

CAUSE (GROUND) OF OBLIGATION OF THE CONTRACT ON REPRESENTATION IN SPORT⁴³

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Abstract

In the law of the Republic of Serbia, the cause of contractual obligation has the significance of a general assumption of the validity of the contract. It represents an essential condition for the creation and survival of every contract. Accordingly, “every contractual obligation must have a permissible cause. The cause is impermissible if it is contrary to cogent rules, public policy, or good morals” (Article 51(1-3) of Law on Obligations). It is assumed that the contractual obligation has a cause, even though it is not expressed. The legal consequence of the non-existence or impermissibility of the cause is the nullity of the contract.

The subject of interest in this paper is the consideration of peculiarities regarding the cause of obligation of the contract on representation in sports, which distinguish it from other types of contracts. For that purpose, special attention is devoted to the analysis a few characteristic cases of concluding contracts on representation in sport in contractual practice. It has been observed that existence of false (unreal) cause in the practice of formation of these contracts are not rare. Additionally, the unreal ground is, as a rule, the result of the will of the contractors themselves. The existence of a putative cause in contracts on representation in sports is difficult to imagine due to the mandatory written form prescribed by law. Therefore, the false cause in these contracts can be manifested in the form of a fictitious or simulated contract. The falseness of the ground is most often expressed in the form of a reduction

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or increasing of the obligations stated in the written contracts, compared to those that were actually contracted. It would be difficult to say that such payments, outside of legal payment flows, are an unusual phenomenon in modern sports.

Considering the above, it is necessary to take a position regarding the solution of the exposed legal problem from the point of view of national legislation. On the ground of the rules contained in the legislation of the Republic of Serbia, the author concludes that the existence of an false cause results in the nullity of all contracts that were used in the simulation operation. Therefore, the sanction would consist in the absolute nullity of the fictitious, simulated and dissimulated contract due to the circumvention of legal regulations, the mutual confiscation of the object of performance due to violation of cogent regulations and public policy, as well as compensation for damage caused due to the violation of legally protected interests of *bona fide* third parties.

Key words: contractual representation in sport; putative cause; fictitious cause; simulated cause; nullity.

Introductory remarks

A contract on representation in sport is a contract in which the sports agent undertakes that, with or without compensation, he/she will try to find and bring in contact with the client a suitable person for the purpose of negotiating the conclusion of an employment contract, i.e. a transfer contract, as well as to the obtained authorization during negotiations to protect the interests of the client and to conclude a employment contract, i.e. a transfer contract, on his/her behalf and for his/her account. An athlete, a sports expert, or a sports organization can act as the principal of a sports agent.

The conclusion of a legally binding contract on representation in sports, likewise the formation of any other contract, presupposes the exchange of agreed statements of wills suitable for the creation of the desired legal effect. The exchange of agreed statements of wills is the meaning and essence of every contract (Jakšić.&Stojanović, 1995). Accordingly, in order for a contract on representation in sports to be valid, certain assumptions must be met that relate to: the content of consent statements of wills (will and its attributes,

internal and declared will, ways of expressing will); the absence of defects in consensual declarations of wills (absence of delusion, fraud, coercion in the narrower sense-physical coercion, threats-psychological coercion); achieving concurrence of wills between the parties (negotiations, offer and acceptance of the offer). In the contracts we are considering, the exchange of agreed declarations of wills must be expressed in the qualified written form, prescribed by law.

In addition to the agreed declarations of wills and form, in order for a contract on representation in sport to be validly created and produce legal effects, the other general conditions for the validity of the contract must be met, which relate to: capacity to contract, object and cause (ground) of contractual obligation. Further exposition is devoted to the consideration of peculiarities regarding the cause (ground) of contractual obligation of the contract on representation in sports.

