

**‘NO PAIN, NO GAIN’ – A COMPARATIVE ANALYSIS OF AUSTRIAN
AND LOUISIANA CONTRACT LAW CONCERNING THE
CORRELATION BETWEEN RISK-TAKING AND IRRELEVANCE
OF ORIGINAL AND CONTINUING LAESIO ENORMIS**

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Abstract: For all contracts, the risk component is either the initial lack or the subsequent disruption of the value balance of services. Determining the conditions under which the value of the service and the consideration at the time of the contract’s conclusion (as a matter of invalidity) or at the time of the performance (as a matter of breach of contract) can be in proper balance may be both a legislative and an enforcement issue. If the band, within or around which the difference between the two values is not considered to be legally undesirable, is defined by the legislator, there is no discretion left to the application of the law. However, in the case of a generalised rule, i.e., where the legislator does not define disproportionality in terms of a specific ratio or range of values, it is at the discretion of the jurisdiction to decide on the question of proportionality. The rules of invalidity and of breach of contract as traffic safety criteria are expressly excluded by law for certain types of contracts, while in other cases, the law expressly authorises the parties to exclude these guarantee rules for their legal relationship by their commercial will, since their interests are precisely directed towards a higher degree of risk-taking. Where these rights are not based on law, the parties’ contractual intention must include the assumption of these rights. In the continental-rooted civil codes of the US-State of Louisiana, the problem is based on a body of law being fairly similar to that of Austria: Even the wording of the codes’ provisions is somehow identical. At the same time, it is remarkable that, compared to this legal environment, judicial thinking in litigation before the courts of the highest instances greatly differs.

Keywords: *laesio enormis, contractual risks, General Civil Code of Austria, Louisiana Civil Code, Sale of Hope*

‘ὄρα, πόνου τοι χωρὶς οὐδὲν εὐτυχεῖ’
Sophocles’ Electra (line 945)

1. INTRODUCTION: A BRIEF EUROPEAN OVERVIEW

1. In the 5th century BC, according to the motto of this article, Sophocles’ Electra guides Chrysothemis by telling him “Remember, nothing succeeds without pain”.¹ Even much earlier, the contemporary of Homer, Hesiod shows us an eternal truth in the 8th/7th century BC by saying in his Works and Days: ‘[289] τῆς δ’ Ἀρετῆς ἰδρῶτα θεοὶ προπάρειθεν ἔθικαν [290] ἀθάνατοι· μακρὸς δὲ καὶ ὄρθιος οἴμος ἐς αὐτήν [291] καὶ τρηχὺς τὸ πρῶτον’ — meaning “but in front of Excellence the immortal gods have set sweat, and the path to her is long and steep and rough at first”². The Roman Stoic, Seneca the Younger tells in the 1st century AD, in his tragedy, *Hercules furens* (437), in a dialogue between Lycus and Megara, by the words of the latter that ‘*non est ad astra mollis e terris via*’³, i.e., ‘it is not a soft path from earth to stars’. In more popular terms: ‘*per aspera ad astra*’ — ‘through the rough to the stars’. The ancient predecessors of dignified thought have then survived in 17th-century English poetry as well. In his two lines poem “No Pains, No Gains”, Robert Herrick rhymes ‘*If little labour, little are our gains: Man’s fortunes are according to his pains*’.⁴

‘Κόρων γάρ, ὡς φασι, καταγόντων σαγήνην, / καὶ ξένων ἐκ Μιλήτου πριαμένων τὸν βόλον οὐπω / φανερόν ὄντα, χρυσοῦς ἐφάνη τρίπους ἐλκόμενος (...)’ — tells us, Plutarch in his Parallel Lives at Solon’s Biography (IV, 2sq), according to which: ‘On one occasion, when some fishermen were casting their nets on the island of Kos, visitors from Miletus were on the island and bought unseen their catch in advance: But a golden tripod swam into the net.’ The legal issue was solved, as Plutarch narrates the story further, in a very ‘Greek manner’. Namely, the three-legged golden vessel went round and round among the Seven Sages of Greece, until at the end it was returned to Thales, and then it was taken from Miletus to Thebes and offered to Apollo.⁵ Even these days, disputes are all the same. In any case, the way, how these are settled, is even more sophisticated, although the past of this method is just as deep as a well.

2. The question of risks of unforeseen advantages and disadvantages around a contractual relationship is one of the oldest and longest analysed problems in

¹ Greek text of the motto, and its translation see Sophocles’ (2020) *Electra*. Commentary by Roisman, H. M., Oxford Greek and Latin College Commentaries. Oxford: Oxford University Press, p. 149.

² Hesiod (2018). ‘Works and Days’. In: Most, G. W. (ed.). *Theogony. Works and Days. Testimonia*. Revised ed. Cambridge, Mass: Harvard University Press, pp. 110–111.

³ Fitch, J. G. (eds.) (1987). *Seneca’s Hercules Furens: A Critical Text with Introduction and Commentary*. Ithaca and London: Cornell University Press, p. 81.

⁴ Pollard, A. (eds.) (1898). *Robert Herrick, The Hesperides & Noble Numbers*. Vol. II. Revised ed. London and New York: Lawrence & Bullen, p. 66.

⁵ Perrin, B. (eds.) (1914). *Plutarch, The Parallel Lives*. Vol. I. Cambridge, Mass and London: Loeb Classical Library Edition, pp. 412–413.

contract law. For all contracts, a key component of risk is either the initial lack or the subsequent disruption of the value of performances undertaken concerning each other. Determining the conditions under which the value of performance and consideration are being in or out of the proper balance either at the time of the conclusion of a contract or at the time of performance can be both a legislative and an applicatory issue. If the band, within what or around which the difference between the two values is not considered to be legally undesirable, is defined by the legislator, there is no or there is only a minor discretion left to the application of the law. However, in the case of a generalised rule, where the legislator — on the forerunner pattern of the Glossators (Zimmermann, 1996, p. 259 fn 154) — does not define the disproportionality in terms of a specific ratio or of a range of values, it is at the discretion of the jurisdiction to decide on the question of balance or proportionality.

The proportionality of value of performances undertaken regarding each other can be examined at two relevant periods: on the one hand, at the time of the conclusion of the contract, in which case the issue is examined in the context of the invalidity of the contract, or, on the other hand, at the time of performance, in which case the problem falls within the scope of the breach of contract.

As guarantees of safety of traffic and trade, the rules of invalidity and breach of contract are either expressly excluded by law for certain types of contracts, such as aleatory contracts or the so-called sale of hope, or, in other cases, the law expressly authorises the parties to exclude these guarantee-rules by their commercial will for the very legal relationship thereof, since their interests are precisely directed towards a higher degree of risk-taking (see e.g. *pactum de non praestanda evictione*). (Cf. Finkenauer, 2010, pp. 70–71 and fnn. therein)

Where the right for warranty against legal and material deficiencies of the thing sold and the right to avoid a contract on the ground of lesion are not based on law, the contractual intention of the parties must include the assumption of these rights, or without such expressed intention, these rules, without which the contractual risks increase, will not be a part of the contract.⁶ In the background, there can stay the hope for, or the expectation of higher profit associated with a higher range of risk-taking.

