

REMARKS ON THE CONCEPT OF GROSS DISPARITY IN VALUE IN HUNGARIAN LAW

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Abstract: As it is well-known, *laesio enormis* is an ancient legal institute of Roman Private Law. According to Roman law, in sales of land, if the price paid was less than half of the value of the land, the vendor could have the contract rescinded unless the purchaser made up the full. The paper scrutinises the appearance of this legal institute in Hungarian private law from a comparative-historical approach, bearing in mind the differences in the regulation of this legal institute in the old Civil Code of 1959 and the new Civil Code of 2013 has been effective since the 15th of March, 2014. The study also highlights the important findings of the decisions of the High Courts of Hungary (Supreme Court, Courts of Appeal, etc.) regarding the application of *laesio enormis* (gross disparity).

Keywords: *private law, Roman law, invalidity, laesio enormis, gross disparity, Hungarian Civil Code*

1. INTRODUCTION

In this paper, I am dealing with a major issue of contractual invalidity: the question of gross disparity in value. I will present the topic through examples of the rich theoretical and practical segments of the legal institution, with an emphasis on current and important law enforcement issues.

Indubitably, in the system of invalidity of contract law, the avoidance based on the gross disparity in value has a long history of legal history embedded in moral foundations. Its first appearance in Roman law was *laesio enormis*, a.k.a abnormal harm (Földi and Hamza, 2011, p. 513; Thomas, 1976, p. 283; Kaser, 1968, p. 161), highlighted as follows in one of the most prominent sources in Roman law:

If you or your father sold property worth a higher price for a lower price, it is equitable that either you get back the land sold through a court order, refunding the price to the purchasers, or, if the buyer chooses, you get back what is lacking from the just price. The price is deemed to be too low if less than half of the true price has been paid. (C. 4. 44. 2.)

The three defining elements of the legal institution in Roman law were the admissibility of an action for avoidance, in correlation with the buyer's purchase

option, and the 50% whenever it was possible to exercise the relevant legal consequences.

Laesio enormis cannot be applied in Roman law in the case of the sale of hope (i.e. *emptio venditio sper*) if the testator ordered the sale or purchase of a thing at a specified price in their will. According to the available sources, *laesio enormis* cannot be applied in a case in which the party who suffered *laesio enormis* was aware of the real value of the thing sold, and yet entered into, or renounced, the transaction or some sources did not allow for it in a case of an official auction (*subhastatio*). (Dömötör, 1996, p. 275; Siklósi, 2005, p. 67)

As it is well known, the concept of *laesio enormis* was further broadened and supplemented with additional moral content by canon law. (Dömötör, 1997, pp. 45–46)

It is worth mentioning that German law does not regulate gross disparity in value independently; rather, it can be deduced from Article 138 of BGB:

Art. 138 Legal transaction contrary to public policy; usury

(1) A legal transaction which is contrary to public policy is void.

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment, or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

This paragraph concerns itself mainly with immoral contracts, declares them null and void, and subsumes German case law under this case. (Köhler, 1983, p. 219)

The Austrian Civil Code, the ABGB also contains rules regarding the gross disparity in value in Section 934.

The rule essentially deems half of the real value as the limit which can give rise to grounds for avoidance. Contractual exclusion of the rule is not possible, but cannot be applied on the grounds of avoiding the contract in a case in which someone enters into a contract guided by a special preference value (*besondere Vorliebe*) or has expressed knowledge of the actual value, and in this knowledge concluded transactions in disparity in value, and also cannot be applied in a case of court auction. In essence, Austrian law incorporated the rules of Roman law about *laesio enormis*.

2. RELEVANT RULES OF THE OLD HUNGARIAN CIVIL CODE

The old Hungarian Civil Code, Act IV of 1959, regulated the gross disparity in value as follows:

201. § (2) 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 bestowing a gift, is grossly unfair the injured party shall be allowed to contest the contract.

It is noteworthy that in Hungarian civil law, before the old Civil Code, within the section about usurious contracts we can find somewhat similar wording. Act VI of 1932 on the usurious contract stated:

1. § An usurious contract is a contract in which a person, by taking advantage of a party's distress, lightness, intellectual weakness, inexperience, dependent position, or position of trust (...) enters into or obtains a pecuniary advantage for himself or a third party which conspicuously disproportionately exceeds the value of his/her service (usury asset advantage).

