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THE COMMERCIAL COURT IN NOVI SAD
21000 N o v i S a d
No 3 Sutjeska Street P. 1327/2015

for

THE SUPREME COURT OF CASSATION

Claimant: ATP VOJVODINA, a.d. Novi Sad, Novi Sad, No 1a Put Novosadskog Partizanskog Odreda

Defendant: The City of Novi Sad represented by the City Attorney General

The intervener on the side of the claimant: Dević Ilija from Belgrade, No 9 Vile Ravijojle Street, who in accordance with the attached authority, is represented by Vladimir LJ.Dobrić, lawyer from Belgrade, No 15 Birčaninova Street

AUDIT OF THE INTERVENER

to the judgement made by the Commercial Court of Appeal No 5 Pž 1102/2018 from 16 May 2019

On 28 May 2019 the intervener's proxy received the judgement Pž 1102/2018 from 16 May 2019 made by the Commercial Court of Appeal No5, by which the appeals filed by the claimant and the intervener regarding the judgement P. 1327/2015 from 16 November 2017 made by the Commercial Court in Novi Sad were rejected, as well as the claimant and intervener's demand for the second instance procedure compensation. The intervener is not satisfied with the final and executive judgement, so he is reporting the audit within the legal deadline, thus contesting the final decision for all the legal reasons, and especially because of:

- misapplication of the substantive law, which is the audit reason from the Article 407, Paragraph 1, Point 4 of the Law on Civil Procedure

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- the reason from the Article 407, Paragraph 1, Point 3, i.e. the important breach of provision from the Article 374, Paragraph 1 of the Law on Civil Procedure, because the Court incorrectly applied the provision from the Article 396, Paragraph 1 of the Law on Civil Procedure.

The claimant suggests to the audit court to diversify the second instance judgement (Pž 1102/2018 from 16 May 2019 made by the Commercial Court of Appeal) by either adopting the appeal filed by the intervener and the claimant and adopting the claim as a whole, and to oblige the defendant to bear the costs of the audit process in the amount of the audit tax and the audit judgement in the total amount of 1,950,000 dinars and 90,000 dinars for the audit composition, as well as the accompanying costs regarding the first and second instance civil proceedings, or by setting aside the second instance judgement and returning it to retrial on appeal.

E X P L A N A T I O N

1. Timeleness of the audit.

The audit was made by the intervener within the legal deadline of 30 days from the date of reception of the second instance judgement.

2. Permissiveness of the audit

The audit was made for the legal reasons pursuant to the Article 407 of the Law on Civil Procedure. The property census required for an audit is fulfilled as well.

3. Merits of the audit

3.1. Description of the subject of the dispute, of the first and second instance judgements.

The subject of the dispute is the demand of the claimant for compensation of the damage - the damage that was made during 15-month-period from 1 December 2011 to 28 February 2013 on the basis of the lost profit relating business activities of the claimant's very bus station in the amount of 297,823,680.00 dinars with the statutory default interest starting from 1 June 2016 till the payoff, as well as the damage made during the 72-month-period from 1 March 2007 to 28 February 2013 on the basis of the lost profit caused by termination of passenger transport in the intercity and international traffic, termination of work of the service centre and termination of being official representative in selling EvoBus, Setra and Mercedes buses in the amount of 6,479,383,608.00 dinars with the statutory default interest starting from 1 June 2016 till the payoff.

By its first instance judgement the Court rejected the claim as a whole, stating two reasons. The first instance Court said that they accepted the attitude of the Supreme Court of Cassation from the audit judgement Prev. 58/2013 and Pzz. 1/2013 from 9 May 2013 and that the damage compensation to the claimant as unconscionable contractual party was exhausted for the period from 1 March 2007 to 1 December 2011 and that the right was exhausted for the later periods as well. Further, the first instance Court said that the damage compensation could not be materialized in future due to null and void contractual provision, because there was no legal basis for that, since nobody can exercise their future

rights on the bais of unconscionable and unauthorized contracting (null and void contractual obligation). The first instance Court founded their opinion on the thesis that only the claimant was unconscionable contractual party and that is contrary to the legal understanding of the abovementioned audit judgement.

The Commercial Court of Appeal stated in their second instance judgement that the first instance judgement was correct, but the reasons they stated were somewhat different from the ones stated by the first instance Court. Namely, the Commercial Court of Appeal stated that the claimant based his demand on the contract provision which the judgement P. 287/2013 from 26 March 2014 made by the Commercial Court of Appeal had defined as null and void. Besides, the second instance Court quoted the provisions from the Articles 104 and 108 of the Law on Obligations, and gave the legal interpretation of the way in which the abovementioned provisions of the Law on Obligations were applied in this very case. The second instance Court gave their opinion that the provision from the Article 104 of the Law on Obligations related establishment of the previous state of the contractual parties' property and that the rule from this provision did not relate to damage compensation or acquisition without foundation. The second instance Court also concluded that the issue of the damage compensation had been discussed in the lawsuit P. 4597/2010 at the Commercial Court in Novi Sad, outcome of which was making the judgement by which the claimant was to get the damage compensation in the amount of 307,800,000 dinars, in which way the claimant's property state was established in the same value as it had been before the contract conclusion, so that was the reason why the second instance Court rejected the claim for any (other) (damage) compensation.

The second instance Court stated that the claim reasons given by the claimant and intervener by which they contested the judgement Prev. 58/2013 made by the Supreme Court of Cassation were unallowed, but that they were also of no influence upon the second instance Court's different decision.

