

## **PARTIAL INVALIDITY IN HUNGARIAN CONTRACT LAW\***

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**Abstract:** The study aims at reviewing certain questions relating to a legal institution, partial invalidity, which is rarely examined by the contemporary civil law literature. After a short historical overview, examinations focus on the provisions on partial invalidity contained by the Hungarian civil code in force. These examinations cover both the problems of assessment of the legal institution's legal nature and the difficulties of its application in the judicial practice. Concerning the question of the divisibility or separability of the contract which is a preliminary question when assessing partial invalidity, foreign regulatory examples are also reviewed. The last part of the study attempts to reveal the parties' contractual intention during the assessment of the partial or full invalidity of the contract, outlines the difficulties of interpretation, and drafts the potential interpretation methods.

**Keywords:** *partial invalidity, application of legal consequences of invalidity, hypothetical contractual intention, severability*

### **1. INTRODUCTION**

The study aims at reviewing certain questions relating to partial invalidity, a legal institution that is rarely examined by the contemporary civil law literature, although its thorough examination is justified. Recently, some studies appeared that, among others, concern the problem of partial invalidity. (Darázs, 2019; Juhász, 2020) Nevertheless, a scientific work has not been born yet, which would be problem-oriented and would comprehensively analyse the topic regarding both the dogmatic aspects and the practical questions arising in judicial practice.

Examinations within the framework of this study cover both the problems of assessment of the legal institution's legal nature and the difficulties of its application in judicial practice. At the same time, dogmatic basics of partial invalidity are also examined.

Concerning the question of the divisibility or separability of the contract which appears as a preliminary question when assessing partial invalidity, foreign regulatory examples will also be reviewed. The last part of the study attempts to

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reveal the parties' contractual intention during the assessment of the partial or full invalidity of the contract, outlines the difficulties of interpretation, and drafts the potential ways of interpretation.

## 2. HISTORICAL OVERVIEW

The historical roots of partial invalidity date back to ancient times. Even though it was known at this time to some extent (Siklósi, 2009; Darázs, 2016; Tamáné, 2016; Török, 2020), it has not been properly elaborated as a legal institution yet.

In Hungarian private law, partial invalidity is a well-known legal institution from the beginning of the civil law traditions. The Draft Private Law Code (*'Magánjogi Törvényjavaslat'*, hereinafter DPLC) of 1928 already contained rules on the invalidity of contract and provided on the cases of partial nullity and voidability. According to Art. 1020 DPLC, the entire juridical act failed as the main rule, unless it could be established that the party would have made his statement in the lack of the invalid part. This was decided by the court on grounds of equity.

*Károly Szladits* discussed partial invalidity only briefly. He declares that a juridical act can be partially invalid. In this case, the entire act shall be invalid, unless the circumstances indicate that the parties would have the contract concluded without the invalid part. (Szladits, 1938, p. 357) Regarding the above-mentioned article of the DPCL, another contemporary legal scholar, *Lajos Tóth*, noted that instead of the application of the principle *'utile per inutile non vitatur'*<sup>1</sup>, the invalidity of the entire contract is the general rule. (Tóth, 1938, p. 180)

Partial invalidity has a special place within the system of invalidity rules. Article 238 of the original text of Act IV of 1959 on the civil code (hereinafter referred as to HCC [1959]) stated as a general rule that *in case of the partial invalidity of a contract the entire contract fails*. Nevertheless, a contract was exceptionally invalid only in part, if (a) a legislative act provided otherwise, (b) the interests of the socialist state justified the maintenance of the other rules of the contract, or, (c) the parties would have the contract concluded in the lack of the invalid part.

Among the above-mentioned exemptions, the third one needed the further interpretation and discretion of the court, namely, when shall be deemed a certain (invalid) contract term for parties such as does not impact substantially the contract and the parties would their contract have concluded even in the lack of this part.