According to contemporary practice, including all the circumstances of a case, and, if the nature of the transaction involves special risk-taking, its magnitude must be taken into account in determining whether there is a significantly disproportionate difference between the value of the service and the consideration due. (Szladits et al., 1934, p. 62; Szladits, 1933, p. 162)

In essence, the regulation in the old Civil Code treats the difference in value as fundamentally objective grounds for avoidance. And, the rule states that a kind of proportionality can be expected between certain services and the counter-services. This wording was intended to protect the synallagmatic nature of contracts. (Weiss, 1969, p. 286)

Relating to the old Civil Code, understandably, there has been a significant body of case law on the gross disparity in value. One example of this was the highway lawsuit, which is well-known and well-presented by the media from several points of view. The essence of the lengthy litigation was related to the first toll motorways and the question of whether such a short road justifies paying a relatively high toll to be permitted to use it.

In connection with this issue, two sides of the problem, which are very important in the context of gross disparity in value, have been examined. *Lajos Vékás* criticized the above-mentioned rule of the old Civil Code in that it leaves too much room for interference with private autonomy, is incompatible with the basic principles of a market economy, and it violates market flow safety. It should be noted that *László Kecskés* had a similar opinion. (Kecskés et al., 1999, p. 66) On the other hand, according to *Kázmér Kovács*, similar to the practice of the Constitutional Court of Hungary, this is a conflict between fundamental principles, between which, as reflected in the cited rule, the legislator has already considered and placed the requirement of proportionality before the safety of market flow. (Vékás, 1998, pp. 326–327; Kovács, 1999, p. 407)

It should already be emphasized that, from a theoretical point of view, this is one of the key questions of the legal institution of gross disparity in value: Which is the higher interest, the parties' private autonomy, or at least the existence of some kind of expected proportionality between services and the consideration? An earlier explanation of the old Civil Code states in this circle:

“We need to protect the good faith of a contractor who, when concluding a contract, trusts what he can truly trust based on our economic order. On the other hand, the market flow does not justify the protection of the good faith of a contracting party who is confident that he can do a particularly advantageous business to the detriment of others and obtain a profit that can hardly be described as fair.” (Benedek, 1995, p. 545)

It is natural that in respect of certain contracts, because of their primarily aleatory nature, under the old Civil Code avoidance based on a gross disparity in value was also excluded. Typically, such contracts are maintenance agreements and life-annuity contracts. Regarding the maintenance and life-annuity agreements, in practice, avoidance usually occurs when the dependent dies shortly after the maintenance or life-annuity agreement has been concluded. In many cases, the conclusion of a maintenance or life-annuity contract involves significant damage to the interests of the legal heirs of the dependent, – in cases where they are not the same as the maintenance provider, as their inheritance is reduced by the consideration of the maintenance agreement. In these cases, sometimes motivated by a lot of emotions, the question arises as to whether the maintenance contract can be avoided because the maintenance provider has only provided maintenance for a very short period. From the point of view of civil law, this means whether the maintenance or life-annuity contract can be the target of an invalidation procedure based on the gross disparity in value. The case law in this regard takes into account the fact that maintenance is an aleatory contract (*aleatorischer Vertrag*), a contract of chance, from which it is not possible to know exactly how long the contract will last.

It is worth mentioning the decision which was published as BDT 2009.2002. from the recent case law. According to that decision, the maintenance contract cannot be avoided on the grounds of gross disparity in value between the service and the consideration, because, by its very nature, it is not possible to determine the ratio between the service and the consideration at the time of the conclusion of the contract. The maintenance contract is not necessarily invalidated by the obligated party's prior knowledge of the dependent's serious illness. Otherwise, those suffering from an incurable disease would be left without care, support, and assistance during the most difficult period of their lives. Impersonation is a bilateral deliberate act where the common will of the parties is not to enter into a contract or to enter into legal consequences. However, where the intention of the parties regarding the transfer of assets is real, the legal consequences of a sham contract cannot be applied to such an agreement. The Supreme Court took a position similar to that of a maintenance contract with regard to a contract of succession, as emphasized in BH 1976.60., among others. (Ujlaki, 2005, p. 73)

Of course, the case law has also examined the significance of the fact that, at the time of the conclusion of the contract, the knowledge of the party initiating the avoidance, or even both parties, extends to the possibility that there can be a gross disparity in value in the relationship between the value of the service and the consideration due.