⁶ Regarding the right of retroactive termination (cancellation) of the contract, this was the case, for example, in Rome before Diocletian (284–305). The sale could not be cancelled either on the grounds that the buyer paid twice the actual market value or on the grounds that the seller did not receive half of it. While bargaining, even ‘tricking’ each other, according to Paul’s edict-commentary (Paul. D. 19,2,22,3: “*invicem se circumscribere*”), was expressly permitted. See more detailed recently Jusztinger, 2016.

A general right to challenge (both upwards and downwards), covering all types of performances and that of contracts, will only be the result of canon law a millennium later. The development of the general warranty for hidden defects in the purchase of goods, which applies to all kinds of goods, also took a good thousand years in ancient Rome. According to a commentary by Ulpianus, the warranty for latent defects was introduced by the *aediles curules* in their edicts by the second century BC, but only in a very limited range (e.g. for livestock sold in the market) and only for certain types of defects. See Jakab, 2011; Jakab, 1993, p. 221.

3. In European systems of private law, the applicability of the rules of warranty and lesion can be excluded in many ways, such as *a*) through the laws upon special nominated aleatory contracts concluded by the parties, *b*) by the parties' intention for transactions that are not specifically aleatory, *c*) by explicit ancillary agreements, *d*) in an implied way through concluding a peculiar type of contract, or *e*) by standard contract terms.

In aleatory (risky) contracts (or contracts of fortune), the complex doctrine of which was first developed by the Authority of Law of Nature, *Christian Wolff* (1679–1754), the right of action on the grounds of warranty and lesion is expressly excluded by law by *natura contractus*. (Wolff, 1745, pp. 189–340) For example, in Italian civil law, the possibility of challenge in the event of a serious disturbance of the balance of the value of performance and consideration (*eccessiva onerosità*) can be excluded by the will of the parties (Art. 1469, Codice Civile), while, in the case of aleatory transactions, Art. 1448 excludes it: '*Non possono essere rescissi per causa di lesione i contratti aleatory.*' In many cases, the laws upon specific non-aleatory agreements exclude or limit liability, e.g., in the case of inheritance purchase (*Erbschafts Kauf*). [Cf. Art. 2376(1)(2) BGB]

The new Hungarian Civil Code says that 'If, at the time of the conclusion of the contract, the difference between the value of service and the consideration due — without either party having the intention of making a gratuitous grant — is grossly unfair, the injured party shall be allowed to avoid the contract. The contract shall not be avoided by the party who knew or could be expected to have known the gross disparity in value, or if he assumed the risk thereof [Art. 6:98 (1) HCC]. The parties may exclude the right of avoidance provided for in paragraph 1, apart from contracts that involve a consumer and a business party.'

In general, i.e., also for transactions that are not specifically aleatory, some civil codes allow for the exclusion of these rights by the parties' intention as well. In German private law, in Article 476⁷ of the German Civil Code (hereinafter BGB), which had remained unchanged until *Schuldrechtsmodernisierung* in 2002, and the role of which was taken over by Article 444⁸ (last amended in 2004), creates the

It was only about 7-8 centuries later that Justinian extended the liability to all sorts of things sold and to all kinds of hidden defects. Moreover, given the specific ancient Roman model of property acquisition, it is not surprising that the modern legal warranty for eviction never developed in ancient Rome, even in Justinian law, culminating only in the recovery of a third party's claim (*evictio*) for the goods sold. The Digest left namely unchanged the commentary of the Paulian edict (see D. 19,4,1*pr*), according to which the seller was not obliged to transfer the property itself. Cf. Zimmermann, 1996, pp. 278–279.

⁷ „Eine Vereinbarung, durch welche die Verpflichtung des Verkäufers zur Gewährleistung wegen Mängel der Sache erlassen oder beschränkt wird, ist nichtig, wenn der Verkäufer den Mangel arglistig verschweigt.“ [In effect from 1st Jan. 1900 to 1st Jan. 2002]

⁸ „Auf eine Vereinbarung, durch welche die Rechte des Käufers wegen eines Mangels ausgeschlossen oder beschränkt werden, kann sich der Verkäufer nicht berufen, soweit er den Mangel arglistig verschwiegen oder eine Garantie für die Beschaffenheit der Sache übernommen hat.“ [In effect from 8th Dec. 2004 on.]

possibility of excluding and limiting the warranty based on the parties' intention in the transaction, but this agreement cannot be invoked by the seller if he knew of a legal or material defect in the goods and fraudulently concealed it from the buyer (or assumed a warranty). Exclusion of liability can also be implemented by an explicit ancillary agreement⁹, and through standard contract terms (Walter, 1987, pp. 222–227) as well.

However, in some cases, the exclusion of warranty can be, even in German private law, merely implied (Medicus, 1987, pp. 380–381; Walter, 1987, p. 223 fn. 538), like in the case of the purchase of fungible goods in a lump sum (*Pauschalkauf*), or the non-codified sale of hope (*Hoffnungskauf*), or the sale for a “friendship price” (*Verkauf zum Freundschaftspreis*).

In French private law, for example, the rule could have survived as a simple legal proverb, i.e., without any codified legal regulation. The adage or doctrine — the codified grounds of which has remained unaffected also by the October 2016 reform of the Code Civil's *droit des obligations* — links the rules of aleatory contracts (*contrats aléatoires*) and the rule of avoidance for lesion: ‘*aléa chasse la lesion*’, i.e. ‘risk triggers lesion’. The adage is to be interpreted as ‘the parties’ intention for concluding an aleatory contract implicitly excludes the right to claim for cancellation on the ground of lesion’. There is, therefore, no way to challenge the contract, as the law can support such a claim neither for psychological reasons (i.e. ‘whoever takes a risk must expect to lose’) nor for mathematical considerations (scil., ‘the value of the risky service is uncertain’). (Klein, 1979, pp. 13–40; Roland and Boyer, 1986, pp. 1103–1104)

4. In the continental-rooted Civil Code of the State of Louisiana, the problem is based on a body of law, which is fairly similar to the General Civil Code of Austria (hereinafter: ABGB). Even the wording of these Codes’ relevant provisions is sometimes identical. In any case, this is somehow not surprising, since the private law of Louisiana, through the French code civil and the thorough works of Domat and Pothier and some Spanish Jesuits as well, was based on natural law, just as the ABGB is classified as a ‘*naturrechtliches Gesetzbuch*.’

At the same time, it is remarkable that in these two states, compared to the almost identical legal environment, the methodological thinking in litigation greatly differs before the courts of higher instances. This paper investigates this very issue within the European and the US-American fields of the Continental framework of private law.

⁹ Typical cases of this are the so-called *talis-qualis* sale (*Klausel tel-quel*; i.e. purchase the thing ‘as it is’), in which the parties exclude liability for latent defects, except in the case of fraudulent deception; and the sale with clause ‘as viewed’ (*Klausel ‘wie besichtigt’*), in which the case law also examines the circumstances of the inspection, the discernibility or detectability of defects and, in the case of damage, the negligent conduct of the buyer who was not sufficiently careful. See OLG zu Köln, Berufungsurteil vom 16. 9. 1991. (2 U 51/91); BGH, in *Betriebsberater* 1953, 693; 1954, 116; 1957, 238. Cf. Henssler, 1994, p. 162, fn. 131. See also Walter, 1987, p. 224, fnn. 548–550.