In 1978, Act IV of 1977 on the amendment and consolidated text of Act IV of 1959 on the Civil Code of the People's Republic of Hungary amended and renumbered the article of the HCC [1959] on partial invalidity and introduced new provisions on the partial invalidity of contracts concluded between commercial entities. The 'new' Article 239(2) HCC [1959] stated that in all those cases when a contract concluded between commercial entities is partially invalid, the legal consequences of invalidity applied only to the invalid part. However, the court had

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<sup>1</sup> The principle *'utile per inutile non vitatur'* is a legal maxim which was formulated in the *ius commune*, although it can be tracked back to Ulpian. (Cf. Tomás, 2016)

the right to declare the invalidity of the entire contract. Article 239(3) HCC [1959] also stated that in case of the partial or full invalidity of contracts between commercial entities, the court had the right to establish a contract between the parties and declare its content. Nevertheless, legal acts could provide otherwise.

In short, then: while the invalidity of a certain part of a contract between private persons resulted in the invalidity of the entire contract, the general rule, and the exemption is reversed in the case of a contract between commercial entities. According to *Gyula Eörsi*, with the drafting of the exemptions from the partial invalidity, Hungarian legislator aimed at maintaining, 'saving' the contract, which can fulfil its purpose, although certain elements are removed from it due to the (partial) invalidity (Eörsi, 1981, p. 125).

Until the beginning of the 1990s, it was a governing rule in the codified Hungarian civil law that invalidity concerning only a certain part of a contract leads to the invalidity of the entire contract. Partial invalidity appeared as an exemption from this general rule. It shall be applied only in those cases when a legal act expressly stated so or it was justified by the economic interests of the people or it could be proved that contractual parties would not have concluded the contract without the invalid part.

After the change of political regime, Article 239(1) HCC [1959] was amended again and the phrase 'interests of the socialist state' was changed by the expression 'interests of the national economy'. Nevertheless, the rules on partial invalidity were comprehensively amended in 1993, by Act XCII of 1993 on the amendment of certain provisions of the civil code. The modification came into force on 1st November 1993. This amendment reflected the changing attitude of the Hungarian legislator toward the legal institution of partial invalidity. Moreover, the legislator intended to react to the criticism that had been expressed by the legal literature and the practice. On the one hand, the new wording of Article 239 HCC [1959] did not distinguish the contracts concluded between private persons or commercial entities. Thus, in case of the invalidity of a certain part of the contract, the invalidity of the entire contract became the general rule, regardless of the nature of the contracting parties. The amended text of the article stated that the contract failed in its entirety only if the parties would not conclude it without the invalid part. Declaring the invalidity of the entire contract remained still the task of the courts, but, according to the judicial practice of the Curia (at that time the Supreme Court of Hungary), the burden of proof is on that party who seeks to achieve the invalidity of the entire contract. It means that this party has to prove that they, i.e. the parties, would not conclude the contract without the invalid part. (BH 2001.436.) Finally, Article 239 HCC [1959] also stated that a legal act may provide otherwise and in these cases, a ground for invalidity concerned only a certain part of the contract can lead to the invalidity of the entire contract.

According to the explanatory memorandum of the amending act, the modified text and the reversing of the general rule and the exemption serve better the smooth flow of transactions and the prevailing of the contractual parties' autonomy. Hence, partial invalidity became the general rule and the entire contract failed only in those

cases when the parties would not have concluded it in the lack of the invalid part. As the explanatory memorandum emphasized, in these cases, the legal effect relating to the invalid part is so important for the contractual parties that there is no interest to maintain their contract when this legal effect fails. This is the reason, why the entire contract shall be deemed invalid.

It should also be mentioned that HCC [1959] did not provide how to apply the legal consequences of the invalidity in the case of partial invalidity. Regarding this issue, the explanatory memorandum of the amending act of 1993 declared that in case of partial invalidity, the legal consequences of invalidity shall be applied only to the invalid part.