Opinion No. PK 267 of the Supreme Court, considered relevant in this regard, highlights the following:

1. *In the case of avoidance of a contract based on the gross disparity in value between the value of the service and consideration due, the court must examine the circumstances in which the contract was concluded, the entire content of the contract, the turnover (value) relations, the peculiarities arising from the nature of the transaction, the method of determining the service and consideration to determine whether the difference in value is remarkably large.*
2. *In the case of a contract that is avoided based on the gross disparity in value the court must declare the contract valid, and set a level of consideration at which the difference in value is no longer remarkably large.*

The opinion also states, almost in a casuistic way, that in determining the remarkably large disproportionate part and deducting the legal consequences of possible invalidity, the circumstances of the contract, the requirements of bona fide, the proper exercise of rights, the parties' high interest in the transaction, and the market value of the real estate (in the case of real estate) have to be examined with increased focus. (Kiss and Sándor, 2008, pp. 263–265)

In my opinion, two very important conclusions can be drawn from the opinion. On the one hand, if and to the extent that a gross disparity in value is established in the lawsuit, the court does not have the task of ensuring full parity of value, but rather at most the abolition of an outrageously large disparity with its judgment. In other words, even if a grossly unfair transaction is successfully avoided, it cannot be expected that the transaction will then be fully proportionate to the usual price and value in the market. At most, it should no longer be remarkably disproportionate, so the economic loss of the party will be only reduced, but will not be completely eliminated.

On the other hand, in my view, although the opinion makes it mandatory to examine the circumstances in which the contract was concluded and the parties' possible awareness of the value, the conspicuously large disproportionate value could lead to objective avoidance. In my view, it cannot be read from this opinion that any awareness of the parties (so that one of the parties was aware that there was a significant disproportion between the contracted service value and the consideration due) could completely preclude avoidance of the contract based on the gross disparity in value.

It is important to mention that recent case law does not necessarily agree with this. In a 2014 decision of the Budapest Court of Appeal, referring to the new Civil Code, the Court stated the following: *'The court also points out that there is no difference in the assessment of the gross disparity in value under the old Civil Code and the new Civil Code. The new Civil Code reflects the case law set out in Resolution PK 267. According to the case law, in the case of avoidance of a contract based on the gross disparity in value between the service value and the consideration*

due, the fundamental requirements of the proper exercise of rights must also be taken into account. Given the requirement of the proper exercise of the rights, it is not possible to avoid a contract by the party who, at the time of concluding the contract, was aware of the conspicuous disproportion or assumed the risk arising therefrom.' (Decision in case number 5.Pf.21.187/2014. of the Hungarian Court of Appeal.)

In my opinion, the above-mentioned judgment of the Budapest Court of Appeal interprets opinion No. PK 267 in a way that cannot be read in any way from the resolution, and intends to consider the significantly different provisions of the old Civil Code and the new Civil Code as equivalent in a case in which case the provisions of the old Civil Code have to apply.

It should be noted that, contrary to the judgment of the Budapest Court of Appeal cited here, the position I have expressed above is supported by BH 1994.187. The decision states that if the buyer consistently insists on acquiring ownership of a real estate property, even for a purchase price that may exceed the market value, he/she may only avoid the contract due to his/her increased interest in concluding the contract, and he/she can only avoid the contract if the disparity is conspicuously large. Here, therefore, as a final conclusion, the objective nature of disproportion will take precedence over the content of consciousness.

It is worth emphasizing that the ad hoc decision was published under BH 1990.57. also emphasizes the objective nature of conspicuous disproportion, as it states that only in the case of a glaring difference in value is it appropriate to establish gross disparity in value if the seller intentionally accepted the buyer's purchase offer knowing the market value.

Although it applies to a special segment, it is appropriate to refer to Economic Principle Resolution 870/2003, which states that the purchase price of a security (government bond) is a uniform whole, determined by the distributor in its duly-published exchange rate table. When avoiding a contract based on the gross disparity in value, the full purchase price must be examined. There is no legal basis for the distributor to successfully avoid the disproportionate value of the part of the daily price in relation to the accrued interest, separately from the full price.

Resolution BH 2012.262. sets out important aspects of the assessment of gross disparity in value determining the order of the procedure as well. It stipulates that in the case of an action for the avoidance of a contract based on the gross disparity in value if the conditions for enforcement generally exist, the court must first take a commitment to the objective condition of the gross disparity in value. If that is the case, it must examine whether, in the light of the circumstances in which the contract was concluded, the contract can be declared invalid.

