originalni naučni rad

UDK 347.73(497.11)
336.274

PARALELNI DUG U FINANSIJSKOM PRAVU SRBIJE

Miloš Kuzman

advokat, Advokatsko ortačko društvo Zavišin Semiz Preradović
milos.kuzman@zsp-legal.com

Rezime

U ovom radu predstavljen je mehanizam paralelnog duga u srpskom finansijskom pravu. Pri razmatranju da li sam mehanizam može ostvarivati svoju funkciju, predstavljen je anglosaksonski institut trust-a i objašnjeno je zbog čega ovaj institut ne korespondira ni jednom institutu srpskog prava. Potom je predstavljen sam mehanizam paralelnog duga uz raspravu o dopuštenosti njegovog osnova u srpskom pravu. Uporedno pravna rešenja pojedinih kontinentalnopravnih sistema takođe su predstavljena u ovom radu. U zaključnim razmatranjima, autor predlaže da na osnovu premisa izvedenih u ovom radu institut paralelnog duga bude proglašen dopuštenim ukoliko se ikada nađe pred razmatranjem srpskog suda.

Ključne reči: institut paralelnog duga u srpskom pravu, nemogućnost ugovaranja trust-a, dopuštenost osnova ugovaranja paralelnog duga, stav kontinentalnopravnih sistema o paralelnom dugu

JEL: K10, K40, G20

Rad primljen: 19.05.2014.

Odobren za štampu: 20.06.2014.

UDK 347.73(497.11)
336.274

original scientific paper

PARALLEL DEBT IN THE SERBIAN FINANCE LAW

Miloš Kuzman

Attorney, Law Office Zavišin Semiz Preradović
milos.kuzman@zsp-legal.com

Summary

The purpose of this paper is to present the mechanism of parallel debt in the Serbian financial law. While considering whether the mechanism of parallel debt exists under the Serbian law, the Anglo-Saxon mechanism of trust is represented. Hence it is explained why the mechanism of trust is not allowed under the Serbian law. Further on, the mechanism of parallel debt is introduced as well as a debate on permissibility of its cause in the Serbian law. Comparative legal arguments about this issue are also presented in this paper. In conclusion, the author suggests that on the basis of the conclusions drawn in this paper, the parallel debt mechanism is to be declared admissible if it is ever taken into consideration by the Serbian courts.

Key words: parallel debt mechanism, inability to conclude trust agreements in Serbia, permissibility of parallel debt cause under the Serbian law, admissibility of parallel debt mechanism in civil law jurisdictions

JEL: K10, K40, G20

Paper received: 19.05.2014

Approved for publishing: 20.06.2014

Uvod

Institut paralelnog duga predstavlja relativno nov institut u pravu onih evropskih država u kojima se pravna tradicija zasniva na kontinentalnom pravu, pa samim tim i srpskog prava. Potekavši iz anglosaksonskog pravnog sistema, ovaj institut je prenet u kontinentalnu Evropu kada je anglosaksonska verzija kreditnog aranžmana postala dominantna u svetu finansijskog prava. Preciznije govoreći, ova pravna forma predstavlja svojevrsnu "zamenu" za strukturu u sastavu "*common law trust*" instituta koji je već tradicionalno zastupljen u zemljama *common law* sistema.

Uključivanje stranog kapitala u srpsku privredu unelo je u srpski finansijsko pravni sistem brojne do tada nepoznate pravne institute. Domaće pravo je neke od tih instituta prihvatilo i uvrstilo ih u domaće zakonodavstvo. Sa druge strane, mnogobrojni instituti su i dalje predmet nedoumica stručne javnosti. Takvo stanje uzrokovano je i nespremnošću sudske vlasti da ponudi tumačenje tih pravnih struktura. Ovakav stav bi se mogao braniti sa pozicije očuvanja posebnosti srpskog pravnog sistema u okviru kontinentalnog prava kao i nastojanja i umešnosti nosilaca pravosudne vlasti da u srpskom pravnom sistemu pronađu institut koji će makar i delimično zameniti anglosaksonski.

Institut paralelnog duga do sada nije bio predmet kako zakonodavne tako ni sudske aktivnosti u Srbiji. Pojedini sudovi u kontinentalnopravnim sistemima su se bavili ovom temom, primer su skorašnje odluke francuskog i poljskog suda koje će biti prikazane u ovom radu. Pored pravne analize ovog instituta kroz prizmu srpskog prava u praksi, posebno mesto u ovom radu zauzima i analiza pitanja da li je ugovaranje ovog instituta moguće s obzirom na stavove o nepostojanju pravnog osnova pri formiranju paralelnog duga.

Zbog čega ne primenjujemo institut trust-a u srpskom pravu

Institut trust-a u anglosaksonskom pravnom sistemu sadrži, kao njegov neraskidivi deo i institut paralelnog duga. Svrha ugovaranja trust-a je u tome da se pravno lice - trasti (najčešće neka od banaka koja je istovremeno poverilac ili kakva druga banka) koje je stručno u naplati dugovanja, obavljanja poslova upravljanja dugom, aktiviranja založnog prava, naplate iz predmeta zaloge i drugih srodnih poslova angažuje da umesto jednog ili više poverilaca u svoje ime i za svoj račun naplati potraživanje prema dužniku, a nakon toga sredstva dobijena prilikom naplate duga prosledi poveriocima i za obavljeni posao dobije nagradu. Takođe, angažovanjem trastija smanjuju se rizici naplate dugovanja pa se stoga ovaj institut redovno ugovara pri sastavljanju kreditnih ili ugovora o zajmu kod projektnih finansija i finansiranja prilikom preuzimanja privrednog društva.