In 2006, after slightly more, than a decade, Article 239 HCC [1959] was amended again. With Act III of 2006 on the amendment of Act IV of 1959 on the civil code and of other acts for legal harmonisation related to consumer protection (hereinafter Amending Act [2006])<sup>2</sup>, Hungarian legislator introduced new rules to make coherence with the European rules on consumer protection. A new paragraph was added to Article 239 HCC [1959] which stated that in the event of partial ineffectiveness of a contract concluded with a consumer, the contract fails in its entirety only if it is impossible to perform it without the ineffective part. (Act. 7 Amendment Act [2006]) As can be seen, in the case of consumer contracts, partial invalidity is the main rule, but the invalidity of the entire contract can also be declared. However, in these cases the application of the exceptional rules is not based on the intention of the contractual parties, i.e. they would have or would have not concluded their contract, but on the impossibility of the performance without the invalid part.

HCC [1959] contained the above-mentioned rules on partial invalidity until the adoption of the new Hungarian civil code, Act V of 2013 (hereinafter HCC) which also maintains the principle of partial invalidity. According to Article 6:114(1) HCC, if the ground for invalidity concerns specific parts of the contract, legal effects of invalidity shall apply to those parts. In the event of partial invalidity of a contract, the entire contract shall fail if there is reason to believe that contractual parties presumably would not have concluded it without the invalid part. In the case of consumer contracts, paragraph (2) of the above-referred provision of the HCC contains a specific rule in line with EU law. According to this, invalidity concerning a certain part of a contract only leads to the invalidity of the entire consumer contract, if the contract cannot be performed without the invalid part [Article 6:114(2) HCC]. This question, i.e. if the contract can be performed or not without the invalid part, was studiously examined by the Curia concerning the foreign currency-denominated loan agreements. In the operative part of its uniformity decision no. 6/2013 PJE the Curia stated that in the case of these kinds of consumer contracts, if the court finds a clause void but the contract can be performed without the invalid part, the clause found to be void becomes ineffective from the point of view of legal consequences,

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<sup>2</sup> This act was adopted to adjust the Hungarian contract law provisions to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21. 4. 1993, pp. 29–34).

however, the remaining contractual clauses continue to bind the parties. (Point 5 of 6/2013 PJE) Thus, certain unfair terms of foreign currency-denominated loan contracts which are consumer contracts at the same time, partial invalidity shall be applied.

The invalidity of a consumer contract was also argued recently when the invalidity of the entire contract was claimed based on the fact that the general terms and conditions of a travel contract provided the consumer to pay for a booking fee. According to the related regulation on travel contracts which was in force at the time of the conclusion of the travel contract, the charges for the service shall be determined in a lump sum, as a total of all partial services. As Curia stated, though the obligation to pay for a booking fee is contrary to the law, the contract can be performed without the booking fee, therefore, the travel contract shall be deemed invalid only partially, in its term on the booking fee. (BH 2021.106.)

Returning the general rule of partial invalidity, i.e. Article 6:114 (1) HCC, it should be discussed, how the scope of the invalidity shall be accessed. When assessing whether a ground for invalidity concerning only a certain part of the contract would affect the entire agreement, the court shall answer the question, of whether parties presumably would or would not have concluded their contract without the invalid part. The phrase ‘there is reason to believe’ appears as a novelty in the text of the HCC. With the introduction of this term, the legislator makes it necessary to reveal the parties’ intentions as completely as possible. However, the expression raises difficulties in the practical application, and therefore, requires further interpretation. Since the reveal of the contractual parties’ intention needs further analysis, the comprehensive examination of the topic takes place in Point 4 of this study.

### **3. THE APPLICABILITY OF PARTIAL INVALIDITY. DIVISIBILITY OF CONTRACT AS A PRECONDITION.**

In Point 2 it was reviewed, how the legislator’s approach to partial invalidity has been stepwise changed during the 20th century and, as a result of this change, how the general rule of invalidity of the entire contract became an exemption from the general rule of partial invalidity.

