

INTERPLAY BETWEEN UNDUE INFLUENCE, USURY, AND IMMORAL CONTRACTS IN THE LIGHT OF THE RECENT CASE LAW OF HUNGARY*

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Abstract: In this short writing, we intended to show the recent tendency in the Hungarian judicial practice, a slight movement to rediscover the importance and the great variety of the subjective elements of usury contract, focusing on the so-called undue influence as a subjective condition of the invalidity. However, a twofold finding should be expressed here. First, the conceptual scopes of these grounds are not totally separated from each other, although, a distinction should be made, moreover, not only between the undue influence and other defects of contractual intention but also between usurious contract, immoral contract and unfair exploitation, with the observation that the latter ground of invalidity has only historical importance in Hungarian law. Second, as the former judicial practice placed too much importance on the assessment of the reciprocity condition in usury cases, in the cases of the gift contracts concluded by the party under the undue influence the court constitutes the invalidity based on immorality, not on usury.

Keywords: *undue influence, usurious contract, unfair exploitation, contracts contrary to good morals, good faith in contract law, gift contract*

1. INTRODUCTION

In recent years, the Hungarian supreme judicial forum, the Curia published several decisions of great interest concerning the borderlines between the invalidity grounds of the vice of consent, the usurious contract and the immoral contract, focusing on the subjective elements of the exploitative contracts, especially the undue influence upon the party's free contractual will. In the following, this article is to examine this case law, their judicial and academic assessments, positioning into the framework of the Hungarian system of the invalidity of the contract, and also the underlying considerations of the Curia. Before that goal, we strive to introduce shortly the development and changes of the legal instances and rules relating to the above-

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mentioned undue influence, first, back to the era of the Private Law Bill of 1928 (known as Mtj.), then the old Civil Code of Hungary of 1959 (hereinafter referred to as OldHCC) and last, the statutory provisions of the Hungarian Civil Code in effect, from 2013 (hereinafter referred to as HCC).

2. UNDUE INFLUENCE, UNFAIR EXPLOITATION AND USURY FROM A COMPARATIVE PERSPECTIVE

Here, one should shed light on the main differences between the national contract law approaches to unfair exploitation. In the Common Law of England (including Equity) today, the equity rule of undue influence belongs to the group of invalidity grounds of the contractual intention. However, there is no sharp boundary between the categories of economic duress, undue influence and unconscionable bargain. Notwithstanding, they are not interchangeable (Menyhárd, 2004, p. 47). In most cases of undue influence, if the agreement has been obtained with improper pressure, this pressure did not amount to duress (Peel and Treitel, 2015, pp. 505–506). In order to protect the freedom of formation of the contractual intention, common law concentrates on the procedural fairness of the negotiations, rather than of assessing the substantive justice of contracts (Chen-Wishart, 2006, p. 262).

As it is stated above, undue influence is a case of the invalidity of a contract bordering on duress and other defects of will, but in which the test is not merely the defect of the contractual will of the person influenced, but also the unfairness of the conduct of the party benefiting, or, the donee, which in the vast majority of cases is the exploitation of the relationship of trust between the parties. In addition, the common law also requires its detrimental (economical) effect upon the ‘influenced’ party, the ‘wicked exploitation’ (Bigwood, 1996, p. 504) ‘The doctrine extends to cases of coercion, domination or pressure outside those special relations, though such cases will often now come within the doctrine of duress.’ (Beale, 2018, pp. 788–789) In judicial practice, undue influence may also be established – as equity law focuses on the conscience of the party in a dominant position – in cases where the party has gained the advantage through emotional influence or has taken advantage of the fact that the victim has also followed his advice blindly, against his own well-perceived interest (Beale, 2018, p. 790). It should be noted here that English jurisprudence provides for a presumption of undue influence in certain relationships of trust, provided that the weaker party entered a transaction that requires explanation (presumed undue influence). In other cases, the burden of proof is on the contracting party to prove that the other party induced him or her to enter into the transaction by undue influence (so-called actual undue influence) (Beale, 2018, p. 793). Assessing substantial elements, the undue influence is bordering the invalidity ground of unconscionable contracts.

For the sake of this short comparative assessment, one can choose the Draft of Common Frame of References (von Bar, 2009), since its Article II.–7:207 provides unfair exploitation among the invalidity case of vitiated consent:

‘Party may avoid a contract if, at the time of the conclusion of the contract (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party’s situation by taking an excessive benefit or grossly unfair advantage.’

The legal consequence is not a nullity, but avoidance, so the party that suffered the detriment is entitled to decide whether to challenge the contract. The adaptation of the contract by the court is also possible at the request of the party.