3.2. The reasons for the audit.

3.2.1. Misapplication of the substantive law

The first and second instance judgements are based on the legal attitude:

- that the claimant in the lawsuit P. 4597/2010 at the Commercial Court in Novi Sad outcome of which was making the judgement by which the claimant was to get the damage compensation in the amount of 307,800,000 dinars, **EXHAUSTED** the right to damage compensation (the first instance Court's attiude), i.e. that he established the state of his property in the same value as before the contract conclusion,
- that the claim for the damage compensation is based on the null and void contractual provision.

The first instance Court did not give the legal basis for their attitude that the judgement on the damage compensation in the amount of 307,800,000 dinars meant exhaustion of the claimant's right to the

damage compensation. In their explanation of the judgement the second instance Court had a similar attitude that the claimant was practically precluded from claiming the damage compensation in the form of the lost profit, because the damage was compensated in the case P. 4597/2010. The second instance Court did not give detailed explanation of their attitude. The presupposition for "exhaustion", i.e. preclusion in exercising of a right means that the claimant has that right (to the damage compensation), but that there is a circumstance regulated by the law which influences upon termination of that right. In the contested judgement the second instance Court referred to the provisions from the Articles 104 and 108 of the Law on Obligations which do not regulate "exhaustion", i.e. termination of the right to the damage compensation, so it is not clear based on which substantive-legal basis the second instance Court concluded that the claimant "exhausted" the right to the damage compensation. This is an independent and sufficient basis for adoption of the audit.

Referring to the attitudes from the explanation of some court decisions, even if they are the decisions made by the highest court instances, is not a valid source of law which the first and second instance courts can legally refer to (*a court decision is not source of law*), especially when either then or now there have not been bases in the law for such the attitudes. The claimant and the intervener do have the right to legal court decision, not only in formal but also in substantive sense. Mere authority of the court which has made decision is not sufficient, but the decision must be based on law. That is the criterion which makes difference between a legal and discretionary decision, i.e. the criterion based on which it can be decided if the claimant and intervened had **the right to fair trial**.

How did the Court conclude, without the strongpoint in the law, that the damage compensation assigned in the case P. 4597/2010 was sufficient (especially when there is not indentity between the claim in this court case and res judicata in the case P. 4597/2010), and that in this way his right to the damage compensation was exhausted? What is ***the criterion of sufficiency***, how did the Court determine it and which evidence produced was used as the basis for the decision? Although the Law on Obligations does not recognize the criterion of sufficiency (it recognizes the right to total damage compensation pursuant to the Articles 189 and 190 of the Law on Obligations), because the criterion of sufficiency itself means arbitrariness of the one who decides if something is sufficient or not, we are also going hereinafter to a more detailed explanation of the illegality of the impugned judgments.

It was undisputedly found out during the first instance proceedings that the damage compensation assigned in the case P. 4597/2010 related to the damage in the form of faded benefit **from business activities of the bus station** of the claimant for the period **from 1 March 2007 to 1 December 2011.**

As for the case P. 1327/15 the claim relates to:

- the damage compensation in the form of faded benefit **from business activities of the very bus station** of the claimant in the amount of 297,823,680 dinars with the statutory default interest starting from 1 June 2016 till the payoff f**or the period of 15 months from 1 December 2011 to 28 February 2013.**
- and compensation of the damage made **on the basis of the lost profit caused by termination of passenger transport in the intercity and international traffic, termination of work of the service centre and termination of being official representative in selling EvoBus, Setra and Mercedes buses in the amount of 6,479,383,608.00 dinars with the statutory default**

interest starting from 1 June 2016 till the payoff, occuring in the period of 72 months **from 1 March 2007 till 28 February 2013.**

This shows that the claim in this civil case is not identical to the civil case in the case P. 4597/2010, neither by the type of the faded benefit nor by the period of time it relates to. As for the case P. 4597/2010, the indemnified damage is only the damage relating business activities of the bus station and only for the period from **1 March 2007 to 1 December 2011,** while in this civil case the indemnified damage is the one occuring from business activities of the bus station for the following period – **from 1 December 2011 to 28 February 2013,** as well as the form of the damage caused by termination of passenger transport in the intercity and international traffic, termination of work of the service centre and termination of being official representative in selling EvoBus, Setra and Mercedes buses (in the period from1 March 2007. to 28 February 2013) which was in no case the subject of discussion and adjudication in the civil case P. 4597/2010. In that sense there is not sameness between the assigned damage compensation in the case P. 4597/2010 and the damage compensation demanded in this civil case. The opinion of the second instance Court that the claimant has exhausted his right to the damage compensation in the case P. 4597/2010 means that the claimant does not have right to, on the basis of the same harmful event for which the defendat is responsible, claim damage compensation for the same form of the faded benefits but for the following period in which the harmful consequences are arising, as well as that he does not have the right to the damage compensation for other forms of faded benefits which were not the subject of adjudication in the case P. 4597/2010? Where is the basis in the law for such a legal attitude of the first and second instance Courts?

There si the question if it is possible to limit the right of the damaged **relating the period of time and type of damage** to claim the damage compensation, because it can be concluded that it was the reason for the second instant Court's attitude relating **"exhaustion"** of the right to the damage compensation. The very term *exhaustion* is non-legal term, and neither the first nor the second instant Court justified it in details; they also did not state the substantive and legal basis they founded their attitude on, the attitude that the right on the damage compensation can be exhausted relating the period of time and extent of the damage compensation.

