aktivnostima. Konkretnije, sponzorisani treba da na način vidljiv javnosti istakne znakove razlikovanja sponzora. Primera radi, na sportskoj opremi, sportskom terenu, prevoznim sredstvima, ulaznicama, katalozima i drugom promotivnom materijalu koji prati sponzorisani događaj... Zatim se obavezuje na aktivno učešće u reklamnim kampanjama sponzora... Ugovorom o sponzorstvu često se sponzorisani obavezuje na dobro ponašanje, odnosno preuzima tzv. obaveze dobrog ponašanja. Konkretnije, sponzorisani treba da se uzdrži svih postupaka koji bi mogli oštetiti imidž sponzora (npr. da u javnosti pominje sponzora u negativnom kontekstu), kao i postupaka koji mogu oštetiti njegov imidž (npr. da se dopinguje).⁴ Takvi postupci, ne samo

³ Arbitražni sud iz Milana, Odluka od 7.7.1990., u sporu između kompanije sponzora Manjifiko Irge i sponzorisanog sportskog kluba Aurora Desio, dostupno u: (Mormando 1998, 60), Sud iz Rieti, Odluka od 19.3.1994., u sporu između kompanije sponzora Emeceta i sponzorisanog sportskog kluba Basket Rieti, dostupno u: (Mormando 1998, 62), Arbitražni sud iz Milana, Odluka od 25.5.1990., u sporu između kompanije sponzora Sintek Ponola i sponzorisanog sportskog kluba Virtus Palakanestro Roma, dostupno u: (Capri, Tocci 2007, 99), spor koji je nastao 2006. godine između kompanije sponzora Adidas i sponzorisanog Nemačkog plivačkog saveza, koji doduše nije dospelo pred sud, ali u javnost svakako jeste, dostupno u: (Rudiger 2010/2011, 30-35).

⁴ Inače, obaveze dobrog ponašanja čak i kada nisu ugovorene, za sponzorisanog nastaju na temelju načela savesnosti i poštenja. Naime, Zakonom o obligacionim odnosima propisano je da se strane prilikom zasnivanja obligacionih odnosa, kao i prilikom realizacije prava i obaveza iz obligacionih odnosa moraju pridržavati načela savesnosti i poštenja (Zakon o obligacionim odnosima Republike

što bi mogli osujetiti ostvarenje očekivanog transfera pozitivnog imidža sa sponzorisanog na sponzora, nego bi mogli takođe prouzrokovati transfer negativnog imidža na sponzora. Takođe, sponzori vrlo često ugovaraju za sebe ekskluzivnost, s obzirom da bi u slučaju da sponzorisani ima više različitih sponzora, to moglo uticati na ostvarenje željenog transfera imidža, u smislu da bi ga ako ne u potpunosti osujetilo, ono bar ublažilo.

Kauza ugovornih obaveza ugovarača iz ugovora o sponzorstvu

Opšti pojam kauza ugovorne obaveze podrazumeva razlog za preuzimanje ugovorne obaveze (Antić 2008, 223). Međutim, bliže određenje ovog pojma, to jest, preciziranje šta je konkretno razlog za preuzimanje ugovorne obaveze, nailazi na suprotstavljene stavove, kako među pravnim teoretičarima, tako i donekle u sudskoj praksi. U nastavku ćemo ukratko izložiti osnovne stavove mešovite, objektivne i subjektivne koncepcije kauze ugovorne obaveze i ustanoviti šta bi prema svakoj od njih bila kauza ugovornih obaveza ugovarača iz ugovora o sponzorstvu.

Primena mešovite koncepcije kauze ugovorne obaveze na ugovor o sponzorstvu

Pobornici mešovite koncepcije, prilikom definisanja kauze ugovorne obaveze, ukazuju na značaj kako objektivnog elementa, koji određuju kao pravni cilj obavezivanja, na osnovu koga se inače utvrđuje postojanje kauze ugovorne obaveze, i koji u dvostranoobaveznim ugovorima predstavlja ispunjenje ugovorne obaveze drugog ugovarača, tako i subjektivnog elementa, pobuda (motiva), koji su merodavni za proveru da li je kauza ugovorne obaveze dopuštena, pa se kod teretnih ugovora uzimaju u obzir samo ako su nedopušteni i ukoliko su oba ugovarača nesavesna (Perović 1981, 330-331).

Prema stanovištu mešovite koncepcije kauze ugovorne obaveze, postojanje kauze ugovorne obaveze, osim što je uslov punovažnog nastanka ugovora,

Srbije („Sl. list SFRJ“, br. 29/78, 39/85, 45/89-odluka USJ i 57/89, „Sl. list SRJ“, br. 31/93 i „Sl. list SCG“, br. 1/2003-Ustavna povelja), čl. 12, u daljem tekstu ZOO). Obaveze dobrog ponašanja za sponzorisanog, ali i za sponzora takođe, nalaže Zakon o oglašavanju Republike Srbije. Tako, sponzor ne sme ugrožavati integritet aktivnosti koju sponzoriše, niti sme da ošteti ugled sponzorisanog. Sa druge strane, važi za sponzorisanog zabrana izmena u imenu, ili znakovima razlikovanja sponzora, kao i zabrana oštećenja ugleda sponzora. (Zakon o oglašavanju, („Sl. glasnik RS“, br. 6/2016), čl. 6., st. 3. i st. 4). Slično je predviđeno i Međunarodnim pravilima o sponzorstvu Komisije za marketing i reklamu Međunarodne trgovačke komore iz 2003. godine. Ova pravila bi trebalo da predstavljaju smernice i standarde etičkog ponašanja sponzora i sponzorisanog, pa tako sponzor ima obavezu zaštite ugleda sponzorisanog, dok sponzorisani ima obavezu da ne ošteti ugled sponzora (ICC International Code on Sponsorship, September 2003., Commission on Marketing and Advertising, čl. 5., dostupno na: www.iccwbo.org/home/marketing).

istovremeno je i uslov njegovog održanja (Grujić 2014, 106). Zato, kauza ugovorne obaveze mora postojati ne samo u trenutku zaključenja ugovora, već i tokom dejstva ugovora, sve do trenutka izvršenja ugovornih obaveza (Dudaš 2011, 143). Tako je moguće, da u ugovoru koji je punovažno nastao, naknadno otpadne kauza ugovorne obaveze (Nikšić 2006, 1068), recimo kao posledica toga da jedan ugovarač ne izvrši ugovornu obavezu, usled čega, drugi ugovarač može jednostrano raskinuti ugovor. Dakle, nepostojanje kauze ugovorne obaveze u trenutku zaključenja ugovora rezultira ništavošću ugovora, a ako ona kasnije otpadne, ugovarač odan ugovoru isti može raskinuti.

Norme ZOO koje se tiču kauze ugovorne obaveze formulisane su u skladu sa mešovitom koncepcijom. Propisano je da svaka ugovorna obaveza mora imati dopušten osnov,⁵ onaj koji nije protivan niti prinudnim propisima, niti javnom poretku, niti dobrim običajima.⁶ U suprotnom, konsekvenca je ništavost ugovora, a to važi i za slučaj nepostojanja osnova.⁷ Pobude (motivi) iz kojih ugovarači sklapaju ugovor, načelno, na punovažnost istog nemaju uticaja.⁸ Ali, za teretne ugovore važi, da ako je pobuda (motiv) koja je bitno uticala na odluku jedne ugovorne strane da sklopi ugovor bila nedopuštena, a druga ugovorna strana za nedopuštenost pobude (motiva) znala, ili morala da zna, to rezultira ništavošću ugovora.⁹

Primena objektivne koncepcije kauze ugovorne obaveze na ugovor o sponzorstvu

Pobornici objektivne koncepcije, poznate i kao ekonomska koncepcija, kauzu ugovorne obaveze posmatraju kao ekonomski cilj ugovarača. Kauzu ugovorne obaveze vide u ekonomskom ekvivalentu, odnosno pozitivnom ekonomskom efektu kojem se u svojoj imovini ugovorne strane nadaju na osnovu sklapanja i ispunjenja konkretnog ugovora (Gams 1959, 155-157), pri čemu se željeni ekonomski cilj postiže razmenom dobara i usluga (Vuković 2019, 241). Nama se ipak čini, da je pozitivni ekonomski efekat moguć samo u imovini onog ugovarača koji u transakciji „bolje prođe“.

Međutim, u vreme nastanka ekonomske koncepcije kauze ugovorne obaveze, radilo se prevashodno o ugovorima kojima se razmenjuju materijalna dobra i usluge. Kao što smo videli, ugovorom o sponzorstvu razmenjuju se materijalna dobra, novac i stvari, ili usluge za nematerijalno dobro, imidž. Ipak

⁵ ZOO, čl. 51, st. 1.

⁶ ZOO, čl. 51, st. 2.

⁷ ZOO, čl. 52.

⁸ ZOO, čl. 53, st. 1.

⁹ ZOO, čl. 53, st. 2.

bi se i ugovor o sponzorstvu mogao upodobiti ovako shvaćenoj ekonomskoj koncepciji kauze ugovorne obaveze. Kada su se u praktičnoj primeni na sponzorstvo Zakona o porezu na dobit pravnih lica¹⁰ i Zakona o porezu na dodatu vrednost¹¹ javile nedoumice, Ministarstvo finansija i ekonomije je u svojim mišljenjima u cilju razjašnjenja tih nedoumica, ugovor o sponzorstvu odredilo kao ugovor kojim se razmenjuju materijalna dobra (novac i stvari), ili usluge sponzora za uslugu reklamiranja, odnosno propagande sponzorisanog.¹²

U okviru pravne literature u kojoj je zastupljena ekonomska koncepcije kauze ugovorne obaveze, ipak se može naći i daleko preciznija definicija kauze ugovorne obaveze. Tako se navodi, da kauza ugovorne obaveze predstavlja zakonom dozvoljen ekonomski cilj koji ugovarači imaju u vidu prilikom zaključenja ugovora (Kapor 1951, 98). Ova definicija pruža mogućnost njene primene i na ugovore kojima se razmenjuju materijalna dobra i usluge za nematerijalna dobra. Tako, kauzu ugovorne obaveze sponzora možemo odrediti kao željeni transfer imidža, dok bi kauza ugovorne obaveze sponzorisanog bila dobijanje novca, ili stvari kao ekonomskih dobara, ili dobijanje ugovorenih usluga kao podrške njegovim aktivnostima.