Za potrebe ovog rada koristimo određenje pojma trust-a iz Konvencije o merodavnom pravu i priznanju instituta trust-a donete 1. jula 1985. godine, koju su ratifikovale i pojedine zemlje kontinentalnopravnog sistema. Odredbom člana 2 navedene Konvencije određeno je da je trust pravni odnos *inter vivos* ili *mortis causa* ustanovljen od strane određenog lica, gde se imovina stavlja pod kontrolu trastija u korist beneficijara ili za određenu svrhu. Takođe je određeno da su karakteristike trust-a: da imovina stavljena pod kontrolu trastija ne prestavlja njegovu posebnu imovinu već se od nje formira poseban fond; da se imovina data trastiju registruje na njegovo ime ili ime lica koje deluje u ime trastija kao i da trasti ima pravo i dužnost, u granicama svojih ovlašćenja, da upravlja, angažuje ili raspolaže imovinom u skladu sa odredbama ugovora kojim je ustanovljen i posebnim dužnostima određenih zakonom. U daljem tekstu je potrebno da prikažemo pojedine srodne institute srpskog prava kako bi utvrdili odgovara li neki od njih institutu trust-a.

Zakon o obligacionim odnosima određuje, počevši od člana 771, institut komisiona kao, čini nam se, najsličniji institutu trust-a. Instituti naloga, posredovanja i trgovinskog zastupništva nisu razmatrani u ovom radu usled očigledno različitih pravnih priroda ovih instituta u odnosu na trust (nalogoprimac, posrednik i agent deluju u ime i za račun nalogodavca). Ugovorom o komisionu komisionar za naknadu obavlja u svoje ime i za račun komitenta jedan ili više poslova koje mu poverava komitent. Komitent ima pravo zaloge

Introduction

The institute of parallel debt is a relatively new concept in the law of those European countries where the legal tradition is based on civil law, including the Serbian law. Taken from the Anglo-Saxon legal system, the institute was transferred to continental Europe when the Anglo-Saxon version of the credit arrangement became dominant in the world of the financial law. Specifically, this legal form is a kind of "replacement" of the structure within the "common law trust" form, which is traditionally applicable in the common law systems.

The entrance of foreign capital in the Serbian economy has brought many hitherto unknown legal forms to the Serbian financial legal system. The domestic law has accepted some of these institutes and included them into domestic legislature. On the other hand, some of these institutes are still subject of debate among legal experts. Such situation was caused by the unwillingness of the judicial authorities to offer the interpretation of their legal structure. This could be defended from a position of preserving the particularities of the Serbian legal system within the civil law as well as with efforts and skills of judicial authorities to find an institute within the Serbian legal system that would at least partially replace the Anglo-Saxon one.

The institute of parallel debt has not been the subject either of legislative or judicial activities in Serbia. Some courts in civil law jurisdictions have addressed this issue, the examples being the recent decisions of the French and Polish court that will be presented in this paper. In addition to the legal analysis of this mechanism through the prism of Serbian law in practice, a special place in this paper is taken by an analysis of whether agreeing upon this institute is possible with regard to opinions about the lack of a legal basis for the establishment of parallel debt.

Why is the institute of trust inapplicable in Serbian law

The institute of trust in the Anglo-Saxon legal system contains as its integral part the institute of parallel debt. The purpose of the institute of trust is the fact that the legal entity - trustee (usually one of the banks which is also a creditor or any other bank) who is an expert in debt collection, debt management, activation of lien, charge from the collateral and other related activities is engaged instead of one or more creditors and has to bill the claim in its own name and for its own account against the debtor and afterwards to forward the funds received from debt collection to creditors, obtaining a fee for the conducted work. Furthermore, the engagement of trustee reduces the risks of debt settlement and therefore the institute is regularly arranged within credit or loan agreements considering project finance and funding with respect to takeovers of companies.

In this paper we use the definition of the concept of trust from the Convention on the Law applicable to Trusts and their recognition dated 1 July 1985, which has also been ratified by individual countries with civil law jurisdiction. Article 2 of the said Convention stipulates that the trust is a legal relationship *inter vivos* or *mortis causa*, as established by a particular person, where the property is placed under the control of trustee for the sake of the benefit of beneficiary or for a particular purpose. It was also determined that the characteristics of the trust are: the assets under the control of trustee do not represent a specific property but it forms a special fund; the property given to trustee is registered in its name or in the name of the person who acts on behalf of trustee and that trustee is authorized within the limits of its powers to manage, employ or dispose of the property in accordance with the provisions of the agreement by which trust is established and specific duties of certain law. In the following lines some related institute of Serbian law will be presented in order to determine whether any of them corresponds to the form of trust.

The Law on Obligations defines, starting from Article 771, the institute of commission that seems to be most similar to the trust. Legal institutes of giving instructions, brokerage and trade representations were not considered in this study due to the apparently different legal nature of these institutes in relation to the trust (instructing party, broker and agent act only on behalf of the principal). By Commission Agreement commissioner shall in its name and for the account of a customer perform one

nad imovinom koje je predmet ugovora dok se stvari koje predstavljaju predmet komisiona nalaze kod njega. Komitent može zahtevati da mu se isplati potraživanje iz posla koji je komisionar zaključio sa trećim i za njegov račun tek nakon ustupanja potraživanja. Komisionarovi poverioci se ne mogu namiriti iz imovine koju je komisionar stekao za svoj račun ali u ime komitenta. Ovaj institut je blizak pojmu trust-a po obimu posla koji obavlja komitent, ali ne i po svojoj suštini. Osnovna razlika je to što komisionar vrši radnje u svoje ime i za račun komitenta, dok trasti sve radnje vrši u svoje ime i za svoj račun, što praktično znači da samostalno nastupa pred sudskim i administrativnim organima iako imovina koju zastupa pripada trećem licu. Takođe, sudski, izvršni ili administrativni naslovi nikada ne mogu glasiti na ime komisionara, ma koliku slobodu on imao pri upravljanjem imovinom komitenta, niti komisionar u svoje ime može pristupiti namirenju iz založene imovine.