Questions relating to partial invalidity have arisen several times in judicial practice. After the amendment of the CC [1959] in 1993, some judgment was born, that attempted to determine the conditions under which the rule of partial invalidity can be applied. According to the practice of the Curia (at that time Supreme Court of Hungary), partial invalidity could be assessed if the ground for invalidity concerned only a certain part of a divisible service. (BH 1997.38.) Partial invalidity was also applied by the court in the case when the contractual clause on the right of termination was invalid. (BH 1991.402.) Similarly, in the case of a mandate contract, the court, instead of declaring the entire contract invalid, declared only the stipulation of a contingency fee invalid. (BH 2008.185.)

The question of partial invalidity was discussed not only in the practice of the Curia but the higher courts. In a judgment published in 2002, it was stated by the court that partial invalidity can only be applied if the ground for invalidity concerns a certain, *non-essential part* of the contract. Moreover, the other parts of the contract shall be valid and it should be established that the parties would have concluded their contract without the invalid part. According to the opinion of the court, these conditions shall be fulfilled at the same time. (Fejér Megyei Bíróság Pf. 20 448/2001/3., BDT 2002.622.)

The judgment of the court suggests that the nature of the concerned part of the contract shall be examined, namely, if the invalid element was essential or not for the parties. However, the assessment of this question is quite difficult, since it cannot be answered objectively. Instead, subjective aspects and the circumstances of the conclusion of the contract shall be taken into account, while the interpretation of the parties' statements is also needed. Based on all of these can be assessed if a certain element of the contract was essential or not, and therefore, parties would have or have not concluded their contract in case of the invalidity of this element.

The explanatory memorandum of the HCC [1959] refers to the fact that the court shall not expressly examine if the parties would have concluded a contract without the concerned contract term, but how would any reasonable party act in a similar case? Statements of the parties made during their legal debate are not relevant, since these statements were made knowing the changed circumstances.

According to the right interpretation, the court shall examine if the parties' consent would be created or not without the given contract term. Article 239 HCC [1959] must not be interpreted in such a way that the mere fact that either of the parties would not conclude the contract without the invalid part, would provide a basis for the invalidity of the entire contract.

In another case relating to the applicability of partial invalidity, the court explained that during the assessment if the entire contract fails or not, declarations of the parties made during the judicial procedure have no relevance. Instead, it shall be examined if a reasonable party who considers economic rationalities at the time of the conclusion of the contract, would have concluded the contract without the term which afterward proved invalid. (BDT 2010.2351.) In another decision which was made already under the scope of the HCC in force, the court, relating to a certain ground for invalidity concerning the principal service, stated that the invalidity of the entire contract shall be declared since the contract cannot come to exist in the lack of the principal service. (Kúria Pfv. 21.422/2018/6.)

As it is clear from the above-mentioned judgments of the different Hungarian judicial forums, the applicability of partial invalidity tightly connects to the question of the divisibility or separability of the contract which can be treated as a preliminary question. As in his related work, *Lénárd Darázs* noted, that in the case of partial invalidity '*there is an error in the contract, because of which the State withdraws the legal effect from a separate part of the contract, which part coherently fit into the rules of the contract*'. (Darázs, 2019, p. 80) If certain parts of the contract cannot

be separate, i.e. the contract is indivisible, partial invalidity cannot be applied, but the entire contract will be inappropriate to trigger the legal effects intended to reach by the contractual parties.

At the beginning of the examination of the divisibility or separability of the contract, it should be noted that the *divisibility of the contract* and the *divisibility of the contractual service* to be fulfilled by the obligor in the course of the contract, are not the same. Nevertheless, Article 6:28 (2) HCC provides some help for the interpretation of the term. According to this article, a service shall be construed as divisible, if *it can be broken up into independent sections*.