The closest legal term relating the legal consequences created by the second instance Court's use of the term "exhaustion" of a right is the term *preclusion*, which means loss of legal power to exercise some subjective right (the right to damage compensation, for example). However, if the damaged were to lose the right to the damage compensation and having in mind the general rule from the Article 154, paragraph 1 of the Law on Obligations about the obligation to compensate the damaged, an exception should be provided in the law which would relate to either time after which that right would expire, be lost or terminated, or to the form of the damage for which the damaged would not have the right to claim. Such an exception is not provided by the law. Besides, the first and second instance Courts incorrectly applied the substantive right because they did not apply at all the provision from the Article 154, Paragraph 1 of the Law on Obligations.

The provisions of the Law on obligations relating the damage compensation do not anticipate the possibility that, in case that there is the basis for the damage compensation and the cause of the damage, the damaged has the right to the damage compensation only till certain period of time and only for certain form of the damage. The cause of arising the damage and the extent of the defendant's

responsibility were defined in the civil proceedings P. 4597/2010. As for this civil proceedings, the cause of the damage is the same. The obligation from the civil proceedings P. 4597/2010 relates to only one form of the damage and only certain period of time. During the proceedings, the defendant did not reprimand that the cause of the damage had ceased. It was concluded on the basis of expertise that the harmful consequences arising from termination of the bus station functioning were lasting even after 1 December 2011 and till 28 February 2013, as well as that there was the damage for the same reason due to termination of passenger transport in the intercity and international traffic, termination of work of the service centre and termination of being official representative in selling EvoBus, Setra and Mercedes buses (in the period from 1 March 2007 to 28 February 2013. That is why there is a strong reason for asking: how is it possible that the claim for the damage compensation is unfounded on the basis of the same harmful event for the harmful consequences which were indisputably established?

The provisions of the Articles 189 and 190 of the Law on Obligations define that the parties suffering the damage have the right to compensation of both common and faded damages in the form of **the total damage** which is necessary in order to bring the claimant's financial situation back into the state in which it would have been if there had not been the harmful act. In this very case, if the defendant had not refused to regulate the bus traffic in the way predicted in the Article 5 of the Contract concluded on 8 May 2006, the claimant would have been doing his regular activities and generating the income from work of the bus station in the period from 1 December 2011 to 28 February 2013, the income from transport of the passengers in the intercity and international traffic, the income from work of the service centre and the income from being the representative in selling EvoBus, Setra and Mercedes buses in the period from 1 March 2007 to 28 February 2013. This part is also the one in which the substantive law was applied in a wrong way because the first instance and the second instance Courts did not state the law provisions on which they based their legal attitude that the right of the claimant to the damage compensation was exhausted after 1 December 2011, i.e. they did not apply the provisions of the Articles 189 and 190 of the Law on Obligations.

The legal attitude of the second instance Court relating application of the Articles 104 and 108 of the Law on Obligations is not legally based, because they did not explain in which way assignment of 307,800,000 dinars in the lawsuit P. 4597/2010 at the Commercial Curt in Novi Sad established the state of the claimant's property the same as it had been before the Contract conclusion, since that was by the Court's attitude the reason for rejecting any sort of demand for any (other) (damage) compensation. Through such a legal attitude there is unfounded mixing of the legal institutes of restitution as a legal consequence of nullity (according to the Article 104 of the Law on Obligations) and the legal institute of the damage compensation when a person is responsible for conclusion of a null and void contract (Article 108 of the Law on Obligations).

Restitution is a rule by which one party is ordered to give back to the other party the profit gained at the expense of the other party without the legal basis, and its aim is to establish the state of the property of the participant in the activity the same as it had been before arising of the consequences of the activity nullity. Each party gives back what it gave, which presupposes duality in giving. That is what application of the corrective justice principle consists of. It is not possible for one party to keep something, while the other one has the obligation to give something back. The exception is legally

regulated. In this very case, only the claimant had the givings in accordance with the contract, because he was the only one who fulfilled the contractual obligation to build a new bus station and a new service. He did everything at his expense and the expense of the intervener. The defendant did not have any kind of giving. In this regard it is impossible to apply the rule of restitution, because the claimant does not have the obligation to give back anything to the defendant. Besides, the claimant even cannot use the built facilities without fulfillment of the defendant's obligation to regulate the intercity bus traffic because, according to the contract, he can use the built facilities only for the basic activity – bus traffic. In this sense, the provision of the Article 104 of the Law on Obligations cannot be applied, either as a natural one or as financial restitution. The only possibility is to apply the right to the damage compensation from the Article 108 of the Law on Obligations and in that case all the rules relating damage compensation are to be applied (primarily the Article 154, as well as the Articles 189 and 190 of the Law on Obligations).

Unlike restitution, there is no return of the given in the case of the damage compensation, but there is only obligation of the pest to pay the entire damage to the damaged party. When the damage compensation is considered, it is not only the state of the damaged party's propery which had been present before the damage occurence to be protected, like in the case of the common damage compensation, but the damaged party also has the right to compensation of the faded benefit, i.e. faded enhancing of the property which would have happened in regular course of events if the harmful act had not taken place. The damaged party has the right to the damage compensation as if the pest had nor refused to fulfill the contractual obligation. The defendant pledged to permanently regulate the intercity bus traffic (not only till 1 December 2011) in order to provide conditions for the claimant to perform his basic activities – intercity and international bus traffic. In its legal nature, the defendant's obligation was permanent presation, so it is not possible to talk about some future right of the claimant, i.e. obligation of the defendant, which could occur after the contract conclusion. In that sense, there is absolutely no legal basis for the second instance Court's attitude relating the statements that the claimant does not have right to the damage compensation on the basis of the faded benefit demanded in this case because the adjudgement of 307,800,000 dinars as the damage compensation in the lawsuit P. 4597/2010 established to the claimant the state of his property the same one as it had been before the contract conclusion. How and on the basis of which evidential process did the Court make this conclusion?