U članu 16. Zakona o založnom pravu na pokretnim stvarima upisanim u registar propisano je da založni poverilac može odrediti da treće lice preuzme pravne radnje radi zaštite i namirenja založenog potraživanja, koje lice se upisuje u Registar zaloge umesto založnog poverioca i u odnosu na zalogodavca se sada to treće lice smatra založnim poveriocem. Iz dva osnovna razloga se ovo treće lice ne može smatrati trastijem na način kako je ovaj institut određen Konvencijom. Prvi razlog je što se ova odredba odnosi samo na zalaganje pokretnih stvari, ne i ostalih stvari koje po redovnom toku mogu predstavljati predmet zaloge koju trasti može izvršiti. Drugi i važniji razlog je to što u ovom slučaju zastupnik nema tako širok spektar ovlašćenja kakav ima trasti koji nema položaj založnog poverioca niti bi kao takav mogao biti smatran u anglosaksonskom pravu, te što trasti za razliku od zastupnika postupa u svoje ime i za svoj račun. Još jedan ne tako bitan razlog koji se nameće je taj što se u ovom slučaju zastupnik određuje od strane založnog poverioca, što kod instituta trust-a ne mora da bude slučaj.

Na osnovu iznetog stava našeg zakonodavca proizlazi da institut trust-a ne odgovara niti jednom institutu srpskog prava. Međutim u literaturi se javlja mišljenje da je strukturu nalik trust-u moguće konstruisati ukoliko bi se u ime jednog od, prema dužniku, solidarnih poverilaca registrovala sva založna prava koja poverioci imaju prema dužniku ili više dužnika. Takav bi poverilac mogao u svoje ime i na račun kao i u ime i na račun ostalih solidarnih poverilaca da pristupi namirenju iz založene imovine o dospelosti potraživanja. Obrnuta konstrukcija sa istim ishodom bi postojala ukoliko imamo trastija na strani dužnika. Mogućnost da se formira zajednica poverilaca koji nisu solidarni poverioci prema dužniku i da se odredi zastupnik svih njih koji će da nastupa prema imovini ne bi ostvarila svrhu, jer zastupnik ne bi mogao da u ime i za račun svih poverilaca pristupi namirenju. Istina je da trasti u smislu anglosaksonskog prava može biti i poverilac, ali je takva njegova funkcija sporedna, dok ovde poverilac iz praktičnih razloga preuzima ulogu trastija. Šta više, da bi se postigli praktični efekti trust-a ovde poverilac koji pristupa namirenju *mora* i sam imati potraživanje prema dužniku.

Kako opisana konstrukcija takođe ne može zameniti trust, mora se pronaći alternativno rešenje kojim bi se postigao isti efekat. Stoga bi u Srbiji, kao i u drugim zemljama kontinentalno pravnog sistema, najcelishodnije bilo koristiti institut paralelnog duga kako bi bio nadomešćen i postignut efekat instituta trust-a. Napominjemo da su pojedine države kontinentalno pravnog sistema prihvatile institut trust-a kao na primer Francuska (u ograničenom obimu) ili Kina [Wood, 2007].

Institut paralelnog duga

Generalno, u međunarodnom finansijskom pravu institutom paralelnog duga smatra se dug između trastija i dužnika (ili više njih) iste vrednosti kao dug između poverioca/laca prema dužniku (ili više njih), obezbeđen zalogom nad imovinom založnog dužnika. Sa druge strane, trasti i poverioci zaključuju poseban ugovor kojim poverilac ovlašćuje trastija da u svoje ime i za svoj račun drži predmete zaloge, aktivira ga i namiri se iz njega (Collateral Sharing Agreement). Kako u srpskom kao ni u većini kontinentalnih prava nemamo institut trust-a, lokalna modifikacija ovog instituta je takva da se institut paralelnog duga formira prema trećem licu koje deluje u svoje ime i

or more tasks entrusted to him/her by a client and obtain the relevant compensation in return. The client shall have a lien against the property that is the subject of the agreement as long as the items that are subject to commission are in its possession. Client may require to be paid by the receivable that the commissioner has been concluded with third party on the account of client, after the transfer of receivables. Commissioners' creditors could not be paid from the property that the commissioner acquired for its own account, but on behalf of the client. This institute is similar to the trust in terms of the scope of work performed by a client, but not in terms of its essence. The main difference is that the commissioner performs actions on its own behalf and on the account of the client, while a trustee performs all acts in its own name and for its own account, which practically means that the trustee independently performs before judicial or administrative authorities, although the assets represented by trustee belong to a third party. Also, the judicial, executive or administrative titles can neither be entitled in the name of a commissioner, no matter how much freedom he has in the client's asset management, nor can the commissioner provide settlement of pledged assets in his own name.

In Article 16 of the Law on Pledges on Registered Movable Property it is prescribed that the pledgee may designate a third party to take legal action in order to protect and foreclose pledged receivables, which third party shall be entered in the Pledge Register instead of the pledge, and from there on the third party is considered as pledgee in relation to pledgor. For two main reasons this third party cannot be considered a trustee as defined by abovementioned convention. The first reason is that this provision applies only to the pledgee of movables, not the other things that in the ordinary course of proceedings may present a pledge enforceable by the trustee. The second and more important reason is that in this case the third party does not have a wide range of powers that the trustee has; the trustee neither has the position of a pledgee nor could he be considered as such by the common law; also, the trustee unlike a third party acts in its own name and for its own account. Another, less important, reason that arises is that in this case the agent is determined by the pledgee, while in the institute of trust this does not have to be the case.