Kako smo već napomenuli u uvodnom delu, naša sudska praksa iznedrila je presudu u kojoj je kauza ugovorne obaveze definisana kao ekonomski cilj. Naime, sudski postupak je pokrenut povodom ugovora koji je bio zaključen sa ciljem konsolidovanja jedne banke. Ipak, kako konsolidacija nije ostvarena, podneta je tužba radi utvrđenja ništavosti ugovora iz razloga nepostojanja osnova. Sudovi prvog i drugog stepena konstatuju nepostojanje osnova uz obrazloženje da se nije realizovao ekonomski interes ugovornih strana i utvrđuju ništavost ugovora. Revizijski sud je imao, čini nam se potpuno opravdano, drugačije mišljenje. Smatrao je pobude i motive pravno irelevantnim jer u konkretnom slučaju nisu bili formulisani kao uslov, pa tako nisu ušli u sadržinu ugovora,¹³ dok neostvarenje konsolidacije kao svrhe ugovora rezultat je poslovnog rizika koji su ugovarači preuzeli, te ne može imati za posledicu ništavost ugovora. Ipak, Savezni sud ukida ovu presudu i

¹⁰ Zakon o porezu na dobit pravnih lica ("Sl. glasnik RS", br. 25/2001, 80/2002, 80/2002-dr. zakon, 43/2003, 84/2004, 18/2010, 101/2011, 119/2012, 47/2013, 108/2013, 68/2014-dr. zakon i 142/2014).

¹¹ Zakon o porezu na dodatu vrednost („Sl. glasnik RS“, br. 84/2004, 86/2004-ispr., 61/2005, 61/2007, 93/2012, 108/2013, 68/2014-dr. zakon, 142/2014).

¹² Videti, Mišljenje Ministarstva finansija i ekonomije br. 414-00-94/2003-04 od 24.06.2003., dostupno na: www.propisionline.com, i Mišljenje Ministarstva finansija i ekonomije br. 413-00-1423/2008-04 od 7.7.2008., dostupno na: www.propisionline.com.

¹³ Ugovarači imaju na raspolaganju mogućnost da motive iz kojih zaključuju ugovor formulišu u vidu uslova, pa bi kao rezultat toga, pravno dejstvo ugovora zavisilo od ostvarenja motiva, na isti način kako uslov utiče na nastupanje, ili prestanak dejstva pravnih poslova. Videti, (Dudaš 2011, 18).

potvrđuje presude suda prvog i drugog stepena, definišući pritom kauzu ugovorne obaveze ugovarača kao direktan razlog koji navodi na sklapanje konkretnog ugovora, a ako ona nije prepoznatljiva iz ugovora, obaveza je suda da je ustanovi uzimajući u obzir motive strana ugovornica za sklapanje dotičnog ugovora, običaje koji važe u prometu, kao i opšta moralna načela.¹⁴

Mišljenja smo da je stav Revizijskog suda ispravan. Željena konsolidacija čini svrhu ugovora, tako da njeno neostvarenje samo po sebi ne bi moglo imati uticaja na ugovorni odnos. Ipak, ako bi neostvarenje svrhe ugovora nastupilo kao posledica nepredvidivih, neizbežnih i nesavladivih okolnosti, tada bi u skladu sa pravilima ZOO o uticaju promenjenih okolnosti na ugovor, ugovarač na čiju štetu su se okolnosti promenile, mogao sudskim putem zahtevati raskid, ili pravičnu izmenu ugovora. Isto tako, neostvarenje svrhe ugovora za jednog ugovarača moglo bi nastupiti i kao posledica postupaka drugog ugovarača, primera radi, delimičnog neispunjenja ugovorne obaveze, pa bi ugovoru verna strana imala pravo da jednostrano raskine ugovor. Upravo je to bio slučaj, čini nam se, što se može i zaključiti iz obrazloženja presude, u kome se navodi da je tužilac dug preuzeo radi konsolidacije poslovanja banke, pri čemu konsolidacija nije ostvarena usled propusta tužene.¹⁵

Prvostepeni i drugostepeni sud, kao i Savezni sud su zapravo svrhu ugovora (željenu konsolidaciju kao ekonomski cilj ugovora), najpre poistovetili sa kauzom ugovorne obaveze, a zatim neostvarenje svrhe ugovora tretirali kao nepostojanje kauze ugovorne obaveze i na osnovu toga utvrdili ništavost ugovora. Inače, čak i ukoliko bi prihvatili ekonomsku koncepciju kauze ugovorne obaveze, na način kako je ona interpretirana u ovim presudama, smatramo da se nipošto ne bi moglo govoriti o nepostojanju, već samo i isključivo o naknadnom otpadanju kauze ugovorne obaveze, što bi opet kao posledicu eventualno moglo imati pravo na raskid ugovora, a ne ništavost ugovora.

U suprotnom, prihvatanje ekonomske koncepcije kauze ugovorne obaveze na način na koji su to učinili prvostepeni i drugostepeni sud, kao i Savezni sud, vodilo bi potpunoj pravnoj nesigurnosti. Naime, kauza ugovorne obaveze je uslov punovažnog nastanka ugovora, pa kao takva, mora postojati u trenutku zaključenja ugovora, jer u suprotnom, ugovor je ništav. Ukoliko bismo dosledno pratili stav prvostepenog, drugostepenog i Saveznog suda, to bi značilo da u nekim slučajevima moramo sačekati ispunjenje ugovora radi

¹⁴ Presuda Saveznog suda, br. Gzs 15/2000, od 29.6.2000., navedeno prema: (Dudaš 2011, 18).

¹⁵ Propusti su se ogledali u neobezbeđivanju novih deponenata, ne unošenju novih novčanih sredstava, deponovanju svojih novčanih sredstava sa zakašnjenjem..., dostupno na: Intermex sudska raksa.

ustanovljenja da li kauza ugovorne obaveze postoji, jer neostvarenje kauze ugovorne obaveze, izjednačava se sa njenim nepostojanjem. Na taj bi se način, domen primene instituta kauze ugovorne obaveze proširio i izvan granica koje je postavila mešovita koncepcija kauze ugovorne obaveze, dakle, na period nakon izvršenja ugovora.

Kako bi to izgledalo u praksi, prikazaćemo na primeru sponzorskog ugovora, i karakterističnog ekonomskog cilja sponzora, koji se, kako smo videli, ispoljava u tzv. transferu imidža. Pretpostavimo da je ugovor sklopljen na period od nekoliko godina. Kauza ugovorne obaveze ispoljena u transferu imidža, kao ekonomskom cilju sponzora, svakako postoji u momentu sklapanja ugovora o sponzorstvu, jer ako to ne bi bilo tako, ugovor o sponzorstvu ne bi mogao punovažno nastati. Na sličan način, kako se u skladu sa mešovitom koncepcijom kauze ugovorne obaveze ugovarač obavezuje zato što očekuje izvršenje ugovorne obaveze drugog ugovarača, tako se i u skladu sa ekonomskom koncepcijom kauze ugovorne obaveze sponzor obavezuje zato što očekuje transfer imidža. Za vreme trajanja ugovora moglo bi se desiti da kauza ugovorne obaveze otpadne, pa bi u zavisnosti od okolnosti konkretnog slučaja, trebalo primeniti pravna pravila koja važe za promenjene okolnosti, ili pak ona koja važe za jednostrani raskid ugovora zbog neizvršenja ugovorne obaveze. Domaći sudovi bi, kako smo videli, utvrdili ništavost ugovora zbog nepostojanja osnova.

Ipak, na osnovu stava prvostepenog, drugostepenog i Saveznog suda iznetog u njihovim odlukama, u praksi bi mogla nastati i ovakva situacija. Nakon urednog izvršenja ugovora, sponzor sprovede evaluaciju rezultata,¹⁶ što sponzori u praksi i inače redovno čine kako bi proverili efekte sponzorstva, i ustanovi da se željeni transfer imidža nije ostvario, te po tom osnovu zahteva utvrđenje ništavosti ugovora o sponzorstvu zbog nepostojanja kauze ugovorne obaveze, jer kao što smo već rekli, prema shvatanju prvostepenog, drugostepenog i Saveznog suda, neostvarenje kauze ugovorne obaveze isto je što i njeno nepostojanje, a kauzu ugovorne obaveze sud utvrđuje uzevši u obzir motive strana ugovornica za sklapanje dotičnog ugovora, običaje koji važe u prometu, kao i opšta moralna načela. Moramo priznati, nastupila bi potpuna pravna nesigurnost.

¹⁶ Efekti sponzorstva mogu se meriti ciljanim istraživanjem tržišta. Drugačije rečeno, može se utvrditi da li je željeni transfer imidža postignut. Videti, (Stjuart 1994, 144-146).

*Primena subjektivne koncepcije kauze ugovorne obaveze na ugovor o
sponzorstvu*

Pobornici subjektivne koncepcije, kauzu ugovorne obaveze traže u motivima ugovarača za zaključenje konkretnog ugovora. Uvidevši ono što je očigledno, da za zaključenje konkretnog ugovora može biti i više različitih motiva, vrši se preciziranje, tako što se kauza ugovorne obaveze vezuje za odlučujući motiv, dakle motiv koji je neposredno uticao na zaključenje konkretnog ugovora. Ipak, subjektivna koncepcija kauze ugovorne obaveze našla se pred kritikom, ponajviše usled toga, da bi njeno prihvatanje i praktična primena vodila pravnoj nesigurnosti, usled teškoća koje bi nastale u vezi utvrđivanja i dokazivanja odlučujućeg motiva (Perović, Stojanović 1980, 240; Antić 2006, 1154). Generalno gledano, ne postoji mogućnost saznanja kako bilo kog, tako i odlučujućeg motiva za zaključenje konkretnog ugovora, osim u slučaju da ga sami ugovarači saopšte.

Ukoliko bi subjektivnu koncepciju kauze ugovorne obaveze primenili na ugovor o sponzorstvu, morali bismo dati odgovor na pitanje motiva koji su odlučujuće uticali na sponzora i sponzorisanog da zaključe ugovor o sponzorstvu. O mogućim motivima sponzora i sponzorisanog mogu se dobiti posredna saznanja, pregledom ekonomske literature o sponzorstvu. Tako, kao mogući motivi sponzora navode se motivi vezani za rast prodaje proizvoda, ili usluga, utvrđenje i ojačanje pozicije na tržištima na kojima je sponzor već prisutan, ili širenje na nova tržišta, konstantno održavanje veze sa potrošačima, kao i konstantno pominjanje i prisustvo u javnosti prevashodno usled globalne medijske pokrivenosti sponzorisanih događaja, ili sa tim u vezi, ušteda troškova, jer kako se pokazalo u praksi, sponzorstvo može biti daleko učinkovitije nego li klasično oglašavanje, a uz manje troškove, mogućnost dobijanja ekskluzivnosti, zaobilazanje zakonskih zabrana vezanih za oglašavanje alkoholnih i duvanskih proizvoda... (Šurbatović 2014, 263; Jobber, Fahy 2006, 254-255). Dakle, ovo su samo neki od mogućih motiva. Koji od njih je bio u datom slučaju odlučujući, može se znati, samo ako ga sam sponzor iznese.