2. COMPARATIVE ANALYSIS OF LAWS INSIDE AND OUTSIDE EUROPE

2.1. The Continental Framework of Private Law in a US-State Civil Code

Mapping the interaction of private law codifications that began around the world in the 19th century is no easy task. At first glance, one might think that the codification of a US-American state, which seems particularistic from a European point of view, could only have a one-sided relationship with Europe: The latter could only influence the former. Well, it is not quite that simple. It has been demonstrated in the literature that processes in the opposite direction have also played an important role. For example, even though the Spanish Civil Code project of 1851 was subject to a strong influence of the Code Napoléon, *F. Garcia Goyena* (1783–1855) tried to follow the Spanish cultural background, and the Civil Code of Louisiana helped him. (Parise, 2008, pp. 843–847 and *passim*)

For obvious and well-known historical reasons, it can be assumed that it was the French Civil Code that had the greatest influence on the first Louisiana Civil Code. Some have gone so far as to claim that during the codification process more than 1,400 articles were explicitly copied, mostly verbatim, from the French Code civil into the Louisiana Digest. (Palmer, 2021, pp. 49–50)

But providing the historical background and antecedents is also not easy for historical reasons. Indeed, the Louisiana Civil Code of 1808 had no accompanying record of the sources consulted and used by its drafters. The first published reference to the existence of such a record appeared in 1941. (Franklin, 1940–41)

How is it to be explained that the French Code civil being in force at the time of the Louisiana Codification did not even contain an article on the sale of hope similar to the Louisiana Rule (as well as the jurisprudential Authorities of France in the 19th century), although the French Code explicitly defines aleatory contracts? If this ‘Sale of a Hope’ provision did not come from French law, where does it come from?

The six-page *avant-propos* of the original manuscript of the 1808 Code, written in French calligraphy and probably by *L. Moreau Lislet* (1766–1832), can answer these questions. (Dainow, 1958) The last part of the preface lists the laws and authors used: Besides *Domat* and *Pothier* (Herman, 1995, p. 268), the authors include *Febrero* and *Rodriguez*. (Dainow, 1958, p. 49) From §2 and §4 of the Preface, the reader learns that in addition to these, the Spaniard canonists *Hevia Bolanus* and *Gómez* were also instrumental in drafting the text of the law. (Dainow, 1958, pp. 44–45 and *fnn.*) On our subject, these jurists certainly have a common opinion: both *Domat* and *Pothier*, as well as the two eminent canonists, think that the object of *spei emptio* (i.e. sale of hope) is the mere hope itself (this was namely highly debated in legal history).

For examining the laws regarding our issue, we shall first turn to the specific contracts, which partially or entirely modify the basic guarantee rules for proportionality of performance and consideration. These are the aleatory contracts and the sale of hope, or that of uncertain future goods. Afterward, we shall take look at the laws, which make possible the exclusion of general rules upon warranty for

legal and material defects as well as for lesions, which guarantee the proportionality regarding performance and consideration.

2.2. Austrian and French based Louisiana Laws on Aleatory Contracts

1. The French Code civil's (hereinafter CC) old Art. 1104 said: '*Lorsque l'équivalent consiste dans la chance de gain ou de perte pour chacune des parties, d'après un événement incertain, le contrat est aléatoire.*' It means that the contract is aleatory, insofar the consideration is the chance of gain or loss for each party due to an uncertain event.

The 2016 comprehensive modification of the *droit des obligations* has changed the text as well as the numbering of this very article. So, the new Art. 1108 says similarly: '*Il est aléatoire lorsque les parties acceptent de faire dépendre les effets du contrat, quant aux avantages et aux pertes qui en résulteront, d'un événement incertain.*' This translates as it is aleatory when the parties agree to make the effects of the contract depend on an uncertain event in terms of the benefits and losses that will result from it.

Another codified definition and enumeration of types of aleatory contracts were abrogated by the mentioned comprehensive modification in 2016. The need for derogation of the former text was obvious since it duplicated the upper regulation. It said that '[a]n aleatory contract is a mutual agreement whose effects, in terms of benefits and losses, either for all parties or for one or more of them, depend on an uncertain event'.¹⁰ Article 2 of this very article enumerated these contracts as follows: insurance contracts (own *Code des assurances* of 1930), gambling and betting (Art. 1965–1967 CC in effect), and life annuity contracts (Art. 1968–1983 CC in effect), bottomry was abrogated from the list in 2009.

2. The Art. 1912 of Louisiana Civil Code of 1870, which was last modified in 1985 (Shinn, 1987) and which regulates aleatory contracts among the typology of contracts in a dogmatic way¹¹, provides that '*[a] contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event*'.

3. Part II, Chapter 29 on aleatory contracts (contracts of fortune, *Glücksvertäge*; Art. 1267–1292) of the ABGB of 1811 contains the unchanged text of the 1811 promulgated Code. (Márkus, 1907, pp. 282–287) While the chapter on aleatory contracts follows the Wolffian structure of natural law in its entirety, the sale of goods (Art. 1053–1089) is explicitly pandectically inspired.

¹⁰ According to the original text, which was lastly modified in 2009, "*Le contrat aléatoire est une convention réciproque dont les effets, quant aux avantages et aux pertes, soit pour toutes les parties, soit pour l'une ou plusieurs d'entre elles, dépendent d'un événement incertain.*"

¹¹ After the definition of contract in Art. 1916, the Civil Code sets up the following classes of types (Art. 1907–1914) unilateral and bilateral or synallagmatic contracts, onerous and gratuitous contracts, commutative and aleatory contracts, principal and accessory contracts, and, at last, nominate and innominate contracts.

The ABGB in its Article 1267 states that: ‘*Ein Vertrag, wodurch die Hoffnung eines noch ungewissen Vortheiles versprochen und angenommen wird, ist ein Glücksvertrag.*’ A contract is namely aleatory, when the hope of a yet uncertain advantage is promised and accepted.

The ABGB enumerates aleatory contracts as the bet, game, lot, purchase of a hoped right, purchase of a future yet undetermined thing, annuities, social pension institutions, insurance, bottomry (see in Art. 1269 ABGB), purchase of inheritance (see in Art. 1278–1283 ABGB¹²), and the aleatory purchase of a mining share, which was invented by Voet in the 17th century¹³, (*Hoffnungskauf eines Kuxes*¹⁴; see in Art. 1277). The latest, concerning comparative issues of the Louisiana sales practice of hydrocarbon extraction, becomes relevant (cf. sub-chapter 3.4, point 2 below).

2.3. Austrian and Louisiana Laws upon the so-called ‘Sale of a Hope’

1. There are not many civil codes around the globe, that even deal with the sale of hope, and the number of codes, which define the sale of hope in such an abstract and complex way as Art. 2792 of the *Código Civil Federal de Mexico of 2000* does, are even less. It namely says: ‘A contract for the purpose of acquiring, for a fixed sum, the fruits that a thing will produce within a fixed time, the buyer taking for himself the risk that these fruits will not come into existence, or the uncertain products of an event, which can be estimated in money, is called the purchase of hope. The seller is entitled to the price even if the fruits or products purchased do not come into existence.’¹⁵

2. The French Code civil as a role model of the Codes of Louisiana, however, contrary to the latest, has no law of such object like ‘*vente d’espoir*’ otherwise ‘*vente*

¹² Cf. Art. 1696 of the French Code civil: “*Celui qui vend une succession sans en spécifier en détail les objets n’est tenu de garantir que sa qualité d’héritier.*”

¹³ The legal possibility of this was invented in the 17th century by the greatest figure of *usus modernus*, and the leading exponent of Dutch *jurisprudentia elegans*, Johannes Voet, and then elaborated in detail in the 18th century by Wolff (*emptio kucki*).

