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CONSENT TO CONTRACT**

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

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

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INTRODUCTION

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

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

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

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

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

GENERAL QUESTIONS ABOUT THIRD-PARTY CONSENT TO CONTRACT

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

The Concept and Development of Third-Party Consent

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

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

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

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

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

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

⁴ SCC, para. 533.

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

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

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

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

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

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

⁸ More on this later in the paper.

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

FORM OF THIRD-PARTY CONSENT TO CONTRACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ Family Law, art. 193, para. 3.

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

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

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

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

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

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

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

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

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

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

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

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

³⁵ GCC, para. 108, al. 2.

³⁶ SWCC, para. 19a.

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

³⁸ *Ibid.*

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

The Relationship of Third-Party Consent with Related Institutions

a) Representation

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

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

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

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

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

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

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

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

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

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

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

⁴⁶ Family Law, art. 64, paragraph 1.

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

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

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

b) Management without a mandate

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

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

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

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

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

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

⁵³ Law of Contract and Torts, Art. 228.

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

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

Contracts with Persons with Limited Business Capacity

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

⁵⁴ Law of Contract and Torts, Art. 56.

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

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

⁵⁵ Family Law, art. 64, paragraph 2.

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

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

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

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

⁶⁰ Terre, F., Fenouillet, D. (2012). *Droit Civil: Les personnes: Personnalité. Incapacité. Protection*. Paris: Dalloz, 280.

⁶¹ *Ibid.*

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

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

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

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

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

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

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

⁶⁶ FCC, para. 1147

⁶⁷ FCC, para. 1148.

⁶⁸ Smits, J.M., 127.

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

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

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

Similarly, in Swiss law, a person has business capacity if they are of age and capable of discernment, and majority is attained at the age of 18.⁷² According to Article 19 of the Swiss Civil Code, every minor who is capable of discernment may conduct all legal transactions with the consent of their legal representative, while they may independently conduct only those legal transactions that only bring them benefit. A person is considered capable of discernment if they do not lack the ability to act lucidly and rationally due to their minority, mental retardation, mental disorder, intoxication, or similar circumstances. Although the capacity for discernment is not determined abstractly but in light of each individual case or legal transaction, a presumption of capacity for discernment is legally established for all persons.⁷³

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

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

⁷¹ FCC, para. 388–1–2.

⁷² SWCC, para. 13.

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

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

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

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

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

⁷⁵ GCC, para. 104.

⁷⁶ GCC, para. 107.

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

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

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

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

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

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

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

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

⁸³ Public Notary Rules of Procedure, Art. 60.

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

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

Sublicense Contracts and Sublease Contracts

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

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

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

⁸⁶ FCC, para. 387–3, para. 1.

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

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

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

⁸⁷ Law of Contract and Torts, Art. 704.

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

⁸⁹ Law of Contract and Torts, Art. 588.

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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