Na drugoj strani, primećujemo vrlo interesantnu situaciju. Naime, radi se o gotovo potpunoj objektivizaciji motiva sponzorisanog, što je opet rezultat posebnosti ovog ugovora. Za sponzorisanog, odlučujući je motiv dobijanje podrške za njegove aktivnosti. Ovo ne samo što je odlučujući, nego je često ujedno i jedini motiv sponzorisanog, koji on po pravilu i saopštava potencijalnim sponzorima prilikom „traženja“ sponzorstva. Ipak, ne radi se o potpunoj objektivizaciji motiva, jer se u literaturi navode i drugi, doduše ređi, mogući motivi. Recimo lična finansijska sigurnost individualnog sportiste, ili

jačanje pregovaračke pozicije za nove ugovore o sponzorstvu (Rohborn 1997, 93).

Svrha ugovora

ZOO-om je propisano da ukoliko se okolnosti koje postoje u momentu sklapanja ugovora, posle toga, a pre nego li istekne rok za ispunjenje ugovorne obaveze, izmene u tom smislu, da izmena bude na štetu jedne ugovorne strane, i ako ta ugovorna strana nije morala da uzme u obzir takvu promenu okolnosti u momentu sklapanja ugovora, niti je izmenjene okolnosti mogla izbeći, ili savladati, onda ona može sudskim putem zahtevati raskid, ili izmenu ugovora. Okolnosti su se promenile na štetu jednog ugovarača ako mu znatno otežavaju izvršenje ugovorne obaveze, ili ga onemogućavaju u ostvarenju svrhe ugovora, tako da ugovor više nije u skladu sa očekivanjima ugovarača i bilo bi nepravično, prema opštem mišljenju ugovor ostaviti na snazi u takvom obliku.¹⁷ Pri odlučivanju suda o raskidu, ili izmeni ugovora zbog toga što su se okolnosti koje su postojale u momentu sklapanja ugovora naknadno promenile, sud mora postupati prema principima poštenog prometa, a posebno mora voditi računa o ugovornom cilju i riziku koji je uobičajen za konkretnu vrstu ugovora, kao i da uzme u obzir, kako opšti, tako i interes ugovornih strana.¹⁸ Mogućnost raskidanja, odnosno izmene ugovora, usled naknadne promene okolnosti, dakle postoji, ako nove okolnosti, niti fizički, niti pravno ne sprečavaju ispunjenje ugovorne obaveze, ali deluju tako da se narušava ekvivalencija uzajamnih davanja, ili tako da sprečavaju ostvarenje od obe strane priznate svrhe ugovora (Đurđević 1994, 176). U nastavku, pokušaćemo da damo odgovor na pitanje šta se pod svrhom ugovora o sponzorstvu, kako za sponzora, tako i za sponzorisanog, podrazumeva. No najpre, moramo ustanoviti šta se uopšte pod svrhom ugovora podrazumeva, naročito iz razloga, što se u domaćoj pravnoj literaturi mogu pronaći stavovi u prilog istovetnosti kauze ugovorne obaveze i svrhe ugovora.

¹⁷ ZOO, čl. 133.

¹⁸ ZOO, čl. 135. U domaćoj pravnoj doktrini, objašnjenje raskida, ili izmene ugovora zbog promenjenih okolnosti bazira se ili na teoriji ekvivalencije, ili na teoriji kauze. Ipak, postoji shvatanje po kome ZOO primenjuje dvojaki osnov raskidanja, ili izmene ugovora zbog promenjenih okolnosti. Naime, otežano ispunjenje ugovorne obaveze ukazuje na teoriju ekvivalencije. Nemogućnost realizacije svrhe ugovora, ukazuje pak, na delimično prihvatanje Larencove tzv. teorije o otpadanju objektivne osnove posla, prema kojoj dolazi do osujećenja svrhe ugovora, ako objektivna i u sadržini ugovora na neki način ispoljena svrha trajno postane neostvarljiva, a da pritom ispunjenje ugovorne obaveze ne postane nemoguće. Jednostavno, nastupa objektivna nesvršishodnost ispunjenja. Videti, (Đurđević 1994, 155-158).

Bliže određenje pojma „svrha ugovora“ u pravnoj literaturi

I pored toga, što u pravnoj literaturi postoje stavovi koji izjednačavaju kauzu ugovorne obaveze i svrhu ugovora, ipak se, usled specifičnog poimanja kauze ugovorne obaveze koje zauzimaju zastupnici takvog stava, autori u pogledu shvatanja o tome, šta se konkretno podrazumeva pod svrhom ugovora mogu grupisati na one koji pod svrhom ugovora vide motive ugovarača i one koji pod svrhom ugovora vide ekonomski cilj ugovarača. Tako se prema jednom mišljenju iznetom u pravnoj literaturi svrha ugovora posmatra kao vaninstitucionalna kauza, pa se raskidanje, ili izmena ugovora zbog promene okolnosti objašnjava otpadanjem vaninstitucionalne kauze. Inače, prema ovom mišljenju, jedinstveni pojam kauze ugovorne obaveze obuhvata kako institucionalnu, tako i vaninstitucionalnu kauzu. Institucionalna kauza zapravo predstavlja kauzu ugovorne obaveze shvaćenu kao pravni cilj obavezivanja, dok vaninstitucionalna kauza suštinski predstavlja motive ugovarača.¹⁹

U pravnoj literaturi može se pronaći i mišljenje, da sve odredbe ZOO u kojima se pominje bilo osnov ugovorne obaveze, bilo pobude za sklapanje ugovora, čine prvi nivo manifestacije teorije kauze, dok norme ZOO u kojima se bilo kako ukazuje na pravni značaj cilja ugovora, čine drugi nivo manifestacije teorije kauze. Kako je u ZOO primenjena tzv. mešovita, tj. objektivno-subjektivna koncepcija kauze ugovorne obaveze, smatra ovaj autor da cilj ugovora nekada treba shvatiti objektivno, dakle kao pravni cilj obavezivanja, a nekada subjektivno, dakle kao pobudu za sklapanje ugovora (Dudaš 2011, 172-173). Svrhu ugovora iz člana 133 ZOO tumači on subjektivno, dakle, kao pobudu za sklapanje ugovora (Dudaš 2011, 172-173).²⁰

Zastupljeno je u pravnoj literaturi i mišljenje da je svrha ugovora zapravo finalna pobuda koja je odlučujuće uticala na jednog ugovarača da zaključi ugovor, pri čemu se ta pobuda, od drugih pobuda razlikuje po tome što je poznata drugom ugovaraču i kao takva uticala je na sadržinu izjave drugog ugovarača, pa na osnovu toga prestaje da bude isključivo individualna pobuda i postaje zajednički cilj (Đurđević 1994, 210).

Na drugoj su strani autori koji pod svrhom ugovora vide ekonomski cilj ugovarača. Tako se navodi da se ovde ne radi o neposrednoj pravnoj svrsi koju ugovarači hoće da postignu i koja predstavlja kauzu ugovorne obaveze, nego o ekonomskoj svrsi zbog koje se ugovarači obavezuju (Šmalcelj 1966, 91). Ili se navodi da u domenu raskidanja, ili izmene ugovora zbog promenjenih

¹⁹ Stanovište Stojana Cigoja. Navedeno prema: (Đurđević 1994, 145-149).

²⁰ Sa druge strane, cilj ugovora koji se pominje u članu 135 ZOO, tumači on objektivno, kao pravni cilj obavezivanja.

okolnosti pravnu relevantnost ima kauza u objektivnom smislu, kod koje se zapravo radi o pravno oblikovanoj ekonomskoj svrsi koja se objektivno ostvaruje ispunjenjem ugovornih obaveza (Vedriš 1987, 7).

Takođe, ima mišljenja da svrhu ugovora treba razlikovati kako od objektivno shvaćene kauze ugovorne obaveze (što je pravni cilj obavezivanja), tako i od subjektivno shvaćene kauze ugovorne obaveze (što je pobuda za sklapanje ugovora). Analizirajući termine korišćene u ZOO, zaključuje ovaj autor da ZOO upotrebljava razne termine koji ukazuju na pravni značaj kauze ugovorne obaveze u objektivnom smislu (osnov ugovorne obaveze, cilj ugovora, nema interesa za ugovornu stranu, ne odgovara potrebama ugovorne strane) i kauze ugovorne obaveze u subjektivnom smislu (pobuda za zaključenje ugovora, odlučujuća pobuda). Termin svrha ugovora se među njima ne nalazi. Shodno tome, prema ovom mišljenju, termin svrha ugovora se odnosi na ekonomski cilj koji se sklapanjem konkretnog sinalagmatičkog ugovora nastoji realizovati (Vuković 2019, 290-292).²¹ U prilog tome navodi se da je Vrhovni sud Srbije u jednoj odluci bio mišljenja da ima razloga da se, zbog promene okolnosti, ugovor o zakupu poslovnih prostorija raskine, ukoliko zakupnina, koja nije dovoljna ni za podmirivanje izdataka za tekuće održavanje poslovnog prostora, ne omogućuje realizaciju ugovorne svrhe, koja se manifestuje u očekivanju zakupodavca, da od sklopljenog ugovora ostvari određenu ekonomsku korist.²²

Svrha ugovora o sponzorstvu

Prema našem mišljenju, svrha ugovora može se manifestovati ili kao ekonomski cilj, ili pak, kao odlučujući motiv ugovarača. Predstavimo to na osnovu ugovora o sponzorstvu. Mišljenja smo, da je svrha ugovora dozvoljeni cilj jednog ugovarača, sa kojim je drugi ugovarač upoznat, i koji se može manifestovati ili kao ekonomski cilj, ili kao odlučujući motiv koji je jednog ugovarača naveo na zaključenje konkretnog ugovora. Kako se tokom izvršenja ugovora, okolnosti mogu promeniti na štetu kako jednog, tako i drugog ugovarača, moramo utvrditi svrhu ugovora oba ugovarača ponaosob. Ne znači da će se u jednom ugovoru svrha ugovora za oba ugovarača ispoljiti isključivo kao ekonomski cilj, ili isključivo kao odlučujući motiv, već se može desiti da svrha ugovora jednog ugovarača bude ekonomski cilj, a drugog ugovarača

²¹ Ovaj autor smatra da se cilj ugovora iz člana 135 ZOO odnosi na kauzu ugovorne obaveze u objektivnom smislu (pravni cilj obavezivanja), dok opisna formulacija člana 133 ZOO „da ugovor više ne odgovara očekivanjima ugovornih strana“ ukazuje na kauzu ugovorne obaveze u subjektivnom smislu (pobude za zaključenje ugovora).