¹⁴ “*Der Antheil an einem Bergwerke heißt Kux. Der Kauf eines Kuxes gehört zu den gewagten Verträgen. Der Verkäufer haftet nur für die Richtigkeit des Kuxes, und der Käufer hat sich nach den Gesetzen über den Bergbau zu benehmen.*” This means “The share in a mine is called a ‘kux’ (*kuckuus* in Latin). The purchase of a mining share is a risky contract. The seller is only liable for the correctness of the mining claim, and the buyer has to behave according to the mining laws.” See e.g., Scheuchenstuel, C. (1855) *Motive zu dem allgemeinen österreichischen Berggesetze vom 23. Mai 1854*. Wien: Braumüller, pp. 127–138.

¹⁵ “*Se llama compra de esperanza al contrato que tiene por objeto adquirir por una cantidad determinada, los frutos que una cosa produzca en el tiempo fijado, tomando el comprador para sí el riesgo de que esos frutos no lleguen a existir; o bien, los productos inciertos de un hecho, que puedan estimarse en dinero. El vendedor tiene derecho al precio aunque no lleguen a existir los frutos o productos comprados.*”

d'espérance'.¹⁶ This notion exists merely in the jurisprudence of *droit commercial* (Zachariä, 1808, pp. 330–335; Pardessus, 1836, pp. 168–170), but even there is of merely historical importance.¹⁷ The reason for this kind of ignorance of the institution in French jurisprudence of *droit civil* lies in the historical background of trends and schools that evolved around the Code civil, such as *école de l'exégèse*, according to which the law is complete, everything is in the law, and all issues must therefore be deduced from the law. Thus, if the Code civil is silent about the institution, as is the case with the sale of hope, it cannot be considered a subject of private law jurisprudence.

Everyday life of litigation was, however, not so simple. Therefore, French commentators of the Exegetical School developed a *qualification test* or method for the question of deciding whether the contract was concluded about future things themselves or merely about the chance or hope of the coming into being or existence thereof. (Troplong, 1837, p. 283; Dalloz, 1907, pp. 785–786; Aubry and Rau, 1907, p. 43; Mourlon, 1896, p. 248) It is namely a problem of interpretation:

- a) The test is the comparison of the price to be paid with the probable value of the thing, should it be produced. If the price is equal or nearly equal to the probable value of the thing, it is presumed that the parties intended that there should be a sale of the thing only upon its becoming existent; whereas if the price is relatively very small, the presumption is that there is a sale of a hope.
- b) Another test is the construction of the language used in the agreement: if the agreement should read that the fruits were sold which the land of the seller will produce, it is presumed that the buyer did not intend to buy hope. On the other hand, if instead of 'will', there was used 'may', it would evince the uncertainty of the fruits being produced and would justify the presumption of a sale of hope.
- c) If none of these tests is applicable, the doubt is always resolved in favor of the buyer. (Oppenheim, 1940–41, pp. 594–595)

3. In contrary to the French Code, all three Louisiana Codes — namely the Digest of Civil Laws of 1808 (III,6,2,19), and the Civil Code of 1825 (Art. 2426) and Civil Code of 1870 (Art. 2451) — said (see *right column*) just right after the Latin

¹⁶ Cf. „*l'espérance de vie*” in Code du travail R4641-13. Art., „*l'espérance d'un gain*” in Code de la consommation L121-36. Art.; R121-11. Art. or „*le profit espéré*” in Code des assurances: L171-3. Art.

¹⁷ In the areas along the Rhine where the Code civil came into force as a result of the Napoleonic conquest, it was usually published in an authentic German translation, issued by imperial decree. E.g., in the Grand Duchy of Berg (but not in the Grand Duchy of Bad for instance), the official German text translates „*contrat aléatoire*” as „*Glücks- oder Hoffungsvertrag*”. Brauer, 1810, pp. 691–699; *Décret impérial portant la mise en activité du Code Napoléon dans le Grand-Duché de Berg*. Cf. *Napoleons Gesetzbuch. Einzig offizielle Ausgabe für das Großherzogtum Berg*. (1810) Düsseldorf: Levraut, pp. 834–835. Otherwise see e.g. Freiherr von Eggers, 1811, pp. 145–147; Bauerband, 1873, pp. 253–254; Cretschmar, 1883, pp. 445–449; Förtsch, 1897, pp. 258–259 and 291–295. However, 'sale of hope' is mentioned by Spangenberg, 1811, pp. 230–232.

wordings of an ancient *Pomponius-Fragment* (D. 18,1,8,1; *left column*) compiled in the Digest of Justinian that:

A sale is, however, sometimes understood to be contracted without the thing sold, as, for instance, where a purchase is made dependent upon chance, which occurs where fish (...) which are yet to be caught [...] is bought. A purchase is also contracted even if nothing happens because it was a sale of hope. (...) ¹⁸

It also happens sometimes that an uncertain hope is sold; as the fisher sells a haul of his net before he throws it; and, although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught.

The cited Art. 2451 of Civil Code of 1870 was modified by Article 1 of Act 1993 No. 841 with effect from 1st January 1995 as follows: ‘[a] *hope may be the object of a contract of sale. Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties’ expectations, and even if nothing is caught the sale is valid.*’ The 1995 modification was based on the practice of purchasing oil to be extracted in the future from a certain land. Sometimes the costs of extraction were very high, and the buyer has found no oil but has reached millions of tons of gas in the soil. Since the buyer made the contract for oil at his peril and risk, the gain of the gas was entirely that of the seller or of the owner of the land, and the range of losses of the buyers endangered the industry itself. (Detailed see in sub-chapter 3.2 below.)

4. The Article 1275 of the ABGB defines *Hoffnungskauf*, which is the Sale of Hope as follows: ‘*Wer für ein bestimmtes Maß von einem künftigen Ertragnisse einen verhältnißmäßigen Preis verspricht, schließt einen ordentlichen Kaufvertrag.*’ — which means that ‘*Whoever promises a proportionate price for a certain amount of future earnings concludes a proper purchase contract*’. (Other details regarding the exclusion of lesion see below sub-chapter 2.5!)

