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Guest Editors' Foreword for the Special Issue of European Integration Studies

Conference proceedings of the 'Invalidity Rules in the European Civil Codes' International Online Scientific Conference in Miskolc, 3rd December 2021

On 3rd December 2021, the Department of Civil Law (Faculty of Law, University of Miskolc, Hungary), the Research Centre for Modern Hungarian Civil Law and European Private Law ('Research Centre'), and the Hungarian Academy of Sciences, Regional Committee in Miskolc co-organized an international scientific conference entitled *'Invalidity Rules in the European Civil Codes'*, by the support of the Hungarian National Research, Development and Innovation ('NRDI') Fund.

The conference, which took place in an audio-visual online form via the Google Meet application, was the closing event of the four years of the research project funded by the NRDI and carried out by the team members of the Department of Civil Law. During that time, senior and junior researchers belonging to this group and the Research Centre conducted research on the legal institution of invalidity considering the new Hungarian Civil Code of 2013. Research directions covered not only the invalidity of contracts but its appearance and operating mechanism in several other fields of civil law (e.g. in family law, competition law, etc.). The general approach that the invalidity of contracts shall always be always adjusted to the social and economic circumstances, should also be followed during the project.

The goals of this Conference were to ensure a possibility not only to disseminate the results of this research but also to open a wider forum on an international level for debates about theoretical and practical challenges regarding invalidity issues. The organisers attempted to open a European-wide forum to discuss the current interpretational and applicational problems of both the Hungarian and foreign civil codes. We consider it successful regarding the special issues of the journal *European Integration Studies* dedicated to the conference papers. The two volumes contain the studies in alphabetical order of the authors, regardless of the academic title or affiliation.

For the Call for Papers, scholars at the highest professional level answered from Central Europe and brought special issues of high interest to every member state of the European Union, since we had similar civil law tools to solve similar problems where the contractual relationships suffer original defects. These common problems generate similar solutions regardless of whether there is a spontaneous Europeanisation or a heightened one by the European Union's harmonisation process among the EU Member States (e.g. unfair terms of consumer contracts).

We owe special thanks to our all Speakers for contributing their thoughts to the public with their presentations and for contributing to the accomplishment of the research project with their written papers at a high-level professionality of the Department of Civil Law at the Faculty of Law, University of Miskolc. All main purposes of our research project were successfully strengthened by this Conference, as follows: dogmatic analysis of the legal instrument of invalidity, recodification of the legal consequences of invalidity, the foreign currency loans and invalidity, the temporality of claims deriving from an invalid contract, the analysis of the invalidity and ineffectiveness of legal statements concerning agreements on property relations of spouses (cohabitants). The international nature of the conference also served our goal, to take a comparative perspective for analysing the above-mentioned issues.

The conference consisted of a plenary session with two panels and other thematic sessions. The presentations of the Hungarian keynote speakers in the plenary session were followed by the presentations of international guest speakers with special country reports focusing on special topics of high interest at the time. The academic discussion was continued in parallel thematic sessions after a short lunch break.

Panel I of the plenary session started with the presentation 'Invalidity in the principles of European contract law' by *Tamás Fézer*, a full professor at the University of Debrecen, Faculty of Law. He aimed at seeking the golden balance between the European common core solutions and other alternative ways. He highlighted that the Principles of European Contract Law (PECL) certainly has an impact on the amendments to the legal framework for contracts throughout the Member States. Moreover, he explicitly explained terms like fraud, threat, and mistake besides other grounds of invalidity. Finally, he mentioned other matters not covered by the PECL such as illegality, immorality, or lack of capacity.

The second key speaker was *István Sándor*, a full professor at the Eötvös Loránd University, Budapest. In his presentation 'The system of grounds for invalidity in Hungarian private law' he outlined that the Hungarian Civil Code has no general part, therefore, it is possible to set up, by applying the concepts elaborated for the invalidity of contracts, a framework for the invalidity of all legal transactions. One of his starting points was the distinction between nullity and contestability, while, as he mentioned, the other systematisation aspect is based on the dogmatic triad of conditions of validity.

The presentation was followed by the presentation 'Invalidity as a tool of protecting private and public interests' by *Attila Menyhárd*, a full professor at the Eötvös Loránd University, Hungary. He addressed three main issues. At first, he highlighted the importance of having specific consequences, as in absence of them nullity and non-existence could essentially be identical. Secondly, the speaker explained the doctrine *'in pari delicto'* according to which 'punishing' the party by rejecting the claim for restitution is lawful while leaving the benefit for the other party is not legitimate. Thus, mutual legitimacy, generally required in private law relationships, is lacking. Thirdly, the professor outlined the paternalistic trend. As he told, courts have an increasing role in 'repairing' the contract via judgment, i.e.

judicial amendment of the contract, even if the amendment is against the interests of one of the parties. Finally, he considered the invalidity 'the heart of contract law'.

Panel II of the plenary session involved an international discussion consisting of five presentations.

The first lecturer, *Tina de Vries*, lawyer and mediator of the Institution for East European Law (Institut für Ostrecht) in München, presented 'Invalidity Rules in the German Civil Code', the Example Of 'Common Decency'. She emphasized the indirect third-party effect of fundamental rights in private law, acknowledging the importance of the general clause and the judge-made law, i.e. the developed case groups, in the light of Article 138 of the German Civil Code (BGB). As she mentioned, older German court decisions interpreted Article 138 and stated that a transaction is contrary to morality if it is 'contrary to the sense of decency of all fair and just thinkers'. She said that the formulation used by case law in recent times read: '[a] legal transaction is to be judged immoral within the meaning of this provision if it is incompatible with the fundamental values of the legal and moral order according to its overall character, which can be inferred from the summary of its content, motive, and purpose.'

The second presentation was 'General rules of invalidity of contracts in Serbian law' by *Attila Dudás*, associate professor at the University of Novi Sad, Serbia. Based on the Serbian Law on Obligations, he outlined the system of null and void contracts, avoidability of contracts, and non-existent contracts. He explained the Serbian doctrine, which clearly identifies the non-existent contracts, but, as he added, it is questionable whether the Law on Obligations envisages the application of a separate legal regime distinct from the one applicable to null and void contracts, for this category. The professor pointed out that the rules on the legal consequences of invalidity refer only to null and void, and avoidable contracts.

The next, third presentation was given by *Sibilla Buletsa*, a full professor of the Faculty of Law of Uzhhorod National University, Ukraine. Her presentation aimed at introducing the features of the regulation of the invalidity of an agreement under the Civil Code of Ukraine. As she stated at the beginning, the Civil Code of Ukraine embodied the approach, according to that the provisions on invalid transactions are general in nature, and they must apply to both unilateral transactions and agreements. The professor also talked about a decision of the Ukrainian Supreme Court related to civil rights and interests, and she gave an in-depth analysis of the recent judicial practice concerning the invalidity, disputability, and nullity of the contract.

Emőd Veress, a full professor of the Sapientia Hungarian University of Transylvania, in Cluj-Napoca, Romania, and the University of Miskolc, focused on the invalidity rules of the Romanian Civil Code which distinguishes between two grades of nullity, the absolute and relative nullity. He described these categories in detail and explained that Romanian law, in line with the Francophone tradition, refers to voidability by the term 'nulitate relativă', literally translated as 'relative nullity'. He also pointed out the disputation of the unwritten clause's legal nature. He put that it is a specific form (subtype) of partial absolute nullity, where a provision of the parties to a legal transaction that is contrary to the law and which is

automatically null and void, by the effect of the law, is spontaneously replaced by the mandatory provisions of the law, thus saving the legal transaction.

Panel II of the conference was closed by the presentation by *Tatjana Josipović*, a full professor at the University of Zagreb, Croatia. She explained the restitution claims for null and void contracts under the Croatian Obligation Law. As she mentioned, restitution claims for null and void contracts recently became a topical question not only among legal practitioners and academics but the wider public. This is because final decisions were issued by the Croatian courts regarding a consumer collective action, declaring contract terms containing CHF foreign currency clauses and floating interest rates in consumer credit contracts as unfair.

In this regard, the related changes in legislation over the past decades exemplified the unfair contract terms. Explaining the judicial case law, she deeply analysed the reasons for the change and the extent of the effects in particular on the new opinions of the highest Croatian courts.

Panel III chaired by *Réka Pusztahelyi*, associate professor at the University of Miskolc, consisted of seven presentations.

Gábor Palásti, an external lecturer of the Károli Gáspár University of the Reformed Church in Hungary, presented validity issues in the system of the Rome I regulation and reviewed the solutions offered by Rome I for those cases when a contract is invalid or non-existent under 'lex causae'.

The second speaker, *Ádám Boóc*, a full professor at the Károli Gáspár University of the Reformed Church in Hungary introduced the appearance of the *laesio enormis* (gross disparity) in the Hungarian contract law. In his presentation, he dealt with the question of whether the ground for invalidity based on laesio enormis could be regarded as an objective or a subjective category, considering the provisions of the new Hungarian Civil Code.

The third presentation by *Anikó Grad-Gyenge*, associate professor at Budapest University of Technology and Economic, focused on the renewed bestseller clause in Hungarian copyright law. She outlined how the bestseller clause provides protection for a creator being in a weaker contractual position than the user, and how it provides an opportunity for the court to amend the contract and eliminate the striking value disproportion. She also emphasized that the rule has very poor judicial practice, both in Hungary and abroad, and introduced how the EU Directive on Copyright in the Digital Single Market aims to extend the legal opportunities for weaker contracting parties.

The next speaker, *Edit Sápi*, assistant professor at the University of Miskolc introduced the legal theory and judicial practice of the invalidity of license agreements. She overviewed the invalidity rules and case law of the licence agreements in the field of copyright law. Then, she focused on some 'general civil law' issues of invalidity, such as the requirement of written form or the problems of standard contractual terms, and the special forms of invalidity regulated by copyright law and reviewed the relevant judicial practice.

The presentation by *Csenge Halász*, assistant lecturer at the University of Miskolc, aimed at pointing out the invalidity issues related to the general terms and

conditions of social networking sites. After classifying the contract concluded between the parties and reviewing how unfair terms can typically be used as grounds for invalidity, she examined the validity of the general terms and conditions and presented some foreign cases. She highlighted that most issues come from the fact that users, in most cases, do not read the terms of use, and, therefore, they are not aware of the contents of the provisions included therein. As she stated, this is a worrying practice since general terms and conditions are an integral part of the contract existing between the parties.

József Benke, associate professor at the University of Pécs, gave a comparative analysis of the Austrian and Louisiana private law jurisdiction concerning the correlation between contractual risk-taking and the irrelevance of the original and continuing *laesio enormis*. He emphasized how determining the conditions under which the value of the service and the consideration at the time of the conclusion of the contract, or, at the time of performance can be in proper balance, can be an issue having both legislative and enforcement nature.

The last presentation of the third panel was by *Réka Pusztahelyi*, who talked about the legal concepts of undue influence and unfair exploitation, and introduced how these legal concepts are 'hiding' in Hungarian legislation and judicial practice. She highlighted the unique (re)naissance of a special ground of invalidity, i.e. the English equity doctrine of undue influence, at the very beginning of the 20th century, during the period of the heightened endeavours for the Hungarian private law, parallel with the impact of Article 138 of the German Civil Code (BGB). She also mentioned that undue influence upon testamentary disposition was regulated as a sui generis ground of invalidity in the Hungarian Civil Code. To highlight its importance, she also dealt with the undue influence as a subjective condition of the usurious contract according to Article 6:97 of the Hungarian Civil Code,

In Panel IV chaired by Ágnes Juhász, associate professor with habilitation at the University of Miskolc, six high-quality, well-prepared lectures were given by respected legal scholars.

The first speaker was *Ádám Auer*, associate professor at the University of Public Service, Department of Civilistics, Budapest. He presented the Hungarian rule on prohibited contracts in a European context. He examined not only the problem of these contracts but discussed the conflict of prohibited contracts with other, non-civil law rules. As he emphasized, problems arise from the fact that only a limited scope of contracts are governed solely by civil law, while several specific laws apply to all other contracts. That is why the dogmatic relationship between said laws is not a negligible problem. In addition, three models of prohibited contracts were explained in detail and the possible directions for improvement were drafted as well.

Sarolta Molnár, assistant professor of Pázmány Péter Catholic University, Faculty of Law and Political Sciences, commented on the presentation considering it very interesting, and raised the question of whether the lecturer had an idea of how a better solution, without the intent to legislate, would be made. As Ádám Auer answered, he was not sure about the best solution, since the examined question is very complex, and many problems and mistakes arise in the judicial practice.

The second presentation by *János Dúl*, assistant professor at the University of Public Service, Faculty of Public Governance and International Studies, Budapest, addressed the issue of validity and invalidity of asset management contract concerning national assets. As he highlighted, the contract under review is a contract on the borderline of private law and public law, therefore, attention shall be paid to every aspect of this contract. One of them is the validity and invalidity of the contract. Regarding the presentation, *Ágnes Juhász* asked if any case law exists in Hungary related to this topic. The speaker replied he did not find any cases related to the invalidity of the asset management contracts yet and expressed his hopes that in the future there will be some.

Balázs Völcsey, assistant professor at the Eötvös Lóránd University, Budapest, Faculty of Law examined Articles 6:90–6:93. § of the Hungarian Civil Code on the invalidity of the contract due to a mistake and highlighted the meaning of 'error of will'. He presented not only certain grounds for the error of will resulting in the invalidity of the contract but also summarized the most important conclusions that can be drawn from the case law.

In her presentation, *Sarolta Molnár,* assistant professor of the Pázmány Péter Catholic University, Faculty of Law and Political Sciences, Budapest, raised a rather interesting topic about the appearance of invalidity in the institution of marriage and the peculiar character of the Book IV of the Hungarian Civil Code, which employs the notions of invalidity and the language of contracts to the material bond. While some legal traditions consider marriage a contract, others look at it as a covenant. Procedures that result in invalidity have notably different consequences from a simple contract. But what are the grounds for invalidity when forming a marriage, and can the courts deal with the special complexity of such cases? In her comment, Professor *Sibilla Buleca* asked, how this issue can be solved without using common law expressions. As the presenter answered, Spanish or Italian law can serve as examples. She said marriage was not viewed purely as a contract because these legal systems linked more closely to the original canon conception of marriage; that was why she spent much time looking at those roots. As she emphasized, in family law, apart from marriage, contract law terms can be used in the same way as we use them in traditional contract law. However, since marriage is not purely a contract but a legal institution that can be treated in many ways according to the individuals, traditional contract law terms can only be applied with certain limitations. *Edit Kriston*, assistant lecturer at the University of Miskolc, Faculty of Law adopted a similar position.

The session continued with the presentation of *Edit Kriston*. She outlined the problem of the invalidity of family property contracts which are primarily regulated by family law and secondly by contract law. As she said, among others, it is an important reason for the complexity of the legal rules of the family property contract next to contractual freedom, which provides private autonomy in a wide circle. Though private autonomy between family members does not tolerate intervention, there are several situations that make the intervention necessary. She reviewed the

Hungarian legal practice and the interpretation of the immoral contract, and analysed some recent cases as well.

As the last speaker of the session, *Ágnes Juhász*, associate professor with habilitation, at the University of Miskolc, Faculty of Law, reviewed the partial invalidity in Hungarian contract law. As she said, this topic was rarely examined in contemporary civil law literature. As to paragraph (1) of Article 6:114 of the Hungarian Civil Code, if the ground for invalidity concerns specific parts of the contract, legal effects of invalidity shall apply to those parts. In case of partial invalidity, the entire contract shall fail if the contractual parties presumably would not have concluded it without the invalid part. The term 'presumably' required further interpretation and makes it necessary to reveal the contractual intention of the parties. As she, mentioned, the intention of the contractual parties is not always clear. At this time, the exploration of the hypothetical contractual will can be an appropriate solution.

Panel V of the conference was chaired by *László Leszkoven*, associate professor at the University of Miskolc and the Head of the Research Centre for the Modern Hungarian Civil Law and European Private Law. This session addressed multiple recent issues concerning invalidity and ineffectiveness.

First, *József Szalma* emeritus professor at Károli Gáspár University of the Reformed Church in Hungary and the University of Novi Sad, Serbia. He outlined the conditions and effects of the legal transaction according to Hungarian and European law. Then, he analysed the dissolving and suspensive conditions and time limits, as ancillary provisions of the legal transaction, which makes dependent the entry, cancellation, or modification of the legal effect of the contract or the legal transaction from an uncertain, future circumstance not caused by the parties.

The co-presenters of the second presentation were *Tamás Prugberger*, emeritus professor at the University of Miskolc, and *György Nádas*, associate professor at the University of Debrecen. In their presentation, they review the cases of the deficiencies of contractual intention, i.e. mistake, misrepresentation, and unlawful threat. As they mentioned, nowadays, Western European states regulate the legal mechanism for the rectification of errors and omissions in all contracts and legal statements based on civil law, which also applies to contracts related to employment.

Zoltán Rácz, associate professor at the University of Miskolc, held his presentation about the nonexistence, invalidity, and ineffectiveness of the juridical acts in labour law. At the beginning of his speech, he spoke about the relationship between labour law and civil law. Then, several interesting questions about the termination of an employment contract were reviewed.

László Leszkoven, associate professor at the University of Miskolc and the head of the Research Centre for Modern Hungarian Civil Law and European Private Law, spoke about the invalidity and contractual equilibrium. In his presentation, he highlighted the importance of the doctrine on the contractual synallagma. As he said, reciprocity, i.e. remunerative nature is a classic example of this correlative legal situation. For handling the contradiction between contractual freedom and the protection of parties' interests concerning contractual synallagma, the principle of

good faith and fair dealing seems to be appreciated, while the notion of decency ('good morals') is filling up with modern content. Blanket clauses (general clauses) allow flexible evaluation including the evaluation of changed circumstances and the development of the legal application as well. Nevertheless, the uncertain content of these factors is contrary to legal certainty. Therefore, the exploration and elaboration of the relationship between the legal consequences of acts contrary to civil law principles and the legal institution of invalidity are unavoidable.

In his presentation, *Gábor Mélypataki*, assistant professor at the University of Miskolc examined the validity of the termination of employment sent by email and outlined the dilemmas of electronic communication in Hungarian labour law as well. The entry into force of the new Hungarian labour code brought to the fore responses to new life situations, such as the possibility of electronic communication. Electronic documents are treated by the Hungarian legislator similarly to paper-based documents. Nevertheless, our everyday interactions are in constant change and becoming more and more digital. These changed circumstances raise many new questions as it was demonstrated by a corresponding lawsuit in the presentation.

Panel VI of the conference was opened for the PhD students, chaired by *Ibolya Stefán*, PhD student at the Department of Civil Law, University of Miskolc.

The first lecturer was *Amanda Petra Shakibapoor*, PhD student at the University of Pécs, who reviewed the Council Directive 93/13/EEC on unfair terms and the related legislation. As a starting point, she described the concept of a contract in the European Union and compared it with the provisions of the Hungarian Civil Code. She covered the regulation of unfair contract terms, as well as the new Civil Code and Directive 93/13/EEC. She also talked about the differences between notions in the regulation of unfairness.

Meera Alma'Aitah, a PhD student at the University of Debrecen, presented about the concept of nullity and its types. At the start of the lecture, she clarified the concept of nullity, then she introduced the types of nullity and its effects on the contract.

In his presentation, *Tamás Szendrei*, PhD student at the University of Debrecen, outlined some considerations regarding the nullity of the juridical person in the light of the Romanian Civil Code. The presentation approached some aspects, related to the institution of nullity, whether absolute or relative, as it is stipulated by the Romanian Civil Code, resulting in the nullity of the juridical person. Moreover, he also focused on the controversial and critical conceptual aspects of the issue.

Jantsan Otgongerel, PhD student at the University of Debrecen presented the statements expressed by the Court of Justice of the European Union (CJEU) in *actio Pauliana*-related disputes. She selected and compared five specific disputes with the court decisions that accepted the claims, established international jurisdiction, and refused to accept the claim, as well as attracted the attention of lawyers and researchers.

In his presentation 'Can a gift contract conflict with good morals?', *Gergő József Tóth*, assistant lecturer at the University of Miskolc, Faculty of Law, noted that good morals and the general duty to comply with these principles go hand in hand with the needs of the legislator and law-seeking audience from the very beginning of the

society. He said that people often forget a simple and obvious circumstance: due to the contractual nature of the gift contract, the agreement is a bilateral legal transaction where the acceptance of the gift made by the donee is essential for the conclusion of the contract. From this point of view, the violation of good morals in the case of this contract shall be examined exclusively here, because by accepting the gift, the donee presumably knew what other circumstances had affected the contractual consent of the donor.

Finally, on behalf of the Organizers, we would thank all speakers for their presentations. We especially thank those, who delivered the written version of their presentation and actively contributed to the publication of this special volume. We would specifically like to thank the young colleagues of the Department of Civil Law, Faculty of Law of the University of Miskolc, for their helping hands and active cooperation, namely *Levente Lajos Cserba*, *Dóra Erdélyi*, *Fanni Fürjes*, *Szilárd Halász*, *Laura Papp* and *Dorottya Stefán*.

It is our sincere hope that our publication which contains a wide range of studies on the topic of invalidity and ineffectiveness will attract the professional audience's interest.

16th October 2022

Dr. habil. Ágnes Juhász and Dr. Réka Pusztahelyi
guest editors

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'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*

'ὅρα, 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 ἱδρῶτα θεοὶ προπάροιθεν ἔθηκαν* [290] *ἀθάνατοι· μακρὸς δὲ καὶ ὄρθιος οἶμος ἐς αὐτὴν* [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]

'Κῴων γάρ, ὥς φασι, καταγόντων σαγήνην, / καὶ ξένων ἐκ Μιλήτου πριαμένων τὸν βόλον οὔπω / φανερὸν ὄντα, χρυσοῦς ἐφάνη τρίπους ἑλκόμενος (…)' — 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

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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.

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[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 *(Erbschaftskauf)*. [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 476[7] 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 444[8] (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 al 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 agreement[9], 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.

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[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 way[11], 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.

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[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 ABGB[12]), and the aleatory purchase of a mining share, which was invented by Voet in the 17th century[13], (*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*

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[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

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[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 Hoffnungsvertrag"*. 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 officielle Ausgabe für das Großherzogtum Berg*. (1810) Düsseldorf: Levrault, 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 Erträgnisse 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 text[19] did, that "Whoever sells an intangible right must guarantee its existence at the time of

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[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*

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[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:

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[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, nähmlich 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 Erbschaftskauf 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

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[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 Zeitpuncte 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 entgeldlichen und unentgeldlichen 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 Rechtmittel 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: OGH[36]) 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 530/78[37]); 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 135/07t[38]).

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[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 139/65[39])
- 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. 621[44]). 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])

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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 soleat, 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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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. (Osztovits, 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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FEATURES OF REGULATION OF INVALIDITY OF THE AGREEMENT IN THE CIVIL CODE OF UKRAINE

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Abstract: This article is devoted to the peculiarities of regulating the invalidity of the agreement in Ukraine. The Central Committee of Ukraine embodies an approach in which the provisions on invalid transactions (§ 2 of Chapter 16) are general in nature, and they should apply to both unilateral transactions and contracts. Moreover, there is no doubt that most of these rules are designed to apply to an invalid contract [for example, paragraph 2 of Art. 216(1) of the Civil Code of Ukraine, hereinafter CCU]. In turn, certain norms devoted to certain agreements (subsection 1 of section III of book 5 CCU) provide grounds for challenging the condition [Art. 668(1) CCU], the invalidity of the contract [Art. 661(2), Art. 698(4) CCU, etc.], the grounds for contesting (Art. 998) or the invalidity of the contract [Art. 719(3), Art. 981(2), etc.], the legal consequences of the invalidity of the contract or condition [Art. 1057-1, Art. 1111(2), Art. 1119(4) CCU]. The Supreme Court of Ukraine noted the difference between the invalidity of the contract and the obligation, emphasizing the admissibility of the invalidity of the obligation. He pointed out that the invalidation of the contract and the invalidation of the obligation are not identical concepts, because, by the direct indication of the law, the contract declared invalid by the court is invalid from the moment of its conclusion, and invalidation of obligations under this agreement such an agreement. The decision of the Commercial Court of Cassation of the Supreme Court in case № 201/8412/18 (March 10, 2021) states that the existence of grounds for invalidation of the contract should be established by the court at the time of its conclusion, and not as a result of non-performance or improper performance. Failure to perform or improper performance of obligations arising under the disputed contract is not grounds for its invalidation.

According to Articles 16, 203, and 215 of the Civil Code of Ukraine, for a court to declare a disputed transaction invalid, it is necessary to sue one of the parties to the transaction or another interested person; the existence of grounds for contesting the transaction; establishing whether the subjective civil right or interest of the person who applied to the court is violated (not recognized or disputed). This understanding of invalidating a transaction as a means of protection is well-established in judicial practice. According to Art. 263(4) Civil Procedure Code of Ukraine when choosing and applying the rule of law to the disputed legal relationship, the court takes into account the conclusions on the application of the relevant rules of law, set out in the decisions of the Supreme Court. The decision of the Supreme Court of the Joint Chamber of the Civil Court of Cassation of 5 September 2019 in case № 638/2304/17 concluded that ‘the invalidity of the contract as a private law category designed

to prevent or suppress violations of civil rights and interests or in essence, initiating a dispute over the invalidity of a contract not to protect civil rights and interests is unacceptable'.

Keywords: *invalidity, contract, parties, consequences, obligations, disputability, nullity*

1. INTRODUCTION

In the civil law of Ukraine, there is the concept of a transaction, which is a broader concept than the concept of contract, as the latter is the basis for the transaction. Art. 215 CCU defines the grounds for invalidity of the transaction, which are non-compliance at the time of the transaction by the party (parties) requirements for: the content of the transaction, which may not contradict the Civil Code of Ukraine, other acts of civil law; expression of the will of the participant of the transaction, which must be free and correspond to his inner will; the focus of the transaction on the actual occurrence of the legal consequences caused by it; transactions committed by parents (adoptive parents) may not contradict the rights and interests of their minor, underage or disabled children.

In Ukrainian law, a transaction is invalid if its invalidity is established by law (a void transaction). In this case, the recognition of such a transaction as invalid by the court is not required. In cases established by the Central Committee of Ukraine, a void transaction may be recognized by a court as valid. If the invalidity of a transaction is not directly established by law, but one of the parties or another interested person denies its validity on the grounds established by law, such a transaction may be declared invalid by a court (disputed transaction).

The purpose of this article is to reveal the peculiarities of recognizing contracts as invalid under the civil law of Ukraine.

Issues related to the recognition of agreements (contracts) as non-concluded and their invalidity were raised in the scientific works of many domestic civilians of different times, in particular, D. Meyer, D. Genkin, I. Novitsky, O. Gutnikov, S. Berveno, T. Bodnar, V. Vitryansky, O. Kucher, O. Zozulyak, S. Borodovsky, S. Podoliak, S. Potopalsky and others (Davidova, 2011; Smola, 2016; Guk, 2013; Bezzubov and Armash, 2017).

2. CONCEPTS AND TYPES OF INVALID CONTRACTS

It should be noted that in Ukraine the concept of 'invalidity of the contract' is absent in the Civil Code and other acts of civil law. However, the case law of national courts in this regard indicates that the invalidity of a contract means that a transaction entered into in the form of that contract does not give rise to legal consequences, i.e., does not contribute to the emergence, modification, or termination of civil rights and obligations. The agreement (contract) is declared invalid, loses its legal force from the moment of its conclusion, and therefore, the legal

grounds, for example, obtaining property or acquiring ownership of it under such an agreement do not occur.[1]

In private law, invalidity (nullity or disputability) may relate to or 'affect' a contract, transaction, act of a legal entity, state registration, or document.[2]

At the same time, the contract as a document can not be considered in terms of validity or invalidity. The document, i.e., the physical side of the action, performs in this case only one function — makes the will of the person available for perception, i.e., is a means of expression, the bearer of legal content (Tuzov, 2007, p. 54). The legislation does not contain and cannot contain requirements for the validity of the document. A document as a tangible medium of information either exists or does not exist. A similar situation arises regarding a legal fact, which is also a fact of reality and which is given a certain legal meaning. As a fact, it may or may not exist, so you can not talk about its invalidity, as you can not say 'invalid flood', or 'invalid fire' — such phrases are meaningless and contrary to the laws of formal logic (Lavrinenko, 2012, p. 60).

To resolve the issue of the validity of the contract, the priority is to resolve the issue of its conclusion (Ponomaryova, 2016, p. 37). As only the concluded contract can be recognized as invalid. In particular, contracts are not considered concluded in which: there are no conditions provided by law, necessary for their conclusion (no agreement has been reached on all the essential conditions for this transaction); acceptance was not received by the party that sent the offer; the property has not been transferred if its transfer is required by law; the state registration or notarization necessary for its commission, etc. has not been carried out. Having established the relevant circumstances, the commercial court refuses to satisfy the claims both on the invalidation of the transaction and on the application of the consequences of the invalidity of the transaction.[3] If the party prematurely transferred property for the performance of a non-concluded contract, legal relations arise between the parties as a result of the acquisition, and preservation of property without sufficient legal basis (Generalization, 2008, p. 22; Art. 1212–1215 CCU).

Art. 204 of CCU[4] determines that the transaction is lawful if its invalidity is not expressly established by law or if it is not declared invalid by a court. This presumption means that the transaction is considered lawful, i.e., that it gives rise to, alters, or terminates civil rights and obligations until this presumption is rebutted, in particular, based on a court decision that has entered into force or by direct reference

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1 Decision of the Kirov District Court of Donetsk of 25 April 2014 in case No. 258/4225/14-ц. Available at: https://reyestr.court.gov.ua/Review/38954048 (Accessed: 8 September 2022).

2 Resolution of the Supreme Court dated 27 October 2021 in case No. 346/6034/13-ц. Available at: https://reyestr.court.gov.ua/Review/100704340 (Accessed: 8 September 2022).

3 Resolution (2013 of the Plenum of the Higher Economic Court of Ukraine dated May 29, 2013, No. 11.

4 Civil Code of Ukraine of 16 March 2003 p. 435-IV. *Official Gazette of Ukraine*, 2003, No. 11, p. 461.

to the law.[5] In case of non-refutation of the presumption of legality of the contract (for example, in connection with the cancellation of the court decision) all the rights acquired by the parties to the transaction under it, should be carried out without hindrance, and the created duties are subject to the performance.[6]

Note that an invalid contract is an agreement between two or more persons that does not create legal consequences, except for the consequences associated with its invalidity. It means that this agreement does not meet the requirements of the law.

Scholars propose the following classification of invalid contracts:

1) the contract is invalid from the very beginning of its existence;

2) a contract that becomes invalid over time, whereas it was originally valid;

3) the contract is valid in itself but may be terminated by court decision (Meyer, 2000, pp. 203–204).

National courts determine that, as seen from the content of Art. 215 CCU (invalidity of the transaction), it is necessary to distinguish between the types of invalidity of transactions, namely:

— void deeds, the invalidity of which is established by law;

— disputed, the invalidity of which is not directly established by law, but one of the parties or another interested person denies their validity on the grounds established by law.[7]

A void transaction is invalid due to its non-compliance with the requirements of the law and does not require its recognition by such a court. The disputed transaction may be declared invalid only by a court decision. Therefore, in resolving the relevant requirements, it is important to distinguish between null and void transactions, as each of the types of invalidity of transactions provides different ways to protect civil rights and interests.[8]

Null and void contract. As we have already noted, a void transaction, in contrast to the disputed one, is invalid regardless of the presence or absence of a relevant court decision. Therefore, the lawsuit to protect the right by invalidating the void transaction is not provided by law and is not an effective way of protection and such that will have a real restoration of the violated rights of the plaintiff.[9]

Since the consequences of the nullity of the transaction occur for the parties due to the law, if one of the parties voluntarily disagrees that the transaction is null and void, the person has the right to go to court to apply for the consequences of the

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5 Separate opinion of the judge of the Great Chamber of the Supreme Court, Rogach, L.I. dated October 31, 2018 in case No. 465/646/11. Available at: https://reyestr.court.gov.ua/Review/81287693 (Accessed: 8 September 2022).

6 Resolution of the Supreme Court of June 19, 2019 in the case No. 643/17966/14-ц. Available at: https://reyestr.court.gov.ua/Review/82997488 (Accessed: 8 September 2022).

7 Resolution of the Supreme State Court of Ukraine of 18 July 2010 in case No. 12/71. Available at: https://reyestr.court.gov.ua/Review/12382794 (Accessed: 8 September 2022).

8 Resolution of the Supreme Court of 2 June 2021 in case No. 916/154/20. Available at: https://reyestr.court.gov.ua/Review/97735186 (Accessed: 8 September 2022).

9 Resolution of the Supreme Court of 3 October 2018 in case No. 369/2770/16-ц. Available at: https://reyestr.court.gov.ua/Review/77181171 (Accessed: 8 September 2022).

nullity of the transaction.[10] For example, if the plaintiff claims that the contract on termination of the pledge agreement is null and void, the consequence of such nullity will be the validity of the pledge agreement. Recognition of the right of pledge will be an appropriate way to protect the interests of the plaintiff in such a case.[11]

At the same time, case law indicates that the fact that a void transaction is invalid regardless of the presence or absence of a relevant court decision, this does not preclude the possibility of filing and satisfying a claim for invalidation of a void transaction (agreement) (Resolution, 2013).

In this case, the person applies for the annulment of the disputed contract.[12] Such a requirement shall be considered in the event of a dispute. Such a claim may be filed separately, without applying the consequences of the invalidity of a void transaction. In this case, in the operative part of the court decision, the court indicates the invalidity of the transaction or refusal to do so (Resolution No. 9, 2009).