The amount of 307,800,000 dinars assigned in the lawsuit P. 4597/2010 does not even relate to compensation of the actual damage if we talk about the state of the damaged party's property before the contract conclusion, but it relates to the faded benefit only for one form of damage and only for a shorter period of time. The level of groundlessness of the second instance Court's attitude that the adjudgement of 307,800,000 dinars puts the claimant's state of property in the state before conclusion of the contract is confirmed by the undeniable fact between the parties that, due to the defendant's acts, the claimant was not able to perform his business activities and to generate revenues from which he could settle the obligations towards the trustees, which eventually caused intitiating the bankruptcy procedure against the claimant. The assigned amount of 307,800,000 dinars was sufficient only for settlement of an insignificant part of the claimant's secured and bankruptcy trustees' deamands. The abovementioned legal attitude of the second instance Court does not have any basis in the evidence that can be found in the case documentation, and it has not been the subject of the evidential process. That

is why a question can be asked about the way in which the Court reached the abovementioned conclusion.

As for the attitude of the first and second instance Courts that the demand for the damage compensation is based on the null and void provision of the contract, the second instance Court did not at all assessed the element of the claim saying that the claimant's demand did not refer to the defendant's acts pursuant the Article 1 of the Contract from 8 May 2006, but that it referred to his obligation from the Article 5 of the Contract, which was not defined as null and void. In that sense, both the first and second instant Courts incorrectly referred to the judgement P. 287/2013 made on 26 March 2014 by the Commercial Court in Novi Sad.

The issue of nullity of the Contract concluded on 8 May 2006 was discussed in the audit judgement Prev. 58/2013 and Pzz.1/2013 made on 9 May 2013 by the Supreme Court of Cassation, which was followed by the judgement P. 287/2013 made on 26 March 2014 by the Commercial Court in Novi Sad. Another thing that can be found in the explanation of the audit judgements Prev. 58/2013 and Pzz.1/2013 from 9 May 2013 in the process of solving of the previous legal issue relating scope of the contractual obligations of the defendant for the damage compensation, was the question of validity of the Articlew 1 of the Contract from 8 May 2006 where it was said that the first provision of the contract was null and void because it established the monopolistic position of the claimant. However, it did not prevent the Supreme Court of Cassation from standing for the attitude that there was divided responsibility of the defendant and the claimant for the damage sufferred by the claimant (the defendant did not suffer any damage) due to conclusion of the contract in which the first article was null and void. The abovementioned audit judgement finally completed the litigation initiated by the claimant in the case P. 4597/2010 at the Commercial Court in Novi Sad which was used as the basis for defining the defendant's obligation to pay to the claimant the damage compensation in the amount of 307,800,000 dinars along with the associated default interest. That is why the folowing question can be asked: how could the Commercial Court of Appeal make a conclusion that there was not the defendant's responsibility arising from conclusion of the null provision of the contract in case, even if the claimants demand would have been based on the null provision of the contract?

The Commercial Court of Appeal accepted the attitude of the first instance Court that it was not possible to exercise **the future rights** based on malpractice and illegal contracting of the (null) contractual provision and that the demand could not rely on a contract relationship in which a provision of the contract was null. The second instance Court did not explain which future rights were concerned there, having in mind the fact that the defendant took the permanent obligation of regulating the bus traffic when signing the very contract, as well as that the defendant's obligation had the basis in their refusal to fullfill such obligation. Such an attitude is directly opposite to the rule from the Article 108 of the Law on Obligations, as well as to the rule on the entire damage compensation from the Articles 189 and 190 of the Law on Obligations. In this very case, the claim does not refer to exercise of the (future) rights. It neither refers to it on the basis of the null provision of the contract nor on the basis of the defendant's failure to fulfill the obligation pursuant to the Article 5 of the Contract, but it refers to compensation of the (entire-total) damage sufferred by the claimant either because the defendant as the local body of the authorities concluded the contract with the claimant the first provision of which is

null, either because the defendant refused to fulfill the contractual obligation from the Article 5 of the same Contract.

We are also pointing to different understanding of the Commercial Court of Appeal in the same litigation in relation to the legal importance of the judgement P. 287/2013 made on 26 March 2014 by the Commercial Court in Novi Sad. Namely, during the first deciding on the complaint to the first instance judgement, the Commercial Court of Appeal made the decision 9. Pž. 2012/14 from 30 July 2015 in which, among other things, they took into consideration existence of the judgement P. 287/13 made on 26 March 2014 by the Commercial Court in Novi Sad and they gave their opinion that the first instance judgement P. 856/13 made in this litigation on 3 December 2013 should be abolished and that the Court had the obligation in the repeated proceedings to consider all the presented evidence or, if they refused to consider the evidence, they had the obligation to explain the reasons for the refusal. In the repeated proceedings the Court considered all the presented evidence on the amount of the damage (that is something that is being processed only if there is the basis for the damage compensation), but they made the judgement P. 1327/15 on 16 November 2017 which was based on the same reasons as the judgement P. 856/13 from 3 December 2013 which had been originally abolished by the same second instance Court. The first instance and second instance Courts explained their decisions by saying that the claimant had not proved the basis for the damage existence, but a question can be asked why the Court allowed consideration of the evidence on the amount of the damage. Besides, how is it possible that the basis for the damage compensation from the very event was determined in effect in the case P. 4597/2010 at the Commercial Court in Novi Sad, and now that legal basis disappeared? What influenced upon the Court to change their legal attitude?