2.4. Laws on Exclusion of Warranties for Material and Legal Defects

1. The *French Law of Transport of Claims and Intangible Rights* (Book III Title 6 Chapter 8) serves as a compass for understanding Louisiana law. Code civil Art. 1693 says about the *transferability of future rights*, similarly as its former text¹⁹ did, that “Whoever sells an intangible right must guarantee its existence at the time of

¹⁸ ‘*Aliquando tamen et sine re venditio intellegitur, veluti cum quasi alea emitur. Quod fit, cum captum piscium vel avium [...] emitur: emptio enim contrahitur etiam si nihil inciderit, quia spei emptio est. [...]*’

¹⁹ ‘*Celui qui vend une créance ou autre droit incorporel doit en garantir l’existence au temps du transport, quoiqu’il soit fait sans garantie.*’ I.e., ‘A person who sells a claim or other intangible right must guarantee its existence at the time of the transfer, even if it is made without guarantee.’

transport, even if it is done without guarantee”.²⁰ The so-called *lex Anastasiana*²¹ was, however, abrogated by the new law of obligations of 2016. The former Art. 1694 stated: ‘He [i.e. the transferor] is only liable for the solvency of the debtor when he has undertaken to do so, and only up to the amount of the price he has received for the claim.’ (Ordonnance no. 2016-131 du 10 février 2016, Art. 5) The situation is similar in the case of the abrogated Art. 1695 formerly saying ‘[w]here he has promised to guarantee the solvency of the debtor, this promise refers only to present solvency and does not extend to the future, unless the assignor has expressly stipulated otherwise’.²²

The original (unmodified) Art. 1696 of the Code civil ordains that ‘[a] person who sells an inheritance without specifying the objects in detail is only obliged to guarantee his status as an heir’.²³ The new Art. 1697 modified in 2009 allows the heir selling the own inheritance to keep the benefits of the estate already acquired when the contract was concluded,²⁴ and unmodified Art. 1698 permits the exclusion of all warranties for the sake of the seller.²⁵

2. After its 1993 modification, Art. 2503 of the Louisiana Civil Code says: ‘(...) the parties may (...) agree to an exclusion of the warranty, but even in that case the seller must return the price to the buyer if eviction occurs, unless it is clear that the buyer was aware of the danger of eviction, or the buyer has declared that he was buying at his peril and risk, or the seller’s obligation of returning the price has been expressly excluded.’

Art. 2458 § 2 of the Louisiana Civil Code with an effect from 1995 states: ‘When things, such as goods or produce, are sold in a lump, ownership is transferred between the parties upon their consent, even though the things are not yet weighed, counted, or measured.’ The unmodified Art. 1586 of the French Code civil says the

²⁰ ‘Celui qui vend un droit incorporel doit en garantir l’existence au temps du transport, quoiqu’il soit fait sans garantie.’

²¹ A law enacted by Byzantine emperor Anastasius I, and confirmed by Justinian the Great, and more particularly defined in certain points, according to which a person who buys a debt cannot claim from the debtor more than he himself has paid for it, with the addition of the legal interest on the purchase price. For its survival in the codifications of the 18th and 19th centuries see in detail Lodigkeit, 2004, pp. 117–118.

²² ‘Lorsqu’il a promis la garantie de la solvabilité du débiteur, cette promesse ne s’entend que de la solvabilité actuelle, et ne s’étend pas au temps à venir, si le cédant ne l’a expressément stipulé.’

²³ ‘Celui qui vend une hérédité sans en spécifier en détail les objets n’est tenu de garantir que sa qualité d’héritier.’

²⁴ ‘S’il avait déjà profité des fruits de quelque fonds, ou reçu le montant de quelque créance appartenant à cette succession, ou vendu quelques effets de la succession, il est tenu de les rembourser à l’acquéreur, s’il ne les a expressément réservés lors de la vente.’

²⁵ ‘L’acquéreur doit de son côté rembourser au vendeur ce que celui-ci a payé pour les dettes et charges de la succession, et lui faire raison de tout ce dont il était créancier, s’il n’y a stipulation contraire.’

same: *'If, on the other hand, the goods have been sold en bloc, the sale is perfect, although the goods have not yet been weighed, counted or measured.'*²⁶

The 1995 amendment, which was referred to in the article several times, has also affected the rule on warranty for legal defects in the so-called *sales of a right of succession*. Art. 2513 namely states that *'[i]n a sale of a right of succession, the warranty against eviction extends only to the right to succeed the decedent, which entitles the buyer to those things that are, in fact, a part of the estate, but it does not extend to any particular thing'*.

3. The ABGB orders in Article 929: *'A person who knowingly takes possession of another person's thing has as little right to a guarantee as a person who has expressly waived it.'*²⁷ Article 929 of ABGB states: *'If goods are handed over in lump sum, which means as they are, so, without number, measure and weight, the transferor shall not be liable for defects discovered therein, except if a condition wrongly specified by him or required by the recipient is missing.'*²⁸ For a special case, Article 1276 ABGB not only excludes the warranty for deficiencies but at the same time, it suspends also the invalidity claims for lesion: *'Whoever buys the future benefits of a thing in a lump sum or the hope of the same in a certain price, concludes an aleatory contract; and bears the risk of the expectation being entirely frustrated; but is also entitled to all ordinary benefits obtained.'*²⁹

In the case of the sale of an inheritance, the ABGB forms the notion of *'Hoffnungskauf einer Erbschaft'*, i.e. 'Sale of Hope for an Inheritance' [cf. Article 1278(1) ABGB], which is not a Pantectist 'invention', but a classical Roman one. The first mention of the purchase of inheritance in this very context of the sale of hope is found in the 2nd and 3rd-century fragments compiled into Justinian's Digest Book XVIII Title 4 (*'emptio spei hereditatis'*). Article 1278(1) ABGB says: *'The purchaser of an inheritance accepted by the seller or at least accrued to him enters not only into the rights but also into the liabilities of the seller as heir, insofar as these are not highly personal. If the purchase is not based on an inventory, the inheritance purchase is also a contract of fortune.'*³⁰ Article 1283 follows the previous law as:

²⁶ *'Si, au contraire, les marchandises ont été vendues en bloc, la vente est parfaite, quoique les marchandises n'aient pas encore été pesées, comptées ou mesurées.'*

²⁷ *'Wer eine fremde Sache wissentlich an sich bringt, hat eben so wenig Anspruch auf eine Gewährleistung, als derjenige, welcher ausdrücklich darauf Verzicht gethan hat.'*

²⁸ *'Werden Sachen in Pausch und Bogen, nämlich so, wie sie stehen und liegen, ohne Zahl, Maß und Gewicht übergeben; so ist der Übergeber, außer dem Falle, daß eine von ihm fälschlich vorgegebene, oder von dem Empfänger bedungene Beschaffenheit mangelt, für die daran entdeckten Fehler nicht verantwortlich.'*

²⁹ *'Wer die künftigen Nutzungen einer Sache in Pausch und Bogen; oder wer die Hoffnung derselben in einem bestimmten Preise kauft, errichtet einen Glücksvertrag; er trägt die Gefahr der ganz vereitelten Erwartung; es gebühren ihm aber auch alle ordentliche erzielte Nutzungen.'*

³⁰ *'Der Käufer einer vom Verkäufer angetretenen oder ihm wenigstens angefallenen Erbschaft tritt nicht allein in die Rechte, sondern auch in die Verbindlichkeiten des*

*'If the sale of the inheritance was based on an inventory, the seller is liable for the same. Otherwise, he is liable for the correctness of his status as heir, and for any damage caused to the purchaser through his fault.'*³¹

2.5. Laws on Exclusion of Lesion

1. There is an old proverb in French civil law, which says that 'consent in aleatory matters removes lesion' (originally as '*aléa chasse la lesion*'). (Klein, 1979, pp. 13–16; Roland and Boyer, 1986, pp. 1103–1104) The adage has remained unaffected by the October 2016 reform of the Law of Obligations. In such a case, there is no way to challenge or annul the contract.

Louisiana Civil Code's Art. 1965 says from 1985 that: '*A contract may be annulled on grounds of lesion only in those cases provided by law.*'

There is — although the regulation of lesion is colorful in the code regarding also the *measure of disproportionality*³² —, however no provision for any of the mentioned situations such as that of aleatory contracts or sale of a hope. Therefore, one can assume that challenging a sale of hope or an aleatory contract on the ground of lesion is not permitted by law, which also means that it cannot be a matter of the parties' agreement either.