In this case, the court does not declare the transaction invalid, but only confirms its invalidity by law in connection with its challenge and non-recognition by others. However, to establish the invalidity of such a transaction, it is not necessary to assess any circumstances under which it was committed. It is achieved by comparing the content of the transaction and the provisions of applicable law.[13]

In the event of a dispute over the legal consequences of an invalid transaction, one of the parties to which or another interested person considers it null and void, the court checks the relevant arguments and in the motivating part of the judgment, applies the relevant provisions of substantive law, confirms or denies the invalidity of the transaction.[14] Such legal consequences of the invalidity of a void transaction, which are established by law, may not be changed by the agreement of the parties. The requirement to apply the consequences of the invalidity of a void transaction may be filed by any interested person, and the court may apply the consequences of the invalidity of a void transaction on its own initiative. (See Article 216(4)(5) CCU)

In addition, if the plaintiff refers to the invalidity of the transaction to substantiate another claim, the court may not refer to the lack of a court decision to establish the invalidity of the transaction and must assess such arguments of the plaintiff.[15]

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[10] Resolution of Supreme Court of 12 June 2019 in case No. 761/13371/18. Available at: https://reyestr.court.gov.ua/Review/82637240 (Accessed: 8 September 2022).

[11] Resolution of Supreme Court of 4 June 2019 in case No. 916/3156/17. Available at: https://reyestr.court.gov.ua/Review/82424016 (Accessed: 8 September 2022).

[12] Resolution Supreme Court of 7 February 2018 in case of 357/3394/16-ц. Available at: https://reyestr.court.gov.ua/Review/77801192 (Accessed: 8 September 2022).

[13] Separate opinion of judges of the Grand Chamber of the Supreme Court: O.M. Sytnik, V.V. Britanchuk, M.I. Hrytsiva, N.P. Lyashchenko, O.B. Prokopenko, dated June 4, 2019 in case No. 916/3156/17. Available at: https://reyestr.court.gov.ua/Review/82968335 (Accessed: 8 September 2022).

[14] Resolution of Supreme Court of 10 April 2019 in case No. 463/5896/14-ц. Available at: https://reyestr.court.gov.ua/Review/82065661 (Accessed: 8 September 2022).

[15] Resolution of Supreme Court of 24 October 2018 in case of 755/6287/16-ц. Available at: https://reyestr.court.gov.ua/Review/77684845 (Accessed: 8 September 2022).

Thus, the person filing the lawsuit is determined independently with the violated, unrecognized or disputed right, or legally protected interest that requires judicial protection. However, care must be taken before going to court, as the plaintiff's choice of an inappropriate way to protect his rights is an independent ground for dismissing the claim[16].

In our opinion, it is expedient to agree with V. Proroka, who in a separate opinion of the judge noted that if the law or contract does not determine an effective way to protect the violated right or interest of the person who appealed to the court, such a person may determine in his decision a method of protection that does not contradict the law.[17] Therefore, domestic justice, denying the lawsuit due to the election of an improper method of protection, forgets about the Constitution, which guarantees everyone the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law.[18] And if there is no direct prohibition on the person's chosen method of protection, the person can count on a fair and impartial resolution of the case.

The disputed contract. If the invalidity of a transaction is not directly established by law, but one of the parties or another interested person denies its validity on the grounds established by law, such a transaction may be declared invalid by a court (disputed transaction) [Art. 215(3) CCU]. A transaction, the invalidity of which is not established by law (disputed transaction), gives rise to legal consequences (acquisition, change, or termination of rights and obligations), to which it was directed until it is declared invalid on the basis of a court decision. Disputing the transaction occurs only on the initiative of his party or another interested person by filing claims for invalidation of the transaction (lawsuit to challenge the transaction, recourse claim).[19]

The invalidity of the contract as a private law category is designed to prevent or suppress violations of civil rights and interests or to restore them.[20] This is manifested in the fact that the parties to civil relations, as a rule, independently initiate the application of the rules on the invalidity of the contract and its legal consequences. The invalidity of the contract is reflected (or may be reflected) on the rights and interests of other participants in civil relations, and therefore there must

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16 Resolution of Supreme Court of 2 February 2021 in case No. 925/642/19. Available at: https://reyestr.court.gov.ua/Review/95439652 (Accessed: 8 September 2022).

17 Separate Opinion of Judge of the Grand Chamber of the Supreme Court, Proroka, V.V.B., dated 2 February 2021 in case No. 325/642/19. Available at: https://reyestr.court.gov.ua/Review/96406954 (Accessed: 8 September 2022).

18 Article 55 of the Constitution of Ukraine of June 28, 1996, No. 254k/96-VR. *Голос України*, 1996, No. 128.

19 Resolution of Supreme Court of 27 October 2021 in case No. 346/6034/13-ц. Available at: https://reyestr.court.gov.ua/Review/100704340 (Accessed: 8 September 2022).

20 Ibid.

be certain legal grounds and consequences of invalidity, including for 'related' participants in civil relations.[21]

This provision follows from the logical thesis that the task of civil proceedings is to effectively protect violated, unrecognized or disputed rights, freedoms, or interests (Art. 2(1) of the Civil Procedure Code of Ukraine). Such protection is possible provided that the rights, freedoms, or interests are violated, and the participants in civil traffic use civil proceedings for such protection. Private law tools (in particular, initiating a dispute over the invalidity of a contract not to protect civil rights and interests) should not be used by civil traffic participants for failure to perform public duties, release property from arrest in public relations or create a preliminary court decision for public relations.[22] For example, if in a dispute over the invalidation of the land lease agreement, the person refers to the fact that the agreement does not specify all the essential terms of the agreement (cadastral number of land, conditions for maintaining its condition), but the rights and interests of the plaintiff violated (lease of the same plot agreed upon by the parties) the claim for invalidation of such an agreement is inadmissible and must be rejected.[23]

Invalidation of a contract means its invalidation as a legal fact, which also results in the invalidity of the obligations of the parties arising from such a contract. In this regard, the Grand Chamber of the Supreme Court notes that in accordance with the norms of the Central Committee of Ukraine, only a contract as a transaction can be declared invalid. The contract as a document, as well as a duplicate or copies of such a document, cannot be declared invalid. Therefore, challenging a duplicate agreement that fully corresponds to the original has no independent meaning and force on the transaction, as its publication does not establish, change or terminate civil rights and obligations, but is a document that only duplicates, reproduces the content of the agreement, and may not violate the rights of the individual. Therefore, the possibility of declaring it invalid due to non-compliance with the procedure of its issuance is not provided by any law.[24]

The claim for invalidation of the transaction is identified among the main ways of judicial protection of civil rights and interests [paragraph 2 Art. 16(2) of CCU]. For the court to declare the disputed transaction invalid, the existence of the following conditions[25]:

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[21] Separate opinion of the judge of the Civil Court of Cassation as part of the Supreme Court of Krat V.I. dated January 20, 2021 in case No. 127/14089/18. Available at: https://reyestr.court.gov.ua/Review/94490087 (Accessed: 8 September 2022).

[22] Resolution of the Supreme Court of September 5, 2019 in case No. 638/2304/17. Available at: https://reyestr.court.gov.ua/Review/84152558 (Accessed: 8 September 2022).

[23] Resolution of Supreme Court of 27 November 2019 in case No. 685/261/17. Available at: https://reyestr.court.gov.ua/Review/86070428 (Accessed: 8 September 2022).

[24] Resolution of Supreme Court of 14 November 2018 in case No. 161/3245/15-ц. Available at: https://reyestr.court.gov.ua/Review/78192852 (Accessed: 8 September 2022).

[25] Resolution of Supreme Court of of 22 June 2020 in case No 205/8732/15-ц. Available at: https://reyestr.court.gov.ua/Review/90073669 (Accessed: 8 September 2022).

1) Filing a lawsuit by one of the parties to the transaction or by another interested person. In addition to the parties to a contract, it can also be challenged by a person who was not a party to the transaction (interested person), at the time of the court has no property rights or property rights to the transaction and/or does not claim that the property in kind was transferred to her possession. The requirements of the interested person, who in court seeks recognition of the transaction, are aimed at bringing the parties to the invalid transaction to the state that they, the parties, had before the transaction. The self-interest of the interested person means that the subject of the transaction is owned by a particular person or that the party (parties) to the transaction is in a certain legal position, as it depends on the further possibility of the lawful exercise of the rights of the interested person.[26] At the same time, the Civil Code of Ukraine does not contain a definition of 'interested person', so the range of interested persons should be clarified in each case depending on the circumstances of the case and legal norms applicable to the disputed relationship unless otherwise provided by law.[27]

2) The existence of grounds for contesting the transaction. Such grounds are established by law, and they include requirements for: the content of the transaction, which may not contradict the Central Committee of Ukraine, other acts of civil law, the interests of the state and society, and its moral principles; subjects of the transaction, which must be endowed with the necessary amount of civil capacity; unity of will and expression of will; the focus of the transaction on the actual occurrence of the legal consequences caused by it; protection of socially vulnerable categories of persons, namely – transactions committed by parents (perpetrators) may not contradict the rights and interests of their minors, underage or disabled children (Art. 203 CCU).

3) Establishing whether the subjective civil right or interest of the person who applied to the court is violated (not recognized or disputed). As an example, we can point out that missing preliminary permission of the body of guardianship and custody required by law at the time of conclusion of the disputed transaction is not the unconditional basis for recognition of the invalidity.

Since, in order to invalidate, for example, a real estate gift agreement where the donee is a minor, it is necessary to establish whether such an agreement contradicts his rights and interests, does not reduce the scope of existing property rights, and does not violate the lawful interests of the child. restricts the rights and interests of the child about housing.[28]

In Ukraine, a void agreement declared invalid by a court is invalid from the moment of its conclusion. If under an invalid contract the rights and obligations were

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[26] Resolution of Supreme Court of 15 May 2019 in case No. 462/5804/16-ц. Available at: https://reyestr.court.gov.ua/Review/82246769 (Accessed: 8 September 2022).

[27] Resolution of Supreme Court of 16 April 2019 in case No. 916/144/17. Available at: https://reyestr.court.gov.ua/Review/81266214 (Accessed: 8 September 2022).

[28] Resolution of Supreme Court of 30 June 2020 in case No. 199/8820/17. Available at: https://reyestr.court.gov.ua/Review/90202382 (Accessed: 8 September 2022).

provided only for the future, the possibility of their occurrence in the future ceases. In addition, the invalidity of a particular part of the transaction does not result in the invalidity of other parts and the transaction as a whole, if we assume that the transaction would have been committed without the inclusion of the invalid part (Art. 217 CCU). Terms of the contract that significantly worsen the situation of one of the parties may be declared invalid, including the condition of releasing the party from liability for failure to perform its civil duties (Articles 661, 698, 780, 787, 1056-1, 1137 Central Committee of Ukraine).

In practice, void and disputed transactions differ in the following criteria:

- the degree of importance of defects in the transaction;
- the nature of the rights and interests that have been violated in connection with the conclusion of the transaction;
- judicial procedure for establishing the invalidity of the transaction and the independence of establishing the invalidity of the transaction from the court decision;
- the statute of limitations set for appealing to the court to declare the transaction invalid (Generalization, 2008).

To the last point, we can note that the statute of limitations on the requirements for the application of the consequences of a void transaction begins from the day when its implementation began [Art. 261(3) CCU].

3. GROUNDS FOR INVALIDATION OF THE CONTRACT

Since contracts are bilateral transactions, the conditions of their invalidity follow from the conditions of invalidity of transactions.

Article 203 of the Civil Code of Ukraine provides for general requirements, compliance with which is necessary for the validity of the transaction, including the contract, namely:

1) the content of the transaction may not contradict the Central Committee of Ukraine, other acts of civil legislation, as well as the interests of the state and society, or its moral principles [Art. 203(1) CCU];

2) the person who commits the transaction must have the necessary amount of civil capacity [Art. 203(2) CCU];

3) the will of the participant in the transaction must be free and correspond to his inner will [Art. 203(4) CCU];

4) transactions must be made in the form prescribed by law, i.e. according to Art. 205(1) of CCU transactions may be made orally or in writing (electronically). In writing in accordance with Art. 208 of the Civil Code of Ukraine should be made: a) transactions between legal entities; b) transactions between an individual and a legal entity, except for transactions that are fully executed by the parties at the time of their commission, except for transactions subject to notarization and (or) state registration, as well as transactions for which failure to comply with written form invalidates them; c) transactions between individuals in the amount exceeding

twenty times or more the amount of the non-taxable minimum income of citizens (0.56 euros); d) other transactions for which the law establishes a written form;

5) the transaction must be aimed at the actual occurrence of the legal consequences caused by it. The absence of the parties' intention to actually arise, change or terminate the rights and obligations stipulated by the transaction is the basis for the application of the established Art. 234–235 CCU on the consequences of committing fictitious and fictitious transactions;

6) transactions committed by parents (adoptive parents) may not contradict the rights and interests of their minor, underage or disabled children.

Thus, the invalidity of the transaction is due to the presence of defects in its elements:[29]

1. Defects (illegality) of the content of the transaction. The content of the transaction consists of rights and obligations, the acquisition, change, or termination of which the parties to the transaction have agreed. The content of the contract or other transaction is fixed in its articles (items) (Generalization, 2008). From the content of Art. 203 of the Civil Code of Ukraine it follows that the content of the transaction must comply with: the Central Committee of Ukraine; other laws of Ukraine adopted in accordance with the Constitution of Ukraine and the Central Committee of Ukraine; acts of the President of Ukraine in cases established by the Constitution; resolutions of the Cabinet of Ministers of Ukraine; acts of state authorities of Ukraine, authorities of the Autonomous Republic of Crimea, issued in cases and within the limits established by the Constitution and the law; as well as the moral principles of society.

Transactions that do not meet the requirements of the law do not generate any desired results for the parties, regardless of the will of the parties and their fault in the transaction. The legal consequences of such transactions occur only in the forms prescribed by law – in the form of returning the situation to the original state (restitution) or in others. It should be borne in mind that the court's invalidation of the contract is a consequence of its commission in violation of the law, and not a measure of responsibility of the parties. Therefore, for such recognition, it usually does not matter whether the parties were aware (or should have been aware) of the illegality of their conduct during the transaction (exceptions to this rule are possible if they derive from the law) (Resolution, 2013).

Article 6 of the Civil Code of Ukraine provides for the right of the parties to enter into an agreement that is not provided by acts of civil law, but meets the general principles of civil law; the parties have the right to deviate from the provisions of the contract from the provisions of civil law and to settle their relations at their discretion; the parties to the contract may not deviate from the provisions of civil law, if these acts explicitly state this, as well as if the parties are bound by the provisions of civil law follows from their content or the nature of the legal relationship of the parties. Thus, the contradiction of a transaction with acts of

[29] Resolution of the Supreme Court of December 18, 2019 in case No. 916/2194/18. Available at: https://reyestr.court.gov.ua/Review/86660800 (Accessed: 8 September 2022).

legislation as a ground for its invalidity must be based on fully and reliably established by the courts the circumstances of the case of violation of a transaction (or part of it) imperative prescription of the law or the conclusion of a transaction in itself, the deviation of the parties from the provisions of the law, regulating them otherwise, does not indicate a contradiction in the content of the transaction to this Code, other acts of civil law, as well as the moral principles of society.[30]

2. Defects (non-compliance) with the form. In Ukraine, as a general rule, non-compliance with the written form of a transaction established by law does not result in its invalidity, except as established by law. The objection is made with the page of the fact of commission of the transaction or dispute of its separate part can be proved by written proofs, using video-audio recording, and other proofs. The court's decision cannot be based on the testimony of witnesses. And, according to which law establishes its invalidity in case of non-compliance with the requirements for written form, concluded orally and one of the parties performed the action, and the other party confirmed his deed in accordance with the performance, such in case of dispute may be recognized by the court valid (Art. 218 CCU).

Thus, violation of the requirements for the proper form of law is not in all cases to its invalidity, except in cases established by law [for example, cf. Art. 547, Art. 719(3), Art. 981, 1055, 1059, 1107 CCU].

Notarization of transactions (contracts) is mandatory without conditions or when the parties have agreed on the notarization of the contract, requirements of the obligatory notarization, the obligatory confirmation of the right established for the power of attorney, issued by way of transfer, the mortgage agreement, the contract of sale of the object of privatization of state property, the contract of hire of transport concerning the participation of the physical person, etc. Due to non-compliance with the requirements for notarization of transactions, only such transactions are null and void, in accordance with current legislation are subject to mandatory notarization or such, and the conditions provide for mandatory notarization (Resolution, 2013).

In cases when the state registration mandatory for such types of agreements has not been carried out, these agreements are considered not concluded at all [for example, Art. 577(2) CCU]. Although, if the parties to the agreement related to the transfer of ownership of immovable property do not comply with the rules on the state registration of rights to such property, this circumstance alone is not grounds for invalidating such an agreement, as such registration is not an element forms of contract. At the same time, it should be borne in mind that according to Art. 334(4) of the Civil Code of Ukraine, rights to immovable property subject to state registration arise from the date of such registration in accordance with the law.

3. Defects of the subject composition. Such transactions include those committed by a natural person outside his/her civil capacity and/or a legal entity without a relevant permit (license) (e.g. gambling permit, tour operator activity, security

[30] Resolution of the Higher Economic Court of Ukraine dated December 14, 2011 in case No. 3/164. Available at: https://reyestr.court.gov.ua/Review/19943091 (Accessed: 8 September 2022).

activity, etc.)[31], or by the head of a legal entity under he does not have the authority to commit a transaction (for example, the commission of a transaction of one or more requires the consent of the General Meeting of the legal entity, etc.).

The rules of civil law also stipulate that a representative may not enter into transactions on behalf of the person he represents, in his own interests or in the interests of another person whose representative he is at the same time. This norm prohibits the conclusion of a transaction in which one representative acts simultaneously on behalf of several counterparties (except for commercial representation). The interpretation of this provision shows that a representative should be understood as a legal representative (in particular, a father, or guardian) and a person acting on the basis of a power of attorney issued on the basis of an act of a legal entity or contract. For example, if an agreement is concluded between an individual on the one hand and the director of a legal entity on the other (who is also a representative of this legal entity), this is the basis for invalidating such an agreement.[32]

4. Defects of will – inconsistency of will and expression of will. In a transaction, the external will of a person must correspond to his inner will, which must be aimed at achieving the appropriate legal consequence. Therefore, those actual actions of a person that do not directly lead to the emergence, change, or termination of civil rights and obligations cannot be considered as transactions. On these grounds, Ukrainian civil law distinguishes transactions committed under the influence of fraud, violence, difficult circumstances, and on extremely unfavourable terms, as well as a result of a malicious agreement.

A mistake is a person's misperception of the facts of the transaction, which affected his expression of will, in the absence of which it could be assumed that the transaction would not have been committed. The reasons for the error, in this case, do not matter. For a transaction to be declared invalid under the influence of an error, the error must be significant, i.e. an error regarding the nature of the transaction, the rights and obligations of the parties, such properties and qualities of the thing that significantly reduce its value or intended use. Significant is an error, the consequences of which can not be eliminated at all or to eliminate which the wrong party must incur significant costs. Error regarding the motives of the transaction is not significant, except in cases established by law (Art. 229 CCU). For example, operating one of the basic principles of civil law – freedom of contract – is not considered a mistake to formulate in the lease of property clause on its safekeeping, because in such a contract there was a unity of will and expression of rights and obligations of the parties under such agreement. the parties themselves have not

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[31] On licensing of types of economic activity: Law of Ukraine dated March 2, 2015, No. 222-VIII. Information of the Verkhovna Rada of Ukraine, 2015, No. 23, Art. 158.

[32] Separate opinion of the judge of the Civil Court of Cassation as part of the Supreme Court, Krat V.I. dated November 25, 2020 in case No. 639/5187/17. Available at: https:// reyestr.court.gov.ua/Review/93564537 (Accessed: 8 September 2022).

proved that in the absence of the disputed clause, the contract would not have been concluded.[33]

Fraud occurs when one party intentionally misleads the other party about the nature of the transaction, rights, and obligations. In addition, deception occurs when the party to the transaction denies the existence of circumstances that may prevent the transaction or conceals their existence, because knowledge of which may prevent the transaction (Art. 230 CCU). For example, a court will invalidate a contract as an error if one party was not informed of all material terms of the contract and the negative consequences of involving the other party in the performance of the contract, including the provision of services to purchase of a specific indefinite product, on the terms set out vaguely and incomprehensively, without providing available information necessary for the customer to make an informed choice when concluding the contract. The arguments of the opposing party about the plaintiff's negligence were not taken into account by the court.[34]

In the case of a transaction under the influence of violence (Art. 231 CCU) the formation of the will of the person committing the transaction is due to the intervention of an external factor – physical or mental pressure from the counterparty or another person to motivate would do without the presence of such physical or mental suffering.[35] It should be expressed in illegal, not necessarily criminal, actions. To invalidate a transaction, the plaintiff must prove the following circumstances: (1) the fact that physical or psychological pressure from the other party or a third party was applied to him (to the injured party to the transaction); (2) committing a transaction against one's true will; (3) the existence of a causal link between the physical or psychological pressure and the commission of the contested transaction.[36]

In practice, such an outside influence is quite difficult to prove, as not only the testimony of witnesses, but even forensic handwriting and forensic linguistic examinations do not prove that the disputed contract was made *'precisely due to external physical or mental pressure'*.[37]

The representative must act in the interests of the person he represents. Therefore, if he entered into a malicious agreement with the other party to the contract, and acted in his own interests, neglecting the interests of the person he represented, such a contract is invalid by the court (Art. 232 CCU).

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[33] Resolution of the Kyiv Commercial Court of Appeal dated December 14, 2017 in case No. 910/15401/17. Available at: https://reyestr.court.gov.ua/Review/71169223 (Accessed: 8 September 2022).

[34] Decision of the Shevchenkivskyi District Court of the city of Kyiv. Kyiv of 27 March 2013 in case No. 761/4329/13-ц. Available at: https://reyestr.court.gov.ua/Review/30289980 (Accessed: 8 September 2022).

[35] Resolution of the Supreme Court dated January 23, 2020 in case No. 484/3809/16-ts. Available at: https://reyestr.court.gov.ua/Review/87144759 (Accessed: 8 September 2022).

[36] Resolution of the Supreme Court of June 30, 2021 in case No. 556/2085/19. Available at: https://reyestr.court.gov.ua/Review/98083363 (Accessed: 8 September 2022).

[37] Resolution of the Supreme Court dated April 21, 2021 in case No. 601/1083/16. Available at: https://reyestr.court.gov.ua/Review/96631445 (Accessed: 8 September 2022).

A malicious arrangement is a deliberate collusion of a representative of one party to a transaction with the other party, resulting in adverse consequences for the person on whose behalf the transaction is made. In declaring a transaction invalid on the relevant grounds, it is not the presence of the principal's will to prove the transaction, but the existence of the intention of the representative, who is aware of the transaction against the principal's interests, presupposes (Resolution, 2013). According to this provision of the law, the necessary features of a transaction committed as a result of a malicious agreement between the representative of one party and the other are: 1) the presence of an intentional agreement between the representative of the injured party and the other party; (2) the occurrence of negative consequences for the principal and his disagreement with such consequences; (3) the actions of the representative were carried out within the powers granted to him.[38]

An example of an agreement concluded as a result of a malicious agreement between a representative of one party and the other party may be a lease agreement on behalf of a person on extremely unfavourable terms, taking into account: the term of the agreement (5 years), setting a disproportionately high penalty termination of the contract on his initiative ($300,000), as well as excessively low rent (UAH 6,000 per month for renting a 3-room apartment). These circumstances do not meet the interests of the principal and such a lease agreement is declared invalid by the court[39].

The transaction, the recognition of which is invalid under Art. 233 of the Civil Code of Ukraine, is characterized by the fact that a person commits it voluntarily, aware of their actions, but forced to make transactions due to difficult circumstances and extremely unfavourable conditions, and therefore the will of the person is not considered free and does not meet his inner will. The grounds for declaring a transaction invalid in the following circumstances and the subject of proof in the case are: (1) the existence of a serious circumstance in which the person was and which forced him to make the transaction; (2) the transactions were made on extremely unfavourable terms.[40]

Severe circumstances may include the serious illness of a person, members of his family or relatives, the death of a breadwinner, the threat of losing his home or the threat of bankruptcy, and other circumstances to eliminate or reduce such a transaction.[41]

For example, if a person donates his property to close relatives, and invalidates the contract on the grounds that he is an elderly person and in need of constant

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[38] Decision of the Pechersk District Court of Kyiv dated July 31, 2013 in case No. 757/2091/13-ts. Available at: https://reyestr.court.gov.ua/Review/32849702 (Accessed: 8 September 2022).

[39] Resolution of the Kyiv Court of Appeals dated September 20, 2018 in case No. 753/886/18. Available at: https://reyestr.court.gov.ua/Review/76612288 (Accessed: 8 September 2022).

[40] Resolution of the Supreme Court of 5 February 2020 in case No. 462/3280/17. Available at: https://reyestr.court.gov.ua/Review/87517105 (Accessed: 8 September 2022).

[41] Resolution of the Supreme Court of 16 October 2019 in case No. 333/1238/16-ц. Available at: https://reyestr.court.gov.ua/Review/85238411 (Accessed: 8 September 2022).

support for health, he must provide evidence to prove that it is unsatisfactory health and his unfavourable financial situation could be eliminated or improved as a result of concluding such an agreement.[42]

It is not a serious circumstance to conduct criminal proceedings against a person with the threat of confiscation of housing, as further actions of the person to donate such real estate indicate the presence of his will to avoid possible confiscation of property belonging to him to continue using it with the defendant. after the conclusion of the contract, they continued to live in the disputed housing.[43]

The will of the party to the transaction must be free and in accordance with his inner will. An expression of will, which is expressed without the intention to create civil rights and obligations, but only for the form or to cover up another agreement, is not the implementation of the agreement.[44]

Indeed, Art. 234 CCU stipulates that a transaction is fictitious, which is committed without the intention to create legal consequences, which were due to this transaction. The fictitious transaction is declared invalid by the court. To recognize the obligation as fictitious, the law requires the following conditions: the fault of persons, manifested in the form of intent, which is aimed at committing a fictitious contract; such intention must arise in the parties before the conclusion of the contract; the purpose of concluding such an agreement is the absence of legal consequences stipulated by the agreement.[45]

Under a fictitious transaction, the rights and obligations of the parties arise, but not those arising from the content of the transaction (Art. 235 CCU). Having established in the case that a certain transaction was made to conceal another transaction (pretended transaction), the court must assume that the parties committed exactly the transaction they meant, and consider the case on the merits with the rules governing this last transaction. If it contradicts the law, decides to declare it invalid with the application, if necessary, of the relevant legal consequences (Resolution, 2013). The consequences of invalidity provided by the Ukrainian legislation can be applied to the pretended transactions only in the case when the transaction which the parties made is null and void or the court recognizes it as invalid provided it is disputed (Resolution, 2009).

4. LEGAL CONSEQUENCES OF INVALIDATION OF THE CONTRACT

The lawful consequence of the invalidity of the contract is restitution (the main consequence) and damages (additional consequence).

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[42] Resolution of the Supreme Court of February 5, 2020 in case No. 462/3280/17. Available at: https://reyestr.court.gov.ua/Review/87517105 (Accessed: 8 September 2022).

[43] Resolution of the Supreme Court dated October 2, 2019 in case No. 646/1916/18. Available at: https://reyestr.court.gov.ua/Review/84876680 (Accessed: 8 September 2022).

[44] Resolution of the Higher Economic Court of Ukraine dated February 3, 2009 in case No. 6/370d/08. Available at: https://reyestr.court.gov.ua/Review/4033833 (Accessed: 8 September 2022).

[45] Court order of the Supreme Court of May 7, 2019 in case No. 910/4994/18. Available at: https://reyestr.court.gov.ua/Review/82294086 (Accessed: 8 September 2022).

Participants in civil relations may not, at the level of a contract (including an amicable agreement), qualify a contract as invalid (void or disputed), determine the legal consequences of the nullity of the transaction, or agree on the application of restitution. By the agreement of the parties, only the legal consequences of the disputed transaction may change. In essence, the application of the design invalidity of restitution, as well as the invalidity of the contract itself is not to protect civil rights and interests unacceptable.[46]

Interpretation of Art. 216 CCU (legal consequences of the invalidity of the transaction) shows that it is necessary to distinguish between the legal consequences of the invalidity of the transaction and the legal consequences of the invalid transaction. Thus, the legal consequences of the invalidity of the transaction include the fact that it does not create any legal consequences. In addition, if in connection with the commission of an invalid transaction the other party or a third party has suffered damage and non-pecuniary damage, they are to be compensated by the party at fault.

The legal consequences of the performance of a bilateral invalid transaction (agreement) include bilateral restitution. Restitution is a special obligatory way of protection of the property right which can be applied only in case when the subject of the invalid transaction of the time of the decision of the corresponding question is in that party of the invalid transaction to which it was transferred.[47]

Restitution as a way to protect civil rights is used only if there is an agreement between the parties, which is void or is declared invalid.[48] The purpose of restitution is to restore the status quo between the parties in the factual and legal situation that existed before the transaction, by, so to speak, the absolute destruction of the legal significance of any actions taken by the subjects – participants in the invalid transaction.[49]

Prescriptions of Art. 216(1) CCU are not used as a basis for a claim for the return of property transferred for the execution of an invalid transaction, which was alienated to a third party. Claims of property owners for invalidation of subsequent transactions concerning the alienation of this property, which were made after the invalid transaction, cannot be satisfied. The rights of a person who considers himself the owner of the property are not protected by satisfying the claim against a bona fide purchaser using Articles 215 and 216 CCU. Such protection is possible by satisfying the vindication claim, if there are grounds for this, provided by Art. 388 CCU, which gives the right to claim property from a bona fide purchaser.[50] In this

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[46] Resolution of the Supreme Court of 27 October 2021 in case No. 346/6034/13-ц. Available at: https://reyestr.court.gov.ua/Review/100704340 (Accessed: 8 September 2022).

[47] Resolution of the Supreme Court of 9 September 2021 in case No. 925/1276/19. Available at: https://reyestr.court.gov.ua/Review/99612754 (Accessed: 8 September 2022).

[48] Resolution of the Supreme Court of 11 July 2018 in case No. 910/5221/17. Available at: https://reyestr.court.gov.ua/Review/75298668 (Accessed: 8 September 2022).

[49] Resolution of the Supreme Court of 9 September 2021 in case No. 925/1276/19. Available at: https://reyestr.court.gov.ua/Review/99612754 (Accessed: 8 September 2022).

[50] Resolution of the Supreme Court of 28 November 2018 in case No. 504/2864/13-ц. Available at: https://reyestr.court.gov.ua/Review/81842010 (Accessed: 8 September 2022).

case, the property may be claimed from a person who is not a party to the invalid transaction, in particular from a bona fide purchaser, by filing a vindication claim.[51]

Thus, if the property was purchased under a contract from a person who had no right to alienate it, the owner has the right under Art. 388 CCU to sue to recover property from a bona fide purchaser, not a claim for recognition of the contract of alienation invalid[52] (Resolution, 2014, 27).

Rule of Art. 216 CCU applies only to the parties to the transaction. This concept is operated by Art. 1212(1) CCU, which states that a person who acquired property or kept it at the expense of another person (victim) without sufficient legal basis (unreasonably acquired property), is obliged to return the property to the victim. The person is obliged to return the property even when the basis on which it was acquired, later disappeared. In accordance with paragraph 1 of Art. 1212(3) CCU, the provisions of this chapter also apply to claims for the return of an invalid transaction.[53]

The list of consequences of invalidity of transactions is not exhaustive, and the person concerned has the right to make any claim to apply the consequences of such a transaction, based on the principle of restoration of its violated rights and legally protected interests.

A special legal consequence of certain types of invalid contracts is, for example, the cancellation of the entry from the State Register of real rights to immovable property and their encumbrances.[54] However, the court's decision on the invalidity of the transaction does not entail the obligation to cancel the decision on state registration of ownership of the object. To do this, a person whose rights have been violated by such an invalid transaction applies to the court with a request to cancel the decision on state registration of rights.[55]

In our opinion, this definition of the Grand Chamber of the Supreme Court is incorrect, because if the root cause is rejected (invalidation of the contract), all its further consequences should be cancelled, including the cancellation of the decision on the registration of property rights, which, in turn, was adopted on the basis of the same invalid contract. In our opinion, taking into account the principle of procedural

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51 Separate opinion of judges of the Grand Chamber of the Supreme Court: Sytnik, O. M., Britanchuk, V. V., Lyashchenko, N. P., Prokopenko, O. B. dated November 28, 2018 in case No. 504/2864/13-ts. Available at: https://reyestr.court.gov.ua/Review/82316149 (Accessed: 8 September 2022).

52 On judicial practice in cases on the protection of property rights and other property rights: Resolution of the Plenum of the Higher Specialized Court on Consideration of Civil and Criminal Cases dated February 7, 2014, No. 5, Business-Accounting-Law, Taxes, Consultations, 2014, No. 35, p. 27.

53 Resolution of the Supreme Court of 9 September 2021 in case No. 925/1276/19. Available at: https://reyestr.court.gov.ua/Review/99612754 (Accessed: 8 September 2022).

54 Resolution of the Supreme Court of 24 April 2018 in case No. 910/7606/17. Available at: https://reyestr.court.gov.ua/Review/73793155 (Accessed: 8 September 2022).

55 Resolution of the Supreme Court 11 September 2018 in case No. 909/968/16. Available at: https://reyestr.court.gov.ua/Review/76860058 (Accessed: 8 September 2022).

economy, in case of invalidation of a contract, the court decision should indicate the cancellation of all further consequences related to the subject of such a contract (except for the transition of the subject to a bona fide purchaser).