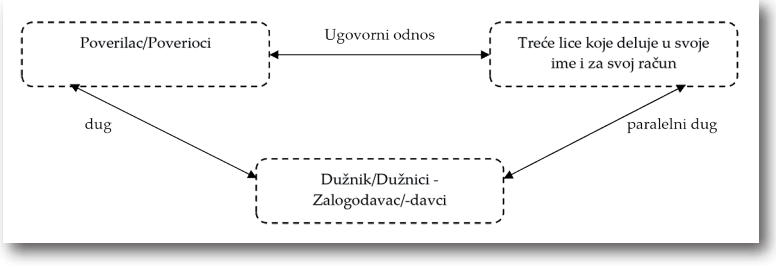
Based on the above opinion of the Serbian legislator, a trust does not match any institute of the Serbian law. However, the literature reports the opinion that the trust-like structure could be constructed if all liens that creditors have against the debtor or more debtors were registered in the name of one of the joint and several creditors (against the debtor). Such a creditor could, on its own behalf and for its own account and on behalf of and for the account of other joint and several creditors, settle the debt from pledged assets upon debt maturity. The reverse situation with the same outcome would take place if the trustee were the debtor. The possibility to form a community of creditors who are not joint and several creditors against the debtor and to determine their representative who will act against the property, would not achieve the purpose, because such creditor could not approach the settlement in the name and on behalf of all creditors. It is true that in terms of the Anglo-Saxon system a trustee may be a creditor, but that is its secondary function, whereas here the creditor for the sake of convenience takes the role of the trustee. Moreover, to achieve the practical effects of trust, here the creditor achieving the settlement *must* have a claim on its own against the debtor.

Given that the described construction cannot replace the trust, we must find an alternative solution that would achieve the same effect. Therefore, in Serbia, as well as in other countries of the continental legal system, the most appropriate institute to use is the institute of parallel debt, with a view to achieving and effecting the mechanism of trust. Please note that some states with the continental legal system accepted the institute of trust, such as France (to the limited extent) or China [Wood, 2007].

Parallel Debt Mechanism

Generally, in international financial law the parallel debt institute is considered a debt between the trustee and the debtor (or more debtors) of the same value as the debt between the creditor/creditors towards debtor (or more debtors), secured by pledge over the property

za svoj račun, te se isplatom dela duga tom trećem licu smanjuje dug poverilaca i obratno. O dospelosti potraživanja koje nije isplaćeno u roku, zastupnik ima pravo namirenja iz vrednosti založene stvari koji će iznos proslediti poveriocima po osnovu ugovornog odnosa koji ima sa njima, dok će za izvršenje navedenih radnji primiti naknadu. Slikovni prikaz sistema paralelnog duga prikazan je ispod:



Standardna verzija ugovora o paralelnom dugu ne sadrži preterano složenu strukturu. Ugovorne strane su dužnici i poverioci iz osnovnog posla kao i trasti. Dužnik se bezuslovno obavezuje da trastiju isplati dug koji ima prema poveriocu o dospelosti. Ugovorne strane dalje saglasno konstatuju da su obaveze dužnika prema trastiju odvojene i nezavisne od obaveza dužnika prema poveriocu. Dalje se predviđa da se isplatom duga prema trastiju srazmerno smanjuju obaveze dužnika prema poveriocu i obrnuto, osim u obimu u kome su te obaveze izbegnute ili umanjene u vezi odredaba zakona koje uređuju bankrotstvo, stečaje, likvidaciju ili odredaba drugih zakona. Naglašava se i da ukupne dospele obaveze dužnika prema trastiju ne smeju da premaše iznos duga koji dužnik ima prema poveriocu.

Ugovor sadrži i odredbu kako trasti deluje u svoje ime i za svoj račun, a ne kao zastupnik, agent ili trasti nekog drugog poverioca, kao i da potraživanja samog trastija iz paralelnog duga ne ulaze u sastav trust-a. Takođe, ukoliko je samo određenom poveriocu data zaloga za obezbeđenje duga, takva zaloga ne ulazi u trust već se iz nje navedeni poverilac može odvojeno namiriti. Ove se odredbe ne mogu *stricto sensu* predvideti u srpskoj verziji ugovora, ali se suštinski mogu ugovoriti.

Završne odredbe standardnog ugovora govore da će sva plaćanja koje trasti ostvari putem naplate duga ili izvršenja zaloge biti isplaćena poveriocima, da trasti ne sme samostalno uvećati obaveze dužnika, te da se smatra da dug prema trastiju dospeva na naplatu u isto vreme i pod istim uslovima kao i dug prema poveriocu.

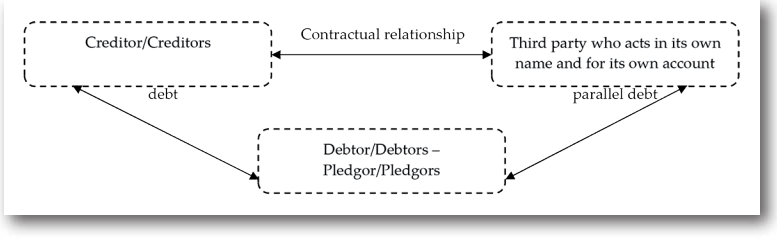
Iako sama struktura instituta nije suviše kompleksna, postavlja se problem njenog ugovaranja. Osim odredaba koje se eksplicitno odnose na prirodu trust-a koje smo već obradili, postavlja se problem mogućnosti postojanja dva duga gde plaćanje po jednom isključuje obavezu plaćanja prema drugom dugu.

Dopuštenost instituta paralelnog duga u srpskom pravu

Srpski zakonodavac Zakonom o obligacionim odnosima propisuje odredbe koje se odnose na dopuštenost osnova kod ugovornih obaveza. Prema navedenim odredbama osnov mora postojati kod ugovornih obaveza i ne sme biti protivan prinudnim propisima, javnom poretku i dobrim običajima jer će se u suprotnom raditi o ništavom osnovu. Pretpostavlja se da osnov postoji i ako nije jasno izražen u ugovoru. Odredbe koje se odnose na nedopuštene pobude ugovornih strane na zaključenje ugovora ne uzimamo u obzir kao relevantne polazeći od pretpostavke da obe ugovorne strane žele zaključenje ugovora o paralelnom dugu. Udžbenički primer za navedenu vrstu osnova predstavljaju apstraktni pravni poslovi kao npr. menični posao, preuzimanje duga ili ustupanje potraživanja, gde sam osnov obavezivanja nije jasno izražen. Značaj ovakvog vida pravnih poslova po tvrdnjama nekih autora je u tome što se njima ubrzava pravni promet [Perović, 1990].