²² Rešenje Vrhovnog suda Srbije, Rev. 959/94 od 23. marta 1994. godine, navedeno prema: (Vuković 2019, 292).

odlučujući motiv, što je čini nam se u ugovoru o sponzorstvu slučaj. Tako, mišljenja smo, da kao svrhu ugovora za sponzora, treba uzeti njegov ekonomski cilj, dakle transfer imidža, dok je u slučaju sponzorisanog svrha ugovora njegov odlučujući motiv, dakle dobijanje podrške za njegove aktivnosti, jer sponzorisanog ne zanima niti sticanje prava svojine na novcu, ili stvarima, niti sticanje prava korišćenja na stvarima koje mu predaje sponzor, niti ga stvari i novac interesuju kao ekonomska dobra, ukoliko ne služe realizaciji njegovog motiva, a to je podrška njegovim aktivnostima.

Zamislivi su praktični slučajevi kada bi se na ugovor o sponzorstvu mogao primeniti institut raskidanja, ili izmene ugovora zbog promenjenih okolnosti. Recimo, ugovor o sponzorstvu koji su zaključili uspešna kompanija i fudbalski klub. Nakon izvesnog vremena, tokom trajanja ugovora o sponzorstvu, prilikom putovanja na utakmicu, u avionskoj nesreći poginu svi članovi prvog tima fudbalskog kluba, što se inače i dešavalo u stvarnosti.²³ Sponzorisani i dalje može da izvršava svoje ugovorne obaveze. Na raspolaganju su mu rezervni fudbaleri. Ipak, pitanje je da li se u takvom slučaju za sponzora da realizovati svrha ugovora, željeni transfer imidža, ukoliko sponzora promovišu ne toliko poznati fudbaleri. Naravno, sa druge strane ostaje faktičko pitanje, kako bi se i inače na imidž sponzora odrazilo raskidanje ugovora o sponzorstvu i napuštanje sponzorisanog zbog takvog nesrećnog slučaja.

Isto tako bi se recimo moglo desiti, što se trenutno i dešava, da zbog pandemije korona virusa bude zabranjeno prisustvo gledalaca fudbalskim utakmicama. Sponzorisani može da ispuni ugovorne obaveze, ali za sponzora je onemogućeno ostvarenje svrhe ugovora, transfera imidža, putem stvaranja u očima javnosti utiska o povezanosti sa sponzorisanim, jer gledalaca, to jest javnosti nema. Naravno, neke će se utakmice televizijski prenositi, ali mnoge neće, ili će na televiziji biti prikazane samo u pregledu. Mišljenja smo ipak, da to nije dovoljno za uspešan transfer imidža.

Sa druge strane, pretpostavimo da je ugovor o sponzorstvu zaključen tako da sponzor finansira odlazak sponzorisanog na sportsko takmičenje, a sponzorisani preuzme obavezu učešća u reklamnom spotu sponzora. Usled pandemije korona virusa bude zabranjeno održavanje sportskog takmičenja. Sponzor svoju ugovornu obavezu može izvršiti, ali za sponzorisanog, svrha ugovora, odlučujući motiv koji ga je naveo na zaključenje ugovora o sponzorstvu, a to je odlazak na sportsko takmičenje se ne može ostvariti. Sponzorisanog zapravo ne zanima niti sticanje prava svojine na novcu, niti

²³ Poznat je slučaj iz 2016. godine kada su tokom putovanja na fudbalsku utakmicu u Kolumbiji u avionskoj nesreći poginuli gotovo svi fudbaleri brazilskog fudbalskog kluba Šapekoense.

njegova ekonomska upotreba, ukoliko to nije u cilju odlaska na sportsko takmičenje.

Predzaključna razmatranja

Dok je u ZOO za označenje kauze ugovorne obaveze upotrebljen termin osnov ugovorne obaveze, u članu 133 ZOO reč je o svrsi ugovora. Dakle, ono što je očigledno i što najpre upada u oči, jesu terminološke razlike. Različitost upotrebljenih termina bi svakako mogla upućivati na zaključak da svrha ugovora i kauza ugovorne obaveze nisu isto. Nesporna je činjenica da je kauza ugovorne obaveze uslov punovažnosti ugovora, pa njeno nepostojanje u trenutku zaključenja ugovora rezultira ništavošću ugovora. Svrha ugovora definitivno uslov punovažnosti ugovora nije, jer neostvarenje svrhe ugovora samo po sebi ne prouzrokuje nikakve posledice po ugovor i ulazi u okvire poslovnog rizika. Tek ukoliko bi neostvarenje svrhe ugovora bilo rezultat nepredvidivih, neizbežnih i nesavladivih okolnosti, mogao bi se ugovor raskinuti, ili izmeniti.

Ako su svrha ugovora i kauza ugovorne obaveze isto, samo se po sebi nameće pitanje, kako jedan isti pravni institut istovremeno može pod određenim okolnostima (njegovog nepostojanja) biti uzrok ništavosti ugovora, a pod drugim okolnostima (njegovog neostvarenja) biti uzrok raskida, ili izmene ugovora. Da je tako nešto moguće, možemo zaključiti pozivajući se na pravila ZOO o jednostranom raskidu ugovora zbog neizvršenja ugovorne obaveze, ukoliko naravno kao teorijsku osnovu pravila ZOO o jednostranom raskidu ugovora zbog neizvršenja ugovorne obaveze prihvatimo teoriju kauze. U takvom slučaju, kao što smo već napomenuli, nepostojanje kauze ugovorne obaveze u trenutku zaključenja ugovora uzrokuje ništavost ugovora, dok njeno docnije otpadanje za posledicu ima raskid ugovora. Ipak, argument bi se mogao osporiti time, da teorija kauze svakako nije jedina teorija kojom se objašnjava jednostrano raskidanje ugovora zbog neispunjenja ugovorne obaveze.²⁴ Inače, najozbiljnija zamerka teoriji kauze, kao teorijskoj osnovi objašnjenja jednostranog raskidanja ugovora zbog neispunjenja ugovorne obaveze, tiče se toga, da je u skladu sa mešovitom koncepcijom kauze ugovorne obaveze postojanje kauze ugovorne obaveze, kako uslov punovažnog nastanka ugovora, tako i uslov njegovog održanja, pa ako bi se dosledno toga pridržavali, u slučaju otpadanja kauze ugovorne obaveze trebalo bi da nastupi ništavost, a ne raskid ugovora, dok sa druge strane neizvršenje

²⁴ Pored teorije kauze, jednostrano raskidanje ugovora zbog neispunjenja ugovorne obaveze u pravnoj literaturi objašnjava se još i teorijom o prećutnom raskidnom uslovu, teorijom pravičnosti, teorijom ekvivalencije i teorijom javnog poretka. Više o tome videti, (Grujić 2014, 97-119).

ugovorne obaveze nikako ne može uzrokovati ništavost ugovora, jer uzroci ništavosti moraju postojati u trenutku zaključenja ugovora, a docnije nastale okolnosti, što podrazumeva i neizvršenje ugovorne obaveze, ne mogu prouzrokovati ništavost ugovora (Grujić 2014, 109-110). Saglasni smo sa mišljenjem iznetim u pravnoj literaturi da bi institut kauze ugovorne obaveze trebalo primenjivati jedino i isključivo na pitanje punovažnog nastanka ugovora. Za njegovom primenom nakon zaključenja ugovora ne postoji nikakva potreba, jer ZOO stavlja na raspolaganje druge institute, između ostalih, institut raskidanja, ili izmene ugovora zbog promenjenih okolnosti, tako da bi se primena instituta kauze ugovorne obaveze u periodu izvršenja ugovora preklapila sa primenom ovog instituta (Nikšić 2006, 1098; Šmalcelj 1980, 13).

Zaključak

Jesu li kauza ugovorne obaveze i svrha ugovora iz člana 133 ZOO isto, odgovor je u direktnoj vezi sa tim za koju koncepciju kauze ugovorne obaveze se odlučimo. Na raspolaganju nam stoje mešovita, objektivna (ekonomska) i subjektivna koncepcija. Subjektivne koncepcije možemo se odmah odreći, jer ona, niti je prihvaćena u ZOO, niti u pravnoj teoriji, niti u sudskoj praksi. Ukoliko se opredelimo za mešovitu koncepciju kauze ugovorne obaveze, čemu smo skloni, različitosti između kauze ugovorne obaveze i svrhe ugovora postaju i više nego jasne. Dakle, na osnovu mišljenja iznetih u pravnoj literaturi, da se zaključiti, da se, baš kao i kauza ugovorne obaveze, isto tako i svrha ugovora može ispoljiti objektivno, ili subjektivno. Ipak, razlike su očigledne. Dok se kauza ugovorne obaveze objektivno ispoljava kao pravni cilj obavezivanja, svrha ugovora se objektivno ispoljava kao ekonomski cilj ugovarača. Na drugoj strani, kako kauza ugovorne obaveze, tako i svrha ugovora, mogu se subjektivno ispoljiti u vidu motiva ugovarača za zaključenje konkretnog ugovora. No, opet, razlike su očigledne. U pojam kauze ugovorne obaveze kod teretnih ugovora ulaze motivi samo ukoliko su nedopušteni i ukoliko su oba ugovarača bila nesavesna. Pravno relevantni kao svrha ugovora mogu biti samo i isključivo dopušteni motivi. Očigledno je dakle, da se kod raskida, ili izmene ugovora zbog promenjenih okolnosti radi o slučajevima u kojima kauza ugovorne obaveze one ugovorne strane na čiji teret je došlo do promene okolnosti i dalje postoji, usled toga što drugi ugovarač može i hoće da izvrši svoju ugovornu obavezu, ali se za prvog ugovarača ne može ostvariti svrha ugovora. Sve izneto, čini nam se dokazuje, da kauza ugovorne obaveze, onako kako nju shvata mešovita koncepcija, i svrha ugovora nisu isto.

Ukoliko bismo se opredelili za objektivnu (ekonomsku) koncepciju kauze ugovorne obaveze, odgovor bi bio drugačiji. Naime, došlo bi do poklapanja

kauze ugovorne obaveze i svrhe ugovora, kod onih ugovora, kod kojih bi se svrha ugovora ispoljila kao ekonomski cilj ugovarača. S obzirom na to, da smo videli kakvu pravnu nesigurnost bi izazvala praktična primena objektivne (ekonomske) koncepcije kauze ugovorne obaveze, onako kako su to učinili domaći sudovi, nikako se ne bismo založili za njeno prihvatanje. Pa makar se radilo o ugovorima kakav je ugovor o sponzorstvu kod kojih je toliko jasno i dominantno izražen i vidljiv ekonomski cilj obavezivanja.