In such cases, the appropriate defendant will not be the state registrar, but the opposite party to the contract.[56] And, given all the procedural possibilities of delaying the case (which, in our opinion, in the study should not be mentioned), a person under such an invalid contract should wait a long time to return to his position in what was before the contract.

5. CONCLUSIONS

Both in the domestic doctrine of civil law and at the level of the Central Committee of Ukraine, it is traditional to divide invalid transactions into insignificant and disputed, which allows it to be used in the context of invalidity of the contract. The disputed agreement is declared invalid by a court if one of the parties or another interested person denies its validity on the grounds established by law [Art. 215(3) CCU]: error (Art. 229), deception (Art. 230), violence (Art. 231 CCU) and other defects. The Central Committee of Ukraine regulates certain grounds for contesting transactions separately (Art. 222, 223, 225, 227, 229–233, 234, 235 CCU), but does not contain an exhaustive list of grounds. This means that any contract can be challenged if it does not meet the general requirements of the transaction (Art. 203 CCU). The challengeability of the contract is embodied in the so-called 'virtual' invalidity, when only the most typical grounds for challenge are listed. In this case, it is allowed to challenge the contract by filing a claim for invalidity and on other grounds. Sometimes they are additionally indicated [for example, Art. 668(3) CCU], but in general, it is allowed in case of violation of mandatory norms enshrined in acts of civil law, the interests of state and society, its moral principles. The decision of the Supreme Court in the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation of June 22, 2020 in case № 177/1942/16-ts states that 'the existence of grounds for invalidating the contract must be established by the court at the time of its conclusion. The contract must exist at the time of its conclusion, and not as a result of non-performance or improper performance of obligations arising under the contract.'

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THE INVALIDITY OF ASSET MANAGEMENT CONTRACTS

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Abstract: The paper addresses the issue of validity and invalidity of the asset management contract of national property. The definition of 'national property' covers both state property and municipal property, therefore the asset management contract is regulated by Act CXCVI of 2011 on the national property, Act CVI of 2007 on state property, and Act CLXXXIX of 2011 on Hungary's local governments. Those must be taken also other legal acts into consideration such as Act V of 2013 on the Civil Code because the above-mentioned legal acts use certain legal terms regulated by the Civil Code. The contract shall be considered as a contract on the borderline of private law and public law; one must pay attention to every aspect of this contract. One aspect of it is the validity and invalidity of the contract.

I will outline the issue of validity primarily along the grounds for invalidity regulated by the Civil Code. However, certain grounds cannot be taken into account. They are, in principle, related to the performance of a public task as the purpose of the asset management contract, or to the subjects of this contract, or the contract is valid due to other special features.

Keywords: *validity, invalidity, nullity, contestability, national property, asset management contract*

1. INTRODUCTION AND GENERAL NOTES

In this paper, I deal with the validity and invalidity of asset management contracts related to national property. I outline the issue of validity and invalidity primarily along the grounds of invalidity, namely, whether and to what extent each ground of invalidity applies in the context of the asset management contract.

At a theoretical level, several works (journal articles, studies, and books) have dealt with issues related to the asset management contract, but have not defined the concepts of asset management, right of asset management, and asset management contract. (B. Szabó et al., 2018; Csehi, 2001–2002; Diczházi and Macher, 2000; Drinóczi and Frank, 2008; Németh and Sík, 1997). The previous sentence should be interpreted restrictively in that way the term 'asset management' has been used to refer to a wide range of legal institutions and definitions, but not many such concepts are associated with state and municipal property, which are essentially related to the

professional management of property by natural persons and legal entities, typically in the course of their business. Concepts that refer to the management of national property are not sufficiently comprehensive or are too general.

In my view, an asset management contract is a legal relationship under which the person exercising the property rights commits the state or municipal property by *Act CXCVI of 2011 on national assets* (hereinafter NPA) to an asset manager for a period or until the occurrence of a condition specified in the contract. So, the exercise of property rights and the performance of ownership obligations are transferred within a certain scope, whereby the asset manager is granted the rights of the owner and is subject to the obligations of the owner, in particular, the rights of possession, use, and utilisation unless otherwise provided by law or the contract, while the right of disposal is limited under the NPA. The asset manager is obliged to ensure the preservation, good maintenance, and operation of the property, to fulfil its other obligations under the law and the contract, and to use the property in accordance with the purpose specified in the NPA and the contract, and, in the event of termination of the asset management contract, to return the property taken into asset management/received and to account for it.[1]

Before discussing the topic in more detail, I will make a few remarks, partly methodological and partly related to the content. Based on the current state of my research, this topic has not yet been dealt with comprehensively in Hungarian legal literature, and therefore I cannot present a legal literature position closely related to this topic to support some of my statements, as no relevant partial studies have been produced. I do not wish to argue here with literary positions of nature on civil law invalidity, if only because, where I have no specific comment in this context, I accept the position(s) and wish to make them part of my thoughts.

In my research so far, I have found only a small number of court decisions on the asset management contract, and this is even truer for the invalidity of this contract. However, it is also true that there are other decisions, which are only loosely connected with this contract, but the ideas expressed in them can provide powerful support in answering certain questions. These decisions are related to national property. However, it should be avoided that any similar decisions or legal instruments, which they bring within the scope of the examination, should be considered equivalent to an asset management contract: they should be taken into account only *mutatis mutandis*.

Based on the legal environment, I am convinced that, apart from certain special rules, the common rules of contract law laid down in *Act V of 2013 on the Civil Code* (hereinafter CC) should and may be applied to asset management contracts without any further exceptions. In my view, if any private law element of it is removed, the public law part is almost unintelligible, whereas if the public law elements are removed, the asset management contract in its present form loses its *raison d'être* and becomes a special legal relationship not governed by the CC. Therefore, the contract has strong elements of civil law, but is also subject to significant public law

[1] For more detailed conceptual approaches to asset management contracts, see Dúl, 2019.

interference, and can be classified as a mixed contract with substantial civil law elements. Overall, this contract shall be considered as a contract on the borderline of private law and public law.

As a matter of principle, I do not intend to deal with the distinction between nullity and voidability, nor with the doctrinal issues relating to the various grounds of invalidity, but will merely deal with them to the extent that I consider them to be indispensable in the discussion of the grounds of invalidity of trust contracts.

In addition to declaring the right to property and inheritance, Article XIII(1) of the Fundamental Law of Hungary also notes that property means social responsibility. The declaration of social responsibility about property at the level of the Fundamental Law was not unfamiliar to Hungarian constitutional law and constitutional court practice, as it had been present since 1993. (Téglási, 2013, p. 69) The significance of this social responsibility in relation to state and municipal property is of a higher level of content than that of social responsibility compared to private property. (Bende-Szabó, 2014, p. 4) *Adrián Fábián* notes, in the context of municipal property, *'[e]stablishment of the right of asset management does not affect the local government's statutory duty to perform its functions and its responsibility for the performance of those functions. This means that if the asset manager is unable for whatever reason to perform the public task, the local government is obliged to ensure that the task is performed by other means. The transfer of the right of asset management is linked to a specific purpose, the purpose being to ensure the effective performance of the municipal functions, to preserve and protect the condition and value of the property, and to increase its value.'* (Fábián, 2021) In the case of state property, the legal institution of asset management also implies involvement in the performance of public tasks, and the ideas quoted are valid in the context of state property. These must be considered at all times, e.g. in the invalidity of the contract.

2. FURTHER NOTES ON THE VALIDITY OF CONTRACTS

According to *Gábor Kiss* and *István Sándor*, *'[a] contract can be considered valid if the parties make a declaration in accordance with their will, i.e. their will and their declaration are consistent with each other, their declaration is made in a form and content that complies with the legal requirements, and the declarations made by the contracting parties are identical, and the parties' declaration of will is capable of producing the legal effect they intend'*. (Kiss and Sándor, 2014, p. 15)

András Osztovits approaches invalidity from a negative direction, giving the basic concept, i.e. we speak of invalidity *'[i]f an essential element of the contract (intention, legal declaration, legal effect) is defective, not capable of producing the intended legal effect. In the case of such contracts, the civil law rules declare the legal relationship between the parties to be invalid, thereby precluding the legal effect which the parties intended to obtain.'* (Osztovits and Hajnal, 2014, p. 210)

The category of non-existent, invalid contracts is of course not only relevant from a legal and jurisprudential point of view. Based on the case published in BH 2017.60., a non-existent contract must be distinguished from an invalid contract.

This is because while a non-existent contract cannot have any legal effect at all, an existing but invalid contract may have legal effect. A non-existent contract cannot give rise to contractually enforceable claims, whereas a void contract gives rise to contractually enforceable legal consequences. However, this does not make the two doctrinal categories identical. In my view, Curia has summarised the quintessence of these legal concepts in a very precise manner.

I will not examine all the grounds of invalidity, because certain grounds cannot be connected to the asset management contract. For example, there are obviously no consumers in this contract in the sense of the CC. [Point 3 of Art. 8:1(1) CC]

3. THE GROUNDS OF INVALIDITY

3.1. Error of contract will

3.1.1. Mistake, common misconception, deception

Regarding mistake, the CC provides that anybody mistaken upon the conclusion of the contract concerning a substantial circumstance may contest his contractual juridical act if his mistake was caused or could be recognised by the other party. The mistake concerns a substantial circumstance if the party would have not concluded the contract if he had been aware of it or would have concluded the contract with different content. [Art. 6:90(1) CC] In my view, it is perfectly conceivable that either party was in a mistake about any part of the asset management contract. If the mistake is conceivable, and in my view, it is already possible, then if, as a consequence, the parties could have been in the same erroneous assumption on a material point at the time of the conclusion of the contract, that is also a ground of voidability. [Art. 6:90(2) CC]

In a court decision (ÍH 2014.149.) the local government provided a directly enforceable suretyship and created a mortgage on the property for a debt equal to the amount of a tender. The municipality complained that the president of the public benefit association that had invested in the project and the then mayor were the same person, and that, as time went on, the construction itself did not progress, the tender was not won, the subsidy was not paid, the loan had expired, and the loan was claimed from the local government because of the provision of the directly enforceable suretyship. The case shows that the investment itself served an essentially noble purpose, the development of the municipality. A lease contract was also concluded in connection with the investment, and the court held that the lease itself was not in bad faith (having been pleaded in addition to the mistake), because it was not in bad faith at the time the contract was concluded, having been concluded for the good cause set out above.

A question was raised as to whether the representatives were mistaken when making decisions on municipal property, before taking a decision, when making a decision, or whether they were mistaken because they were not well informed on certain details. In my view, the court before which the matter was brought correctly adopted the view that such a question was irrelevant, since the adoption of a decision

by a body of representatives is a matter of public law, whereas error and the duty to cooperate (in the decision-making process) are concepts unknown in public law and cannot, therefore, be relied on to prevent a decision which they define from having the legal effects which they imply.

The very fact that the mayor 'interprets' the decision of the body of representatives to the outside world is based on public law, Article 65 of Act CLXXXIX of 2011 on Hungary's local governments (hereinafter LGA).[2] Nevertheless, the judicial practice has also established the thesis that the body of representatives has the right to exercise ownership rights over the municipal property. Within the scope of these rights of disposal, the mayor may be authorised in the rules of organisation and operation to determine the rights, which the body of representatives may exercise, and the scope of the property, which it may dispose of.[3] (BH 2009.302.) Under the principle of imputation (Auer, 2018, p. 44), the acts of the mayor as a representative (in the civil law sense) must be imputed to the municipality, so ultimately it is the mayor acting in his representative capacity who must be at fault and not the members of the body of representatives.[4] No question arises as to the application of this principle because, under LGA, the local government is a legal person, and the provisions of the CC relating to legal persons apply to the exceptions provided for in the Act. [Art. 41(1) CC] The error is, of course, not only in the case of local governments but also in the case of the asset manager and the person exercising the property rights over state property.

Since, in my view, a mistake can exist regarding any element, on the theoretical level even misrepresentation can have its place, namely in the sense that the other or third party can play a role in the creation of a different consciousness from reality.

3.1.2. Unlawful threat

The unlawful threat is also defined as a ground for invalidity; under the CC, if someone has been induced to conclude a contract by the other party by using unlawful threats, he may contest his contractual juridical act. [Art. 6:91(2) CC] In my view, this ground for invalidity is less conceivable for asset management contracts. The threat can be exerted at the outset only in the direction of the asset manager or the person exercising the property rights, but not specifically towards the legal person. Nor do I consider it possible to conclude a contract under the influence of a threat, which involves the transfer of a public task.

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2 Art. 65 LGA The body of representatives is chaired by the mayor. The mayor convenes and chairs the meetings of the body of representatives and *represents the body of representatives*. (Author's emphasis.)

3 It is worth noting that the wording could be misunderstood in the sense that the right to dispose is part of the ownership triad, instead it would be more correct to refer to the exercise of property rights. My thanks to the proofreader for this comment in connection with my other paper.

4 I am grateful to Professor Tekla Papp for the professional discussion on this issue.

3.1.3. Secret provisos, sham contracting

Secret provisos or hidden motives are also possible in the case of asset management contracts by either party, but based on Article 6:92(1) of the CC, the validity of the contract shall not be affected by these circumstances.

A sham contract is an exciting and interesting legal institution, to the point wording of the CC gives room for countless theoretical discussions. Sham contracts shall be null and void. If a sham contract disguises another contract, the parties' rights and obligations shall be assessed based on the disguised contract. [Art. 6:92(2) CC][5] In the case of the asset management contract, in my view, this ground for invalidity cannot expressly arise: it could be examined either in such a way that the contract is a sham, that is to say, it is a disguised contract, or in such a way that the asset management contract becomes the disguising contract. If it is a disguised contract, then the purpose of the disguise is to transfer a public task and could be for national property for which no asset management contract can be concluded, nor any other legal instrument, but the disguised contract is legally possible. The rules of Article 6(1) of NPA – it is precisely based on the rules of the law on trusts that an asset management contract can be concluded for assets in respect of which many other legal instruments are not applicable. Among the cases that could have arisen (Vékás, 2019, pp. 120–121), there may be some relevance in the case where there is a sham in respect of legal entities to allow a person who does not meet the legal requirements for the possible person of the asset manager to participate in the asset management contract. This can, however, be 'remedied' by the asset manager leasing the property to such a person, for example.

3.2. Error in the contractual juridical act

Based on Article 6:6 of the CC, if form-related requirements are prescribed by law or by the agreement of the parties, the juridical act shall be valid in that form. *'Failure to put it in writing renders the entire contract invalid. (...) The essence of the mandatory form is that, for reasons of public interest or trade safety, contractual statements must be recorded in such a way that their creation and content cannot subsequently be the subject of dispute or be a matter of proof.'* (Kiss and Sándor, 2014, p. 120) In light of the above, the question of whether there is a mandatory formality for asset management contracts, and whether they should be in writing, is a further relevant question.

As the CC does not provide any guidance in this context, since it is not a contract regulated in the CC, it is necessary to look at other legislation. Pursuant to Article 25(4) of *Act CVI of 2007 on state property* (hereinafter SPA), a contract for the utilisation of public property must be in writing. The question arises as to whether the asset management contract constitutes utilisation in the context of national

[5] Article 207(6) of the former Civil Code, Act IV of 1959, regulated this legal instrument in the same way. In the legal literature see for example: Gellén, 2005; Gellén, 2006; Gellén 2008.

property, a question which I will refer to another rule to answer. Under Article 23(1) of SPA, the person exercising property rights manages it himself or, based on a contract, in particular a lease, a leasehold, or a mandate, transfers it for use or places it under asset management or beneficial use. Based on a grammatical interpretation of the text, it seems to me that, since it lists by way of example certain contracts which are to be regarded as contracts of use and the asset management is expressly separated from them in the legal act, it may be concluded that no equivalence mark can be placed between the asset management and utilisation. It is in the sense that SPA does not in any way exclude the possibility of the use of property, is not a form of utilisation under this Act, and therefore does not need to be written concerning the relevant paragraph, i.e. the legislation does not impose a formal requirement. The same conclusion can be drawn from the NPA. The NPA explicitly excludes that the transfer of property into asset management is included in the scope of utilisation: the transfer by the person exercising property rights or user of national property of the right to possession, use or benefit from a national property by any legal title which does not result in a transfer of ownership, excluding the transfer into asset management and the creation of beneficial use, is considered to be a utilisation. In this respect, the NPA, which covers a larger category, and SPA, which regulates one of its elements, are consistent with each other. Because of the grammatical and taxonomic interpretation of these laws, asset management does not constitute utilisation and there is no explicit legal provision in the context of the need to put it in writing.

Based on *Act CXLI of 1997 on Real Estate Registry* (hereinafter REA), in the case of state-owned real estate, the person exercising the property rights of the state and the asset manager; and in the case of municipal property, the right of asset management and the right to operate an exclusive economic activity and the asset manager may be entered in the Real Estate Register. [Point a), Art. 16 REA] Unless otherwise provided by law rights may be registered, on the basis of public documents, private documents with full probative force, or a notarized copy thereof, which certifies the creation, modification, or termination of the right or fact which is the subject matter of registration and contains a declaration by the right-holder of record or potential right-holder to be registered in the real estate register as an interim beneficiary. (Art. 29 REA)

In the context of state property, pursuant to Article 7(1) of Government decree 254/2007. (X. 4.) on the management of the state-owned property (hereinafter referred to as Govt. decree), the right of asset management over real property based on an asset management contract is established by registration in the real property register. Article 7(2) of the Govt. decree provides that the asset manager shall ensure the registration of the right of asset management in the real property register (...) within thirty days of the conclusion of the contract. In my view, this should be understood to mean that if the public property is not registered as under asset management, the asset manager cannot exercise the right of asset management. The declaratory language of paragraph (2) of the quoted article may be read as imposing an obligation on the asset manager. If this is so understood, then, in conjunction with

Article 29 of REA, an appropriate deed is required; if there is a statutory obligation to register the property, then the asset management contract on the state property must be written down in advance. In the case of an asset management contract established on municipal property, LGA does not contain any rules of this kind. Such an obligation may be laid down in municipal ordinances adopted based on the LGA. In the light of the above, it is my view that the asset management contract will be in writing: given the totality of the rules governing national property and the totality of the requirements for an asset management contract, I see little reason why such a contract, linked to the performance of a public task, should not be in writing. However, for the reasons set out above, I do not consider that this ground of invalidity is applicable at present, since, as a matter of law, it does not have to be in writing, so its form cannot be infringed. As a *de lege ferenda* proposal, it would be worthwhile to formulate clearly, in NPA as a specific provision, that the asset management contract must be in writing.

3.3. Error of intended legal effect

3.3.1. Prohibited contract[6]

A recent case law correctly follows the provisions of the CC in the context of a contract in breach of law: the nullity of a contract may be based not only on a breach of civil law regulation but also on a breach of another legal provision. The contract is null even if the other legal rule does not expressly so provide, but it can be established that the purpose of the rule is to prohibit the legal effect, that the contract is intended to produce. (BDT 2020.4227.) Although not so rich in case law, nullity contrary to the law on the national property can provide several starting points, which may also be relevant in the context of asset management contracts. The municipality may manage the assets forming part of its common property within the limits of the law on the national property, and therefore cannot lawfully convert the common property into a condominium (KGD 2015.183.) since this would allow the property, which would otherwise be common property, to be owned not only by the municipality but also by others.

The unmarketability of the national property is underlined by the fact that the sale contract for the alienation of the property is invalid, even though the authorities have approved the land conversion. It is irrelevant whether the property meets the technical characteristics of a public road, since, in the absence of such characteristics, it does not become marketable. (PJD 2017.20. I.) The fact that the contracting party was aware of the status of the property as national property at the time the contract was concluded does not alter this position and is irrelevant to the invalidity of the contract. (PJD 2017.20. II.)

The problem with the national property, which was the exclusive property of the local government, was that it was not recorded as such in the land register, but was

[6] In the context of prohibited contracts, see also in particular: Auer, 2012; Auer, 2018a; Auer 2018b; Auer 2021.

otherwise part of the common property and a sale agreement was nevertheless concluded. In the case under appeal, Curia said that the courts had correctly held that the property at issue, which was described as a 'disused road and building', was not covered by point a) of Article 5(3) of NPA, the court had correctly held that the land and the public road, and the public road at issue in the proceedings in question belonged to the national property of the local government, which is the exclusive property of the local government. Property of this nature is defined in Article 6(1) of NPA, the property is therefore unmarketable, and the contract of sale concluded for its sale is therefore void under Article 6:95 of CC.[7] However, the reasoning of the judgment did not include the provisions of Article 15 of NPA, according to which the mere fact that a contract or other legal transaction or provision is void in contravention of the provisions of that Act confirms the invocation of the relevant provisions of the CC, while at the same time rendering the provisions of the CC null and void. (Second sentence of Art. 6:95 CC)

In the context of state property, the nullity of a contract for breach of the SPA is confirmed by Article 5/A SPA, which states that a contract concluded in breach of the substantive and procedural rules of the Act is null and void. If an asset management contract is in breach of the law, it is necessary to look at the type of property (state or municipal) and the law to which the specific provision of the contract is in breach. If it conflicts with a provision of the NPA, it is void as a prohibited contract under the CC, but it is also void under the NPA and since the NPA. does not provide for a legal consequence different from the CC, the CC can be fully applied. Some of the provisions related to state property are contained in the SPA. As the nullity of a contract that conflicts with the provisions of the SPA is also specifically provided for in the special rule, the fate of the contract is similar to the fate of the former.

The LGA does not contain any general or special rule on the nullity of a contract, but in my view, there is no need for such a rule: on the one hand, the municipal property counts also as national property; the asset management contract is also regulated by the NPA, and a contract that is in conflict with the NPA is null and void. On the other hand, in its absence, the prohibition on prohibited contracts in the CC could be used as a basis in these situations.

3.3.2. Contract contrary to good morals

'The prohibition of violation of morality can be seen as an open-ended general clause, formulated at a high level of abstraction, which does not prohibit or make obligatory certain specific behaviours. By its very nature, it marks the moral limits of private freedom (private autonomy), and within these limits, it seeks to influence

[7] Contracts violating the law or concluded by circumventing the law shall be null and void unless the law attaches other legal consequences to it. Despite these other legal consequences, the contract shall also be null and void if it is specifically provided by the law, or if purpose of the law is to prohibit the legal effect intended to be reached by the contract.

the conduct of legal persons and the direction and content of their decisions. (...) In the general rule of the prohibition of conflicts with morality, the requirements of the moral norms of society are reflected.' (Points 3.2. and 3.3. of Decision 801/B/2002. AB of the Constitutional Court of Hungary) Decision published as BDT 2016.3604. summarises laconically the maxims of judicial practice in connection with contracts that are manifestly contrary to morality, according to which, in general, contracts are considered to be such if, although not prohibited by law, the objective to be achieved, the nature of the obligation undertaken, the consideration offered in return or the subject of the contract are manifestly contrary to generally accepted moral standards or customs, and are therefore clearly unfair and unacceptable in the general social perception.

In my view, accepting the previously cited decision published as ÍH 2014.149, and taking the introductory ideas of the present study into account, there can be no question of a conflict of morals in the case of asset management contracts. The reason for the conclusion of such contracts is that the State or local government thought that the public task to be achieved by the property could be performed more efficiently by the asset management. The performance of a public task cannot be contrary to morality and, in this regard, in my view, the manifest conflict of morals is not a relevant ground for invalidity of asset management contracts.

3.3.3. Obvious disproportionality – Usurious contracts

Proportionality between service and consideration (Cf. Art. 6:98 CC) is known in the context of national assets. National assets exceeding the value thresholds set by law or by local government ordinance under the NPA may be exploited, unless an exception is provided by law, only by competitive bidding to the highest overall bidder, with the proportionality of service and consideration. [Art. 11(16) NPA]

The same rule applies to the transfer of ownership. [See Art. 13(1) NPA] If the transaction does not meet this criterion, it shall be considered null and void under the general rule of law. (Art. 15 NPA) It was in the light of this provision that, in a certain case, the court held that the requirement of responsible management of national assets precluded the kind of economic risk-taking that would allow the transfer of ownership of the property at a price below its value. If the transfer of the ownership of the national assets in return is not for value, the transaction is void. (BDT 2018.3882. I.)

It is questionable, however, when proportionality is achieved or, to put it the other way round when there is disproportionality between the service and the consideration. According to the court, since there is no further special restriction on disproportionality of value in the Art. 6:98 CC, the definition declared in the CC must be used. (Auer, 2021) Although to a large extent, private law instruments (e.g. transfer of property, use, etc.) are involved in both laws, the whole regulatory system of the NPA is governed by different, special principles and rules for national assets than for private property, and proportionality may not be upheld in the same way. While it would be desirable to use the same set of concepts, the obvious

disproportionality, and the unmarked, without adjective, proportionality cannot be identified, and if they were to be understood as the same, the legislator would have had to ensure consistency between the laws.

'As a general rule, an asset management contract can be concluded as a contract for consideration. An exception to this general rule is where the national property is entrusted exclusively for the performance of a public task, in which case the asset management contract may be concluded free of charge to the extent necessary for the performance of that public task.' (Bende-Szabó, 2014, p. 14) The NPA provides for proportionality in the case of contracts for the use of the property (not including, in the present case, the transfer), but, I think that this provision does not apply *ab ovo* to an asset management contract, since it cannot be considered as a use of the property. It should also be noted that, in the case of asset management, this provision does not apply because it provides, in relation to utilisation, that proportionality must be observed and that asset management cannot be understood as exploitation concerning the systematic interpretation of NPA. However, this does not mean that the possibility of invalidity under the CC can or should be excluded. In my view, if the level of the asset manager's fee can be determined in the case of an asset management contract for consideration, the practice developed in relation to the CC should make obvious disproportionality determined. '*In the field of public service provision, local authorities may, in principle, be exempted from paying the asset manager's fee, but in practice, MNV Zrt.* (i.e. the Hungarian National Asset Management Inc.) *concludes free of charge asset management contracts for all local governments*.' (Boros, 2018, p. 68)

For usurious contracts, in addition to the existence of obvious disproportionality as defined in the CC, the situation of the other party and the exploitation of that situation – by 'one of the parties' is required. (Art. 6:97 CC)[8] Again, I must refer to the performance of a public task, since there can be no question of a situation of distress in the case of asset management contracts: the asset manager receives the assets to participate in the performance of a public task, while the person exercising the property rights transfers them to ensure that the public task is properly performed. Asset management is only one of the possible ways for this performance. The need to perform a public task is not a situation that, in my view, should exist in usurious contracts and the public task must be performed.

3.3.4. Impossibility of performance. Incomprehensible, conflicting clauses

As regards the types of impossible services (Barzó et al., 2015, p. 223), contracts impossible for legal reasons may arise in the case of asset management contracts if the contract is not concluded in full compliance with the NPA and other related legal acts. Objectively, an asset management contract would be impossible if the asset manager could acquire the property rights after a certain period, while subjectively, it would be impossible if the person exercising the property rights

[8] In the context of usurious contracts, see also Menyhárd, 1999, pp. 223–240.

concluded the contract with a person who does not belong to the possible asset managers under the NPA.

The incomprehensible and conflicting clauses [Art. 6:107(2) CC] are not of such a special nature, nor is there any criterion in the asset management contract that would preclude the existence of such clauses in asset management contracts, and this ground for invalidity can be applied without further ado.

4. CONCLUSION

Summarising the results of the paper, it can be said that most of the examined grounds for invalidity regulated by the CC can be applied to asset management contracts. In my opinion, this is because of private law embeddedness of the asset management contract, which has elements of both private and public law, is well founded, and further examination of the issues is justified.

The grounds of invalidity, which cannot be taken into account in the light of the above analysis, are essentially either unrelated to the performance of a public task, as the purpose of the trust contract, or are not justified by other characteristics of the asset management contract. I am convinced that, even if some of the reasons could be applied on a theoretical level, they will not be applied in practice along other lines linked to the legal instrument.

Several grounds of invalidity can be used. However, there are certain grounds that cannot be taken into account. They are, in principle, related to the performance of a public task as the purpose of the asset management contract, or the subjects of this contract or the contract is valid due to other special features.

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THE INVALIDITY IN THE PRINCIPLES OF EUROPEAN CONTRACT LAW – COMMON CORES AND ALTERNATE WAYS

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Abstract: The Principles of European Contract Law (PECL) has never been adopted as a binding legal authority in the European Union. While it remained a conclusion of a massive research project, the PECL certainly has an impact on the amendments to the legal framework for contracts throughout the Member States, and it serves as a unique *lex mercatoria* for European businesses. Furthermore, the PECL provides a starting point for any research that aims to identify common cores in the European contract law heritage. Chapter IV of PECL is dedicated to the validity of contracts, thus, this chapter serves as the base for the document's approach to the invalidity of contractual obligations. The invalidity of contracts remains a much-debated legal phenomenon in almost all jurisdictions and international business law. The presentation embraces the instances of invalidity (mistake, threat, fraud, inaccuracy in communication, excessive benefit, unfair advantage, unfair terms not individually negotiated), matters not covered by the PECL (illegality, immorality, or lack of capacity), the concept and the effect of avoidance, and the consequences of avoidance in light of the most recent amendments to the contract law framework in the Member States. The central question is whether the PECL's system on the invalidity of a contract may serve as a bridge between the different approaches of continental civil law legal systems and the common law legal systems. The presentation provides some examples of hot topics from the case law of selected municipal courts in Europe to identify the challenges courts face when deciding on the validity of contracts these days. Using these examples and combining them with some of the most recent legislative developments on invalidity across Europe, the presentation is searching for an answer to whether the common cores the PECL identified could help the spontaneous approximation of the laws of the Member States on contractual invalidity, or the Member States chose alternate ways to react to the practical challenges of the modern business environment.

Keywords: *PECL, invalidity, contract law, European legal heritage, harmonization of laws*

The question of the validity of contracts has been a long-time phenomenon not only in jurisprudence but in everyday legal practice as well. In the European Union, despite several attempts, even a partial harmonization of the general rules of contract law seems to be an idea. While the European Commission has been committed to the establishment of a European contract law that may provide for common cores and harmonized concepts in the topic of general contract law, no attempt was found

worthy of adoption by the Member States. Till now, the probably most interesting and influential attempt in the process of harmonizing contract laws in the European Union is the Principles of European Contract Law (hereinafter PECL) (Lando, 2003), which was intended to be much more than just a snapshot on the common cores and legal heritage of the Member States concerning contract law and the law of obligations: it was meant to offer a normative text, a draft for a future legislation in the EU. The PECL never earned the status of a binding legal authority, therefore, it remained an interesting outcome of a very thorough research project. Despite this troubled history of the PECL, it still often served as a reference point to national lawmakers across the European Union when introducing revisions to their existing contract law regimes. Therefore, the impact of the PECL is far more overreaching than what we may envisage given this latent and yet spontaneous harmonization of contract laws in the Member States the document could achieve. We do not say it is equal to the original intention behind the making of the PECL, however, it is still much more than what one could foresee based on the current non-legal status of the document.

As contract law relies on the concept of enforceability everywhere in the world, the PECL also had to pay particular attention to the classic crack on the shield: the grounds for invalidity. Chapter IV of the PECL is dedicated entirely to the question of validity (and invalidity) making it a key topic with outmost importance to any lawmaker. As with other chapters of the PECL, Chapter IV is incomplete as it does not cover the classic grounds of nullity, instead, it only deals with the grounds of voidability. The former category merges those instances when a serious mistake undermines the enforceability of the contract, and that mistake jeopardizes not only the interest of the parties or one of the parties but the public interest and the entire society. These grounds of nullity mainly cover three scenarios in most legal systems in the European Union: illegality, immorality, and lack of capacity. Illegality typically resembles the attitude of the lawmaker in a society that may be connected to the national culture or national political ambitions and public policies. (Keirse, 2011, p. 39) Therefore, it is easy to understand why a document that aims to harmonize contract laws in various legal systems should not cover the grounds of illegality as a threat to the enforceability of contracts. Immorality is even more rooted in the national culture and is also in constant motion. The morality of a society can hardly be seen as a constant phenomenon and as a beacon that applies to more than one nation. Also, immorality is a troubled legal category that is in lack of an exact definition, instead, it is formed by judicial practice. Finally, lack of capacity is an issue connected to the law of persons, an area of private law that also relies on national legal culture. The PECL was intended to provide for the second branch in the harmonisation of private laws in the EU that targeted business-to-business transactions as opposed to the first branch of the harmonization attempts: consumer contracts. Illegality, immorality, and lack of capacity (the grounds for nullity) are typically associated with consumer contracts (either contract between consumers or between a business and a consumer). In the business-to-business (B2B) world of contract law, voidability is more often referenced the dispute settlement proceedings,

therefore, it seemed the right decision to focus on this angle of validity in a document that was entrusted to launch a harmonization process in the European Union. Two and a half decades have passed since the publication of the PECL, and business ethics, and contracting practices changed a lot. In the globalized world economy, it is a genuine question to see whether the intended provisions of the PECL on validity can still reflect those common cores in the contract laws of the Member States of the European Union, or the Member States stepped into alternate paths when deliberating on contractual issues connected to the invalidity of the agreements. This short paper intends to disclose some debates connected to the problem of validity in the Member States from the angle of the PECL.