2. Regarding the regulation of lesion in Austrian private law, jurisprudence and positive law seem to be in conflict. Namely, Article 934 of the ABGB says '*If in the*

Verkäufers als Erben ein, soweit diese nicht höchstpersönlich sind. Wenn dem Kauf kein Inventar zugrunde gelegt wird, ist auch der Erbschafts Kauf ein Glücksvertrag.'

³¹ '*Wurde dem Verkauf der Erbschaft ein Inventar zugrunde gelegt, so haftet der Verkäufer für dasselbe. Andernfalls haftet er für die Richtigkeit seines Erbrechts, wie er es angegeben hat, und für jeden dem Käufer durch sein Verschulden zugefügten Schaden.'*

³² E.g., in case of *extrajudicial partition of conjoint property*, the partition may be rescinded on account of lesion if the value of the part received by a co-owner is *less by more than one-fourth of the fair market value* of the portion he should have received (Art. 814). The proportion is the same in the case of *sale immovable rights of heritage to a coheir* (Art. 1406). According to this proportion of unproportionality, Art. 2589 says the *sale of an immovable* may be rescinded for lesion when *the price is less than one half of the fair market value* of the immovable, and *lesion can be claimed only by the seller and only in sales of corporeal immovables*. To determine whether there is lesion, *the immovable sold must be evaluated according to the state in which it was at the time of the sale* (or of the option contract, or the contract to sell) — says Art. 2590. There is no range of disproportionality in Art. 2592, which regulates, as its title says, also lesion: '*If the buyer elects to return the immovable he must also return to the seller the fruits of the immovable from the time a demand for rescission was made.*' For complex contractual situations Art. 2594 says '*when the buyer has sold the immovable, the seller may not bring an action for lesion against a third person who bought the immovable from the original buyer. In such a case the seller may recover from the original buyer whatever profit the latter realized from the sale to the third person.*' For exchanges of corporeal immovables order Art. 2663: '*A party giving a corporeal immovable in exchange for property worth less than one half of the fair market value of the immovable given by him may claim rescission on grounds of lesion beyond moiety.*'

case of bilaterally binding transactions, one party has not received from the other half of what he has given, the law grants the injured party the right to demand rescission and restoration to the previous stand. (...) The disproportion of the value is determined according to the time of the conclusion of the transaction.³³ While Article 935 orders that '[t]he application of section 934 cannot be excluded by contract; however, it does not apply [in the following cases]:

- if a person has declared that he has taken over the thing for an extraordinary value out of special preference;
- if, although he knew the true value, but agreed to the disproportionate value;
- if it is to be assumed from the relationship of the persons that they wanted to conclude a contract which was a mixture of a pecuniary and a non-pecuniary contract;
- if the actual value can no longer be ascertained;
- finally, if the thing has been auctioned by the court'.³⁴

Additionally, S. 1268 of ABGB says that 'In the case of aleatory contracts, the remedy of the lesion does not apply'.³⁵

In Austrian literature, the compatibility of the more recent (1979) regulation of *laesio enormis* (Art. 934sq, see above) with the general exclusion of the contestability of aleatory contracts on the ground of lesion (Art. 1268, see the previous paragraph), and with the rule of risk assumption in sales of hope (Art. 1276, see above sub-chapter 2.4) as well, has been disputed for decades, more exactly, since the 1979 modification of Art. 934sq. (Koziol and Welser, 2008, p. 226; Winner, 2008, pp. 53–56) The Consumer Protection Act of 1979 [*Konsumentenschutzgesetz*, *KSchG* S. 33(6)] has amended ABGB S. 935 to the effect that the sanctions of lesion laid down in Art. 934 cannot be excluded by contract.

Although the taxative list in the amended Art. 935 allows for five exceptions where the application of Art. 934 can be excluded, there is no reference to the sale of hope and aleatory agreements. Winner, for example, observes that this kind of prohibition of rescission relates to the issue that the right of rescission is permitted

³³ 'Hat bey zweyseitig verbindlichen Geschäften ein Theil nicht einmahl die Hälfte dessen, was er dem andern gegeben hat, von diesem an dem gemeinen Werthe erhalten, so räumt das Gesetz dem verletzten Theile das Recht ein, die Aufhebung, und die Herstellung in den vorigen Stand zu fordern. [...] Das Mißverhältniß des Werthes wird nach dem Zeitpunkt des geschlossenen Geschäftes bestimmt.'

³⁴ 'Die Anwendung des § 934 kann vertraglich nicht ausgeschlossen werden; er ist jedoch dann nicht anzuwenden, wenn jemand erklärt hat, die Sache aus besonderer Vorliebe um einen außerordentlichen Werth zu übernehmen; wenn er, obgleich ihm der wahre Werth bekannt war, sich dennoch zu dem unverhältnißmäßigen Werthe verstanden hat; ferner, wenn aus dem Verhältnisse der Personen zu vermuthen ist, daß sie einen, aus einem entgeltlichen und unentgeltlichen vermischten, Vertrag schließen wollten; wenn sich der eigentliche Werth nicht mehr erheben läßt; endlich, wenn die Sache von dem Gerichte versteigert worden ist.'

³⁵ 'Bei Glücksverträgen findet das Rechtsmittel wegen Verkürzung über die Hälfte des Werthes nicht Statt.'

by contract in the case of a disproportion of value less than in lesion, and with the fact that the rule of prohibition of usury also applies to aleatory contracts. (Winner, 2008, pp. 53–54, fn. 178) In the context of the applicability of the rule of the lesion, *Mayer-Maly* points out that the rule's statutory exclusion (Art. 1268) must be examined on a case-by-case basis, since the parties' will is decisive in the question of whether a given contract of sale is concluded with or without an aleatoric element. (Winner, 2008, pp. 53–54, fn. 178.)

The old commentaries and manuals before this amendment still treated the exclusion of the right of avoidance on the ground of lesion in aleatory contracts as an undebatable question. (Winiwarter, 1844) More recent literature, e.g., *Krejci, Binder, Gschnitzer, Reischauer, Wenusch* (Winner, 2008, p. 55, fn. 184), however, goes so far as to consider, contrary to the letter of the law, the sanction of lesion applicable to aleatory contracts as well.

As mere hope is held by law as the object of the transaction, there is no basis for excluding any civil sanction that would otherwise exist for any quantitative and qualitative depreciation of the *goods* in hope. In this case, there does exist a good without a thing, namely the hope of the prospective goods. This understanding could have guided the drafters of the law when they explicitly excluded the possibility of challenge on the grounds of a significant disparity in the value of the service and consideration.

3. COMPARATIVE ANALYSIS OF AUSTRIAN AND LOUISIANA CASE LAW

3.1. Decisions by the Austrian Oberster Gerichtshof

1. Over the last hundred years or so, the Austrian Supreme Court (*Oberster Gerichtshof*, hereinafter: OGH³⁶) has regularly examined the links between contractual risk-taking, contractual elements of fortune, and the absence of warranty or right of annulling the contract as well.