Literatura

1. Antić, Oliver. 2008. *Obligaciono pravo*. Beograd.
2. Antić, Oliver. 2006. „Pravno-teorijske osnove različitih shvatanja kauze“. *Arhiv za pravne i društvene nauke* br. 3-4.
3. Capri, Roberta., Tocci, Mario. 2007. *Il contratto di sponsorizzazione*. Trento.
4. Dudaš, Atila. 2011. „Kauza obligacionih ugovora“. Doktorska disertacija. Univezitet u Novom Sadu. Pravni fakultet Novi Sad.
5. Đurđević, Marko. 1994. „Raskidanje ili izmena ugovora zbog promenjenih okolnosti“. Magistarska teza. Univerzitet u Beogradu. Pravni fakultet Beograd.
6. Gams, Andrija. 1959. „Kauza i pravni osnov“. *Anali Pravnog fakulteta u Beogradu* br. 2.
7. Grujić, Nenad. 2014. „Raskid ugovora zbog neispunjenja i pravna dejstva raskida“. Doktorska disertacija. Pravni fakultet Univerziteta Union u Beogradu.
8. Ječmenić, Milan. 2018. „Ugovor o sponzorstvu“. Doktorska disertacija. Univerzitet u Kragujevcu. Pravni fakultet Kragujevac.
9. Jobber, David., Fahy, John. 2006. *Osnovi marketinga*. Beograd.
10. Kapor, Vladimir. 1951. „Neosnovano obogaćenje u građanskom pravu“. Doktorska disertacija. Univerzitet u Beogradu. Pravni fakultet Beograd.
11. Mormando, Marco. 1998. *I contratti di sponsorizzazione sportive*. Bari.
12. Nikšić, Saša. 2006. „Kauza obveze i srodni instituti u poredbenom pravu“. *Zbornik Pravnog fakulteta u Zagrebu* br. 4.
13. Perović, Slobodan., Dragoljub, Stojanović. 1980. *Komentar Zakona o obligacionim odnosima*. Gornji Milanovac-Kragujevac.
14. Perović, Slobodan. 1981. *Obligaciono pravo*. Beograd.
15. Rohrborn, Stefan. 1997. *Der Sponsoringvertrag als Innengesellschaft: Abschluß, Vollzug und Leistungsstörungen*. Berlin.
16. Rudiger, Benjamin. 2010/2011. „Sponsoring und Vertragsrecht: Zur Frage der Definititon von Kommunikationserfolgen in

- Sponsoringvertragen“. Seminar zum Sportrecht bei Prof. Dr. Peter W. Heermann, LL.M., Wintersemester.
17. Šmalcelj, Želimir. 1966. „Djelovanje izmijenjenih okolnosti na obligatorne ugovore“. *Naša zakonitost* br. 2.
 18. Šurbatović, Jovan. 2014. *Menadžment u sportu*. Beograd.
 19. Tarner, Stjuart. 1994. *Sve o sponzorstvu*. Beograd.
 20. Vedriš, Martin. 1987. „„Osnova“ po Zakonu o obveznim odnosima“. *Privreda i pravo* br. 7-8.
 21. Vuković, Zoran. 2014. „Ugovori o stručnom angažovanju sportskih stručnjaka“. Doktorska disertacija. Univerzitet u Kragujevcu. Pravni fakultet Kragjevac.

ARE THE CAUSE OF THE CONTRACTUAL OBLIGATION AND THE PURPOSE OF THE CONTRACT THE SAME?

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Original scientific paper

Abstract

The paper examines the relationship between the cause of the contractual obligation and the purpose of the contract. Namely, an attempt is made to answer the question, whether these are two different legal institutes, or if apart from terminology, there are no other differences between them. The problem is analyzed based on the sponsorship agreement. This contract was chosen due to one of its peculiarities. The economic goal of the sponsor is so obvious and visible, that, without any hesitation, one can think about applying the economic concept of the cause of the contractual obligation to this contract. If we take into account that we have a basis for such a thing in court practice (namely, there are decisions in which the economic concept of the cause of the contractual obligation is applied), as well as the fact that in domestic legal doctrine some authors define the purpose of the contract as an economic goal, the issue becomes obvious.

Key words: *cause of contractual obligation, purpose of contract, economic goal, sponsorship contract, image transfer.*

JEL: K12.

Introduction

In this article, the author analyzes the relationship between the cause of a contractual obligation, on one hand, and the purpose of the contract mentioned in Article 133 of the Law on Obligations (hereinafter LOO) on the other hand. The goal is to determine whether it is one and the same institute, or whether there are differences between them. As for the cause of the contractual obligation, we have a mixed, objective (economic) and subjective conception. The mixed conception of the cause of contractual obligation has been accepted in the LOO, most of the domestic legal theory, as well as in court practice. The objective (economic) conception of the contractual obligation cause is accepted in one part of domestic legal theory, but in our courts there is a decision in which the contractual obligation cause is interpreted in such a way

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that it is the economic goal of the contractor. The subjective conception of the cause of contractual obligation has no supporters in our legal doctrine or in our case law. On the other hand, in our legal doctrine, there are attitudes that identify the purpose of the contract with the cause of the contractual obligation. However, given the specific understanding of the contractual clause taken by proponents of such an attitude, in terms of understanding what is specifically meant by the purpose of the contract, the authors can group into those who see the motives of the contractor and those who see the economic goal of the contractor.

We will consider the posed question on the example of a sponsorship agreement due to one specificity of this agreement. Namely, for the sponsor, as one of the contracting parties to the sponsorship agreement, the economic goal of the commitment is so obvious and clearly expressed, in the terminology of economic literature marked as „image transfer“. Consequently, it seems quite easy and tempting to reach for an objective (economic) conception of the cause of a contractual obligation in the case of a sponsorship agreement, especially since the basis for such a thing can be found in both domestic legal theory and domestic case law. Whether this is justified, we will see below. We will show how domestic courts apply the objective (economic) concept of the contractual obligation cause in practice, as well as what it would look like on a sponsorship agreement. As in the case of the sponsorship agreement, it is a bilateral and freight agreement, everything we will write about below will refer to bilateral and freight agreements.

A brief overview of a sponsorship agreement

A sponsorship agreement obliges the sponsor to pay the agreed amount of money to the sponsored, in order to support the activities of the sponsored, or hand over the stipulated amount (owned or used), or provide the agreed services (provided that these obligations can be combined), and the sponsored leaves to the sponsor the right to use his image for marketing purposes and undertakes the obligation to promote the sponsor and participate in his marketing activities (Ječmenić 2018). As a rule, sponsors are successful companies, and sponsored successful individuals in sports, arts, culture, or sports organizations and federations, Olympic committees, sports, or cultural and artistic events. Essential features of the sponsorship agreement are support of the sponsor, communication counter-action of the sponsored, as well as the characteristic economic goal that the sponsor wants to achieve with this contract, and which in the books on economics is called image transfer. Namely, it is about the objective economic goal of every sponsorship agreement for the sponsor, regardless of who was the sponsor or the

sponsored, or in which area the sponsorship occurs. This specific economic goal of the sponsor is so immanent to this agreement, that in its absence, in our opinion, it would not be possible to talk about a sponsorship agreement at all.

Two questions can be asked immediately. First, what does image transfer actually represent? Second, how can image transfer be an economic goal? Extremely simplified, it could be said that the image transfer is an attempt to create the impression of the connection between the sponsor and the sponsored by public sponsorship, so that based on that connection the positive image that the sponsored enjoys in public is transferred to the sponsor, his products, or services, where the sponsor can strengthen, or improve the existing, or gain a completely new image. Regarding the question of how the transfer of the image can be an economic goal, in other words, it should be established what positive economic effect image transfer can have on the sponsor's assets. The verdict of the German Federal Supreme Court in the case of Marlene Dietrich states that the image, name, and other elements of personality can have significant economic value, which is based on public awareness and reputation, and acquired through special achievements, mainly sports, or art. This popularity, as well as the image associated with it, can be exploited economically by celebrities, by allowing others to use their image, name, or other personality elements (based on which they can of course be recognized in public) in advertising goods or services for a fee. In advertising, a significant role is played by the so-called image transfer, where it is actually a matter of positive associations that consumers associate with a famous person being transferred to the advertised products. In this way, celebrities significantly contribute to creation of added value.²⁶

The sponsor doesn't enter into a contractual relationship only for the purpose of acquiring the right to use the image sponsored in accordance with its marketing goals, but also for the purpose of image transferring, where acquiring the right to use the image of the sponsored for marketing purposes is considered exclusively as the asset that enables him to perform image transfer. The importance of image transfer to the sponsor can be seen from the fact that all the obligations undertaken by this contract are sponsored, designed so that image transfer is realized as easily as possible. However, as this is not an obligation of results, it does not guarantee the sponsor the realization of the desired image transfer. However, he is obliged to refrain from all actions that could thwart the image transfer. Thus, in foreign court practice, one can find

²⁶ BGH, Urt. v. 1. Dezember 1999 - I ZR 49/97 - Kammergericht, LG Berlin, dostupno na: http://lorenz.userweb.mwn.de/urteile/njw00_2195.htm. Subject of the dispute was the post-mortem protection of Marlene Dietrich's personal rights from unauthorized commercial use.

numerous disputes arising from the sponsor's request for termination of the sponsorship agreement due to the fact that the sponsored man's actions thwarted the realization of the desired image transfer.²⁷

Obligations undertaken by the sponsor under the sponsorship agreement, in their entirety can be subsumed under the general notion of supporting, for the simple reason that the sponsor supports the activities of the sponsored by paying money, handing over things, or providing contracted services. We have already mentioned that all contractual obligations of the sponsored company are conceived in such a way that the desired image transfer is realized, and in order to prove that, we will briefly show them. In general, the contractual obligations of the sponsor can only be called a communication counter-action, since he performs communicative tasks for the sponsor, and thus communicates his message to the public. The sponsored of the sponsorship agreement gives the sponsor the right to use his image for marketing purposes. More specifically, the sponsored allows the sponsor to use his name and character (if the sponsored is a natural person), or insignia (if the sponsored is a legal entity, or an event) for marketing purposes. He then further takes the responsibility of promoting the sponsor and participate in his marketing activities. More specifically, the sponsored should separately highlight the signs of different sponsors in a way that is visible to the public. For example, on sporting equipment, sports field, means of transport, tickets, catalogs and other promotional material that accompanies the sponsored event etc. He is also obliged to actively participate in the sponsor's advertising campaigns. The sponsorship agreement often commits the sponsored to good behavior, i.e. to take the so-called obligations of good conduct. More specifically, the sponsored should refrain from any action that could damage the sponsor's image (eg. mention the sponsor in public in a negative context), as well as actions that could damage his or her image (eg. doping).²⁸

²⁷ Arbitration Court of Milan, Decision from 7 July 1990 in the dispute between the sponsoring company Manjifiko Irge and sponsored football club Aurora Desio, available in: (Mormando 1998, 60), Court of Rieti, Decision from 19 March 1994., in a dispute between the sponsor Emecet and the sponsored sports club Basket Rieti, available in: (Mormando 1998, 62), Arbitration Court of Milan, Decision from 25 May 1990, in a dispute between the sponsor Sintek Ponola and the sponsored sports club Virtus Palakanestro Roma, available in: (Capri, Tocchi 2007, 99), a dispute that arose in 2006 between Adidas sponsor and the sponsored German Swimming Federation, which did not go to court, but it did go public, available in: (Rudiger 2010/2011, 30-35).