1. AN OPPOSITION OF CIVIL LAW AND COMMON LAW CONCERNING MISTAKE

Civil law and common law legal systems exist right next to each other in the European Union. While the United Kingdom left the European Union factually on 1 January 2021, it still left some legal systems that were heavily influenced by English common law (Ireland and Malta are notable examples). The vast majority of the Member States follow civil law traditions, however, our globalized world most certainly left an impact on some of these civil law systems pushing them a bit closer to mixed systems that merge common law legal institutions and civil law concepts in their contract laws. (Hesselink, 2021, p. 228) On the concept of invalidity, there is a big gap between common law and civil law. Civil law legal systems typically recognize mistake as a ground for invalidity even if the mistake to fact or law was not accountable to the other party. The civil law concept of mistake is equal to misapprehension. Civil law systems also list fraud or threat (including undue influence) as classic grounds for invalidity and typically categorize these instances as scenarios of voidability in contract law. Common law legal systems, however, barely recognize unilateral mistake as a ground for challenging the enforceability of the contract, instead, they rely on the concept of misrepresentation as a classic ground of voidability. Misrepresentation remains the core concept in common law, and very often it is even more restrictive given that it exclusively refers to a common (shared) mistake of the parties. The ideology behind this restrictive approach to the mistake is that the law should protect the reasonable reliance of the other party who believes an agreement did come into existence. (Smits, 2021, pp. 159–176) Declaring a contract invalid merely based on a unilateral mistake of one of the contracting parties would jeopardize this mission of contract law in common law legal systems.

It is not that hard to see a relationship between the concept of misapprehension/misrepresentation and the interpretation theories in contract law. The impact of the interpretation theories on invalidity concepts is remarkable in the two legal systems. Civil law systems typically follow the subjective interpretation approach when looking for the true and enforceable meaning of the contract. The subjective interpretation theory dictates looking at what was in the minds of the parties at the time they made the contract. This approach equally protects the parties

and provides for the possibility to challenge the enforceability of the agreement even if just one party was at a mistake. The invalidity concept of misapprehension, therefore, can be deducted from the subjective interpretation theory. (Kötz and Weir, 1997, p. 147) Common law, however, mainly relies on the objective interpretation approach when it instructs judges to look only at circumstances as they would seem to an impartial bystander. This latter concept is a bit more compatible with serving public policies as it keeps some distance from the parties when a dispute on the interpretation of the agreement is at the centre of the discussion. Therefore, it is not surprising common law legal systems do not want to give recognition to unilateral mistakes of one party to the agreement as it is typically hidden from society or from that impartial bystander. The PECL follows a mixed concept of interpretation. It merges the subjective and the objective concepts prioritizing the subjective approach when stipulating *'a contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words'*. [Art. 5:101(1) PECL] The objective approach is reflected in the PECL as follows: the party's statements and other conduct are to be interpreted *'according to the meaning that reasonable persons of the same kind as the parties would give it in the same circumstances'*. [Art. 5:101(3) PECL] The PECL, therefore, can safely take the more open concept of mistake as a ground for invalidity too: it recognizes the civil law misapprehension as well as the common law misrepresentation.

The preconditions to mistake as to fact or law are clearly defined in the provisions of the PECL. The existence of the contract is by far the most important requirement to even analyse the effects of a potential mistake. When the meeting of the parties' minds is completely missing, it results in a non-existent contract rather than an invalid one. In practice, however, it is a truly thin dividing line between the non-existence of a contract and the invalidity of a contract based on a mistake. The decisive factor is the importance of the subject of the mistake. If the mistake refers to an important but non-essential part of the agreement, it should be categorized as a potential ground for invalidity. If the mistake is essential, therefore, the mistaken party would not have entered into an agreement at all, this is a defect in the meeting of the minds of the parties, therefore, the contract does not even exist. The second prerequisite to assessing the effect of a mistake is misapprehension. Civil law limits legally relevant mistakes to errors about the *'very substance of the thing or about the person with whom one contracted'*. (Smits, 2015, p. 163) Misapprehension does not require the conduct or the involvement of the other contracting party. It only refers to an important mistake in facts or law. The third precondition is the existence of a causal link. The contract would not have been concluded under the same conditions on a correct assessment of the facts. This causal link is vital when deciding on the invalidity of the contract. The mistake refers to an important element (or elements) of the contract, however, it is not fundamental that could have resulted in the party's lack of intent to make a contract in the first place. Finally, the fact the mistake refers to must bear apparent importance. The other party may not know the mistake but that the mistaken party regarded a certain quality as vital. This last condition clearly shows that PECL embraced the civil concept of mistake rather than the

misrepresentation concept of common law. The PECL does not necessarily require the mistake to be a common mistake. The classic situations that lead to the invalidity of the contract are as follows:

- the mistake was caused by information given by the other party;
- the other party knows or should have known of the mistake (contrary to fair dealing and good faith to leave the mistaken party in error);
- the other party made the same mistake (common or shared mistake).

In the first situation when the mistake is caused by incorrect information given by the other party, it does not necessarily mean the other party had any intention to mislead the mistaken party. The PECL does not go into details on the nature of the incorrect information, however, we can see some problems in the interpretation of the incorrect information in practice. Especially in the heavy and dynamic competition environment of the 21st century in the European Union, the so-called 'sales talk' is often at the centre of discussion whether it can be assessed as incorrect information given by the other party or not. (Kötz, 2017, p. 124) Such sales talks include the magnification of certain attributes of a product or a service without going into too many details. Examples would be 'the best', 'unique', 'the most beautiful', and alike that the future contracting party use to increase the demand for the product or the service. Sales talk, in the judicial practice of most Member States, does not result in rights that would arise from it. Courts typically conclude sales talk is too generic to induce mistake in the other party. While it can have an impact on the psyche of the other party, it is not specific enough to be assessed as a generator of a mistake. (Gordley, 2001, p. 247) More concrete statements are needed to induce mistake for the other party. In real-life scenarios, examples would be when the merchant states the product is fit for a certain use and has a certain quality that is missing. These statements, however, are rarely referred to as situations leading to the voidability of the contract. Parties are more interested to use these more concrete statements as measurements of the conformity of the performance to the contract. Therefore, it is mostly assessed as an instance of the breach rather than a situation of invalidity. The misled party may rely on the concept of the breach and apply the remedies of the breach (e.g. claim for performance, damages, or termination) that may not be available in case of an invalid contract.

Another situation of mistake is when it is caused by non-disclosure by the other party. Civil law accepts silence as a cause of a legally relevant mistake, it does not require the active conduct of the other party. Modern contract law in the laws of the Member States now provides for some solutions to assess pre-contractual obligations. Some of them would categorize it as a form of tortious liability, while others have specific rules for this in contract law. (Gullifer and Vogenauer, 2014, p. 189) The party should reasonably expect to be informed about certain matters before agreeing. By this concept, Article 4:107(3) of the PECL describes the common grounds for this situation of mistake when determining the disclosure of information on:

- whether the party had special expertise;
- the cost to it of acquiring the relevant information;

- whether the other party could reasonably acquire the information for itself;
- the apparent importance of the information to the other party. [Art. 4:107(3) PECL]

The obvious question is when and what to disclose. In case the information can be easily acquired by one's own effort, it is typically not an obligation to the other party to disclose. There are, however, serious differences between societies valuing initiatives and education. In societies valuing initiatives, the law expects the citizens to be vigilant and active in gathering information on the expected performance in the contract. These legal systems tend to look at citizens as grown-ups and hold them accountable for recklessness in acquiring readily and easily available information. In the latter case, however, the legal system is more patriotic over citizens and expects less activity from a future contracting party to acquire even easily available information. (Hesselink, 2021, p. 73) In practice, this results in a gap in the assessment of the obligation of disclosure. Still, some common cores can be identified in the judicial practice of the Member States. There is no need to inform about future changes that may be acquired by the other party. Especially in the contract between businesses (professionals), one party does not have to disclose information on a likely surge in the market for the product that is the subject of the agreement. The costly acquiring of the information, however, may be relevant in several jurisdictions (e.g. France, Germany). (Mak, 2020, p. 202) It is not surprising some legal systems pay particular attention to the costs of acquiring certain information and decides on the obligation of disclosure based on the outcome of the cost efficiency analysis. Civil liability has been in transition from classic liability (sanction) to a cost and risk allocation system since the 1970s. (Gullifer and Vogenauer, 2014, p. 107) This cost efficiency analysis concept suits this trend and may be seen as a purely objective theory. Based on this concept, a hidden defect of the hardwood floor (woodworms affecting the floors) can only be recognized if the potential buyer invests in a costly and unreasonable opening of a section of the floors. Common law legal systems rarely respect the situation of non-disclosure as a ground for invalidity. In sales contracts, they apply the 'caveat emptor' (buyer beware) policy that shows the non-disclosure of information is not relevant in their theories on invalidity.

The only type of mistake recognized in common law legal systems is the common (shared) mistake. In this scenario, both parties may avoid the contract, therefore, it is a practical approach to the question of validity. Civil law legal systems also recognize common mistakes, however, they do not limit the scope of application of the concept of mistake to this scenario. In the infamous German match-fixing case, a football club purchased the game rights of a football player from another club. None of the parties (football clubs) were aware the player had accepted a bribe to lose a game before the parties made the contract. When the incident became known to the oversight bodies, the player lost his game rights and became practically useless to any football club. The buyer invoked the concept of common mistake and successfully made the court declare the contract void. The German court followed a

risk allocation on the wrong assumption and made the seller pay the consideration back to the buyer. (Sefton, 2005, p. 341)

2. FRAUD

In case the party's misapprehension is caused or self-induced by the other party's statement of silence, it is the instance of fraud that also leads to the invalidity of the contract. Fraud requires the intention and bad faith of the other party. In the previous instances of invalidity, non-disclosure might have been completely unintentional and, therefore, unaccountable to the party. Fraud, however, is pre-meditated. The party understands the consequences of giving incorrect information or non-disclosure, and he also knows whether the information is incorrect or it has relevance and importance to the other party. The most obvious difference between mistake and fraud is in the remedies. In case of a mistake, the mistaken party may avoid the contract, while fraud almost always leads to damages.

While the prerequisites to fraud are almost identical in the laws of the Member States, the party's contribution to fraud remains an open question and results in divergent theories on fraud. Not all intentionally misleading and false statements lead to deceit as the party's (the victim's) contribution may levy the conduct of the fraudulent party. The addressed party's knowledge and expertise must be dully analysed when deciding on the relevance of that party's contribution. There is, however, an obvious problem concerning the addressed party's knowledge. Some Member States adopted the concept of the 'average consumer' that was originally created in European consumer law to filter the contribution of the addressed party. These legal systems (e.g. Belgium, Germany, Hungary) require a certain level of knowledge and expertise from the contracting parties and oblige them to recognize obvious instances of fraud. Other legal systems, however, only care about the special circumstances of the case that may derogate this expectation on the party's knowledge and expertise in busting the fraudulent fact and information. Regarding the latter concept, the special circumstances of the case may derogate the idea of an average consumer and judicial practice is more willing to levy the expectation toward the addressed party. A model case to illustrate this scenario is medical quackery. In an Italian case, the plaintiff's relative was suffering from terminal cancer. The medical doctors gave up on him and declared no cure was available for him. The plaintiff could not let his spouse pass away, therefore, she turned to the defendant who advertised his services using statements that might have been seen as quackery under normal circumstances. The defendant claimed he treated many people in this stage of cancer and brought them back to life, some of whom were recognized as famous persons known even to the plaintiff. The plaintiff, relying on the obviously misleading and false statements of the quack, paid money to the defendant and used his services. The patient died and medical science could easily prove the methods the defendant took to 'heal' the deceased were not scientifically approved and were the obvious practice of quackery. The Italian court concluded the special circumstances of the plaintiff (she was desperate of losing her husband which

affected her state of mind) justified her belief in the obvious case of quackery. (Smits, 2015, p. 171)

3. THREAT

The threat is also treated differently in common law and civil law legal systems. In case of a threat, common law sees a defect of consent, while civil law deems it as a ground for invalidity. The PECL lists threat as a ground for invalidity following the civil law argument. The practical problem about with the threat is the difficulty in drawing a line between legally accepted pressure and unlawful harassment. If the party makes statements to get a better deal from the other party (e.g. in lack of a discount, I will buy the product from your competitor), however, the alleged threat is basically about proposed actions that he has a right to take, the threat should not be concluded. Unlawful harassment, however, is not always about threatening the other party to commit unlawfulness if she does not accept the proposed terms of the future contract. The case when the creditor threatened the debtor that he would file for bankruptcy unless the debtor accepts a low price on a new contract was found unlawful and labelled as a threat by a German court. (Sefton, 2005, p. 273) The court concluded the threat must be unrelated to the obligation of the other party, therefore, even lawful actions (like filing for bankruptcy) can be seen as a threat. This broad concept of threat shows a step toward the implementation of business ethics in the world of contract law placing the obligation of fair dealing and fair negotiation on the parties. In other legal systems, however, the threat remains an instance of a clearly unlawful action, therefore, lawful actions would never lead to the invalidity of the contract. (Keirse, 2011, p. 47)

Undue influence may be seen as a subcategory of threat. Undue influence requires a relationship of trust between the parties. This trust is used to strengthen bargaining power. The question is the level of use of this trust. Usury exists in the laws of the Member States, and in some, it is the only concept of undue influence. Usury, however, is a very serious form of exercising undue influence as it exploits the desperate situation of the other contracting party to gain unilateral and unfair advantages. Undue influence can be much less in some jurisdictions. The reason the PECL left it without discussion is that undue influence is in relationship to immorality that is not covered by the PECL.

4. PRACTICAL CONSIDERATIONS – INVALIDITY OR BREACH

The grounds of invalidity as described in the PECL have not changed much in the laws of the Member States since the publication of the PECL. The gap between common law and civil law legal systems is still present and obvious, with respect to the concept of mistake, the instances of mistake, fraud, and threat (undue influence). Common law legal systems were not influenced by the PECL and did not move closer to the civil law approaches the PECL mostly incorporated. Judicial practice, however, shows the parties form the concepts of invalidity rather than the lawmaker or the courts. (Jansen and Zimmermann, 2018, p. 1248) Is it more beneficial to the

party to base his claim on invalidity rather than to claim remedies available for a breach? This remains the core question. We saw the difficulties in providing evidence for mistake or fraud, therefore, the concept on the burden of proof functions as a deterrence to parties and to make them move to the concept of the breach rather than base their claims on invalidity. It is also important to compare the available remedies to invalidity and breach. Invalidity typically results in the remedy of avoidance, while a classic remedy of the breach is damage. It is beyond debate, damages are far more attractive to the party than avoidance, especially if expectation damages can be claimed per the applicable laws. Invalidity cases are also more prominent in court litigation than in other dispute settlement processes. These conclusions prove legislation may seem constant, while the claims of the parties shape the approach to validity and they intend to channel most scenarios to the more open concept of the breach.

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THE RENEWED BESTSELLER CLAUSE OF THE COPYRIGHT ACT

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Abstract: The bestseller clause of the Copyright Act is an older legal institution of Hungarian copyright law. The rule was taken over by Hungarian law from the German Copyright Act. The bestseller clause provides protection for a creator in a weaker contractual position than the user. It provides effective assistance for the subsequent consideration of unforeseen circumstances at the time of the conclusion of the contract. Its primary purpose is to remedy the post-contractual shift in value using the special means of judicial amendment of the contract.

The legal institution of the bestseller clause is a special regulatory solution compared to the provisions of the Civil Code on invalidity. It is a special provision compared to invalidity in the event of a significant difference in value, however, it provides a strong limitation on the legal consequences of invalidity.

It only provides an opportunity for the court to amend the contract and eliminate the striking difference in value.

The rule has very poor judicial practice, both in Hungary and abroad. The primary reason for this is that the parties apply contractual arrangements that avoid future uncertainties regarding the amount of the royalty.

One of the aims of the DSM Directive is to extend the legal opportunities for weaker contracting parties, including the EU-level harmonization of the bestseller clause. According to Article 20 DSM, Member States shall ensure that in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed on turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.
The essay examines the possible effects of the extension of the bestseller clause to new areas in the national copyright law and the relationship between the new provisions and civil law invalidity rules.

Keywords: *correction of license by court, bestseller clause, DSM directive, (copyright) contract adjustment procedure*

1. INTRODUCTION

This short essay[1] will focus on the so-called bestseller clause of the *Hungarian Copyright Act*, the *Act LXXVI of 1999 on Copyright* (hereinafter referred to as *HCA*), as it was amended on 1st June 2021 by Article 17 of Act XXXVII of 2021 on the harmonization amendment of the Act LXVI of 1999 on copyright and the amendment of the Act XCIII of 2016 on collective management of copyright and neighbouring rights (hereinafter referred as *Amending Act*). The bestseller clause can be evaluated as an atypical invalidity rule whose latest amendment only enhanced this atypical aspect. I will analyse this aspect of the regulation.

The bestseller clause has been in the Hungarian copyright regime since 1999 (Art. 48 HCA). The legislator made extensive changes in the copyright regime in HCA, which took effect in 1999. Major changes were made in the norms applied to set the royalties and remunerations paid for uses. The main goal of the copyright codification was to harmonize the copyright system with the principles of market economy and with the other substantial changes in the legal system.[2] Besides the extensive liberalisation of the former copyright contract law, the legislation took into account that the author is typically the weaker party when concluding a license, therefore numerous rules were included in the regulation to protect the author's legitimate interests (Faludi, 1999, pp. 161–164). Nevertheless, the chapter on contracts of the 1999 Act could not be considered revolutionary by far even when it was passed. It can rather be regarded as the codification of market and judicial practice created by the change of the political regime. Since then not many changes have been made in the licensing chapter of the HCA: the only modifications worth mentioning were the mitigation of strict provisions on written contracts (Art. 45 HCA; Art. 15 Amending Act) and the introduction of rules with regard to the temporal scope of agreements of the related rightholders, due to extending the term of protection (Art. 55 HCA). Perhaps it is not far-fetched to state that the practice codified in 1999 has stood the test of time.

The bestseller clause had been unchanged in the HCA from 1999 until its text was modified in 2021. Even this was not explained by any internal problem of the regulation. Its reason cannot be found in the judicial practice, taking into consideration the fact that we cannot talk about such practice in Hungary with regard to the bestseller clause in the last 22 years since 1999.[3] The amendment was brought

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1 It is the written form of the lecture held at the international scientific conference titled "Invalidity in the European Civil Codes", organised by the University of Miskolc, Faculty of Law, on 3rd December 2021.

2 In defense of the author as a weaker party, *Péter Gyertyánfy* urged the re-creation of the rules of contract law already in 1996. See Gyertyánfy, 1996.

3 The Hungarian literature on the bestseller clause is very poor. The practice of the Hungarian Council of Copyright Experts does not know any case dealing with the bestseller clause either.

about by the aim of the European Union to harmonise this field and the obligation to implement the DSM directive.[4]

It is worth putting the regulation in a wider context and analysing the international and European Union framework of the bestseller clause so that the clause and its practical significance can be assessed properly.

2. INTERNATIONAL BACKGROUND OF THE BESTSELLER CLAUSE

Although the concept of intellectual work has always been international, and this feature has been supported by multilateral international treaties for over a hundred years, they lack the complex regulation of contractual law, and regulation of different aspects of royalty for transferring the right of use is severely incomplete. (The rules of international contract law are summarized by *Daniel Alexander Zampf.* Cf. Zampf, 2002, p. 63.)

The *Berne Convention*, adopted in 1886, which constitutes the backbone of international copyright, basically contains only rules on the various aspects of legal actions (transfer or waive of rights) concerning copyright. The issue of royalty is treated only in special cases when the freedom of contract cannot prevail due to the circumstances of the use, supposedly because of the unequal economic weight of the parties. This moderate approach is followed by the international treaties concluded later, especially the copyright agreements of the World Intellectual Property Organization (von Lewinski, 2008, pp. 427–428).

International rules – or rather the lack of them – clearly shows that the contracting parties did not intend to conclude agreements on the rules of contracts, which was partly the result of them traditionally being less open to any harmonization and partly because copyright agreements focused on ensuring material rights for a long time and when they were granted, it was law enforcement that caused difficulties on an international scale, therefore harmonization also turned into this direction.

As the harmonization of the contract laws of member states in the European Union is beyond the competences of the Union, no complex copyright contract law can be found in the copyright directives and regulations issued so far (von Lewinski, 1996, p. 49).

While in the EU member states with Anglo-Saxon legal system *freedom of contract* prevails, in France a relatively detailed copyright contract law was created,[5] and in Spain, copyright obligations were addressed in more than fifty paragraphs of the copyright act.[6] With such a diversity of national regulations, Union rules have always been moderate and to this date, it interferes with the rules of copyright contract law where it would seriously infringe any of the fundamental rights.

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4 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter referred as DSM directive).

5 Loi Nr. 92-597 Code de la propriété intellectuelle (CPI).

6 Ley 43/1994 de Propriedad Intelectual (B.O.E. Nr. 313. 31. 12. 1994).

So the scope of international and European rules does not comprehend the entirety of copyright contract law. In the case of international regulations, it is mainly caused by the differences among the various national copyright regulations. In international treaties concluded by countries with very differentiated copyright systems, it is obviously a difficult task to agree on some common contract rules. In the European Union, the lack of competence of the Union in the creation of contract law contributes to this.

However, the fact that there are some provisions on the royalties scattered both in international treaties and in European directives is to be analysed separately. The scattered regulations have one thing in common in this respect: both regulatory levels support the functionality of the market and the principle of *'qui pro quo'* (consideration due for the service). Thus they only provide for rules on royalty when without this, the functioning of the market would be distorted or the interest of the weaker party would be seriously and typically infringed. So express regulation does not mean that without such a regulation the due/adequate/fair royalty should not be paid, either in international treaties or in EU acts, but on the contrary: where there is no express rule regarding them, the legislation takes it for granted that the service is in proportion with the royalty so there is no need for any public power to interfere with market conditions.

To give a complete picture, it is to be noted here that most legal systems today provide sufficient guarantees for the fair remuneration of authors or the holders of related rights for the licensing managed by copyright collective rights management organizations even if there is no contractual agreement, so the regulation of collective rights management clearly strengthened the positions of the authors. As opposed to this, authors concluding single contracts are more and more likely to find themselves in the role of the weaker party so authors must be supported in the conclusion of single license as regards setting the royalty.

3. COPYRIGHT CONTRACT LAW AND GENERAL COPYRIGHT LAW

The regulation of copyright contract law is necessarily in close connection with the general contract laws as the general standards of civil law complement copyright standards as background rules everywhere. There is no example of the copyright acts giving a comprehensive and closed contract law regulation, refraining from applying the rules of civil law.

The only significant difference between national copyright laws is how detailed rules are prescribed by the legislation or whether any separate copyright contract law is created with detailed provisions for the different types of licenses or whether the rules are included in the copyright act only in a separate chapter. Concerning the regulation of the amount of royalties prescribed in licenses, two major types can be distinguished. In most cases the royalty is determined exclusively by the contractual intention of the parties, the legislator will not interfere with freedom of contract. The French CPI and the earlier mentioned Spanish copyright act expressly prescribe *fees that are in proportion with the scope of the license*, without establishing any special

regulation for the control of the content of the contract apart from the general rules for being challengeable or declaring it null and void.

HCA declares as a general principle that for the use of a work royalty is to be paid if the law does not provide anything else [Art. 16(4) HCA]. It has been proved by judicial practice that royalty should be paid not only for a user license but also for unauthorized/infringing use, which can appear as a claim for the payment of damages or as a claim to the recovery of the enrichment achieved via the infringement.

According to a word-by-word interpretation of the norm, the parties may agree on any type of payment other than the royalty in proportion to the revenue earned in connection with the use of the work. The text of the law also implies that if the parties do not agree on the royalty otherwise, the dispositional rule will prevail, so in this case, if the author did not waive it expressly, the royalty must be set in proportion with the income deriving from the use. Nevertheless, it is only true with the limitation that the contract must contain some provisions for the royalty as it is an essential element, the *essentiale negotium* of the contract. The lack of any agreement on the royalty implies that the parties did not agree on an important element, therefore the contract was not concluded. Certainly, it is difficult to imagine a situation when the parties agree on the payment of a royalty but not its amount. If the contract contains any formal errors (because the parties only made an oral agreement on the royalty) and the court will remedy the invalidity of the agreement, the rule of proportionate royalty cannot prevail as in these cases it is much more reasonable to set the same prices as those set down in the verbal contract.

In the case of works of art (paintings, sculptures), it is not a rare situation that the work only becomes valuable when the original is sold or the copyright exploitation rights are transferred. It would be seriously unjust if the authors did not benefit from the increased value of their works. Thus in copyright law, two methods have been elaborated to restore the balance for the benefit of the author.

The doctrine of *Artist's Resale Right* grants artists the right to proper remuneration on any commercial resale of their works of art after it is first sold. This remuneration, therefore, is due to the author for each resale continuously, independently of any concrete sale agreement, but under it, and it cannot be waived beforehand. It grants the author material benefit from any later success of their works of art (Tomasovszki, 2021).

By contrast, *the bestseller clause* is a general copyright contract law institution (so it can be applied not only for works of fine art), enabling the later amendment of a contract when the remuneration set down in the contract becomes disproportionate to the profit made by the user after the contract is signed.

The agreement infringes the author's substantial lawful interest in having a proportional share in the income resulting from the use because the difference in value between the services provided by the parties becomes strikingly great as a result of the considerable increase in the demand for the use of the work following the conclusion of the agreement.

The bestseller clause of the HCA can clearly be distinguished from the regulation of civil law on extreme disproportionality as in this case the disproportionality comes

about *ex post,* only after the agreement is signed. This regulation must be distinguished from contract amendments made by courts on the basis of the Art. 6:192 of the Civil Code too, as in this case judicial amendments can be made not only in the case of long-term legal relations.

Nevertheless, the scope of the *bestseller clause* is narrower because the balance of proportionality can only be problematic (and the contract can be amended according to the bestseller clause) if the royalty is not set in percentages. If the royalty is determined in percentages, it logically increases with the success of the work (e. g. the number of copies (sold).

As the *bestseller clause* is a rule that expressly protects the interests of the author, it can be enforced, unlike the rule of extreme disproportionality in Art. 6:98 of the Civil Code (which can be referred to by either contracting party who has suffered an injury), only for the benefit of the author, only the author may request the later amendment of a contract, adjusting the proportional royalty.

Judicial practice in copyright law has not created a separate content for the concept of extreme disproportionality, so extreme disproportionality must be interpreted as is general in civil law. (Sándor, 2021)

With regard to the fact that the contract does not contain any error when signed, any later imbalance in the *synallagma* will not incur all the legal consequences of invalidity: the Copyright Act only enables the court amendment of a contract, considerably limiting the scope of claims.

It must also be noted that the bestseller clause can also be applied to contracts transferring rights and to the contracts of performing artists.

4. NATIONAL CASE LAW OF THE BESTSELLER CLAUSE WITHIN THE EU

Nonetheless, the bestseller clause has not been incorporated in practice in Hungary, and not many cases have been brought to the courts in other EU member states either which resulted in the judicial amendment of the royalty set down in the contract, and only a few member states apply this means in their contract laws.

Dutch law introduced it in 2015 (Senftleben, 2017–2018), and since then there has been no known case law. It has been part of German law since 2004, but the literature knows only a few cases. A good example was recently the case of the Director of Photography of the movie ‘Das Boot’, who was granted 580,000 Euro instead of the 100,000 set originally (OLG München, 21. 12. 2017 – 29 U 2619/16). The disproportionality after concluding the synchronization contract was the result of the fact that the movie was granted numerous awards so the profit deriving from it increased considerably. Another movie that ended up in court was the Pirates of the Caribbean (BGH Urteil vom 10. 5. 2012 – I ZR 145/11). In this case, the law court awarded a higher royalty for the achievement of the German voice actor. Here the court emphasized in the explanation of the decision that when the agreement was signed the actor did not see the market conditions concerning the expected success of the movie, still does not constitute such carelessness on his side, which would give any reason to the court not to correct the terms and conditions of the agreement

later. The situation was made more intense as the dubbed footages originally intended for distribution in Germany were later also used in Austria and Switzerland.

From Poland, only one case is known, which was not brought to court eventually, but was discussed in the press in detail. The series called Witcher, written by Andrzej Sapkowski is widely known.[7]

Based on the two volumes of short stories and a series of five novels and a sixth separate novel by the Polish writer, three video games (and three other video games that do not constitute a series but are worth mentioning) a film and two series have been produced, out of which Netflix's own production running by the name of 'Witcher' can be highlighted besides the Polish film and series. What must be emphasized and is relevant to copyright among these works is the three video games. These games are all based upon the books by Sapkowski focusing on Geralt of Rivia, the witcher, who rids the people living on the Continent in the centre of the world created by Sapkowski of various monsters for money. With regard to their story, the games follow the events written about in the books, but they are not part of the plot created by the writer, so they can be considered fan-fictions in this respect. From the three games that belong to the main storyline, the third element of the series should be emphasized. This work is considered to be one of the best open-world action role-playing games, which is indicated by the fact that by December 2019 over 28 million copies were sold worldwide. Although a 554% rise in its sales also contributed to this number, which was driven by the release of the Netflix series in that month, it can firmly be stated that it was this game that brought world fame for the works that are set in the world of Witcher as over 20 million copies of the game were sold in June 2019. Eventually, the author managed to enforce his claim to a fair share of the profit made out of the unexpected popularity of the video games and the dispute was closed with an agreement 'beneficial for all parties'.[8]

The bestseller clause does not have extensive practice apart from these extreme cases. It is supposedly caused by the contract law practice, which avoids such cases in advance, and by the fact that in case of any change in the value, the amendment of the agreement as the only possible solution can be avoided if the parties themselves agree on the modification of the contract suitable for them. Certainly, it also requires the necessary attitude from the parties. It is conspicuous that Hungarian judicial practice has had no such case, which might indicate that in Hungarian law there is no need for this rule, the parties can take care of their problems with disproportionality for themselves. By a positive interpretation, it can be stated that the function of the rule is to persuade the parties to come to an agreement.

However, this rule could be beneficial in those cases when the work is used in accordance with an agreement signed earlier but meets with popularity bigger than

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7 https://wccftech.com/the-witcher-author-million-usd/ (Accessed: 16 September 2022).

8 Demand for Payment by Andrzej Sapkowski. Available at: https://www.cdprojekt.com/en/wp-content/uploads-en/2018/10/31450043_rb_15-2018_-_demand-for-payment.pdf (Accessed: 16 September 2022).

expected. If we think of the new online popularity of old movies and old musical albums, the necessity of this rule becomes perfectly understandable.

5. BESTSELLER CLAUSE AND THE DSM DIRECTIVE

The DSM directive of the European Union prescribes for the Member States to introduce a contract adjustment mechanism. In the legal systems of most Member States, it will mean far-reaching changes as they have limited regulations for authors' contracts if at all. The directive mentions a reason completely different from the regulatory considerations mentioned earlier, which renders the introduction of the bestseller clause (and the harmonization of the Union) indispensable:
Recital 79 DSM reads:

> *'Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers, or by their representatives on their behalf, related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States should be able to either establish a new body or mechanism, or rely on an existing one that fulfils the conditions established by this Directive, irrespective of whether those bodies or mechanisms are industry-led or public, including when part of the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure are to be allocated. Such alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.'*

So the directive does not consider the amendments of contracts by the court as the ideal solution but recommends an intermediate solution for the Member States, which is between the private agreements of the parties and the amendment of the agreement made by a court.

By implementing the directive, the original text of Article 48 of the Copyright Act will not change. But two complementary rules have been created: according to the first, the bestseller clause should not be applied for remunerations set based upon the tariffs of collective management organizations [Art. 48(2) HCA]. However, as it was mentioned, it is not surprising as the regulation of copyright collective management organizations is differentiated enough for any situation requiring the application of the bestseller clause. Another novelty is the provision for the alternative resolution of disputes. This was implemented by the Hungarian legislature in the Copyright Act, appointing a dispute settlement body working as a part of the Council of Copyright Experts, which works with the Hungarian Intellectual Property Office. The procedure of the dispute settlement body may have multiple advantages over judiciary procedures: its members must be appointed from amongst the members of the Council of Copyright Experts, so the parties can rely on the opinions of experts in certain fields of copyright (Art. 102 HCA).

6. CONCLUSION

In conclusion, today only a temporary statement can be made: the new regulation seems to break down the means of civil law by which the balance of the synallagma tipped after the agreement was signed is restored by incorporating the possibility of alternative dispute resolution in the system. The bestseller clause put a limitation on the tool that could be used in case of the invalidity of a contract to avoid unsettled legal relationships for already started uses.

From the aspect of codification, it seems that the regulation in the copyright act considers law courts as the main rule and the possibility of alternative resolutions is considered to be a complementary solution. Nevertheless, knowing the practice (or the lack of it), it can be expected that more serious situations that make direct solutions between the parties more difficult will push the parties towards seeking alternative resolutions. If the parties can trust the settlement of their dispute to a third party, this third party may take them to the law court later.

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RESTITUTION CLAIMS FOR NULL AND VOID CONTRACTS

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Abstract: In Croatian law, the nullity of contracts is prescribed for the gravest and most serious breaches of the fundamental principles of social order originating from the Constitution, the mandatory laws, and the morals of the society, as well as for the most serious breaches by the parties to a contract. Null and void contracts do not produce the legal effects they produce if valid. In the cases of nullity, each contractual party is obligated to effect restitution to the other party for anything received under the void contract. The enforcement of restitution claims after null and void contracts became a topical question for legal practitioners, academics, as well as wider public after a final decision had been issued by the Croatian courts regarding a consumer collective action, declaring the contract terms containing CHF foreign currency clauses and variable interest rates in consumer credit contracts as unfair. A question that was raised was how collective actions affect the statute of limitations applied to individual restitution claims for the amounts overpaid under such unfair contract terms. On the other hand, it was a matter of dispute how the limitation period was calculated and when it started to run for individual restitution claims. The courts altered the existing opinions concerning the calculation of the limitation periods for the restitution claims after null and void contracts. This paper presents the most recent opinions by the highest Croatian courts on the pursuance of restitution claims after null and void contracts. The paper also analyses their effects on the protection of the contractual parties, as well as on legal security in general.