However, the case is exempted, when the division of the service would harm the obligee's essential legal interest. The divisibility of service, therefore, is based on the separate usability or unusability of certain parts of the service which is traceable to the physical divisibility or indivisibility of the thing as the object of the contractual service. On the other hand, even if its physical divisibility, a service is only divisible when its sections separately can satisfy the obligee's contractual interests. (Osztovits, 2014, p. 85) By contrast, the divisibility of the contract does not base on the divisibility of the service but means the relationship, i.e. the divisibility or indivisibility of the contractual terms.

The question of the divisibility of the contracts is quite unworked in Hungarian private law theory. Conversely, the topic has rich literature both in Germanic, i.e. German, Austrian and Swiss, and English law. Since the contractual parties rarely declare clearly in their contract that they would not conclude it without a certain (invalid) part, revealing their real contractual intention is quite difficult. Similarly, it is also not typical that parties to provide, if they would the 'residual contract', i.e. the contract which remains after the separation of the invalid part, maintain or not. However, in the civil law practice of many European countries like Germany, the United Kingdom, Switzerland, and Luxembourg, the application of the so-called *severability clauses* (*Salvatorische Klauseln*, *separability clause*, *clause de divisibilité*, etc.) is particularly characteristic. It is also worth mentioning that, maybe due to the Western examples, the inserting of such clauses into the contract spreads more and more nowadays in the domestic, i.e. Hungarian contractual practice as well. A separability clause is a provision that keeps the remaining provisions of a contract in force if any part of the contract is judicially declared *void*, *unenforceable*, or *unconstitutional*. From our point of view, the case has relevance when the ground of invalidity concerns only a certain part of the contract.

The insertion of a severability clause into the contract can be quite helpful in the case of individual agreements. If the contractual parties insert such a clause into their contract, they may provide the legal status of their agreement in case of partial invalidity, and therefore, the uncertainties and interpretation problems, and difficulties relating to the reveal of the contracting parties' intention can be prevented. Thus, in some scenarios, a severability clause can save an otherwise invalid contract. (Cf. Beyer, 1988; Baur, 1995, pp. 31–42; Marchand, 2008, p. 246; Nordhues, 2011, pp. 213–214; Perez, 2019, pp. 280–281) This finding is fully by the thought of Gyula Eörsi, who, referring to the development direction of the then

Hungarian private law, emphasized the expanding trend of the cases of the partial invalidity of the contract. As he stated, these cases result in the amendment of the contract since the aim is to ‘keep alive’ or ‘save’ the contract, and thereby, the contract can fulfil its functions while certain elements will be out of the contract due to partial invalidity. (Eörsi, 1981, p. 125)

The application of a severability clause presupposes that the contract has certain parts which prevail independently from each other, i.e. a contract can ‘survive’ even if a given contract term is invalid. However, in the lack of such a clause, the *divisibility* of the contract is a prerequisite for the application of partial invalidity, whereas indivisibility leads to the invalidity of the entire contract. Regarding this question, it should be highlighted that the possibility for break up the contractual service into independent sections does not mean the divisibility of the contract.

In German-speaking literature, the divisibility of a contract (*Teilbarkeit*) is examined from several aspects. *Objective divisibility* means that certain terms of a judicial act are invalid but other terms not concerned by the ground for invalidity remain in force. In other words, this kind of divisibility focuses on the content of the contract and examines if certain terms and conditions of the contract can be separated from each other. By contrast, the *subjective divisibility* of a contract covers a situation, where a contract was concluded between more parties, and the given ground for invalidity is raised only in the relation of certain parties. A further type of divisibility is *quantitative divisibility*, according to which the contract can be divided either in time or in space or its extent (Pierer von Esch, 1968, pp. 54–59; Zimmermann, 1979, p. 63; Petersen, 2010, p. 420).