²⁸ It should also be mentioned that obligations of good behavior, even when not agreed, arise for the sponsored on the basis of the principles of conscientiousness and honesty. Namely, Law on Obligations stipulates that the parties must adhere to the principles of conscientiousness and honesty when establishing obligations, as well as when realizing rights and obligations, Law on Obligations of the Republic of Serbia ("Official Gazette of SFRY", no. 29/78, 39/85, 45/89-decision of the ACY and

Such actions could not only thwart the realization of the expected transfer of a positive image from the sponsored to the sponsor, but could also cause the transfer of the negative image to the sponsor. Also, sponsors often negotiate exclusivity for themselves, considering that if there are several different sponsors, it could affect the realization of the desired image transfer, in the sense that if it does not completely thwart, it would at least mitigate it.

The cause of the contractual obligations of the contractor from the sponsorship contract

The general notion of the cause of a contractual obligation implies a reason for taking over a contractual obligation (Antić 2008, 223). However, a closer definition of this term, that is, specifying what exactly is the reason for taking on a contractual obligation, encounters conflicting views, both among legal theorists and, to some extent, in case law. In the following, we will briefly present the basic views of the mixed, objective and subjective conception of the cause of the contractual obligation and establish what would be the cause of the contractual obligations of the contractors from the sponsorship contract according to each of them.

Application of the mixed concept of the contractual obligation cause to the sponsorship agreement

Proponents of the mixed concept, when defining the cause of the contractual obligation, point out the importance of both, the objective element, which they determine as the legal goal of the obligation, on the basis of which the cause of the contractual obligation is determined, and which represents the fulfillment of contractual obligations in bilateral contracts, as well as the subjective element, motives, which are authoritative for checking whether the cause of the contractual obligation is allowed, so they are taken into account in cargo

57/89, „Official Gazette of the FRY“, no. 31/93 and „Official Gazette of Serbia and Montenegro“, no. 1/2003- Constitutional Charter), article 12. Obligations of good behavior for the sponsored, but also for the sponsor, are imposed by the Law on Advertising of the Republic of Serbia. Thus, the sponsor must not compromise the integrity of the activity he sponsors, nor must he damage the reputation of the sponsored. On the other hand, the sponsored is prohibited from changing the name or insignia of the sponsor, as well as prohibited of damaging the reputation of the sponsor. (Law on Advertising, („Official Gazette of the Republic of Serbia“, no. 6/2016), article 6., paragraphs 3 and 4). A similar provision is made in the 2003 International Rules on Sponsorship of the International Chamber of Commerce's Marketing and Advertising Commission. These rules should represent guidelines and standards of ethical conduct of the sponsor and the sponsored, so the sponsor has an obligation to protect the reputation of the sponsored, while the sponsored has an obligation not to damage the reputation of the sponsor (ICC International Code on Sponsorship, September 2003., Commission on Marketing and Advertising, čl. 5., dostupno na: www.iccwbo.org/home/marketing).

contracts only if they are inadmissible and if both contractors are negligent (Perović 1981, 330-331).

According to the position of the mixed conception of the cause of a contractual obligation, the existence of the cause of a contractual obligation, apart from being a condition for valid occurrence of the contract, is also a condition for its maintenance (Grujić 2014). Therefore, the cause of the contractual obligation must exist not only at the time of concluding the contract, but also during the validity of the contract, until the moment of fulfillment of contractual obligations (Dudaš 2011). Thus, it is possible that in a valid contract, the cause of the contractual obligation is subsequently dropped (Nikšić 2006, 1068), for example as a consequence of one contractor failing to perform the contractual obligation, as a result of which the other contractor may unilaterally terminate the contract. Therefore, the non-existence of the cause of the contractual obligation at the time of concluding the contract results in the nullity of the contract, and if it is subsequently terminated, the contractor loyal to the contract may terminate it.

The norms of the LOO concerning the cause of the contractual obligation are formulated in accordance with a mixed concept. It is defined that every contractual obligation must have an admissible basis,²⁹ one that is not contrary to coercive regulations, public order or good customs.³⁰ Otherwise, the consequence is the nullity of the contract, and this also applies in the case of non-existence of grounds.³¹ Motives for the contractors conclude the contract, in principle do not affect its validity.³² However, for cargo contracts, if a motive significantly influenced the decision of one contracting party to enter into a contract was inadmissible, and the other contracting party knew, or had to know about the inadmissibility of the motive, it results in nullity of the contract.³³

Applying the objective concept of the cause of a contractual obligation to the sponsorship contract

Proponents of the objective concept, also known as the economic concept, view the cause of the contractual obligation as the economic goal of the contractor. They see the cause of contractual obligations in the economic equivalent, i.e. positive economic effects that the contracting parties hope for in their assets on the basis of concluding and fulfilling a specific contract

²⁹ LOO, article 51, paragraph 1.

³⁰ LOO, article 51, paragraph 2.

³¹ LOO, article 52.

³² LOO, article 53, paragraph 1.

³³ LOO, article 53, paragraph 2.

(Gams 1959), whereby the desired economic goal is achieved by exchanging goods and services (Vuković 2019). However, it seems to us that a positive economic effect is possible only in the property of the contracting party who „passes better“ in the transaction.

However, at the time of the emergence of the economic concept of the cause of a contractual obligation, it was primarily related to contracts that exchange material goods and services. As we have seen, the sponsorship agreement exchanges material goods, money and things, or services for intangible goods, image. However, the sponsorship agreement could be compared to the economic conception of the contractual obligation cause. When there were doubts in the practical application of the Law on Corporate Income Tax³⁴ and the Law on Value Added Tax³⁵ on sponsorships, in order to clarify these doubts the Ministry of Finance and Economy in its opinions, defined the sponsorship agreement as a contract for the exchange of material goods (money and things), or services of a sponsor for the service of advertising, i.e. propaganda of the sponsored.³⁶

Within legal literature in which the economic conception of the contractual obligation cause is represented, however there is a far more precise definition of the contractual obligation cause. Thus it is stated that the cause of the contractual obligation represents the legally permitted economic goal that the contractors have in mind when concluding the contract (Kapor 1951). This definition provides the possibility of its application in contracts for exchange of tangible goods and services for intangible goods. Thus, the cause of the contractual obligation of the sponsor can be defined as the desired image transfer, while the cause of the contractual obligation of the sponsored would be receiving money or things as economic goods, or obtaining contracted services to support his activities.

As we already mentioned in the introductory part, our case law has produced a judgment that the cause of a contractual obligation is defined as an economic goal. Namely, court proceedings were initiated regarding an agreement that was concluded with the aim of consolidating one bank. However, as the consolidation was not achieved, a lawsuit was filed to determine the nullity of

³⁴ Law on Corporate Income Tax („Official Gazette of the Republic of Serbia“, no. 25/2001, 80/2002, 80/2002-other law, 43/2003, 84/2004, 18/2010, 101/2011, 119/2012, 47/2013, 108/2013, 68/2014-other law and 142/2014).

³⁵ Law on Value Added Tax („Official Gazette of the Republic of Serbia“, no. 84/2004, 86/2004-correction, 61/2005, 61/2007, 93/2012, 108/2013, 68/2014-other law, 142/2014).

³⁶ See Opinion of the Ministry of Finance and Economy no. 414-00-94/2003-04 from 24 June 2003, available at: www.propisonline.com, and Opinion of the Ministry of Finance and Economy no. 413-00-1423/2008-04 from 7 July 2008, available at: www.propisonline.com

the contract due to lack of grounds. First and second instance courts state the absence of grounds with the explanation that the economic interest of the contracting parties has not been realized and determined nullity of the contract. Court of Auditors had a completely justified different opinion. It considered the motives legally irrelevant because in this particular case they were not formulated as a condition, so they were not included in content of the contract,³⁷ while non-consolidation as the purpose of the contract is a result of business risk taken by the contractors. However, the Federal Court quashes this judgment and upholds the judgments of first and second instance courts, defining the cause of the contractual obligation of the contractor as a direct reason for concluding a specific contract, and if it is not recognizable from the contract, it is the court's obligation to establish it, taking into consideration the motives the contracting parties for concluding the contract in question, customs in force, as well as general moral principles.³⁸

We are of an opinion that the position of the Court of Auditors is correct. The desired consolidation constitutes the purpose of the contract, so its non-realization by itself could not have an impact on the contractual relationship. However, if the non-fulfillment of the purpose of the contract occurs as a result of unpredictable, unavoidable and insurmountable circumstances, then in accordance with the rules of the LOO on the impact of changed circumstances on the Contract, the contractor to whose detriment the circumstances have changed, could sue to terminate or fairly amend the contract. Also, non-fulfillment of the purpose of the contract for one contractor could occur as a consequence of the actions of the other contractor, for example, partial non-fulfillment of the contractual obligation, so the party faithful to the contract would have the right to terminate the contract unilaterally. It seems to us that this was the case, which can be concluded from the explanation of the verdict, which states that the plaintiff took over the debt in order to consolidate the bank's operations, while consolidation was not achieved due to the defendant's omission.³⁹

First and second instance courts, as well as the Federal Court have in fact identified the purpose of the contract (desired consolidation as the economic goal of the contract) with the cause of the contractual obligation, and then

³⁷ Contractors have the opportunity to formulate the motives to conclude the contract in the form of conditions, and as a result, the legal effect of the contract would depend on the realization of the motive, in the same way as the condition affects the occurrence or termination of legal transactions. See (Dudaš 2011).

³⁸ Judgment of the Federal Court, no. 15/2000, from 29 June 2000, stated according to: (Dudaš 2011).