It is worth taking the BGB rule on usurious contracts as the next example, since at the beginning of the 20th century, during the attempts for the codification of the Hungarian civil code and among the numerous spontaneous adoptions of German civil law concepts and legal solutions into the Hungarian customary law, the Hungarian legal development of usurious contracts was significantly influenced by the German Civil Code, the BGB. Article 138 of BGB states that a legal transaction contrary to public policy (usury) is void, in particular, when a person, by exploiting the predicament, inexperience, lack of sound judgement 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 (usury).¹ The usurious contract is null and void, the remedy is similar to the Hungarian rule.

However, at the time of early civil codification attempts, that was not only the German BGB or, the Austrian ABGB had influenced upon the drafts. According to Antal Almási, among the conditions of a usurious contract that the party could exploit, one of them, i.e. the abuse of the relationship of trust (or reverence, or dependency) reflects the impact of the English concept on undue influence (Almási, 1932, pp. 181–183). Few years earlier, Endre König pointed out the same (König, 1926, p. 383). In the following, several scientific findings are given from the first half in the 20th century to reflect the importance of subjective elements of the invalidity rule, and the protection of the free contractual intent.

3. THE CONCEPT OF UNDUE INFLUENCE IN HUNGARIAN CONTRACT LAW FROM A HISTORICAL PERSPECTIVE

The Private Law Bill of 1928 (Mtj.) provided undue influence only as an element of the usurious contract.² Parallely with the codification, the usury and the unfair

¹ Official translation available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0417.

² Cf. Art. 977 (second sentence) of the Private Law Bill of 1928: ‘contract by which a person, taking advantage of another’s inexperience, recklessness, dependence, or distress, or of his relationship of trust with him, concludes or obtains for himself or a third person a gratuitous advantage or disproportionate profit, to the substantial detriment of the other party, is also null and void.’

exploitation had gained statutory definition and regulation as the Law on usury No. VI of 1932 stepped into force, and on the basis of the same approach. Meanwhile the undue influence took root in the judicial practice and became (again) a part of the customary law (Almási, 1926, p. 14).

Tibor Lów put that the undue (illegal) influence of contractual intention is a concept comprising all grounds of coercion, misrepresentation, or unfair exploitation of the party's situation and emphasised that this undue influence refers to the contract concluded in such a way which is contrary to good morals (Lów, 1926, p. 148). As he pointed out, limiting the word *usury* to the credit contracts had the effect that other "transactions which could be called usurious because they are also the result of the exploitation of the distress or imprudence or inexperience of one party and provide the other party or a third party with a consideration disproportionate to the service rendered, all fall into the category of transactions contrary to good morals".³ Szladits stated also that an exploitative contract is voidable not because of its object (the intended legal effect), but because of the vice of consent (Szladits, 1932, pp. 53–54). László Szigeti also examined the subjective elements of the concept of usury. In his opinion, its very essence and the '*differentia specifica*' of usury is that the usurious party has obtained this disproportionate advantage by taking advantage of the distress, imprudence, mental weakness, inexperience, dependence or relationship of trust of the party who has contracted with him. 'Usury is nothing more than the use of unfair influence to negotiate credit contract terms.' (Ifj. Szigeti, 1933, p. 252)

Several years later, István Szászy also confirmed the same idea. He also noted the Common Law origin of undue influence. However, he also points out a fundamental difference: while the English doctrine of undue influence is based on the unfair exploitation of a dependent legal situation, in Hungarian judicial practice the concept 'includes the notions of unlawful threat, fraudulent misrepresentation and exploitative contract, i.e. all cases in which one party induces the other to enter into a transaction by unlawful means'. (Szászy, 1948, p. 256)

Thus, invalidity based on unfair influence appeared in Hungarian academic works primarily as an institution for the protection of contractual freedom, and within the freedom of contractual will.

4. UNDUE INFLUENCE AS SUBJECTIVE ELEMENT OF USURY, FADED AWAY BY THE TIME OF THE OLDHCC

The promulgated text of the former Civil Code (OldHCC), in Art. 202, condensed the subjective elements of the facts into the phrase "*by taking advantage of the position of the other party*". Meanwhile, objective disproportionality of value has also been included as a separate ground for invalidity introduced by Article 201(2), and the principle of reciprocity was also stipulated in Art. 201(1).

³ He also explained that there may, however, be further instances of undue influence on the will to enter into a contract, which are different from typical examples of immoral contract. *Ibid.*

The reduction of the subjective elements changed the application of the concept of usury in judicial practice.