In English law, a similar approach is applicable regarding the severance of the contract in case of illegal promises. In those cases, when promises of one contractual party are partly lawful and partly illegal, the latter can be cut out and lawful ones can be enforced. However, this mechanism can only be done if three conditions are satisfied. These are the followings:

- a) severance of the promises, i.e. the promise must be of such a kind as can be severed;
- b) redrafting the contract must not be necessary;
- c) and severance must not alter the whole nature of the contract. (Peel, 2011, p. 559)

As a general rule, there can be no severance of a criminal or immoral promise, unless a criminal promise was made without guilty intent. The need for redrafting the contract shall also be examined. This can be assessed by the so-called ‘blue pencil rule’. Under this test ‘(...) *the court will sever only where this can be done by cutting words out of the contract (or by running a blue pencil through the offending words)*’. (Peel, 2011, p. 559) The earlier case law of the courts suggested that promises could be severed only if the ‘blue pencil’ test was satisfied. Nevertheless, nowadays it is already accepted that the ‘blue pencil’ test restricts, but does not determine the scope of the doctrine of severance. In summary, ‘blue pencil’ means to cut out certain promises while other not interdependent promises remain enforceable. It should be noted that the court will not redraft the contract by adding or rearranging words, or by substituting one word for another, i.e. in these cases, the court has no statutory



power to revise the contract. However, in cases of *statutory severance*, the revision of the contract by the court is possible.

After the short review of the theories relating to the divisibility of contractual promises, it should be highlighted that this characteristic of a contract always has to be examined, unless the parties do not insert a severability clause into their contract. In this case, the contract can be severed and partial invalidity and its legal consequences can be applied, while in the lack of such clause the divisibility of the contract shall be assessed by revealing the contractual intention of the parties.

#### **4. THE ROLE OF REVEALING THE CONTRACTUAL INTENTION DURING THE ASSESSMENT OF THE PARTIAL OR FULL INVALIDITY OF THE CONTRACT. DIFFICULTIES OF INTERPRETATION.**

At first sight, the rules on the invalidity of the contract and its interpretation are quite remote from each other and there is no particular relationship between them. Nonetheless, the two issues connect in a special way in case of partial invalidity, where the interpretation of the phrase *'there is reason to believe that the parties would not have concluded it without the invalid part'* [Article 6:114(1) HCC] is necessary, to reveal the parties' intention as comprehensively as possible. The interpretation of this term is particularly important since the application of partial invalidity or the extension of invalidity to the whole contract can be assessed upon this.

Nevertheless, regarding the interpretation of the above-referred term, several problems arise. Firstly, it shall be laid down that the original intention and consciousness of the parties hardly can be recovered afterward, while exploring the parties' original will be essential since this is the basis for accessing if parties would or would not have concluded the contract without the invalid part. The revealing of the contractual parties' intention already causes difficulties in itself. However, in case of partial invalidity, this task becomes even more difficult due to the phrase *'if it is assumed'*.

In case of partial invalidity of the contract, the HCC provides the procedure to be followed. This procedure is seemingly clear: the partial or the full invalidity of a contract shall be assessed upon the parties' intention, i.e. the court shall declare how important was for the parties the part concerned by the ground for invalidity, and the legal effect intended to reach by the contract, would they have concluded the contract without this part or not. As *Lénárd Darázs* notes in its related work, answering this question is not a simple technical legal problem, but it is an important additive to assess, how the borders of private autonomy are designated by a legal system in such an area, where the necessity of the State's intervention because of the existence of the ground for invalidity cannot be disputed (Darázs, 2019, pp. 79–80).

As can be seen, revealing the contractual parties' intention is a serious business, which faces many difficulties. Thus, contractual parties rarely declare clearly in their contract that they would not conclude it without a certain (invalid) part. Similarly, it is also not typical that parties to provide, if they would the *'residual contract'*, i.e. the contract which remains after the separation of the invalid part, maintain or not.

It is important to note that in all those cases when the contractual parties insert a so-called severability clause into their contract, they provide the future legal status of their contract in case of partial invalidity, and therefore, they prevent the interpretation problems which arise in the course of revealing the parties' contractual intention.