³⁹ The omissions were reflected in the non-provision of new depositors, non-deposit of new funds, deposit of their funds with delay etc., available at: Intermex court practice.

treated the non-fulfillment of the purpose of the contract as non-existence of the contractual obligation. Otherwise, even if we accept the economic concept of the contractual obligation cause, in the way it is interpreted in these judgments, we believe that we could not talk about non-existence, but only about the subsequent elimination of the contractual obligation cause, which could result in the possibility of the right to terminate the contract, not the nullity of the contract.

Otherwise, accepting the economic conception of the cause of the contractual obligation in the way that the first and second instance courts, as well as the Federal Court did, would lead to complete legal uncertainty. Namely, the cause of the contractual obligation is a condition for the valid occurrence of the contract, so as such, it must exist at the time of concluding the contract, because otherwise, the contract is void. If we consistently follow the position of the first instance, second instance and the Federal Court, it would mean that in some cases we have to wait for the fulfillment of the contract to determine whether the cause of the contractual obligation exists, because failure to fulfill the cause of the contractual obligation would be that same as if it didn't exist. In that way, the domain of application of the institute of cause of a contractual obligation would be extended beyond the limits set by the mixed concept of the cause of a contractual obligation, i.e. to the period after the execution of the contract.

We will show how this would look in practice on the example of a sponsorship agreement and a characteristic economic goal of the sponsor, which, as we have seen, is manifested in the so-called image transfer. Suppose a contract is made for a period of several years. The cause of the contractual obligation expressed in the image transfer, as the economic goal of the sponsor, certainly exists at the time of concluding the sponsorship agreement, because if it were not so, the sponsorship agreement could not be valid. In a similar way, as in accordance with the mixed concept of the contractual obligation cause, the contractor undertakes because he expects the performance of the contractual obligation of the other contractor, so in accordance with the economic concept of the contractual obligation cause, the sponsor undertakes because he expects image transfer. During the duration of the contract, the cause of the contractual obligation could be dropped, so depending on the circumstances of the case, the legal rules that apply to changed circumstances or those that apply to unilateral termination of the contract due to non-performance of the contractual obligation should be applied. As we have seen, the domestic courts would determine the nullity of the contract due to lack of grounds.

However, based on the position of the first and second instance and the Federal Court set out in their decisions, such a situation could arise in practice. After proper execution of the contract, the sponsor evaluates the results,⁴⁰ which sponsors in practice regularly do to check the effects of sponsorship, and finds that the desired image transfer has not been achieved, and therefore requires the nullity of the sponsorship contract due to lack of contractual obligation because, as we have already said, according to the first-instance, second-instance and federal courts, non-fulfillment of the contractual obligation is the same as its non-existence, and the court determines the cause of the contractual obligation, taking into account the motives of the contracting parties, as well as general moral principles. We have to admit, there would be complete legal uncertainty.

Applying the subjective conception of the cause of a contractual obligation to the sponsorship contract

Proponents of the subjective conception seek the cause of the contractual obligation in the motives of the contractor to conclude a specific contract. Seeing what is obvious, that there can be several different motives for concluding a specific contract, the specification is made, so that the cause of the contractual obligation is tied to the decisive motive, i.e. the motive that directly influenced the conclusion of a specific contract. However, the subjective conception of the cause of a contractual obligation was criticized, mostly due to the fact that its acceptance and practical application would lead to legal uncertainty, due to difficulties that would arise in determining and proving the decisive motive (Perović, Stojanović 1980; Antić 2006). In general, there is no possibility of finding out any or the decisive motive for concluding a specific contract, unless the contractors themselves announce it.

If we were to apply the subjective conception of the cause of a contractual obligation to the sponsorship agreement, we would have to answer the question of the motives that decisively influenced the sponsor and the sponsored person to conclude the sponsorship agreement. Indirect information can be obtained about the possible motives of the sponsor and the sponsored person by reviewing the economic literature on sponsorship. Thus, possible motives of the sponsor are motives related to the growth of sales, products or services, establishing and strengthening the position in markets where the sponsor is already present, or expanding into new markets, constantly maintaining contact with consumers, as well as constant mention and presence in public, primarily due to global media coverage of sponsored events, or

⁴⁰ Effects of sponsorship agreements can be measured by targeted market research. In other words, it can be determined whether the desired image transfer has been achieved. See (Stjuart 1994).

related savings, because, as practice has shown, sponsorship can be far more effective than traditional advertising, at lower cost, with possibility of obtaining exclusivity, circumventing legal prohibitions related to advertising alcoholic and tobacco products etc. (Šurbatović 2014; Jobber, Fahy 2006). So, these are just some of the possible motives. Which of them was decisive in the given case, can be known only if the sponsor himself presents it.

On the other hand, we notice a very interesting situation. Namely, it is about almost complete objectification of the sponsored motive, which is again the result of the uniqueness of this contract. For the sponsored, the decisive motive is to get support for his activities. This is not only decisive, but it is often the only motive of the sponsored person, which he, as a rule, communicates to potential sponsors when „seeking“ sponsorship. However, it is not a question of complete objectification of motives, because other, albeit rarer, possible motives are mentioned in literature. For example, the personal financial security of an individual athlete, or strengthening of the negotiating position for new sponsorship agreements (Rohborn 1997).

Purpose of the contract

LOO stipulates that if the circumstances that exist at the time of concluding the contract, after it and before the expiration of the deadline for fulfillment of a contractual obligation, change in that sense, that the change is to the detriment of one party, and if that party didn't have to take into account such a change of circumstances at the time the contract was concluded, nor could avoid or overcome the changed circumstances, then that party can request the termination or modification of the contract in court. Circumstances have changed to the detriment of one contractor if they significantly impede the performance of a contractual obligation, or prevent him from achieving the purpose of the contract, so that the contract is no longer in line with the contractor's expectations and it would be unfair to leave the contract in force.⁴¹ When the court is deciding to terminate or amend the contract because the circumstances that existed at the time of the contract subsequently changed, the court must follow the principles of fair dealing, and in particular must take into account the contractual purpose and risk that are common for a particular type of contract, as well as to take into account both the general and the interests of either contracting party.⁴² The possibility of termination or change of a contract due to subsequent change of circumstances, therefore exists, if new circumstances, neither physically nor legally prevent the fulfillment of the

⁴¹ LOO, article 133.

⁴² LOO, article 135.

contractual obligation, but act in such a way as to violate the equivalence of mutual benefits, or to prevent both sides to fulfill their obligations (Đurđević 1994). We will try to answer the question of what is meant by the purpose of the sponsorship agreement, for both the sponsor and the sponsored. Firstly, we must establish what is meant by the purpose of the contract in general, especially for the reason that in domestic legal literature views in favor of the identity of the cause of the contractual obligation and the purpose of the contract can be found.

A closer definition of the term "purpose of the contract" in legal literature

Despite the fact that in the legal literature there are views that equate the cause of a contractual obligation and the purpose of the contract, still due to the specific understanding of the cause of the contractual obligation of the proponents of such a position, in terms of understanding what is specifically meant by the purpose of the contract, the authors group them into those who under the purpose of the contract see the motives of the contractor for the purpose of the contract and those who see the economic goal of the contractor for the purpose of the contract. Thus, according to one opinion expressed in legal literature, the purpose of the contract is considered as a non-institutional cause, so the termination or change of the contract due to a change of circumstances is explained by elimination of the non-institutional cause. Otherwise, according to this opinion, the unique notion of the cause of a contractual obligation encompasses both institutional and non-institutional causes. The institutional cause is in fact the cause of the contractual obligation understood as the legal goal of the obligation, while the non-institutional cause essentially represents the motives of the contractor.⁴³

In legal literature one can find the opinion that all provisions of the LOO which mention either the basis of the contractual obligation or the incentive to conclude a contract, constitute the first level of manifestation of the theory of cause, while the norms of the LOO which indicate the legal significance of the contract constitute the second level of manifestation of the theory of cause. How was the so-called mixed, i.e. objective-subjective conception of the cause of the contractual obligation, this author believes that the goal of the contract should sometimes be understood objectively, i.e. as a legal goal of obligation, and sometimes subjectively, i.e. as an incentive to conclude a contract (Dudash 2011). He interprets the purpose of the contract from Article 133 of

⁴³ The position of Stojan Cigoj. Stated according to: (Đurđević 1994, 145-149).

the LOO subjectively, therefore, as an incentive to conclude a contract (Dudaš 2011).⁴⁴

There is also an opinion in legal literature that the purpose of the contract is actually the final initiative that decisively influenced one contractor to conclude the contract, and that initiative differs from other initiatives in that it is known to the other contractor and as such affected the content of the statement of the other contractor, and on that basis it ceases to be exclusively an individual initiative and becomes a common goal (Đurđević 1994).

On the other side are authors who see the economic goal of the contractor under the purpose of the contract. Thus, it is stated that this is not about the immediate legal purpose that the contractors want to achieve and which is the cause of the contractual obligation, but about the economic purpose for which the contractors commit themselves (Šmalcelj 1966). Either it is stated in the domain of termination or amendment of the contract due to changed circumstances, the cause has a legal relevance in the objective sense, which is actually a legally formed economic purpose that is objectively achieved by fulfilling contractual obligations (Vedriš 1987).

There are also opinions that the purpose of the contract should be distinguished both from the objectively understood cause of the contractual obligation (which is the legal goal of the obligation) and from the subjectively understood cause of the contractual obligation (which is the incentive to enter into a contract). Analyzing the terms used in the LOO, this author concludes that the LOO uses various terms that indicate the legal significance of the contractual obligation in the objective sense (basis of the contractual obligation, purpose of the contract, no interest in the contracting party, does not meet the needs of the contracting party) and cause of the contractual obligation in subjective sense (incentive to conclude a contract, decisive initiative). The term purpose of a contract is not among them. Accordingly, according to this opinion, the term purpose of a contract refers to the economic goal that is sought to be realized by concluding a specific synalagmatic contract (Vuković 2019). In support of this, it is stated that the Supreme Court of Serbia in one decision was of the opinion that, due to changing circumstances, the lease agreement for business premises is terminated if the rent, which is not enough to cover expenses for current maintenance of business premises, does not allow realization of the contractual purpose, which

⁴⁴ On the other hand, the purpose of the contract mentioned in Article 135 of the Law on Obligations, he interprets objectively, as the legal goal of the obligation.

is manifested in the expectation of the lessor, to realize a certain economic benefit from the concluded contract.⁴⁵

Purpose of the sponsorship agreement

In our opinion, the purpose of the contract can be manifested either as an economic goal, or as a decisive motive of the contractor. We will present this on the basis of the sponsorship agreement. We are of the opinion that the purpose of the contract is the permitted goal of one contractor, with which the other contractor is familiar, and which can be manifested either as an economic goal or as a decisive motive that led one contractor to conclude a specific contract. During the execution of the contract, circumstances may change to the detriment of either contractors, we must determine the purpose of the contract of both contractors individually. It does not mean that in one contract the purpose of the contract for both contractors will be manifested exclusively as an economic goal, or exclusively as a decisive motive, but it may happen that the purpose of the contract of one contractor is an economic goal and for the other contracting party a decisive motive, which might be the case in a sponsorship agreement.