3. RELEVANT RULES OF THE NEW HUNGARIAN CIVIL CODE. COMPARISON

The new Hungarian Civil Code, Act V of 2013, contains a rule about the gross disparity in value, which differs significantly from the old Civil Code in several respects, as follows:

6:98. § [*Gross disparity in value*]

(1) *If, at the time of the conclusion of the contract, the difference between the value of a 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.*

(2) *The parties may exclude the right of avoidance provided for in Subsection (1), with the exception of contracts that involve a consumer and a business party.*

In connection with the new provision, György Wellmann explained that the system of conditions of avoidance based on the gross disparity in value (Article 6:98) is supplemented by a subjective criterion in the new code: a person who may have recognized the disparity or assumed the risk of it is not entitled to avoid the contract. (Wellmann, 2014)

It is worth paying attention to the ministerial reasoning of the new Civil Code, which states in this respect that the legal policy reason for the provision is that the measurement and determination of the balance in value of contracted services and considerations involves a lot of uncertainty and evaluation in market conditions. (Osztoivits, 2014, p. 240)

Compared to the old Civil Code, in addition to the slightly more precise wording of the act, the difference is that the avoidance based on the gross disparity in value becomes subjective to the extent that whoever may have recognized the gross disparity, as we have indicated above, or assumed the risk is excluded from the action of avoidance. According to the Commentary of the new Civil Code *'the assumed expression not only means that the party is not entitled to avoid the contract if at the time of concluding the contract he/she has known expressively his/her damage, but also if he/she could have recognized it with due care, that is to say, because he/she was guilty of serious negligence in discovering the market value'*. (Wellmann, 2013, p. 150)

Another Commentary of the new Civil Code sees the concretization of the principle of *nemo turpitudinem suam allegans auditur* contained in Article 1:4 (2) of the Civil Code in this new itemized rule of avoiding gross disparity in value. (Vékás and Gárdos, 2014, p. 1454)

All this requires a different approach to the new regulation and fundamentally narrows the scope of avoiding a contract based on this claim.

4. CONCLUDING REMARKS

Summarizing the above, in our opinion, the following conclusions can be made regarding the new rules of gross disparity in value. The rules of the old Civil Code, even if not all of the cases cited above agree with this, consider the right of avoidance to be an essential objective category. So, except in very extreme cases, avoidance is

allowed when the difference in value is remarkably large. The new Civil Code significantly examines the content of the consciousness of the party entitled to avoidance, as it is a very important question as to whether that party could or could not have recognized the gross disparity through due diligence. Thus, the gross disparity in value in the system of the new Civil Code can be considered a subjective category.

Obviously, for example, it is very difficult for a company to avoid a contract under the new Civil Code's regulatory system based on the gross disparity in value, because in a lawsuit, obviously the condition of recognizing the disparity at the time of concluding the contract will be examined.

It depends on the legal transaction and how the person entitled to avoidance ascertained whether the transaction is proportionate before concluding the legal transaction. And, in this case, in the case of a company, especially if it is concluded that the given transaction was in connection with its economic activity, the expected standard is presumably higher than in the case of a layman, which is why it may be difficult to later avoid a contract based on the gross disparity in value.

At the beginning of my writing, however, I have pointed out that the rule of gross disparity in value, given its historical roots, also carries a kind of moral content, the expectation that the synallagmatic nature of service and consideration should exist to some extent. If the rule is interpreted differently by the provision made subjective in the new Civil Code, there is a certain likelihood that this moral content, which is necessarily an objective measure, may be lost from the legal institution and its practical application.

At the same time, the question may arise as to whether the contracting parties concluded a contract so disproportionate that it also infringes upon the morals of the society in that the cited provision of the contract may be in breach of good morals due to gross disparity in value. Taking into account the principle of contractual freedom enshrined in the Civil Code, it is important to mention that the law prevents the parties from asserting interests contrary to their social and economic order, and therefore deprives them of the legal effect of contracts whose resulting contents are contrary to good morals.

According to the traditional interpretation, good morality expresses the general value judgment of the society, the limits of private autonomy determined by social consensus, and the degree of generally-expected behavior. Contractual freedom is therefore not unlimited; the law does not accept as valid contracts that manifestly violate generally-accepted moral standards. It follows from all this that the value system of honest people in business is the standard that defines the abstract concept of good morals. (Cf. Menyhárd, 2004)

In this connection, the position taken by BH 2009.153. is worth mentioning, according to which: the mayor of the municipality has obtained a significant property advantage to the detriment of the municipality by the fact that the actual value of the real estate included in the contract is 7.5 times the agreed purchase price. That contract was found to be contrary to good morals, although it also exhausted the category of gross disparity in value.

It follows from the position taken by that decision and from the foregoing that the gross disparity in value, in particular in the case of a very large difference in value, carries a substantial moral content and has a certain objective character, irrespective of interference with private autonomy. The subjective standard in the new Civil Code, in comparison with this feature and view of the new rules and problematic points related to the avoidance of the contract, poses a challenge to the correct application of the gross disparity in value, which I hope this article can help to overcome.

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