At this point, we should refer to Article 6:63 (2) HCC which states that the creation of a contract needs the parties' agreement concerning all essential issues as well as those deemed relevant by either of the parties. According to the text of the above-referred article, an agreement on the issues which are deemed relevant shall be required for the conclusion of the contract if either party expressly indicates that an agreement on such issues is a precondition for the conclusion of the contract. Thus, by Article 6:114 (1) HCC, in all those cases when a contract contains such a term, the invalidity of a certain part of the contract exempts from the general rule of partial invalidity and leads to the invalidity of the entire contract. When determining the extent of the invalidity, exclusively the parties' *real contractual intention* forms the basis of the decision.

Somewhat more difficult is, when the parties' agreement contains neither the express declaration with the above-mentioned content, nor the provision on the future legal status of the contract, but the intention of the parties can be established beyond a reasonable doubt. As can be seen, the real intention of contractual parties shall be revealed in this situation, without, however, having an express statement. According to Darázs, it could be considered without doubt, which rules (i.e. partial or full invalidity of the contract) shall be applied (Darázs, 2019, p. 84). Nevertheless, it also should be mentioned that despite the possible applicability of the reconstruction of the parties' original intention in such a way, it leads very rarely to the expected result in the practice.

Deciding on the application of partial invalidity or the entire invalidity of a contract causes the most difficulties, when parties, on the one hand, do not provide either the significance of the contract term concerned by the ground of invalidity or the future legal status of the contract. It means, that it is not expressly declared if the invalid part of the contract was essential or not, and regarding this characteristic, parties would have or would have not concluded their contract in the lack of the invalid part. On the other hand, the real intention of the parties cannot be revealed by extensive proof. In these cases, according to the text of the HCC, the exploration of the parties' assumed intention is needed. The court should answer, what was the intention of the parties at the time of the conclusion of the contract. Here, it is important to refer back to the interpretation of the contract, since the phrase '*there is reason to believe that the parties would not have concluded it without the invalid part*' [Article 6:114(1) HCC] shall be interpreted, firstly, by the application of Article 6:8 and 6:86 HCC. If the application of interpretation of rules does not lead to results, the application of the *hypothetical contractual intention* of the parties would solve the problem.

The hypothetical contractual intention is known, but rarely examined legal institution in Hungarian civil law. During the revealing of the contractual parties'

hypothetical (assumed) intention, the court shall take into consideration all circumstances of the conclusion of the contract, to determine what the parties intended to achieve with the conclusion of their contract. Moreover, it shall be assessed that bearing in mind the principle of good faith and fair dealing, how the contractual parties would have agreed, if they would have known that a certain part of the contract is invalid.

In the words of *Károly Szladits*, it shall be revealed that under the given circumstances, how fair persons with insight as business parties usually used to act, persons who intend to reconcile their interests instead of harming each other (Szladits, 1938, p. 21).

In his already referred work, Darázs draws attention to the fact that there is an essential difference between the application of the above-mentioned two cases, i.e. the interpretation of contractual intention by the court and the hypothetical contractual intention. In the first case, upon the interpretation rules, the intention of the parties can be reconstructed as a part of private autonomy. This will be not the actual real intention of the parties, but their interpreted, assumed intention (Darázs, 2019, p. 84). By contrast, the hypothetical contractual intention is a *sui generis* legal institution appearing within the rules of partial invalidity, and therefore, it can be applied exclusively during the application of partial invalidity (Darázs, 2019, p. 85).

## 5. THE LEGAL CONSEQUENCES OF PARTIAL INVALIDITY

Concerning partial invalidity of the contract, one of the most important tasks is to answer the question, of how the legal consequences of the invalidity, regulated by the HCC (Art. 6:108–6:113 CC), shall be applied. To answer, the legal nature of partial invalidity should be examined. HCC [1959] did not contain a clear provision on the application of the legal consequences of the invalidity. Although the explanatory memorandum of the modification act of 1993 declared that legal consequences shall be applied for the invalid part of the contract, controversial judgments appeared along which two opposite approaches evolved in Hungarian private law practice. As Harmathy noted, this is mainly justified by the fact that even though the HCC [1959] provided the contract's legal status, the rules on the legal consequences of invalidity had not been revised (Harmathy, 2002, p. 614).