Može se desiti da ugovorne strane smatraju da su zaključile ugovor sa određenim osnovom a da ga u stvarnosti nisu zaključile u kom slučaju imamo prividni osnov zaključenja ugovora, te slučaj da su ugovorne strane sklopile pravni posao bez osnova. Pod predpostavkom da u konkretnom slučaju imamo savesne ugovorne strane, ovde nećemo razmatrati slučaj fiktivnog ili simulovanog osnova gde stranke prevarno predstavljaju da su zaključile ugovor sa određenim osnovom a u stvari ga nisu zaključile. U oba slučaja imamo situaciju u kojoj ugovor neće proizvoditi pravna dejstva,

of the pledgor. On the other hand, the trustee and creditors conclude a separate agreement by which creditor authorizes the trustee to hold subjects of pledge in its name and for its own account, enforce it and settle the debt out of it (*Collateral Sharing Agreement*). Given that in the Serbian nor in most of the continental law countries there is no institute of trust, a local modification of this mechanism is in the form of parallel debt towards a third party acting on its behalf and for its own account, hence by the payment of debt to the concerned third party the debt towards creditors gets reduced and *vice versa*. Upon maturity of the debt that is not paid in time, the third party is entitled to settlement from the value of the pledged property that will be forwarded to the creditors on the basis of the contractual relationship third party has over them, while for the enforcement of pledged property it will receive compensation. The chart below describes the system of parallel debt:



The standard version of the parallel debt agreement does not imply an overly complex structure. The contracting parties are debtors and creditors of the underlying transaction and trustee. The debtor is unconditionally obliged to pay the debt to the trustee instead of creditors when due. The parties shall further agree that obligations of the debtor towards trustee are separate and independent from obligations between debtor and creditor. It is further provided that the payment of the debt to trustee proportionally reduces the obligations of the debtor to the creditor and *vice versa*, except to the extent that such obligations are avoided or reduced in relation to the law governing bankruptcy, liquidation or other provisions of the law. It is pointed out that the total accrued liability of the debtor to trustee shall not exceed the amount of debt that the borrower has against the creditor.

The agreement contains a provision that trustee acts in its own name and for its own account and not as a representative, agent or trustee of another creditor, and that the claims of the trustee in respect of parallel debt are not included in the trust. Also, if a particular lender was provided by collateral to secure the debt, such lien is not included in the trust but instead said creditor may obtain payment separately. These provisions cannot *stricto sensu* be predicted in the Serbian version of the agreement, but could be essentially arranged.

The final provisions of the standard agreement provide that all payments that the trustee achieved through debt collection or enforcement of the pledge will be paid to creditors, that trustee cannot independently increase the obligations of the debtor, and that it is considered that a debt to trustee matures at the same time and under the same conditions as the debt to the creditor.

Although the structure of the parallel debt is not too complex, there is a problem with its arranging. In addition to the provisions which are explicitly related to the nature of trust which we have already dealt with, the problem is the possible existence of two debts, with the repayment of one excluding the obligation to repay the other.

Admissibility of the parallel debt mechanism in the Serbian law

The Serbian legislator, pursuant to the Law on Obligations, prescribes the provisions relating to the admissibility of the cause of contractual obligations. According to these provisions, a cause shall exist in contractual obligations and must not be contrary to mandatory rules, public order and good customs as it will otherwise present an invalid cause. It is assumed that a cause exists even if it is not clearly stated in the agreement. The provisions relating to improper motives of the contracting parties to enter an agreement are not taken into account as relevant under the assumption that both parties want to agree upon parallel debt. A textbook example of this form of cause are abstract legal obligations such as debenture bonds, the assumption or assignment of receivables, with the cause of commitment not being clearly defined.

dok kod apstraktnih pravnih poslova ugovor proizvodi pravna dejstva iako osnov nije vidljiv.

Kada se radi o odnosu poverioca i dužnika iz osnovnog duga, osnov obavezivanja je jasno postavljen, dužnik duguje određenu svotu novca poveriocu po osnovu određene prestacije koju mu je ovaj učinio. Potraživanje iz takvog dužničko poverilačkog odnosa ima svoje vreme dospeća i pravilo je da isplata dela duga srazmerno oslobađa dužnika obaveze koju ima prema poveriocu. Problem koji se javlja prema shvatanjima pojedinih autora nastaje pri formiranju duga dužnika prema trećem licu koje deluje u svoje ime i za svoj račun koji paralelno postoji sa osnovnim dugom. U konkretnom slučaju sporan je pravni osnov po kome dužnik isplaćuje dug tom trećem licu tj. smatra se da taj osnov ne postoji. Na suprotne tvrdnje koje zastupaju stanovište da je osnov vidljiv iz ugovora o paralelnom dugu zaključenog na gore propisan način odgovara se da je u tom slučaju pravni osnov samo prividan i da su ugovorne strane saglasnost volja usmerile u nedopuštenom smeru.

Da bi se dao konačan sud o ovom pitanju potrebno je još jednom predstaviti osnove mehanizma po kome paralni dug funkcioniše. Isplatom po paralelnom dugu dužnik se oslobađa obaveze isplate proporcionalnog dela duga poveriocima. Obaveze po paralelnom dugu se ne mogu dodatno uvećati bez dodatnog obavezivanja po glavnom dugu a obaveze po oba duga dospevaju u isto vreme. Potraživanje iz paralelnog duga obezbeđeno je istim sredstvima obezbeđenja kao i glavni dug. Takođe, ovde se mora imati u vidu da su zakonski uređene odredbe o zaključenju pojedinih ugovora obligacionog prava, kao na primer ugovora o zakupu ili ugovora o kreditu, dispozitivnog karaktera, te da strane mogu svoj obligacioni odnos drugačije ugovoriti osim ukoliko norme imperativnog karaktera ne govore drugačije.