Keywords: *null and void contracts, restitution claims, statute of limitations, unfair contract terms*

1. INTRODUCTION

In Croatian law, the nullity of contracts is prescribed for the gravest and most serious breaches of the fundamental principles of social order originating from the Constitution, the mandatory laws, and the morals of the society, as well as for the most serious breaches by contractual parties. The concept of nullity protects the most important public interests and the interests of the parties. Null and void contracts do not produce any legal effects they normally have if valid. The right to invoke the nullity of a contract does not terminate. The courts monitor the nullity of a contract *ex officio* and it may be claimed not only by the parties to a contract, but also by any other interested party, or by the state attorney. Once the nullity of a contract has been

declared, each party is obligated to give back to the other party anything received under the null and void contract. In Croatian contract law, the consequences of nullity have been regulated for a long time. Restitution claims had already been stipulated in the former Obligations Act of 1978,[1] and the same regulatory concept was taken over in the Obligations Act which became effective on January 1, 2006 (hereinafter: OA).[2] These are traditional contract law rules laying down that in the cases of nullity, each party is obligated to recover, in favour of the other party, anything received under a null and void contract. For several years, the application of these rules has not been particularly problematised or addressed neither in case law nor in literature.

The effective enforcement of restitution claims after null and void contracts became a topical question for legal practitioners, academics, as well as wider public after a final decision had been rendered by the Croatian courts, regarding a consumer collective action, having declared that the contract terms, containing CHF foreign currency clauses and variable interest rates, in consumer credit contracts, had been unfair.[3] The fact that those contract terms were declared unfair and the consumer contract terms were thus considered as null and void, raised some novel questions regarding the pursuance of consumer restitution claims against banks. On the one hand, a question was raised about how collective actions affected the statute of limitations for individual restitution claims for the amounts overpaid under such unfair terms. On the other hand, it remained disputed how the limitation periods were calculated and when they started to run for individual restitution claims, i.e., whether they started running from the conclusion of the contract, from the payment, or from the final judgment declaring the nullity of a particular contract. The main problem arose because, although the right to invoke nullity was not time-barred, restitution claims for the restitution of what had been paid under a null and void contract, had a relatively short limitation period of five years. Therefore, a question was raised in practice, whether it was possible to ensure effective consumer protection from unfair contractual provisions, in accordance with the standards of protection established by the European Court of Justice (hereafter: ECJ). In 2020, the Croatian courts changed their existing opinions regarding the calculation of the limitation periods for restitution claims for null and void contracts. Their opinion changed partly because of the existing public pressure, but it was mostly due to the commitment to interpreting national law in light of the EU law and the ECJ case law dealing with the interpretation of Directive

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1 Official Gazette NN 53/91, 73/91, 111/93, 3/94, 7/96, 91/96, 112/99, 88/01.

2 Official Gazette NN 35/05, 41/08, 125/11, 78/15, 19/18, 126/21.

3 See the judgments of the Commercial Court in Zagreb, P-1401/2012, 4/7/2013; High Commercial Court of the Republic of Croatia, Pž-7129/13, 13/6/2014; Supreme Court of the Republic of Croatia, Revt-249/14-2, 9/4/2015; Constitutional Court of the Republic of Croatia, U-III-2521/2015 et al.; 13/12/2016; Supreme Court of the Republic of Croatia, Revt-575/16-5, 3/10/2017; High Commercial Court of the Republic of Croatia Pž-6632/2017-10, 14/6/2018; Supreme Court of the Republic of Croatia Rev 2221/2018-11, 3/9/2019. All these decisions are available at www.iusinfo.hr (Accessed: 16 January 2022). For more see (Josipović, 2020).

93/13/EEC on unfair terms in consumer contracts (hereinafter: UCTD)[4] regarding effective consumer protection. Specific opinions on certain issues regarding the calculation of the periods of limitation for collective actions, not regulated under the statutory contract law, were accepted. These novel opinions and interpretations of the application of the statute of limitations, when dealing with restitution claims, have had serious effects on the position of the parties to null and void contracts. A significantly larger number of consumers, whose claims had been time-barred in the interim, were thus able to pursue their restitution claims. Furthermore, since this was a general opinion applicable to all null and void contracts (and not only to consumer credit contracts), the concept of calculating the limitation periods of restitution claims for all null and void contracts was changed irrespective of the grounds for the nullity, and irrespective of the identity of the contractual parties and the type of their respective contracts. The new interpretation brought about a resurgence of old restitution claims in many other cases following null and void contracts.

This paper considers and describes the new opinions and case law of the highest Croatian courts on the pursuance of restitution claims for null and void contracts. It brings an analysis of their effects on the protection of contractual parties, as well as on legal security in general. In addition, the paper considers whether judicial activism is sufficient for optimum legal security and the protection of legitimate interests of the parties to null and void contracts, or whether a legislative intervention is sometimes necessary to adjust the regulation of contracts to current socioeconomic conditions in the market.

2. THE NULLITY OF CONTRACTS AND ITS EFFECTS

2.1. General and particular grounds for the nullity of contracts

In several provisions, the OA lays down both general and particular grounds for the nullity of contracts. General grounds are provided for in Art. 322 OA. Null and void contracts are contrary to the Constitution, the mandatory laws, and the morals of the society (Art. 322 OA). They do not produce any legal effects normally produced if they are valid. The effects of the nullity of contracts set in already at the moment they are concluded (*ex tunc* effects of nullity).

A contract is null and void if it is contrary to the principles enshrined in the Constitution or in some of its provisions, or if it is contrary to the mandatory provisions of the OA, or some other Act (i.e. the Consumer Protection Act, Agricultural Land Act, *inter alia*), or if it is contrary to moral social norms.[5, 6] The Obligations Act, based on

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21/4/1993, pp. 29–34.

[5] Contracts contrary to the Constitution, the mandatory laws or the morals of the society are null and void if the objective of the violated right does not indicate any other consequence, or if the law does not prescribe otherwise.

[6] The nullity of a particular provision of a contract does not cause nullity of the entire contract if the contract may exist without the null provision (Art. 324 OA).

these general grounds for nullity, lays down numerous concrete grounds for the nullity of contracts. For instance, the OA specifies that a usurious/usury contract is null and void because it is contrary to the morals of society [Art. 329(1) OA].[7] There are separate provisions of the OA laying down various other grounds for the nullity of contracts, such as impossible, inadmissible, not determined, or not determinable performances [Art. 270(2) OA], contractual/legal incapacity (Art. 276 OA), the use of force against a party when entering into a contract [Art. 279(3) OA], misunderstanding (Art. 282 OA), simulated contracts (Art. 285 OA), contracts not made in the prescribed form [Art. 290(1) OA].[8] It is also possible to adopt separate laws on particular types of contracts to provide for the grounds of their nullity (e.g. because of the violation of the legal right to pre-emption). Because of these being the most serious breaches of the fundamental principles of social order ensuing from the Constitution, the mandatory laws, and the morals of the society, null and void contracts may not become valid even if the grounds for their nullity subsequently cease to exist (Art. 326 OA). There are only some exceptional cases, prescribed by law, when null and void contracts may subsequently become valid.[9]

2.2. Unlimited period for invoking nullity

The period for invoking nullity is unlimited (Art. 328 OA). The right to invoke nullity does not terminate regardless of the time that has elapsed from the conclusion of a null and void contract and regardless of how much time has passed from the total or partial fulfilment of the obligations under a void contract. This is a logical consequence of the rule that null and void contracts, after a certain period of time has passed, do not convalidate, i.e. they do not become valid.

The nullity of a contract may be invoked by the parties to the contract, by any other interested third party, or by the state attorney (Art. 327 OA). In addition, in court proceedings, the courts have an *ex officio* obligation to monitor the nullity of a contract [Art. 327(1) OA] regardless of whether or not the parties have invoked the nullity of the contract.

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[7] Usurius contracts are contracts where a person, exploiting the state of need, or a difficult financial situation of another person, its lack of experience, levity or dependence, agrees on a benefit for itself, or for a third party that is manifestly disproportionate to whatever it has given to, or performed for, or undertaken to give to, or performed for the other party.

[8] For more on the grounds of the nullity of contracts see Gorenc et al., 2014, pp. 413–416, 421–423,426–429, 434–435,439–441, 448–449, 513–519, 528–530; Klarić et al., 2014, pp. 137–150; Gavella, 2019, pp. 293–334; Nikšić, 2014, pp. 142–147.

[9] A banned contract is considered to be valid if the ban is of minor significance and the contract itself has been fully executed [Art. 326(2) OA].
A usurious contract will be valid if the court has accepted the aggrieved party's request to decrease its obligation to a just amount. Such a request must be filed within 5 years from the conclusion of the contract [Art. 329(3, 4) OA].
A null and void contract, because of the lack of the prescribed form, will be considered valid if the parties to the contract have fulfilled their obligations fully or partly, unless it ensues differently from the objective of the prescribed form (Art. 295 OA).

However, the effects of the nullity of a contract set in by the law itself *(ex lege)*, regardless of whether an authorised person has requested the establishment of the nullity of a contract. A judicial decision on nullity is a declaratory judgment consisting only of its declaration. Likewise, the effects of nullity are set in regardless of whether the court has established it by a declaratory judgment, because the consequences of nullity set in *ipso iure* (Gorenc et al., 2014, p. 527). Therefore, the OA does not expressly condition the realisation of the protection of contractual parties to null and void contracts (e.g. the realisation of restitution claims) by the existence of a previous court declaration of nullity. In the largest number of cases, the courts decide on the nullity as on a prejudical question on which their decision on the well-foundedness of restitution claims depends due to the nullity of a contract. However, the most recent case law on the calculation of the periods of limitation for restitution claims has opened some new questions on the connectedness between a declaratory establishment of nullity in court proceedings and restitution claims.[10]

3. THE CONSEQUENCES OF NULLITY

3.1. Restitution claims

The main consequence of nullity is *restitution in integrum* [Art. 323(1) OA]. Both parties to the contract have the obligation to effect restitution in favour of the other party of everything received under a null and void contract. If restitution is not possible, or the nature of what has been performed prevents restitution, the parties are bound to pay monetary compensation in accordance with the prices at the time the court decision was rendered, unless otherwise established by law. In addition, the contractual party responsible for the conclusion of a null and void contract must pay for the damages suffered by the other, *bona fide* contractual party because of the nullity of the contract (Art. 323/2 OA). Such regulation of the consequences of nullity stems from the fundamental rule according to which, already at the moment of their conclusion, null and void contracts do not produce any legal effects. Therefore, the same rules on the consequences of nullity, and the obligations of the parties to the contract because of its nullity apply to all cases of nullity, regardless of the grounds for which a contract is null and void.

Restitution claims for null and void contracts are based on the rules on unjust enrichment (Art. 1111 OA).[11] Regarding *ex tunc* effects of nullity (from the moment of the conclusion of a null and void contract), it is held that whatever has been paid

[10] For more see 4.3.

[11] See the judgments of the County Court in Velika Gorica Gž-448/2021, 11/5/2021; the County Court in Varaždin, Gž-711/2019, 27/5/2021; the County Court in Varaždin, Gž-276/2021, 13/7/2021; the County Court in Varaždin, Gž-3168/15, 13/6/2016; the County Court in Varaždin Gž-1934/17, 7/6/2018; the Supreme Court of the Republic of Croatia, Rev-247/11, 22/10/2014.
On the other hand, according to older case law, restitution claims was considered as a claim for compensation for damage [Art. 230(1) OA]. See the judgment of the County Court in Varaždin Gž-620/2017, 23/11/2017. (Eraković, 2020, p. 37)

or transferred to the other contractual party under a null and void contract, is considered as a transfer of assets not based on a legal transaction, a court decision, or a decision by another competent, or legal authority. Hence, anything received under a null and void contract, including any fruits, or default interests in case of monetary claims, is subject to restitution. Default interest is repaid from the day of the submission of a restitution claim, or from the date of the receipt, if the contractual party has acted in bad faith (Art. 1115 OA).

3.2. Limitation periods for restitution claims

Despite an unlimited period for invoking the nullity of a contract, the statute of limitations applies to restitution claims. There is a general period of prescription of five years (Art. 225 OA). The limitation starts running on the first day following the day on which the creditor was entitled to seek the performance of an obligation [Art. 215(1) OA]. In the context of restitution claims for null and void contracts, it means that the limitation period starts running from the day when a contractual party, based on a null and void contract, paid to the other party a certain amount of money (i.e. a specific loan installment which has been declared void). It is a limitation period calculated objectively, by taking into account the moment when an unfounded transfer of assets took place. The prescription may be interrupted by litigation, or any other creditor's action against the debtor before a court, or another competent body, to ascertain, secure or effect a claim (Art. 241 OA).[12] Following the interruption, the limitation period starts running from scratch, but the time elapsed before the interruption is not included in the prescription stipulated by law [Art. 245(1) OA].[13]

According to previous case law, the limitation period for restitution claims, after null and void contracts, was calculated from the moment when the consequences of the nullity were first manifested.[14] The calculation of the limitation period used to start running on the first day following the day on which the payment under a null and void contract was made. For example, the Constitutional Court of the Republic of Croatia, in its decision of 23 May 2017 on a constitutional complaint seeking

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[12] Limitation periods are also interrupted when the debtor admits the debt (Art. 240 OA).

[13] Under Croatian law, by the application of the statute of limitations, the right to request the fulfilment of the obligation ceases to exist [Art. 214(1) OA]. Upon the expiry of the limitation period, the obligation does not cease to exist but it becomes a natural obligation. Since it is a period regulated by substantive law because by the application of the statute of limitations, the right to a claim the limitation period ceases to exist, the courts do not take into account the limitation *ex officio*. They decide whether the claim is time-barred only upon the claim of the debtor [Art. 214(3) OA].

[14] See the judgments of the Supreme Court of the Republic of Croatia Revx-183/11-2 of 16 October 2013, Rev-374/03-2 of 28 May 2003, Revx-808/11-2 of 12 September 2012; Rev-x 511/12 of 28 April 2015. Available at http://www.iusinfo.hr (Accessed: 16 January 2022).

restitution because of a null and void contract concluded in foreign currency, held as follows:[15]

"Foreign currency loan contracts are null and void and, as the result, the defendant is obliged to return to the applicant all the previously received money. The obligation of returning the money received, based on such a contract, is due at the moment the contract was entered into because it was when the nullity set in. Since both the receipt and the return of the money took place on the same date when the contract was entered into, the limitation period, according to the Supreme Court of the Republic of Croatia, started running on the first day following the receipt and the recovery of the money. In general, a five-year time limit applies."[16]

The consequence of such an interpretation was that restitution claims for null and void contracts, upon the expiry of five years following the payment made under a null and void contract, were considered time-barred. The courts would thus admit the claim for the application of the statute of limitations and reject the restitution claims as time-barred. Even though the court declared the nullity of the contract, and more than five years had elapsed from the payment, the aggrieved party was no longer able to realise, through a court, its restitution claim for an unfounded payment. If a restitution claim was founded on property law (e.g. restitution of ownership of an immovable under a null and void contract), property law rules applied according to which actions for the protection of property rights (e.g. *rei vindicatio*) were not subject to the statute of limitations.[17] All these aspects could lead to a significant imbalance in the legal position of the parties to the contract. (Eraković, 2020, p. 38) Their protection, in the case of null and void contracts, depended on the nature of their restitution claims (governed by the law of obligations or by the property law), or on how much time, at the time of filing an action for restitution, had passed from the payment under a null and void contract, regardless of whether, or when, the nullity of the contract was declared.[18] When a contractual party based its restitution

[15] It is possible to contract the payment in foreign currency between residents and between residents and non-residents only in the cases prescribed by law or a decision issued by the National Bank of Croatia (Art. 15 of the Foreign Exchange Act, Official Gazette NN 96/03,140/05, 132/06, 150/08, 92/09, 153/09, 133/09, 145/10, 76/13, 52/21). This Act limits the conclusion of credit contracts in foreign currency only to credits between the banks and residents, while residents among themselves may not enter into credit contracts in foreign currencies (Art. 17). In all other cases, contracts where foreign currency payments are specified, are considered null and void by reason of being contrary to the mandatory rules laid down in Foreign Exchange Act.

[16] See the Decision of the Constitutional Court of the Republic of Croatia U-III-5859/2014, 23/5/20 Available at www.iusinfo.hr (Accessed: 1 December 2021).

[17] See Art. 161/2 Property Act, Official Gazette NN 91/96, 68/98, 137/98, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17.

[18] For example, if a null and void immovable sales contract was concluded in 1990, the transfer of ownership and the payment was made in 1991, and the contract was declared null and void only in 2021, the position of the contractual parties regarding the restitution claims is significantly different. The limitation period on the buyer's claim for the

claim on unjust enrichment, the fact that the OA prescribed an unlimited period of claiming nullity did not have any significant impact on the possibilities of success of the party's restitution claim. At all events, no matter whether and when the nullity of a contract was declared, the aggrieved party was entitled to restitution of only the payments made five years prior to the submission of its restitution claim. The restitution claims for all previous payments were considered time-barred and could no longer be enforced. Hence, the aggrieved contractual party, despite the fact that the contract had been declared null and void, could not always succeed in obtaining complete restitution of all the payments made on the basis of a null and void contract. Interestingly enough, this problem was not of any particular concern in the previous case law.[19] Only in the past few years has the question of efficient protection of restitution claims become more topical and has brought about a radical change in the interpretation of the statute of limitations involving restitution claims after null and void contracts.

4. RESTITUTION CLAIMS AND THE PRINCIPLE OF EFFECTIVENESS

4.1. Practical problems in connection with restitution claims after null and void contracts

Because of a relatively short limitation period of five years, the problems connected with efficient enforcement of individual restitution claims after null and void contracts have become very apparent in practice. These problems become apparent in practice after the Croatian courts held that the contract terms on the variable interest rate, and foreign currency clause in CHF, had been unfair in the proceedings for the protection of the collective interests of consumers in consumer credit contracts denominated in CHF. The proceedings for collective protection were initiated in 2012 and they dealt with the protection of consumers against unfair contract terms in consumer credit contracts concluded from 2003 to 2008. After very long-lasting proceedings, the final decision was rendered that the contract terms on the variable interest rate and foreign currency clause were unfair, and null and void, and the sued credit institutions were banned from their further application. The decision regarding the clause on variable interest rate became final in 2014, and the one on the foreign currency clause in CHF, only in 2018.[20] After the finality of the

restitution of the payment took effect 5 years from the payment (1996). Although the nullity of the contract was established, the buyer was no longer entitled to a restitition claim for the payment. On the other hand, because the claim for the restitution of ownership is not time-barred, the seller is still allowed to claim the restitution of ownership of the immovable.

[19] There have been arguments in literature that this opinion may, in practice, cause some problems, particularly when it comes to null and void contracts entered into for periods longer than five years. See Jug, 2016, pp 159–198.

[20] The proceedings for collective consumer protection in consumer credit contracts regarding unfairness of contract terms on variable interest rates were brought to an end on 13 June 2014 by a final decision of the High Commercial Court of the Republic Croatia

decisions rendered in the proceedings for the collective protection of consumers, efficient fulfilment of restitution claims for the restitution of prepaid amounts on the basis of unfair contract terms in consumer credit contracts became actualised. A large number of consumers then brought their individual actions for restitution payments made on the basis of unfair contract provisions.

The calculation of the periods of limitation to succeed in individual consumer restitution claims for the recovery of prepaid amounts on the basis of unfair contract terms, in accordance with the then established case law, would have resulted in a situation where a large number of individual restitution claims would have been considered time-barred. The consumers of about 90,000 consumer credits (mostly fully or partially repaid five years before the initiation of the injunction procedure, or prior to the finality of judgments) would thus have been brought in an extremely unfavourable position. In addition, at the time when the judgments in injunction procedures became final, 30,000 consumers had not even filed their individual restitution claims for the overpaid amounts on the basis of unfair contract terms. (Metelko, 2021) Most consumers waited for the courts to decide on their collective redress. In the meantime, a large number of consumers, on the basis of specific provisions of the Consumer Credit Act[21] agreed with credit institutions to convert their credits denominated in CHF to credits denominated in EUR (for more see Josipović, 2019, pp. 165–168).

It has become apparent that the concept, according to which a five-year limitation period for restitution claims is calculated from each payment made under null and void contract terms, cannot ensure efficient and full protection of consumers from contractual provisions. If that were the case, the protection of consumers would not correspond to the standards defined in numerous ECJ judgments on UCTD.[22] The ECJ held that unfair contract terms must be regarded as if they have never existed, without having any effect on the consumers. Therefore, it was necessary to ensure that

(Pž-7129/13). The proceedings for collective consumer protection by consumer credit contracts regarding unfairness of contract terms in the foreign currency clause in CHF were brought to an end by a final judgment of the High Commercial Court of the Republic of Croatia of 14 August 2018 (Pž-6632/17).

21 Official Gazette NN 75/09, 112/12, 143/13, 147/13, 9/15, 78/15, 102/15, 52/16.

22 For example, if a consumer credit contract, with unfair contract terms, was concluded in 2003 and the credit was fully paid in 2008, at the time of the finality of the injuction against the credit institution to refrain from using unfair contract term on variable interest rate (2014), individual restitution claim for the return of overpaid amouts on the basis of unfair contract term was already time-barred.

In addition, if a consumer credit contract with unfair contract terms was concluded in 2003 for a period of 20 years, and the consumer had been paying the instalments, at the time of the finality of the injunction against the credit institution to refrain from using unfair contract terms (2014), a part of the restitution claim for the return of overpaid amounts on the basis of unfair contract terms was already time-barred (the amounts paid from 2003 to 2009). At the time of the finality of the injunction, the consumer's restitution claim was not time-barred only for the overpaid amounts paid in the last five years.

the consumers were given back all the overpaid amounts under unfair contract terms. Only then could the consumer be brought into the legal and factual situation he would have been in, had the unfair contract terms not existed.[23] In other words, paying back all the overpaid amounts on the basis of unfair contract terms is the main prerequisite for the effective re-establishment of the balance between consumers and traders and, in general, effective protection of consumers against unfair contract terms.

To find an adequate solution for efficient and full protection of consumers against unfair contract terms, the Croatian courts had to answer two crucial questions. The first was the impact of the initiation of civil proceedings for collective redress on the limitation period for individual restitution claims for prepaid amounts under unfair contract terms. It was an issue not expressly provided for in the OA and its provisions on the limitation period and its interruption, and it had not existed in the previous case law. The second question was, from which point in time the limitation period for a restitution claim after a null and void contract must be calculated, or should the then valid case law be revised (according to which the limitation period started running on the day following the payment under a null and void contract). By changing their opinions on these two important questions regarding individual restitution claims, the Croatian courts have taken two important steps towards more efficient protection when dealing with restitution claims after null and void contracts, as well as any other contracts.

4.2. The first step towards more efficient protection of restitution claims

The first step towards better protection of restitution claims for null and void contracts was made in 2018 when the Supreme Court of the Republic of Croatia stated the following (hereafter: Opinion/2018):

"The initiation of civil proceedings for the protection of collective interests of consumers results in interruption of the limitation period according to Art. 241 OA. The limitation of individual restitution claims starts to run as of the moment the judgment rendered in collective proceedings becomes final."[24] The Supreme Court invoked Art. 241 OA according to which prescription is interrupted by a lawsuit or any other action brought by the creditor against the debtor before a court, or other competent body, to ascertain, secure, or effect a claim. The Supreme Court also held that according to Art. 241 OA, *"any other action before a court or other competent body"*, by which prescription is interrupted, may be considered as the initiation of the proceedings for collective protection. In other words, the Supreme Court's

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[23] See judgments C-154/15, C-307/15 and C-308/15, Naranjo, ECLI:EU:C:2016:980, points 61, 62.
See Guidance on the Interpretation and Application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts, European Commission, Brussels, 22/7/2019, C(2019) 5325 final, pp. 49, 50. Available at https://ec.europa.eu/info/sites/default/files/uctd_guidance_2019_en_0.pdf (Accessed: 16 January 2022).

[24] See the decision of the Supreme Court of the Republic of Croatia Rev-2245/17, 20/03/2018. Available at www.iusinfo.hr (Accessed: 31 October 2021).

interpretation has been that the period of limitation for individual restitution claim payments, made on the basis of unfair terms in consumer credit contracts, is not only interrupted by filing individual actions for repayment, but also by initiating the proceedings for the protection of collective interests of consumers against unfair contract terms. The application of the statute of limitations for restitution claims is interrupted by instituting the proceedings for collective protection, although a direct objective of these proceedings is not the protection of individual interests of consumers, but the protection of their collective interests and the prohibition against using unfair contract terms in consumer credit contracts. The Supreme Court held that the proceedings of the protection of collective interests of consumers are also connected with the protection of their individual interests and that their initiation must contribute to more efficient protection of restitution claims.

The Supreme Court argumented their Opinion by several very important reasons. In practice, there have been some major difficulties in the realisation of restitution claims after null and void consumer credit contracts. These claims become time-barred in a relatively short period of five years. In addition, there are no separate law provisions in the Croatian legal order specifically providing for the interruption of the limitation period for restitution claims when the proceedings for the protection of the collective interests of consumers have been initiated. The Supreme Court also held that consumers must be guaranteed efficient legal protection after the proceedings for collective protection have been completed. If this is not the case, collective protection proceedings in the described circumstances do not make sense.[25] This position of the Supreme Court was later confirmed by the Constitutional Court of the Republic of Croatia, by taking into account the purpose of the concept of limitation period on the one hand, and the purpose of the system of collective protection of consumers on the other. The Constitutional Court held that the Supreme Court had addressed the disputed issue of interruption of the limitation period by balancing the conflicting consumers' interests as creditors, as well as those of the applicant as the debtor. Therefore, according to the Constitutional Court, there was nothing obviously unreasonable, or arbitrary, in the legal interpretation of the Supreme Court in the disputed judgment.[26]

By its interpretation of Article 241 OA on the interruption of the limitation period, the Supreme Court closed the loophole in the Croatian legal order that came into existence in the process of harmonisation of the Croatian law with the EU law dealing with the protection of collective interests of consumers provided for in Directive 2009/22/EC on injunctions for the protection of consumers' interests.[27, 28] This Directive did not expressly lay down the correlation between the proceedings

[25] See the Decision of the Supreme Court of the Republic of Croatia Rev-2245/17, 20/03/2018.

[26] Decision of the Constitutional Court of the Republic of Croatia, U-III-2922/2018, 20/2/2020. Available at www.iusinfo.hr (Accessed: 16. January 2022).

[27] OJ L 110, 1/5/2009, pp. 30–36.

[28] See Arts. 106–123 of the Consumer Protection Act OG NN 110/15, 14/19.

for collective protection and the proceedings for the protection of consumers' individual claims, and as the result, the issue was not expressly regulated in Croatian law either. To provide for more efficient protection of consumers from unfair contractual terms in such circumstances, the Supreme Court interpreted the meaning of the expression *"any other action before the court or other competent body"* as the reason for the interruption of the limitation period for individual restitution claims. Initiation of collective proceedings was interpreted as *"any other action before the court"* as a reason for the interruption of the limitation period. Such an interpretation given by the Supreme Court made it possible to align the protection of consumers' individual restitution claims with EU standards. It was also in accordance with the then expressed tendencies in EU law that the protection of individual claims, for the violation of EU law, had to be connected with other judicial and administrative proceedings for the establishment of infringement of EU law, i.e. that such proceedings for collective protection should, in the end, also ensure efficient and full protection of individual claims.[29] Finally, the Supreme Court's Opinion/2018 was subsequently also confirmed by the new Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.[30] By Article 16/2 of the new Directive (EU) 2020/1828, Member States are expressly bound to ensure that a pending representative action for a redress measure for the protection of the collective interests of consumers has the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that representative action. After all Member States will have transposed Article 16/2 of Directive (EU) 2020/1828[31], the same standards of consumer protection regarding individual claims will be established following the proceedings for collective consumers' interests.

In practice, the application of the Supreme Court's Opinion/2018 has significantly enhanced the protection of consumers when it comes to individual restitution

[29] At the time when the Supreme Court interpreted the proceedings of collective protection and the limitation periods on individual restitution claims, the rules already existed in EU law which, for some other cases, provided that by initiating court or administrative proceedings for the violation of EU rights, interruptions or suspensions of the limitation periods occur for individual claims because of the violation of EU law. Thus, for instance, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5/12/2014, pp. 1–19) expressly lay down the obligation of Member States "to ensure that a limitation period is suspended or, depending on the national law, interrupted, if a competition authority takes action for the purpose of investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension ends at the earliest one year after the infringement decision has become final, or after the proceedings are otherwise terminated." [Art. 10(4) Directive 2014/104/EU]

[30] OJ L 409, 4/12/2020, pp. 1–27.

[31] Member States are obliged to transpose Directive (EU) 2020/1828 by 25 December 2022 and apply the transposition measures from 25 June 2023 [Art. 24(1)].

claims for prepaid payments on the basis of unfair contractual terms in consumer credit contracts denominated in CHF. The new limitation period for individual restitution claims regarding prepaid payments based on unfair contract terms on variable interest rates started running anew from 14 June 2014. Regarding individual restitution claims for prepaid payments on the basis of unfair foreign currency contract terms in CHF, the new limitation period started running anew from 15 June 2018. When adjudicating individual restitution claims, the courts started rejecting the objection that the claims are time-barred that were not in accordance with the Opinion/2018.[32] The application of the Opinion/2018 broadened the protection of consumers to include all individual restitution claims that were not time-barred at the time when the proceedings for collective protection were initiated. The protection was also extended to include the restitution claims not time-barred at the time of the initiation of the proceedings for collective protection but were time-barred in the course of the proceedings. To apply Opinion/2018, it was important that at the time of initiation of collective proceedings, an individual restitution claim existed, that was not time-barred. It was also important that an action for the restitution of prepaid payments was brought within a limitation period of five years following the finality of the decision on collective redress because that was the time when the new limitation period for individual restitution claims started running anew.

However, an unresolved problem continued to exist in practice, connected with the efficient protection of consumers, and, the full restitution of prepaid payments on the basis of unfair contract terms in consumer credit contracts denominated in CHF. The Supreme Court's Opinion/2018 on the interruption of the limitation period by initiating the proceedings for collective protection made efficient and full protection possible only for individual restitutional claims which, at the time of the initiation of the proceedings for collective protection, were not time-barred. Because of the fact that collective proceedings were conducted for the reason of unfair contract terms in consumer credit contracts, entered into in the period from 2003 to 2008, a large number of individual consumer restitution claims were time-barred before the proceedings for collective protection had even begun. For such time-barred restitution claims, the problem of efficient protection could not be resolved by applying the interpretation of interruption of the limitation period by initiating the proceedings for the protection of collective interests.

4.3. The second step towards efficient protection of restitution claims

The second step towards efficient protection of restitution claims for null and void contracts was taken in 2020, when the Civil Division of the Supreme Court of the Republic of Croatia gave its legal interpretation (hereafter: Legal Interpretation/2020) stating the following: *"In the case of restitution claims according to which each party is obliged to effect restitution to the other party of everything it has*

[32] See, for example, the decision by the County Court in Varaždin, Gž-1934/2017, 7/6/2018. Available at www.iusinfo.hr (Accessed: 11 January 2022).

received on the basis of a particular contract, or, in the case of a claim referred to in Art. 323, para. 1[33] *of the OA/05 (Art. 104, para. 1 of the OA/91), as the consequence of the declaration of nullity of a contract, the limitation period starts to run from the day of the finality of the court decision declaring nullity, or when nullity is declared in some other way."*[34]

Different from Opinion/2018 on the periods of limitation for restitution claims,[35] which only deals with consumer contracts, the Legal Interpretation/2020 covers all null and void contracts, regardless of who are the parties to the contract.

The Legal Interpretation/2020 has brought a radical change compared to older case law according to which the limitation period for restitution claims was calculated from the day when the payment/transfer was effected on the basis of a null and void contract, regardless of whether and when the court declared its nullity. According to the Legal Interpretation/2020, to calculate the limitation period for a restitution claim, it is no longer decisive when the payment was made under a null and void contract. It is also not important when a null and void contract was concluded. To calculate the limitation period for a restitution claim, it is only crucial when the court declared the nullity of the contract, or when its nullity was established in some other way.

The effects of such a radical change in the interpretation of the limitation period for restitution claims for null and void contracts have had far-reaching consequences not only for efficient consumer protection against unfair contract terms in consumer credit contracts, but also for the protection of the parties to any other null and void contracts. The Legal Interpretation/2020 made it possible for the consumers to request compensation from credit institutions for all prepaid payments based on null contract terms in consumer credit contracts, including all the payments already time-barred according to previous case law. In line with the new interpretation, all consumer restitution claims, regardless of when the payments were made, become effective on the date on which the nullity was declared or from the date when the judgments in the proceedings for collective protection were rendered. As a result, for all consumers, the new limitation period of five years started running from the finality of judgments.

There is no doubt that by the Legal Interpretation/2020, the conditions were established according to which, in conformity with the case law of the ECJ, all

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[33] Art. 323, para.1 OA lays down the obligation of restitution of what has been paid or transferred to the other party under a null and void contract. For more see 3.2.