Contemporary theoretical understandings of the cause (ground) of contractual obligation in the fields of contract on representation in sports

In domestic civil law, the ground of obligation has the importance of a general assumption of the valid contractual agreement. There are no disagreements in jurisprudence about the general concept of cause of the contractual obligation (Markesinis&Unberath&Johnston, 2006; Zimmermann, 2005; Carbonnier, 2004). The ground is determined as the reason for the creation of the contractual obligation and the contract itself (Dudaš, 2011; Perović, 2011; Antić, 2005). However, there is no unique position on what is specifically meant by the reason for the creation of the contractual obligation. If we exclude the understanding that denies the existence of the ground, within the framework of modern theoretical considerations on the cause, subjective, objective and mixed approaches can be distinguished. That is, subjective, objective and mixed theories about the cause of the contractual obligation.

Representatives of the subjective theory see the ground of obligation in the motives that leads the contracting parties to conclude the contract. In this case, only the decisive motive can be considered, i.e. the one that decisively influenced the shaping of the will of a person in the direction of concluding a

specific contract. Given that the contracting parties motives can be very diverse, insufficiently clear, changeable, and that everything depends on the current personal convictions and attitudes of the contracting parties, it would be very difficult to prove them in the event of a dispute (Perović, 2011). In this sense, the legal theory emphasizes that "proving decisive motives in practice creates almost insurmountable difficulties, because it is often practically impossible to prove what were the decisive motives for entering into a contractual relationship of one or the other party" (Antić, 2005). In this regard, the main reason that conditioned subjective understandings of the cause of contractual obligations did not find much support in the doctrine, lies in legal uncertainty. Such a claim can be substantiated without too much effort on the example of a contract on representation in sport.

Thus, the athletes decisive motive for concluding a contract on representation in sport could be to find a suitable work engagement. In the sense of concluding a employment contract with a sports organization in which the player would have the best conditions for sports advancement, training and achieving top results in the sport he is engaged in. However, bearing in mind that a professional sports career is, on average, of short duration, it is also possible that the decisive motive for concluding a contract on representation in sports is the desire to achieve as much financial income as possible from playing professional sports. Therefore, players are aware that the help of a qualified sports agent is practically necessary for them to make the most of their own sports talent and positive public image during the relatively short duration of their professional sports career. In this regard, it is a common occurrence in modern sports that prominent athletes move to less attractive and competitively underdeveloped teams and leagues, motivated by extremely high compensation amounts for their engagement. Significantly higher than those offered to them by teams in the highest quality professional competitions. At the same time, some sports agents have specialized in certain sports markets and direct their principals in that direction. Thus, an increasing number of famous football players are hired by Saudi Arabia football clubs, or clubs from the United Arab Emirates, or Qatar, or China. The sums paid for their engagement are, on average, twice the sums they earned at the clubs where they played in Europe's best football leagues. The situation is similar in

basketball, handball, etc. It also happens that the athlete's decisive motive for concluding a contract on representation in sport is his desire to play in a specific club. For example, because he has supported that club since early childhood, or because of the "rich" sports tradition of the club and its recognizable sports successes and results. It is precisely for this reason that the athlete wants to hire a sports agent who successfully cooperates with the representatives of the specific sports organization for a long period of time.

As with athletes, coaches' motives for concluding a contract on representation in sport can be diverse. For example, the decisive motive can be the coach's desire to work in a club where he will have the opportunity to achieve satisfactory sports results. However, it could also be his desire to work in a sports organization that pays special attention to the development of young talented players. That is, in a sports environment where results are not the primary goal of the competition.

It is similar when we talk about the motives of sports organizations and sports agents. Thus, the decisive motive on the side of a sports organization for concluding a contract on representation in sports could be the desire to increase its own sports capacities by hiring a talented and quality athlete. But, the decisive motivation could also be reflected in the desire to achieve the most favorable financial arrangement during the transfer of the athlete.

Recognition of the decisive motivation of the sports agent causes particular difficulties in situations where a contract on representation in sports was concluded as a benevolence. Of course, except when one of the close relatives is in that role. It is conceivable that it would be a desire for a free presentation of an athlete with whom there is a long-standing successful cooperation, which has grown into a friendship. Or, on the other hand, the desire to present without compensation a young talented player with whom he intends to cooperate for a long period of time. It goes without saying that in all the mentioned situations there can be an intertwining of motives that significantly influence the decision to enter into a contract on representation in sports.