As Attila Menyhárd (Menyhárd, 2016, p. 238), Hella Molnár (Molnár, 2006) and Gábor Kiss and István Sándor (Kiss and Sándor, 2014, pp. 155 et seq.) put it in their works, in the majority of cases, the judicial practice of the OldHCC, interpreted the situation of the other party restrictively (it should be distressed or disadvantaged), it required the conscious, purposeful exploitation of this situation on behalf of the contracting party. Furthermore, it often identified the obviously disproportionate, i.e., excessive advantage (Art. 202 OldHCC) with the obvious disproportionality *between the performance and the consideration*, under Art. 201(2) OldHCC. According to that, several decisions stipulated again and again that the usury contract is merely a subtype of a contract with obvious disproportion. (Curia decision No. EBH 2001.436) Only in exceptional cases, the court established the elements of a contract of usury in other circumstances, including personal problems, health, dependency or family reasons (ibid.).

The New Civil Code of Hungary (Act V of 2013; HCC) incorporated the definition of usury with unchanged wording, as follows: ‘If, by exploiting the other party’s situation, a contracting party gains excessive benefit or unfair advantage when the contract is concluded, the contract shall be considered null and void’.

Seemingly minor, yet of greater significance for our topic, is the fact that the Civil Code classifies certain grounds of invalidity in Chapter XVIII on nullity and voidability into the groups of errors of intention, errors of declaration and errors of purposive legal effect. In my opinion, this diminishes the importance of the subjective aspects of the usury contract and detaches it from the aim of protecting the contractual will, which is the starting point of the illicit nature of the undue influence.

Attila Menyhárd analysed the interpretation and operation of the elements of usury contracts in judicial practice and reported on a basically strict, restrictive interpretation of the judicial practice with regard to both the contracting party’s distress or the disadvantageous position and its exploitation. He highlighted the fact that the judicial practice of the general clause declaring the nullity of a contract contrary to good morals was also not so firmly established underlying this state of facts (Menyhárd, 2016, p. 237).

5. CONTRACT CONCLUDED UNDER UNDUE INFLUENCE ASSESSED AS CONTACTS CONTRARY TO GOOD MORALS

Analysing the relationship between usury and immoral contract, the common historical root should be pointed out, since the usury contract was formerly a special case of immoral transactions. Due to being worded into a special statutory rule, it ceased to be a type of contract contrary to good morals *per se* (Trócsányi, 1909, p. 47). Based on this approach, situations in which one party persuades the other party to conclude a contract by using unconscionable means do not imply that the contract is null and void on the ground of immorality (Menyhárd, 2004, pp. 26–28). It was

also indicated however, that the conceptual scopes of immoral and usurious contracts never lost their close connection and interplay.

The restrictive approach prevailed in the judicial interpretation of the rule of OldHCC. Up to recent years, the narrow and restrained application of the invalidity ground of immoral contract also reflected some kind of subsidiarity in the practice (Curia decision No. EBH 2012. P 17).⁴ Meanwhile, the judicial fora did also not pay more attention to the statutory rule of the usurious contract. As stated above, the assessment of the subjective elements – concerning here the undue influence as a factual situation, a conduct influencing the free contractual will – was also carried out with great restraint. Provided that, the applicability of the invalidity ground for usurious contract is enough broad to cover all relevant cases where undue influence occurred.

Nevertheless, the authors Gábor Kiss and István Sándor draw attention to the increasing number of cases of ‘psychological usury’ *within* the category of contracts in conflict with good morals in judicial practice:

‘In recent years, a particular category of contracts which are manifestly contrary to good morals has become increasingly noticeable in the case law of the courts, which relates to legal transactions with persons of limited capacity or emotionally vulnerable persons.’ (Kiss and Sándor, 2014, pp. 148–150).

In the last decade, this continuing trend in judicial practice seems to confirm this statement. The subjective factual elements of the cases, such as emotional vulnerability, abnormal physical and emotional dependence, partial impairment of mental abilities, susceptibility to influence, instability, inability to form one’s own will have gained more importance in constructing the immorality of the conduct of the other party the exploitation of which results in a contract for pecuniary benefit or harm to the pecuniary interests of the person abused (Kiss and Sándor, 2014, pp. 148-150).

In a decision published in 2012 a maintenance agreement covering a gift contract was examined. According to the facts established by the court, the defendant used his cohabitation with the testator to establish an intimate sexual and emotional relationship, a partnership, taking advantage of the testator’s intense need for personal care, strong attachment and social ties after the death of his wife. Fear of being alone, neglected, lonely, and being influenced caused emotional disturbance in the deceased person’s psychological state. The defendant recognised this and felt this opportunity to encourage the testator to give him a share in the property in order to obtain the support and care he wanted. The court found that the agreement was contrary to good moral because the contractual intention was not the result of free deliberation, but of the decisive influence of the defendant exploiting the dependency of the deceased person. (Curia decision No. BH 2012.8)

⁴ The invalidity of a contract on the ground of immorality cannot be established on the basis of circumstances which are in themselves the basis of one of the statutory grounds for invalidity.