Some *general issues* are as follows (year of the decision see in brackets): an avoidable contract can never be a sale of hope (OGH 20.12.1950 2 Ob 827/50); the statutory list of aleatory contracts in S. 1269 is not taxative (OGH 02.03.1978 6 Ob 530/78); the object of an aleatory contract is the mere expectation of some uncertain future benefit or advantage (OGH 02.03.1978 6 Ob 530/78); in aleatory contracts, the object of the performance is the assumption of the risk itself (See OGH 02.03.1978 6 Ob 530/78³⁷); in equally bilaterally risky contracts (*aleatorisch synallagmatisch*) it is not foreseeable at the time of the conclusion of the contract whether the transaction will ultimately be beneficial for the parties (See OGH 07.08.2007 4 Ob 135/07³⁸).

³⁶ All cases downloaded from www.jusline.at.

³⁷ "Beim Glücksvertrag ist unmittelbarer Vertragsgegenstand die Übernahme eines Risikos, eines Wagnisses." See OGH 02.03.1978 6 Ob 530/78.

³⁸ "Das Wesen eines aleatorischen synallagmatischen Vertrags besteht darin, dass von vornherein nicht gesagt werden kann, ob sich der Vertrag im Endergebnis - betrachtet

We shall now turn to some *specific problems*, at first to those, in which the Supreme Court stated an *analogous* aleatory contract:

- On several occasions, the OGH has described as a sale of hope an exhaustion/mining contract (*Abbauvertrag*), in which the holder acquires the right to extract a specific soil's treasures for a one-off purchase price for as long as it is profitable for him. (OGH 11.10.1927 3 Ob 915/27; OGH 14.12.1960 6 Ob 373/60; OGH 06.07.1965 8 Ob 139/65³⁹)
 - Between 1965 and 1997, the OGH stated some 9 times (the first decision was published in 1965) that a lifetime tenancy for a one-off payment of money, either to the lifetime of the tenant or to that of the landlord, is an aleatory contract, so the right to annul or challenge it on the ground of lesion is excluded. (OGH 17.03.1965 7 Ob 63/65; OGH 05.07.1972 1 Ob 154/72; OGH 11.02.1975 3 Ob 82/74; OGH 10.11.1977 6 Ob 742/77; OGH 02.03.1978 6 Ob 530/78; OGH 24.10.1978 4 Ob 569/78; OGH 24.06.1993 8 Ob 562/93; OGH 04.07.1995 5 Ob 521/95; OGH 15.12.1997 1 Ob 2342/96k)
 - According to the literature (Winner, 2008, p. 54 fnn, 176–177), it is an aleatory contract, on the other hand, the sale of a law firm together with its clientele, which seems to me a peculiar opinion on the risks of law practice.
2. The *antiparallels*, i.e. the cases, in which the Supreme Court had *not* qualified an indeed risky contract as an aleatory one — which interpretation led to the applicability of warranty as well as lesion rules — are as follows:
- A 1966 judgment held that the purchase of a precisely defined but not precisely measured plot of land does not fall within the category of aleatory sales, which is only for the sale of something not yet existing at the time of the contract. (OGH 20.12.1966 8 Ob 314/66)
 - In 1978 and two times previously as well, the OGH said that since the object of aleatory contracts is the hope of some uncertain future benefit or advantage, a '*Holzabbauvertrag*', i.e., the sale of timber for extraction, is not aleatory. (OGH 01.09.1965 5 Ob 49/65; OGH 23.01.1973 8 Ob 262/72; OGH 02.03.1978 6 Ob 530/78)
 - Furthermore, there is no aleatory contract in the case of a sale of the right to practice medicine together with the list of patients (OGH 10.07.2001 4 Ob 147/01y), (cf. above the case of selling a law firm).
 - Non-aleatory is the sale of a business with all its goodwill and customers (OGH 30.09.2002 1 Ob 157/02y).

man ihn für sich alleine – für den einen oder für den anderen Teil vorteilhaft auswirken wird." See OGH 07.08.2007 4 Ob 135/07t.

³⁹ "*Ein Abbauvertrag, mit dem der Berechtigte gegen die Bezahlung eines einmaligen Preises das Recht auf Gewinnung von Bodenschätzen auf so lange erwirbt, als ihm (seinen Rechtsnachfolgern) die Gewinnung ersprießlich erscheinen wird, ist nach den Regeln des Hoffnungskaufes zu beurteilen.*" See OGH 11.10.1927 3 Ob 915/27; OGH 14.12.1960 6 Ob 373/60; OGH 06.07.1965 8 Ob 139/65.

- as well as the sale concluded in an Internet auction (OGH 07.08.2007 4 Ob 135/07t).
- Regarding the distinction between transaction risks and risky transactions, a 2006 judgment ruled that it is not an aleatory contract to buy goods in the hope that they will be sold at a profit. (OGH 19.12.2006 1 Ob 240/06k)⁴⁰
- According to a 1928 opinion of the OGH, confirmed in 1966, it is not a *Sale of Hope for an Inheritance* where the object of the sale is the sum of the estate's assets as listed in the inventory of the estate. (OGH 19.09.1928 3 Ob 702/28; OGH 23.02.1966 6 Ob 59/66) The Supreme Court ruled some seven times between 1931 and 2006 that the buyer of the estate is the universal successor to the seller, i.e. the heir. The buyer, therefore, receives the estate in the state it was in when the seller acquired it '*übernimmt die Erbschaft in dem Stande, in dem sie sich befindet*' (OGH 30.10.1931 1 Ob 990/31; OGH 17.09.1953 3 Ob 503/53; OGH 23.10.1957 3 Ob 415/57; OGH 07.10.1959 5 Ob 73/59; OGH 28.10.1959 6 Ob 93/59; OGH 20.12.2000 7 Ob 142/00h; OGH 16.02.2006 6 Ob 16/05f.), since the object of '*Erbschaftskauf*' is the heir's right to inherit (*Erbrecht*; 1967, 1976, 2000). (OGH 30.03.1967 1 Ob 15/67; OGH 30.01.1976 7 Ob 509/76; OGH 20.12.2000 7 Ob 142/00h)

3.2. Leading Cases of Louisiana Supreme Court

1. According to the leading cases of the Louisiana Supreme Court, it is curious that, in a very similar legal environment, like the Austrian, the judicial thinking in litigation is different from that in Austria. The following cases can illustrate this.

- In the case of *Slidell v. McCoy's Executors* (15 L. R. 340 [1840] see Oppenheim, 1940–41, p. 595), the Louisiana Supreme Court based its decision on the general doctrine of consideration. Accordingly, the applicant's plea of lack of consideration is unfounded, because when he speculatively bought the property to resell it at a profit, this led to a sale of a hope. In this case, referring to the lack of consideration is a legal nonsense, because the *quid pro quo* was the hope for profit. The opinions of the Austrian and the Louisiana Supreme Courts are thus on the one hand the same, because such a transaction cannot be challenged, and on the other hand different, because the reason for the same result is in stark contrast. In Austrian law, such contracts cannot be considered aleatory because of the lack of unity of transaction and cannot be challenged for the same reason, while in Louisiana they cannot be challenged because the multiple contract construction is treated as a unitary one called the sale of hope, so, it is compatible with the lack of consideration.
- In *Laville v. Rightor* (17 La. 303 [1841]) (Oppenheim (1940–41), p. 595), the Louisiana Supreme Court held that it is a presumption, that the parties

⁴⁰ "*Wer etwas in der Hoffnung kauft, es mit Gewinn weiterveräußern oder auf sonstige Weise verwerten zu können, schließt keinen Glücksvertrag.*" See OGH 19.12.2006 1 Ob 240/06k.

concluded a sale of hope, if the text of the contract says that '*if the vendee buys all the rights that the vendor had in a certain land*'. It was only later discovered that the property sold did not belong to the vendor. Under today's law, the risk that the thing to be sold is owned by a third party should have been assumed by the buyer using an express declaration.