It can be concluded that the Commercial Court of Appeal gave two different legal understandings in the same litigation case regarding legal importance of the judgement P. 287/2013 made on 26 March 2014 by the Commercial Court in Novi Sad and by that act the Court called in question the right of the parties to rely on the legal attitude of this Court, which is ultimately violation of the right to fair trial. The right to fair trial was violated because the Court estimated behavior of the defendant as unlawful in one case and in the second case (this one) as lawful.

We are pointing to the fact that the Republic of Serbia is also a signatory of the European Convention on the Protection of Human Rights and Fundamental Freedoms and that it is its obligation to apply the legal standards from the judgement made by the European Court of Human Rights. In that sense, we are pointing to the fact that the legal attitude from the audit judgement Prev. 58/2013 and Pzz.1/2013 made on 29 May 2013 by the Supreme Court of Cassation in the part regarding the scope of responsibility of the defendant is in contradiction with the legal attitude of the European Court of Human Rights found in the case ***GLADYSHEVA vs RUSSIA*** (Remonstrance No.7097/10, the judgement made by the European Court of Human Rights in Strasbourg on 6 December 2011). The abovementioned judgement made by the European Court of Human Rights has become binding for all the countries signatories of the European Convention on Fundamental Freedoms and Human Rights. This judgement clearly states that the conscientious persons (*bona fide*) are protected against the legal consequences of the state, local authority or state company's error, including the case when a conscientious person has acquired something on the basis of the null and void contract concluded with a state, local authority or state company. To simplify the matter, if a contract is concluded by a state,

local authority or state company (in this very case the defendant as a city authority body in Novi Sad), they cannot refer to nullity of some provisions or the contract they concluded as a whole. As for all levels of authority, a state is the pillar of the legal security, the one which guarantees legality and the rule of law, so it is consequently legally unsustainable for it to conclude the contracts which are either partially or completely null and void. Even if that happens, the other contractual party and the third parties cannot bear the harmful consequences. **For this reason we think that there is the exclusive responsibility of the defendant for conclusion of the first article of the underlying contract.** The statement from the second instance judgement that this part of the intervener's assertion is illegal would mean that the second instance Court does not have the obligation to apply the legal attitudes of the Auropean Court of Human Rights, which is legally unacceptable.

The first and second instance Courts did not take into consideration even the intervener's assertions that the claimant's claim was not based only on the damage compensation arising from the defendant's responsibility for conclusion of a contract from 8 May 2006 the first provision of which was null, but that the claim was founded on the elements from the Article 5 of the abovementioned Contract for which the Court did not find that it was null. In this very case, the Supreme Court of Cassation in their judgement Prev. 58/2013 and Pzz. 1/2013 from 9 May 2013, in the part of deciding on the previous issue of scope of the damage compensation by the defendant, had the attitude that the first provision of the Contract concluded on 8 May 2006 was null because it enabled monopolistic position to the claimant. After that, the Commercial Court in Novi Sad made the decision P. 287/13 on 26 March 2014 by which they decided that the abovementioned provision of the Contract concluded on 8 May 2006 was null. Such an attitude of the Courts influences exclusively upon the scope of the damage compensation which the claimant has the right to demand from the defendant, having in mind the legal attitude of the Supreme Court of Cassation that both parties were equally unconscious while concluding the underlying contract (for a moment we will neglect the legal attitude of the European Court of Human Rights). It was in this respect that the Supreme Court of Cassation applied the rule from the Article 108 of the Law on Obligations.

Unlike the null first provision of the Contract from 8 May 2006, the provision of the Article 5 anticipates obligation of the defendant to regulate the bus traffic in such a way that the route lines of the buses in the intercity and international traffic as well as the bus stops are arranged in accordance with the new location (of the claimant), and all that on the basis and reccommendations from the Analysis of the public transport of the passengers prepared by the Public Company *Urbanizam*, the Institute for Urban Planning in Novi Sad. In accordance with the provision, the defendant had the contractual obligation to regulate the issue of the routes and bus stops for the bus traffic in intercity traffic in the way which will provide conditions for the claimant to perform his principal business activities.

Such an obligation of the defendant arose not only from the Article 5 of the underlying Contract, but also on the basis of the changes and amendments to the General Plan of the City of Novi Sad till 2021 (published in the Official Journal of the City of Novi Sad No. 10 from 14 April 2006). The obligation of the defendant from the Article 5 of the underlying Contract, as well as from the changes and amendments to the General Plan of the City of Novi Sad till 2021 to regulate the bus traffic in the way which will provide conditions for the claimant to perform his principal business activities did not

necessarily mean creation of the monopolistic position for the claimant. The Public City Transport Company *Novi Sad* could either stay and continue its business activities on the already existing location or, in accordance with the General Plan of the City of Novi Sad till 2021 changed by the founder – here the defendant (at own expense) it can be removed to other location, in the same time providing the conditions for the claimant to do his business activities in a normal way. There was not even one provision in the Contract from 8 May 2006 or in the amended General Plan of the City of Novi Sad till 2021 which planned the obligation of termination of work of The Public City Transport Company *Novi Sad*. By execution of obligation from the Article 5 of the Contract from 8 May 2006 the defendant would have fulfilled his contractual obligation, without creating of monopolistic position for the claimant. In that way, the defendant would have also enabled competitive business of the claimant and The Public City Transport Company *Novi Sad*. Contrary interpretation of the provision from the Article 5 of the underlying Contract is not only contrary to the basic rule of interpretation of the contract ***in favorem negotii***, but it would also lead to maintaining of monopolistic position and this time it would not be the claimant who would have the monopolistic position but The Public City Transport Company *Novi Sad* which is owned by the defendant.