In a Curia decision in 2013, the court ruled that the gift contract on the real property of the donor (plaintiff) was null and void as contrary to good morals because the donor was in a vulnerable situation due to his mental deterioration and alcoholism, the donee (defendant) took advantage of his situation and had no relationship with him to justify the gift. The defendant and his family, noticing and taking advantage of the pensioner plaintiff's lack of money, his constant desire for alcohol and his conflicts with his spouse in connection with his alcoholism, had him transported to the office of the lawyer chosen by the defendant family to conclude the deed of gift. The gift was accepted by the applicant, knowing the circumstances of the case and also knowing that the applicant was in a much more vulnerable position than the average person in relation to her and her family because he drinks 'on credit' in a bistro jointly run by her father-in-law and her husband. (Curia decision No. BH 2013.95) In this case, the transaction served the goal to recover his debts from him.

As it can be perceived, the contract concluded with unfair influence (unfair exploitation) can be deemed as a contract contrary to good morals in the current judicial practice, because its weightier alternative, the contract of usury, cannot cover these situations due to the current above-mentioned narrow interpretation. However, not only a gift contract may be considered as an immoral contract.

In the next case example, 'A' suffers from epilepsy and mental disorder, was educated in a special school, was regularly under medical treatment and was easily influenced. He lived with his mother, whose insight was also generally, permanently and severely impaired due to a constant loss of reality control, and increased susceptibility to influence. A's mother had formed a partnership with B, who thus became a confidant of A as his 'foster father'. After coming of age, 'A' got free access to his inheritance, and with his mother, they decided to pay back their debts and renovate the house inherited from his father several years ago. B offered his help and persuaded A to sell the property to him for one-third of its real market value (for cca. HUF 4 million, instead of HUF 16 million), and he would have it renovated. Although B was acquitted of fraud in the criminal procedure, the civil law court found his act unfair and declared this contract null and void as being contrary to good morals. According to the court, 'it is contrary to good morals for someone to conclude a contract with a person who is knowingly unstable, impressionable, vulnerable and unable to assert his interests properly, by taking advantage of his position, in order to obtain an unjustifiably one-sided advantage for his own benefit' (Curia decision No. BH 2020.143)

6. CLOSING REMARKS

In this paper, we underlined that the Hungarian Civil Law did not create a *sui generis* invalidity rule for undue influence in the field of contract law, similar to the Austrian and German Civil Codes, and due to their impact on the nascent Hungarian Modern Civil Law in the first half of the 20th century. Before the OldHCC rule, the usurious contract (and the special rule for unfair exploitation) covered the cases where the

contracting party exploited the opportunity (any weakness, distress or relationship of trust) to gain undue advantage to the detriment of the other party to the contract. As the statutory rule of usurious contract had been stripped from most of the subjective elements in the OldHCC, its case law had also followed this restrained interpretation and application.

We borrowed the concept of undue influence from the English Law to show the significance of the subjective elements of usurious contract, and at the same time, to present the faint borders between the invalidity rules relating to intended legal effect and relating to error of contractual will, as well.

Summarizing the above-mentioned issues, it can be established that, due to (1) the restrictive approach to the subjective elements of the invalidity rule of usury contract, (2) the required obvious disproportionality and synallagmatic nature, (3) the sanction of nullity, and (4) the alternative rule of obvious disparity, the application of usurious contract had already been diminished in the era of the OldHCC. To expand the legal relevance of the subjective aspects of invalidity, i.e. the undue influence, other grounds of invalidity, especially, the immorality stepped into focus, and into the assessment. To achieve this goal, and to fill the feasible application gap between invalidity grounds, the judicial practice had to change the above-mentioned restrictive approach to the invalidity rule of immoral contract, and started to apply this invalidity rule for the cases of undue influence. In recent years this tendency was strengthened by judgments again and again, so the following ratio decidendi explained it:

‘It is a conflict with good morals if someone enters a contract with a person who is recognisably unstable, susceptible to be influenced, in a vulnerable position, or unable to assert his interests properly, and exploits this situation to obtain unjustifiably one-sided advantages for his own benefit.’ (Curia decision No. BH 2020.143)

However, one question arises: whether a difference of degrees does exist between unfairness (acting contrary to good faith) and immorality (contrary to good morals) or not. Which means that could someone subsume all cases of undue influence under the invalidity of immoral contracts? As Tibor Lőw put it: “this term ‘undue influence’ is not other in Hungarian law, as a summary of transactions concluded in a manner contrary to good morals, which is a better understanding of the essence.” (Lőw, 1926, 148). According to his words, all forms of undue influence can be identified as a case of immoral transactions.

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