Na osnovu gore iznetog, smatramo da zaključenjem ugovora o paralelnom dugu nijedna imperativna odredba Zakona nije prekršena. Primeri koji se redovno navode za pravne osnove protivne prinudnim propisima, javnom poretku i dobrim običajima su zakup stvari koja je potpuno propala do trenutka ugovaranja, obaveza dužnika da vrati dug koji nije ni primio itd. Očigledno je da primer paralelnog duga ne može biti egzemplaran u poređenju sa datim primerima. *Exceptiones sunt strictissimi interpretacionis*, pa tako i u konkretnom slučaju gde dužnik izuzetno duguje isto potraživanje prema dva poverioca. Uska tumačenja se naročito imaju koristiti kod ugovora u privredi, a kako su privredne aktivnosti dinamične i konstantno podložne zahtevima modernih pravnih formi. Osobenosti mehanizma paralelnog duga pokazuju da se, iako se formalno radi o dva duga koja se međusobno isključuju, praktično radi *o jednom dugu koji se solidarno isplaćuje prema dva poverioca*, a koji je dozvoljen pozitivnim zakonodavstvom. Kako je već gore konstatovano, paralelni dug postoji kao mehanizam u kontinentalnom pravu kako bi se na pravno dopušten način nadomestio intitut trust-a.

Naše je mišljenje da se kod paralelnog duga radi o apstraktnom pravnom poslu gde ugovorne strane postojeći osnov prosto nisu učinile vidljivim. Tumačenjem na način kako smo gore naznačili jasno je ne samo da osnov postoji nego kakva je njegova priroda. Ne može se određeni pravni mehanizam arbitrerno proglasiti nedopuštenim ukoliko pre toga nije bio poznat u određenom pravnom sistemu. Mora se krenuti od njegove suštine, od volje samih ugovornih strana da bi se zaključilo da li je cilj dopušten ili ne. Mehanizam instituta paralelnog duga jasno pokazuje da nijedna ugovorna strana neće biti subjekt pravno neosnovanog obogaćenja ta da nijedna ugovorna strana neće primiti više nego što joj pripada odnosno platiti više nego što je obavezana.

Paralelni dug u drugim kontinentalno pravnim sistemima

Institut paralelnog duga još uvek nije dobio svoju potvrdu pred sudovima zemalja u regionu, kao ni u Srbiji [Theiss 2010]. Ista situacija je u najvećoj zemlji kontinentalnopravnog sistema Nemačkoj, gde autori konstatuju da postoji rizik da sud institut paralelnog duga (nem. *abstraktes Schuldanerkenntnis*) može proglasiti nedopuštenim [Von Buttlar, 2010]. U jednom konkretnom slučaju autor smatra da bi se institut paralelnog duga mogao proglasiti

According to some authors, the importance of this kind of legal operations is that they can accelerate business transactions [Perović, 1990].

It may be that the parties are considered to have concluded an agreement with a certain cause that in reality is not concluded, in which case we would have the apparent cause of the agreement as well as the case when parties have entered the agreement without a cause. Assuming that in this case we have conscientious contracting parties, we will not consider the case of fictitious or simulated cause where parties fraudulently represent that they have concluded an agreement with a certain cause but in fact the agreement was not concluded. In both cases this is a situation where an agreement could not be performed, while the abstract legal obligations have legal effects although the cause is not visible.

When it comes to the relationship between creditor and debtor from the principal debt, the cause of the commitments is clearly set, the debtor owes a sum of money to the creditor on the basis of a specific obligation. The claim arising from such a creditor-debtor relationship has its maturity and the rule is that the repayment of one part of the debt partially relieves the debtor's obligation to the creditor. According to some views, the problem that arises is created by the formation of the debtor's debt to a third party acting on its behalf and for its own account, which exists in parallel with the principal debt. In this case a legal basis on which the borrower pays the debt to a third party is controversial, ie. it is considered that the cause does not exist. The answer to the contrary views, considering that the cause is visible from parallel debt agreements concluded in the above prescribed manner, is that in this case the legal basis is only apparent and that the contracting parties placed their consent in the illicit direction.

In order to give a final judgment on this issue, it is necessary to present once again the basic mechanism of parallel debt. By repaying the parallel debt, the debtor is relieved of the obligation to pay a proportionate part of the debt to creditors. Liabilities under parallel debt cannot be further enlarged without additional commitment by the principal debt and both debt have the same maturity date. The claim from parallel debt is secured by the same collaterals as the principal debt. Also, it must be considered that the regulated provisions on the conclusion of certain contracts of law on obligations such as lease agreement or loan agreement have dispositive character, and that the parties can arrange their contractual relationship differently unless the imperative norms prescribe otherwise.

Based on the above stated, it is our opinion that by agreeing to parallel debt, no provision of the Law on Obligations is violated. The examples regularly taken for causes opposite to mandatory rules, public order and good customs include: the lease of objects that completely collapsed by the time of effectiveness of agreement, the borrower's obligation to repay the debt which he did not receive, etc. It is obvious that these examples are not comparable with the case of parallel debt. *Exceptiones sunt strictissimi interpretacionis*, and it is so in this particular case where the borrower owes the same claim towards the two creditors. Narrow interpretations are of particular use in commercial agreements, having in mind that economic activities are dynamic and constantly subject to the challenges of modern legal forms. The features of parallel debt mechanism show that, although we have two debts which are mutually exclusive, there is practically one debt that is paid jointly by two creditors, which construction is allowed by positive legislation. As already noted above, the parallel debt exists as a mechanism in civil law in order to compensate the institute of trust in a legally admissible way.