[34] Legal interpretation of the Civil Division of the Supreme Court of the Republic of Croatia, Su-IV-47/2020-2, 30/1/2020. Available at VSRH_GO_2020_Su-IV-47-2020-2_2020-1-30_sjed01.pdf (Accessed: 16 January 2022).
Legal understanding expressed by the Supreme Court of the Republic of Croatia serves to the establishment and harmonisation of case law as an obligation for all judges of the Civil Division of the Supreme Court. By the power of authority of the highest court in the Republic of Croatia, this understanding is binding on all other civil law judges. See the Decision of the County Court in Varaždin, Gž-194/20, 16/9/2020, www.iusinfo.he (Accessed: 11 January 2022).

[35] For more see 4.2.

consumers who have entered into consumer credit contracts with unfair contract terms, must be guaranteed full restitution of all prepaid amounts regardless of when the payments have been made.[36] The possibility that individual restitutional claims become time-barred before the court has declared the nullity of unfair contract terms has thus been removed. This approach made a full restoration to the legal and factual situation possible, as if unfair terms had not even existed. In that sense, the Legal Interpretation/2020 can be considered as being aligned with the ECJ judgments where the ECJ interpreted that *"(...) a limitation period may be compatible with the principle of effectiveness only if the consumer has had the opportunity to become aware of his or her rights before that period begins to run or expires"*.[37, 38] It seems that the new way of calculating the limitation period for restitution claims is precisely based on the idea that only by a declaration of the nullity of a contract, the aggrieved party to the contract may find out for sure that its payments, on the basis of a null and void contract, have been unjustified and that the party is entitled to a restitution claim against the other party. In addition, by the adoption of the Legal Interpretation/2020, the need for the application of the Opinion/2018 actually ceased to

[36] Interest claims in connection with full restitution may also be a problem. If it is considered that the limitation period starts running only from the declaration of nullity, default interest for prepaid payments may become effective on the date on which nullity is declared regardless of when payments are made. This would mean that consumers would not be entitled to default interest on prepaid payments from the time when the payments are made, until the declaration of nullity. In some cases, this will be a considerable loss of profit for consumers. The judgments rendered for collective redress became final in 2014 or 2018, relate to consumer credit contracts entered into from 2003 to 2008. According to the new interpretation, regardless of the fact that the prepaid payment was made in 2003, default interest would start running only at the time of the final judgment.

[37] Judgment C-776/19, BNP Paribas Personal Finance, ECLI:EU:C:2021:470, point 46. It arises from the case law of the ECJ that Article 6(1) and Article 7(1) of Directive 93/13/EEZ *"do not preclude national legislations which, while providing that an action for a declaration of nullity of an unfair term in a contract concluded between a seller or supplier, and a consumer, is not subject to a time limit, subjects the action to enforce the restitutory effects of that finding to a limitation period, provided that the principles of equivalence and effectiveness are observed"*. See judgment C-776/19, BNP Paribas Personal Finance, ECLI:EU:C:2021:470, point 39. See judgment C-485/19, Profi Credit Slovakia, ECLI:EU:C:2021:313, points 56, 57, 58; judgments C-224/19 and C-259/19, Caixabank, ECLI:EU:C:2020:578, point 92; judgments C-698/18 and C-699/18, Raiffeisen Bank, ECLI:EU:C:2020:537, point 58.

[38] It arises from the case law of the ECJ that the calculation of the limitation period for restitution claims, which begins to run from the date on which the unjust enrichment occurred, may be contrary to the *principle of effectiveness.* Even more so, when *"the limitation period applies even if the consumer is not in a position to assess for himself or herself that a contractual term is unfair or has not been made aware of the unfairness of the contractual term in question"*. In that context, particularly disputable may be the circumstance that the limitation period expires prior to the termination of the contract. See judgment C-485/19, Profi Credit Slovakia, ECLI:EU:C:2021:313, points 61, 63.

exist.[39] Indeed, according to the new interpretation of 2020, the limitation period for restitution claims for all null and void contracts begins to run from the court's declaration of nullity, or from a declaration of nullity issued in some other way. Hence, the Legal Interpretation/2020 also covers the cases where it is declared, by a judgment regarding collective redress to protect the collective interests of consumers, that the terms in consumer contracts are unfair and that the trader is banned from their further use. Therefore, there is no longer any need for the application of the Opinion/2018 according to which the institution of the proceedings for the protection of collective consumer interests, regarding unfair contract terms, leads to an interruption of the limitation period for restitution claims. Namely, the Legal Interpretation/2020 provides more efficient and complete protection because it includes all restitution claims, regardless of whether they, at the moment of the institution of the proceedings, were time-barred or not. In practice, the Opinion/2018 may also be relevant for the cases where the consumers, on the basis of a decision rendered regarding collective redress, are entitled to some other restitution claims against traders, not based on the nullity of the contract.

Although the main motive for a new interpretation of the limitation period for restitution claims has been the efficient and full protection of consumers against unfair contract terms, the Legal Interpretation/2020 has had a significant impact on the protection of other contractual parties involved in null and void contracts because it applies to all such contracts. It has been a significant step forward to efficient protection of restitution claims of any aggrieved parties to null and void contracts, regardless of who they are (C2B, B2B, C2C), when they entered into contracts, what is the cause of nullity, or when the payments have been made. The same rule now applies to all restitution claims for null and void contracts, whereby the limitation period is calculated from the declaration of nullity. In addition, the same level of protection with regard to restitution claims is established for any contractual parties, in any null and void contracts, regardless of their capacity when concluding them. Since the limitation period is calculated from the declaration of nullity, this interpretation applies retroactively to any restitution claims arising from null and void contracts for which, from the declaration of nullity, the limitation period has not expired, regardless of when the contract is concluded and when the payments are effected. This is why even the restitution claims become effective which, according to the previous case law, were considered as time-barred because the limitation period used to be calculated from the payment/transfer under a null and void contract.

Although this is a very important change in the calculation of limitation periods for restitution claims after null and void contracts and it significantly changes the position of the parties to null and void contracts, the Supreme Court has omitted to explain such a radical shift in its earlier positions.[40] Such a crucial change requires a

[39] For more see 4.2.

[40] The resons for the new interpretation of the calculation of limitation periods for restitution claims after null and void contracts can be found in the decision of the Supreme Court Rev-x 999/2021 of 10/10/2019 which preceded the adoption of the Legal Inter-

detailed explanation and argumentation. Namely, after the Court's position had been declared, numerous practical questions arose about how the limitation periods for restitution claims should be calculated in practice. There have also been many questions connected with legal security, prevention of the abuse of law, protection of the parties' legitimate interest, and retroactivity. The new opinion applies to all null and void contracts for which nullity has not been declared and it is, therefore, necessary to establish a new balance between the parties' confronting interests. To begin with, it is crucial to know how the Supreme Court explains the reasons for which the limitation period (Art. 1111 OA) starts running at the moment of declaration of nullity and no longer at the time of the payment (although unjust enrichment occurred at the moment of payment under a null and void contract). Namely, according to the Legal interpretation/2020, the restitution claim takes place only at the moment of declaration of nullity and no longer at the moment of the payment. It is true, however, that by such an approach, some problems arising in practice are "bridged" because of an unlimited period to exercise the right to invoke nullity on the one hand, and because of a short limitation period for a restitution claim on the other. We thus avoid the possibility that a restitution claim becomes time-barred even before the nullity is declared. However, precisely because of an unlimited period for invoking nullity, there is now a possibility that a party, despite the fact that a lot of time has passed from the conclusion of a null and void contract, and even despite the fact that the contractual party has been aware of the nullity from the very beginning, after a long period of time (e.g. several decades after the conclusion of the null and void contract) seeks the declaration of nullity and subsequently also restitution. Such interpretation opens a possibility for the

pretation/2020. In this decision, the Supreme Court stated that in the context of the limitation period for restitution claims, it must be taken into account that the right to invoke nullity does not cease to exist regardless of the passage of time. Hence, restiution claims are not time-barred prior to the issue of nullity of a legal transaction is solved. Otherwise, the objective of Art. 323 on restitution in integrum would not be met and the obligation of restoration of the previous situation would be negated regardless of the passage of time. Therefore, when dealing with null and void contracts, time needed for the prescription for restitution claims does not start running from the day when the party seeking recovery had given what is the subject of its claim. The application of the statute of limitations starts running only following the finality of the court decision establishing the disputed claim. The limitation period of 10 years applies (Art. 233 OA) because it is a restitution claim established by a final court decision. The Supreme Court emphasised that by such interpretation, the previous dominant legal understanding on the limitation period of restitution claims after null and void contracts changed. The new interpretation results in better equality of the parties in obligation law relations, there is more legal security in terms of the parties' duty to fulfil their obligations and the objective of the provision of Art. 323 of the OA is achieved (neutralisation of the effects of null and void legal transactions by the restoration of the previous status quo, regardless of the passage of time). See the Decision of the Supreme Court of the Republic of Croatia Rev-x 999/2021 of 10/10/2019. Available at: www.iusinfo.hr (Accessed: 16 January 2022).

contractual parties to invoke nullity and restitution on the grounds which may sometimes be considered to be an abuse of law. In every concrete case, the courts must take into account this possible circumstance. Their case law will be faced with an extremely challenging task of defining the criteria for assessing whether, in a concrete case, abuse of law is involved and if so, how to then decide on a particular restitution claim. It would have been very useful had the Supreme Court described the shift from objective to subjective calculation of the limitation period. In earlier case law, the limitation period was calculated objectively, from the time an unfounded payment was effected, regardless of whether the aggrieved contractual party already knew about the nullity of the contract, or when it actually became aware of it. In somewhat older case law, a restitution claim could be time-barred even though the fact that a party to the contract did not know, or could not know anything about the nullity of the contract. At present, although the calculation of the limitation period for restitution claims is linked with the declaration of nullity as an objective fact, it is calculated by taking into account the necessity that the aggrieved party must first be brought into a situation to find out, by a declaratory court decision on nullity, that the contract is null and void. Then, within the limitation period following the declaration, the party must file a restitution claim for all prepaid payments made under the null and void contract. However, this new approach to the calculation of the limitation period opens additional questions connected with the realisation of restitution claims. For example, a question may be raised whether, in the present situation, a declaration of nullity is a precondition for a restitution claim, whether a party to the contract, to succeed with a restitution claim, must have previously initiated court proceedings for a declaration of nullity on which the calculation of the limitation period for restitution claims depends. According to the previous case law, it was sufficient to request restitution, and it was on the court to decide on the nullity as a prejudicial question, without expressly declaring the nullity in the dispositive part of its decision. Regarding the fact that according to the new interpretation given by the Supreme Court, restitution claims become due only after the court has declared the nullity, (Eraković, 2020, p. 36) and the courts may condition their adjudication on the restitution claims by the preliminary judicial declaration of the nullity of the contract.[41] Their interpretation may be that a request for the declaration of nullity is a prerequisite for a condemnatory restitution claim[42] (Baretić et al., 2021). This will also be important for the determination of the length

[41] The courts' interpretation is that a subjective right to restitution is acquired only by declaring the nullity of a contractual provision. On the other hand, the courts' explanation is that restitution claims are based on the rules of the OA on unjust enrichment (Art. 1111). See the judgment of the County Court in Varaždin, Gž-711/2019, 27/5/2021. Available at: www.iusinfo.hr (Accessed: 11 January 2022).

[42] It is possible that the courts will find that a restitution claim, not due if the nullity has not been declared, is premature. It is an open question how the courts will interpret situtations where it is held that nullity has been declared. Will it always be necessary to get a final judgment declaring nullity, or will it be enough to decide on the nullity as on a prejudicial question? (Eraković, 2020, p. 39)

of limitation periods for restitution claims. A question also arises whether Art. 225 OA on a general five-year limitation period applies, or Art. 233 OA on a ten-year limitation period for the claims established by a final court decision. In addition, the calculation of default interest on the payments made under null and void contracts also depends on an answer when a restitution claim becomes due and this calculation would also start from the declaration of nullity. (Eraković, 2020, p. 41)

5. CONCLUSION

Practical problems connected with the realisation of individual consumer restitution claims for null and void contract terms in credit contracts denominated in CHF have resulted in a radical change of case law dealing with the protection of restitution claims. It is obvious that the traditional rules regulating the consequences of nullity and the restitution claims in Croatian contract law that have been the same for almost 45 years, cannot always ensure optimal and just levels of protection of legal order, private interests of contractual parties, and a balance between the parties' confronting interests. It is also not possible to ensure the standards of protection of individual rights in accordance with the EU law. The protection of restitution claims that is based on the rule of unlimited period for invoking nullity (Art. 328 OA), a short general limitation period for restitution claims (Art. 225 OA), and the calculation of the limitation period from the moment of the payment/transfer, i.e. unjustified calculation (Art. 1111 OA), cannot always, in practice, achieve optimal effects. Serious violations of the Constitution, the mandatory laws, or the morals of the society require that the right to invoke nullity be unlimited, that null and void contracts never become valid and that legal and factual situation is established which existed before the conclusion of the contract. The interests of legal security, certainty, and justness in private law relations require that restitution claims are limited in time. Various problems arise in practice, because in the process of application of all the mentioned rules, it is necessary to reconcile various interests and objectives: from the protection of public order, the protection of private and individual interests of contractual parties, to the establishment of legal security and certainty in contractual relations. At the same time, the biggest problem is a relatively short limitation period for restitution claims and the beginning of its calculation. This seems to be one of the main reasons for which, in the past few years, case law has radically changed when it comes to restitution claims.

These new opinions and legal interpretations given by the Supreme Court of the Republic of Croatia have primarily been some kind of "fire-fighting measures", its *ad hoc* problem-solving activities because of the loopholes in the rules on the limitation periods for restitution claims, the lack of coordination of the rules on prescription with the new legal remedies for the protection of contractual parties (collective protection) and the obviously unjust effects of traditional calculation of limitation periods for restitution claims from the moment of payment (because of unjust enrichment). Such judicial activism was mostly motivated by a demand for efficient protection of consumers against unfair contract terms in accordance with

the standards of EU laws. This new concept of the protection of restitution claims after null and void contracts has been extended to include all null and void contracts regardless of the grounds for nullity and the capacity of the parties when concluding such contracts. The results of this approach immediately became noticed in practice. Many consumers were brought into a situation where they were able to fully succeed in their restitution claims based on unfair contract terms. However, it is still unknown whether such judicial activism can finally contribute to legal security and protection of all the values which must be protected by the rules on the nullity of contracts. Indeed, the opinions and legal interpretations by the Supreme Court, despite the fact that at a particular and delicate time, they provided efficient protection of restitution claims, nevertheless revealed some new questions and dilemmas regarding legal security, retroactivity, and imbalance in the protection of the parties to null and void contracts.

These new Supreme Court opinions and legal interpretations on restitution claims show that it is very urgent to initiate a discussion on the traditional concept of restitution claims for null and void contracts provided for in the Obligations Act. It would be particularly useful to analyse how to align the rule on *ex lege* and *ex tunc* existence of the legal effects of nullity[43] with the length and calculation of the limitation periods for the realisation of restitution claims. Relatively short limitation periods for restitution claims, particularly if they are calculated from the moment of the payment under a null and void contract, may, in practice, result in a considerable imbalance in the legal position of contractual parties and in possible abuse of the unlimited right to invoke nullity. These are all very important issues and are, after all, in the legislator's area of competence. It would be extremely useful, though, to consider the possibilities of adopting a law to lay down in detail the realisation of restitution claims for null and void contracts, a longer limitation period for such claims, and when it has started running, to take into account the fact that a party to the contract must be protected from the moment it has made the payment under a null and void contract. Special cases of interruption of a limitation period must also be specified, as well as how the circumstance, that a contractual party is aware of the reasons for nullity, has impacted the unlimited right to invoke nullity and the right to restitution. All these issues connected with restitution claims have become obvious because of widespread activations of individual restitution claims invoked by consumers due to unfair contract terms. They clearly point to a serious problem in the regulation of null and void contracts which may result in many legal, economic, social, and moral consequences. This cannot be solved by case law but only by the legislator whose task is to amend the rules on null and void contracts to ensure legal security and balanced protection of all contractual parties.

[43] For example, Eraković, A. (Eraković, 2020, p. 36) is of the opinion that the court has changed the concept of nullity.

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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'*[1], 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

[1] 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])[2], 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,

[2] 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 Klauzeln*, *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 the 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 form 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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THE LEGAL ROLE OF IMMORALITY IN FAMILY PROPERTY CONTRACTS*

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Abstract: A family property contract is an atypical contract, regulated by family law and contractual legal rules simultaneously. Contractual freedom is an important part of family property relations. Although private autonomy between family members cannot tolerate intervention, there are several situations that make it necessary. The limits of contractual freedom have a complex system in the Civil Code. The reason for that is the protection of legal rules has two directions. On the one hand, it helps family members in a vulnerable situation, and, on the other hand, it protects third parties who have a legal relationship with the family members. Another important reason for this complexity is the connectable nature of legal rules. Property contracts are primarily regulated under family law, secondly under contract law. As a result, we can find limits raised from family law orders, parallel to those, having contractual nature but at the same time adjusting effect to the family relationships.

However, the invalidity of these contracts, as an important issue is already a neuralgic point. In cases of family property contracts, the long-term nature and emotional relation among family members make it difficult to use the traditional legal consequences of contract law. Furthermore, it is also complicated to find a perfect solution for legal arguments between parties. This is especially true in the internal/intimate legal relations of the parties, where the basis of accounts is called into question – because the property of parties is always changing –, it is difficult to reconstruct the circumstances at the time of concluding the contract not mentioning occurring temporary changes of property value.

Immorality, as a ground for invalidity, has a unique interpretation and adjudication in family property contract because the emotional reason of parties complicates the situation, and it is difficult to track back the root cause or the original motivation, which led family members to accept disadvantageous terms.

In my study, I will introduce the Hungarian legal practice and the interpretation of immoral family property contracts.

Keywords: *family property contract, contract, immorality, invalidity, family law*

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1. INTRODUCTION

Legal relations between family members had and have always had a dedicated place in the system of civil law. Family law, as an independent area of the law, was regulated by an independent act for a long time, separated from the other rules of civil law, but it was never controversial that family law is part of civil law. (Weiss, 2000, p. 4)[1]

The Family Act tried to keep this distance from the other rules of civil law, but sometimes it was not sustainable and generated legal contradiction or absence in practice. It was indispensable in many cases, that the courts used CC 1959 simultaneously and combined the rules of these two acts for efficient dispute resolution.

During the codification of Act V of 2013, the Civil Code of Hungary (hereinafter CC 2013), realized this symbiosis, because the legislator integrated the rules of family law into the CC 2013. However, two important factors substantiate the righteousness of the divergent interpretation:

- Has a dominant part of the moral requirements after the legal regulations in the case of family relationships as in any other legal relationship.
- There are a lot of family relations which is not required legal intervention, so the private autonomy of the family members is extremely wide. (Barzó, 2017a, p. 21)

After all, we can declare, that the rule of CC 2013 in book four behaves like *lex specialis* and the other rules of CC 2013 (for example the rules of contract law or right in rem) complement as *lex generalis*.

The interaction of the rules is more significant for example in the contractual relationship of family members, especially in property questions. I think so, it is true for these contracts, that they are different from the contract of business life. The causes of the differential are the next:

- The motivation and the causes of binding family property contracts are based on emotional factors[2] but in the case of the contracts of business life, it is always significant the individual interest mostly the economic interests of the parties.

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[1] *Emília Weiss* marks only the fact that family relations can be regarded as private legal relations even if the previous legislation has not quite reflected this. She refers here not only to the separation of the Act IV of 1952 about marriage, family, and guardianship (hereinafter: Family Act) and the Act IV of 1959 about the Civil Code of Hungary (hereinafter CC 1959), but also to the fact that until 1959 the traditional legal relations of civil law were based on unwritten law, while at the same time a written law regulated the right to marry and guardianship. – (Weiss, 2000, p. 4)

[2] Just think of the fact that the protection of property and the preservation of property independence are often in the background of a separation of assets, whereas the purpose of common property contracts is often to express unity and, above all, belonging in the sense of property law. In addition, the parties can settle their financial relations with these contracts according to their own needs, especially in contracts that share common property, in which the emotional decision rather than the rational cause is realized.

- The legal effect in the family property contracts, without exception, try to order the property relationships between the family members. As another effect, it can help this solution but in the contract of business life the subject and the types of the contracts determine the legal consequences.
- Consequently, the subject of family property contracts is exclusively the settlement of the parties' property relations, but in other contracts, the type of service determines the subject of the contract.[3] (Leszkoven, 2015, pp. 41–42)
- In family property contracts, the protection of third parties is enhanced, which can be traced back to both the special creditor protection and liability rules. On the other hand, in business contracts, the internal relationship has special relevance to the contractual guarantees, which most encourage the parties to accomplish the contract.[4]

However, it would be wrong to conclude from all this, that family property contracts are sharply separate from other types of contracts. These delimitation criteria are intended only to illustrate that family property contracts have also specific characteristics that need to be considered. The legislator follows this solution, because he places the rules of property contracts largely in the Book of Family Law, emphasizing the special elements that deserve to be more attention. However, these contracts are also considered to be contracts, so in the absence of special rules, they are governed by the general rules of contract law. (Kőrös, 2013, p. 119) I mentioned in the previous thoughts property contracts between family members as family property contracts. (Family property contracts are part of family property law, see in detail: Kriston 2020a; Kriston, 2020b) The term is a summing-up definition, which is a novelty in the legal literature of family law and is intended to express that in the changing system of family relations, property rights issues affecting family members are necessarily changing. In the past, property disputes focused almost exclusively on the issue of matrimonial property law, and this issue has also played a significant role in legislation and jurisprudence. Today, however, the system of family legal relations presents a more complex picture, (Kriston, 2018, pp. 396–407) and the renewed and expanded family law regulation of the Civil Code necessarily requires the application of progressive approaches as well. Accordingly, by family property contract, we mean contracts that settle the relations between persons in a family relationship between themselves and against third parties, differed from the property regulations of the Civil Code relating to family members or even confirming or supplementing them.

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[3] The services that appear in the contracts are grouped according to several criteria, but there can be four types of services in terms of type: the dare type, the service for the performance of an activity (*facere* type), the stand-up service (*praestare* type) and finally the tolerable service (*non-facere* type). (Leszkoven, 2015, pp. 94–95)

[4] This does not mean, of course, that creditor protection does not appear in the contracts of the business. There may be a situation in which a third party is involved in addition to the contractual partners (e.g. in the case of the sale of a mortgaged real estate property), but such situations can also be settled by the general rules of the contracts.

However, we can also distinguish between a broader and narrower definition of family property contracts. The broadest interpretations include contracts of family entities affecting all property rights, such as the agreements governing the maintenance or the right of tenancy contracts. The narrower interpretation has decreased in two directions in the definition of contracts: on the one hand, in the case of the subjects, in a narrower sense, we can reduce the definition to contracts concerning the property relations of family members as in legally regulated relationships, and on the other hand, in terms of the subject of the contracts, we can include agreements that arrange the classical property relations. This division is created by *Éva Csűri*. (Csűri, 2006, p. 229) Accordingly, the classic property contracts of persons in a relationship can be divided into three categories:

- On the one hand, this includes contracts that settle the parties' financial relations in the frame of dispositive rules and diverge from the family property law (especially the matrimonial property rules) of the Civil Code. The main function of these contracts is to determine the prevailing property status for the duration of matrimony or cohabitation of the parties. (hereinafter Type 1)
- On the other hand, this includes contracts terminating the family members' financial relations, the purpose of which is to divide or even settle the parties' property disputes according to the specific needs of the parties after the termination of the relationship. (hereinafter Type 2)
- Finally, we can include the classical contracts which, although not much different from the similar contractual relations of business, the character of the family law prevails so strongly that it is necessary to delimit. The characteristic of these contracts is that the parties are family members, they conclude the contract with each other, and the influence of the emotions is strong, therefore these contracts sometimes can violate the rights of third parties. This argument can justify the differentiation of these contracts from the other contracts of business life. (hereinafter Type 3)

Furthermore, the subject of the analysis consists of the latter, narrower interpretation, accordingly, where I mention a family property contract, which means only these three specific types of contracts.

In the case of family property contracts, the freedom of determining the content is significant Thus, those who want to conclude a contract for their financial relations are most likely to want to adjust the content of their agreement to their individual life situations, taking advantage of the possibility of dispositivity. Therefore, the legislator does not specify obligatory content elements in the case of these contracts. In the case of Type 1, the two alternative property systems are provided only as guidelines for family members. The case law also took the view that neither the previous rules of the Family Act, nor the CC 2013 contains any restrictions or limitations on the minimum content of the property contracts, according to which the parties can only settle the position of their assets to be acquired in the future or settle other related civil rights issues in the property contract. (Barzó, 2017, p. 33)

In the absence of a minimum content, as *Éva Csűri* affixes, the contract is considered invalid as a property contract, but it can be considered valid as another

contract if it is suitable for both the content and formalities of them. (Csűri, 2016, p. 330) However, the deficiency of minimal content may also result in a deficiency of consensus between the parties, as they do not agree on the relevant content element. The CC 2013 declares that the conclusion of the contract requires the agreement of the parties on matters which are relevant, and which are considered relevant by either of them. [Art. 6:63(2) CC 2013] It can therefore also be concluded that the deficiency of minimum content does not result in the invalidity of the contract, but rather the non-existence. However, it can be accepted as a different contract. The minimum content varies in the different types of family property contracts. In the case of Type 3, the regular content (e.g. in a sales contract the details of selling itself) of the contract itself determines this question. Accordingly, for example, in a sales contract between family members, in addition to the need to record the intention to transfer property itself, in the case of real estate, minimum content elements corresponding to PED XXV must also appear in the contract of parties.In Type 1, the legislator creates necessary the criterion for family members that, instead of the application of the provisions of CC 2013, to choose a property system which they want to apply during their marriage or another kind of cohabitation. However, the establishment of a chosen system of property rights may cover either the assets of the parties as a whole or only a few assets. [Cf. Art 4:63(2) CC 2013] In Type 2, freedom of content also appears in a specific way, since the parties often argue that the sharing contract of the common property does not contain a balance mechanism[5] or the agreement does not contain all assets. The Curia, as the Hungarian high court has pointed out in many cases that the fact if the sharing of the assets in a Type 2 contract is incomplete or not comprehensive does not make the contract controversial, because it does not cover every asset, common debts or any claim for reimbursement. It is acceptable because the rules of family law provide the possibility to renew or modify the contract or bind a new agreement about the missing assets. (Pfv. II. 20.685/2007.)

Moreover, the balance mechanism is not an obligatory content element of the Type 2 contracts, because it is sufficient for the content to be valid if the assets are shared, the ownership rights are settled, and payment obligations are counted for each other by the parties – that is the based element to terminate their family property relationship. If, on the other hand, the parties do not agree on a specific payment obligation, just make a list of the assent one by one, estimate the value of these assets,

[5] Balancing mechanism is a technical procedure in jurisprudence of Hungarian courts. The purpose is to equalize property relations during the sharing of assets of the spouses. Within this framework, the parties' common property will be separated from their separate/individual assets, and their obligations to each other – which the Hungarian legislation calls the claim for reimbursement – will also be in account. As a result, the claims between the parties are settled and there is nothing left but pure common property, which the court must distributes. This solution is applied primarily in the case of sharing the matrimonial property, but it is also necessary to adopt it in case of civil partners for the sharing of jointly acquired property, since the legislator orders that the civil partners have to share their assets in jointly acquired property as the spouses, so the court's procedure is the same.

and with this value calculate the 'debt' owed to each other by the amount of these, but do not agree about the details of the sharing, it does not create a right for the claim. (Pfv. II. 21.525/2009.) Moreover, if the contract does not show that the content is the final intention to terminate the property relations of the parties, and the settling of accounts is comprehensive, so they will be not any claim against each other, it cannot be considered as Type 2 contract as well. (Pfv. II. 21.057/2009.)

Summarizing all of these it is clear that family members enjoy great freedom when arranging their property relations. However, this freedom is not unlimited. The legislator has also incorporated several limitations into the CC 2013, which are purely family law solutions on the one hand, but on the other hand, they can be derived from the rules of obligation law. Among the norms of family law, the content-forming effect of the principles and the special provisions protecting third parties or creditors, limited the content of the contract, while on the side of the obligation law the main limitation is the question of the invalidity and ineffectiveness of the contracts. (For more details see Kriston, 2020c) The detailed introduction of all the limitations would significantly exceed the framework of this study, and accordingly, as can be seen from the title of the study, I will build argumentation and presentation around a certain problem, the analysis of the question of the immorality of these contracts. I am looking for the answer to the question, what are the unique features and interpretation possibilities of immorality in family property contracts and how can immorality influence and break down the freedom to determine the content and private autonomy in these contracts?

2. SOME THOUGHTS ABOUT THE IMMORALITY

Like many other private legal institutions, immorality originates in Roman law, even the contemporary legal scholars were convinced that the law was not merely a set of substantive laws without content, but based on certain moral foundations. The principle *'contra bones mores'* appeared in the interpretation of the legal rules even before Christianity, according to which the right to immoral conduct or behavior cannot be acceptable. (Földi and Hamza, 1996, p. 486) The old Hungarian private law also took over and acknowledged the importance of good morality[6], and then the science of socialist civil law and the codification – in the words of *Barnabás Lenkovics*– *'threw it away'* and replaced it with the requirements and expectations of socialist coexistence. (Lenkovics, 2017, pp. 319–320) At the same time, the collision with good morals as a reason for invalidity has a place in both the CC 1959 and the current regulations in CC 2013 also. Finally, Act XIV of 1991 reinstated it to the definition system. (Kőrös, 2017, p. 313) The legislator declares in Article 6:96 of the CC 2013 that a contract shall be null and void if it is manifestly in contradiction to good morals. As it can be seen, the legislator gives us only a framework regulation,

[6] *Károly Szladits* said, according to the law, sometimes even the violation of a moral duty effect disadvantageous legal consequences and this makes the moral duty a legal duty, and its violation lead us to unlawful behaviour. He marks also, that immoral contracts cannot be a base of a claim. (Szladits, 1937, p. 182)

as we called in Hungary, 'general clause'. The general clause is formulated openly as a framework for regulation, so it is difficult to adjudicate the content elements – what can be immoral in the legal sense. Many authors point out that the concept of immorality should be defined by the courts in view of the individual and all the circumstances of the case.[7] *Attila Menyhárd* identifies the content of this legal institution as a judgment of a person who thinks fair and square, reasonable and equitable. (Menyhárd, 2004, p. 99) In determining the criteria for immorality, the courts take the general judgment of society as the basis for which *András Kőrös* notes that it cannot be interpreted extensively because it would violate the freedom of the contract and, through it, the private autonomy of the parties. (Kőrös, 2017, p. 313) Accordingly, in determining a conflict with good morals, it is necessary to examine not the harm to the interests of the Contracting Party, but whether the legal transaction itself is socially reprehensible. (Barzó, 2017, p. 33) Another very important characteristic of immorality is that it is a subsidiary legal institution, which means it can be used only if there is no other concrete regulation for the violation of the contract. (Vékás, 2016, p. 128) For example, the value of the services in the contract is very high, and society reprehends it but in CC 2013 there is a special invalidity reason for this situation, the gross disparity in value. (Art. 6:98 CC 2013) Therefore, we can not say automatically, that the contract is immoral because of the value, and first, we must consider the possibility of gross disparity in value.

The Curia also accentuates that immoral contracts can be considered according to the conditions existing at the time of the binding of the contract, and the subsequent changes cannot be considered when assessing the conflict of the contract with good morals. (BDT 2010.2269., BH 2016.280.) In the same case, the Curia also notes that the contract can only be regarded as null and void if the conflict with good morals is obvious. From this, it concludes that, with due care, both parties should be aware that the content of the contract is intended to achieve a prohibited purpose, that its unethicality is obvious to them, but that the good or bad faith of the parties is no longer relevant. (BDT 2010.2269.)

After all, the characteristics of immoral contracts can be summarised as follows:

- a collision with good morals is a subsidiary fact that can only be applied if there is no specific legal provision based on which the disputed situation can be decided,[8]
- the basis of the judgment is the value judgment of society and not the unfair situation of the contracting party,

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[7] *István Szászy* said, according to the judicial discretion, it determines which transactions are immoral. *'In judicial practice, guidelines have emerged in all ages as to what is the moral perception prevailing in the people's community, and if the content of the transaction does not correspond to this moral standard, the transaction should be considered null and void.'* (Szászy, 1949, p. 84) See also Vékás, 2016, pp. 127–128.

[8] Immorality is a subsidiary title, which means that it cannot be established on its own on the basis of circumstances which serve as the basis for the invalidity reason referred to in the law. (EBH 17.P.2010.)

- the good or bad faith of the parties is irrelevant in determining immorality,
- the collision with good morals must exist at the time of the conclusion of the contract, and the changes in circumstances do not subsequently affect the validity of the contract. (Kőrös, 2017, p. 313)

3. IMMORALITY IN FAMILY PROPERTY CONTRACTS

The content of family property contracts can be affected by several invalidity reasons. In judicial practice, one of the most frequently examined questions is the immorality of these contracts.

The examination of the collision of family property contracts with good morals may be based on the different and often unbalanced financial situation of the parties, as stipulated in the contract. Whether it is any type of property contract, the party to the dispute most often complains about the unfairness of the state of the property on the grounds of this legal institution. (See for example BH 2011.337., BH 2000.539., BDT 2010.2269., EBH 2011.2403.) However, equity cannot provide the consideration of social, but the individual aspects, requiring the interpretation of the regulation defining the facts in general given the specific characteristics of the case. Therefore, inequity should not be the reason for the treaty's immoral contracts. (Kőrös, 2017, p. 317 and BH 278.278.2001.)