Correct application of the provision from the Article 5 of the underlying Contract is also important relating the scope of the obligations of the defendant for the damage compensation, because in that case the defendant would be the only one who is responsible for the caused damage.

We think that, as far as this case is concerned, there is an exclusive responsibility of the defendant for non-execution of the legally valid provision of the Article 5 of the Contract from 8 May 2006.

On the basis of the reasons stated by the first instance and second instance Courts for rejecting the claim for the damage compensation, it can be concluded that the Courts did not apply the provisions of the substantive law the intervener had pointed to in his complaint (Articles 154, 189 and 190 on the Law on Obligations), that they incorrectly applied the provisions of the Articles 104 and 108 of the Law on Obligations, and that they did not say on which legal basis they founded their attitude that the claimant exhausted his right to the damage compensation. It is also still unclear why the first and second instance Courts interpreted the underlying Contract and apply the respective provisions of the Law on Obligations in the way contrary to basic principles of contemporary European contractual law (which can be found in the judgements made by the European Court of Human Rights), and all that in order to exculpate the defendant from the responsibility for the damage.

When deciding on responsibility for the damage compensation, the courts can either apply the principle of corrective justice and determine responsibility of the pest for the damage inflicted on the damaged party or apply the principle of distributive justice in which case the damage is not be paid by the pest but by somebody else (an insurance company, for example). However, it is legally impossible that nobody is responsible for the damage occurred, and that is what the Court decided in this case.

At this place we are pointing to the fact that even in the second half of the 19th century the famous legal theorist Henry Sumner Maine (together with Friedrich Carl von Savigny - the best known theorist of that time) in the book *Ancient Law,* 1861, emphasized that the ancient law changed into progressive law when the rights and obligations of the subject of the law stopped to be defined in accordance with

their status (affiliation to the nobility, classes, families) but in accordance with the contract which they concluded as free and equal citizens (the famous maxim "***From status to contract***"). The question is if the claimant has been denied the right to the damage compensation only because of the defendant's status, because a similar application of the substantive law has not taken place in the judicial practice before this case.

Because of all the facts stated so far, the second instance judgement was based on incorrect application of the substantive law.

3.2.2. The important breach of the provisions of the litigation procedure by the second instance Court.

The intervener made the complaint written on 13 pages against the first instance judgement P. 1327/2015 made on 16 November 2017 by the Commercial Court in Novi Sad. Apart from the ascertainment that the claimant and intervener made the complaint for all the legal reasons, the second instance judgement did not contain the explanation of the complaint reasons stated by the intervener, why the reasons were unfounded and, especially, why was the intervener's referring to the provisions of the substantive law he had referred to unfounded. Instead, the second instance judgement mostly repeated the statements given in the first instance judgement on the second half of the third page and first half of the fourth page of the second instance judgement. This means that the Court needed only less than a page to give their legal attitude about the reasons why the claim assertions written on 13 pages were unfounded? In that sense, there is not even one estimation of the claim assertions in the explanation of the second instance judgement (the second instance Court did not even say which of the claim assertions were important so that their being unfounded could be especially explained), although it was obligatory pursuant to the Article 396, Paragraph 1 of the Law on Civil Procedure. This is an important violence of the civil procedure provisions and that is the audit reason from the Article 407, Paragraph 1, Point 3 of the Law on Civil Procedure.

Namely, the reasons stated in the intervener's claim were the ones saying that the claimant's claim was based not only on the defendant's responsibility for conclusion of the first Article of the Contract from 8 May 2006 which was declared void, but also on failure to fulfill the contractual provision of the defendant from theArticle 5 of the same Contract, which is legally valid. It was especially pointed in the claim to the reasons for unconscientiousness of the defendant (acting contrary to the changes and amendments to the General Plan of the City of Novi Sad till 2021, the failure to get legal opinion of the competent Attorney General about legal validity of all contractual provisions prior to the Contract conclusion, the fact that the defendant as a holder of public authority called upon nullity fo the Contract they had concluded (***Nemo auditur propriam turpitudinem allegans***). It was also stated in the claim that neither first instance judgement contained expalantion from which it could be seen that the Court had listened to the claimant and intervener's arguments with the necessary attention and considered the evidence produced (the Court ordered expertise but did not take in consideration the expertise results).

There is an attitude in practice of the European Court of Human Rights that the explained court decision protects the individuals against arbitrariness, i.e. the decision made by a domestic court should contain the reasons which can respond to the essential factual and legal aspects – both substantial and procedural- of the arguments of the parties to the dispute (the case ***Ruiz Torija vs. Spain***). Essentially,

the right to an explained court decision in the abovementioned sense is also part of the obligation to consider the important assertions pursuant to the Article 396, Paragraph 1 of the Law on Civil Procedure. Since neither the first nor second instance Court's judgement contain the important allegations, firstly relating the reasons which are the basis for the demand for the damage compensation and then the complaint to the first instance judgement, the audit reason from the Article 407, Paragraph 1, point 3 of the Law on Civil procedure is satisfied.

Besides, the first and second instance judgements have not explained why the assertions given by the intervener that the Contract (except in its first provisons) is not contrary to the public order, compulsory regulations and good business practices in accordance with the Article 5 of the Contract, and that the Contract is not only far from being null, but it is socially desirable. The intervener also pointed to the fact that, based on the Contract from 8 May 2006, the claimant had the obligation to invest his own assets as well as the assets of the majority owner (here intervener), and that such investments are welcome and socially acceptable and they are in some cases even stimulated by the state. On the basis of such investments, the conditions are provided for additional employment of workers and the business activities and quality of the bus transport are improved. Such an investment would also contribute to solving of the urban and environmental problems of the City of Novi Sad. All these aims were planned to be achieved by the underlying Contract, and they were defined by the amendments to the General Plan of the City of Novi Sad till 2021. It is clear that the underlying Contract is not null and void in that part.