It is our opinion that the parallel debt is an abstract legal transaction in which the contracting parties simply did not make the cause visible. By interpretation in the way we have indicated above, it is clear not only that the cause exists but also that its legal nature is presented. Any legal mechanism cannot be arbitrarily declared inadmissible, if it was not previously known in a certain legal system. The essence of such legal mechanism shall be observed, as well as the will of the contracting parties to conclude the agreement, whether its aim is allowed or not. The mechanism of parallel debt clearly shows that none of the contracting parties would be subject to unjust enrichment and that none of the contracting parties would receive more than they already have or pay more than they are obliged.

nedopuštenim zbog toga što zaloga kao akcesorno pravo može pratiti samo glavni a ne i paralelni dug kako obično stoji u Collateral Sharing Agreement. Međutim poslednjih godina u vezi sa ovim institutom posebno su značajni stavovi izraženi u odlukama francuskih i poljskih sudova koje će sumarno biti predstavljene i komentarisane u ovom radu.

Pred francuskim sudovima je do problema došlo kada su založni poverioci iz paralelnog duga i trasti pokrenuli izvršni postupak nad založenom imovinom usled docnje dužnika bez punomoćja poverilaca (svi ugovori iz kojih su nastale navedene obaveze zaključeni su u skladu sa pravom države Njujork). Potom su dužnik i založni poverioci drugog reda usled nedostatka punomoćja poverilaca osporili njihovu aktivnu legitimaciju. Prvostepeni sud je svojom odlukom prihvatio aktivnu legitimaciju založnih poverilaca iz paralelnog duga i trastija, a drugostepeni a potom i Vrhovni kasacioni sud Francuske su takvu odluku potvrdili.

Ne zahtevajući punomoćje poverilaca i dajući aktivnu legitimaciju navedenim licima, francuski sudovi su praktično rekli da je paralelni dug (fra. *dette parallèle*) sopstveni dug zastupnika poverilaca, a ne sporedni dug duga koji dužnici imaju prema poveriocima. Kao razlog za ovakvu odluku viši sudovi su naveli sledeće činjenice: veliku sličnost instituta paralelnog duga sa određenim mehanizmima koji postoje u francuskom pravu, i glavni i paralelni dug dospevaju istovremeno, srazmernim smanjenjem jednog duga usled isplate drugog uklanja se rizik duple isplate i postojanje osnova se ne može u potpunosti tumačiti u skladu sa odredbama francuskog međunarodnog privatnog prava zbog toga što se radi o međunarodnoj transakciji koja uključuje više jurisdikcija [International Bar Association, 2012]. Stoga ostaje sporno kakva bi odluka sudova bila da su ugovori na osnovu kojih je obaveza nastala bili zaključeni u skladu sa francuskim pravom.

U poljskom slučaju ugovori koje je sud tumačio su takođe bili zaključeni u skladu sa stranim pravom. U konkretnom slučaju se sud nije direktno bavio temom paralelnog duga (polj. *dług równoległy*) već time da li trasti može imati sredstva obezbeđenja po dugu koji teče paralelno sa glavnim dugom. Činjenica da u tom procesu sud nije osporio punovažnost paralelnog duga posredno govori o njegovom stihijskom priznanju. Pored navedene odluke najvišeg suda u državi, potrebno je imati u vidu činjenicu da su pre donošenja navedene odluke niži sudovi prihvatali punovažnost ugovaranja paralelnog duga, te su u jednoj odluci izričito naglasili da postojanje duga koji je paralelan osnovnom dugu nije protivan poljskom javnom poretku [Jacaszek, Szegda, 2012].

Prethodno navedene odluke govore u prilog teoriji da pravna priroda instituta paralelnog duga korespondira opštim pravnim načelima prihvaćenim u kontinentalno pravnim sistemima. Trebalo bi očekivati da će sudovi ostalih kontinentalnopravnih zemalja donositi slične zaključke u budućnosti ukoliko im se ukaže prilika da cene dopuštenost samog institute [Simeonov, 2013].

Zaključak

Kako to često biva kod prikaza pravnih instituta koji svoje postojanje nisu potvrdili u domaćoj praksi, ovaj rad zaključujemo u nadi da će se sudovi pri utvrđivanju dopuštenosti instituta paralelnog duga rukovoditi gore navedenim razmatranjima kao i stavovima izraženim u sudskoj praksi kontinentalnopravnih zemalja. Sa pozicija srpskog zakonodavca ne vidimo razlog da se ovi stavovi ne uvaže.

Potrebe i nastojanja Srbije da se ravnopravno uključi u svetske tokove finansijskih operacija mora nužno pratiti i prilagođavanje domaćeg pravnog sistema institutima koji do tada nisu bili poznati u pravnoj praksi. Ukoliko se pokaže da su ti instituti dopušteni tj. da je mehanizam konkretnog instituta dopušten, njihovo pravno dejstvo se ne sme osporavati. Trenutno se srpski advokati retko odlučuju da pri strukturiranju određene finansijsko pravne konstrukcije koriste mehanizam paralelnog duga, upravo iz razloga nepostojanja sudske prakse koja bi potvrdila dopuštenost ovog instituta sa aspekta srpskog prava.

Stavovi koji se odnose na pravni osnov posebno su značajni zbog nefleksibilnih posledica jer ukoliko se utvrdi da pravnog osnova za nastanak pravnog posla nema, neće biti ni samog posla. Čak i da uvažimo

Parallel debt in other continental law jurisdictions

The institute of parallel debt has not been recognized yet at the courts in the region, nor in Serbia [Theiss 2010]. The situation is the same in the largest country of the continental legal system - Germany, where, as the authors state, there is a risk of the court declaring parallel debt mechanism (German: *abstraktes Schuldanerkenntnis*) inadmissible [Von Buttlar, 2010]. In one particular case, the author believes that the institute of parallel debt could be declared inadmissible because the pledge as the accessory right could only follow principal and not parallel debt as is it usually the case in Collateral Sharing Agreement. However, in recent years particularly important views in respect of this legal institute have been the ones expressed in the decisions of the French and Polish courts, and such views will be summarily presented and commented on in this paper.