- In *Losecco v. Gregory* (108 La. 648; 32 So. 985 [1901]), a multi-year contract was interpreted, according to which: '*the seller sells all the oranges his trees may produce*'. But an unusual and unexpected frost destroyed the crop. The main issue in the case was whether the court should interpret the contract in favour of the buyer or the seller. Thus, whether the contract was a sale of future goods, in which the payment of the purchase price is subject to a suspending condition, or whether it was a sale of hope, in which the seller receives the purchase price unconditionally. In the court's view, the contract was a sale of hope, because the conditional mode of '*may produce*' implied that the buyer had assumed the entire risk of crop failure.

2. The legal practice of *oil and gas extraction* in the pelican-crested state is also of interest to us because one of the multiple contractual arrangements that allow transactions to take place has been classified as Sale of a Hope in the extensive practice of the Supreme Court. The *classification* is based on the *legal titles* of the extraction operator (legal person) that allow him to collect the benefits of the land.⁴¹ On the one hand, by nature, extraction can be carried out on the legal basis of ownership. However, it should be distinguished from the case where *land is purchased* either with hidden or overt motives, or with secret or public reservations, but ultimately for the *sole purpose of extraction*. Although not discussed in the literature, this version can only fall within the scope of Sale of Hope if the parties expressly agree that the purpose of the purchase is the extraction and resale of the minerals in the property purchased. In this case, in addition to assuming the risk of a lack of mineral resources, it is expressly because of this extraction purpose that the buyer pays a much higher price than the usual price for the normal uses of the property such as construction, or agricultural production.

On the other hand, extraction may also be carried out based on a beneficial title of right *in rem* (e.g. usufruct) or of *in personam* (e.g. by the different types of lease contracts and agreements). There is very extensive literature on these cases from the 1900s to the present day. For space reasons, only the contours can be drawn.

- Beneficial titles from *in personam* rights include, of course, extraction under a lease, which the Supreme Court's practice (from 1922 on) saw as closer to

⁴¹ See Art. 490: "*Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it. The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.*" Amended by Act 1979 No. 180 S. 1.

a sale rather than a lease.⁴² (Cf. the Institutions of Gaius III, 145, where the great Roman jurist declared: Since sale and lease are sometimes very similar to each other, in some cases it is questionable whether the parties have concluded a sale or a lease contract.⁴³)

- Another method is the sale of a reversionary mineral interest interpreted as the sale of a servitude. (Corey, 1945–46, pp. 259–260)
- According to the Supreme Court in *Gailey v. McFarlain* (194 La. 150; 193 So. 570 [1940]), such a sale falls expressly within the type of contract of ‘Sale of a Hope’. The element of risk is that the exploitation right is extinguished after ten years of unsuccessful exploration, since this legal fact has been interpreted by the court as the non-usage of the easement for 10 years, which results in its extinction (Art. 621⁴⁴). The exercise of the easement is not an *attempt* to extract, but the *extraction* itself, which must therefore begin within a decade, depending on the success of the exploration. The reason why practice classifies the case as a *reversion* is precisely because the person conducting the exploration at his own risk and the extraction for his own benefit acquires not the right of servitude until the extraction or exploitation begins, but the reversion of servitude, which transforms into a subject right (servitude) upon the discovery of the raw material to be extracted or the *de facto* commencement of extraction.
- In *White v. Hodges* (201 La. 1; 9 So. 2d 433 [1942]), the Supreme Court ruled that if the landowner sells the mineral easement twice in succession, the ten-year eminent domain, until the extraction of the minerals begins, is suspended as to the latter purchaser. The reason is that the seller cannot sell the same thing twice, because at the second sale (resale) the seller no longer has the right to dispose of it — at least until the maximum of ten years has elapsed. When this occurs, however, the extraction right does not pass to the seller, but *ipso facto* to the second buyer as an increment when the obstacle is removed. This is the so-called doctrine of accretion, which has an extensive Supreme Court practice. (See *Wolf v. Carter*; 131 La. 667, 60 So. 52 [1912]; *St. Landry Oil & Gas Co., Inc. v. Neal*; 166 La. 799, 118 So. 24 [1928]; *Jackson v. United Gas Public Service Co.*; 196 La. 1, 198 So. 633 [1940])

⁴² “... an oil or gas lease partakes more of the nature of a sale than of a lease.” Cf. *Nabors Oil & Gas Co. v. Louisiana Oil Refining Co.* See 151 La. 362, 398; 91 So. 765, 778 (1922).

⁴³ “*Adeo autem emptio et uenditio et locatio et conductio familiaritatem aliquam inter se habere uidentur, ut in quibusdam causis quaeri solet, utrum emptio et uenditio contrahatur an locatio et conductio.*”

⁴⁴ See Art. 621: “A usufruct terminates by the prescription of nonuse if neither the usufructuary nor any other person acting in his name exercises the right during a period of ten years. This applies whether the usufruct has been constituted on an entire estate or on a divided or undivided part of an estate.” Amended by Article 1 of Act 1976 No. 103.

- A case similar to the latter is the *royalty-type agreement* that, in return for a percentage of the proceeds of a successful transaction, the easement holder will carry out — at its own risk — the costly and inherently risky (e.g. health and employer risks) activities of extraction and ancillary operations (like the test drilling, exploration, ancillary earthworks, road construction, pipe laying, etc.). (See *Glassell v. Richardson Oil Co.*; 150 La. 999; 91 So. 431 [1922]; *Smith v. Tullos*; 195 La. 400, 196 So. 912 [1940]; *Raines v. Dunson*; 145 La. 525, 542, 82 So. 960, 966 [1919]) (Oppenheim, 1940–41, p. 596)
- This construction can also be realised, when, as in *St. Martin Land Co. v. Pinckney* (212 La. 605; 33 So. 2d 169 [1947]), the royalty holder pre-finances the costs of extraction through the purchase of an undivided share.
- In *Fite v. Miller* (192 La. 229; 187 So. 650 [1939]), the lessee sold 50% of the extraction proceeds to the vendee as a royalty holder in exchange for the conduct of production. However, the buyer failed to drill the borehole and the seller (i.e., the vendor and lessee) sued him for damages. The vendor won the case, and the court set the amount of damages at the market value of the seller's hope that the buyer would drill the well, and the *value of hope* was defined in terms of the cost of drilling to a certain depth. (Oppenheim, 1940–41, p. 596)

4. EPILOGUE

The analysed issues are not among the most significant and complicated problems of contract law and even of the law of sales, and they form merely a part of exceptional rules of sales as an extraordinary phenomenon, the question arises whether the choice of topics for this comparative law study is well-founded. In my opinion, an affirmative answer can be found precisely in the distinctive and peculiar nature of the topic, which could justify the alertness of the most important representatives (authorities) of the respective jurisprudence. This constant and moving interest of legal scholars showed that some social and economic problems are ubiquitous regardless of time and place, and lawyers can provide colorful answers to the questions that arise. I do regard it as fascinating and touching.

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