In addition, in several cases the supreme court that it is not conflicting with the general moral conception of society if one party gives the other a free financial advantage at the expense of his property, nor does it if he transfers his common property to his/her own property of the spouse. (BH 1999.409., BH 2000.539.) In addition, it stated that the family property contract is not immoral because it defines the property questions of the parties differently from the law. (BH 2011.337.) However, it declared immorality in cases where the parties intended to dispossess the spouse.[9] The behaviour of the parties to jointly manage until the termination of the family property contract and establish a family order according to one party runs the household and raises the children, and the other ensures the circumstances of luxurious life, and then retroactively binding a family property contract about separation of assets and excludes the party leading the household from the property, obviously violates the general value judgment of the society. (Pfv. II. 21.696/2014.) However, it is also important to examine the social and cultural background of the parties, because in cases where the parties come from a state that differs from domestic regulation in terms of tradition and legal system, and where the personal

[9] It conflicts with good morals, as a result, the point of the marriage property contract (partial invalidity) which, even going back to the establishment of the community of life 17 years earlier, and not only excludes the community of property for the future, and in this connection only one of the parties names all the properties listed under a common name in the land register, or the share of the business jointly owned according to the register of companies, as separate assets. The contract declared the complete absence of the common property without even containing an indirect reference to the fact that the parties had shared the jointly acquired assets. (BH 2015.254.)

and property inequality between the partners – and its flagrant realization – is accepted at the social level, the contractual terms, which determine this situation of the parties, cannot be immoral. (Pfv. II. 21.240/2007.) It is also not conflicting with the popular opinion that spouses, registered partners, or *de facto* partners conclude their property contract with the purpose of excluding the subsequent claim for compulsory heirs of the descendant. (Pfv. II. 21.737/2006.) Therefore, when examining immoral contracts, the entirety of the legal transaction itself must be taken into consideration, based on the circumstances at the time of the conclusion of the contract, compared to the parties' intentions and the objectives to be achieved by the contract. Accordingly, judicial practice interprets the establishment of immorality narrowly to ensure contractual freedom and considers it justified only in the case of a seriously flagrant and one-sided contract. (BH 2015.254.) In this context, the Curia also points out that, in determining the existence of that reason for invalidity, it is necessary to examine not the harm or violence to the interests of the contracting party, but the social reprehensibility of the legal transaction. The general social perception is not opposed to, for example, when the partners settle only the legal status of an asset from their common property, nor if the value of the assets is not determined, in addition to establishing the method of sharing. (Pfv. II. 20.069/2017.)

4. SUMMARY

The purpose of family property contracts is to settle the parties' property relations for the duration of their relationship and its termination. Accordingly, the contract is not one of the business contracts, which the legislator provides by the special legal rules. However, it is a contract, it is also governed by the rules of the law of obligation, in particular the law of the contract, in addition to the norms of family law.

To secure the private autonomy for the parties, the freedom to determine the content of the contract is very significant in these contracts, and accordingly, the State tries to intervene in these life situations only in a manner consistent with its obligation to protect this institution (family protection). However, the freedom to determine the content of the contract is not limitless. Both family law and obligation law provide limits that adequately restrain the parties' freedom of action.

One of the limitations is the invalidity of contracts. CC 2013 contains several grounds for invalidity. However, not all of them can be applied in the contractual relationships of the family members. The most typical ground for invalidity that jurisprudence has dealt with on numerous occasions is the immorality of contracts.

The basis of immoral contract as a ground for invalidity is the social perception, as a result of which it is necessary to take into account not the individual's interest, but the general expectations of the society. In family property contracts, immorality is often the subject of a claim, but in many cases, the parties try to identify inequity by a collision with good morals. That is why the jurisprudence of the Hungarian courts consistently follows the standpoint that the unfair situation arising as a result of the contract does not result in a collision of the treaty with good morals.

Another important statement of the Curia is that the freedom of contract and the guarantee of private autonomy of the parties require the courts to intervene only in situations where there is a flagrant level of grievance. Accordingly, the conflict of family property contracts with good morals can be based primarily on extremely flagrant contractual clauses and unacceptable to society.

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„GRENZFRAGEN DER UNWIRKSAMKEIT“ – SCHWEBENDE GRENZEN IM PROBLEMFELD DER NICHTIGKEIT UND UNWIRKSAMKEIT*

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Abstrakt: In diesem Beitrag befassen wir uns mit den grundlegenden, konzeptionellen Fragen der Nichtigkeit und Unwirksamkeit im Zivilrecht. Der Begriff „schwebende Grenzen“ soll den Übergang zwischen den Definitionen, die unscharfe Abgrenzung verdeutlichen. In der Studie gehe ich auf die Problematik „nicht vorhandener“ *(non existens)* Verträge ein, indem ich die theoretischen und praktischen Reaktionen kurz vorstelle. Wir untersuchen die wichtigsten Rechtsphänomene, die sich aus der Kombination der beiden Begriffe ergeben, in erster Linie die Fälle der relativen Unwirksamkeit, zum Beispiel den Fall der Nichtigkeit aufgrund persönlicher Verstöße wegen Verletzung eines Deckungsvertrages *(actio Pauliana)* und des Vorkaufsrechts. Wir gehen auf einige Besonderheiten der Regulierung durch Generalklauseln ein und weisen dabei auf den Zusammenhang hin, der zwischen der Nichtigkeit eines gegen die guten Sitten verstoßenden Vertrages und den Grundprinzipien des Zivilrechts, vor allem dem Grundsatz von Treu und Glauben besteht.

Stichworte: *Unwirksamkeit, Nichtigkeit, relative Nichtigkeit, Deckungsvertrag, Konsens/ Dissens, nicht vorhandenes Rechtsgeschäft, Rechtsgeschäfts-/Vertragswille*

1. EINLEITUNG

Wir werden den Begriff „schwebende Grenzen“ innerhalb kurzer Zeit zum zweiten Mal verwenden und ihn zum zweiten Mal von *Gusztáv Szászy-Schwarz* entlehnen. So leitete Szászy-Schwarz seinen Vortrag *„Schwebende Grenzen im Recht“* im Anwaltsverein ein.

„Vielleicht ist es am besten, wenn ich gleich damit beginne, was ich unter dem Begriff ‚schwebende Grenzen‘ verstehe. Es gibt Begriffe, sowohl im Leben als auch in der Wissenschaft, deren Grenzen sich mit mathematischer Präzision markieren

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lassen, deren Konturen scharf und unverkennbar sind, wie eine Silhouette. Wo die Grenze zwischen Morgen und Nachmittag, zwischen dem Ende eines Jahres und dem Beginn eines anderen, zwischen der Nordhalbkugel und der Südhalbkugel, zwischen Leben und Tod, zwischen Vergangenheit und Zukunft liegt – diese Phänomene lassen sich in Raum, Zeit, und Vorstellung genauso präzise voneinander trennen, wie sich in der Mathematik x von x+1 oder x-1 unterscheiden lässt. Aber Leben und Wissenschaft rufen auch andere Begriffe hervor. Wo liegt die Grenze zwischen einem Bach und einem Fluss? Wo ist die Grenze zwischen Hügel und Berg? Zwischen Wald und Hain? Zwischen viel und wenig? Solche Fragen sind genauso unergründlich wie die Frage des bekannten Sophisten: Ab wievielten ausgefallenen Haaren beginnt die Glatze? Hügel und Berg, Bach und Fluss, Hain und Wald, – die Grenzen zwischen solchen benachbarten Begriffen sind nicht fest und sicher, wie in der ersten Gruppe, sondern sich bewegend und unsicher, schwebend wie Luft, ineinanderfließend wie Wasser – die Grenzen solcher Begriffe nenne ich ‚schwebend' (...)" (Nizsalovszky, 1933)

Das Privatrecht ist von solchen schwebenden Grenzen durchdrungen und die Problematik der Nichtigkeit und Unwirksamkeit bildet diesbezüglich auch keine Ausnahme. Wir können gleich damit beginnen, dass es bereits diesen Begriffen an konkreten Umrissen fehlt. Ich möchte vorwegnehmen, dass ich in dieser Studie nicht die Absicht habe, das Thema umfassend und eingehend zu prüfen, vielmehr will ich in die unzähligen Interpretations- und Ansatzmöglichkeiten einen Einblick geben.

In unserem bisherigen Privatrecht diente der Begriff *„Unwirksamkeit"* als eine Art *Sammelbegriff*. Vielleicht würden wir nicht einmal denken, dass die Begriffe der Nichtigkeit und der Unwirksamkeit, die heute geklärt zu sein scheinen – obwohl sie in ihren Grundzügen und Inhalten noch immer nicht als stabil bezeichnet werden können –, in den Rechtsinstitutionen durch eine so ernsthafte Bewegung, man könnte auch sagen: durch *„konzeptionelle Dynamik"*, geprägt waren.

Károly Szladits schrieb in seinem Buch „Überblick über das ungarische Privatrecht" wie folgt: *„Wenn in einem bestimmten Tatbestand der Anschein eines Rechtsgeschäfts besteht, aber eines oder mehrere der notwendigen Elemente der Rechtsgeschäfte fehlt, dann haben wir mit einem unwirksamen Rechtsgeschäft zu tun. Die Hauptarten der Unwirksamkeit sind Nichtigkeit und Anfechtbarkeit. Allerdings können wir auch Zwischen- und Übergangsstrukturen finden."* (Szladits, 1933b, S. 162) In die Fußstapfen von Szladits trat auch *István Szászy,* der meint: *„[ein] Rechtsgeschäft (im weiteren Sinne) ist unwirksam, wenn es nicht die von den Parteien gewollte Rechtswirkung entfaltet. Dies ist der Fall, wenn dem Rechtsgeschäft eine der Wirksamkeitsvoraussetzungen fehlt."* (Szászy, 1947, S. 215) Diese Unwirksamkeit kann verschiedene Gründe haben, wie er schreibt.[1] (Szászy, 1947, S. 215) Das ist nach seiner Ansicht beispielsweise der Fall – abgesehen diesmal von der ausführlichen Erläuterung und Erklärung –, wenn der Tatbestand des Rechtsgeschäfts nicht geschaffen wurde (nicht besteht), wofür es bekanntermaßen eine große Bandbreite von Fällen gibt. Im weiteren Sinne handelt es sich auch dann

[1] Diese Gründe stimmen nicht damit überein, was heute unter der Wirkung eines Rechtsgeschäfts verstanden wird.

um Unwirksamkeit, wenn das Geschäft zwar abgeschlossen ist, aber es einen vom Gesetzgeber als wesentlich erachteten Rechtsfehler aufweist und deshalb die erhofften Rechtswirkungen nicht oder nur unvollkommen eintreten. Im letzteren Bereich werden bei ihm die nichtigen und anfechtbaren Geschäfte erwähnt, natürlich mit gewissermaßen anderen Nichtigkeitsgründen als heute. Im weiteren Sinne wird ein Rechtsgeschäft ebenfalls als unwirksam angesehen, wenn eine oder mehrere der im engeren Sinne genommenen Wirksamkeitsvoraussetzungen fehlen: diese Kategorie steht der heutigen Auffassung am nächsten, zwar deckt sie sie nicht ganz ab. Hierzu zählen wir die Rechtsgeschäfte, in denen die Wirkung von einer Bedingung oder Zeitbestimmung abhängt oder die Billigung eines Dritten erfordert wird, aber auch die Verträge, die aufgrund einer Auflösungsbedingung oder durch Kündigung, bzw. Rücktritt usw. ihre Gültigkeit verloren haben. Und wir haben auch Strukturen in unserem Recht, die Übergänge aufweisen, die sich – schreibt Szászy – aus einer *Kombination* von Nichtigkeit, Anfechtbarkeit und im engeren Sinne genommener Unwirksamkeit ergeben. (Szászy, 1947, S. 215) Beispiele hierfür sind die relative Nichtigkeit oder die in diesem Beitrag – sagen wir mal – einer genaueren Betrachtung unterzogene, *relative Unwirksamkeit*.

Es ist echt wahr: In diesen Rechtslagen hat diese Art der Unvollständigkeit oder Kürzung des Sachverhalts zur Folge, dass die gewünschte Rechtswirkung nicht erreicht wird. Wir könnten auch sagen, dass sie nicht in der üblichen Weise eintritt. Beispielsweise wird die Einstellung des Gesetzgebers durch das – „privilegierte" – Interesse einer gesetzlich als schutzwürdig erachteten Partei (eines beschränkt handlungsfähigen Menschen, eines Verbrauchers etc.) oder wegen Beiseins eines Dritten im Tatbestand – der nicht Vertragspartei ist – (Vorkaufsberechtigter, Gläubiger etc.) angepasst. Wir können Beispiele für beide Fälle finden.

In seiner Studie schrieb Nizsalovszky: *„Unter unvollkommenen Rechtsgeschäften verstehe ich allgemein Phänomene, die den äußeren Tatbestand eines Rechtsgeschäfts zeigen, ohne die im Rechtsgeschäft erzielte Wirkung tatsächlich zu entfalten."* (Nizsalovszky, 1933, S. 158) Dazu – also „zum Minimum des äußeren Tatbestandes" – ist es in einem einfachen Ansatz erforderlich, dass sich die Parteien in jedem als wesentlich erachteten Vertragspunkt einig sind und ihre rechtlichen Erklärungen einander dementsprechend mitteilen. Es ist auch möglich, dass das Rechtsgeschäft nicht vollkommen ist – schreibt Nizsalovszky –, weil beispielsweise ein Element des erforderlichen Tatbestandes fehlt. Ein solches Geschäft ist noch nicht abgeschlossen, und es gilt erst nach dem Eintritt (und der Einfügung) der fehlenden Bedingung (Erscheinen, Herbeiführung usw.) tatsächlich als erfüllt. (Nizsalovszky, 1933, S. 159)[2]

[2] Unter diesem Gesichtspunkt ist es auch eine sehr interessante Frage, ab wann und ab welchem „Bereitschaftsgrad" wir überhaupt über einen Vertrag sprechen dürfen. Von dieser Einstellung hängt unter anderem ab, ob ein Vertrag, der der Einwilligung eines Dritten bedarf, zunächst (bis zur Erteilung der Einwilligung) als nicht erfüllt angesehen wird oder ob die Erklärung des Dritten zur Wirksamkeit eines ansonsten fertigen Rechtsgeschäfts erfordert wird.

2. DIE ERSTE FRAGE IST ALSO: SEIN ODER NICHT SEIN?

Wenn es um unwirksame Rechtsgeschäfte geht, ist zunächst zu entscheiden, ob der Vertrag überhaupt zustande gekommen ist. Allerdings sollte hier betont werden, dass es sich im Folgenden generell um Vertragsgeschäfte und nicht um einseitige Rechtsgeschäfte handelt. So werden auch unsere Beispiele aus dem Vertragsrecht genommen. Hier und da werden aber auch Fragen behandelt, die sich speziell auf einseitige Rechtsgeschäfte beziehen. So verdient etwa die unter der Nummer PJD 2020.31. veröffentlichte Fallentscheidung eine Erwähnung, wonach *die selbstständige Unwirksamkeit der einen Vertrag begründenden rechtlichen Erklärung nicht festgestellt werden kann*. Weiter heißt es in der Entscheidung, dass der Kaufvertrag durch die Erteilung der Registrierungserlaubnis seitens des Verkäufers als erfüllt gilt, *also (sic!) ist* eine Prüfung der Unwirksamkeit dieser rechtlichen Erklärung *ausgeschlossen*. Die Entscheidung an sich ist interessant, aber der „Entscheidungskopf" der veröffentlichten Entscheidung ist in dieser Form nicht richtig.

Eörsi weist auch darauf hin, dass die ungültigen und unwirksamen Verträge von den Verträgen, die nicht wirklich existieren, zu unterscheiden seien. Der Vertrag kommt seiner Ansicht nach nicht zustande, wenn sich *die Parteien in wesentlichen Fragen nicht einig sind* oder sich bei einem Auslegungsversuch des Vertragsinhalts herausstellt, dass der Vertragsinhalt nicht festgestellt werden kann und zwischen den Parteien tatsächlich keine Einigung besteht.[8] (Eörsi, 1983, S. 94) Ein Dissens ist versteckt, wenn die Nichtübereinstimmung vertraglicher Aussagen nicht einmal für die Parteien offensichtlich ist. In solchen Fällen helfen grundsätzlich die Auslegungsregeln bei der Konfliktlösung. Der geheime Vorbehalt *(reservatio mentalis)* ist jedoch generell gleichgültig.

Im Wesentlichen finden wir diesen Ansatz im geltenden Zivilrecht mit zusätzlichen Präzisierungen und Verfeinerungen. Selbst die Definition des Vertrags – eine übereinstimmende Willenserklärung um Rechtsfolgen auszulösen – stellt den *Konsens* in den Mittelpunkt: am häufigsten begründet zweifellos der *Dissens* das Phänomen des „nicht bestehenden Vertrages". Es ist notwendig, dass sich die Parteien über wesentliche Angelegenheiten oder über sonstige, die eine der Parteien für wesentlich hält, einigen. (UBGB § 6:63, Absatz 2) In unserer geltenden Rechtsprechung wird die übereinstimmende Willensäußerung (Konsens) als Hauptregel verlangt, um überhaupt von einem Vertrag sprechen zu dürfen.

Die Entscheidung der Frage „existiert es oder nicht?" ist folglich auch eine Art *„vertragsontologische Vorfrage".* Auch *Eörsi* wies nachdrücklich darauf hin: *„Die Unterscheidung von nicht bestehenden, nichtigen und unwirksamen Verträgen ist von praktischer Bedeutung. Durch einen nicht zustande gekommenen Vertrag kann keine Rechtswirkung eintreten, ein nichtiger Vertrag kann – wie es bei seiner ausführlichen Erörterung deutlich wird – bestimmte Rechtsfolgen herbeiführen, und im Falle der Unwirksamkeit bleibt der Vertrag von den Rechtsfolgen, die sich während der Gültigkeitsdauer des Vertrages aus dem Vertrag ergeben, unberührt."* (Eörsi, 1983, S. 94) Da *vertragliche Rechtsfolgen* definitionsgemäß *an einen nicht bestehenden Vertrag nicht geknüpft werden können*, ist es logisch auch

nicht möglich, sie auf Vertragsbasis zu behandeln.[3] Das Gericht hat zunächst zu prüfen, ob der Vertrag zustande gekommen ist, ob der Vertragswille der Parteien bestand, und erst dann sind die Nichtigkeits- und Anfechtbarkeitsgründe zu prüfen.[4]

Natürlich wird im Recht ein auf den ersten Blick fehlender Konsens oft kompensiert. Realisieren lässt sich das mit Hilfe von Einzelvorschriften, mit „fiktiven" oder auf Annahmen beruhenden rechtstechnischen Lösungen. Wir haben eine breite Palette von gesetzgeberischen Auffassungen und Meinungen, insofern wir beispielsweise *die dispositiven Regeln als mutmaßlichen Willen der Parteien* betrachten, oder wenn es darum geht, dass die *Gewohnheiten* oder die gängige *Praxis* automatisch zum Vertragsinhalt werden können. Entscheidungen in der Rechtsprechungspraxis beruhen auch häufig auf Rechtstatsachen, die mit den Ausdrücken *„es sollte angesehen werden, als ob"* oder *„man muss darauf schließen, dass"* eingeleitet werden und die dann eine Rechtsverhältnis-begründende Kraft ausüben. Einige von diesen werfen auch Grenzfragen in Bezug auf die Unwirksamkeit auf. Denken wir an die *von den Parteien durch den Gesetzgeber erforderte Sorgfaltspflicht, (z. B. culpa in contrahendo): ihre Erfüllung oder Nichterfüllung wird „das fiktive Zünglein an der ebenfalls fiktiven Waage der Nichtigkeit" hin und her neigen.*

Nehmen wir auch andere, konkretere Beispiele. In den Vereinbarungen über das Kaufrecht müssen die Parteien den Optionskaufpreis festlegen, dieser Preis muss jedoch nicht in den Vertrag, der das Kaufrecht begründet, aufgenommen werden. Es besteht die Möglichkeit, den Kaufpreis im Kaufrechtsvertrag in der Form zu bestimmen, indem die Art und Weise der Preisbildung festgelegt wird, was eine Kooperation der Parteien erfordert [BH 2014.245. (Beschl.)], und die Kurie hat auch akzeptiert, wenn die Parteien die Festsetzung des Kaufpreises in einer einmaligen Ausgleichszahlung von dem nach dem Abschluss des Kaufrechtsvertrags durchzuführenden Sachverständigenverfahren abhängig machen. [BH 2012.200. (Beschl.)] Der Kaufpreis des zukünftig mit Käufermacht abzuschließenden Kaufvertrages muss daher bestimmbar, aber von Anfang an nicht zwingend festgesetzt sein. Ein solcher (vorübergehende, nachher behebbare) Mangel in der Bestimmung des Optionskaufpreises wird im Kaufrechtsvertrag gesetzlich anerkannt. Aber wenn *der Preis* aufgrund des Vertrages *nicht kalkuliert werden kann* und daher *unsicher* ist, wird nicht toleriert und als fataler Fehler angesehen *(nicht bestehender Vertrag).*

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[3] Siehe dazu BH 2017.60. (Gerichtsbeschluss) Entscheidung über die Zuständigkeitsgründe. Gemäß EBH 2004.1146. (Grundsatzentscheidung) kommt bei einem Rechtsgeschäft, das von einem Anscheinsvertreter abgeschlossen wird, kein Vertrag zustande, ein nicht bestehendes Rechtsgeschäft begründet keine vertragliche Verpflichtung. Für die aufgrund eines solchen „Vertrags" entstandene Abrechnung sind die Regeln der ungerechtfertigten Bereicherung ordnungsgemäß anzuwenden.

[4] BH 2013.64. (Beschl.) Siehe zu diesem Thema auch die Stellungnahmen 1/2010. (VI. 28.) PK und 2/2010. (VI. 28.) PK (Kurie Zivilkollegium).

Ist hingegen die Kaufpreisfestsetzung *nicht rechtskräftig oder die Vergleichsberechnung zwischen den Parteien mangelhaft* (fehlerhaft), so kann dies bereits zu einem Rechtsfehler – zur *Nichtigkeit* – des abgeschlossenen Vertrages führen. So erklärte das Gericht beispielsweise die Optionsverträge für ungültig, bei denen der im Falle der Sicherungsübereignung vom Sicherungsgläubigen zu zahlende Kaufpreis in Höhe des aktuellen Schuldbetrags des Schuldners festgesetzt wurde, weil diese Lösung als eine für die Umgehung der Abrechnungsverpflichtung und des Verbots der *lex commissoria* geeignet erachtet wurde. [Siehe z. B. BH 2008.48. (Beschl.)]

Die unter BDT 2017.3717. veröffentlichte Fallentscheidung von Pécsi Ítélőtábla (Berufungsgericht Pécs) verdient unter mehreren Gesichtspunkten Beachtung: die Klausel im Pfandvertrag, nach der allein der Pfandgläubiger berechtigt ist, im Falle einer außergerichtlichen Zwangsversteigerung des Pfandgegenstandes den Ersteller des Wertgutachtens, das zur Berechnung des niedrigsten Verkaufspreises als Grundlage dient, auszuwählen, gilt als missbräuchlich, und verpflichtet den Schuldner einseitig, das Wertgutachten im Voraus vertraglich anzunehmen. Die unter BDT 2012.2725. verfügbare Entscheidung von Fővárosi Ítélőtábla (Hauptstädtisches Berufungsgericht) bewegt sich in diesem Grenzbereich und betrifft die Problematik „nicht nichtbestehend oder nichtig“: Der Optionsvertrag wird nicht ungültig, wenn die Parteien einen Optionskaufpreis vereinbaren, der an den Marktpreis und an eine Preisbestimmungsmethode gebunden ist. Wenn sich der Verkehrswert einer als Sicherheit angebotenen Immobilie – abhängig insbesondere von der wertvermehrenden Wirkung der dafür aufgewendeten Kosten oder von den Marktverhältnissen – wesentlich ändern würde, können die Parteien den Optionskaufpreis zur Bewahrung der Wertstabilität gemäß dem Verkehrswert zum Zeitpunkt der Eigentumsübertragung festsetzen. Eine solche Vereinbarung gilt weder als rechtswidrig noch als sittenwidrig. Diese Entscheidungen veran-schaulichen perfekt die rechtlichen Herausforderungen, die sich im Wirtschaftsleben im Thema Vertragsnichtigkeit tagtäglich ergeben.

Das Gericht wandte *in Bezug auf den Vertragsgegenstand* eine ähnliche, das fehlende Konsenselement „ergänzende-erläuternde“ Lösung, d. h. nicht die Prüfung der Bestimmung der Gegenleistung in der unter BH 2019.15. veröffentlichten Fallentscheidung an, in der festgestellt wurde, dass zwar die Bestimmung des betreffenden Gegenstandes im Kaufrechtsvertag ein obligatorisches, wesentliches inhaltliches Element ist, *gilt dieses Erfordernis als erfüllt*, wenn unter Berücksichtigung der im Vertrag festgehaltenen Daten *offensichtlich ist, dass der Gegenstand des Kaufrechts für die Parteien nicht zweifelhaft ist*.

3. DIE ANSCHEINSVOLLMACHT

Ein weiteres Beispiel für einen nicht bestehenden Vertrag ist *die Anscheinsvollmacht*. Gibt jemand als Vertreter eine rechtliche Erklärung ab ohne wirkliche Vertretungsmacht zu haben, oder hat die Grenzen seiner Befugnis überschritten, entfaltet diese Erklärung gegenüber dem Vertretenen keine Rechtswirkung. Der durch einen Vertreter ohne wirkliche Vertretungsmacht abgeschlossene Vertrag

berechtigt und verpflichtet den Vertretenen nicht. [EBH 2004.1146 (Grundsatzentscheidung)] Mit *Fehérvárys* Worten: das Gesetz legt die Entscheidungsmacht in die Hände des vermeintlichen Vertretenen: er ist *der Geschäftsherr (dominus negotii), der* – so Fehérváry – *entweder ratihabiert und ordiniert den gestor damit ex tunc zum verus procurator oder verweigert ihm jede Gemeinschaft.* (Fehérváry, 1941, S. 54) Wird der Akt des Vertreters jedoch nachträglich vom Vertretenen bewilligt, wird dadurch das ansonsten fehlerhafte – mangels Anerkenntnis oder Bestätigung grundsätzlich rechtsunwirksame Verfahren – rückwirkend korrigiert. Ein Schulbeispiel, das keiner Erklärung bedarf, könnte man sagen. Siehe z. B. die unter der Nummer BH 2014.303. veröffentlichte Begründung der Fallentscheidung, aus der auch die Tatsache hervorgeht, dass *diese Bewilligung nicht formgebunden ist*. Grundsätzlich gibt es auch keine zeitliche Begrenzung, aber während des Schweigens des Vertretenen entscheidet sich in der Regel ohnehin das Schicksal der vom Anscheinsvertreter vorgenommenen Rechtshandlungen.

In seinem mehrmals erwähnten Lehrbuch hat Eörsi *die rechtliche Erklärung eines Vertreters ohne Vertretungsmacht* – im Gegensatz zur auch von Fehérváry formulierten allgemeinen Meinung – *für ungültig (d. h.: negotium non existens) erklärt,* und auch nicht ganz unbegründet. (Eörsi, 1983, S. 79)[5] Das wichtigste Argument der juristischen Literatur für die Auffassung solcher Fälle als nicht vorhandene Rechtsgeschäfte – nämlich, dass keine Erklärung vorliegt, die als Erklärung der vertretenen Person angesehen werden könnte – könnte auch die Nichtigkeit als Rechtsfolge unterstützen. Auch die Möglichkeit der nachträglichen Billigung lässt sich mit der Wiedergutmachung im Bereich der Nichtigkeit vergleichen, dies kommt allerdings auf die Sichtweise an. (*Tamás Török* hat sich kürzlich mit dem Thema befasst. Török, 2020)

Bereits die Formvorschriften der Billigung – oder vielmehr *die Feststellung ihrer Formlosigkeit* – machen einen nachdenklich: Aus unserer Sicht wäre es gerechtfertigt, für die Billigung die formelle Synchronregelung nach § 6:6 Abs. 2 UBGB anzuwenden. *Wird die rechtliche Erklärung rechtswirksam in einer bestimmten Form abgegeben* – gemäß der obigen Bestimmung des UBGB –, *so bedarf auch die rechtswirksame Bestätigung der Erklärung einer angemessenen Form.* Unabhängig davon, ob wir die Ratihabitation als Wiedergutmachung in Bezug auf Nichtigkeit oder als einen Rechtsakt betrachten, der einem nicht vorhandenen Geschäft Leben einhaucht, sind wir zweifelsohne mit der Bestätigung eines Rechtsverhältnisses konfrontiert.

Bleiben wir bei der „ontologischen" Frage, um die es hier geht: Der Anscheinsvertreter wird entweder zum Vertreter oder zum Schadenersatzpflichtigen. *Es ist eine Ausnahmeerscheinung, dass das Gesetz die Person, die eine unbefugte Erklärung im Namen einer anderen Person – den Anscheinsvertreter – an ihrer Verpflichtung festhält.* Ein Beispiel hierfür ist die Regelung gemäß § 8 des Gesetzes CLXXXV von 2017 (Wechselgesetz), wonach eine Person, die einen Wechsel in

[5] Dieser Standpunkt ist auch im Gesetzeskommentar von Gesetz IV von 1959 (2002) vertreten. (Benedek, 2002, S. 758)

Vertretung einer anderen Person unterzeichnet, zu deren Vertretung sie nicht berechtigt ist, wird selbst aufgrund dieses Wechsels zum Verpflichteten. Gleiches gilt, wenn der Vertreter seine Vertretungsbefugnisse überschreitet. Der Grund dafür liegt in der strengen Form der Wechselpflicht.

Als ein interessanter Beitrag soll hier die Fallentscheidung Nr. BDT 2018.3824. erwähnt werden. In diesem Fall mussten laut der gerichtlichen Entscheidung die im Namen einer juristischen Person, des „Schuldners" handelnden Vertreter – nachdem sich im Prozess herausstellte, dass die juristischen Personen als Kreditnehmer gar nicht existieren – ihre Verpflichtung auch weiterhin im eigenen Namen erfüllen. Der Kopfteil des Beschlusses lautet wie folgt: „Haben die beim Abschluss des Darlehensvertrages als ‚Vertreter' nicht existierender Firmen handelnden natürlichen Personen den Darlehensgeber über die Person des Vertragspartners – über den Darlehensnehmer – getäuscht, kann der Darlehensgeber den Vertrag unter Berufung auf einen Rechtsfehler in Bezug auf die Vertragspartei anfechten. Erfolgt keine Anfechtung, ist der Darlehensvertrag gültig und kommt zwischen dem Darlehensgeber und den natürlichen Personen, die das Darlehen tatsächlich in Anspruch nehmen, zustande." In der Urteilsbegründung heißt es: Die Beklagten hatten die Rechtsfähigkeit der in den Vertrag einbezogenen Unternehmen nachzuweisen, d. h. dass die Unternehmen existieren und dass sie den Darlehensvertrag nicht eigenständig im eigenen Namen unterzeichnet haben."

Das Gericht entschied wegen Scheiterns der Beweisführung zu Lasten der Beklagten und betrachtete die im Darlehensvertrag enthaltene mit dem Hauptschuldner gesamtschuldnerische und unbedingte Verpflichtung der Beklagten zur Rückzahlung des Darlehens als eigenständige (teils Darlehens-, teils Bürgen-) Verpflichtung. Mit anderen Worten: Unter Berufung auf die Beweislast „umging" das Gericht im Wesentlichen die Frage über den nicht vorhandenen Vertrag: Es hielt die als Vertreter handelnden natürlichen Personen in eigener Person im Schuldverhältnis.

4. Interessenkonflikt zwischen Vertreter und Vertretenem: konzeptionelle Änderung in der Rechtsfolge

Wir bleiben noch ein Weilchen beim Thema Vertretung, fügen aber neue Farbnuancen zum Bild. Ein Problem, das die Wurzeln des Rechtsinstituts der Stellvertretung betrifft, ist *der Interessenkonflikt zwischen dem Vertretenen und dem Vertreter*, und es von entscheidender Bedeutung, wie damit umgegangen wird. Nach den Vorschriften des § 221 Abs. 3 alt. BGB (rPtk) hat der Vertreter keine Macht zu handeln, wenn die Gegenpartei oder die Vertragspartei mit gegensätzlichen Interessen er selbst oder eine andere Person ist, die er ebenfalls vertritt. Eine Ausnahme machte das Gesetz nur, wenn der Vertreter eine juristische Person war, in diesem Fall war die ausdrückliche Genehmigung des Vertretenen erforderlich. In einem solchen Fall wird auch die „Vertretungsmacht" des Vertreters bedenklich: Bei einem Geschäftsabschluss sind die Interessen der Gegenparteien – wenn auch nicht zwingend, aber in der Regel – gegensätzlich, und es ist fraglich, ob in einem solchen

Fall der Vertreter die Fäden kontrollieren könne, die in seiner Person zusammenlaufen. Eine der möglichen Antworten auf diese Rechtslage ist gerade das Verbot, auf das die genannte *kategorische Bestimmung* des alten BGB den Schluss ziehen lässt: Der Vertreter darf in solchen Fällen nicht vorgehen, das Widersetzen verstößt gegen das Gesetz, daher ist die Erklärung nichtig. Lajos Vékás sieht in diesem Fall einen *Fehler in der Willenserklärung*: „In solchen Fällen bringt die rechtliche Erklärung des Vertreters den Vertragswillen des Vertretenen gegenüber dem Vertragspartner nicht authentisch zum Ausdruck." (Vékás, 2020, S. 124)[6] Der andere Ansatz basierte früher darauf, dass der Vertreter in einem solchen Fall schlicht keine Vertretungsbefugnis hat und somit als Anscheinsvertreter anzusehen ist, dessen Rechtshandlung von der „vertretenen Person" im Nachhinein genehmigt werden kann. Es besteht kein Zweifel am rechtlichen Mangel und der Unvollständigkeit einer rechtlichen Erklärung, die dem Interessenkonflikt der Vertretung unterliegt: was während der Gültigkeitsdauer des alten BGB umstritten war, ist es, welche *Rechtsnatur* der Fehler hatte und welche *Haltung der Gesetzgeber* einnehmen sollte.