Proponents of the objective theory believe that the ground of the obligation is the economic effect that is intended to be achieved by entering into a specific contract, so this understanding is also referred to as economic theory. The

cause is, therefore, an economic goal permitted by law that has a decisive influence on one's decision to enter into a contract (Gams, 1959; Kapor, 1951). Like that, the cause of contractual obligations was treated as an economic aim in some decisions of domestic courts (Judgement of Federal Court of Federal Republic of Yugoslavia Gzs 15/2000, 29. 06. 2000). The achievement of a certain economic goal is expressed in the form of exchange of goods and services (See more: Ječmenić, 2022). Adherents of objective understandings about the cause of obligations encounter difficulties when trying to explain the ground in gratuitous contracts. In this respect, these contracts are either without a ground, or it, on the other hand, consists of a negative economic effect (*exempli causa*, the donor wants to reduce its own property by the value of the gift).

The application of this theory to the contract on representation in sports would lead to the conclusion that the sports agent is obligated to the athlete, i.e. the sports organization because he wants money as an economic good in the form of an intermediary commission, while the athlete, i.e. the coach wants the appropriate earnings (salary). When it comes to sports organizations, there is a difference in the basis of the obligation of a sports organization that hires a player and such an organization that the player leaves. Thus, the sports organization to which the player joins wants the economic use of the player's sports capacities, while the sports organization that the athlete leaves wants to achieve property profit in the form of transfer remuneration. In our opinion, the objective theory cannot provide a satisfactory explanation of the ground of obligation of the contract on representation in sport in cases where it is concluded as a benevolence. Consistent application of this theory would imply that the cause consists of a negative economic effect that the sports agent seeks to achieve by concluding the contract. Such an effect would be expressed in the wish of the sports agent to make his workforce (in the sense of representation services in sports transfers) available to the athlete, sports expert, or sports organization, without any economic effect. Such an explanation does not seem tenable to us.

Proponents of the mixed theory of the cause of contractual obligation take into account both objective and subjective elements. According to this

understanding, the cause of obligation is the legal purpose of the obligation. In the case of synalagmatic contracts that purpose consists in the fulfilling of the contractual obligation of the other party (Antić, 2005). That is an objective element. The legal importance of the contractor's motivations, which represent a subjective element, differs in the case of mutually binding and benevolence contracts. With the former, motives are taken into account only if they are immoral and prohibited and when both parties were negligent. That is, when they knew or had to know that legally impermissible motives would lead them to an unlawful purpose. In contrast, in the case of gratuitous contracts, the motives are equated with the ground due to their small number, since they represent a decisive reason for making a choice on assuming a contractual obligation.

The mixed theory of the ground of contractual obligation is accepted in our Law on Obligations. This Law stipulates that “every contractual obligation must have a permissible cause, and the cause is impermissible if it is contrary to cogent rules, public policy, or good morals” (Article 51(1-3) of Law on Obligations). It is assumed that the contractual obligation has a ground, even though it is not expressed. The legal consequence of the non-existence or impermissibility of the cause is the nullity of the contract (Article 52 of Law on Obligations). The legal significance and influence of the motive on the validity of the contract is much more pronounced in the case of gratuitous than in the case of mutually binding contracts. In principle, “the motives that prompted the contracting parties to conclude the contract do not affect its validity” (Article 53(1) of Law on Obligations). However, “if an impermissible motive significantly influenced the decision of one contracting party to conclude a synalagmatic contract and if the other contracting party knew or should have known this, the contract will remain void. Benevolence contract has no legal effect even when the other contracting party did not know that an illegal or immoral motive significantly influenced the decision of his co-contractor to conclude the contract” (Article 52(2-3) of Law on Obligations).

The application of the mixed theory on the cause of contractual obligations to the contract on representation in sports leads to the conclusion that the sports

agent is obligated to the athlete, sports expert, or sports organization due to the fulfillment of their obligation to pay compensation, when the contract is concluded as mutually binding. In the case of a gratuitous contract on representation in sports, the ground of contractual obligation could be represented by any legally permissible motive that prompted the sports agent to enter into a contract without monetary payment. On the contrary, an athlete, a sports expert, or a sports organization is obligated to a sports agent due to the fulfillment of the obligation of mediation or representation in sports transfers.