Practical cases are imaginable when the institute of termination or amendment of the contract due to changed circumstances could be applied to the sponsorship agreement. For example, a sponsorship agreement concluded by a successful company and a football club. After some time, during the duration of the sponsorship agreement, during the trip to a match, all members of the first team of the football club died in a plane crash, which happened in reality.⁴⁶ The sponsor can still fulfill his contractual obligations. Reserve football players are at his disposal. However, the question is whether in such a case the purpose of the contract should be realized for the sponsor, the desired image transfer, if the sponsor is promoted by not so well-known football players. Of course, on the other hand, the factual question remains, how the termination of the sponsorship agreement and leaving the sponsored due to such an accident would affect the image of the sponsor.

It could also happen, for example, which is currently happening, that due to the corona virus pandemic, the presence of spectators at football matches will be banned. The sponsored can fulfill the contractual obligations, but the sponsor is prevented from achieving the purpose of the contract, image

⁴⁵ Decision of the Supreme Court of Serbia, Rev. 959/94 from 23 March 1994, stated according to: (Vuković 2019).

⁴⁶ There is a well-known case from 2016, when almost all the football players of the Brazilian football club Chapecoense were killed in a plane crash while traveling to a football match in Colombia.

transfer, by creating the impression of connection with the sponsored in the eyes of the public, because there are no spectators, i.e. the public. Of course, some matches will be televised, but many will not, or will be shown on television only in the preview. We are of opinion, however, that this is not enough for a successful image transfer.

On the other hand, let's assume that the sponsorship agreement is concluded in such a way that the sponsor finances the sponsored's departure to a sports competition, and the sponsored undertakes to participate in the sponsor's commercial. Due to the corona virus pandemic, sports competitions will be banned. The sponsor can fulfill his contractual obligation, but for the sponsored, the purpose of the contract, the decisive motive that led him to conclude the sponsorship contract, and that is to go to a sports competition can not be realized. The sponsor is not really interested in acquiring the right of ownership over money, nor its economic use, unless it is for the purpose of going to a sports competition.

Pre-concluding considerations

While in LOO the term basis of a contractual obligation is used to denote the cause of the contractual obligation, in article 133 of the LOO it is about the purpose of the contract. So, what is obvious and what catches the eye first are the terminological differences. The variety of terms used could certainly lead to the conclusion that the purpose of the contract and the cause of the contractual obligation are not the same. It is an indisputable fact that the cause of the contractual obligation is a condition for the validity of the contract, so its non-existence at the time of concluding the contract results in the nullity of the contract. The purpose of the contract is definitely not a condition for the validity of the contract, because failure to achieve the purpose of the contract does not in itself cause any consequences for the contract and falls within the scope of business risk. Only if the non-fulfillment of the purpose of the contract were the result of unpredictable, inevitable and insurmountable circumstances, the contract could be terminated or changed.

If the purpose of the contract and the cause of the contractual obligation are the same, the question arises, how one and the same legal institute can under certain circumstances (its non-existence) be the cause of nullity of a contract, and under other circumstances (its non-fulfillment) be the cause of termination or change of a contract. We can conclude that such a thing is possible by referring to the rules of the LOO on unilateral termination of a contract due to non-performance of a contractual obligation, if of course we accept the theory of the cause as the theoretical basis of the LOO rules on unilateral termination

of a contract due to non-performance of a contractual obligation. In such a case, as we have already mentioned, the non-existence of the cause of a contractual obligation at the time of concluding the contract causes the nullity of the contract, while its later termination results in termination of the contract. However, the argument could be challenged by saying that the theory of the cause is certainly not the only theory that explains the unilateral termination of a contract due to non-fulfillment of contractual obligations.⁴⁷ By the way, the most serious objection to the theory of the cause, as the theoretical basis for explaining the unilateral termination of the contract due to non-fulfillment of a contractual obligation, is that in accordance with the mixed concept of the cause of the contractual obligation as a condition for the valid occurrence of the contract, as well as the condition for its maintenance, so if you would consistently adhere to it, in case of termination of the cause of the contractual obligation, the nullity should occur, not termination of the contract, while on the other hand, non-performance of the contractual obligation can not cause nullity of the contract because the causes of nullity must exist at the time of concluding the contract, and the subsequent circumstances, which includes non-performance of the contractual obligation, cannot cause the nullity of the contract (Grujić 2014, 109-110). We agree with the opinion expressed in the legal literature that the institute of the cause of the contractual obligation should be applied only and exclusively to the issue of the valid origin of the contract. There is no need for its application after the conclusion of the contract, because the LOO makes other institutes available, including the institute of termination or amendment of the contract due to changed circumstances, so that the application of the institute of contractual obligation in the period of contract overlap (Nikšić 2006; Šmalcelj 1980).

Conclusion

Whether the cause of a contractual obligation and the purpose of the contract from article 133 of the Law on Obligations are the same, the answer is directly related to which concept of the cause of the contractual obligation we decide on. We have a mixed, objective (economic) and subjective conception at our disposal. We can immediately renounce subjective conceptions, because they are neither accepted in the LOO, nor in legal theory, nor in court practice. If we opt for a mixed conception of the contractual obligation cause, which we are prone to, the differences between the contractual obligation cause and the

⁴⁷ In addition to the theory of cause, unilateral termination of a contract due to non-fulfillment of a contractual obligation in the legal literature is also explained by the theory of tacit termination condition, the theory of fairness, the theory of equivalence and the theory of public order. See more about that: (Grujić 2014).

purpose of the contract become more than clear. Therefore, based on opinions expressed in legal literature, it can be concluded that, just like the cause of the contractual obligation, the purpose of the contract can also be expressed objectively or subjectively. However, the differences are obvious. While the cause of the contractual obligation is objectively manifested as the legal goal of the obligation, the purpose of the contract is objectively manifested as the economic goal of the contractor. On the other hand, both the cause of the contractual obligation and the purpose of the contract can be subjectively expressed in the form of the contractor's motive for concluding a specific contract. But again, the differences are obvious. The notion of the cause of the contractual obligation in cargo contracts includes motives only if they are inadmissible and if both contractors were negligent. Only permissible motives can be legally relevant as the purpose of the contract. It is therefore obvious that termination or amendment of the contract due to changed circumstances are cases in which the cause of the contractual obligation of the contracting party at whose expense the change of circumstances still exists, due to the fact that the other contractor can and wants to perform his contract obligation, but the purpose of the other party the contract cannot be achieved. All the above, it seems to us, proves that the cause of the contractual obligation, as it is understood by the mixed concept, and the purpose of the contract are not the same.

If we opted for an objective (economic) conception of the cause of the contractual obligation, the answer would be different. Namely, there would be a coincidence of the cause of the contractual obligation and the purpose of the contract, in those contracts where the purpose of the contract would be manifested as the economic goal of the contractor. Given that we have seen what legal uncertainty would be caused by the practical application of the objective (economic) concept of the cause of the contractual obligation, as the domestic courts did, we would not advocate its acceptance. Even if it was about agreements such as the sponsorship agreement, in which the economic goal of commitment is so clearly and dominantly expressed and visible.

Literature

1. Antić, Oliver. 2008. *Obligaciono pravo*. Beograd.
2. Antić, Oliver. 2006. „Pravno-teorijske osnove različitih shvatanja kauze“. *Arhiv za pravne i društvene nauke* br. 3-4.
3. Capri, Roberta., Tocci, Mario. 2007. *Il contratto di sponsorizzazione*. Trento.
4. Dudaš, Atila. 2011. „Kauza obligacionih ugovora“. Doktorska disertacija. Univezitet u Novom Sadu. Pravni fakultet Novi Sad.

5. Đurđević, Marko. 1994. „Raskidanje ili izmena ugovora zbog promjenjenih okolnosti“. Magistarska teza. Univerzitet u Beogradu. Pravni fakultet Beograd.
6. Gams, Andrija. 1959. „Kauza i pravni osnov“. *Anali Pravnog fakulteta u Beogradu* br. 2.
7. Grujić, Nenad. 2014. „Raskid ugovora zbog neispunjenja i pravna dejstva raskida“. Doktorska disertacija. Pravni fakultet Univerziteta Union u Beogradu.
8. Ječmenić, Milan. 2018. „Ugovor o sponzorstvu“. Doktorska disertacija. Univerzitet u Kragujevcu. Pravni fakultet Kragujevac.
9. Jobber, David., Fahy, John. 2006. *Osnovi marketinga*. Beograd.
10. Kapor, Vladimir. 1951. „Neosnovano obogaćenje u građanskom pravu“. Doktorska disertacija. Univerzitet u Beogradu. Pravni fakultet Beograd.
11. Mormando, Marco. 1998. *I contratti di sponsorizzazione sportive*. Bari.
12. Nikšić, Saša. 2006. „Kauza obveze i srodni instituti u poredbenom pravu“. *Zbornik Pravnog fakulteta u Zagrebu* br. 4.
13. Perović, Slobodan., Dragoljub, Stojanović. 1980. *Komentar Zakona o obligacionim odnosima*. Gornji Milanovac-Kragujevac.
14. Perović, Slobodan. 1981. *Obligaciono pravo*. Beograd.
15. Rohrborn, Stefan. 1997. *Der Sponsoringvertrag als Innengesellschaft: Abschluß, Vollzug und Leistungsstörungen*. Berlin.
16. Rudiger, Benjamin. 2010/2011. „Sponsoring und Vertragsrecht: Zur Frage der Definititon von Kommunikationserfolgen in Sponsoringvertragen“. Seminar zum Sportrecht bei Prof. Dr. Peter W. Heermann, LL.M., Wintersemester.
17. Šmalcelj, Želimir. 1966. „Djelovanje izmijenjenih okolnosti na obligatorne ugovore“. *Naša zakonitost* br. 2.
18. Šurbatović, Jovan. 2014. *Menadžment u sportu*. Beograd.
19. Tarner, Stjuart. 1994. *Sve o sponzorstvu*. Beograd.
20. Vedriš, Martin. 1987. „„Osnova“ po Zakonu o obveznim odnosima“. *Privreda i pravo* br. 7-8.
21. Vuković, Zoran. 2014. „Ugovori o stručnom angažovanju sportskih stručnjaka“. Doktorska disertacija. Univerzitet u Kragujevcu. Pravni fakultet Kragjevac.

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