The intervener has pointed to the fact that this Contract in its essence has the elements of the public-private partnership (Article 7, Paragraph 7 of the Law on Public-private Partnership and Concessions defines that the public-private partnership means long-lasting cooperation between a public and a private partner in order to provide financing, building, management or maintenance of infrastructure and other facilities of public importance and to provide services of public importance, which can be either contractual or institutional). The elements of public-private partnership do exist because the contractual parties are the private (ATP VOJVODINA) and public partner (The City of Novi Sad), and the private partner has the obligation to build a new bus station with his own funds, in order to achieve the aims the City of Novi Sad defined through the amendments to the General Plan of the City of Novi Sad till 2021 (relocation of the suburban terminal from Riblja pijaca to the cathegorized lot 3351 KO Novi Sad 1, along with solving the environmental problem in the City centre, the urban problem, the traffic problem of organizing bus transportation etc.). **The issue that differs this very Contract from the contract on public-private partnership is that the public partner in the Contract did not take over the obligation to transfer some actual right to the private partner, and the public partner also did not take over the obligation to pay the private partner some compensation from the budget; the public partner also did not give the concession right to the private partner to exploit the built facility. THE PUBLIC PARTNER'S OBLIGATION WAS ONLY WITHIN REGULATION OF THE INTERCITY AND INTERNATIONAL TRAFFIC IN THE WAY WHICH WOULD ENABLE REGULAR FUNCTIONING OF THE NEWLY BUILT BUS STATION.** It was not only the defendant's obligation towards the claimant, but it was the obligation towards the citizens of Novi Sad as well.

There has never been a city which has concluded more favourable contract than the City of Novi Sad. With no budget funds – either fold or of future budget payments, the claimant built in that time (and now as well) the most modern bus station. The fact that the investor, here intervener, invested his assets, employed additional number of 300 workers, renewed the bus fleet and guaranteed with his private property fulfillment of the claimant's credit obligations towards banks, additionally clarifies if the underlying Contract was, from the point of view of an objective observer, harmful or socially desirable.

What is the message sent by the Serbian judiciary to all the investors, the message that it is possible that even such a contract does not have legal protection, and that the defendant does not have any kind of responsibility for not fulfilling the contractual obligation to regulate the intercity and international traffic in such a way that the claimant could regularly work and generate income from performing the regular activities, but also for not fulfilling the obligation which they would have to fulfil in regular situation even without concluding the Contract (having in mind the amended General Plan of the City of Novi Sad till 2021)?

Even at the beginning of the 20th century, Serbian legal thought through one of its most prominent legal theorists stated that the legal attitudes of the judges has very important influence upon public morality (Prof. Živojin Perić: *Uticaj sudije na javni moral*, posebno izdanje Državna štamparije Kraljevine Jugoslavije, Beograd, 1907) [Prof. Živojin Perić: Influence of a Judge upon Public Morality, special edition published by the State Printing Office of the Kingdom of Yugoslavia, Belgrade, 1907]. Prof. Perić pointed to the role of a court in application and interpretation of the unclear legal provisions an changing understanding of a society about morality through the time, as well as to influence of the courts in performing a judge function upon the public morality (almost seventy years later Ronald Dworkin was writing about a similar role of judges in interpretation of the unclear provisions – Ronald Dworkin, Hard cases, Harvard Law Review, Vol. 88, No. 6 (Apr., 1975), 1057-1109), However, we think that the influence of judges upon public morality when interpreting clear legal provisions and their consistent implementation is even more important. The claimant and the intervener agreed with the defendant to invest their own assets, the intervener took over the security for the claimant's credit obligations on the basis of the concluded Contract, and when the claimant fulfilled all his obligations the defendant – referring to nullity, decided to abandon the obligation to fulfill their obligations.

The legal theory is almost united about the attitude that a contract is based on morality obligation to fulfill the obligation (Aristotle, Nicomachean Ethics, trans. Reeve C. D. C, Hackett Publishing, 2014, 35-38 (1110a-1111b), 80-81 (1131a), St. Thomas Aquinas, The Summa Theologica, part II, London, 1922, 104-113 (q.88), Grotius H, Rights of war and peace. books 1-3 (3 Vol. Set), Book III, Liberty Fund Inc. 2005, 1187, Gordley J, The Philosophical origins of modern contract doctrine, Clarendon Press, 2011, David Hume, A Treatise of Human Nature, LA. ed. Selby-Bigge, Oxford: The Clarendon Press, 1960 (reprinted from 1888.), 516-525, Kant I, The Philosophy of law, An Exposition of fundamental principles of jurisprudence, and the science of right, Edinburgh, 1887, Kant I, Practical philosophy, Cambridge University Press, 1999, 61-89, 384-385, 422-426, Cohen M.R, The Basis of contract, Harvard Law Review, vol. 46, 1933, 571-575, Raz, J. Promises and obligations, Law, morality and society, Hacker P.M.S. & J. Raz ed. Oxford University Press, 1977, 210-28, Raz J, Voluntary obligations and normative powers, Normativity and norms, Critical perspectives on Kelsenian themes, ed. Paulson S.L, Paulson B.L, Oxford University Press, 1988, 458, Raz J, Is there a