According to the first approach, which can be called 'falling-part theory', partial invalidity is an independent (*sui generis*) legal institution. It means that all parts which are not concerned by the ground for invalidity will continue to exist and the contract shall be deemed and be fulfilled as if the parties would have agreed originally without the 'excised' part. (Kemenes, 2016a, p. 9) Invalid parts *ex lege* fall out from the contract, therefore the legal consequences of invalidity declared by the civil code cannot be applied. The other approach considers *partial invalidity as a type of invalidity* and accordingly, it does not require the application of special legal consequences, therefore legal consequences determined by the civil code shall be applied for the invalid part of the contract. This approach was supported by the explanatory memorandum of the amendment act of 1993.

It should be noted that this differentiation between the approaches on partial invalidity and the application of the invalidity's legal consequences has already been exceeded nowadays, whereas the civil law regulation in force supports the approach denying partial invalidity' independent nature. Thus, Article 114(1) HCC, along the direction designed by the amendment of the HCC [1959] in 1993, expressly states that the legal effects of invalidity shall apply to those parts of the contract which are concerned by the ground for invalidity (Kemenes, 2016a, p. 9; Kemenes, 2016b). The above-mentioned provision of the civil code is also confirmed by the relevant legal practice. (BDT 2015.85.)

Though the text of the HCC clarifies the application of legal consequences of invalidity, opinions appeared emphasizing the risks that arose by the remedying of the invalid part of the contract by the court. Thus, court is not bound by the claims of the parties: according to paragraph (3) of Article 6:108 of the HCC, the court decision may resolve the consequences of invalidity in a manner that differs from the party's request. Some scholars consider that giving the courts more space to intervene is worrisome, since this judicial intervention may overshadow the prevailing of the principle of contract freedom.

Accordingly, such a situation may arise, when the court remedies the invalidity of a certain part of the contract by the amendment of the contract. This is a drastic action from the part of the court, which may push the principle of freedom of contract into the background. It is also emphasized by *Tamáné*, in her related work. (Tamáné, 2016, p. 311) It is indeed true, that HCC states that such a court decision may not prescribe a solution that is protested by all parties. However, this provision does not necessarily constitute a sufficient guarantee, whereas the 'undifferentiated and mass' application of judicial right, as *Tamás Török* warns, contains several dangers and conveys the wrong message to the civil law entities (Török, 2020, p. 19).

Although the application of partial invalidity is driven by the aim to keep the contract alive, it is worth thinking how the fulfilment of a contract whose elements are left or modified can serve the parties' interests and the realisation of the originally defined contractual purposes. *Attila Menyhárd* argued, how correct is the approach, guiding in the Hungarian judicial practice, according to which maintaining the legal relationship has primacy compared to the termination. Nevertheless, maintaining the contractual relationship 'at all cost', even by disregarding the parties' intention, can be hardly justified appropriately on the legal and political arguments – this reflects the State's paternalist approach to contracts. However, a contract is not a value in itself to be protected. As Menyhárd noted, provisions on partial invalidity would support the private autonomy and freedom of contract, if in those cases when a certain ground for invalidity concerns only a part of a contract the entire contract would be declared invalid, since in such case, the possibility would open up for the parties to renegotiate or 'renew' their contract. But, as he added, neither the heterogeneity of the invalidity situations and the uncertainty to determine the contractual unity of will, nor the aspects related to the aim of regulating the content of the contract or the consideration of the parties' legally protected interests do justify the prevailing of such a provision. (Menyhárd, 2021, p. 22)

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