Before the French courts a problem occurred when the lien creditors from the parallel debt together with the trustee initiated enforcement proceedings against the pledged property due to the debtor's default, without the power of attorney granted by the creditors (all agreements from which these obligations arose have been concluded in accordance with the laws of New York). Hence the borrower and the lien creditors of the second order, due to the lack of the creditors' power of attorney, challenged their legal capacity. In its decision, the First Instance Court accepted legal capacity of lien creditors from the parallel debt and the trustee, with the second instance court and then the French Supreme Court of Cassation having confirmed that decision.

Without requiring the authorization of the creditors and by acceptance of legal capacity to the above stated persons, French courts practically said that the parallel debt (French: *dette parallèle*) presents a separate debt of the creditors' representatives, rather than a side debt of the debt that debtors owe to creditors. As arguments for such a decision the higher courts stated the following facts: high similarity of the institute of parallel debt with certain mechanisms that exist in the French law, the main and parallel debt maturing at the same time, a proportional reduction of any debt due to the repayment of the second one eliminating the risk of double payments, and the existence of a cause cannot be fully interpreted in accordance with the provisions of the French private international law since in the present case we had an international transaction involving multiple jurisdictions [International Bar Association, 2012]. Therefore, it remains questionable how the decision of the courts would look like if the agreements under which obligations were incurred have been concluded in accordance with the French law.

In the Polish case, the agreements interpreted by the Court were also concluded in accordance with the international law. In this case the court did not directly deal with the topic of parallel debt (Polish: *dług równoległy*), but with the question whether trustee could have collateral for the debt that exists in parallel with the main debt. The fact that in this process the court did not challenge the validity of the parallel debt indirectly suggests its spontaneous acceptance. In addition to the above decision of the highest court in the state, it is necessary to bear in mind the fact that before this decision was rendered, the lower courts accepted the validity of the parallel debt in agreements, and so in one decision specifically noted that the existence of the debt which is parallel to the principal debt is not contrary to the public policy in Poland [Jacaszek, Szegda, 2012].

The aforementioned decisions are in favor of the theory that the legal nature of the parallel debt institute corresponds to the general principles accepted in continental legal systems. It should be expected that the courts of other continental legal countries make similar conclusions in the future if there are given the opportunity to decide about the admissibility of the parallel debt mechanism [Simeonov, 2013].

Conclusion

As it often happens when presenting legal institutes that have not had their existence confirmed in domestic practice, this paper concludes on a positive note, hoping that the courts, while determining the admissibility of the parallel debt institute, would be guided by the above considerations and the views

pojedine stavove teorije da je postojanje pravnog osnova sporno, postavlja se pitanje da li je zaista u javnom interesu Republike Srbije da se, na primer, javi nemogućnost izvršenja obaveza po međunarodnom kreditu u čijem je nastanku i izvršenju učestvovalo nekoliko jurisdikcija uključujući srpsku i čiji iznos se meri milijardama evra. Posledice nemogućnosti ugovaranja određenih pravnih instituta u Srbiji bi se nakon nekoliko ovakvih slučajeva pokazale kao negativne po sam javni poredak.

Stoga smatramo da bi državni organi trebalo da u svakom konkretnom slučaju prilikom ocene dopuštenosti pojedinačnog pravnog instituta vodi računa o pretežnijem javnom interesu, te da nakon podrobne analize donese pravovaljani zaključak.

Literatura / References

1. Wood, Philip R. Regulation of International Finance, First edition. London: Sweet / Maxwell, 2007.
2. Perović, Slobodan. Obligaciono pravo - knjiga prva, sedmo izdanje. Beograd: Naučna knjiga, 1990.
3. Wolf Theiss. Lessons learned - Restructuring Loans and Enforcement of Security. Vienna: Wolf Theiss, 2010.
4. Von Buttlar, Mattias. Enforcement of security interests in banking transactions in Germany. Frankfurt am Main: Clifford Chance, 2010.
5. International Bar Association. 29th International Finance Law Conference, Summary of the session - Enforcement of different security agent structures: parallel debt, trusts and alternative solutions. Istanbul: International Bar Association, 2012.
6. Jacaszek, Patrycja. Szegda, Łukasz. Parallel dept in Polish legal practice. Warsaw: 2012. Available at: http: //www. portaltransakcyjny. pl/en/publications-and-studies/art, 99, the-parallel-debt-concept-in-polish -legal-practice. Html.
7. Simeonov, Damian. The use of Parallel Debt in South East Europe. Sofia: 2013. Available at: http://boyanov.com/BNV_resources/uploads/2013/10/The-use-of-parallel-debt-in-South-East-Europe-1 510133.pdf

expressed in the case law of continental law countries. From the position of the Serbian legislators we do not see any reason to disregard these arguments.

The needs and efforts of Serbia to be equally involved in the global financial operations must to be accompanied by the adjustments of the domestic legal system by means of institutes which have not been known in legal practice. If it turns out that these institutes are allowed i.e. that the mechanism of a particular institute is allowed, their legal effect shall not be disputed. At the moment the Serbian lawyers rarely decide to structure legal construction of certain financial mechanism by using parallel debt, precisely because of the lack of case law that would confirm the compatibility of this institute with the Serbian law.

Arguments relating to the legal cause are particularly important because of their inflexible consequences, if it gets determined that the legal grounds for the creation of legal operation do not exist, the whole operation would not exist. Even if we acknowledge that individual views of the legal commentators stating that the existence of the cause is disputable, the question is whether it is really in the public interest of the Republic of Serbia to face, for example, impossibility of the fulfillment of obligations under an international loan which was granted and executed in several participating jurisdictions including Serbian and has the principal amount measured in billions of euros. The consequences of the inability to agree upon certain legal institutes in Serbia in a few such cases would exert adverse effects to the public order.

Therefore, we believe that the state authorities should in each particular case in the process of assessing the admissibility of a single legal institute take into consideration the priority public interest, reaching, after careful analysis, a legitimate conclusion.