Das neue BGB erkennt den Rechtsfehler und stellt in der Bestimmung des § 6 Abs. 13 BGB die Unwirksamkeit als Rechtsfolge fest, wendet jedoch ihre dem Tatbestand der Anscheinsvollmacht näherstehende Form, also die *Anfechtbarkeit* an. Das heißt, das Gesetz überlässt es auch hier dem Geschädigten – dem Vertretenen – zu entscheiden, ob er den Eintritt der Nichtigkeit wünscht oder sich hinter den Vertreter stellt und seine Erklärung bestätigt. Im Wesentlichen ist die Situation ähnlich wie in den anfechtbaren Rechtsgeschäften im Allgemeinen. Auch der Grund für die Anwendung der relativen (bedingten) Unwirksamkeit ist klar, die Aspekte für die Abwägung und Entscheidung des Vertretenen stimmen im Wesentlichen mit der Rechtslage der *Ratihabitation* der Anscheinsvollmacht überein.

5. ZUR RELATIVEN UNWIRKSAMKEIT

Den Begriff der Unwirksamkeit im engeren Sinne genommen betrachtet – nicht als „Sammelbegriff" wie in unserem bisherigen Privatrecht –, müssen wir die Fälle relativer Unwirksamkeit prüfen. Zumindest in den Fällen, wenn wir in den Tatbeständen nach Rechtsfehlern suchen, die im Grenzbereich der Nichtigkeit liegen. *Bei relativer Unwirksamkeit besteht die Relativität (d. h. der relative Charakter) darin, dass die Wirkungen des Rechtsgeschäfts gegenüber einer bestimmten Person oder Personen eintreten, in Richtung anderer aber nicht.* Deshalb wird diese Art der Rechtsfehler auch als persönliche Unwirksamkeit bezeichnet. Ein klassisches Beispiel dafür ist die *actio Pauliana*, die relative Unwirksamkeit eines Sicherungsvertrages. Dies werden wir im Folgenden ausführlich behandeln.

Der im materiellen Recht bekannte und geregelte Fall der relativen Unwirksamkeit liegt vor, wenn gemäß § 6:195. Abs. 1 die *Klausel für den Ausschluss*

[6] Soweit ich mich erinnere, hat auch Professor *György Bíró* in seiner Vorlesung über die Vertragstheorie gesagt, dass der Vertreter bei der Ausübung der Vertretung kein selbstständiges, eigenes Interesse haben darf: er ist nicht zufällig „Vertreter"… Er ist Träger fremder Interessen.

der Forderungsabtretung Dritten gegenüber unwirksam ist. In solchen Fällen ist die Vertragsklausel wirksam, ihre Verletzung wird als Vertragsbruch angesehen und begründet typischerweise eine Schadenersatzpflicht; sie kann jedoch nicht gegenüber Dritten geltend gemacht werden. Die Geltung der bezüglichen Bestimmung ergibt sich aus der Vertragsfreiheit des Zedenten und des Schuldners, aus dem anerkannten Verfügungsrecht über die Forderung, und durch die Feststellung der relativen Unwirksamkeit wird im Zivilrecht in erster Linie die Möglichkeit des zukünftigen Rechtserwerbs Dritter geschützt.

Ein weiteres Beispiel hebt den Charakter der relativen Unwirksamkeit deutlicher hervor. Nach der Bestimmung des § 6:417 Absatz 2 BGB darf der Bürge gegenüber dem Gläubiger die Einwände erheben, die dem Schuldner gegenüber dem Gläubiger zustehen. *Nach der Übernahme der Bürgschaft ist die rechtliche Erklärung des Schuldners, in der er auf diese Einwände verzichtet, gegenüber dem Bürgen nicht wirksam.* Die Rechtsfolge tritt dem vorgenannten Beispiel entsprechend ein: Der etwaige Rechtsverzicht des Schuldners ist gültig und gegenüber dem Gläubiger auch wirksam, kann aber wegen seiner relativen Unwirksamkeit gegenüber dem Bürgen nicht geltend gemacht werden – zum Schutz der Bürgeninteressen. In diesem Fall werden durch die Bestimmung der relativen Unwirksamkeit eindeutig die Vermögensinteressen des Bürgen berücksichtigt, der die Einstandspflicht zur Befriedigung fremder Forderungen übernimmt – aufgrund der streng genommenen akzessorischen Verpflichtung des Bürgen.

Abschließend schöpfen wir noch einmal aus dem Thema Zession: Im Satz 1 Abs. 2 § BGB heißt es, dass eine Änderung des Vertrages zwischen dem Schuldner und dem Zedenten nach der Benachrichtigung des Schuldners gegenüber dem Zessionar unwirksam ist. Auch in dieser Bestimmung lässt sich der rechtsschützende Aspekt erkennen, der durch die Wahrung des zum Zeitpunkt der Benachrichtigung bestehenden Zustandes die Verhinderung eines Austricksens des Zessionars garantieren soll.

6. GENERALKLAUSELN, OFFENE RECHTSNORMEN

Wirkliche Grenzfragen stellen sich in Bezug auf die Generalklauseln im Rechtsbereich der Nichtigkeit, genauer gesagt in Bezug auf die Regelungsweise mit den Generalklauseln. *Offene Rechtsnormen, Rechtsrahmen, Blanko-Rechtsdokumente etc.* – um nur einige der unzähligen möglichen Bezeichnungen zu nennen – sind häufig präsent in privatrechtlichen Sachverhalten. Wir haben dieses Thema bereits früher berührt. (Leszkoven, 2020) Wir schließen auch die vorliegende Studie mit einschlägigen Gedanken ab.

Als eine Norm, die als Beispiel für die Regelung mit den Generalklauseln dienen kann, gilt die Regel, die *einen offensichtlichen Verstoß gegen die guten Sitten für unwirksam erklärt*. Der Hinweis auf einen Verstoß gegen die guten Sitten ist eine interessante, aber nicht ungewöhnliche und auch keine seltene rechtstechnische Lösung. Sein Wesen lässt sich darin zusammenfassen, dass die Bestimmung eines gesetzlichen Verbots durch eine Verweisungsklausel erfolgt. Auch *Tamás Lábady*

stellte zutreffend fest: *„In vielen Fällen kommt es vor, dass eine zu ergänzende Regel im Privatrecht ihre Ergänzung von anderen ‚Kulturmächten', aus außerhalb des Rechts stehenden gesellschaftlichen Regeln, aus der Sphäre der Meta-Jurisprudenz bezieht. Unter den verschiedenen kulturellen Phänomenen der Gesellschaft haben Moral, Religion, Sitte, Etikette und Konvention einen Regel-Charakter."* (Lábady, 2017, S. 254) Der Wert dieser Lösung liegt darin, dass sie eine Flexibilität ermöglicht, und hat bei richtiger Anwendung mehr Vor- als Nachteile.

Das Verbot der sittenwidrigen Rechtsgeschäfte schränkt den Vertragswillen ein, *markiert seine Grenzen und legt den Rahmen des grundsätzlichen Freiraums fest*. Beim Verbot der sittenwidrigen Rechtsgeschäfte ist nicht nur der Verweis auf eine „Idee außerhalb des Gesetzes" erwähnenswert: Es ist auch nicht zu übersehen, dass das gesetzliche Verbot *als eine Art prinzipielle Schmelztiegel fungiert*, insofern darin eine enge Beziehung zu den Grundprinzipien des Zivilrechts auf eine fast selbstverständliche Weise zum Ausdruck gebracht wird.

Diese Beziehung ist jedoch nicht immer reibungslos. In einem der veröffentlichten Urteile des Berufungsgerichts Győr (Győri Ítélőtábla) heißt es, dass *„das Gericht aufgrund der im BGB genannten Ursachen für Nichtigkeit oder Anfechtung die Unwirksamkeit eines gültig zustande gekommenen Vertrags (oder einer seiner Klauseln) feststellen kann. Nichtigkeitsgründe können auch durch gesonderte Gesetze definiert werden. Auf die Unwirksamkeit eines nichtigen Vertrages kann sich – sofern das Gesetz keine Ausnahme macht – jedermann ohne Fristsetzung berufen [§ 234 Abs. 1 alt. BGB]. Die allgemeine Rechtsfolge, die die Nichtigkeit eines Vertrages oder seine Teilnichtigkeit [§ 239 Abs. 1 alt. BGB] mit sich bringt, ist es, dass der Vertrag (oder ein bestimmter Teil davon) nicht mehr geeignet ist, Rechtswirkungen auszulösen. (…) Die in den einleitenden Bestimmungen des BGB geregelten Grundsätze wie das Gebot von Treu und Glauben, die Mitwirkungspflicht [§ 4 Abs. 1 alt. BGB], sowie das Rechtsmissbrauchsverbot [§ 5 Abs. 1 alt. BGB] gehören jedoch nicht zu den Nichtigkeits- oder Anfechtungsgründen, die zur Feststellung der Unwirksamkeit eines Vertrages herangezogen werden könnten. Obwohl die Parteien, die miteinander ein zivilrechtliches Rechtsverhältnis eingehen, beim Abschluss und bei der Erfüllung der Verträge alle grundlegenden Anforderungen gemäß den Rechtsregeln des BGB beachten müssen, sieht eine Verletzung dieser die Feststellung der Unwirksamkeit des Vertrages mit Verweis auf die Rechtsvorschriften [§ 200 Abs. 2 alt. BGB] nicht vor."* [Siehe auch EBH 2009.1972 (Grundsatzentscheidung)]

Damit sind wir wieder beim Thema. Diese Entscheidung des Berufungsgerichts stellt unseres Erachtens kein einmaliges Beispiel für eine unwürdige Behandlung der grundlegenden Bestimmungen[7] dar, aber wir sehen gerne eine gewisse Änderung in

[7] Das Gericht hat es in der Begründung einer Einzelfallentscheidung so formuliert: „Die Grundprinzipien haben grundsätzlich keinen normativen Gehalt und geben als Generalklauseln Anhaltspunkte für die richtige Auslegung spezifischer Rechtsvorschriften, daher können einzelne Rechtsstreitigkeiten nicht unmittelbar nach den Grundprinzipien beurteilt werden, durch den Hinweis auf die Verletzung eines Grundsatzes kann die Benennung des konkreten Rechtsverstoßes nicht ersetzt werden, mangels dessen kann der Hinweis

der Bewertung des Problems (neuer Maßstab – unter Berufung auf den Titel einer Studie von Salamon Beck). Es versteht sich von selbst, dass wir bei der Auslegung der in eine Generalklausel verdichteten gesetzgeberischen Erwartung mit großer Sorgfalt und Vorsicht vorgehen müssen.[8] Wenn wir jedoch davon überzeugt sind, dass die gegebene Rechtstatsache gegen den Grundsatz von Treu und Glauben verstößt, dann kann ein solcher Vertrag oder eine solche Vertragsklausel vom Staat nicht anerkannt werden und auch keine Verbindlichkeit entfalten.

Im Kommentar zum Grundsatz von Treu und Glauben heißt es: „Stellt das Gericht einen Verstoß gegen die Vorschrift von Treu und Glauben in Bezug auf ein Element eines Rechtsverhältnisses fest, muss es die rechtliche Tatsache (z. B. Vertragsklausel), die das gegebene Element begründet, *ignorieren*. Hinsichtlich der Verträge *lässt sich* diese Folge *auch aus § 6:95 ableiten, der die unzulässigen Verträge für nichtig erklärt.*“ (Vékás, 2018, S. 52) Der Verstoß gegen die Vorschrift des § 1 Abs. 3 BGB hat daher – bei richtiger Betrachtung – *im Grunde genommen die Nichtigkeit zur Folge: solche Rechtsgeschäfte begründen keine Rechtsverhältnisse, also können die von den Parteien gewünschten Rechtswirkungen nicht erreicht werden. Dies ist die Rechtsfolge, die das Gericht im Falle der Nichtigkeit von Amts wegen anwenden muss* und auf die sich – sofern das Gesetz keine Ausnahme macht – jedermann fristlos berufen kann. (Stellungnahme Nr. 1/2010. PK [Zivilkurie] Punkt 2.) In ihrer Entscheidung Nr. 296 des BH2010 hat die Kurie beispielsweise prinzipiell festgestellt, dass das Gericht bei der Ausübung des Vorkaufsrechts von Amts wegen prüft, ob die Rechtsausübung der Parteien mit den grundsätzlichen Bestimmungen des BGB, mit dem Grundprinzip von Treu und Glauben zu vereinbar ist. Wir haben oben bereits die Frage der Rechtmäßigkeit des Verkaufs als Sachgesamtheit erörtert und darauf hingewiesen, dass die Lösung für die komplexe, aus verschiedenen Blickwinkeln betrachtete Rechtslage in der Rechtspraxis schließlich am „Wendepunkt“ der Einhaltung der Grundprinzipien gefunden wurde. [Stellungnahme 2/2009. (24. 04.) PK (Zivilkurie) S. 9.]

In Bezug auf unser geltendes Zivilrecht muss man den 1935 zu Papier gebrachten Gedanken von *Harasztosi* weitgehend zustimmen: Allein diejenige allgemeine Rechtsvorschrift, die die Erfüllung der Pflichten *auf der Grundlage des Lebenskonzepts, des billigen Ermessens, des Prinzips von Treu und Glauben und der Anforderung der gegenseitigen Loyalität und des Vertrauens vorschreibt*, hat nach heutigem Verständnis eine „Konjunktur“. (Harasztosi Király, 1935, S. 311) Dieser Behauptung steht auch die von Szladits in seiner Grosschmids Glosse geäußerte Ansicht ziemlich nah: „Der Ungar *erfüllt seine Pflicht* nicht nur nach Billigkeit, sondern *mit ‚Ehre und Menschlichkeit‘* (Arany János).“ (Szladits, 1933a, S. 547)

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auf die Verletzung des Grundsatzes keine Grundlage für eine Überprüfung sein.“ Kúria Pfv. 20.989/2016/8. (Zivilkurie)

8 Darauf wies auch *Salamon Beck* hin, als er schrieb: Der *dolus generalis* sei eine Institution *„wie ein magischer Talisman, der weise eingesetzt werden muss, – der jedoch der höheren Moral und der Wahrheit, die über den geltenden Rechtsvorschriften steht, den größten Dienst erweisen kann“*. (Beck, 1928, S. 162)

Auch wenn diese Begriffe in dieser Form, als geltende Rechtsvorschriften nicht vorkommen, hat es Sinn, den Vorschlag von Szladits zum normativen Text zu zitieren: *„Bei der Erfüllung der Verpflichtung muss der Schuldner und bei der Annahme an Erfüllung der Gläubiger mit Ehre und Menschlichkeit vorgehen, wie es das Gebot von Treu und Glauben, unter Berücksichtigung aller Umstände des jeweiligen Falls und der Lebensauffassung, verlangt.“* (Szladits, 1933b, S. 548.) Im Kommentar bezieht Lajos Vékás die Stellung, dass „die Berufung auf den Grundsatz von Treu und Glauben in der gerichtlichen Praxis trotz der relativ langen Zeit, die seit 1991 vergangen ist, noch immer nicht weit verbreitet sei“. (Vékás, 2018, S. 51.) Er hat zwar recht, aber der Vorgang dauert auch noch heute. *„Die Entscheidungs- und Handlungsfreiheit sichernde Privatautonomie (...), wird zusammen mit dem Grundsatz des gegenseitigen Vertrauens inhaltlich ausgewogen, und für das gegenseitige Vertrauen muss man in Übereinstimmung mit dem Gebot von Treu und Glauben vorgehen. Die breite Anerkennung der Privatautonomie und das Gebot von Treu und Glauben sind daher eng miteinander verbunden und bilden die Doppelpfeiler des BGB.“* (Vékás, 2018, S. 51) Abschließend möchten wir festhalten: wir können dankbar sein, dass diese beiden Pfeiler im ungarischen Zivilrecht auf dauerhaften Fundamenten stehen, auf die sich die gerichtliche Praxis in ihrer Entfaltung vertrauensvoll stützen kann.[9]

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E-MAIL OR MESSENGER? – DILEMMAS OF ELECTRONIC COMMUNICATION IN LABOUR LAW*

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Abstract: With the entry into force of the new labour law rules, responses to new life situations, such as the possibility of electronic communication, have come to the fore. Under certain conditions, the legislator treats the electronic document in the same way as paper documents. Our everyday relationships are transforming, becoming more and more digital. As a result, employees are increasingly using digital solutions to make their legal disclaimers. These life situations raise a lot of questions. Some of the questions have not yet been answered by the legislator. In the case of legal disclaimers made in electronic form, the scope of subjects and other conditions of mailing are often not clarified either. It would be necessary for the legislator to respond to these issues, as even in the current pandemic situation, many workers are trapped in the online space, which will result in the more frequent use of digital solutions. In this study, we would like to present the current regulations and make suggestions for rethinking.

Keywords: *legal disclaimer, electronic document, employment, invalidity*

1. INTRODUCTION

In labour law, we can talk about three basic methods of the communication of disclaimers. According to Article 24(1) of Act I of 2012 on the Labour Code (hereinafter LC), there are three basic methods of the communication of disclaimers. *Personal communication* of the disclaimers seems to be one of the simplest solutions. In this case, the communicator and the receiver are in the same place in space and time. The communication itself can be only *verbal*, but in most cases, it is the handover of a *written* disclaimer of the employee or the employer. *Communication by post* is a bit more complicated method. In this case, using (rebuttable) presumptions is also necessary in certain cases if the addressee (knowing or

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suspecting the content of the disclaimer) refuses to accept it. Although, technical development has brought the acceptance of a third communication form, *communication by using an electronic document.* But what is an electronic document? The act does not list in detail the types of electronic documents that are considered to be written. Any electronic communication form can be considered if it meets the above-mentioned conditions (such as SMS, e-mail, a blog entry, a comment on a social website, etc.) (Hrecska et al., 2015).

So, the LC does not record the definition of a concrete electronic document, but it regulates the conditions that an electronic document should meet to connect to the legal consequence of literacy. According to point a) of Article 22(2) of the LC, *the legal disclaimer is written if its communication is electronically suitable for the unchanged recall of the information contained in the legal disclaimer and the identification of the declarant and the time of the declaration.* Regarding this, a wide range of communication channels are open.

The legislator explains the above-mentioned criteria among the formal constraints, in case of which it defines in the regulation in an implicit way that not the form is what determines the electronic document, but its content and its ability to know in function as much as the written communication form. That is why the electronic document, which can perform this function minimally by content as written communication, is accepted as equal with written communication by the legislator. The situation is quite complex from the aspect that the rules helping the interpretation included in the regarding parts of the LC rather inhibit the effective application of the rules. (Kártyás, Répáczki and Takács, 2016, p. 36).

It is important to highlight that the general definition of electronic documents cannot be defined. Earlier, Act XXXV of 2001 on Electronic Signatures (hereinafter: ESA) included a definition (point 12, Art 2 ESA) and type sign. SMS, chat, images, and several other digital formats could be involved in the conceptual range of electronic documents defined in the ESA.[1] In contrast with the ESA, *Act CCXXII of 2015 on the general rules on electronic administration and trust services* (hereinafter: E-administration act) does not have an exact conceptual basis.

2. VALIDITY OF ELECTRONIC DOCUMENTS IN LABOUR LAW

In the labour law frame system, we are talking about simple electronic documents fitting in the earlier conceptual range of the ESA. According to point 12 of §2 of the ESA, an electronic document is a data collection interpretable by an electronic device. Following the amendment of the ESA in 2004, even the electronic signature is not a requirement. If we look at the basic traits of labour relation, we cannot step over the frames of a simple electronic document. The employee, as the person in the position of the more vulnerable party, often does not have either the technical

[1] *Az elektronikus dokumentum körüli dilemmák a munkajogban*. Available at: https://szakszervezetek.hu/dokumentumok/munkajog/7198-az-elektronikus-dokumentum-koruli-dilemmak-a-munkajogban (Accessed: 6 November 2020).

conditions or knowledge to create electronic documents signed by a qualified electronic signature. Electronic communication is typically, but not exclusively, used by employers.

In connection with electronic communication, it should be highlighted that its simplicity means an advantage and a disadvantage at the same time. It can be easily created and managed, but that is why it is so easy to be modified and counterfeit as well. Applying them can often suggest a kind of stronger trust between the parties as well. Electronic communication is often a kind of complementary communication: the party declaring in this way often makes his/her statement on a paper as well after or during the time of the electronic communication. Although, the LC does not require this duality, as it accepts electronic communication to be equal to personal or postal communication.

Currently, electronic communication is not widely as spread in economic labour law as it is in public administration. In the case of civil servants, the communication on their public service legal relationship is performed via the Customer Portal. Article 71(11) of *Act CXXV of 2018 on government administration* (hereinafter GA) defines stricter conditions than the LC. According to the GA, *the part of the instrument of appointment and the amendment thereto, the declaration of termination, the notice of termination of the conflict of interest, and the order for payment shall be issued electronically by the employer exercising at least an enhanced electronic signature.* (Bankó, 2019, p. 176; Petrovics, 2015, p. 69)

However, in the economic labour law examined more deeply by us, the electronic signature with enhanced safety is not a requirement even from the employer. But it is worth examining how the criteria of the format and content are mixed in this regulation. A part of the uncertainties related to the electronic document also connects to this issue – currently, content defines the format. The legislator does not limit the range of the electronic documents whose recognition would be exclusive. On the one hand, this is a logical decision, as it has made the applicability of electronic documents independent of technology-neutral. But its advantage is also its disadvantage. In social terms, if there is a situation when everything is allowed, its value is even unintentionally questioned. We can meet this phenomenon in the case of electronic communication as well. As this communication can be performed in any way and there is not a determined format, the uncertainty and distrust related to its application are also great. The legislator interprets the definition of formal restraint in a completely different way in this case. Accordingly, those automatisms that are realized in the case of a paper-based document at the check of formal restraint do not work. The formal validity of electronic documents will be known only after the examination of their content. Accordingly, we can talk about a *consolidated invalidity situation* in the case of electronic document. It is consolidated since if the electronic document is created with not the appropriate data content, we cannot talk about its formal validity as well. So, these two forms of invalidity should be examined parallel in the case of electronic documents. If the content is inappropriate, the format is it as well. In this case, the parties should act with increased attention.

Such an examination of validity has often been left to the courts. Nevertheless, case law is also not completely unified, as the judgment of digital and electronic communication forms is not identical in front of certain courts.

3. THE ISSUE OF VALIDITY IN THE MIRROR OF A JUDICIAL DECISION

The fact that the issue examined in the study is not only hypothetical in nature is also well-shown by the judgment No. Mfv.I.10.644/2013/9 of the Curia. In the underlying case, the parties recorded in six points of the labour contract made by them that their ways of communication in during working hours are MSN messenger, email, and phone. The MSN program was an internet-based immediately working messenger service by which the parties could chat with each other in real-time. We can see in the conversations had via this program whether the other party has read our sent message or not, and the whole text of the conversations is traceable, and can be recalled later as well.

The defendant communicated the extraordinary termination for the claimant on the morning of 25 May 2010 via MSN in the way that he scanned the written and properly signed termination document and sent it to the claimant's MSN mailbox in JPG format. After this, the person exercising the employer's authority asked the claimant in an SMS to use the MSN program. The claimant entered the MSN program, then he used the program as a communication platform to declare for the defendant in a written form that he received the termination sent in JPG format, and he could open and read it. The claimant accepted the extraordinary termination and asked the defendant only to pay for the holidays for him. The basic question is whether an image file sent in a chat message is suitable to be considered electronic communication. If so, did the communication enter into force?

The above-mentioned questions should be examined in the light that the claimant later argued the validity of the communication. The claimant did not consider the extraordinary termination sent by the employer to be regular, because, according to him, no official documents related to a labour relation can be delivered without an electronic signature and via Internet. So, he terminated his labour relation by extraordinary termination on the same day, 25 May 2010. The question is: can any kind of electronic signature be a requirement on the electronic document in case of labour relations? The LC does not mention this, but Article 20(5) of the Act CXCIX of 2011 on civil servants says that a civil service legal relation can be terminated in the form of an electronic document communicated via the Customer Portal as well.

It can also be seen from the judgment that it was not argued in the lawsuit whether the employers' extraordinary terminations sent by post or MSN are equal or not. Based on this, the court found that the employer terminated the labour relation by extraordinary termination on 25 May 2010. The extraordinary termination of the employment had been written properly before its transmission via MSN, and it had been digitalized by scanning by the defendant. During the digitalization process, the reading head of the scanner read the information from the paper line by line and created its digital version faithful to the content that was sent to the claimant in JPG

(image) format by the defendant. Based on the judging exercise, because of its similarity to the telegram and telegraph, the legal disclaimer sent in JPG format via the MSN program should be considered as written as well. So, the defendant created the original paper-based version of the document and digitalized it. Because of its special function, the scanner took a photo of the document by a special technique. The verdict does not mention the issue that what should be done in the case of electronic communication forms where the document does not have a paper-based version as well. In our opinion, the analogy defined in the verdict can be a guideline only in cases where the paper-based version has also been made. In case of electronic communication which exceeds this, a newer, moreover, independent legal basis would be necessary. But the electronic documents should be accepted in their own right for this, and an own system of the criteria of invalidity should be defined. Mainly because if all these are examined in the mirror of the claimant's reasoning, it can be seen which are the barriers that should be passed.

In the above-mentioned case, the claimant referred to that the contract had been created by the hand-written signature of both parties, the employer justified its validity by a long stamp, and they sent the written contract to each other by post. Corresponding to this, the extraordinary termination should have been transmitted personally or by post to the claimant. The communication sent by the MSN program is deemed to be only verbal communication that is formally defective, so it is illicit. According to him, based on Article 38(2) of the Act entering the Civil Code into force (Act CLXXVII of 2013 on the Transitional and Authorizing Provisions related to the Entry into Force of Act No. V of 2013 on the Civil Code), disclaimers communicated via e-mail, the MSN program or other chat programs do not correspond to the written form required in Article 87(2) of the LC. The essence of the exchange of paper-based letters is that written words are lasting and cannot be modified later. Based on the content of Article 38(2) of the Act entering the CC into force, the exchange of disclaimers made by a permanent tool defined in a separate law can be considered to be a contract made in written form, so, especially an agreement created by a document with enhanced safety and signed by an electronic signature. According to the party, there were not any documents in the lawsuit case that could correspond to the rules associated with the above-mentioned literacy. In the lack of an electronic signature, a document created by a computer and sent in JPG format via the MSN program could not have been an electronic document.

The aim of the electronic document is the same as any other labour law document: causing a legal effect. But this aim should be fulfilled in the double expectation system as well to be valid in terms of content and format. But format and content cannot be separated in this case.

4. ENTRY INTO FORCE OF ELECTRONIC COMMUNICATION

If the electronic document is created in a valid form, the other very important question is how it will enter into force. Legal disclaimers entry into force by communication.

The LC knows personal, postal, and electronic communication. In case of the personal communication, the party making the legal disclaimer communicates it verbally or in a written form. Naturally, this can be only a paper-based or a simple verbal legal disclaimer as well. It is also important here to take into account the constraints defined by the rules. If the other party inhibits the communication or does not accept the legal disclaimer in the case of personal communication, it should be taken as communicated as well. There is also a possibility to communicate legal disclaimers by post, the validity of which is also strengthened by a delivery fiction, especially when the reception would be denied by the addressee. (Bíró, 2018) This option was a rebuttable presumption in the earlier literature in the legal texts. This has been put in place by Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP). But it should be added that the CCP has words only in terms of judicial documents. It is extended to other certain legal disclaimers by certain financial legal rules, such as Article 24(2)(3) of the LC in which the renewed conceptual basis is used for making legal disclaimers between the parties.

The legislator completed the above-mentioned facts in 2012 by acknowledgment of electronic communication. In the definition of the LC, *an electronic document can be considered to be communicated if the electronic document becomes accessible to the party* (Art. 24(1) LC). Proving this is not simple, mainly on the side of the communicating party as he/she has typically no license on the device used by the other party. In connection with accessibility, LC adds that *an electronic document becomes accessible when the addressee or the person entitled to receive gets an opportunity to get to know its content.* It means, practically, that an electronic document becomes accessible when it arrives at the computer tool of the affected person, i.e. the addressee or another person entitled to receive. (Bankó, Berke and Kiss, 2017, p. 120) However, it is important to add that highlighted that non-acceptance or intentionally inhibiting the legal disclaimer causes the same legal effects as the earlier ones, so the communication should be deemed to be in force (Last sentence of Art. 24(1) LC). 'Parking' the electronic letter containing the termination in the mailing system or not opening it consciously can also be the intentional inhibition of communication. It can be stated that the passive behaviour following the arrival of the electronic communication should be interpreted as the denial of the reception as well. (Barański et al., 2021) But as it has been mentioned earlier, it is seriously difficult to prove these from the side of the declaring party, so there is a literature point of view that especially recommends not using electronic communication as an exclusive communication form in case of legal disclaimers causing a significant legal effect. (Lőrincz, 2012, p. 69)

From a certain point of view, the claimant's reasons raised earlier in the case of No. Mfv.I.10.644/2013/9. strengthen this as well. The claimant told it in his justification that in addition to the fact that the document in JPG format can be freely rewritable and formattable, the proof of its sending and receipt is also problematic. According to him, neither the sender nor the addressee of the document is neither the claimant nor the defendant, but both of them are users marked by fantasy names. Later, this also supposes that the person of the sender and the addressee is not proved,

and it is also not proved who really sat in front of the computer at the time when the message exchange happened. The claimant also brought up the reason that there is not any receipt about the delivery of the termination, and the chat extract attached to the documents can also be manipulated. (Petrovics, 2020, p. 282)

In this current case, the uncertain facts mentioned by the claimant have not been proved, especially regarding the arrival and receipt of the document have not been denied by any of the parties. Although the claimant's suggestions can generally be considered to be valid, critical remarks on regulation, as digital contents are really easy to be manipulated and passive behaviours are also difficult to be proved. Electronic mail has taken over the institution of return receipt used in postal services as well. Of course, not in the same form as the normal postal delivery based on the earlier rules. In this case, the receiver signed the return receipt at the time of the receipt, and this could prove the time and, of course, the fact of the communication. But the return receipt with this name has survived only in the electronic mailing. The post has digitalized this service since 1 January 2021 and introduced electronic delivery confirmation. These primarily prevail in the communication between the employer and the employee. In the case of electronic mailing, this is not automatic, it depends on the intention of the addressee whether he/she returns the return receipt (delivery confirmation) to the sender or not. Of course, proving difficulties arise not only on the side of the sender but on the side of the receiver as well in the case when, in fact, not him/her was the person who opened the communication. It would be easy to define an expectation in the range of electronic communication which is currently involved in theAct V of 2013 on the Civil Code. However, the literature has recognized that the exercise requires triggering the legal effect of less bounding forms. (Pomeisl and Pozsonyi, 2020) And this demand is even more increased in case of labour relations. That is why the legislator does not follow the severity defined in the Civil Code in case of legal disclaimers made in electronically. It would not be too realistic as well. This could be told in the light that electronic communication hardly ever occurs in the establishment of a legal relationship, but mainly in its termination. Accordingly, the court should reconcile the legal force of certain legal disclaimers if a lawsuit develops between the parties. It should always be considered that the basis of diverging from the Civil Code is that the labour contract is completely different in nature. The regulation may take the laic element into account more.

According to Article 6:84(2) of the Civil Code, the party ensuring the electronic way is obliged to confirm the arrival of the other party's contractual legal disclaimer in an electronic way without delay. The labour law regulation does not contain this rule. But as I have written, in labour law, we are not talking about a problem occurring during making a contract, as the parties make this on paper, except in the public service sector. The declarations of intent of the parties point in one direction when concluding the contract. So, the validation of the Civil Code rule cited above is simpler. The parties have completely different interests at the time of the termination of a legal relationship. In some cases, the aim is not that the other party becomes aware that one of them has become aware of the disclaimer or when. So,

following this regulation in legal law relations is more difficult, so the proving questions are much more complex.

5. CONCLUSIONS

Using electronic communication forms and electronic documents still has a lot of questions that cannot be answered by the labour law of the beginning of the 21st century. This is partly because the legislator does not follow the employment phenomena of the 21st century and it continues to insist on the previous labour law forms. Although, the insistence in itself is not good or bad, if it cannot be made more flexible in the mirror of the changed working conditions, this will make legal exercise more difficult. On the other hand, the parties of the labour relation are also not so prepared for using the new conditions, and so for the digitalized labour law legal institutions. Appropriate infrastructure and education are often lack in their case. But this does not mean that digitalized solutions could not come into the foreground in the future. As the year 2020 has shown, digital solutions take us forward in this current, pandemic period, so the communication of electronic documents has become and will be more emphasized. Accordingly, the fate of this legal institution should be rethought. In our opinion, independent formal and content validity criteria should be defined about the electronic documents and their communication, and formal and content validity should be separated more.

Despite that the use of simple electronic documents suffers from a lot of critics in its current condition, we would not recommend its tightening in labour law, as the qualified signature systems are not available for several people. This should be rethought again in the future if the availability of these systems will be general. Until then, it seems to be necessary to redefine the formal and content criteria.

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