False cause (ground) of obligation in the practice of concluding contracts on representation in sports

In the practice of concluding contracts on representation in sports, cases of the existence of an false (unreal) ground are not rare. Moreover, the unreal ground is, as a rule, the result of the agreement of wills of the contractors themselves (James, 2017; Gardiner, 2012). The presence of a putative cause in these contracts is difficult to imagine due to the mandatory written form. Therefore, the false cause in contract on representation in sports can be manifested in the form of a fictitious or simulated contract.

A fictitious contract exists when the contracting parties try to present to third parties (the public) that they have concluded a contract, but in reality they have not concluded it. The contracting parties here do not want the realization of the legal effects of a fictitious contract. They only create the appearance in front of third parties that they have concluded it, in the pursuit of achieving a specific, as a rule, prohibited goal. This, for example, can be the evasion of some legal or contractual obligation or the realization of some right for which the necessary legal conditions have not been met (Đurović, 1997).

The main feature of a simulated contract is the simultaneous existence of two contracts, one of which is public but false (simulated contract) and the other secret but true (dissimulated contract). A simulated contract, therefore, conceals a dissimulated contract. The first is addressed to third parties, but its legal effects are not desired by the contracting parties. The second expresses the true will of the contracting party and the realization of its effects they want to achieve. At the same time, the dissimulated contract, as a rule, changes or

cancels the obligations from the simulated contract. The aim of the simulation action is to circumvent some legal rules (most often tax law) or the rights of third parties, that is, to circumvent some legal prohibition (Ibidem).

According to the regulations contained in the Law on Obligations, an false contract has no effect between the contracting parties. In the event that an false contract conceals another contract, that other contract is valid if the conditions for its validity are met, with the fact that the falseness nature of the contract cannot be emphasized to bona fide third parties (Article 66(1-3) Law of Obligation).

As for the grounds of nullity of false contracts, there are two understandings in legal theory, the so-called subjective and objective conception. According to the subjective conception, the basis of nullity of these contracts is reflected in the absence of the true will of the parties. According to the objective conception, the basis of the nullity of false contracts lies in the prohibited non-contractual purpose of an objective character which, as a rule, consists in circumventing some imperative norm, principle of public policy, or morality, so false contracts are qualified as illegal, prohibited or immoral (Đurović, 1995; Salma, 1979).

The falseness of the ground of contractual obligation of the contract on representation in sport is most often reflected in the form of a reduction or increasing of the obligations expressed in the written contracts, compared to those that were actually contracted (Amson, 2010; Buy, 2009). In this connection, we cite the case of the conclusion of false contracts by representatives of the French football club Paris Saint Germain (Le Paris Saint - Germain FC), in the period from 1998 to 2003. The leaders of this club wanted to hire well-known and quality players. However, at that time the club did not have the financial capacity needed to implement that plan. Although, in order to achieve the set goal, they resorted to concluding false contracts. Thus, simulated employment contracts were concluded with football players, in which the compensation was shown to be less than the real one. The real compensation was in the dissimulated contract. The remaining part, up to the actual compensation, was paid through sports agents. For that purpose, fictitious contracts of representation in sport were concluded with sports

agents, for non-existent mediation services in sports transfers. This kind of operation made it possible to reduce the base for calculating taxes and contributions paid on the earnings of football players, as well as solidarity contributions, in an impermissible way. A solidarity contribution is paid if the transfer of a professional football player was made before the expiration of his contract, in the amount of five percent of the transfer compensation, and is shared between all the clubs that contributed to his training and development (Article 21 and Annex 5 FIFA's Regulations of Status and Transfers of Players). So, we are dealing with amounts that can reach millions of euros. During the transfer of Pedro Miguel Pauleta from Bordeaux (Bordeaux FC) to PSG for ten million euros, another two million euros were paid to the player through two fictitious contracts concluded with sports agents. During the transfer of Nicolas Anelka from Real Madrid (Real Madrid FC) to PSG for twenty-four million euros, through fictitious contracts concluded with his brothers in the role of sports agents, the player was paid another four million euros, by payment to the account of the Swiss company Fidustar, which managed his finances. During the transfer of Frédéric Déhu from Barcelona (Barcelona FC) to PSG, the player received an additional six hundred thousand euros through sports agent Ranko Stojić. In all the mentioned cases, it was discovered that the sums paid to sports agents were later passed on to the footballers (https://www.liberation.fr/.../psg-transferts-sales-a-la-barre_615... PSG: transferts sales à la barre – Libération).