reason to keep a promise, ed. Klass G, Letsas G, Saprai P, Oxford University Press, 2014, 58-77, Fried C, Contract as promise, A Theory of contractual obligation, Harvard University Press, 1981, Fried C, Contract as promise, thirty years on, Suffolk University Law Review, Vol. 45, 2012, 961-978, Scanlon T.M, What we owe to each other, The Belknap Presss, Harvard University Press, 2000, Scanlon T.M, Promises and contracts, The Theory of contract law, new essays, ed. Benson P, Cambridge University Press, 2001, 86-117, Gordley J, The Moral foundation of private law, The American Journal of Jurisprudence, Vol. 47, 2002, 1-23, Penner J.E, Voluntary obligations and the scope of the law of contract, Legal Theory, Vol. 2. 1996, 325-357, Bix B.H, Theories of contract law and enforcing promissory morality: comments on Charles Fried, Suffolk University Law Review, Vol. 45, 2012, 719-734, Searle J.R, Speech acts, An Essay in the philosophy of language, Cambridge University Press, 2011, 56-62 translation in to the Serbian language, refer to *Serl Đž, Govorni činovi, Ogled iz filozofije jezika*, translated by Đukić M, Nolit, Beograd, 1991, Goetz C.J, Scott R.E, Enforcing promises: An Examination of the basis of contract, The Yale Law Journal, Vol. 89, 1980, 1261-1322, Coleman J.L, Risks and wrongs, Cambridge University Press 1992.

Thatcher O.J, The Library of original sources, The Ideas that have influenced civilization, in the original documents, translated, vol. 3. The Roman world, University Research Extension Co. Milwaukee, 1907, 192-193, mentioned the example when Hannibal, in the second Punic War, captured 8,000 Roman soldiers after the Battle of Khan, and then chose 10 whom he, after swearing to their general that they would come back, sent back to Rome to seek a ransom of 3 mines for each prisoner. All 10 legionaries swore to come back, while one of them found an excuse not to come back because he allegedly had forgotten something, so he thought that he held the oath and fulfilled the obligation. The Romans rejected the offer, 9 legionnaires voluntarily returned to Hannibal (although they knew that they would be killed), and the tenth Roman was shackled and sent back to Hanibal in chains.

Not only the legal order, but morality of a society as well were and are based on the given word, both at the beginning of the civilization and nowadays, to fulfill an obligation. One party could take the obligation only if they could rely on the fact that the other party would fulfill their obligation (it is known in the theory of the contractual law as *expectation interest*). That is the basis – foundation of the contractual law which the state protects by means of sanction – obligation of the one who violates their obligation to compensate the damage. That is also the basis of the principle of conscientiousness and honesty in establishing and exercising of rights and obligations (чл. 12. ЗОО).

It is indisputable that the defendant gave up his duty only when it was clear that it would cause damage to the claimant and the intervener. In that sense the decision made by the court in this lawsuit is important, not only for solving of the contentious relationship between the claimant and the defendant, not only for the outcome of the other lawsuit conducted by the intervener against the defendant for the damage compensation (which is the audit case **Prev. 1980/2019**), but also for a much more important question: will the obligation to fulfill the contract depend on the party the obligations relates to?

According to so far shown understanding of the courts, the defendant has limited responsibility for the damage occurred and they do not have the obligation to fulfill the contractual obligation which obviously is not null and void. According to one attitude of the court, the defendant has shared responsibility for the damage occurred while, according to the other attitude, the defendant has no responsibility for the same harmful event. The intervener as the ultimate investor as well as the

guarantee for the claimant's obligations towards the trustees, who believed that the contract the claimant concluded with the state could not be null and void, i.e. he believed that the claimant and the intervener could not suffer harmful consequences due to possible nullity of a part of the contract and failure of the defendant to fulfill the obligations from the rest of the contract, experienced exactly the thing which in no way could happen in a legal state. His investment failed because it was impossible for him to perform his business and make it possible for the claimant to make revenues, along with simultaneous calling of the claimant's trustees who also believed in legal validity of the contract concluded with the defendant as a local body of the authorities. Rejecting of the demand towards the defendant to compensate the damage to the claimant is an additional reason for the defendant's obligation to compensate the entire damage to the intervener as a victim. A bankruptcy procedure was started against the claimant along with parallel burdening of the intervener's property for the claimant's obligations. The intervener now has neither the invested money nor his own property. It is legally impossible that the damage does exist, but that the defendant is not responsible. It is also legally impossible that neither the claimant nor the intervener has the right to the damage compensation.

That is why it is extremelly important for the Supreme Court of Cassation as the highest and most prominent court, to specially give their opinion on all the audit reasons and to base the judgement on the legal provisions, but not on the in advance formed legal attitudes which have their stronhold neither in law nor in the legal theory.

4. Incorrect decision on the procedure expenses.

Since the court incorrectly decided on the claim demand. i.e claim, they in the same way made incorrect decision on the first instance and second instance courts' procedure expenses.

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The Court once already abolished the first instance judgement in this legal case, giving the order about the way in which the first instance Court should eliminate the mistakes made in the procedure, about the way in which they should correctly and completely determine all the relevant facts in order to correctly apply the substantive law. In the intervener's opinion, the first instance Court did not act in accordance with the second instance Court's order, and the very second instance Court departed from the contested decision from their order, which resulted in making a wrong second instance judgement. Because of all the abovementioned facts, we propose to the Supreme Court of Cassation to either change the contested judgement as a whole and to adopt the tuition as a whole, or to abolish the second instance judgement and return it to the second instance Court to retrial.

Belgrade, 24 June 2019 The Intervener's Proxy