It would be difficult to say that such payments, outside of legal payment flows, are an unusual phenomenon in modern sports. Therefore, we believe that it is necessary to take a position regarding the solution of the exposed legal problem from the point of view of national legislation.

Conclusion

According to the rules contained in the Law on Obligations, a fictitious contract concluded between a sports organization and a sports agent would be void. The same would apply to a simulated contract concluded between a sports organization and an athlete, while a dissimulated contract concluded

between a sports organization and an athlete could produce legal effect if the conditions for its validity are met. Let's see if they are.

A sports organization is obliged to establish a working relationship with a professional athlete. According to the provisions of the Law on Labour of the Republic of Serbia “the employment contract should be concluded in written, before the employee starts work. If the employer does not conclude a employment contract with the employee in accordance with the above, it is considered that the employee has established an employment relationship for an indefinite period of time on the day of starting work” (Article 32 Law on Labour). Nevertheless, the Law on Sports in the domain in which it regulates the establishment of an employment relationship between a sports organization and professional athletes represents a *lex specialis* in relation to the Law on Labour. The Law on Sports stipulates that a professional athlete establishes a employment relationship with a sports organization by concluding an employment contract for a certain period of time, up to five years at most (Article 13(1) of the Law on Sport), and “failure to conclude an employment contract is a misdemeanor for which the sports organization can be fined from 500,000 to 2,000 000 dinars” (Article 175(8) of the Law on Sport). We have the opinion that the provisions of the Law on Sports are of such a nature that they derogate from the provisions of the Law on Labour, regarding the fiction of establishing an employment relationship.

The Law on Sport stipulates that contracts between sports organizations and athletes, as well as all amendments and additions to contracts, must be concluded in writing and certified in accordance with the law. The legal consequence of non-compliance with this rule is the nullity of the contract (Article 12(1) of the Law on Sport). It is our opinion that the rule from Article 73 of the Law on Obligations, which foresees the possibility of subsequent validation of a contract that was not concluded in the prescribed legal form, by mutual performance of contractual obligations, could not be applied to this contract. Therefore, this possibility of strengthening a contract that lacks the prescribed form exists only if nothing else obviously follows from the purpose for which the form is prescribed (Article 73 of the Law on Obligations). There is no doubt that the purpose of the regulation, which stipulates a mandatory

written form for all contracts concluded between sports organizations and athletes, in addition to protecting the interests of the athletes themselves, is also the protection of public interests. It confirms that, according to this criterion, a dissimulated contract concluded orally between a sports organization and athletes could not be empowered.

Therefore, based on the rules contained in the legislation of the Republic of Serbia, in the aforementioned case both the fictitious contract concluded between the sports organization and the sports agent, as well as the simulated and dissimulated contract concluded between the sports organization and the athlete, would be null and void.

Finally, we have the opinion that in the situation of simulation, simulated and dissimulated contracts should not be treated separately. Their different consideration is a consequence of the acceptance of the subjective conception of the grounds of nullity of false contracts. Simulation should be viewed as an operation having an impermissible non-contractual purpose, and accordingly all contracts used in the simulation operation would be void. This conclusion is in accordance with the objective conception of the basis of nullity of false contracts (Salma, 1979). In the case that we have analyzed, the sanction would consist in the absolute nullity of the fictitious, simulated and dissimulated contract due to the circumvention of legal regulations, the mutual confiscation of the object of performance due to violation of cogent regulations and public policy, as well as compensation for damage caused due to the violation of legally protected interests of bona fide third parties.

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